Chapter 4
The Law Applicable to Individual Employment Contracts

4.1 Sources of Law

Establishing the law applicable to individual employment contracts, including contracts involving seafarers, fishermen and other employees working on board ships, nowadays relies mainly on Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on Law Applicable to Contractual Obligations,[1] i.e., what is known as the Rome I Regulation. This instrument of EU secondary legislation is the result of a process through which the European Union assumes legislative competence, establishing an area of justice under Article 65 TCE introduced by the Treaty of Amsterdam, now Article 81 TFEU as amended by the Treaty of Lisbon. The outcome of the transfer of legislative competence was the transformation of the 1980 Rome Convention on the Law Applicable to Contractual Obligations into the Rome I Regulation.

Against this background, it is important to emphasise the deep relationship between those two instruments, despite marked differences in their legal bases; not only is the latter based upon the former, but both are also intended to be applied simultaneously. Article 24 of the Rome I Regulation clearly states that it replaces the Rome Convention, but only where contracts that have come into force as from 17 December 2009 are concerned, including those that were concluded that very same day.[2] Meanwhile, contracts entered into before that date remain subject to the conflict rules laid down in the Rome Convention, which is therefore still applicable to claims arising from such contracts, in spite of the fact that they were brought to

[1] OJ No. L 177, 4.7.2008.

[2] Previous to the corrigendum of Article 28 of the Rome I Regulation (OJ No. L 309, 24.11.2009), the topic addressed above was much discussed, given that its initial wording referred to 'after' instead of 'as from'. After the corrigendum, the EU adopted the German stance on the matter. See in this regard BAG 29.10.1992, with comments by Mankowski (1994), pp. 89–92.

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court after 17 December 2009.[3] Furthermore, the genetic dependence of the two legal sources is relevant for interpretation purposes, also because of their links with the Brussels–Lugano system.[4]

The main issue that needs to be addressed with regard to the law applicable to individual employment contracts is the role of provisions such as that in Spain's Additional Disposition 16(7) of Consolidated Text of the Law on State Ports and the Merchant Navy, according to which: 'The working conditions and social security benefits for non-Spanish nationals employed on board ships registered in the Special Register shall be governed by the legislation to which the parties to the contract freely submit, provided that it respects the rules issued by the International Labour Organization or, failing express submission, by the provisions of Spanish labour and social security regulations, all without prejudice to the application of any Community legislation and international agreements signed by Spain'.[5] This provision appears in the legal text that establishes a Special Register of Ships and Shipping Companies in the Canary Islands, which was referred to previously during the discussion of the role of second, international and open registries in maritime employment.[6]

The Spanish provision is far from being an isolated case, as there are a number of comparative law examples[7] that submit working and living conditions on board ships registered in the respective special register to the law chosen by the parties to the employment contract or to the law of the habitual residence of the seafarers or fishermen.[8] In fact, this type of rule underlies the CJEU *Sloman Neptun Schiffahrts*

[3] The Rome Convention entered into force in 1991 and started to apply in Spain from l September 1993, so national rules were applicable before that date, in particular Articles 10(6) of the Civil Code and 1(4) of the Statute of Workers. So, on deciding the case according to the Spanish legislation pursuant to Article 1(4) ET, see STS, *Sala de lo Social*, 7.11.1989, although the lack of proof of Panamanian law is also mentioned.

[4] See Sect. 3.2.3.1.

[5] My translation.

[6] See Sect. 2.3.2.

[7] This applies, for example, to Article 3 of Italian Law No. 30, 27.2.1998, which is drafted in very similar terms to the Spanish regulation: '1. Le condizioni economiche, normative, previdenziali ed assicurative dei marittimi italiani o comunitari imbarcati sulle navi iscritte nel Registro internazionale sono disciplinate dalla legge regolatrice del contratto di arruolamento e dai contratti collettivi dei singoli Stati membri. 2. Il rapporto di lavoro del personale non comunitario non residente nell'Unione europea, imbarcato a bordo di navi iscritte nel Registro internazionale, è regolamentato dalla legge scelta dalle parti e comunque nel rispetto delle convenzioni OIL in materia di lavoro marittimo. 3. Le organizzazioni sindacali sottoscrittrici di contratti collettivi di cui al comma 1 stabiliscono le condizioni economiche, salariali ed assicurative minime che devono comunque essere osservate per tutti i lavoratori non comunitari impegnati a bordo delle navi iscritte nel Registro internazionale, nel rispetto dei limiti internazionalmente stability'.

[8] Currently, the Italian rule cited in the previous footnote is complemented by a collective agreement concluded between representatives of the most prominent employers' organisations on one side and the ITF and other associated trade unions on the other, according to which a clause is laid down submitting all vicissitudes of the contract to the law of the seafarer's habitual residence. See comments on the matter by Zanobetti Pagnetti (2008), pp. 194–200.

AG judgment that elucidates the complaint filed by German trade unions against the hiring of non-EU workers,[9] especially Filipinos, to work on ships registered in the German international register and to whom different working and living conditions from those applicable to German seafarers were applicable, in particular receiving lower wages than the Germans. The CJEU did not tackle the question of whether national legislation that enabled some workers to enjoy different working conditions from others were compatible with Community law, but it did rule on whether this differential treatment constituted a kind of state aid.

Furthermore, the CJEU did not have the power to decide on these provisions' relationship with the Rome Convention on the law applicable to contractual obligations because at that time it had not been conferred with powers of interpretation with respect to the Convention. The answer that the Court did not furnish directly was, however, supplied by the universal scope of the conflict rules in both the Rome Convention and the Rome I Regulation[10]: that the national provisions under discussion could only be understood in relation to the rules of the latter international instruments, i.e., those that ultimately decide on the law applicable to seafarers' employment relationships, even when they were not habitually resident in an EU member state.[11] Accordingly, these provisions operate as mere clarifications, addressed to shipowners, of the consequences of the conflict rule laid down by the Rome I Regulation.[12]

[9] CJ 17.3.1993, Case C-72/91 and C-73/91, *Sloman Neptun Schiffahrts AG*.

[10] Article 2 Rome Convention/Rome I Regulation.

[11] In fact, in CJ 17.3.1993, Case C-72/91 and C-73/91, *Sloman Neptun Schiffahrts AGK*, the German government claims before the CJ that § 21.IV, 1 *Flaggenrechtsverordnung* only aims to clarify the fact that German shipowners may hire non-Community workers according to a legislation other than German legislation, pursuant to Article 6 of the Rome Convention, with a view to avoiding the flight to other flags. In this regard, the judgment issued by the BGA, 24.8.1989, made this point clear. Agreeing on these arguments, see Advocate General Mr. Darmon's Opinion on the *Sloman Neptun Schiffahrts AGK* case, paras. 74–75 and 81, presented on 17 March 1992. On the doctrine, see Basedow (1990), p. 82; von Hoffmann (1996), p. 1644, para. 56, pp. 1646–1648, paras. 60–61; Junker (2005), p. 721, for whom this rule opens the door to the immediate application of the escape clause contained in Article 6 of the Rome Convention; Kühl (1989), pp. 92–95; Thorn (2012), p. 2653, para. 12. Regarding this issue in Italy, see Zanobetti Pagnetti (2008), pp. 200–216.

[12] According to the final amendment of § 21.IV Flaggenrechtsverordnung: 'Arbeitsverhältnisse von Besatzungsmitgliedern eines im Internationalen Seeschiffahrtsregister eingetragenen Kauffahrteischiffes, die im Inland keinen Wohnsitz oder ständigen Aufenthalt haben, unterliegen bei der Anwendung des Artikels 8 der Verordnung (EG) No. 593/2008 des Europäischen Parlaments und des Rates vom 17. Juni 2008 über das auf vertragliche Schuldverhältnisse anzuwendende Recht (Rom I) vorbehaltlich anderer Rechtsvorschriften der Europäischen Gemeinschaft nicht schon auf Grund der Tatsache, daß das Schiff die Bundesflagge führt, dem deutschen Recht. Werden für die in Satz 1 genannten Arbeitsverhältnisse von ausländischen Gewerkschaften Tarifverträge abgeschlossen, so haben diese nur dann die im Tarifvertragsgesetz genannten Wirkungen, wenn für sie die Anwendung des im Geltungsbereich des Grundgesetzes geltenden Tarifrechts sowie die Zuständigkeit der deutschen Gerichte vereinbart worden ist. Nach Inkrafttreten dieses Absatzes abgeschlossene Tarifverträge beziehen sich auf die in Satz

With regard to EU law provisions that can take precedence over the Rome I Regulation,[13] it is worth mentioning Article 3 of Regulation 3577/92 of 7 December 1992[14] regulating maritime cabotage between member states. This rule specifies that generally 'all matters relating to manning' are the flag state's responsibility except for small ships and island cabotage, in which case responsibility is submitted to the host state. The scope of the text quoted was in principle only proposed to cover certain aspects of public law that fall within the employment relationship sphere; the legislative outcome, however, is a provision that is expressed in sufficiently broad terms such as to also embrace aspects of private law that can be extended to the regulation of individual employment contracts, including the relevant collective agreements, in accordance with the submission to the corresponding legal system contained there.[15] The shadow of flags of convenience and fears of a potential flight to states with lower labour costs and the corresponding loss of jobs in host states all support an interpretation of this provision that is consistent with what has been posited here, i.e., one encompassing private matters. This interpretation is not without opposition, however, as is emphasised by a different interpretation based on the more restrictive English version that refuses to accept this provision as a conflict rule.[16]

As a matter of fact, subsequent Commission initiatives seem to confirm that this provision does not interfere with private international law instruments. While in the field of regular passenger and ferry services the great majority of the activity is in the hands of ships both flying EU flags and manned by employees recruited from member states, a trend for hiring non-EU seafarers was detected, triggering Commission intervention with the aim of halting it by amending the Regulation on maritime cabotage and proposing a Council Directive on manning conditions for regular passenger and ferry services operating between member states.[17] Although this measure was never approved, it sheds some light on the matter, as the starting point was the different laws that might be applied on board in accordance with the then in force Rome Convention, with a view to subjecting non-EU nationals to living and working conditions similar to those applied to EU seafarers. No further steps were taken, but the proposal contributed to clarifying the fact that the only relevant provisions regarding the law applicable to employment contracts are those in the Rome I Regulation or the Rome Convention, where it is still in force.

1 genannten Arbeitsverhältnisse im Zweifel nur, wenn sie dies ausdrücklich vorsehen. Die Vorschriften des deutschen Sozialversicherungsrechts bleiben unberührt'.

[13] Article 23 of the Rome I Regulation.

[14] Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within member states (maritime cabotage) (OJ No. L 364, 12.12.1992).

[15] On these alternatives, see Basedow (1994), p. 90. See Fotinopoulou Basurko (2006), pp. 467–478, on this Directive and Directive 96/71/EC.

[16] See Mankowski (1995), p. 458.

[17] Brussels, 3.6.1998 [COM(1998) 251 final].

4.2 Scope of Application of Article 8 of the Rome I Regulation

4.2.1 Territorial Scope of Application

The Rome I Regulation contains a special conflict rule on individual employment contracts, as its predecessor, the Rome Convention, did, specifically Article 8, which corresponds to Article 6 of the Rome Convention. As indicated above, this provision was designed to be universally applicable. Hence, as long as the seized court is bound by the 1980 Convention or the Rome I Regulation, it applies the conflict rule dealing with individual employment contracts included there, even if the claim in question is submitted to a non-EU legal system pursuant to this conflict rule. Identifying the jurisdictions that are bound by these legal instruments is a separate issue that deserves a brief mention here.

When the United Kingdom and the Republic of Ireland exercised their right to opt in, the Rome I Regulation came into force in twenty-six—now twenty-seven, thanks to Croatia—EU member states. The exception is Denmark, which does not participate in any of the acts based on the area of freedom, security and justice. Had Denmark wished to join the Rome I Regulation, it would have had to conclude an international agreement with the European Union for the instrument to be applicable there. However, this did not happen, and as a result the Rome Convention is still applicable in Denmark. Indeed, Article 1(4) of the Rome I Regulation contains a reminder that member states are to be understood as all those to whom the Regulation applies. In contrast, the term member state in Article 3(4) of the Rome I Regulation denotes all member states, including Denmark, and therefore its stipulations on choice of law and EU mandatory rules also refer to this country.

Article 24(1) of the Rome I Regulation contains a significant specification: 'This Regulation shall replace the Rome Convention in the Member states, except as regards the territories of the Member states which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty', now Article 355 of the TFEU. As already indicated when dealing with these matters with regard to the Brussels I and Brussels I *bis* Regulations, the Treaties apply to Guadeloupe, French Guiana, Martinique, Reunion, Saint Barthélemy, Saint Martin, the Azores, Madeira and the Canary Islands, where member states have established a second or open registry. On the other hand, other overseas territories are left out of the territorial scope of the Rome I Regulation and, more generally, of EU legislation, as are those of the United Kingdom since the Regulation only applies to Britain, Northern Ireland and Gibraltar.[18] The Rome Convention does apply to the Isle of Man[19] but not to the Channel Islands,

[18] See *Rome I – should the UK opt in? Consultation response*, available at http://www.justice.gov.uk/consultations/docs/rome-i-consultation-govt-response.pdf. Accessed 19 November 2011.

[19] See Asín Cabrera (1997), pp. 341–345.

territories in Cyprus, Anguilla, Bermuda, the Virgin Islands, the Cayman Islands, the Turks and Caicos Islands and the Maldives. The Rome Convention is in force in French overseas territories[20] such as the Kerguelen Islands, Saint-Pierre and Miquelon, Saint Barthélemy, French Polynesia and the Wallis and Futuna Islands; in Antilles and Aruba, which are under Dutch rule; and in the Danish-ruled[21] territories of Greenland and the Faroe Islands.[22]

4.2.2 Material Scope of Application: Issues Included in Article 8

Like Article 6 of the Rome Convention, the wording of Article 8 of the Rome I Regulation does not contain a proper definition of what is to be understood by individual employment contracts, a definition that cannot even be inferred from its preamble. However, the terminology employed in the new provision includes certain changes with respect to Article 6 of the Rome Convention, seeking a coincidence with the content of Section 5, Chapter II, of the Brussels and Lugano system.[23] The EU aims to bring about a convergence between EU instruments and the concepts and definitions they include, with a view to establishing a relationship between *forum* and *ius*, at least in some cases.[24]

Within this framework, what is understood by the term 'individual employment contract' is to be construed independently,[25] and for this reason reference is made here to the considerations already discussed while dealing with this concept in the framework of international jurisdiction.[26] It is worth remembering here that in general terms an employment contract implies the provision of services in exchange for remuneration, which brings the worker within the organisational framework of the business of the employer. As already said, there are no particular problems of characterisation as regards seafarers once uncertainties concerning captains and share fishermen have been resolved.[27]

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[20] See Fotinopoulou Basurko (2008), pp. 103–108.

[21] See list in Annex II TFEU by reference of Article 355(2) TFEU.

[22] According to Article 27 of the Rome Convention – in force until its amendment by the Treaty of 18 May 1992 on the accession of Spain and Portugal to the EU – Denmark extended its application to the Faroe Islands and the U.K. to Gibraltar.

[23] See Wurmnest (2009), pp. 481–499. In detail, see Hoppe (1999), pp. 101–142, with particular emphasis on the concepts of individual employment contract and employee.

[24] On the coincidence between *forum* and *ius* in employment matters, see Moura Ramos (1991), pp. 165–194.

[25] See, among others, Franzen (2011), pp. 178–179, para. 5; Mankowski (1997), pp. 466–469. Some voices suggest a characterisation *ex lege causae* [see Collins et al. (2006), pp. 1663–1665; Morse (1992), p. 13; Plender and Wilderspin (2009), pp. 304–309, paras. 11-010 a 11-024], or a double characterisation, *ex lege fori* and *ex lege causae*. See Birk (2006), p. 21.

[26] See Sect. 3.2.2.1.

[27] See Sect. 2.4.2.

Article 8 of the Rome I Regulation therefore decides on the law governing individual employment contracts, while Article 12 deals with the issues that are subject to its material scope of application. It is important to bear in mind that collective agreements are also part of the law designated by this conflict rule, although disputes between those with the bargaining power to conclude them are not submitted to this legal system.[28] Collective labour relations are excluded from the scope of application of Article 8 and from Article 6 of the Rome Convention, a question that will be addressed in the last chapter of this book.

Likewise, it should be noted that the law designated in accordance with Article 8 decides on the existence and material validity of employment contracts, as confirmed by Article 10 of the Rome I Regulation, and also covers the consequences of nullity, such as compensation or the obligation to pay wages for the time worked.[29] Nevertheless, the scope of the *lex laboris* does not include the capacity of the parties to contract or the formal validity of the contract. For both issues, the Rome I Regulation lays down specific conflict rules that will be discussed below.

More specifically, according to Article 12 of Rome I the issues that are subject to the *lex laboris* are the following: the subject matter of the contract, contract types, the contents—i.e., the services and tasks that must be performed as part of the employment relationship—the payment of wages—including payment arrangements such as crew profit sharing,[30] and overtime and holidays—workers' duties of loyalty, contract duration, the number hours of work and rest, holidays, contract modification, temporary worker placement, termination of the contract—including the grounds for dismissal—and the interpretation of the contract.

The consequences of ownership transfer of shipping or fishing companies for employment contracts are also subject to the law applicable to the contract regardless of whether there is a change of employer or habitual workplace, the result being that the contract is subject to a new *lex laboris*. In these cases, the effects of business relocation on current employment contracts depend on the *lex laboris* applicable before the move, to oblige the new employer to take on the workers of the transferred business, for example.[31]

The law applicable to individual employment contracts particularly covers employers' obligations towards employees, including the duty of care—whose contents and boundaries may depend on laws other than the *lex laboris*[32]—payment of wages, holidays, equal treatment, training, repatriation and so forth. However, the payment of social security is excluded from the scope of this law, as discussed later in a separate section. It is argued that the obligation to pay for sick leave is also excluded from the *lex laboris* due to its close relationship with the concept of social

[28] In this regard, see the Explanatory Report accompanying the Rome Convention drafted by Giuliano and Lagarde (1992) while commenting on Article 6, para. 2.

[29] See Article 12(1)(e) of the Rome I Regulation.

[30] Among others, see Deinert (2013), p. 297.

[31] Among others, see Deinert (2013), pp. 338–339.

[32] Such as the law of the country in which performance takes place. See Hoppe (1999), p. 223.

security.[33] However, the position advocating its contractual nature is certainly more consistent, inasmuch as this obligation is the result of failure to comply with the main labour obligation. In any event, it is deemed an overriding mandatory rule, given that its ultimate goal is to ensure that the most basic needs are covered during periods of incapacity.[34]

In general, the *lex laboris* decides on the performance of obligations, i.e., whether the parties have fulfilled their obligations, whether there has been noncompliance or compliance has been poor, and to the extent to which the worker is responsible for the defective performance.[35] In this regard, it should be noted that Article 18(1) of the Rome I Regulation states that legal presumptions and rules of burden of proof are also subject to the *lex contractus*. This law also decides on prescription in cases of wage or dismissal claims.[36]

Potential limitations of liability for breach of contract by workers, usually linked to compulsory insurance, must also be sought in the law applicable to the employment contract. On the other hand, third party liability is reserved to tort law and is therefore left out of employment contract matters, except in the event that the employee is entitled to hide behind the employer, as this matter is subject to the *lex laboris*. The procedures for dismissal, deadlines and the consequences are also subject to this law, as are collective redundancies, in principle. It must be pointed out, however, that these cases are subject to overriding mandatory rules because of their impact on the economy, as illustrated by both the intervention of public authorities and the regulation of collective bargaining in this framework.[37]

There are more doubts surrounding health and hygiene issues,[38] which as part of public law are referred to the state where the business performing the service is located. In maritime law, this is the state whose flag the ship is flying, irrespective of the law governing the employment contract. Similarly, if the work is done in port, due regard should be given to what the port state law provides for. This leads us on to the manner of performance, which must comply with the law of the place where the work is carried out. Typical examples are public holidays, longer working hours than those established by the *lex laboris* and the respective risk prevention measures. In fact, given that employment contracts are long-term relationships, many more laws may potentially be taken into consideration,[39] including those regarding

[33] See Hoppe (1999), p. 223; Müller (2004), p. 249, on the basis of CJ 3.6.1992, Case C-45/90, *Vittorio Paletta v Brennet AG*; 2.5.1996, Case 206/94, *Brennet AG v Vittorio Paletta*, on the application of EU law on coordination of social security systems.

[34] See Deinert (2013), pp. 299–301.

[35] See Müller (2004), p. 249, suggesting a secondary connection on non-contractual matters to avoid the non-match of the two laws.

[36] See Article 12(1)(d) of the Rome I Regulation.

[37] As stated by Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of member states relating to collective redundancies (O.J. No. L 225, 12.8.1998).

[38] See Kaye (1993), pp. 227–228.

[39] See examples cited, as well as comments by Thüsing (2003a), p. 1309. Further, also Junker (1992), pp. 294–300.

payment arrangements. In any event, applying the law of the place where the work is carried out is not mandatory, as is illustrated by Article 12(2) of the Rome I Regulation; this only requires the relevant law to be taken into consideration, meaning that there is no impediment to these matters being decided in accordance with the most favourable law for the worker.[40]

4.2.3 Material Scope of Application: Issues Excluded From Article 8

4.2.3.1 The Law Applicable to the Capacity to Contract, Minimum Age and Professional Training

Without prejudice to Article 13 of the Rome I Regulation, the legal capacity of natural persons is excluded from its scope and also from the Rome Convention. Both international instruments exclusively comprise cases in which the parties to a contract enter into the contract in the same country and one party is unaware of the other's incapacity to contract, in which case the law of the country in which the agreement was reached applies. In other cases, it is necessary to turn to national law for the relevant conflict rule, such as Article 9(1) of the Spanish Civil Code or § 7 of the Introductory Act to the German Civil Code, which lays down the application of workers' national law to decide on their capacity to contract.[41] However, some other systems, such as the British, choose to submit this issue to the *lex substantiae actus*, in this case the *lex laboris*. National conflict rules also determine who can supplement workers' limited capacity, i.e., who can or should act as their representative—decided in Spain, for example, by Article 10(10) of the Civil Code—which does not prevent public order from intervening when there is a breach of constitutional principles by the applicable law.

The application of national law to the capacity to enter into an employment contract cannot escape the mandatory rules of the *lex contractus* or the *lex fori*, particularly when they establish the conditions for access to the labour market.[42] Of utmost importance here is the legal provision establishing the minimum working age. This cannot be ignored if a worker's national law stipulates a lower minimum age, as these rules aim to protect children as well as workers' health.[43] A case in point is Spanish law, which allows foreigners to engage in professional activities in

[40] See Magnus (2011), pp. 616–617, para. 213.

[41] Since it concerns workers' legal capacity, as indicated by Ubertazzi (2006), pp. 208–217.

[42] See Gardeñes Santiago (2008), pp. 419–420; Ubertazzi (2006), pp. 208–217. Article 1 of the Resolution of the Institut de droit internacional, 3.8.1971, during the Zagreb session on 'Conflicts of Laws in the Field of Labour Law' seems to acknowledge this distinction by establishing a law applicable to the capacity to contract and another on the ability to act thus.

[43] In doctrine see, among others, Gamillscheg (1983), p. 324.

