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Remote working and European private international law

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Policy implications

- The risk created by expanding the labour pool to workers based in other countries can, if necessary, be dealt with by EU legislative action, for example, through substantive EU employment law. Furthermore, the risk created by expanding the labour pool to workers based in non-EU countries can be dealt with by the overriding application of EU employment standards to situations sufficiently closely connected with the EU. Empirical data is needed to assess the policy implications of the risk created by the expansion of the labour pool to workers based in other countries. This risk should therefore be monitored in the years ahead.
- The Brussels I Regulation, the Lugano Convention and the Rome I Regulation give domestic courts an adequate tool to deal with the potential of remote working to put additional pressure on the employee/self-employed worker dichotomy. Nevertheless, application of the concept of 'individual employment contract' to remote working should be monitored in the years ahead.
- Employers might be able to use arbitration agreements to effectively escape the jurisdiction of domestic courts and employment laws. This issue requires further research.

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Introduction

The Covid-19 pandemic has greatly impacted the working lives of many. One of the biggest trends has been rapid growth in remote working and hybrid working. It is estimated that in April 2020 in the EU 33.7 per cent of employees worked exclusively at home and 14.2 per cent were hybrid workers, working in a variety of places, including at home, on the employer's premises and elsewhere (Eurofound 2020). Remote working and hybrid working are likely to continue to be important features of the world of work in the years ahead.

For many, the pandemic has had the effect of detaching them from a fixed place of work. For some, the pandemic has even detached them from the country in which their employer and its premises are situated. This gives rise to questions of private international law. Which domestic courts have jurisdiction over disputes arising out of employment contracts of remote workers and hybrid workers? Which laws apply to such contracts? Can the rules of private international law deal adequately with pandemic-induced changes in working patterns?

These questions are addressed from the perspective of European private international law. Before addressing these questions, it is necessary to outline the basic rules of the European private international law of employment, and to take a closer look at the concept of remote working, particularly at the features of remote working of relevance for private international law.

European private international law of employment

European private international law of employment is the part of EU law that regulates transnational employment relationships (Grušić 2015). Its rules are set out in the Brussels I Regulation, the Lugano Convention, Rome I Regulation, Rome II Regulation, Posted Workers Directive and the Posted Workers Enforcement Directive. The Brussels I Regulation deals with the jurisdiction of Member States' courts over disputes arising out of individual employment contracts and the recognition and enforcement of Member State court judgments in employment matters. The Lugano Convention effectively extends, with some modifications, the Brussels I Regulation rules to Norway, Switzerland and Iceland. The Rome I and Rome II Regulations deal with the law applicable to contractual and non-contractual obligations arising out of or in relation to individual employment contracts. The Posted Workers Directive guarantees workers posted by their employer from one Member State to another on a service contract that the employer has obtained in the host Member State the application of certain employment standards that are in force in the host Member State. The Posted Workers Directive and the Posted Workers Enforcement Directive provide mechanisms for the enforcement of those standards.

The Brussels I Regulation, the Lugano Convention and the Rome I Regulation contain special rules for "individual employment contracts", whose main objective is the protection of employees as weaker contractual parties.

The focus in this policy brief is on the rules contained in the Brussels I and Rome I Regulations.

The Brussels I Regulation protects employees in two ways. First, it gives employees access to more forums than employers. An employee, for example, may commence proceedings in the EU in the courts of the Member State in which the employer is domiciled (Article 21(1)(a)), in the courts for the habitual place of work (Article 21(1)(b)(i)) or, absent a habitual place of work, in the courts for the engaging place of business (Article 21(1)(b)(ii)). On the other hand, an employer is effectively limited to commencing proceedings in the courts of the Member State in which the employee is domiciled (Article 22(1)). Second, the Regulation precludes employers from imposing unfavourable jurisdiction agreements on employees. A jurisdiction agreement entered into before the dispute has arisen is effective only if it increases the number of forums available to the employee (Article 23). For example, a German-domiciled employer who hires an employee domiciled in France to habitually work in France cannot agree with the employee in advance that German courts will have exclusive jurisdiction over disputes arising out of the employment relationship. According to the Regulation, the employer can sue the employee only in France, whereas the employee may commence proceedings in either France or Germany. The parties can only agree in advance that the employee can commence proceedings in another country, such as Belgium.