Spain when they are over the age of sixteen, regardless of what their respective national legislation says.[44]

In a similar vein, attention should be paid to several international provisions that reinforce the statement that this is an overriding mandatory rule, as established by ILO Convention No. 138, of 26 June 1973 on the minimum age for admission to employment,[45] requiring all contracting states to specify the minimum age for admission to work 'within its territory and on means of transport registered in its territory'.[46] ILO Convention No. 147 of 1976 on minimum standards for the merchant fleet also takes the minimum age into account, through a 1996 Protocol,[47] while MLC, 2006, contains provisions on this matter as well, fixing the minimum age at 16.[48] ILO Convention No. 112 of 1959 on Minimum Age (Fishermen) stands out among the very few conventions dealing with work in the fishing sector; however, this will be replaced by Article 9 of the WFC, 2007[49]—when it enters into force—which sets the minimum age at sixteen with some exceptions for 15-year-olds, provided they are not legally obliged to be in full-time education in their countries of origin and have received professional training.

As discussed above, the employee's age is a matter of capacity to contract and as such is excluded from the Rome I Regulation. The rules on the minimum working age may be opposed not in accordance with this Regulation but by resorting to the respective national law provisions. However, Article 13 of the Rome I Regulation now offers a feasible solution that has the virtue of avoiding the public policy exception. This provision is based on the exception of national interest as developed by French courts in the *Lizardi* case and seeks to ensure that contracts between parties in the same country follow the rules of the market in question, including capacity issues.[50] The broad terms in which Article 13 is written no longer point to the place where the contract is concluded but rather point to the country where the parties to the contract are located. This is true of both the English and Spanish versions, 'en los contratos celebrados entre personas que se encuentren en un mismo país', and also of the German version, which reads as follows: 'bei einem zwischen Personen, die sich in demselben Staat befinden, geschlossenen Vertrag'.

[44] See Article 36(1) of the Spanish Organic Law 4/2000, of 11 January, on rights and freedoms of foreigners in Spain and their social integration.

[45] Ratified by Spain on 13.4.1977 (BOE No. 109, 8.5.1978) and Germany on 8.4.1976.

[46] See Article 2 thereof. Previous to the Convention cited in the text, see ILO Convention No. 7, of 1920, ratified by Spain on 24.4.1924 (*Gaceta*, 13.5.1924) and later amended by the 1936 ILO Convention No. 58, ratified by Spain on 8.4.1971 (BOE No. 120, 19.5.1972).

[47] This Convention was ratified by Spain on 10.3.1978 (BOE No. 15, 18.1.1982) and Germany on 15.7.1980. However, it is not yet in force in either country.

[48] See Rule 1(1) of Maritime Labour Convention, 23 February 2006, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:91:0::NO:91:P91_INSTRUMENT_ID:312331:NO.

[49] ILO Convention No. 188, 14 June 2007 concerning work in the fishing sector, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312333:NO.

[50] For a thorough treatment, see Ubertazzi (2006), pp. 45–92.

This wording allows us to understand that this country is the place where the work is habitually carried out, i.e., the *locus laboris*,[51] thus avoiding differences between nationals and foreigners for reasons of legal certainty.

Although this is not an issue of capacity to contract, workers' professional qualifications are linked to the issue of the minimum working age and have become an additional key component to gaining access to the labour market. Moreover, seafarers' and fishermen's professional qualifications are essential to maritime safety, in addition to being regarded as a way of keeping jobs in the traditional maritime nations. In this regard, it has already been reported that the European Union is active in the struggle to preserve maritime-related employment by focusing on the importance of seafarers' training both for safety at sea and the fight against pollution and also for access to skilled jobs.[52] In this framework, the law governing the professional qualifications seafarers need to have access to work and then keep their jobs will also be the law of *locus laboris*. In this matter, Article 13 of the Rome I Regulation is of little or no use, but these qualifications' links with maritime safety and the fight against pollution enable us to classify them as *lois de police* and thus to activate Article 9 of the Rome I Regulation. This is of course without prejudice to the law governing the employment contract being applicable when it coincides with *locus laboris*.

It is of particular importance these days to highlight the fact that work permits are not a question of the capacity to contract but merely an administrative requirement.[53] Article 36(5) of Spanish immigration law, for example, clearly indicates that lack of authorisation to reside and work in Spain—without prejudice to the employer's respective responsibilities, including where the social security system is concerned—does not invalidate the employment contract where foreign workers' rights are concerned, nor does it preclude them from obtaining the benefits deriving from cases enshrined in international conventions for the protection of workers or other benefits they may be entitled to, provided that these are compatible with their situation. As a matter of fact, work permits are not normally required in the merchant and fishing sectors, in an effort to facilitate the recruitment of crews in third countries and with the subsequent savings in terms of labour and social security costs to shipowners. For example, to enable foreigners to work aboard ships flying the Spanish flag, Spanish legislation simply requires an employment contract or a document of renewal of enrolment; *ergo*, foreign seafarers are exempt from the work permit requirement, and, furthermore, their recruitment is not dependent on the internal situation of the labour market.[54]

[51] See this proposal in Deinert (2013), pp. 85–86.

[52] See Sect. 2.5.2.2.

[53] As discussed by Gamillscheg (1983), p. 325.

[54] Article 64(5) of the Royal Decree 557/2011, of 20 April, approving the Regulation on Organic Law 4/2000, on rights and freedoms of foreigners in Spain and their social integration, after its amendment by Organic Law 2/2009, reads as follows: 'Igualmente, se autorizará a trabajar sin atender a la situación nacional de empleo a los nacionales de Estados con los que se hayan suscrito convenios internacionales a tal efecto, así como a los nacionales de Estados no pertenecientes a la

4.2.3.2 The Law Applicable to the Formal Validity of Contracts

The law applicable to the formal requirements of contracts is decided by the Rome I Regulation, which lays down a specific conflict rule governed by the *favor validitatis* principle, with the aim of avoiding cases of nullity of contracts on the grounds of formal invalidity. The idea is embodied in a result-oriented conflict rule that is structured around alternative connecting factors. Hence, a contract's formal validity has to be tested in accordance with the *lex loci celebrationis*, or pursuant to the law applicable to the contract's material validity or the law of the habitual residence of either party if they are in different countries when the contract is concluded.[55]

Employment contracts are also subject to this array of connecting factors. Unlike consumer contracts and those dealing with real estate or the use of property,[56] the formal requirements of employment contracts do not have a tailor-made conflict rule that refers them primarily to one single law. The Giuliano-Lagarde Report justified this treatment on the ground that merely submitting the form of the contract to *lex laboris* would originate excessive legal uncertainty to the extent that courts may resort to the exception clause in determining the law applicable.[57] Furthermore, the application of the general conflict rule and all its connecting factors is in line with the freedom of form that governs this particular type of contract,[58] namely, a contract's form does not affect its validity, thereby benefitting workers insofar as their access to the labour market is not hampered, nor is the existence of an employment relationship questioned for this simple reason.[59]

Nevertheless, the employment relationship goes well beyond the concluding of the contract, encompassing other acts such as notice of dismissal or provision of written information about working conditions, in such a way that freedom of form is no longer beneficial for the weaker party but rather the reverse. It makes no sense to maintain the principle of *favor validitatis* and the ability to validate such actions in accordance with various laws. This kind of criticism had already been voiced in relation to Article 9 of the Rome Convention,[60] but the drafters of the Rome I

Unión Europea ni al Espacio Económico Europeo enrolados en buques españoles en virtud de acuerdos internacionales de pesca marítima. En este caso, se concederá validez de autorización para trabajar al duplicado de la notificación de embarque o renovación del contrato de tripulantes extranjeros en buques españoles'. Although mention is made of the fishing sector exclusively, it seems that in practice it also covers the merchant shipping sector. See Fotinopoulou Basurko (2005), pp. 228–232. Accepting that this provision is in accordance with immigration laws, see STS 29.5.2003.

[55] See Article 11 of the Rome I Regulation.

[56] See Article 11, paragraphs 4 and 5 respectively.

[57] See Giuliano-Lagarde Report (1980), p. 28.

[58] For example, Article 8 of the Spanish Statute of Workers lays down that the contract may be written or verbal. When the written form is required [see Article 8(2)], non-compliance never invalidates the contract.

[59] See Fotinopoulou Basurko (2008), pp. 159–164; Gardeñes Santiago (2008), pp. 420–421.

[60] See Gamillscheg (1983), pp. 324–325; Krebbert (2000), p. 530.

Regulation did not take the opportunity to address this issue at the time. Article 11 applies to the entire life of the employment relationship, with the aggravating circumstance that this provision has increased the number of laws in accordance with which the formal requirements of the act have to be compared: in addition to the law governing the contract and the *lex loci actus*, it is now possible to apply the law of the country in which the person performing the act in question is habitually resident at the time of its completion.

This problem was not unknown to the Rome Convention drafters, and the Giuliano-Lagarde Report suggested applying Article 7 of the Convention on overriding mandatory rules, in such a way that should the form of the act in question entail mandatory nature, the relevant law is applied in accordance with the provision.[61] Nevertheless, this proposal has been criticised[62] on the ground that it leads to the application of a given law, usually the *lex fori* or the *lex laboris*, avoiding any assessment of which law is the most appropriate to govern these matters. In this regard, it has also been proposed that the issue be resolved through the mechanism of characterisation, i.e., dealt with as a matter of substantive validity or evidence and thus subject to the *lex contractus* pursuant to Article 18 of the Rome I Regulation.[63] Another solution takes the principle of worker protection—underpinning Article 8 of the Rome I Regulation—as a benchmark to project it on Article 11 when applied to an employment relationship; in short, the most favourable solution for workers, either because it is the least or the most demanding in matters of contract form, should be chosen from among the connecting factors provided for.[64]

In the maritime and fishing sectors, however, it seems that precedence should be given to the solution envisaged in the Giuliano-Lagarde Report, which refers not only to overriding mandatory rules laid down in the *lex fori* but also to the *lex contractus*. One way or the other, consideration must be given to international minimum standards that require seafarers' employment contracts to be written down and a copy to be given to workers.[65] The policy underlying these provisions is concerned with the principle of worker protection as it aims to avoid forced work, expressly forbidden by the 1998 ILO Declaration;[66] it is also concerned with

[61] Giuliano-Lagarde Report (1980), comments to Article 9 of the Rome Convention, para. 4. Note that Article 2 of the Resolution of the Institut de droit international, 3.8.1971, during the Zagreb session on 'Conflicts of Laws in the Field of Labour Law', also referred to an array of laws but recalled that 'Nevertheless, any provision imposing special formal requirements must be observed in so far as they are in force in the country in which the work is to be performed'.

[62] As was the proposal of Gardeñes Santiago (2008), pp. 421–422, suggesting the possibility of setting employment contracts aside from Article 11(3) of the Rome I Regulation or otherwise seeking an alternative that is more respectful to the legislative objectives involved, such as the *lex contractus* or the law of the habitual workplace if the former does not match the latter.

[63] See Krebbert (2000), p. 530, citing French decisions seeking to apply formal requirements laid down by French law.

[64] See Magnus (2011), pp. 608–609, paras. 182–183.

[65] See Rule 2(1) MLC, 2006, and Articles 18–20 WFC, 2007.

[66] See Charbonneau (2014), p. 218.

maritime safety[67] and is therefore linked to seafarers' professional qualifications, which in turn bestows the status of overriding mandatory provisions on these requirements.

4.2.3.3 Non-contractual Obligations: Accidents at Work

The behaviour of one party to a contract may involve a breach of contractual obligations but can also constitute an unlawful event that results in non-contractual obligations. Safety in the workplace and accident prevention regulations have forced many jurisdictions to reflect on the characterisation of damage claims resulting from accidents brought by employees against their employers, and which are clearly framed within the contractual relationship. In fact, certain legal systems—including the English system—allow claimants to opt for the kind of liability that they wish to invoke against their employers based on either contract law or tort law.[68]

The well-known case of *Lauritzen v Larsen*[69] in the US entailed the court ruling on an accident that happened in Cuba to a Danish seafarer who had signed his contract in New York to work on board a Danish ship. The decision was finally made in accordance with the flag law, which was deemed to be the law governing the employment relationship; consequently, the *lex loci laboris* was applied, throwing into relief the many doubts that had been raised on the way accidents at work deserved to be characterised and which law ought therefore to be applied in such cases depending on whether they were characterised as non-contractual or contractual matters.[70] Identical doubts also emerged in EU private international law; an initial answer characterising damage claims arising from occupational accidents as contractual matters found its basis in the Rome Convention's silence on the issue.[71] A different answer would now be required in the light of the Rome I Regulation and its relationship to the Regulation (EC) No. 864/2007 of the European Parliament and of the European Council of 11 July 2007 on law applicable to non-contractual obligations (Rome II),[72] as these two legal instruments are complementary and their scopes of application thus have to be clearly separated.

The controversy surrounding this matter continues today, but problems of characterisation and adaptation between rules governing contractual and

[67] See Zanobetti Pagnetti (2008), pp. 129–131.

[68] See Merrett (2011), pp. 188–190, para. 6.31–6.34. However, see *Brodin v A/R Seljan and Another* [1973] S.L.T. 198, avoiding the application of Norwegian law as the law of the employment contract and applying English law as the *lex loci delicti commissi*. In this direction and regarding the Swiss legal system, see Johner (1995), pp. 133–134.

[69] *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953).

[70] See Jambu-Merlin (1983), pp. 255–262.

[71] See Morse (1992), p. 20.

[72] OJ No. L 199 of 31.7.2007.

non-contractual relationships may be avoided by invoking Article 4(3) of the Rome II Regulation. This provision allows decisions to be made on non-contractual obligations in accordance with the law governing 'a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question'.[73] As a matter of fact, the same provision facilitates the overlap between the law applicable to damage claims and that governing social security issues. Articulated as an escape clause, this secondary connection mechanism pushes both the *lex loci damni* and the law of the parties' common habitual residence into the background since both may be the product of mere chance. This is particularly true when it comes to accidents at sea, to the point that it has been claimed that the escape clause enshrined in Article 4(3) *in fine* is much more than just an exception concerning maritime activity.[74] Accordingly, it must be operative in cases where the accident involves another worker as well, provided that both are subject to the same *lex laboris*.[75]

The consequences of applying Article 4(3) of the Rome II Regulation remain uncertain, however, when it comes to setting aside the law chosen by the parties to the employment contract on the ground that the law applicable to the contract in the absence of choice of law favours the worker. The European Commission was perfectly aware of this issue when it presented the proposal for the Rome II Regulation[76] but consciously chose not to include an express provision in this regard on the understanding that workers are entitled to such protection and the law governing the pre-existing relationship is consequently the one governing the contract in the absence of choice of law where appropriate. Therefore, although Article 4(3) does not contain any reference to the protection of the weaker party, fairness and reasons of consistency support such an interpretation.[77] Now the question remains as how to come to the conclusion that such a law is more favourable to the worker than the one chosen in a case dealing with non-contractual liability.[78] Beyond cases in which both types of liability are in question, the first response is to apply the law agreed on by the parties unless it can be proved that the law chosen is less protective than the default law governing the contract.

[73] See Junker (2010), para. 167. This approach is also to be found in *Cour d'Appel* Rouen, 5.12.1991, ship *Diamond*, with comments by Chaumette (1992), where the law governing the contract was applied to decide on damages arising out of a maritime accident, and in the absence of proof of the foreign law, plaintiffs were requested to provide it. The *Cour d'appel* Rouen finally issued a judgment on 3 March 1994, with comments by Chaumette (1994), according to Greek law as a result of an implied choice of law: Panamanian flag, Greek seafarer and Greek shipowner.

[74] This Proposal was suggested by GEDIP (2008), the topic having been introduced there by Profs. Basedow and Siehr. See further Basedow (2010), p. 120.

[75] See Junker (2010), para. 168.

[76] COM(2003) 427 final, p. 14.

[77] See Okoli and Arishe (2012), pp. 539–541.

[78] With some doubts, see Merrett (2011), para. 6.90, pp. 219–220.

When a social security scheme is established by a legal system, employer liability becomes strict liability, i.e. non-dependant on negligence or intentional misconduct and therefore greatly limiting it. The intrinsic correlation between social security systems and employers' disclaimers therefore suggests that the latter should be subject to the law applicable to the former. This is the aim of Article 85 (2) of Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems,[79] which states that 'if a person receives benefits under the legislation of one Member state in respect of an injury resulting from events occurring in another Member state, the provisions of the said legislation which determine the cases in which the civil liability of employers or of their employees is to be excluded shall apply with regard to the said person or to the competent institution'. Apart from these expressly regulated cases, others are covered by the Rome II Regulation, which determines the law governing the treatment of disclaimers. As they are intrinsically connected with social protection, they should be deemed to be overriding mandatory rules, operating only if the worker is really protected against contingencies that occur after the event causing the damage.[80]

When a third party is involved in the employment relationship there will not be such a close connection with the *lex contractus*, and other connecting factors of Article 4 of the Rome II Regulation take precedence in deciding on the law applicable to non-contractual obligations. When liability is attributed to third parties, the *lex loci delicti commissi* comes to the fore, together with the law of the flag. However, in addition to cases where the law of the flag cannot operate in its condition of law of the country in which the damage occurs, such as in cases where ships flying different flags collide,[81] the law of the flag may also be relegated, as priority is given to other interests that can be channelled via the escape clause.[82] Cases involving more than one vessel are generally the most difficult, and it would be desirable for a specific conflict rule on maritime liability to be issued, as was suggested in the European Group for Private International Law report.[83] This idea is reinforced by the role played by uniform law in this area,[84] which would justify referral to the *lex fori*.[85]

[79] OJ No. L 314, 7.6.2004. Amended by Regulation (EC) No. 988/2009 (OJ No. L 284, 30.10.2009) and Regulations (EU) No. 1231/2010 (O.J. No. L 344, 29.12.2010), No. 465/2012 (O.J. No. L 149, 8.6.2012). Regulation (EC) No. 987/2009 of the European Parliament and of the Council of 16 September 2009 (O.J. No. L 284, 30.10.2009) contains its rules of application. Text with relevance for the EEA and Switzerland.

[80] See Deinert (2013), pp. 332–334.

[81] See George (2007), pp. 137–172.

[82] See Manchuk (2007), pp. 221–248.

[83] See GEDIP (2001).

[84] See Guadagna (2006), pp. 668–698. On the autonomous interpretation of uniform law by national courts, see Basedow (2000), pp. 777–798.

[85] See Basedow (2010), pp. 135–137.

4.2.3.4 Social Security Matters

The law applicable to social security matters is relevant to this study because all matters relating to accidents at work and occupational diseases tend to be channelled through this specific law.[86] However, this matter is not included in the Rome I or Rome II Regulations since it cannot be characterised as contractual or non-contractual.[87] As this is about a system for social protection provision and the law applicable is therefore generally decided according to the principle of territoriality with concessions to posted workers, the *lex loci laboris* is usually applied from a conflict of laws perspective.[88]

In a mobile society, this approach can easily lead to injustices stemming from the fact that workers could come under more than one social security system, which is the reason for establishing the principle that they can only be subject to one such system to avoid potential duplication derived from participating in different social security schemes. Workers can of course be employed in different countries and by different employers, and so the choice of applicable law is also governed by the principle of protecting migrants, that is, the relevant system must take into account time worked and the contributions generated abroad to calculate the benefits due. This requires interstate coordination, which in turn has resulted in the conclusion of numerous bilateral and multilateral agreements in this field.

The European Union has issued regulations to coordinate national social security schemes in accordance with the principle of territoriality. The key instrument here is Regulation (EC) No. 883/2004 of the European Parliament and the Council of 29 April 2004 on the coordination of social security systems, where the issue of the system that actually provides guidelines for affiliation to a social security scheme is addressed in Article 11 *et seq*. Article 11(4) states that 'for purposes of this title, an activity as an employed or self employed person normally pursued on board a vessel at sea flying the flag of a Member state shall be deemed to be an activity pursued in the said Member state'.[89]

The Regulation is based on the principle that only the law of a member state, in this case the law of the flag state, should be applied. In this respect, it fails to matter

[86] Undermining the significance of conflicts of laws in these matters, see Gaudemet-Tallon (1986), pp. 2–9.

[87] See Sect. 3.2.2.2. On this debate in Spain, see Fotinopoulou Basurko (2008), pp. 147–151, who departs from its characterisation as a matter of public law to have it excluded from the Rome Convention. In contrast, including it in the Rome Convention, see Carril Vázquez (1999), pp. 221–224.

[88] See García Rodríguez (1991), pp. 60–69 and 149–152; Joussen (2003), p. 21.

[89] In judgment 24.2.2014, the Spanish Supreme Court addressed the issue of whether an accident suffered by a Spanish fisherman working on board a Spanish-flagged ship operated by a Spanish shipowner qualified as an accident *in itinere* since the fall that caused his death while he was trying to board his ship in Dingle (Ireland) happened during his own free time. The death occurred in Irish waters, and the Spanish court applied Spanish law to conclude that it was indeed an accident *in itinere*.

whether the vessel essentially operates in the territorial waters of third states, as the CJEU points out in *M. J. Bakker and Minister van Financiën*,[90] where the underlying discussion was about the contributions made to the Dutch social security system by a worker residing in Spain who provided services for a Netherlands-based company on board dredgers sailing under the Dutch flag and operating in the territorial waters of China and the United Arab Emirates. In this context, the Court stated that 'neither respect for the sovereignty of the coastal State nor the United Nations Convention on the Law of the Sea requires that a worker in Mr Bakker's situation be deprived of the benefit of the social insurance provided for, in accordance with Regulation No 1408/71, by the Member state whose flag the vessel flies, when that vessel is located in the territorial waters of a State other than that Member state'.[91]

The provision also indicates that people who are pursuing activities in a member state, whether as employees or as self-employed persons, are subject to the state's law.[92] This section of Article 11 makes it clear which the relevant state is for these purposes, in cases where the employee works in one country but is resident in another, a particularly significant issue where seafarers are concerned. In the *Salemink* judgment, the CJEU gave an affirmative answer to the question of whether a gas extraction platform situated on the Dutch continental shelf is comparable to member state territory for the purposes of Article 13(2)(a) of Regulation No. 1408/71,[93] on the basis of which Regulation No. 883/2004 is constructed. In this case, the employee was resident in Spain and had consequently been excluded from the statutory social security scheme in the Netherlands. The CJEU indicated that a member state cannot impose a further obligation—in this case, that of residing in the country—for a person to be entitled to the benefits of the social security scheme there when the activity is pursued either as an employed or a self-employed worker in the country. This would fly on the face of the provision in question, as it asserts that these workers should be included in the social security scheme of the state where they work even when they are resident in other states.[94] However, there are three exceptions to this rule.

The first exception is specified in Article 11(4) of Regulation No. 883/2004 to the effect that 'a person employed on board a vessel flying the flag of a Member state and remunerated for such activity by an undertaking or a person whose registered office or place of business is another Member state shall be subject to the legislation of the latter Member state if he resides in that State. The undertaking or person paying the remuneration shall be considered as the employer for purposes

[90] CJ 7.6.2012, Case C-106/11, *M. J. Bakker v Minister van Financiën*, with comments by Avegno (2013), pp. 814–818.

[91] CJ 7.6.2012, Case C-106/11, *M. J. Bakker v Minister van Financiën*, para. 29. See also para. 28.

[92] Article 11(3)(a) of the Regulation No. 883/2004.

[93] CJ 17.1.2012, Case C-347/10, *A. Salemink v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, paras. 32–35, and comments by Rodríguez Magdaleno (2012), pp. 1–5.

[94] CJ 17.1.2012, Case C-347/10, *A. Salemink*, para. 40–44.

of the said legislation'. Thus, the fact that employers and seafarers or fishermen have a common habitual country of residence qualifies the application of this country's law. Certain practices exist that should be mentioned here, such as those followed by the Dutch National Institute of Social Security: Title II of Regulation No. 1408/71, now No. 883/2004, is understood to apply to seafarers who hold nationality in an EU member state or the European Economic Area and are resident in one of these states but employed on board ships that do not fly a member state flag, by the mere fact that the employer is established in the Netherlands.[95]

The second exception affects temporarily posted workers. The principle of a single applicable legislation is put into effect for them by resorting to the law of the state of origin,[96] according to which seafarers or fishermen who are temporarily posted on board vessels flying flags that they do not usually fly remain subject to the legislation of the state of origin, which may well be their country of habitual residence if the employer's residence is also there.

The third is not really an exception, in that it addresses the case of mobile workers.[97] For these cases, where services are provided on board more than one ship or on land as well as on ships or other maritime platforms, the state of seafarers' habitual residence is preferred, provided that a substantial part of their activity is undertaken in this state. Otherwise, priority is given to the member state where the registered office or place of business of the business or employer is located.[98] Nevertheless, the rule again prioritises the state of habitual residence in cases involving several employers with registered offices or places of business in different member states.

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[95] See this mention in CJ 7.6.2012, Case C-106/11, *M. J. Bakker*, para. 15.

[96] Article 12 of Regulation No. 883/2004.

[97] Article 13 of the Regulation No. 883/2004.

[98] A request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands) was lodged on 15 May 2013, Case C-266/13, *L. Kik v Staatssecretaris van Financiën*, on whether Regulation 1408/71 applies to the following case: '(a) a worker residing in the Netherlands who (b) is a national of the Netherlands, (c) in any event, was previously compulsorily insured in the Netherlands, (d) is employed as a seafarer by an employer established in Switzerland, (e) carries out his work on board a pipelayer which flies the Panamanian flag, and (f) carries out those activities first outside the territory of the Union (approximately 3 weeks above the continental shelf of the United States and approximately 2 weeks in international waters) and then above the continental shelf of the Netherlands (periods of one month and approximately one week) and of the United Kingdom (a period of slightly more than one week), while (g) the income earned thereby is subject to income tax levied by the Netherlands'. The Opinion of the Advocate General Mr. P Cruz-Villalón presented on 16 October 2014 is a positive one and classifies this worker as a mobile one as finally asserted by the CJEU in its judgment of 19 March 2015 submitting this issue to 'the legislation of the State in which his employer is established. However, in circumstances such as those of the main proceedings, if, pursuant to Regulation No 1408/71, that legislation entails him being insured under a voluntary insurance scheme or not being insured under any social security scheme, that national will be subject to the legislation of his Member State of residence' (para. 64).

The network of international conventions on social security is certainly intricate, in particular when agreements are concluded between member states, since Regulation No. 883/2004 does not preclude the application of previous agreements that may be more favourable, and allows new ones to be concluded under certain conditions.[99] For example, Spain has entered into numerous agreements with third states that follow *grosso modo* the guidelines laid down in Regulation No. 883/2004,[100] outlined in Article 17 of ILO Convention No. 165 on seafarers' social security, in particular the principle according to which seafarers can only be subject to one social security scheme, be it that of the flag state or their habitual residence. This Convention was terminated by Spain due to its revision by MLC, 2006.[101] WFC, 2007, also follows in the footsteps of MLC, 2006, with regard to fishing vessels.[102]

In any event, both MLC, 2006, and WFC, 2007, are in line with ILO Convention No. 165 and are based on several factors, including differences in social security systems, the need for coordination among those systems and the idea that each system must determine who is entitled to receive coverage. In this regard, they primarily place obligations to provide social protection on flag states but also contain a clear mandate to the member state of seafarers or fishermen's habitual residence to include them in its social security system, aiming for equivalent protection to that granted to every other employee resident in its territory.[103] In short, regardless of the flag flown by the ship on which seafarers serve, the law of habitual residence takes a prominent role in social security matters as it affects the one country that remains truly stable throughout seafarers' or fishermen's working lives. There must therefore be coordination between flag states and states of habitual residence to offer seafarers and fishermen protection that is not less favourable than that enjoyed by land-based workers.[104]

Spanish legislation is already pursuing this approach with a view to protecting workers living in its territory. In general, and on condition that they both reside and provide services in Spain, Article 7 of the Spanish General Social Security Act covers seafarers and fishermen, for whom a special system has been developed.[105]

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[99] Article 8 of the Regulation No. 883/2004.

[100] For an analysis of these conventions' provisions, see García Rodríguez (1991), pp. 265–277. On the relationship between social security matters and private international law, see Lugato (1994).

[101] See Rule 4(5) MLC, 2006.

[102] See Article 34 WFC, 2007.

[103] This is a point at which the flexibility of application with which both Conventions were conceived ought to play a role in allowing contracting states to make progress on social protection for seafarers who are habitually resident on their territory. Along the same lines, see ILO (2012), pp. 36–39.

[104] This may give rise to many implementation issues. See Charbonneau (2014), pp. 224–225.

[105] As established in Decree No. 1867/1970, 9.7 approving the General Regulation of Law 116/1969, 30.12 regulating the special social security scheme for seafarers, and No. 2864/1974, 30.8 approving the Consolidated Text of Laws 116/1969, 30.12 and 24/1972, 21.6 regulating the special social security scheme for seafarers.

The vessel is considered a workplace, and the activity provided on board a ship registered in a Spanish registry is therefore regarded in the same way as that conducted on Spanish soil.[106] This means that all workers on board, regardless of their nationality,[107] have to pay contributions to the Spanish social security system, although there are certain exceptions, as seen above.

The other side of the coin is that Article 125(2) of the General Social Security Act specifies that seafarers or fishermen will be included within the system under certain circumstances if the company they are employed by transfers them to a different country, as long as a special agreement with the social security administration is in place. Hence, workers posted to foreign-flagged vessels by Spanish companies continue to be part of the Spanish social security system, according to the Order of 27 January 1982.[108] If the company is foreign, this scheme no longer applies, and workers can opt for private insurance or sign a special agreement with the social security administration.[109] However, neither of these procedures is fully satisfactory since the benefits and compensations they provide are never as favourable as those provided by the Spanish social security system. In the light of MLC, 2006, Spain should move forward and increase social protection for seafarers and fishermen resident there, given its expected accession to WFC, 2007.[110]

Given that the law of the flag operates as the first connecting factor, flags of convenience are also an important matter and need to be approached within the broader issue of how to protect state nationals abroad; for these purposes, Law No 40/2006 of 14 December on the Statute of Spanish citizens abroad is applicable.[111] Article 18 requires the state to safeguard the social protection of Spanish nationals who move abroad for professional reasons, and the first measure to be taken in the struggle against social protection that is unfavourable to Spanish workers abroad is the signing of international social security agreements.

The second measure was introduced by Spanish labour courts by interpreting the concept of 'employer' to include consignees, manning agencies and joint fishing undertakings,[112] thus making them jointly and severally liable with foreign

[106] See Article 1(5), *in fine* of the Spanish Statute of Workers, indicating that in maritime activity the ship is deemed to be the workplace and located at the province in which is situated its base port.

[107] Along the same lines, see STSJ Galicia No. 343/2003, 3.3.2003, concerning a Senegalese citizen.

[108] BOE No. 40, 16.2.1982. This Order deals with the special nature of affiliation to the Spanish social security scheme for seafarers working for Spanish companies and posted abroad.

[109] This formula was developed by Order TAS/2865/2003, of 13 October, regulating special agreements in the social security scheme.

[110] On Spanish legislation's adaptation to MLC, 2006, see Carril Vázquez (2014), pp. 260–261.

[111] BOE No. 299, 15.12.2006. See Spanish case law applying a foreign law in cases involving foreign employers: SSTSJ Galicia (*Sala de lo Social*), 13.11.1998; Canarias, 17.2.1998; Madrid, 17.2.1998; Navarra, 25.3.1998; País Vasco, 28.4.1998; SSTS 17.12.2012; 18.12.2012; 21.1.2013; 31.1.2013; 19.2.2013. On this issue, see further Fotinopoulou Basurko (2013), pp. 1–13.

[112] SSTS, *Sala de lo Social*, 8.10.1973; 11.12.1974; 28.4.1975; 9.2.1987; 15.3.1984. A different opinion is represented, however, by SSTS 19.2.1990, which dealt with the claim of a Spanish

shipowners for the payment of damages in the event of accidents at work and for widow's and orphan's pensions, in line with the Spanish social security system.

This jurisprudence is currently endorsed by Article 10(3) of the Royal Decree 84/1996 of 26 January on general regulations on business registration and worker affiliation in the Spanish social security system. The law lays down that for the purposes of the special scheme for seafarers, the employers category includes shipowners, operators or owners of fishing vessels or maritime facilities, the consignees of vessels, manning agencies or other natural or legal persons resident in Spain that hire and remunerate Spanish residents to provide services on board foreign flag vessels, including Spanish companies participating in joint fishing ventures incorporated in other countries. More specifically, the Law on Shipping establishes that agents or representatives of foreign shipowners that engage Spanish nationals or residents in Spain must take out an insurance policy whereby seafarers can receive similar compensation to that granted by the Spanish social security scheme in case of death, accident or repatriation; should no policy be taken out, the employment contract will not obtain a visa;[113] all without prejudice to international conventions or agreements signed by Spain.

In fact, Spain has several agreements in this area, and some of the earliest submit these matters to the law of the flag, which is not always favourable to workers.[114] Accordingly, modern social security conventions also take into account Spanish companies participating in foreign undertakings as employers.[115]

Finally, it is interesting to note that there are specific regulations for the rights of return of social security institutions responsible for providing benefits against a third party that is liable to provide compensation for injuries to employees in the European Area of Justice. Articles 93 of Regulation No. 1408/71 and 85 of Regulation No. 883/2004 lay down the recognition of legal subrogation and the right of return when events requiring the intervention of a social security body occur in another member state. It is expected that these rights will also be specified in the

national who entered into a contract in Bilbao and suffered an accident on board a ship flying the Liberian flag; 15.1.2001 on contributions to the Spanish social security scheme by Spaniards working on board a ship flying the British flag and refusing to accept the consignee in the Basque Country – who was paying their remuneration – as an employer. On these case law, see Carril Vázquez (1999), pp. 220–221; Iriarte Ángel (1993), pp. 169–171.

[113] See Article 164(2) of the Law 14/2014, of 24 July, on Shipping (*Ley de la Navegación Marítima*) (BOE No. 180, 25.7.2014).

[114] Pursuant to CJ 15.1.2012, Case C-55/00, *Elide Gottardo v Instituto Nazionale della Previdenza Sociale*, 'when a Member State concludes a bilateral international convention on social security with a non-member country which provides for account to be taken of periods of insurance completed in that non-member country for acquisition of entitlement to old-age benefits, the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so' (para. 34).

[115] On these conventions, see Arrieta Idiakez (2006), p. 156, note 84; Carril Vázquez (1999), pp. 228–231, who cites the Conventions between Spain and Argentina and Spain and Chile as examples of conventions where Spanish fishermen working for joint enterprises are specifically included in the Spanish social security scheme.

respective national laws where applicable, i.e., to cases not involving other member states.

Article 19 of the Rome II Regulation deals with the law applicable to such rights in these instances, therefore making it possible for the issue to be submitted to the same law that governs the employment relationship by invoking Article 4(3). However, the public nature of the social security system advocates a characterisation in accordance with this, and thus the rules containing those rights should be treated as overriding mandatory rules of Article 16 of the Rome II Regulation.[116] At any rate, any ensuing litigation against a third party that was the cause of damage is subject to the relevant conflict rules.

4.2.3.5 Employer Insolvency

Employer insolvency inevitably has a profound impact on employment contracts, and this can be even greater when employees are seafarers on board ships whose debts the shipowner cannot pay.

In the European Area of Justice, the law governing the effects of insolvency proceedings on current contracts is determined according to Regulation (EC) No. 1346/2000 of 29 May on insolvency proceedings[117] or, where this is not applicable, in accordance with the respective national law. The European Insolvency Regulation (hereafter EIR) is only applicable when the centre of a debtor's main interests is located in a member state, except for Denmark, which is not a party to the Regulation. When this centre is in a third country, national law prevails, in Spain's case, Law 22/2003 of 9 July on bankruptcy,[118] in Germany's case, *Insolvenzordnung*,[119] which otherwise seems to copy the cross-border insolvency model adopted by the European Union as, in general, national cross-border insolvency rules are fundamentally similar to those laid down by EIR.[120] Furthermore, the territorial scope of EIR, which came into force in March 2002, requires further clarifications, in particular where its conflict rules are concerned: in addition to always requiring the centre of a debtor's main interests to be in a member state, the conflict rules provided for only apply when the law of a member state is referred to; *ergo*, when the law of a third state is applicable the seized court sets the Regulation aside and resorts to national conflict rules to determine the applicable law.

The opening of an insolvency proceeding does not interfere in principle with specific contractual arrangements, in particular the concluding, performance and termination of contracts, which remain subject to the *lex contractus* determined in

[116] See Deinert (2013), p. 334.

[117] OJ No. L 160, 30.6.2000.

[118] BOE No. 164, 10.7.2003.

[119] *Insolvenzordnung* of 5 October 1994 (BGBl. I S. 2866), as amended by the Law of 31 August 2013 (BGBl. I S. 3533).

[120] See Sect. 3.2.2.2. Employer insolvency.

accordance with either the Rome I Regulation or the Rome Convention. Nevertheless, the objectives of the insolvency proceeding may have certain legal consequences for the contractual relationship—thus, altering its normal course—as a result of the need to reorganise the debtor's estate, with a view to either liquidating or restructuring it. Accordingly, Article 4(2)(e) of EIR submits this matter to *lex fori concursus*, as most legal systems do, i.e., Article 200 of the Spanish *Ley Concursal* or § 335 of the German *Insolvenzordnung*.

However, legal instruments dealing with cross-border insolvency provide for two exceptions to the application of the *lex fori concursus* to the effects of insolvency proceedings on current contracts, specifically for contracts dealing with real estate and employment. These exceptions are laid down in Articles 8 and 10 of EIR, in Articles 206 and 207 of the Spanish *Ley Concursal* and §§ 336 and 337 of the German *Insolvenzordung*. The rules are the consequence of the many interests involved in these matters, which has resulted in a wide array of mandatory rules in both sectors. For this reason, the European Union and member states submit the impact of insolvency proceedings on such contracts exclusively to the law of the place where the property is located or the law governing the employment contract. The law applicable to insolvency proceedings is thus set aside, with the aim of avoiding conflicts between the mandatory rules laid down by these laws, whose basic purpose is to protect tenants and workers.[121]

Article 10 of Regulation 1346/2000, together with its national counterparts such as Article 207 of the Spanish *Ley Concursal* or § 337 of the German *Insolvenzordnung*, sets out the exclusive application of *lex laboris* to employment contracts and relationships. The underlying principle is worker protection, and employees are at least afforded the protection guaranteed by the law applicable to the contract in the event of their employer's insolvency. The *lex laboris* insolvency rules therefore determine the contract's fate, covering aspects such as its continuing validity, modification or termination as a result of the opening of insolvency proceedings, for example via a collective redundancy plan, and under which specific conditions, procedures and deadlines, as well as the rights and obligations arising from the new situation such as the right of workers to terminate their contracts where appropriate.[122]

In accordance with these provisions, the insolvency practitioner must apply the *lex laboris* insolvency rules to deal with employment contracts that are subject to the law of a state other than the one where insolvency proceedings were opened. The implementing of this law by a foreign insolvency practitioner may lead to problems of adaptation that the insolvency judge must try to resolve.[123] Such

[121] Virgós and Schmit Report (1995), para. 118.

[122] Virgós Soriano and Garcimartín Alférez (2003), p. 125.

[123] For example, the relevant law may require the approval of the court that opens the insolvency proceedings, but they may have been opened in a different member state. To solve this adaptation problem, Article 10a of the Proposal amending the EIR presented by the European Commission on 12 December 2012 [COM(2012) 742 final] suggested that 'the court which opened the insolvency proceedings shall have the competence to approve the termination or modification of these contracts'.

problems may prove insurmountable though, for example should the applicable law stipulate the exclusive intervention of the administrative or labour institution in the country of employment. In such cases, insolvency practitioners have to visit the country in order to take the steps prescribed by the law in question there.[124]

In response to these problems, the European Union has undertaken to harmonise the issue by means of Directive 2008/94/EC of the European Parliament and the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer.[125] Articles 9 and 10 deserve particular attention and deal with insolvent companies with activities in the territory of at least two member states, with a view to regulating the activities of each guarantee institution. Once an insolvency proceeding has been opened in a member state—a question to be decided in accordance with EIR—the guarantee institution in the country where the insolvent company's employees work or habitually provide services will take on their case. For these purposes, workers' rights are governed by the law of the competent guarantee institution.[126] Against this legal background, it is however doubtful whether the path opened by the CJEU to the application of national legislation establishing the right of workers to enjoy wage guarantees provided by national institutions is still applicable—in addition to that provided by the guarantee institution of the country of the habitual workplace—on a complementary or substitutive basis;[127] CJEU case law dealt with previous directives, now abrogated by the 2008 directive in force, which lacks any mention of this issue and thus creates a question mark over the matter.[128] For its part, Article 10 establishes coordination obligations between the guarantee institutions involved in cross-border insolvencies, in particular to share information on employees' outstanding claims to clarify the question of who is to pay them.

This Directive replaces others that previously addressed the issue, specifically Directive 2002/74/EC of the European Parliament and the Council of 23 September 2002, transposed by Spanish Law 38/2007 of 16 November regulating the statutory security for payment of unpaid wage claims in transnational insolvency procedures of companies with activities in more than one member state. The result of the transposition and instructions about how to act in these situations can be found in Sections 10 and 11 of Article 33 of the Spanish Workers' Statute, which places obligations on the Wage Guarantee Fund under Articles 9 and 10 of Directive 2008/94/EC. In Spain, these directives were transposed without excluding share fishermen,[129] whereas Greece, Italy, Malta and the UK actually excluded these workers

[124] Virgós Soriano and Garcimartín Alférez (2004), pp. 2922–2924.

[125] OJ No. 283, 28.10.2008. Comments by Orellana Cano (2009), pp. 469–479.

[126] See Article 9 of Directive 2008/98/EC.

[127] CJ 10.3.2011, Case C-477/09, *Défossez*, para. 35.

[128] For an affirmative response, see *Cour.Cass. (Ch.soc.)*, 4.11.2012, No. 11-22.166, and comments by Boskovic (2013).

[129] The Proposal for a Directive on seafarers presented by the Commission in November 2013 aims at putting an end to fishermen's exclusion from its scope of application [COM(2013) 798 final].

on the basis of Directive 2008/94/EC, whose Article 1(3) authorises states not to include them if other mechanisms offer equivalent protection. In this regard, we agree with the Commission that maritime liens do not provide the same protection since the vessel's value may not reach the minimum amount of outstanding claims allowed by the Directive.[130] In any event, seafarers whose workplace is in a third state are not covered by these directives,[131] and their transposition has not entailed extending their coverage.

The exception laid down in Article 8 of Regulation No 1346/2000 as such is thus limited to the effects of insolvency proceedings on current contracts. However, other aspects typically characterised as insolvency matters are not covered by the exclusion and therefore remain subject to the *lex fori concursus*; examples of these are the ranking of claims resulting from these contracts and creditors' rights once insolvency proceedings are over.[132] Other issues include the protection of worker's claims arising from their employment relationship, i.e., whether they are granted preference over other claims and, where appropriate, the amount of the protected claim and the ranking of the preference, or the lodging, verification and admission of claims.[133]

With respect to the ranking of claims and maritime employment, the 1993 Convention on maritime liens and mortgages comes to the fore,[134] as it prevails over domestic insolvency laws in decisions on these issues.[135] This Convention grants as maritime liens 'claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf', as well as 'claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel'.[136] The Convention does not distinguish between enforcement and insolvency proceedings, and the priority of maritime liens as prescribed in Article 5 in more favourable terms for seafarers than in previous regulations must always therefore be respected.[137]

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[130] See Commission Report to the European Parliament and the Council on the implementation and application of certain provisions of Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, Brussels, 28.2.2011 [COM(2011) 84 final], p. 3. Information on the transposition of Directive 2008/94/EC has been taken from this Report.

[131] Requesting universal scope for this Directive, see Chaumette (2007), pp. 133–134, on the ground that these credits may be deemed alimony.

[132] See Virgós Soriano and Garcimartín Alférez (2004), p. 2920.

[133] See Virgós and Schmidt Report (1995), para. 128.

[134] Ratified by Germany on 11.7.1994 and Spain on 7.3.2002, among others. With the same object and prior to this, the 1926 and 1967 Conventions, the content of which was updated by the 1993 Convention.

[135] This is controversial in Spain. See, for all, Alonso Ledesma (2012), pp. 294–303; Ruiz Soroa (2007), pp. 119–130.

[136] Articles 4(a) and (b) of the 1993 Convention.

[137] *Cour d'appel* Aix-en-Provence, 15 ch. Civ., 1.2.2001, ship *Beloostrov*.

Seafarers' maritime liens now take priority over registered mortgages, 'hypothèques' and charges while ranking *pari passu* with those listed in Article 4 of the 1993 Convention, except salvage reward claims for the vessel, which take priority over all other maritime liens. In addition to this, the 1993 Convention lays down provisions on the forced sale of the vessel, and Article 12 establishes that costs and expenses arising out of the sale are to be paid before the creditors mentioned above are satisfied; these include, *inter alia*, vessel and crew maintenance costs, wages and other sums and costs referred to in Article 4(1)(a) such as repatriation costs, incurred from the time of the vessel's arrest or seizure.

When establishing the relationship of maritime liens with insolvency proceedings, it should be noted that the preference granted by maritime liens has an expiry date. Article 9 of the 1993 Convention provides for a period of 1 year—and also regulates the point at which this period starts—which can only be interrupted if the creditor entitled to it is not permitted by law to proceed with the arrest or seizure of the ship. After this 1-year period, the 1993 Convention no longer protects the creditor, and the rank and status of the claim in question is determined by the corresponding *lex fori concursus*. For example, in accordance with the Spanish insolvency law, a maritime lien results in the right to separate enforcement over the vessel, in such a way that only the residuary funds of the forced liquidation become part of the estate of the insolvency proceedings.[138] Hence, maritime liens are not affected by the stay of enforcement of security interests on debtors' estates that are associated with their business activities.[139] Holders of maritime liens such as seafarers[140] are then entitled to arrest the vessel, at least for a 1-year period from the date of the opening of the insolvency proceeding. Once this period is over, the classification and ranking of credits is governed by the provisions of the Spanish Insolvency Act.[141] When the arrest of the ship is effected in a country other than that of the opening of the insolvency proceeding, the seized court may proceed to the recognition of the foreign decision ordering the opening of the insolvency proceeding.[142]

The *lex fori concursus* is not always applicable to the effects of insolvency proceedings on maritime liens, however. In addition to granting their holders priority of payment, maritime liens are characterised by the right to obtain *erga omnes* satisfaction from the attached asset.[143] For our purposes, Article 5 of EIR

[138] Article 76(3) of the Spanish Insolvency Law.

[139] Article 56 of the Spanish Insolvency Law.