The law applicable to individual employment contracts is determined by the Rome I Regulation. The parties to an individual employment contract are allowed to choose the applicable law. But the choice cannot deprive employees of the protection afforded them by the mandatory provisions of the law applicable in the absence of choice (Article 8(1)). In the absence of choice, the contract is governed by the law of the country of the habitual place of work (Article 8(2)) or, if there is no habitual place of work, by the law of the country of the engaging place of business (Article 8(3)). However, where it appears from the circumstances as a whole that the contract is more closely connected with another country, that country's law applies (Article 8(4)). Furthermore, the courts are allowed to apply the overriding mandatory provisions of the forum (Article 9(2)) and, under certain conditions, even the overriding mandatory provisions of the country of performance (Article 9(3)).

Remote working: features of relevance for private international law

Working remotely means working outside the premises of the employer. There are different kinds of remote working (Felstead 2022). There is *working at home*. Historically, this kind of remote working has been done mainly by low-skilled and low-paid workers engaged in manufacturing and routine service work, for example, manufacturing toys and garments, packing boxes and envelopes or performing routine clerical activities. Nowadays, homeworkers are largely managerial, professional or administrative staff who possess higher qualifications and skills and receive better pay. Then there is *working from*

home, where the home is used as a base from which work is done. Examples include some transport workers and commercial representatives. There is also *teleworking*, the phenomenon of using information technology to work from anywhere and at any time. Remote working can be combined with more traditional working patters, giving rise to *hybrid working*. This involves working in a variety of places, including at or from home, on the employer's premises, on the move and elsewhere.

The growth of remote working has created three trends that are of relevance for private international law. The first is a big pandemic-induced switch from working at offices to working at home. This has enabled many employees to detach themselves from a fixed place of work and even to live and work outside the country in which their employer and its premises are situated. The reduced importance of territorial connections has led to the second trend, which is the broadening of the labour pool. Employers now find it easier than before to hire employees based overseas. The first two trends undermine the importance of a physical place of work. This presents a challenge to private international law, whose rules on individual employment contracts are grounded in the territorial jurisdiction of domestic courts and the territorial application of employment laws. The third trend is a decreasing level of control exercised by employers over their employees as a result of the growth of remote working. According to a YouGov survey from November 2020, 20 per cent of employers were either using software to monitor remote workers or were planning to do so (Skillcast 2020). This implies that the majority of employers adopt a more trusting approach to managing their remote workers. A decreasing level of control has the potential to put additional pressure on the employee/self-employed worker dichotomy, which is at the core of the European private international law of employment. For example, employers might try to justify classifying remote workers as self-employed by the fact that such workers are subject to a decreased level of control. Additionally, employers might try to escape the jurisdiction of domestic courts and employment laws by using dispute resolution agreements, which can be fully effective only in relationships that are not classified as employment relationships.

European private international law of employment and challenges presented by remote working

This section assesses how the European private international law of employment deals with three challenges presented by remote working for private international law: (i) the undermining of the territoriality principle; (ii) the risk of misclassification; and (iii) the risk of misuse of dispute resolution agreements.

Undermining the territoriality principle

The main connecting factor used in both the jurisdictional rules of the Brussels I Regulation and the Lugano Convention and the choice-of-law rules of the Rome I Regulation is the habitual place of work. The subsidiary connecting factor of the

engaging place of business becomes relevant only if there is no habitual place of work. Some of the key cases of the Court of Justice of the EU on the concept of habitual place of work concerned remote workers. Particularly important are *Mulox* and *Rutten*. These cases concerned the determination of the habitual place of work of commercial representatives working *from home*, that is, using their homes as the base from which their work was done. The habitual place of work was held to be the place where the employees' homes were located. This interpretation of the concept of habitual place of work was later codified in the Rome I Regulation and the 2012 Brussels I Regulation Recast, which use the formula 'the law of the country in which or, failing that, *from which* the employee habitually carries out his work'. It is clear therefore that when an employer hires an employee based overseas, the habitual place of work is in the country in which the employee is based. The determination of the habitual place of work of an employee who habitually worked in one country and then, perhaps because of the pandemic, moved to another country to live and work there remotely is more complicated. Whether the habitual place of work changes depends primarily on the intention of the parties. The case law of the Court of Justice of the EU, in particular the *Weber* case, and recital 36 of the Rome I Regulation confirm that work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out their tasks abroad. Otherwise, work carried out in another country should be regarded as permanent. The intention of the parties is not the only relevant factor. In particular, the duration of carrying out work abroad should be considered. Thus, if an employee has been working in a foreign country for a significant amount of time, for example 10 years, they should be regarded as habitually working in that country, even though they used to habitually work in another country and the parties intended the employee to return there. This indicates that a temporary relocation from one country to another because of the pandemic should not have an impact on the habitual place of work, as long as the parties intend the employee to return to the former country and the duration of relocation is not of significant length. A special category of remote workers are teleworkers working from anywhere or nomadic workers. If such workers do not establish a habitual place of work, the subsidiary connecting factor of the engaging place of business becomes relevant. Also, the escape clause in Article 4(3) of the Rome I Regulation is more likely to be used to determine the law applicable to the employment contracts of teleworkers or nomadic workers and point to the application of a law that is neither that of the habitual place of work nor that of the engaging place of business.