[140] The scope of application of the 1952 and 1999 Conventions does not fully match that of the 1926 and 1993 Conventions. It is therefore necessary to distinguish between arresting a ship on the ground of a maritime lien and doing so on the basis of a normal loan. For more on the Spanish doctrine, see Rodríguez Ruiz de Villa (2010), pp. 175–198.

[141] Article 76(3), *in fine* of the Spanish Insolvency Act.

[142] Along these lines, see the Venice Tribunal in judgments of 21.12.2010, 23.12.2010 and 24.2.2011, ship *Delphin*, with comments by dal Maso (2011). In France, see *Cour d'Appel* Aix-en-Provence, 29.6.2011, with comments by dal Maso (2013).

[143] Dealing with its nature, see for all Domínguez Cabrera (2010), pp. 145–154.

dealing with third parties' rights *in rem* is important; this applies when insolvency proceedings over employers are opened, provided that both their centre of main interest and the vessel are located in member states.[144] In establishing the ship's location, regard must be paid to Article 2(g) of Regulation 1346/2000, which lays down a general rule that indicates the place where an asset was entered in a public register, therefore to the place where the vessel was registered.[145] When the ship's registration and centre of the debtor's main interests point to a member state, Article 5 is applicable provided that they are different member states; in the absence of one of these prerequisites, national insolvency rules are applicable.

Pursuant to Article 5, third party rights *in rem* are not affected by insolvency proceedings, provided that the asset related to the said right is located in a member state other than the one in which insolvency proceedings have been opened. Therefore, maritime liens falling within its scope are not affected by the insolvency proceedings, and holders may, for example, ignore a temporary stay imposed by the relevant *lex fori concursus*. In contrast, Article 201 of the Spanish *Ley Concursal* or § 351 of the German *Insolvenzordnung* provides for an exception to the application of the *lex fori concursus* as well but submits this issue to the insolvency rules laid down in the *lex rei sitae*. This law decides the effects of the insolvency proceeding on the maritime lien in question. This provision is intended to protect creditors by removing the legal uncertainty generated by the unpredictability of where insolvency proceedings will be opened, and thus which law will decide on the preference granted to creditors holding a right *in rem*, and whether they may effect it or not.

4.3 Connections Provided for in Article 8 Rome I Regulation

4.3.1 Origins and Structure

Although expressed in slightly different terms, Article 8 of the Rome I Regulation follows Article 6 of the Rome Convention, and both are therefore to be interpreted along the same lines due to reasons of consistency in the European Area of Justice, as highlighted by the CJEU in *Koelzsch v Luxembourg*.[146] The latter provision introduces the protection of workers—the weaker party to a contract—into the Rome Convention by establishing measures to counterbalance the other party's dominant position. All those measures are reproduced in Article 8 of the Rome I Regulation, save a few changes arising from the proposals submitted by both the

[144] See Alonso Ledesma (2012), p. 313; dal Maso (2011), pp. 617–618; dal Maso (2013), pp. 202–204.
[145] In these terms, see Virgós and Schmidt Report (1995), para 69.
[146] See CJ 15.3.2011, Case C 29/10, *Heiko Koelzsch v Großherzogtum Luxemburg*.

GEDIP and the Max Planck Institute for Comparative and Private International Law.[147] None of those provisions mentions work performed on board a ship; nonetheless, seafarers' and fishermen's employment contracts are also included within the scope of both provisions, whose connecting factors are to be read in the light of the peculiarities of work at sea.

The first of the measures to put employees and employers on an equal footing is the admission of party autonomy to choose the applicable law, albeit limited to cases in which it benefits workers.[148] By submitting the contract to the chosen law, employers may seek to deprive employees of the protection granted to them by mandatory rules contained in the law otherwise applicable. Worker protection is achieved by their not being deprived of the set of mandatory rules that would govern the contract in absence of choice of law, i.e., the chosen law is applicable as long as it is more favourable to the worker than the law otherwise applicable.[149]

Result-oriented considerations lie behind this particular choice of law, but they are absent from the remaining connecting factors, selected according to the principle of proximity and predictability.[150] In default of choice of law, the country of the habitual workplace comes to the fore as a foreseeable law for both parties, and one that is close to them. Nevertheless, determining this place is not a simple operation when an employee performs services in different countries or in areas that are not subject to sovereignty, as is the case with work carried out on board a vessel. An alternative connecting factor has been established for cases where identifying the habitual workplace is impossible, i.e., when the employee does not discharge duties to the employer in one and the same country; the contract is then subject to the law of the place where the business which engaged the worker is located. This conflict rule is in fact closed by an escape clause to which the seized court is granted discretion to assess whether there is a law that has closer links with the employment contract under the circumstances in question, i.e., a law with more significant contacts with the employment relationship than the law of the habitual workplace or, failing that, the law of the place where the business which engaged the employee is located.

In view of these connecting factors, the law applicable to the employment contract in the absence of choice of law is particularly significant, as it operates not only by default but also when the parties have actually selected a different law

[147] Respectively, GEDIP (2001); and the Max Planck Institute for Comparative and Private International Law (2004), pp. 1–118; Max Planck Institute for Comparative and Private International Law (2007), pp. 225–344. Previously, the work of Gamillscheg (1961), pp. 265–290, 477–498, 677–699, on the development of a bilateral conflict rule in employment contract matters is a key one.

[148] On the historical crystallisation of these connections, see Moura Ramos (1997), pp. 1886–1892.

[149] On party autonomy in general when it comes to protecting the weaker party, see Leclerc (1995), pp. 99–225.

[150] See Gardeñes Santiago (2008), pp. 387–424; Gaudemet-Tallon (2008), p. 195; Mankowski and Knöfel (2011), pp. 524–525. In this sense, while addressing Article 6 of the Rome Convention seeking worker protection, Kaye (1993), p. 221.

to govern the contract. For this reason, when it comes to applying this conflict rule, the *modus operandi* always starts from establishing the applicable law in the absence of choice of law and then proceeds to compare the two legal systems and decide whether the law chosen by the parties to the contract may be applied as more favourable to the worker than the one otherwise applicable.

The following pages are devoted to discussing these connecting factors and their application when the employment relationship is mainly effected on board a vessel. In these cases, the fact that the ship ceased to be considered a territory long ago becomes critical.[151] Nonetheless, both public international law and international labour law are still based on the fiction that the flag state is, *inter alia*, responsible for living and working conditions on board. Preservation of this fiction has to be defended within the framework provided by private international law as well, given that the habitual workplace of seafarers and fishermen is the vessel and the fiction is the only thing that makes this connecting factor meaningful. Although it was ultimately not successful, it is worth bearing in mind that the Proposal for a Rome II Regulation did enshrine this fiction in a rule aiming to provide guidance in the event of damage occurring in a non-sovereignty area.[152] In the same vein, there is a specific reference to the flag state in Article 11(4) of the Regulation (EC) No 883/2004 on the coordination of social security systems.

It has already been indicated here that this dogma is subject to the tensions generated by globalisation, allowing shipowners to choose the applicable law through their choice of country of ship registration. The outcome is an acute case of forum shopping, which in turn encourages another malady, social dumping. In this context and from the standpoint of seafarer's protection, it seems difficult to maintain that the law of the flag state *qua* the law of the habitual workplace is the law governing the employment relationship. Other interpretations have been explored with the aim of providing a more suitable law to govern the employment contracts than the flag law, ranging from directly resorting to the law of the place where the engaging business is located to systematic use of the escape clause, in an attempt to identify the most favourable law to the worker every time. However, the first proposal is based on a connecting factor that can easily be manipulated by the employer, and the second alternative—involving avoiding other connections and always applying the escape clause—clashes with the philosophy behind Article 8, as result-oriented considerations only inform part of the conflict rule laid down there.[153] With the exception of the choice of law, all the remaining connecting factors—including the escape clause—are to be applied according to the principle of proximity and foreseeability, but not with the aim of picking the most favourable

[151] Against the law of the flag state because the flag designates not a territory but a nationality, see Fotinopoulou Basurko (2008), pp. 172–178.

[152] Article 18(b) of the Proposal for a Regulation on the law applicable to non-contractual obligations [COM (2003) 427 final].

[153] Déprez (1995), p. 324, warns against the risks of turning the determination of the applicable law into an equity judgment aimed at protecting the weaker party.

law for the worker. Nevertheless, the escape clause does appear to be an adequate countermeasure to flags of convenience, in particular once the CJEU clarified that this clause had to be understood to be a further connecting factor,[154] not subordinate to the previous ones, and consequently not of exceptional application.

Finally, it must be borne in mind that these factors largely overlap with those in Article 19 of the Brussels I Regulation and the Lugano Convention, 21 of the Brussels I *bis* Regulation, a fact that indicates lawmakers' interest in establishing a coincidence between *forum* and *ius*. With this objective in mind, these common concepts should give rise to an autonomous and above all common interpretation, so for this reason many of the considerations used in the discussions on seafarers' employment contracts and international jurisdiction issues are also valuable in this chapter.

Be that as it may, despite the clear interest in laying down a basis for the seized court to apply its own law, potential deviations between *forum* and *ius* are of course possible, first, because parties to the contract may resort to choice of law and choice of forum clauses are also admitted, but on more restrictive terms than the former; second, because the conflict rule laid down in Article 8 contains an escape clause that can set aside the law of the habitual workplace or, failing that, the law of the business which engaged the employee, in favour of a law that has closer connections with the employment relationship. This is the consequence of the fact that the two sets of rules serve different objectives, which may have also a say in applying the relevant connecting factors.

4.3.2 Party Autonomy

4.3.2.1 Agreement on Choice of Law

The first connecting factor in individual employment contract matters is party autonomy. However, it should be noted from the outset that this only plays a residual role in the case of seafarers.[155] The internationalisation of the maritime and fishing labour markets allows shipowners to resort to other mechanisms that bring about identical results, such as registering vessels in states with poor working conditions or contacting employment and placement agencies in countries with significantly lower labour costs than those shipowners would have incurred by recruiting seafarers at company headquarters. In both situations the issue of the choice of law applicable to the contract is relegated, in the second because the real chances for seafarers or fishermen to file complaints are restricted to the state where they were recruited.

[154] CJ 12.9.2013, Case C-64/12, *Schlecker v Boedecker*, para. 36.

[155] As a matter of fact, choice of law is only exceptionally used in individual employment contracts in general. On this point, see Junker (2007), pp. 20–21; Lorenz (1987), pp. 269–276. In Spain, see Fotinopoulou Basurko (2008), pp. 159–161.

This does not mean, however, that the possibility of selecting the applicable law is not welcome; on the contrary, it has become even more interesting in the current context of the relocation of shipping and fishing businesses.[156] Indeed, against the present background of international mobility, being able to decide on the law governing contracts provides legal certainty as it avoids unforeseeability regarding the applicable law in cases in which employees discharge their duties to their employers in more than one country. In addition to this, parties to a contract are in a better position to decide which law is most closely connected with their relationship. This also applies to seafarers and fishermen, although some kind of limitation on the exercise of party autonomy is unavoidable given the inherently unequal balance of power between the parties to employment contracts. Party autonomy is thus admitted as a connecting factor but also is subject to a serious restriction, namely, that the chosen law will only be applicable as long as it is more favourable than the law that would govern the contract in the absence of such a choice.

The conditions the choice of law clause has to meet to be valid and effective are established in Article 8 of the Rome I Regulation—or 6 of the Rome Convention—by reference to Article 3(1) of the Rome I Regulation, which in turn refers to Articles 10, 11 and 13 laying down respectively the law governing its substantive validity—the law chosen by the parties to the same agreement on choice of law; its formal validity—dependent on the alternatives offered by Article 11; and the capacity to contract, at least among parties located in the same country. This is because, as mentioned above, this issue is generally not governed by either the Rome I Regulation or the Rome Convention and depends on the respective applicable law according to national conflict rules, for example referring the issue to the national law of the person in question, as both Spanish and German laws do. In addition, it is important to emphasise that the choice is always between legal systems, that is, Article 3 does not admit agreements that opt for non-state systems such as the labour rules enshrined in ILO conventions. In such cases, the agreement is characterised as a substantive covenant whose validity depends on the relevant applicable law, but not as a choice of law clause.[157]

More specifically, Article 3 admits both express and tacit choice of law.[158] Here, it is important to highlight that the choice of law clause may also be contained in a collective agreement.[159] In such cases, the choice of law is not among the terms of a

[156] On the grounds of party autonomy today, see Basedow (2011), pp. 32–59, highlighting its contribution to legal certainty. Regarding employment contracts in particular, see Gamillscheg (1983), pp. 313–318.

[157] See Recital 13 of the Rome I Regulation, and Deinert (2013), p. 109.

[158] For example, SSTSJ Canarias, Las Palmas, *Sala de lo Social*, Sección 1, No. 159/2005, and No. 158/2005, 7.3.2005, where the agreement referred to the Spanish law.

[159] See STSJ Galicia, *Sala de lo Social*, No. 2004/2008, 30.6.2008, with comments by Palao Moreno (2008), pp. 937–939, citing previous case law, in particular STS 10.6.1998: after the vessel changed flag, the collective agreement included a clause choosing Bahamian law as applicable to the employment contracts. In Italy in May 1998, the ITF concluded a collective

particular individual employment contract, but a collective agreement applicable to the industry, business or establishment in question, so that the choice of law contained there reaches all employment contracts within its scope of application.[160] This approach raises doubts as to whether it should be the other way around, i.e., first, ascertaining the law applicable to the contract and, second, assessing whether the relevant collective agreement is part of this law.[161] Nevertheless, doubts as to the binding effect of these clauses on particular contracts are dissipated by the fact that a collective agreement is an expression of private autonomy as well.[162] Fewer doubts have been expressed with respect to the choice of law clause included in general terms, as long as the legal conditions arranged to guarantee that the terms are not unfair are met.[163]

The choice of law may also be 'clearly demonstrated by the terms of the contract or the circumstances of the case'. The way in which a tacit choice is asserted is a different matter that may adversely affect the worker, for which reason legitimate doubts arise as to whether it ought to be permitted in employment contracts. The fact that the mandatory provisions of the default law governing the contract are to be applied supports a choice implied from the circumstances as a whole, which at any rate must be 'clearly demonstrated'.[164] In this sense, it is not enough to simply point to some indication that the parties prefer one legal system over others, but rather the terms of the contract or circumstances of the case must point unequivocally to a given legal system.

Recital 12 of the Rome I Regulation is a reminder that choice of forum clauses are relevant when assessing whether a choice of law may be implied from the terms of the contract. The operability of choice of forum agreements is certainly restricted in employment contract matters to the benefit of workers.[165] For that very reason, they should be deemed to be significant indicators that the parties to the contract

agreement covering ships registered in the Italian international registry, which included a clause submitting the employment contracts of non-Community seafarers to the law of their habitual residence. See this information in Zanobetti Pagnetti (2008), p. 197. In Germany, see Franzen (2011), p. 181, para. 11; Magnus (2011), p. 573, paras. 63–64; Plender and Wilderspin (2009), pp. 302–303, paras. 11-005-11-006; Schlachter (2014), para. 7.

[160] For example, LAG Rheinland-Pfalz, 16.6.1981, dealt with a collective agreement adopted by shipping companies, which provided for the application of German labour law, including its collective agreements.

[161] With the same doubts, see Müller (2004), p. 126; Thüsing (2003a), pp. 1304–1305.

[162] See further Deinert (2013), pp. 106–109.

[163] See Martiny (2015), para. 32; Oetker (2009), para. 18; Thüsing (2003a), p. 1304. Nevertheless, see Deinert (2013), pp. 105–106.

[164] See Gardeñes Santiago (2008), p. 402; Müller (2004), pp. 119–121. Denying a tacit choice of law at that time, see Lyon-Caen (1991), p. 54, on the ground of French courts' arbitrariness while dealing with these cases before the entry into force of the Rome Convention. In any event, appreciation must be undertaken *ex officio*. See Jault-Seseke (2005), pp. 259–277, dealing thoroughly with French case law.

[165] Article 21 of the Brussels I Regulation and the Lugano Convention, 23 of the Brussels I *bis* Regulation.

intended to apply the law of the designated forum while simultaneously contributing to the objective of establishing concurrence between *forum* and *ius*, thus avoiding the costs of proof of foreign law.[166]

Other relevant factors emerge when, for example, an employee seeks the payment of claims arising from a particular law[167] or, more generally, when the contract contains typical institutions of a given law and is also written in the language of the state concerned,[168] when the parties settle their disputes in court in accordance with the law of the forum,[169] when the services to be performed are restricted to one particular establishment and the worker's social protection is provided for a given social security system[170] and even in cases where the choice of law results from correspondence between the parties or is contained in a previous contract that has been renewed, without further evidence that modifying the contract has altered the relationship between the parties.[171] Another powerful indication for the purposes of discerning a choice of law from the terms of the contract is any express reference to a collective agreement in the specified country.[172] However, none of these indications in themselves can be considered conclusive evidence of a tacit choice of law. On the contrary, the very fact that there is no express choice reinforces the idea that only in circumstances that clearly point to a particular law is it possible to infer that the parties truly intended it to be applied.

Article 3 of the Rome I Regulation and the Rome Convention also admits a partial choice of law, applicable to just a few aspects of the contract, and provided that it does not compromise the contract's consistency, for which reason the choice of law clause must address a severable part of the contract such as dismissal or certain benefits.[173] The provision also addresses time issues by stipulating that the choice of law can be concluded at any time during the life of a contract and is therefore modifiable or replaceable. Employment contracts are no exception to this

[166] See Deinert (2013), pp. 112–113; Gardeñes Santiago (2008), pp. 402–403. However, noting the weakness of this indication, which must be accompanied by others, see Coursier (1993), pp. 66–67; Wurmnest (2009), p. 489.

[167] BAG 9.10.2002 – 5 AZR 207/01.

[168] As happened in *Corte di Cassazione, S.U.*, No. 10293, 18.10.1993, ship *Rodis Island*, with comments by d'Alessio (1994) and Queirolo (1994); *Corte di Cassazione, S. U.*, No. 10730, 28.10.1998, *La Costa d'Argento Charter Boat GMBH S.R.L c. A. Coli*; or LAG Niedersachsen 4.4.2003 – 10 Sa 1845/01, expressly mentioning the fact that they submit to a German collective agreement.

[169] Among others, Junker (2007), p. 17.

[170] See Franzen (2011), p. 180, para. 11.

[171] See Casado Abarquero (2008), pp. 237–238; Coursier (1993), pp. 70–76.

[172] See BAG, 26.7.1995; LAG Köln, 6.11.1998; Junker (2007), p. 15. Clausnitzer and Woopen (2008), p. 1804, add the cases in which employees' tasks are to be performed only at a given employers' business or they submit to particular rules thereof. In English doctrine, see Collins et al. (2006), p. 1666, and Merrett (2011), para. 6.51, p. 198; and in French doctrine, Fieschi-Vivet (1987), p. 258, also referring to model contracts designed according to a particular legal system.

[173] BAG 23.4.1998. Previously, in contrast, see Gamillscheg (1983), pp. 307–308. In favour, see Leclerc (1995), pp. 138–141; Oppertshäuser (2000), p. 394; Reiserer (1994), pp. 674–675.

rule, and the applicable law may change during their lifetime. Since this is a long-lasting relationship, the issue arises as to when the new law chosen by the parties will be effective. The principle of party autonomy plays a part here, and so the parties may decide whether to apply the choice of law agreement *ex tunc* or *ex nunc* at the time it is entered into. Should they not explicitly address this issue, the bulk of doctrine rightly indicates that the choice of law ought to be interpreted as being operative from the outset of the employment relationship.[174]

4.3.2.2 Limitations to Party Autonomy Based on the Principles of Proximity and Protection

Limitations to party autonomy may be classified according to the principles of proximity and protection, among other criteria.[175] First, the choice of law is restricted to laws that have some relation with the case, that is, to laws connected with the contract whose law is to be established.[176] A limitation of this type is set out in Sections 3 and 4 of Article 3 of the Rome I Regulation with the aim of avoiding the displacement of the mandatory provisions of the law that would have governed the contract had the choice of law not in fact been agreed on. Thus, Article 3(3), like Article 3(3) of the Rome Convention, establishes that when all relevant aspects of the situation are located in a country other than the one whose law has been chosen, 'the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement', i.e., when an employment contract is concluded in Spain between persons domiciled there for the provision of services on board a ship flying the Spanish flag, the parties may choose to submit their relationship to a different law, but this will only govern the contract and its vicissitudes within the framework provided for by Spanish mandatory rules.[177] To assess whether the employment contract is a domestic one, the time at which the choice of law is made has to be considered, although an exception to this rule deserves to be made if the contract is

[174] See, for all, Müller (2004), pp. 124–125.

[175] See Gardeñes Santiago (2008), pp. 399–403.

[176] In fact, this is how the Swiss legislator protects workers, by restricting choice to a list of laws as provided for by Art 121 of the Swiss Act of Private International Law 18 December 1987 (AS 1988 1776). Article 43 of the Law of the People's Republic of China on the Application of Law for Foreign-related Civil Relationships of 28 October 2010; Article 67 of the Tunisian Code on Private International Law issued by Law 98-97, 27 November 1998; and Article 94 of the Panamanian Private International Law Code, issued by Law of 8 May 2014 (*Gaceta Oficial Digital* No 27530, 8.5.2014), do not simply pay regard to choice of law.

[177] In any case, and in the light of Article 8(1) of the Rome I Regulation/6(1) of the Rome Convention, this provision – just like the following one (3.4) – has a very limited scope of application. On this point, see Kaye (1993), p. 230.

concluded with the aim of posting workers abroad.[178] Finally, it is important to observe that if domestic law prevails, this can lead to an outcome that is contrary to the aim of applying the law that is most favourable to the worker. Accordingly, it has been rightly suggested that Article 8(1) of the Rome I Regulation ought to prevail over Article 3(3), meaning that the chosen law should be applied instead of the domestic law whenever it is more favourable to the worker.[179]

Unlike Article 3(3), Article 3(4) of the Rome I Regulation has no equivalent in the Rome Convention. Formulated in a similar way to Section 3, it aims to avoid party autonomy being used to circumvent mandatory provisions enshrined in this case by EU law. The provision thus targets cases where all the relevant elements are located in one or more member states but where the choice of law has been concluded in favour of a third state. Accordingly, the choice of law is not a means to escape from 'the application of provisions of Community law, where appropriate as implemented in the Member state of the forum, which cannot be derogated from by agreement'. The scope of this limitation is debatable,[180] but it refers to provisions laid down in EU instruments that also deal with work at sea. Nevertheless, the rule does not clash with others that determine the scope of application of EU law, that is, it does not prevent the respective directive from being applicable when not all the contacts in the case point to European Union territory, in other words, when its scope of application is broader than that provided for in Article 3(4).

Other limitations to party autonomy directly point to the protection of the weaker party by grading the effectiveness of the choice of law, depending on which legal system is more protective, whether it is the one that is chosen or the one that is otherwise applicable.[181] The protection granted to employees relies on the provisions contained in the law that is applicable in the absence of choice of law and that cannot be derogated from by agreement, meaning all mandatory provisions provided for without exception, for example with regard to the underlying policy: whether they aim to protect workers or target other interests instead.[182] It is

[178] See Junker (1992), p. 253.

[179] See Magnus (2011), p. 570, para. 54; Martiny (2015), para. 127; Schlachter (2014), para. 20.

[180] See Gardeñes Santiago (2008), pp. 400–401. Noting its usefulness, in particular before member states' transposition of directives, see Knöfel (2006), p. 280, who makes his point with the example of discrimination.

[181] Articles 8(1) of the Rome I Regulation, and 6(1) of the Rome Convention. Following this example, see Art 12 of the Japanese Act on the General Rules of Application of Law, enacted by Law No. 87, 21 June 2006; Art 28 of the South Korean Act on Private International Law adopted in 2001, enacted by Law No. 6465, 7 April 2001; Article 27 of the Turkish Act on Private International and Procedural Law No. 5718, 27 November 2007 (as translated by Wilske S and Esin I).

[182] See Gardeñes Santiago (2008), p. 401, note 54; Collins et al. (2006), p. 1666; Junker (1992), pp. 262–267; Kaye (1993), pp. 224–227; Martiny (2015), paras. 36–39; Pocar (1984), pp. 378–379.

important to note here that these provisions may be contained in collective agreements as well or in public law rules that have a certain impact on the employment relationship.[183]

It is even more important to highlight the fact that Article 8(1) of the Rome I Regulation seeks to clearly differentiate between the provisions it refers to—those 'which cannot be derogated from by agreement'—and those in Article 9 dealing with overriding mandatory rules, *lois de police* or *lois d'application immédiate*. In fact, the provisions that Article 8(1) of the Rome I Regulation refers to are in line with those included in Sections 3 and 4 of Article 3 of the Rome I Regulation since all of them deal with mandatory rules. They are not to be confused with overriding mandatory rules, which are applied regardless of the law applicable to the employment contract, as they aim to preserve the forum's core values and essential policy options. This distinction does not mean that the overriding mandatory rules contained in the *lex laboris* are not applicable through Article 8(1), but this rationale does not work the other way around, i.e., the provisions referred to in Article 8(1) cannot be applied via Article 9 of the Rome I Regulation.

The mechanism devised in Article 8(1) of the Rome I Regulation and in Article 6 (1) of the Rome Convention for worker protection obliges more than one legal system to be taken into account, which may lead to a *dépeçage* on one hand[184] and problems of proof of foreign law on the other, making it impossible to tackle the comparison of legal systems as required by the provision at stake.[185] This rule includes a requirement according to which two laws must be compared so that the more favourable of the two can be applied to the worker.

In principle, the comparison should be comprehensive, given that the purpose is not to build an *ad hoc* scheme by picking out the most beneficial provision for the worker from each legal system. Nevertheless, the huge difficulties that the seized court faces in proceeding to such a comprehensive comparison preclude this approach[186] and it has therefore been suggested that what has to be dealt with is the specific issue at hand, and not the rule under discussion, since that would lead to fragmentation of the applicable laws.[187] There are many practical reasons for doing this, in particular that a court cannot be asked to compare all the legal systems

[183] See, for all, Hoppe (1999), p. 96; Junker (2007), p. 19.

[184] Clearly in favour, see Polak (2004), p. 335.

[185] See Wurmnest (2009), p. 487, who nevertheless acknowledges that the parties usually choose the law that is in fact applicable in the absence of such choice.

[186] Differently, see Casado Abarquero (2008), pp. 280–288. The Italian Supreme Court understood it in this way in a case in which Italian law was chosen, rejecting the seafarer's arguments in favour of the law of the flag, Panama. See *Cass.lav.*, Nr. 13053, 1.6.2006, *G. Meglio v. Gracemar S. A.*, Ship *Madeira*. In any event, this judgment deserves to be criticised because it did not apply the protection of the weaker party established at the time in Article 6(1) of the Rome Convention and also because it avoided addressing whether the choice of law was only partial, as the employee suggested.

[187] Explaining the three methods of comparing these laws and the difficulties each involves, see Deinert (2013), pp. 125–128.

involved to assess whether or not one protects workers better than another in general terms.[188] The reasonable and sensible thing to do is to focus on the legal issue raised by the case at hand; more specifically, in assessing whether one legal system is more favourable than another, the comparison should be restricted not to the specific provisions for resolving the issue but to those regulating the institution in question.

The CJEU judgment *Voogsgeerd v Navimer*[189] offers an example of this kind of operation, as the employee claimed protection under Belgian law as the law applicable in the absence of choice of law; the contract was actually submitted to the law of Luxembourg, which sets a shorter time limit on dismissal claims than that established in Belgium and according to which the time limit had already expired. In dealing with the case, the CJEU did not discuss how to compare the two laws, but it is clear that the Court did not consider proceeding to a comprehensive comparative analysis possible. A comparison of the time limits for the opening of proceedings should not be sufficient either. In contrast, the two regulations on dismissal have to be subjected to careful assessment, including the grounds for dismissal, the consequences of a declaration of unfair dismissal and even the rules of evidence.[190] The comparison must be carried out by the seized courts since they have the authority to determine which law is most favourable to the employee. In this regard, the arguments put forward by the worker are not sufficient for concluding which legal system should decide on the case at hand,[191] although they cannot simply be ignored for practical reasons.[192]

[188] With this view, see de Boer (1990), pp. 42–45; Coursier (1993), pp. 249–251; Fieschi-Vivet (1987), p. 259; Franzen (2011), pp. 182–183, paras. 16–22; Gardeñes Santiago (2008), pp. 403–406; Hoppe (1999), pp. 96–98; Magnus (2011), pp. 579–580, paras. 83–89; Martiny (2015), para. 42; Müller (2004), pp. 172–178; Oetker (2009), para. 26; Thorn (2012), p. 2652, para. 8; Thüsing (2003a), p. 1307. Undermining difficulties in comparing, see Pocar (1984), p. 383. Contra, Kaye (1993), pp. 228–229.

[189] CJ 15.12.2011, Case C-384/10, *Jan Voogsgeerd v Navimer SA*.

[190] With this approach, see LAG Baden-Württemberg, 15.10.2002, and comments by Thüsing (2003b), pp. 898–900; Thüsing (2003a), p. 1307. Critical, Junker (2007), p. 20; Junker (1992), pp. 275–279; Morse (1992), pp. 15–16.

[191] See Deinert (2013), pp. 127–128.

[192] See Salvadori (1993), pp. 64–65, mentioning the following example: between readmission and damages, the worker must decide which law most furthers his interests, citing *Cour d'Appel de* Paris, 27.11.1986. See commenting this decision, Lyon-Caen (1988), pp. 322–329.

4.3.3 Applicable Law in the Absence of Choice of Law

4.3.3.1 The *lex loci laboris*

Justification

An individual employment contract's centre of gravity is the location where the work is to be carried out, a place agreed on by employer and employee and consequently known to both parties, which means that both expect this place's law to be applied. Other pro-worker considerations also emerge, as this connection gives priority to the one stable factor within the employment relationship, while simultaneously allowing for equal treatment of all parallel employment contracts since they are all submitted to the same law, i.e., the same law governs the employment relationships of all employees in the same workplace, thereby ensuring equal opportunities for them all[193] and thus avoiding the distortion of competition and the potential social dumping that may result from this distortion.[194]

In favour of this connecting point,[195] it should also be noted that the regulation of the employment relationship is riddled with general and public interests that express national concerns about the regulating of the labour market.[196] The application of the *lex loci laboris* to the entire employment relationship does actually facilitate the work of applicators by avoiding the need to take other laws into consideration,[197] as it must be borne in mind that, in addition to the *lex laboris*, the mandatory rules of the state where the services are performed may come into play when deciding on the employment relationship, via Article 9 of the Rome I Regulation, which actually deals with the overriding mandatory rules of the forum state, as may Article 12(2) dealing with manners of performance and steps to be taken in case of substandard performance. The application of the *lex loci laboris* does reduce the cases in which applicators have to take these other laws into account.

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[193] Claiming that this connection is primarily underpinned by the principle of worker protection and only secondarily by the principle of proximity, see de Boer (1990), p. 42; Polak (2004), p. 326.

[194] In these terms, Zanobetti (2011), p. 356.

[195] Also laid down in Articles 43 of the Law of the People's Republic of China on the Application of Law for Foreign-related Civil Relationships, 12 of the Japanese Act on the Application of Laws, 94 of the Panamanian Private International Law Code, 67 of the Tunisian Private International Law Code; Article 27 of the Turkish Act on Private International and Procedural Law; Article 28 of the South Korean Act on Private International Law; and Article 121 of the Swiss Private International Law Act.

[196] See Leclerc (1995), p. 485; Lorenz (1987), p. 275; Simitis (1977), pp. 155–157.

[197] With this proposal, see Article 3 of the Resolution of the Institut de droit international, 3.8.1971, during the Zagreb session on 'Conflicts of Laws in the Field of Labour Law'. See further Gamillscheg (1983), p. 285; Krebbert (2000), pp. 517–518; Szászy (1968), p. 99; Morgenstern (1987), pp. 40–48, with a list of national laws that laid down this connection before its codification by the Rome Convention, pp. 309–313.

Unlike Article 4 of the Rome I Regulation and the Rome Convention, Article 8 does not take into account the habitual residence of the person carrying out the characteristic performance of the contract. This deviation from what resembles a general rule is explained by the different economic analyses underlying the two provisions. The first conflict rule aims at facilitating international trade for those celebrating contracts with numerous counterparties in different countries, whereas the second focuses on an individual relationship with a party that cannot be simply deemed a supplier and whose protection is to be granted by other means.[198]

As already mentioned, the paramount role granted to the *lex loci laboris* is grounded in considerations of proximity and foreseeability for the parties to the employment relationship. In this context, there is apparently no room left for worker protection; however, the CJEU recently revisited this approach, highlighting the fact that as the *locus laboris* is foreseeable and close to the parties, this in itself is a protection for employees since they are covered by a law they are familiar with.[199]

The advantages of the *locus laboris* in terms of proximity and foreseeability determine its relative priority *vis-à-vis* the connecting factor stipulated for occurrences in which it is not possible to identify a habitual place of work in one country, namely, the place where the business through which the employee was engaged is located. In fact, this connecting point can easily be manipulated by the employer, and this convinced the CJEU of the constant need to identify a habitual workplace, even when a worker provides services in different states, 'to guarantee adequate protection to the employee';[200] in other words, all workers *must* have a habitual workplace, meaning the country with which the work performed 'has a significant connection'.[201]

The position adopted by the Court is somehow questionable because it does not respect the architecture of Article 8 of the Rome I Regulation insofar as it confers a significant discretionary power onto the seized court to decide where the habitual workplace is situated, thus to the detriment of the connecting point, which is

[198] See Gardeñes Santiago (2008), p. 408, note 73.

[199] CJ 13.7.1993, Case C-125/92, *Mulox*, para. 19; 27.2.2002, Case C 37/00, *Weber*, para. 40. As stated in *Mulox*, para. 18, 'in *Ivenel* and *Six Constructions*, the Court took the view that, in interpreting that provision of the Convention, account must be taken of the concern to afford proper protection to the party to the contract who is the weaker from the social point of view, in this case the employee'. See Leclerc (1995), pp. 486–489, already highlighting the significance of connections other than the choice of law, in particular for the protection of workers whose guarantee is ultimately the escape clause.

[200] CJ 15.12.2011, Case C-384/10, *Jan Voogsgeerd v. Navimer SA*, para. 35, and comments by Junker (2012), pp. 41–42; Knöfel (2014), p. 131.

[201] CJ 15.3.2011, Case C 29/10, *Koelszch*, para. 44; 15.12.2011, Case C-384/10, *Jan Voogsgeerd v. Navimer SA*, para 36. Some opinions previous to these judgments criticised focusing on this connection given that it gave rise to fictions, i.e., places that had nothing to do with the provision of services, either temporarily or spatially. See, for all, Hoppe (1999), pp. 144–150, warning against the risk of making the escape clause superfluous (p. 150). On the need to determine the most favourable law for the employee, see Fieschi-Vivet (1987), p. 259.

designed precisely to intervene when problem cases arise. The business through which the employee was engaged therefore becomes a residual connection, on the ground that it does not have the most significant link with the employment relationship. In contrast, the most significant connection with a country leads us to the place where the characteristic performance of the contract is carried out, which is the ultimate justification of the *locus laboris* as a connecting point. The same rationale should explain the relationship between this connection and the escape clause, which allows the seized court to deviate from the habitual workplace and resort to a closer law to the employment relationship.

Finally, when the law governing the employment contract is being established, the interrelationship sought between concepts employed by all instruments linked to the European Area of Justice, such as the Brussels I, Brussels I *bis* and Rome I Regulations, should also be taken into account;[202] these are explained in detail above when dealing with the scope of CJEU case law.

Work Performed at Sea

As seen in the field of international jurisdiction, it is necessary to distinguish between different cases when identifying *locus laboris* in the fishing and shipping sectors. Two clarifications need to be made: the first is connected to public international law to take into consideration the type of waters in which a vessel sails or fishes in pursuit of its objective, while the second focuses on workers who serve on a single vessel or on different ones.

This section deals with seafarers or fishermen who carry out their tasks on one vessel, making it therefore possible—at least in theory—to locate a habitual place of work by taking into account public international law, as shown by the CJEU case law contained in *Weber v Ogden*.[203] When their task of exploiting natural resources is exclusively performed in the territorial waters of one state, maritime or fishing activities are assimilated to any other work performed at a permanent establishment in the country. When the work is performed on the high seas, in an area not subject to state sovereignty or in different maritime areas, public international law supports the application of the law of the flag by 'placing' all matters related to the ship, including maritime employment, under the authority of the flag state, as acknowledged by Article 5 of the Convention on the Law of the Sea, and in particular Article 94 of UNCLOS. This connecting factor prevents the permanent shifting from one law to another depending on the waters through which the vessel is sailing, in addition to submitting all employment relationships on board to the

[202] See Sect. 3.2.3.1.

[203] In this regard, see Magnus (2011), p. 598, para. 147; Martiny (2015), para. 53. Although Górriz (2003), pp. 328–332, differentiates between the maritime area and the ship as a workplace, I understand that public international law only allows playing with the first to determine the applicable law.

same law, in principle guaranteeing equal treatment for all workers on board.[204] All in all, this fiction receives broad doctrinal support[205] and is also underpinned institutionally, as proved by different statements in programmatic[206] and legal texts,[207] as well as case law.[208]

[204] Although provisions on collective redundancies are deemed overriding mandatory rules, it is worth mentioning that the Proposal for a Directive addressing the exclusion of seafarers from Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of member states relating to collective redundancies seeks to include new provisions concerning seafarers and stipulating that the opening of proceedings should be communicated to the public authority of the flag state. See Article 4 of the Proposal of Directive on seafarers [COM(2013) 798 final].

[205] In the literature in favour of this connection, see, *inter alia*, Behr (2009), pp. 88–89; Bonassies (1969), pp. 545–546; Blefgen (2005), pp. 103–118; Coursier (1993), p. 107; Diena (1935), pp. 453–454; Franzen (2011), p. 188, para. 39; Jambu-Merlin (1978), p. 71; Junker (2005), pp. 730–731; Junker (2004), p. 1208; Drobnig and Puttfarken (1989), p. 15; Gamillscheg (1983), p. 323; Geffken (1989), p. 91; Gräf (2012), pp. 580–588; von Hoffmann (1996), p. 1645, para. 58; Iriarte Ángel (1993), pp. 117–122; Junker (1992), pp. 187–188; Magnus (1990), pp. 141–145; Magnus (2011), p. 598, para. 149; Malintoppi (1987), p. 383; Mankowski (2009), pp. 199–200; Morgenstern (1987), p. 54; Müller (2004), pp. 140–143; Polak (2004), p. 331; Schlachter (2004), p. 162; Szászy (1968), pp. 117 and 119; Thüsing (2003a), pp. 1305–1306; Wurmnest (2009), pp. 497–498. Highlighting the difficulties in applying other connections, see Siehr (1983), pp. 314–315; Zanobetti Pagnetti (2008), pp. 143–160; Zanobetti (2011), p. 352.

[206] In these terms, see Article 4(b) of the Resolution of the Institut de droit international, 3.8.1971, during the Zagreb session on 'Conflicts of Laws in the Field of Labour Law', with I. Szászy as spokesperson, and before Article 7 of its Resolution of 2.9.1937 during the Luxembourg session, where D J de Yanguas Messia was the spokesperson.

[207] See a list in Tetley (1993), pp. 150–151. Previous to the Rome Convention, see Article 5 of the French *Code du travail maritime*; Article 1 of the German *Seemannsgesetz*, 26.7.1957; Article 17 of the Belgian Law, 5.6.1928; Article 9 of the Italian *Códice della navigazione*; Article 10(2) in relation to 10(6) of the Spanish *Código civil*; Sección 275 of the *Canada Shipping Act*; Section 16 (2) of the Czech Private International Law code of 1963; Section 4 of the Soviet Merchant Marine Code, 14.7.1929, and Section 265 of the British Merchant Shipping Act of 1894. See also article 68 of the Swiss *Seeschiffahrtsgesetz*. As to international texts, mention should be made of Article 20 of the *Tratado de Montevideo de Derecho comercial internacional* of 1889, binding on Bolivia, Colombia, Peru and Uruguay, although some issues concerning employment contracts are subject to the law of its conclusion (Article 19). Article 20 of the *Tratado de Montevideo de Derecho de la Navegación comercial internacional*, 1940, between Argentina, Paraguay and Uruguay, only refers to the law of the flag state.

[208] In *Lautitzen v Larsen*, Judge Jackson wrote that the application of this law is 'perhaps the most venerable and universal rule of maritime law relevant to our problem'. In Germany, see BAG 30.5.1963; 26.9.1978; OLG Bremen, 9.2.1969; ArbG Bremen, 5.8.1977. Recently, BAG, 24.9.2009 – 8 AZR 306/08, although it deals with international jurisdiction to decide on a claim on grounds of dismissal brought by a German seafarer against two companies, one Greek and the other Liberian but whose head office was in Greece; his work was performed on board a ship flying the Greek flag from Rostock, where he boarded and received instructions, to Finland; the contract was signed on board, written in English and contained a forum selection clause between Finland and Greece, with a similar choice of law clause; social security was paid in Greece. In France, see Cour.Cass. (Ch.soc.), 16.11.1993, No. 90-16030. In Spain, see STSJ Asturias (*Sala de lo Social*), No. 2627/2004, 17.9.2004; STSJ Galicia, *Sala de lo Social*, No. 2404/2008, 30.6.2008; *Juzgado de lo Social de* A Coruña, No. 622/2004, 18.11.2004. The Uruguayan *Tribunal de Apelaciones* No. 387/2012, 19.9.2012, *Marco Antonio Chero Yobera v Pesquerías Marinenses*, denies its

Flags of convenience challenge this equation. Once the assimilation of a vessel to a territory of the flag state is rejected, other arguments seek to strengthen the connection between them,[209] in particular those highlighting the powerful socio-economic bonds between the state and the vessel flying its flag, a connection that becomes weaker when the flag state is a flag of convenience. From a conflict of laws viewpoint, the finding that there is no such close link between the vessel as a workplace and the state whose flag it flies has led to the loss of its central role in establishing the applicable law to an employment contract, as various events show.

The first of these instances is provided by states that have lost their fleet in favour of flags of convenience and have also lost a considerable number of jobs besides, since seafarer's and fishermen's fates are inextricably linked to the ship on which they provide their services, now a vessel flying a foreign flag. When disputes arise, seafarers still lodge their claims at home, and the law of the flag no longer seems to be the most appropriate one to govern maritime employment; consequently, the courts resort to different mechanisms to apply what they think to be the closest law, the *lex fori*.[210]

In the framework of the fight against flags of convenience, it has been suggested that a measure could be introduced involving piercing the veil and thus not recognising the flag when a vessel should in fact be flying a different flag if the shipowner's nationality is taken into consideration. This would amount to establishing a sanction where there is to be no genuine link with the flag state, resulting in the non-recognition of the flag being flown by the vessel in question.[211] A variation of this doctrine is one that directly pushes the law of the flag into the background and brings to the fore the law of the ship's 'base of operations'. This approach has been advocated by the United States of America; for example, the Seamen's Act of 1920 establishes U.S. jurisdiction and the application of the law of the forum to 'a seaman on a foreign vessel when in harbor of United States'.[212]

jurisdiction on the ground that Spanish law applies as the law of the flag of the vessel on board the Peruvian seaman worked.

[209] See an enumeration in Moura Ramos (1991), pp. 930–931, the details of which are discussed in the text.

[210] See Carbone (2009a), pp. 81–89, and thoroughly in Carbone (2009b), pp. 164–195. This statement is apt for US case law and also the Greek case law cited there [Pireaus Labour Court, No. 33, of 1953, cited by Skourtos (1990), p. 88], applying Article 25 of the then in force Civil Code, which required an assessment of all circumstances as a whole to determine the applicable law in the absence of choice of law. See also STS, Sala de lo Social, 9.5.1988.

[211] Pursuing this argument to structure a genuine link between a vessel and a state, see Skourtos (1990), pp. 83–92. Also, Goldie (1963), pp. 254–261; Malintoppi (1987), pp. 383–384.

[212] *Strathearn Steamship Co. v. Dillon*, 252 U.S. 348 (1920), applying this law extraterritorially, which was finally rectified by later decisions analysed by Northrup and Scrase (1996), pp. 403–410.

Fair competition is at stake here and would be damaged if the same standards were not applied to all ships docked at U.S. ports. This background led to the U.S. jurisdiction deciding on the living and working conditions on board the vessel according to the principle of 'base of operations',[213] namely, proving that there is a link between the case and the U.S., taking into account the place where the accident occurred, the place where the seafarer is domiciled and the employer is based, the place where the contract was concluded, the degree of inaccessibility of the foreign forum for the claimant and the *lex fori*.[214] In the same vein, the Australian Fair Work Act 2009 determines its application beyond the Australian exclusive economic zone and continental shelf to any ship operated by an Australian employer and that uses Australia as a base.[215]

The third situation refers to the establishing of second and international registries by traditional seagoing nations to counteract the loss of their maritime and fishing fleets, which also has implications for the flag as a connecting factor.[216] In their endeavours to reduce labour costs, different pieces of legislation break the law of the flag's monopoly over the crew by distinguishing between seafarers and fishermen with habitual residence in the registration state and those without it. With this distinction, crews of convenience—deprived of any of the benefits of the law of the flag as the most favourable to labour rights—make their appearance along with flags of convenience.

These situations merge together to suggest the need to find a different connection to govern employment relationships on board.[217] Before the CJEU *Voogsgeerd v Navimer* judgment, all alternatives proposed for the application of the law of the flag sought to avoid the habitual workplace as a connecting point. Conversely, the Court's decision mentioned above focused on this connection to give it a new twist.[218]

Following the line initiated by the CJEU in *Mulox v Geels* and *Rutten v Cross Medical*,[219] Article 8(2) of the Rome I Regulation was drafted in different terms

[213] See Symeonides (2006). Cases also cited by Skourtos (1990), p. 87. For criticism of this approach, see Ehrenzweig (1970), pp. 641–645.

[214] This doctrine is embodied in the trilogy of cases surrounding the Jones Act, consisting of *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Romero v. International Terminal Operating Co*., 358 U.S. 354 (1958); *Hellenic Lines Ltd. v. Rhoditis,* 398 U.S. 306 (1970). See Currie (1959), pp. 1–78; Goldie (1963), p. 239; Symeonides (2008), pp. 310–313.

[215] Australian Fair Work Act No 28, 2009, Chapter 1, Parts 1-3, Division 3, Section 34(3A).

[216] See Sect. 2.3.2.

[217] See, for all, Carbone (2009b), pp. 164–195.

[218] This approach is also to be found in a Belgian decision, where the court took into account, *inter alia*, where the employee was domiciled, where and in what currency he was paid, which country he was taxed in and which social security law was applicable to him. See Trib.Trav. Liege, 19.9.1997.