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

through substantive EU employment law. Furthermore, the risk created by the expansion of the labour pool to workers based in non-EU countries can be dealt with by the overriding application of EU employment standards to situations sufficiently closely connected with the EU (*Ingmar*).

Also relevant is the fact that an employer may normally commence proceedings only in the courts of the Member State in which the employee is domiciled. The concept of domicile of individuals for the purposes of the Brussels I Regulation is not autonomous and depends on the domestic laws of Member States. Allowing employees to live and work in another country and hiring employees based in another country can lead to a change of the forum that is competent to hear claims brought by employers against employees.

Risk of misclassification

The protective rules of the Brussels I Regulation, the Lugano Convention and the Rome I Regulation apply to 'individual employment contracts'. In *Holterman* and *Bosworth*, the CJEU confirmed the following principles concerning interpretation of the concept of 'individual employment contract':

- this concept is autonomous;
- this concept is the same across all legal instruments that comprise the European private international law of employment;
- the concept of 'individual employment contract' in the European private international law of employment corresponds to the concept of 'worker' used more generally in substantive EU employment law;
- the concept of 'individual employment contract' should be interpreted in light of the objective of protection of employees;
- in order to determine whether a contract is an individual employment contract, domestic courts should take into account the fact that individual employment contracts typically exhibit certain characteristics, such as creating a lasting bond which brings the employee to some extent within the organisational framework of the employer's business, presupposing a relationship of subordination of the employee to the employer, and containing the essential feature that for a certain period of time one person performs services for and under the direction of another in return for which they receive remuneration;
- the form of the relationship between the parties is not determinative for the purposes of its autonomous classification.

The fact that the concept of 'individual employment contract' is interpreted autonomously and broadly indicates that the Brussels I Regulation, the Lugano Convention and the Rome I Regulation give domestic courts an adequate tool to deal with remote working's potential to put additional pressure on the employee/self-employed worker dichotomy. For example, the fact that the concept of 'individual employment contract' corresponds to the concept of 'worker' used more generally in substantive EU employment law means that, where remote working is carried out through digital labour platforms, remote workers should be able to rely on the rebuttable presumption of employment

relationship, including the reversal of the burden of proof, in the proposed directive on improving working conditions in platform work (European Commission 2021), once this instrument enters into force, for the purposes of invoking the application of the protective rules of the Brussels I Regulation, the Lugano Convention and the Rome I Regulation.

Risk of misuse of dispute resolution agreements

Remote working risks incentivising employers to try to escape the jurisdiction of domestic courts and employment laws by using dispute resolution agreements. Choice-of-court and choice-of-law agreements are regulated by the Brussels I Regulation, the Lugano Convention and the Rome I Regulation, whose rules limit the effectiveness of dispute resolution agreements with regard to individual employment contracts. The fact that the concept of 'individual employment contract' is interpreted autonomously and broadly indicates that the risk of choice-of-court and choice-of-law agreements being used effectively to escape the jurisdiction of domestic courts and employment laws is low.

There is, however, one kind of dispute resolution agreement, namely the arbitration agreement, for which it is unclear whether it can be effectively used to escape the jurisdiction of domestic courts and employment laws. There are two reasons for this. The first is that arbitration is expressly excluded from the subject-matter scope of the European private international law instruments (Article 1(2)(d) Brussels I; Article 1(2)(e) Rome I). The second reason is that it is unclear to what extent the principle of effectiveness of EU law can be used to uphold the protective rules of the Brussels I Regulation, the Lugano Convention and the Rome I Regulation when confronted with an arbitration agreement and to what extent the effect of arbitration agreements on the jurisdiction of domestic courts and employment laws is exclusively a matter for domestic law. This question requires further research.

Conclusion

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

The autonomous and broad interpretation of the concept of 'individual employment contract' indicates that the Brussels I Regulation, the Lugano Convention and the Rome I Regulation give domestic courts an adequate tool to deal with the potential of remote working to put additional pressure on the employee/self-employed worker dichotomy.

The Brussels I Regulation, the Lugano Convention and the Rome I Regulation

preclude the use of choice-of-court and choice-of-law agreements to escape the jurisdiction of domestic courts and employment laws. Employers might be able to effectively use arbitration agreements to escape the jurisdiction of domestic courts and employment laws.

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