[219] CJ 13.7.1993, Case C-125/92, *Mulox*; 9.1.1997, Case C 383/95, *Rutten*, para. 23. Previously, pointing to the law of the business through which the employee was engaged in the international transportation sector, see Lyon-Caen (1991), p. 54.

from Article 6 of the Rome Convention, such that '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 innovation in this rule is to be found in the italicised words, which provide a legal answer to all cases in which workers perform their tasks in different countries but still have a base of operations, which is what usually happens in the air transport sector. The question here is whether these terms are also applicable to the shipping or fishing venture, covering by extension all those bound by an employment contract to be carried out at sea.[220] The starting point to the discussion is that in principle the explanation accompanying the new provision does not take into account other staff apart from airline personnel who work in non-sovereignty areas.[221]

This discussion seems to have found a tipping point with the *Voogsgeerd v Navimer* case, the main arguments of which are revisited below. The case involved an engineer—a Dutch national—hired by a Luxembourg firm, Navimer S.A., to serve on two vessels owned by the company and operating in the North Sea. In the account of the facts, no reference was made to the flags flown by the two vessels, but Mr. Voogsgeerd's wages were paid by an agency located in Luxembourg, where his pension and sickness contributions were also being paid. The employment contract contained a choice of law clause submitting it to the law of Luxembourg. However, besides these contacts with Luxembourg, the worker had concluded his employment contract at the headquarters of a different company, Naviglobe N.V., based in Antwerp (Belgium), where he had to go for instructions and where he usually returned at the end of his voyages. On the basis of these contacts, when Mr. Voogsgeerd was dismissed he filed a claim against Navimer and Naviglobe in Antwerp under Belgian law, which he found more favourable to his position than Luxembourg law, according to which the time limit for filing a claim had expired.

The preliminary questions put to the CJEU avoided Section (a) of Article 6(2) of the Rome Convention and focused on Section (b), therefore mainly dealing with the notion of the business which engaged the employee. Nevertheless, the CJEU redirected the determination of the law applicable to the contract in the absence of choice of law to the habitual workplace, taking into account that 'the aspects characterising the employment relationship, as referred to in the order for reference, namely, the place of actual employment, the place where the employee receives instructions or where he must report before discharging his tasks, are relevant for

[220] Clearly opposing the application of this rule to maritime employment in the framework of CJ 15.3.2011, Case C 29/10, *Koelzsch*, see Mankowski and Knöfel (2011), pp. 529–530, followed by Lüttringhaus (2011), p. 558. By contrast, suggesting that this interpretation is applicable to all cases in which work is performed in more than one country, including non-sovereignty areas, see Collins et al. (2011), pp. 397–398; Francq (2009), pp. 65–66; Magnus (2011), p. 598, para. 148; Marquette (2009), p. 532.

[221] See Article 6(2)(b) of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I Regulation) [COM (2005) 650 final], which included a specific reference to non-sovereignty areas. Applauding its non-inclusion in the latest version of the Regulation, see Mankowski (2009), pp. 181–182.

the determination of the law applicable to that employment relationship in that, when those places are situated in the same country, the court seized may take the view that the situation falls within the case provided for in Article 6(2)(a) of the Rome Convention'.[222] Thus, all the circumstances surrounding a worker's tasks should be assessed in order to determine 'whether the employee, in the performance of his contract, habitually carries out his work in any one country, which is that in which or from which, in the light of all the aspects characterising that activity, the employee performs the main part of his duties to his employer'.[223]

The judgment cited and its doctrine are striking in the framework of the ongoing discussion on the law applicable to maritime employment above since at no point do they even mention the law of the flag as the law potentially governing the employment relationship.[224] For this very reason, the judgment does not tackle the issue of flags of convenience and whether or not Luxembourg should be considered one of them. By remaining silent on this issue, the CJEU completely ignored the peculiarities of the maritime world, which were indeed taken into account by the Giuliano-Lagarde Report and the drafters of the Rome II Regulation.

Moreover, by disregarding both precedents, the CJEU put carriers—the subject matter of *Koelzsch v Luxembourg*—and seafarers—the subject matter of *Voogsgeerd v Navimer*—on an equal footing. Thus, it takes for granted that there actually is a base of operations, although this is not easily identifiable in the shipping and fishing sectors, and the alternatives point to places that can be easily manipulated by employers, such as the base port of the ship[225] or the manning agency that recruits seafarers and gives them travel and work instructions. One case can be identified, that of ferries sailing the same route between countries with workers embarking and disembarking at the same port.[226] But in general, the assessment required in *Voogsgeerd v Navimer* is highly flexible in the current framework of growing offshoring trends intensified by free ship registration, business cooperation and the ability to recruit crews all over the world.

However, the main criticism of *Voogsgeerd v Navimer* affects the conflict of laws technique, as it does not acknowledge the *modus operandi* of Article 6 of the Rome Convention or Article 8 of the Rome I Regulation, not only because it undermines the role of the alternative connection to the habitual workplace but also because it obliges the seized court to consider all activities when deciding where the main workplace is, similar to an escape clause. In fact, it could even be

[222] CJ 15.12.2011, Case C-384/10, *Jan Voogsgeerd v. Navimer SA*, para. 40.

[223] CJ 15.12.2011, Case C-384/10, *Jan Voogsgeerd v. Navimer SA*, para. 41. English case law has adopted a similar approach. See Morse (1992), p. 18.

[224] Making this point, see Lavelle (2014), p. 203; Maestre Casas (2012), p. 334. By contrast, assimilating the case discussed here to the case concerning air personnel and carriers, see Geisler (2001), pp. 301–302.

[225] In favour of this connection, see Staudinger (2011), para. 21. See also British case law denying the application of British law as the law of the flag on the ground that seafarers were working outside the United Kingdom: *Royle v Globtik Management Ltd.* [1977] I.C.R. 552; *Wood v Cunard Line Ltd.* [1991] I.C.R. 13.

[226] See Sect. 3.2.3.3. The difficult cases: flags of convenience and mobile workers.

said that it transforms the very nature of this connecting factor—the habitual workplace—which is legal and not factual in that it is necessary to determine the characteristic performance of the contract, *ergo* what type of workers are being dealt with and what the core tasks assigned to them are to then establish where the workplace actually is.[227] In this vein, it does not seem reasonable to accept that a naval engineer's main tasks are picking up his travelling instructions and reporting back to a given business, for example. It seems that lying behind the CJEU's decision was an attempt by the Court to solve the controversy *ex post*, which lacked an appraisal of what is really at stake and of how to avoid conflicts *ex ante*.[228]

Voogsgeerd v Navimer can also be challenged on grounds of the interests at stake, given that it ignores the special features of work at sea, as already noted. Article 8 of the Rome I Regulation and Article 6 of the Rome Convention aim at foreseeability and so prefer a connection that is close to both parties to the contract, employee and employer. In the current context of wild offshoring, these parameters are better met by the law of the flag than by other connecting factors: the flag state is the only one that is internationally obliged to guarantee workers on board ship certain working and living conditions; any other connection leaves it up to the respective state to provide these conditions.

As seen above,[229] the diplomatic struggle to strengthen the link between a state and vessels flying its flag has produced mixed results at best because although all states are still free to grant their flags to vessels under the conditions they themselves impose, indirect controls over flag state activities have increased through the development of uniform legal instruments and port state control measures. MLC, 2006, and WFC, 2007, reflect this trend, which aimed to undermine flags of convenience by specifying flag states' obligations towards seafarers and fishermen and by making port states also responsible for monitoring compliance with these obligations. Despite the counterweights to the flag state, the reading of these Conventions reveals that vessels sailing on the high seas have to primarily organise legal relationships on board according to the law of the country whose flag they are flying.[230]

Furthermore, it is important to be aware of the many difficulties involved in classifying a state as a flag of convenience,[231] which are precisely the same hurdles that can be encountered when deciding on the existence of a genuine link between the flag state and the vessel in question, which means that this problem cannot be

[227] See Malintoppi (1987), pp. 376–377.

[228] Highlighting the significance of such a viewpoint in maritime law, see Braekhus (1979), pp. 262–267, who raises doubts about judgments rendered only on account of the facts of the case since only some cases are brought before the courts, whereas solutions must be provided for them all, including those not decided in court (pp. 274–275).

[229] See Sect. 2.5.

[230] See Carballo Piñeiro (2012), pp. 242–245; Carballo Piñeiro (2014), pp. 38–54; Gräf (2012), pp. 582–583.

[231] This definition is not easy, in particular because it is not true that they attract the worst ships. See Orione (1993), pp. 632–633.

addressed by simply stating that some countries are flags of convenience. In fact, from the conflict of laws viewpoint, it seems more reasonable to address this issue in accordance with Article 8 of the Rome I Regulation: if the law of the flag is not closely connected with the employment contract in question, the seized court must turn to the escape clause to determine the closest law.[232]

Mobile Workers: The *Voogsgeerd v Navimer* Doctrine

Voogsgeerd v Navimer altered the architecture of both maritime and private international laws by failing to consider their peculiarities and techniques. Nevertheless, this judgment's meaning can be put into context by taking into account the series of decisions of which it forms a part, all relating to mobile workers.[233] In the case in question, the worker performed his duties on more than one vessel—although they both shared the same characteristics—and always had to visit a specific business to receive his instructions. Because of this, he was to be deemed to be a mobile worker, meaning that he was the one moving from one workplace to another and his workplaces were in turn located in different states or in areas not subject to territorial sovereignty. In such cases, work is carried out on an unspecified vessel, and the point of reference in the search for the closest connection to the employment relationship must therefore be the company and not the vessel.[234]

The situation is totally different when workers do not actually move from their workplace, which is itself characterised by being mobile;[235] in these cases, the flag must survive as a connecting factor. In contrast, where mobile workers are concerned, the *Voogsgeerd v Navimer* doctrine has to play a leading role because of well-established CJEU case law that underlines the fact that these workers also

[232] Mention must be made here of CJ 27.9.1989, Case C-9/88, *M. Lopes de Veiga*, where this approach was adopted while deciding whether to grant a residence permit in the Netherlands: 'It is for the national court to decide whether the employment relationship of the applicant in the main proceedings has a sufficiently close connection with the territory of the Netherlands, taking into account in particular the following circumstances apparent from the case-file and from the written and oral observations submitted to the Court: the applicant works on board a vessel registered in the Netherlands in the employ of a shipping company incorporated under the law of the Netherlands and established in that State; he was hired in the Netherlands and the employment relationship between him and his employer is subject to Netherlands law; he is insured under the social security system of the Netherlands and pays income tax in the Netherlands' (para. 17).

[233] In particular, CJ 13.7.1993, Case C-125/92, *Mulox*; 9.1.1997, Case C 383/95, *Rutten*; CJ 15.3.2011, Case C 29/10, *Koelzsch*.

[234] In these terms, see Zanobetti Pagnetti (2008), pp. 164–165.

[235] Behr (2009), pp. 90–95, sets out this graphic difference, suggesting it be applied in all cases in which staff work on different means of transportation, ultimately proposing the application of the law of their registration to their employment contracts, as happens with work at sea.

have a habitual workplace, namely the place from where they discharge the essential part of their duties towards their employer.[236] In identifying seafarers' principal place of work, the seized court cannot disregard public international rules, though, as the CJEU seems to take for granted by not making any reference to the flag state in *Voogsgeerd v Navimer*. As a matter of fact, resorting to public international rules is imposed by the concept habitual workplace, as it requires to establish, first, which are seafarers' tasks and, second, the place where the essential part of them are discharged to the employer; should they take place in an area subject to public international law, this has to be taken into account by the seized court.[237]

4.3.3.2 Exceptions to the Application of the *lex loci laboris*: The Law of the State Where the Business Which Engaged the Employee Is Situated

If it is not possible to identify the place where employees habitually or mainly perform their services, the law of the country where the business which engaged them is located takes on an essential role, pursuant to Article 8(3) of the Rome I Regulation, Article 6(2)(b) of the Rome Convention. In the framework of maritime employment, it has been argued that the law of the flag state should always be displaced by this connecting point,[238] although this ignores the significant risk arising from the ease with which it lends itself to manipulation by employers.[239] The country where an engaging business is rests with the employer, who may well resort to a country characterised by poor working conditions.

The secondary role granted to this connecting point is best understood against this background, as has been confirmed by both the current wording of Article 8(3), which highlights its subsidiarity regarding the habitual workplace, and CJEU case law,[240] in particular the *Voogsgeerd v Navimer* judgment. It specifically deals with

[236] A case that should be solved according to the alternative connection, as done by Moura Ramos (1991), p. 1902.

[237] As it happens in CJ 27.2.2002, Case C 37/00, *Weber v Ogden*. See Sect. 3.2.3.3. The difficult cases: flags of convenience and mobile workers.

[238] See Carrillo Pozo (2011), p. 1042; Coursier (1993), pp. 107–108; Deinert (2009), pp. 147–148; Deinert (2013), pp. 166–173; Ebenroth et al. (1989), pp. 138–142; Collins et al. (2006), p. 1670; Eßlinger (1991), pp. 56–62; Hansen (2008), p. 771; Kaye (1993), p. 235; Kühl (1989), p. 94; Lagarde (1991), p. 319; Lorenz (1987), p. 276, note 74; Morse (1992), p. 19; Oetker (2009), paras. 29 and 32; Spickhoff (2011), paras. 24 and 26; Thorn (2012), p. 2652, para. 12. Previously, Micus (1976), pp. 83–115.

[239] See this criticism in von Hoffmann (1996), p. 1646, para. 58; Junker (1992), p. 184; Simitis (1977), p. 173. In Spain, see Fotinopoulou Basurko (2008), pp. 178–180.

[240] Recently, CJ 15.3.2011, Case C 29/10, *Koelzsch*, para. 43. See Junker (2007), p. 24; Kenfack (2007), p. 36; Mankowski and Knöfel (2011), p. 526. Clarifying this point in relation to CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, see Knöfel (2014), pp. 130–136; Pataut (2012), pp. 663–664.

questions on the interpretation of Article 6(2)(b) of the Rome Convention, corresponding to Article 8(3) of the Rome I Regulation, noting that 'the factor linking the employment contract in issue to the country where the employee habitually carries out his work must be taken into consideration first, and its application excludes the taking into consideration of the secondary factor of the country in which the place of business through which he was engaged is situated'.[241]

A remarkable difference between Article 8(3) of the Rome I Regulation and Article 6(2)(b) of the Rome Convention is that the former merely refers to the business 'through which the employee was engaged'. Consequently, the new terms of the Rome I Regulation could point to a business though which the employment contract was not in fact concluded but through which the employee was recruited while the contract was entered into elsewhere.[242] This wording has resulted in the number of interpretations being considerably broadened, as it enables courts to examine which business has the closest connection with the employment relationship in a specific case, for example.[243] In fact, a number of authors suggest focusing directly on the business into whose structure employees are integrated, i.e., where they perform their tasks and from where they are supervised, on the ground that both the place where the contract was entered into and the place where the employee was recruited encourage fraudulent manipulation by the employer.[244] This issue has been ultimately tackled by the Turkish Act on Private International and Procedural Law by indicating that the main workplace of the employer is the establishment to take into account in determining the law applicable to the employment contract of mobile workers.[245]

The different opinions on this issue make sense when there is more than just one business in question,[246] as they help to sort out which one should be taken into account pursuant to Article 8(3). In general, these margins of assessment may be useful to avoid forum shopping by employers, who may be seeking to conclude contracts through businesses situated in countries with poor employment conditions. Nevertheless, the oft-cited *Voogsgeerd v Navimer* judgment resolved this

[241] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, paras. 32 and 34, outlining the hierarchical relationship between the two criteria.

[242] See Garcimartín Alférez (2008), p. 76; Plender and Wilderspin (2009), p. 320, para. 11-054.

[243] See Gardeñes Santiago (2008), p. 413.

[244] See Carrillo Pozo (2011), p. 1043; Deinert (2009), p. 147; Knöfel (2014), pp. 134–135; Junker (2004), p. 1204; Martiny (2015), para. 73; Mankowski (2009), pp. 193–196; Wurmnest (2009), p. 491. Suggesting stability, see Kaye (1993), pp. 235–236.

[245] See Article 27 of the Turkish Act on Private International and Procedural Law No. 5718, 27 November 2007 (as translated by S. Wilske and I. Esin).

[246] See Junker (1992), pp. 185–186. Criticising the lack of definition of business, see Devers (2008), p. 82.

interpretation issue with a further twist by emphasising the role of the habitual workplace, highlighting the secondary role granted to the connection under discussion here even more.[247] In fact, the CJEU provides a literal interpretation of this connecting factor, which actually leads us to the establishment through which the employee was engaged.[248]

More specifically, the CJEU's analysis distinguishes between the two concepts shaping this connecting factor: first, what is understood by the term 'business' and, second, what is meant by the expression 'through which the employee was engaged'. According to the CJEU, this second notion 'clearly refers purely to the conclusion of the contract or, in the case of a *de facto* employment relationship, to the creation of the employment relationship and not to the way in which the employee's actual employment is carried out'.[249] In this sense, the CJEU claims that it is necessary to find out where the contract notice was published and who conducted the interview,[250] which is different from focusing on the business to which the employee is linked by actual occupation. The CJEU's statements may also be useful in cases where the worker is recruited by a manning agency but the contract is entered into on board the vessel where the seafarers or fishermen have been sent following their recruitment by the agency, which has also provided employees with plane tickets for the journey to the vessel.

What it is to be understood by 'business' is a different topic, which stems from the panoply of information accumulated in the *Voogsgeerd v Navimer* case and organised by the CJEU in its answer to the second, third and fourth preliminary questions. First of all—and altering the order followed in *Voogsgeerd v Navimer*—it is important to bear in mind that a business does not need to have legal personality to be deemed as such. However, a certain degree of permanence is required, such that it must include 'every stable structure of an undertaking' like subsidiaries, branches and other units such as offices,[251] including agents who travel to the country where the employer maintains a permanent representation of the undertaking.[252] It may be the case that an employer's agent works in the offices of a

[247] Underlining this subsidiary nature, see Magnus (2011), p. 589, para. 115; Szászy (1968), p. 99, who distinguishes between a *lex loci laboris generalis* and a *lex laboris speciales*, also referring to the place where the employer's head office is located, known as *lex loci delegationis* (pp. 11–118).

[248] It does not prevent resorting to the escape clause if the close link vanishes afterwards. See Geisler (2001), pp. 292–295; Kappelhoff (2011), p. 432. Considering the place where the worker was hired a strong connection, see Franzen (2011), p. 187, para. 36.

[249] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 46. In the same sense, see Blefgen (2005), pp. 72–88.

[250] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 50.

[251] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 54. Para. 55 insists on the stability that must characterise the business.

[252] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 56. Permanence is consequently a relevant factor, although it is also suggested that it ought to be applied liberally. See Collins et al. (2006), p. 1671, citing the *Booth v. Phillips* case, 2004 WL 1476757 Queen's Bench Division (Commercial Court), [2004] EWHC 1437 (Comm.), [2004] 1 W.L.R. 3292, where hiring occurred after the seafarer sent an e-mail from the U.K. to Jordan, where the employer's business was located.

different undertaking. As a general rule, such business should be deemed part of the employer's structure.[253]

If these conditions are not met—for example because the employee is recruited by an employer's agent who is acting as such just for the occasion—the connection has to be filled by reference to the employer's main place of business. This would apply to a captain or master who recruits seafarers or fishermen directly at port due to immediate service needs, for example. Here, the permanence requirement needed to consider the docking port as the place of the employer's business is absent, and hence the business in question can only be identified by resorting to the shipowner's main place of business, an interpretation that is perfectly justified if the powers of representation conferred to the captain or master are taken into account.[254]

In the case that produced the *Voogsgeerd v Navimer* judgment, it appears that a different company was giving the employees their instructions, even though there had been no official transfer of authority from the employer to this particular undertaking. The conclusion to be drawn from the rationale behind the decision is that the rule is to keep companies separate. There is, though, a situation in which one business may be deemed to be another's: 'only if one of the two companies acted for the other could the place of business of the first be regarded as belonging to the second, for the purposes of applying the linking factor in Article 6(2)(b) of the Rome Convention',[255] regardless of the transfer of employer's authority to the second undertaking.[256] With this statement, the Court opened the door to a manning agency being considered a business through which employees were engaged.

This may indeed lead to manipulation with the aim of cutting labour costs, for which reason it may be argued against this interpretation that regard should be given to the employer's main place of business or any other business with a closer link to the employment relationship.[257] The problem lies, however, in this connecting factor being susceptible to manipulation, for which reason its subordinate role has been underlined. In contrast, the line of reasoning leading to the understanding that manning agencies and other employment agencies are an employer's business is a fruitful one as it may enhance employers' access to justice as the concept fills up the forum of the branch as well. The CJEU also considers in its *Voogsgeerd v Navimer* judgment the possibility of lifting the corporate veil and thus whether the Belgian company is the real employer being the Luxembourg one a shell company.[258] This is, however, a different issue from the one here discussed

[253] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 57. Previous to this decision, see Blefgen (2005), pp. 53–71.

[254] See Kühl (1989), p. 94.

[255] CJ 15.12.2011, Case C-384/10, *Voogsgeerd*, para. 64.

[256] Martiny (2015), para. 70.

[257] See Schlachter (2014), para. 16.

[258] CJ 2.5.2006, Case C-341/04, *Eurofood IFSC*, para 37.

as it regards the identification of the employer in the employment contract but not the business which engaged the employer.[259]

4.3.3.3 Exceptions to the Application of the *lex loci laboris*: The Escape Clause

The escape clause laid down in Article 8(4) of the Rome I Regulation authorises the seized court to assess the international elements of the employment relationship in question to decide whether there is a closer law than the one that would be applicable in the absence of choice of law. The introduction of this clause allowed a certain degree of flexibility in the application of the otherwise rigid connecting factors designed to ensure both legal certainty and foreseeability.

In view of these objectives, a strict interpretation of the escape clause's role in the conflict rule has been proposed, namely, that it ought to be invoked exclusively (a) when in fact there are more significant contacts with a legal system other than the one designated pursuant to the connecting factors enumerated in Sections 2 or 3 of Article 8 and (b) as long as the latter law is not truly connected with the case.[260] The CJUE, however, follows the position of those in favour of a broad interpretation of the escape clause[261] by omitting the second requirement: in the words of Advocate General Mr. Wahl, the escape clause is actually an open conflict rule, and no further requirements than actually identifying a law that is closer to the employment relationship need to be met.[262]

Consequently, there is no hierarchical relationship between the connections laid down in either paragraphs 2 and 3 of Article 8 or the derogation from them provided for in paragraph 4. The fact that, unlike Article 6 of the Rome Convention, Article 8 of the Rome I Regulation places the escape clause in a separate section would reinforce this interpretation.[263] Nonetheless, it should be highlighted that both share the objective of selecting the law that is most closely linked to the individual employment contract. In this sense, this interpretation does not transform the

[259] See Sect. 2.4.3.3. Piercing the corporate veil. An example is provided by STS, *Sala de lo Social*, 9.2.1987 (RJ 1987\809), where Spanish law is applied to decide a case in which a fisherman was hired by a Spanish consignee to perform his duties to a foreign employer on board a ship flying a foreign flag. The Spanish court indicated that identifying the subject who actually hired the worker was complex and confusing and therefore ultimately maintained that the Spanish consignee was responsible, given that it was the consignee who paid the salaries.

[260] In this sense, Polak (2004), pp. 331–332, following Dutch practice, criticised by de Haan (2013), pp. 38–58, for being too restrictive. On the different interpretations, see Fentiman (2009), pp. 91–98.

[261] CJ 6.10.2009, Case C-133/08, *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV, MIC Operations BV*, paras. 58–63; 12.9.2013, Case C-64/12, *Anton Schlecker v Melitta Josefa Boedeker*, paras. 36–38.

[262] See Opinion of the Advocate General Mr. N. Wahl to Case C-64/12, para. 51.

[263] See Gulotta (2013), *loc. cit.*, p. 591.

modus operandi when applying Article 8 since this has to start by establishing which law is applicable in the absence of choice of law, either the law of the habitual workplace or, failing this, the law of the place of business through which the employee was engaged; once this has been done, either may still be set aside in favour of another law with more significant contacts with the employment relationship.[264]

When it comes to assessing what is really meant by the concept of 'significant contacts', attention should be paid to the legal context of the clause and to the objectives of the instrument where it is inserted.[265] The escape clause laid down in Article 8(4) aims to determine the closest law to the employment relationship and not the most favourable one to the worker,[266] although comments have been made in support of this approach.[267] The principle of worker protection is of relevance when comparing laws pursuant to Article 8(1), should there be a choice of law but there is no other explicit reference to it in subsequent sections of the provision. In the remaining connecting factors, the Regulation gives most weight to the principle of proximity, with a view to reinforcing legal certainty and foreseeability.

The CJEU's judgment in *Schlecker v Boedecker* makes the above-mentioned point clear; this case involved a worker who had served for 11 years in the Netherlands, where she presented her claim on the grounds of unilateral changes to the workplace on the part of her employer, who had forced her to return to Germany. The employee was a German national who was a resident in Germany while performing her services in the Netherlands, her employer was based in Germany, the employment contract was entered into in Germany, wages were paid in accordance with German standards and contributions to social security, insurance, pensions and taxes were all paid in Germany. In line with *Koelszch v Luxembourg* and *Voogsgeerd v Navimer*, the CJEU's ruling in *Schlecker v Boedecker* reinforced the idea that granting appropriate protection for employees amounts to ensuring the application of the law of the country with the closest connection to the contract in question.[268]

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[264] CJ 12.9.2013, Case C-64/12, *Schlecker v Boedecker*, para. 35.

[265] See Fentiman (2009), p. 98.

[266] In this sense, see Carrillo Pozo (2011), p. 1047; Deinert (2013), pp. 154–155; Geisler (2001), p. 303; Junker (1992), pp. 190–191; Krebbert (2000), p. 527; Martiny (2015), para. 79; Merrett (2011), paras. 6.76–8.78, pp. 211–214; Salvadori (1993), p. 68; Zanobetti (2011), pp. 353–355. For a further opinion, see Magnus (2011), pp. 594–595, para. 138.

[267] Considering the escape clause as a corrective factor for the proximity principle, see Déprez (1995), pp. 326–327; Gaudemet-Tallon (2008), pp. 196 and 199; Sabirau-Pérez (2000), pp. 352–355. Gardeñes Santiago (2008), pp. 417–418, criticises the fact that the changes introduced in the Rome Convention to bring the Rome I Regulation to life were not aimed at intensifying worker protection and contributes a number of substantive considerations in this area. Indicating that worker protection is not included there but ought to be taken into account, see Colins et al. (2006), p. 1672; Pocar (1984), p. 388.

[268] CJ 12.9.2013, Case C-64/12, *Schlecker*, para. 34. In this case, the worker invoked the application of Dutch law as both the law of the habitual workplace and most favourable to her interests,

The application of the escape clause raises further questions. The first concerns the necessary degree of connection with a legal system, which can displace the law of the habitual workplace or, where applicable, the law of the business through which the employee was engaged.[269] Unlike Article 4(3) of the Rome I Regulation, Article 8(4) only requires this law to be 'more closely connected', without using the adverb 'manifestly', meaning that the test this clause involves does not need to be as strict.[270] The main difference is to be found both in the Opinion of General Advocate Mr. Wahl,[271] and in the *Schlecker v Boedecker* decision, where the CJEU remarked that 'where it is apparent from the circumstances as a whole that the employment contract is more closely connected with another country', the seized court may set aside the law of the habitual workplace.[272] This phrasing is different from that used in the CJEU's *ICF* judgment dealing with Article 4(3), which allows the operation of the clause 'where it is *clear* from the circumstances as a whole that the contract is more closely connected with a country'.[273] The divergence's *raison d'être* is to be found in the fact that Article 4 is grounded on the principles of legal certainty and foreseeability, while Article 6 of the Rome Convention/8 of the Rome I Regulation gives due consideration not only to those principles but also to the principle of worker protection. As already noted, beyond Section 1 of Article 8, worker protection entails choosing the law of the country that has the closest connection to the contract.[274]

In any event, this should not undermine the foreseeability of the applicable law to individual employment contracts, which is to say, the law of the habitual workplace can only be displaced when the assessment of the circumstances as a whole indicates that 'the centre of gravity of the employment relationship is not located in the country in which the work is carried out'.[275] In this context, the choice of the method used for assessing such significant contacts is absolutely critical. Two proposals have been made so far, one that focuses on the strongest factual connection with a country, while the other operates on an evaluative basis by seeking the most significant contact or contacts with a country.[276] The CJEU also takes a stance here by expressly rejecting a factual and numerical approach and

while the employee, Schlecker, asked for German law to be applied as the law with the closest link to the employment relationship.

[269] The CJ again highlights the residual role of this particular connecting factor in this decision. See CJ 12.9.2013, Case C-64/12, *Schlecker*, paras. 31 and 32.

[270] However, highlighting its exceptional character, in particular because it does not favour the coincidence between *forum* and *ius*, see Junker (2007), pp. 26–27.

[271] See Opinion of the Advocate General Mr. N. Wahl to Case C-64/12, paras. 57–61.

[272] CJ 12.9.2013, Case C-64/12, *Schlecker*, para. 36. This judgment deals with Article 6 of the Rome Convention, but it is assumed that its doctrine is also applicable to Article 8 of the Rome I Regulation referring to it in the sense expressed above in para. 38.

[273] CJ 6.10.2009, Case C-133/08, *Intercontainer Interfrigo SC (ICF)*, para. 63. My italics.

[274] Or, at least, it is suggested by Advocate General Mr. N. Wahl, para. 37 of this Opinion to C-64/12.

[275] See Opinion of the Advocate General Mr. N. Wahl to Case C-64/12, para. 61.

[276] On both approaches, see Fentiman (2009), pp. 92–98, who prefers the evaluative test.

by emphasising that 'the referring court must take account of all the elements which define the employment relationship and single out one or more as being, in its view, the most significant'.[277]

The escape clause has been widely used by courts to deal with cases in which the law of the flag state really did not have significant links with the contract in question,[278] or there was the suspicion that a flag of convenience was being flown.[279] CJEU case law highlights the fact that applying this device is appropriate only if there is another law that is more closely connected to the employment relationship. The first thing to do would therefore be to ascertain the law of the place where the services are being rendered or, if this connection fails, the law of the business through which the employee was engaged,[280] followed by establishing the existence of a closer law.

According to this *modus operandi*, those who advocate paying no regard to the law of the flag state and considering the escape clause to be the regular connecting factor for work at sea[281] cannot be taken into account. This approach must be set aside, as not only does it bring legal uncertainty, but it can also be used as an excuse to apply the *lex fori* every time.[282] However, this does not mean that the escape clause is a residual connection; CJEU case law provides ample room for its application, as it acknowledges the seized court's power to apply the law that is 'most closely connected' to the contract and not the one that is 'manifestly connected' to it. This entails introducing a significant flexibility factor into the conflict rule on individual employment contracts, which requires further clarification for the sake of legal certainty, in particular with regard to the assessment of circumstances as a whole to establish exactly where the contract's centre of gravity is.

Koelszch v Luxembourg and *Voogsgeerd v Navimer* required this kind of assessment, but in order to find out exactly where the habitual workplace was. The similarities between these two tests—one that assesses where the habitual workplace is located and the other determining which law is more closely connected to the employment relationship—led the Advocate General Mr. Wahl to make it clear that the first test does not supersede the escape clause,[283] although it certainly seems to set limits to it. In other words, the tasks that employees have to carry out for their

[277] CJ 12.9.2013, Case C-64/12, *Schlecker*, para. 40.

[278] Suggesting this solution, see Iriarte Ángel (1993), pp. 157–159; Müller (2004), pp. 142–143; Thorn (2012), p. 2652, para. 12; Schlachter (2014), para. 17.

[279] See Wurmnest (2009), p. 498.

[280] In this sense, see Junker (2005), pp. 720–722. Also critical, Mankowski (2005), pp. 60–61.

[281] Giving priority to its application over the law of the flag state, see Hauschka and Henssler (1988), p. 599; Drobnig and Puttfarken (1989), pp. 14–16. Indirectly, Däubler (1987), pp. 250–252.

[282] See Asín Cabrera (2008), pp. 379–381; Schlachter (2014), para. 16.

[283] Opinion of Advocate General Mr. N. Wahl to Case C-64/12, para. 45.

employers cannot be taken into account when establishing whether there is a closer law to the employment relationship.

To this end, in its *Schlecker v Boedecker* judgment, the CJEU suggested some significant links that in fact point to factors falling outside the employment relationship, such as the place where employees pay income tax and where they are affiliated to social security schemes and covered by pension, sickness insurance and disability schemes.[284] *Schlecker v Boedecker* triggered a new reading of the escape clause in that while it was being applied, attention was paid to objective factors arising from the employment relationship and not to factors of a public law nature, such as tax payment or affiliation to social security schemes. In fact, the Court cannot fail to refer to all the circumstances of the contract, in particular the standards according to which wages and other working conditions are fixed.[285] The objective elements of individual employment contracts should certainly prevail, given that the ultimate aim is to establish the contract's centre of gravity and this cannot be decided according to factors that may respond to other considerations. For example, the place where contributions to a social security scheme are paid may have been solely selected on the basis of the employer's interests,[286] whereas the place where income tax is paid may reflect the employee's interests. The significance the CJEU grants these factors seems to rely on the legislation in these matters in force within the European Area of Justice, thus disregarding the fact that this conflict rule is of universal application.[287] Other factors such as nationality, habitual residence or the language of the contract are also worthy of consideration, although the Court stipulates that they are of minor relevance when deciding on the individual employment's contract centre of gravity.[288]

It must be highlighted at this point that the CJEU is of the opinion that the seized court may single out one or more of these factors as being, in its view, the most

[284] CJ 12.9.2013, Case C-64/12, *Schlecker*, para. 41. Along these lines, before the decision, see Fotinopoulou Basurko (2008), pp. 182–190, and later on, Fotinopoulou Basurko (2014), pp. 79–108.

[285] CJ 12.9.2013, Case C-64/12, *Schlecker*, para. 41, *in fine*. In the Opinion of Advocate General Mr. N. Wahl to Case C-64/12, para. 62, the contract was written in German and contained references to German mandatory rules. In addition, wages were paid in German currency until the euro was introduced, and travelling expenses between the employee's residence in Germany and her workplace were also paid.

[286] Despite working the employee on board ships exclusively sailing on Portuguese fluvial waters and being resident in Portugal, her social security contributions were paid by the French company in France. *Tribunal da Relação* Porto, Section 4 (Social), 5.5.2014, understood under the circumstances that the escape clause applied – in addition to the already mentioned, communications were in French and ships were French flagged – while *Tribunal da Relação* Porto, Section 4 (Social), 2.6.2014, specifically contends in a very similar case the significance of the payments to the French social security scheme compared to the fact that the seawoman was performing her tasks on Portuguese fluvial waters.

[287] In the Opinion of Advocate General Mr. N. Wahl to Case C-64/12, para. 68, the purpose is to find out whether the connection to the social protection schemes was made by mutual agreement of the parties or imposed on the worker.

[288] In this sense, Opinion of the Advocate General Mr. N. Wahl to Case C-64/12, para. 70.

significant to disregard the law applicable by default of choice of law. Nevertheless, it must be borne in mind that Article 8 is constructed on the basis that the habitual workplace reveals the contract's centre of gravity, and for this reason, it is highly doubtful whether the escape clause can operate on the basis of a single element.[289]

The factors that courts weigh up to set aside the law of the flag state are mainly the employer's centre of main interests, the place of conclusion of the contract, the language and form of the contract, the habitual residence or domicile of the employee,[290], the base port or ports from which the vessel operates[291], whether there is a law that applies to all workers in the workplace and the validity of the contract in accordance with the applicable law.[292] However,

[289] Also critical of this judgment, see Junker (2014), p. 15; van Hoek (2014), pp. 163–165.

[290] See these factors in Collins et al. (2006), p. 1671, taken from English practice. However, in *Booth v Phillips & Ors* [2004] EWHC 1437 (Admlty), on 17 June 2004 the Court of Appeal sustained that those factors were not enough to avoid the application of Egyptian law to rule on an Egyptian shipowner's responsibility for an accident suffered at work by an English engineer in Egyptian waters. In Germany, the escape clause was applied in a case concerning a German national employed on board a Cyprian ship but managed from Stuttgart. See LAG Baden-Württemberg, 17.7.1980: both parties to the contract were of German nationality, it was concluded in a German business, wages were paid in German currency, the contract was written in German and the behaviour of both parties denoted that they were confident about the application of German law. Other contracts concluded in Germany are not as clear, even though the country's language and currency were also used (BAG 30.5.1963). In a different case involving the provision of services on board a German ship travelling between the UK and Germany, the relevant factors were the fact that the employee was a British national domiciled in the UK, the contract was in English with an English company and the salary was paid in UK currency, for which reasons English law was applied: BAG 24.8.1989. See Junker (2004), p. 1205; Frigessi di Rattalma (1992), p. 850; Magnus (1991), pp. 382–386. In another case, Indian law was applied to Indian seafarers employed on board ships registered in the German international registry, taking into consideration the place where contracts had been signed, the habitual residence of the plaintiffs at the time the contract was concluded, the language of the contract and the currency in which wages were paid. See BAG 3.5.1995 and comments by Franzen (2011), pp. 187–188, para. 40, and Oppertshäuser (2000), pp. 396–397. In the Netherlands, see Hoge Raad, 31.1.2003, in the case sparking off CJ 27.2.2002, Case C 37/00, *Weber v Ogden*.

[291] See Magnus (2011), p. 599, para. 150. The same thing happened in the case dealing with the ship Obo Basak: *Cour d'Appel* Douai (1ª Ch.), 1.12.1997, ship *Obo Basak*, with comments by Chaumette (1998); *Cour d'Appel* Douai, Ch. Reúnes, 17.5.2004, No. 00/06191, *Akyelken et a. v. Sté Marti Shipping et Sté AS Denmar Denizcilik ve Ticarest A*S, where the court paid attention to the fact that seafarers boarded the ship in Turkey, work was performed on a ship flying the Turkish flag, wages were paid in Turkey and the employment contract referred to the Turkish Maritime Code.

[292] See Merrett (2011), paras. 6.06–6.15, pp. 176–181, paras. 6.50–6.51, pp. 197–198. Of particular interest is the case mentioned in the text *Sayers v International Drilling Co*., rendered by the Court of Appeal in London [1971] 1 WLR 1176, with comments by Kovats (1973), pp. 15–22, and Morse (1992), p. 20: a Texan oil company had several subsidiaries, among them the International Drilling Co. Ltd., with an office in London, and the International Drilling Co. N.V., with an office in The Hague. The latter had an agent working in an office of the London subsidiary, and it was he who hired Mr. Sayers on behalf of the Dutch company to provide services on an oil rig in Nigerian waters. The contract included a term restricting damages in case of accident to a scheme paid by the company on the employee's behalf. There was no choice of law clause. Sayers suffered an

it is also argued that consideration should be given to the common nationality of employer and employee, as this would refer to the law of the labour market affected.[293]

The clearest cases for the escape clause to intervene in are disputes between a seafarer and a shipowner when both are either domiciled or habitually resident in the same country but work performed on a non-national flag vessel is involved.[294] Spanish courts have also taken previous relationships between the parties into consideration.[295] Many Spanish judgments affect fishermen initially hired by Spanish companies to work on vessels flying the Spanish flag, which eventually transferred the business to other registries with the aim of gaining access to the fishing grounds belonging to the countries concerned. In these cases, it is not just the vessel's flag that changes but also the employer, whose status is now that of a joint enterprise. The courts then cling to the escape clause and to considerations about business succession, in some cases piercing the veil to track down Spanish companies.

There is a general tendency to resort to the escape clause with a view to applying the *lex fori*.[296] In a context of wild offshoring of maritime and fishing fleets, national courts seek to protect their nationals working abroad. The relocation process may advise them to take into account an additional factor when establishing the law applicable to the employment relationship, namely, the expectations of the parties at the time of the conclusion or at the outset of the performance of the

accident only a fortnight after arriving in Nigeria and claimed for damages in an English court according to English law.

[293] This principle follows on from the considerations made in the BAG judgment of 29.10.1992, distinguishing between primary and secondary factors, classifying this factor in particular as a primary factor and others such as the language of the contract, the place where the contract was concluded, the place where the employee is paid and the currency and the country where contributions to a social security scheme are paid as secondary factors. The decision dealt with the law applicable to a flight attendant's contract. Of the same opinion, see Clausnitzer and Woopen (2008), p. 1804; Deinert (2013), p. 158; Geisler (2001), pp. 302–304; Hoppe (1999), pp. 191–192; Schlachter (2002), p. 1244; Mankowski (1994), pp. 93–94; Mankowski (1999), p. 336; Mankowski (2001), p. 126. From a critical perspective, Thüsing (2003a), p. 1305.

[294] With a similar example, see Junker (2005), p. 731.

[295] See Asín Cabrera (2008), pp. 382–384, who distinguishes between two types of decisions: firstly, those in which the employment contracts affect Spanish seafarers working on board foreign ships [STSJ Galicia, *Sala de lo Social*, 26.4.2004: Spanish fishermen, a Bahamian ship and job offers in Spain, initially hired by a Spanish company which later transferred the workers to a Bahamian undertaking] and, secondly, those in which the provision of services is performed on board ships owned by joint enterprises [STSJ Canarias, Las Palmas, *Sala de lo Social*, No. 431/2003, 21.3.2003, with comments by Otero García-Castrillón (2004); STSJ Canarias, Las Palmas, *Sala de lo Social*, Sección 1, No. 1123/2004, 24.11.2003, with comments by Requejo Isidro (2005); STSJ Canarias, Las Palmas, *Sala de lo Social*, *Sección* 1, No. 1312/2006, 9.11.2006, with comments by Sabido Rodríguez (2006), pp. 903–908; STSJ Canarias, Las Palmas, *Sala de lo Social*, *Sección* 1, No. 1033/2008, 11.7.2008]. With similar motivation before the entry into force of the Rome Convention, see STSJ de Islas Canarias, Las Palmas (*Sala de lo Social*), 17.7.1992, which applies Spanish law on the basis that the hiring and dismissal occurred in Spain.

[296] The Spanish system matches this trend perfectly. See Asín Cabrera (2008), p. 384.

contract, provided that both are based on solid and objective factors.[297] Nevertheless, introducing this subjective factor while deploying the escape clause may lead to confusion as to whether this is really a case for the escape clause or a choice of law is clearly implicit in the terms of the contract or the circumstances of the case.[298] It is then advisable to keep subjective factors separate from the escape clause to avoid confusion and stick to the objective elements mentioned above, including the ones highlighted by the CJEU, while seeking the closest law to the maritime employment relationship.

4.3.3.4 Change of *lex laboris*, Temporary Posting and Interweaving of Destinations

The fact that the employment relationship is a long-lasting bond facilitates potential changes in the applicable law with the passing of time. The modification of the *lex laboris* may occur as a result of an agreement on choice of law, a case acknowledged in Article 3(2) of the Rome I Regulation to which Article 8(1) refers. Beyond the choice of law, the regularity with which services have to be performed in a specific country in order to determine the law applicable to the contract by default generally avoids the problem of time in the conflict rule. Still, this connecting factor may be subject to variations, unlike the connection that refers to the business through which the employee was engaged, the temporal specification of which—at the time of recruitment—neutralises the time factor. Similarly, the escape clause is to be assessed at the time when the dispute arises; hence, the time factor in this conflict rule is an issue exclusively affecting the transfer of the *locus laboris*.

The starting point has to be establishing at what point the location of the habitual workplace is to be identified, and three possibilities emerge for this: (1) when the contract is concluded,[299] (2) when the proceedings are opened and (3) when the facts giving rise to the lawsuit occur.[300] The latter case takes into account a situation in which a worker has moved workplaces but claims for an issue that arose in the former workplace. Taking this time into account would have the advantage of preserving the rights acquired by employees under a specific law, avoiding a scenario where they would be subject to the vagaries of the change of workplace.[301]

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[297] In this sense, see the Opinion of Advocate General, Mr. N. Wahl, to Case C-64/12, paras. 77 and 78. However, the CJ does not take on his opinion in its judgment 12.9.2013, Case C-64/12, *Schlecker*.

[298] See Okoli and Arishe (2012), pp. 524–529, on the discussion in English law as to the separation of both tests in the context of Articles 3 and 4 of the Rome Convention.

[299] See Carrillo Pozo (2011), pp. 1032–1033.

[300] See Junker (2005), p. 736; Morse (1992), pp. 17–18.

[301] In this sense, see Hoppe (1999), pp. 100–101; Plender and Wilderspin (2009), pp. 318–319, para. 11-051; Sabirau-Pérez (2000), p. 345.

This, however, would lead to different laws being applied to the same legal relationship, when the contract should be governed by one and the same legal system,[302] and assessing where the habitual workplace is at the time when the complaint is filed should therefore be advocated.[303] An overall assessment such as this is necessary to take into account whether possible future postings will be either temporary or permanent, for which reason they may in the end be governed by a law other than the one applicable at the time of the conclusion of the contract, as a result of a change of law produced by a permanent posting. In addition, carrying out the assessment at the time that the claim is lodged serves the purpose of establishing the coincidence between *forum* and *ius*, an underlying objective of this conflict rule.

The modification of the law applicable to the employment relationship is explicitly covered by the Rome I Regulation, as it contains a specific reference to the temporary posting of workers, so that 'the country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country'.[304] This approach embraces a commitment to the stability of the legal system governing the employment relationship, as this does not change on the ground that the work is actually carried out somewhere else. The drafters of the Regulation followed the suggestions of the GEDIP in this,[305] although they left the key distinction between temporary and permanent posting, which depends on whether 'the employee is expected to resume working in the country of origin after carrying out his tasks abroad' for Recital 36.

To elaborate further on the idea reflected in Recital 36 of the Rome I Regulation, the *locus laboris* is established according to whether workers move to another state to carry out a specific task there or to work for a limited period of time while always intending to return to their former workplace at some point. This being the case, the posting does not amount to integration into the labour market of the country workers have been transferred to.[306] In any event, workers' habitual workplace

[302] *Depéçage* is only provided for through choice of law.

[303] In this direction, Magnus (2011), p. 606, para. 175.

[304] Article 8(2), *in fine*.

[305] See GEDIP (2001); Max Planck Institute for Comparative and Private International Law (2007), pp. 288–291. With the same approach, see Belgian *Cour de Cassation*, 27.3.1968889, in a case involving a worker who was transferred to Madagascar but in which the parties to the contract had left his return to his job in Belgium open. In similar terms in France, see Sabirau-Pérez (2000), pp. 345–347.

[306] The point is critical for understanding cases not covered by Recital 36, such as the temporary posting of workers even before they begin work in the country in which the provision of services has been agreed on. Assessing different options for classifying a posting as temporary, in particular its duration, which no longer seems relevant, see Blefgen (2005), pp. 45–50; Coursier (1993), pp. 101–105; Gardeñes Santiago (2008), pp. 410–411; Hansen (2008), pp. 768–770; Hoppe (1999), pp. 168–183; Junker (1992), p. 183; Mankowski (2009), pp. 185–189; Martiny (2015), para. 63; Morgenstern (1987), pp. 48–49; Oetker (2009), para. 31; Plender and Wilderspin (2009), pp. 317–318, para. 11-047; Schlachter (2002), p. 1242; Schlachter (2004), pp. 155–159; Thüsing (2003a), p. 1306; Wurmnest (2009), pp. 492–493. Previously, also taking this approach, see Kaye (1993), p. 233; Simitis (1977), pp. 167–171.

may change for good, perhaps because they are permanently transferred to work on board a vessel flying a different flag or on one operating permanently in another state's waters. In such cases, the applicable law of the employment contract does indeed change.[307]

If a posting is characterised as temporary, this is not affected by the fact that once abroad workers take their instructions from a different employer from the one for whom they habitually performed their duties; to all intents and purposes, they are still under the latter's instructions.[308] In these cases, the employer instructs the workers to carry out the tasks assigned them by a different employer, thus preserving the legal relationship with the former, as may happen while carrying out a time charter.

An analogous situation is found in other cases covered by Recital 36, which refers to successive contracts or employers belonging to the same group of companies[309] and states that 'the conclusion of a new employment contract with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily', i.e., the continuation of the previous employment relationship is not to be disregarded, in particular when it can be assumed that the employee will return to the previous job.[310] Furthermore, there may even be a chain of contracts between businesses that do not belong to the same group of companies—maybe working in networks or on common projects, such as maritime consortia—so the solution for these cases is identical to that proposed for groups of companies, although Recital 36 does not expressly refer to such cases.[311]

The conditions under which the posting occurs—including whether an employer can impose the transfer on employees—are determined by the *lex laboris* in force at the time of the posting, whether this is on a permanent or a temporary basis.[312] In the case of temporary postings, and in spite of what has been said above as to the law applicable to the employment relationship, the law of the place where the temporary performance of services is carried out does have a say, either through overriding mandatory rules or in the European Union through Directive 96/71 of 16 December 1996 concerning the posting of workers in the framework of the provision of services, whose applicability is expressly indicated in Recital 34 of the Rome I Regulation.[313] Article 1(2) of this Directive excludes seafarers from its

[307] See Sabirau-Pérez (2000), p. 344; Thüsing (2003a), pp. 1306–1307; Plender and Wilderspin (2009), p. 317, para. 11-046.

[308] See Thüsing (2003a), p. 1306.

[309] See Junker (1992), pp. 213–219.

[310] GEDIP proposed considering successive contracts concluded with companies in the same group as a mechanism that may help neutralise the *Pugliese* doctrine, which had been strongly criticised for leading to more than one country pursuing the connection of the habitual workplace. Previously, Junker (1992), p. 220, pointing out that in many cases there are two contracts, one active and the other passive (p. 216).

[311] See Mankowski (2009), pp. 191–193; Wurmnest (2009), pp. 493–495.

[312] See, among others, Schlachter (2002), p. 1242.

[313] This Directive is the cornerstone for the construction of the domestic market to the extent that it helps develop a level playing field, avoiding unfair competition arising from substantial wage

scope of application, although it does include fishermen, and it is also understood to be applicable to maritime cabotage; nevertheless, there are serious doubts about its provisions' practical effectiveness.[314] International agreements may play a similar role, however, as they set out international minimum labour standards, in line with the terms of the Directive.

4.4 Overriding Mandatory Rules

The Rome I Regulation and the Rome Convention are characterised by the fact that they envisage different types of mandatory rules while always leaving the door open for the *lex contractus* to be displaced by the application of the overriding mandatory rules laid down by the *lex fori*. In accordance with Article 9(1) of the Rome I Regulation,[315] overriding mandatory rules, *lois de police* or *lois d'application immediate* as they are also known, set out 'the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation'. Hence, they are not provisions that pursue the mere protection of one of the parties to the contractual relationship. In fact, the latter provisions are covered by the law referred to in Article 8(1) of the Rome I Regulation,[316] which is of a different nature from the rules covered under Article 9. While Article 8(1) guarantees minimum protection for workers on the basis of all provisions that cannot be derogated by agreement of the parties contained in the law governing the employment contract in the absence of choice of law, overriding mandatory rules involve the expression of a higher degree of authority, beyond the protection afforded by Article 8(1).

In this sense, the interrelationship between Articles 8 and 9 raises further problems of interpretation. Should the law designated by Article 8 coincide with the *lex fori*, Article 9(2) will not have enough room for application since it is only reasonable to assume that the *lois de police* provided for there are applicable *qua lex contractus* and not *qua lex fori*. Conversely, these would come into play when the

differences among member states. See the Opinion of Advocate General Mischo to Case C 164/99, *Portugaia*, para. 44, finally confirmed by the CJ in its judgment of 24.1.2002.

[314] Recital 17 of the Preamble of Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (O.J. No. L 300, 14.11.2009) clearly established the application of this Directive to maritime cabotage. See in detail van Hoek and Houverzijl (2011), p. 16. This study also indicates that Germany, the Netherlands and the U.K. apply the Directive to maritime transportation (pp. 36–40). This is not the case in Spain, where Article 1(2) of the Law 45/1999 expressly excludes the maritime merchant fleet in line with the Directive.

[315] Taken from CJ 23.11.1999, Case C-369/96, *Arblade*, which was in turn inspired by Francescakis (1966), pp. 1–18.

[316] In contrast to this stance, see Collins et al. (2006), pp. 1667–1668.

applicable law according to Article 8 does not match the *lex fori* and there is therefore no overlap between Articles 8(1) and 9(2) of the Rome I Regulation.[317]

From the private international law perspective, overriding mandatory rules are applicable regardless of the law designated by the conflict rule, in this case the *lex laboris*. They are not applicable to all cases though, as their unilateral nature confers them with their own scope of application,[318] i.e., within their own terms overriding mandatory rules displace the provisions contained in the *lex contractus*.

In addition to this, it is important to bear in mind that the *lois de police* are of exceptional application given that they set aside the law otherwise applicable and are thus incompatible with conflict rules and the international harmony of decisions that they somehow aim to achieve. As a result of this, their application is restricted to cases where there is a link between the facts and the forum, i.e. *Inlandsbeziehung*,[319] for which reason these rules normally determine their territorial scope of application themselves.[320]

Nevertheless, there is a proviso to the statement that they set aside the *lex contractus*, and this becomes apparent when these rules seek to protect a party to the contract through, for example, establishing a minimum wage.[321] Against this background, it is worth wondering whether the priority of an overriding mandatory rule of the forum has to be maintained when it is less beneficial than those provided for in the designated law pursuant to the conflict rule. The CJEU addressed this issue when interpreting Directive 96/71/EC, concluding that while the rules referred to there are also *lois de police*, and thus to be observed in all cases, they do not prevent the application of other more favourable provisions. In other words, the principle of worker protection through the choice of the most favourable law also plays a role in this relationship,[322] so that the overriding mandatory rules of the *lex fori* will not displace the substantive law designated by Article 8 in the event that it is more favourable to the worker.

The main issue of interpretation here is what is to be understood as an overriding mandatory rule.[323] The point is that each state decides which rules are to be deemed overriding mandatory rules, and so they have to be identified within a given legal

[317] Highlighting this point, see Krebbert (2000), p. 531; Morse (1992), pp. 16–17.

[318] See Marques dos Santos (1991).

[319] See de Boer (1990), pp. 57–61; Thüsing (2003a), p. 1308. In general, on the shortcomings of these provisions when it comes to protecting the weaker party, see Leclerc (1995), pp. 192–200.

[320] For a thorough treatment, see Plender and Wilderspin (2009), pp. 322–328, paras. 11-059 to 11-072.

[321] See Gardeñes Santiago (2005), p. 393.

[322] For a thorough treatment, see Magnus (2011), pp. 613–615, paras. 203–210; Martiny (2015), para. 46; Spickhoff (2011), para. 15¸ Staudinger (2011), para. 5. Taking the middle ground, see Oetker (2009), para. 51; Plender and Wilderspin (2009), pp. 354–355, para. 12-043, both differentiating between a rigid rule and another more limited one establishing a minimum standard.

[323] It is easy to find decisions in national case law that confuse the different types of mandatory rules. See Corneloup (2012), pp. 569–572. In Spain, STSJ, *Sala de lo Social*, Oviedo, No. 230/2013, 1.2.2013, with comments by Carballo Piñeiro (2013).

system via a case-by-case examination. Nevertheless, this approach is currently restricted by European Union legislative activity, acting as a limit to such national power,[324] and by the fact that Article 9(1) encodes a definition of *lois de police* that requires autonomous interpretation.[325]

The characterisation of these rules is highly controversial in an area where worker protection is also highly relevant to a state's social organisation. For example, the right to rest and holidays has a role in worker protection and also contributes to improving public health and well-being in general, as it prevents accidents in the workplace, and therefore contributes to a country's social organisation.[326] Rules tailored in accordance with the principle of worker protection are normally in line with the public interests behind states' political, social or economic organisation, as they help in the organisation of the labour market.[327] This could give rise to the idea that rules aiming to protect workers are of an overriding mandatory nature. However, *lois de police* are exceptional, and the difference between the protection afforded by the rules to which Article 8 of Rome I refers, including restrictions on the choice of law, and overriding mandatory rules must be underlined. In addition to this, when establishing what an overriding mandatory rule is, it should be borne in mind that it is always possible to resort to the public policy exception when the result of the application of the *lex contractus* in question contradicts the legal system's fundamental values.[328]

Within this framework, two criteria have been suggested for identifying such rules: first, whether the rule in question is of constitutional origin, such as those dealing with the prohibition of discrimination[329] and, second, whether it involves a public law matter, such as provisions for social security, health and hygiene, and risk prevention at work,[330] or even collective redundancies, as the socio-economic organisation of a country is at issue.[331] Spain, for example, considers *lois de police*

[324] As is made it clear by CJ's judgments 23.11.1999, Case C-369/96, *Arblade*, and 15.3.2001, Case 165/98, *Mazzoleni*. See further Hess and Pfeiffer (2011), pp. 41–43.

[325] On the advantages and disadvantages of this rule, see Bonomi (2009), pp. 112–119.

[326] See Mankowski (2009), pp. 205–207; Müller (2004), p. 187; Thüsing (2003a), p. 1308. Indicating the preference of Article 6 of the Rome Convention over Article 7, although in favour of accumulation where appropriate, see Kaye (1993), pp. 230–231 and 237–238. Also on the difficulties in its determination, see Lyon-Caen (1991), pp. 59–62.

[327] For a detailed treatment, see Gardeñes Santiago (2005), pp. 381–413; Harris (2004), pp. 295–297. On more restrictive terms analysing German case law, see Junker (2007), pp. 28–31.

[328] See Junker (2004), pp. 1211–1214; Montfort (2008), pp. 82–83, underlines the BAG judgment of 12.12.2000, with comments by Gragert and Drenckhahn (2003), pp. 305–308.

[329] A clause on compulsory retirement accepted by the Bahamian law governing the employment contract was held to be against the Spanish legal system by breaching the prohibition of discrimination on grounds of nationality. See STSJ Galicia (*Sala de lo Social*), 26.4.2004, with comments by Michinel Álvarez (2004); STSJ Canary Islands, Las Palmas, *Sala de lo Social*, *Sección* 1, No. 158/2005, 7.3.2005; STSJ Canary Islands, Las Palmas, *Sala de lo Social*, *Sección* 1, No. 159/2005, 7.3.2005.

[330] See Junker (2004), pp. 1212–1214; Junker (2009), p. 95; Krebbert (2000), pp. 531–535.

[331] See, for all, Deinert (2013), pp. 373–374.

to be all rules whose aim is to preserve the dignity and privacy of workers.[332] Meanwhile, the UK as well as Portugal characterise *lois de police* as rules dealing with unfair dismissal,[333] whereas Germany has rejected such an approach but gives consideration to provisions aimed at protecting mothers and the disabled.[334]

Nevertheless, it must be highlighted that Article 9(1) ought not to be studied in the framework of the public–private law distinction since private standards also qualify as overriding mandatory rules.[335] It is worth mentioning in this respect that the CJEU's *Arblade* judgment, which inspired the concept of overriding mandatory rules laid down in Article 9(1), indicates that rules on workers' social protection such as those dealing with the minimum wage are an excellent example of some of the pivotal reasons relating to the public interest that may restrict the exercise of freedom of movement.[336] Nor is the characterisation as an overriding mandatory rule at odds with the fact that the provision in question favours the weaker party, in addition to primarily pursuing a public policy. Protecting the weaker party is not an objective pursued by overriding mandatory rules, however, so the seized court cannot understand a rule to be of an overriding nature on the grounds of worker protection, as some commentators have suggested.[337]

Overriding mandatory rules can also be contained in collective agreements. This issue was a moot point for many years, but the application of Directive 96/71/EC resolved the discussion in the affirmative, as long as the collective agreement at stake has normative effects and can therefore generate this kind of rule.[338]

These rules can also of course be contained in international conventions such as those developed by the ILO with the well-known purpose of establishing a set of

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[332] Article 3(1)(g) of Spanish Law 45/1999.

[333] Questioning this classification, see Merrett (2010/2011), pp. 238–243. According to Article 53 of the Portuguese Constitution, not only dismissal must be fair but also the final outcome of a proceeding in order to grant the employee's rights to be heard and to defence. See *Tribunal da Relação* Porto, Section 4 (Social), 2.6.2014: although the seawoman was protected by the Portuguese law as the law of the habitual workplace, it was contended by the French company that the closest law was the French one, for which reason the court argued that, even in that case, Portuguese law would override French law given that the employee was not granted a fair dismissal proceeding by the company in the case at hand.

[334] See Deinert (2009), pp. 151–152; Deinert (2013), pp. 204–205; Gräf (2012), pp. 611–612, both with a list of the items included.

[335] On the debate in Germany, see for all Deinert (2013), p. 190. Previously, Bonomi (2009), pp. 116–119.

[336] See CJ 23.11.1999, Case C-369/96, *Arblade*, paras. 32 and 51.

[337] The gaps in Article 8 of the Rome I Regulation/6 of the Rome Convention, the basis of which is the principle of worker protection, have been filled in by this means. Along the same lines, see Pocar (1984), pp. 403–408, followed by Gardeñes Santiago (2005), p. 392.

[338] See Deinert (2013), pp. 198–201; Schlachter (2002), pp. 1244–1245, and CJ 28.3.1996, Case C-272/94, *Guiot, Climatec SA*; 23.11.1999, Case C-369/96, *Arblade*; 15.3.2001, Case 165/98, *Mazzoleni*; 25.10.2001, Cases C-49/98, C-50/98, C-52/98 to C-54/98, C-68/98 to C-71/98, *Finalarte*; 24.1.2002, Case C-164/99, *Portugaia Construçoes*.

minimum international labour standards. Nevertheless, despite their undeniably mandatory nature, it is in fact questionable whether they can be deemed overriding mandatory rules *per se*. In a judgment on 9 May 1980, the German Supreme Court[339] ruled against granting ILO Convention No 139 of 1974 on occupational cancer *loi de police* status, in a case brought by German producers against imports of asbestos-containing products from South Korea. Their claim was based on an infringement of German foreign competition law on the ground that the foreign producers had not fulfilled the requirements laid down in the Convention. The German *Bundesgerichtshof* rejected this claim, arguing that South Korea was neither an ILO member at that point nor a contracting party to the Convention in question. Consequently, while South Korea was not obliged to implement the Convention, Germany was equally not entitled to impose it while importing products on the grounds of its overriding mandatory nature. Nonetheless, the ILO itself currently discriminates between conventions that do contain minimum standards and those that do not, a highly illustrative example of this being the 1998 Declaration on Fundamental Principles and Rights, through which the organisation sought to underline the core nature of freedom of association as well as the prohibition of forced and child labour and discrimination in the workplace.

The issue of exactly what are to be deemed overriding mandatory rules in the shipping and fishing sectors[340] is no less controversial. In line with what has already been pointed out, national courts do not apply the rules of the forum dealing with protection against dismissal as *lois de police for example*, nor do they apply those dealing with the transfer of a company's registered office or the rules on enrolment and entitlement to paid leave[341]; in fact, they do not fit the guidelines provided for Article 9(1).

The ILO conventions may help clarify this issue; MLC, 2006, and WFC, 2007, established a set of minimum labour standards with the primary goal of ensuring decent working conditions on board ships, dealing with the minimum requirements for working on a ship, conditions relating to employment, accommodation, recreational facilities, food and catering, health protection, medical care and welfare and social security protection. The fact that they provide internationally acknowledged standards aimed at levelling competition in a highly globalised framework, and that the standards are subject to labour inspection, assists in the task of characterising these provisions as overriding mandatory rules. However, the rules must be looked at on an individual basis, as both the precision requirement and that of connection with the forum state must be fulfilled.

In accordance with these clarifications, provisions laid down in the mandatory part of MLC, 2006—similar to those provided for in WFC, 2007—are suitable to be qualified as *lois de police*. For example, both conventions stipulate a minimum

[339] BGH 9.5.1980, 1 ZR 76/78. Critical, see Muchlinski (2007), pp. 500–501.

[340] On the role of these rules in cases of flags of convenience, see Simitis (1977), p. 171, footnote 68, citing *Hellenic Lines v. Rhoditis*, 412 F. 2d 919 (5th Cir. 1969) and Carbone (1979), p. 164.

[341] BAG 24.8.1989 and 3.5.1995, and Franzen (1997), pp. 1055–1074; Mankowski (1994), pp. 94–96.

employment age and a number of work and rest hours in line with other relevant international conventions on the topic, such as the STCW and the STCW–F conventions, which have significant provisions for maritime safety and which are also of overriding mandatory nature in the sectors involved. The provisions also cover the right to repatriation and all rules on safety, health protection and hygiene. They also establish the need for a minimum wage, but the rule in question does not elaborate on the amount involved. The payment of a minimum wage is linked to social welfare issues, but its application as an overriding mandatory rule seems to be restricted to cases in which the amount of salary paid goes *contra bonos mores*.[342] However, the CJEU stated that the provision laying down a minimum wage consists of an overriding mandatory rule in the context of Directive 96/71/EC, provided it is clearly established. MLC, 2006, and WFC, 2007, merely require a minimum wage, and it will therefore be up to the applicable national law to determine whether or not the corresponding provision is an overriding mandatory rule.

More doubts are raised by what kind of connection is needed with the forum in order to apply an overriding mandatory rule with its origin in these conventions. The issue can be resolved by bearing in mind that MLC, 2006, and WFC, 2007, contain rules applicable to non-contracting states as well: first, although their provisions are primarily aimed at flag states, port states must also ensure that they are generally complied with by either the flag states or shipowners, and second, vessels flying the flag of a non-contracting party to the conventions must also comply with their requirements as they are also subject to port state control, with a view to preventing social dumping. In short, there is always a connection with the forum as these minimum standards cannot be ignored by non-contracting states, regardless of vessel in question's link with the forum.[343]

Finally, Article 9(3) of the Rome I Regulation states that 'effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful'. This provision is the result of a consensus, and its scope is narrower than that of Article 7(3) of the Rome Convention, as it no longer refers to 'another country with which the situation has a close connection', but to the country where the contract is fulfilled, in order to avoid the reservation contained in Article 22 of the Rome Convention, which, for example, was used by Germany.[344]

The notion of overriding mandatory rule is that contained in Article 9(1), though it is no longer that of the *lex fori* but of the *lex loci solutionis*. Where employment contracts are concerned, this situation will arise in particular when a habitual place

[342] As suggested by Gamillscheg (1983), pp. 326–327.

[343] Carbone (2009b), p. 197, qualifies these standards as *erga omnes*.

[344] On the effects of the difference between the two rules on employment contracts, see Basedow (2013), pp. 403–404, for whom it is in any case difficult to see any country's overriding mandatory rules other than the rule referring to the fulfilment of the contract applicable.

of work cannot be identified, when the applicable law is determined pursuant to the escape clause or in the context of the posting of workers. The seized court will examine the legal system of the state where the contract is carried out to determine whether, from the latter's perspective, the case in question entails applying an overriding mandatory rule pursuant to state law.

Nevertheless, the application of third states' *lois de police* to the case is not mandatory,[345] inasmuch as the court is empowered to apply it if the rule in question renders the performance of the contract unlawful. In this sense, it may give effect to foreign rules on working hours and on workers' health and safety, for example.[346] The same applies to rules that require work permits to operate in the country concerned if they are required for the sector involved.

4.5 The Public Order Exception

The role of mandatory provisions of the law governing employment contracts is of such paramount importance that there is little room for the public order exception to operate.[347] However, this does not preclude its intervention, in particular in cases where core values of the forum's legal system are seriously violated,[348] such as in cases of discrimination, shamefully low wages, prohibitions on joining or contacting trade unions, 'lifting of the contractual veil' in the sense that employment contracts may be disguised under other contractual arrangements,[349] when workers are given no reason for their dismissal[350] or when this occurs without compensation,[351] among other cases. The clause has also been invoked to reject

[345] See d'Avout (2008), pp. 2165–2168, on the options opened by the restrictions introduced in Article 9(3) of the Rome I Regulation for avoiding the overriding mandatory rules of a third state by selecting the competent court.

[346] See Thüsing (2003a), pp. 1308–1309. Against the application of third states' *lois de police* on grounds of the legal uncertainty it may generate, see Harris (2004), pp. 269–290.

[347] Along these lines, see Junker (1992), pp. 313, 315–317; Martiny (2015), para. 180; Simitis (1977), pp. 157–159; Spickhoff (2011), para. 30. On the differences between overriding mandatory rules and the *ordre public* clause, see Basedow (2013), pp. 432–444, challenging this difference; de Miguel Asensio (2001), pp. 2857–2881.

[348] See Gamillscheg (1983), pp. 303–304; Gamillscheg (1961), pp. 686–699.

[349] See Birk (2006), pp. 21–31. As a simple problem of characterisation, see Mankowski (1997), pp. 469–472.

[350] In this sense, see *Corte di Cassazione*, Sez.Lav., No. 2622, 9.3.1998, setting aside Liberian law, which was the law chosen and the law of the flag. For a critical approach to this decision, see Ruggiero (2000), pp. 137–145. Also *Pretore* Genova, 15.9.1998, *G. Basciano c. Renaissance Cruises Inc., F.lli Cosulich S.p.a.*; and *Corte di Cassazione*, S.U., No. 15822, 11.11.2002, with comments by Clerici (2003), seeking a justification on Article 30 of the EU Charter on Fundamental Rights (pp. 821–825).

[351] See Deinert (2013), p. 378.

rules relegating the priority of wage claims in insolvency proceedings, on the basis of the interpretative principle *pro laboratoris*.[352]

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[352] See *Tribunale di* Ravenna, 29.12.2006, *F.R. c. M/N Father's Blessing, V. Pertsinis ed altri*: when the ship, which was flying the Honduras flag, had been sold, the seafarers' wages were paid first, as the sale was challenged by a lawyer who argued that according to Honduran law his claim was prior to the others. Clerici (2003), pp. 816–820, rejects the application of this principle in the framework of the Rome Convention.

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