2010

Global Labor and Employment Law for the Practicing Lawyer

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Lewis & Clark Law School
Legal Research Paper Series

Paper No. 2010 - 20

Cross-Border Employment Contracts, Choice of Law, Choice of Forum, and the Enforcement of Cross-Border Judgments in the European Union

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Global Law and Employment Law for the Practicing Lawyer (forthcoming)

61st Annual New York University Conference on Labor
June 5-6, 2008
Presentation of Professor Henry H. Drummonds
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CROSS-BORDER EMPLOYMENT CONTRACTS, CHOICE OF LAW, CHOICE OF FORUM, AND THE ENFORCEMENT OF CROSS-BORDER JUDGMENTS IN THE EUROPEAN UNION

I. INTRODUCTION

The global labor markets require workable and predictable law, forums and jurisdiction, and recognition of judgments for the enforcement of cross-border employment contracts. When a U.S. manager posts to the United Kingdom pursuant to a contract signed in New York, will British or New York law apply to disputes arising from that employment contract? Is the result different if the U.S. citizen performs her work in France or Germany? May the parties choose the applicable law in the contract? May the parties contractually choose the forum or jurisdiction for resolving the dispute and will that affect the applicable choice of law? Will a judgment in one EU country be honored in other EU countries and the U. S., and, in the event the employer sues in the U.S., will courts in the European Union honor a U.S. judgment? How much autonomy is allowed to the parties of the employment contract in working out these rules? What are the considerations ex ante in the drafting of the employment contract on either side of the Atlantic? The plethora of ABA and local bar association sponsored CLE seminar presentations in recent years on these topics reflect the importance of these matters for practicing lawyers.[1]

[1] E.g. "Multi-National Expansion and Relocation" (ABA Section of Labor and Employment Law , 2008), "Introduction to International Labor and Employment Law: What Are the Roles of Labor and Employment Lawyers in the Global Workplace?", ABA Section of Labor and Employment Law, 2008), "Cross Border Employment,

This paper does not purport to give definitive answers to these questions, but rather seeks to provide a foundation for those answers by understanding the emerging conflicts of law revolution in the European Union. Not only will the new EU rules determine many cross-border employment contract issues, but those rules further provide a model to a more predictable system applicable in the emerging world markets for labor.

II. THE FIRST AND SECOND CONLICTS OF LAW REVOLUTIONS

Traditionally, private international law rules affecting these questions found expression at the national or sub-national level. Choice of law rules in the United Kingdom[2] might vary from those in Italy, and within the United States, New York, California, and other states applied their own choice of law and forum rules individually (though often influenced by the Restatements).[3] Global labor markets make this traditional system outdated in the realm of international contracts including employment contracts.

Not only does this multiplicity of conflicts of law domains create confusion about the governing law, but chaos reigns at the doctrinal level. Thus a half century ago the great Torts scholar, William Prosser, referring to the ocean-like literature created by the professortariat, once described conflicts scholars as "learned but eccentric professors who theorize about mysterious

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Discrimination, Non-Competition, and Privacy: A Practical Look", (ABA Sections of International Law and Labor and Employment Law, 2007), "International Employment Law Conference" (San Francisco Bar Association, 2006).

[2] Indeed, the conflict rules within the United Kingdom vary between Scotland, England, and Wales. See generally, Dicey, Morris, & Collins, The Conflict of Laws, (14th edition, 2006); K. J. Wood, Conflicts of Laws Within the UK (Oxford, 2007).

[3] Perhaps the leading current academic authority on American choice of law rules has been Willamette Law School Dean Symeon C. Symonides. See generally, S. Symeonides, The American Choice of Law Revolution: Past, Present, and Future, Volume 4 The Hague Academy of International Law Monographs (Martinus Nijhoff Publishers, 2006). Dean Symonides has published more than a dozen books and dozens of articles on conflicts of law issues including his annual surveys of American cases in the American Journal of Comparative Law. E.g., "Choice of Law in the American Courts in 2007, 56 Am. J. of Comp. Law. (2008). See generally, Restatement (Second) of Conflict of Law , Section 196.

matters in a strange and incomprehensible jargon."[4] Fifty years later the preeminent European conflicts scholar, Friedrich K. Juenger, described modern conflicts law in 2000 as "gibberish."[5]

Prior to the mid-20th century, American conflicts of law concepts were often expressed as rules: for example, torts required application of the law of the place of injury (wherever the tortuous conduct occurred, while contract validity issues looked to the law of the place of contracting and contract performance issues required the law of the place of performance. This conflicts regime found its expression most famously in the First Restatement.[6]

During the second third of the twentieth century this traditional rule-based conflicts regime gave way under sustained attack from academic critics and judicial reluctance to follow the rules in particular circumstances. The academics argued for a generation for a more "interest based" analysis to replace what they perceived as the wooden nature of the older rules based system[7] Thus was born the first conflict of laws "revolution." Several New York cases embraced, bit by bit, the newer interest -based approach.[8] As this development occurred in other states as well,[9] the Restatement of Conflicts, Second (1969) emerged as a compromise, albeit a

[4] Prosser, "Interstate Publication", 51 Mich. L. Rev. 958, 971 (1953).
[5]Juenger, "A Third Conflicts Restatement?" 75 Ind. L. J .403 (2000). Both the Prosser and Juenger quotes, among others, were noted Hillel Y. Levin in "What Do We Really Know About the American Choice of Law Revolution", 60 Stan. L. Rev. 247, at 248 (2007). While Prosser and Juenger were referring to American conflicts law, the European conflicts labyrith drew criticism as well. Mathias Reiman, Conflict of Law In Western Europe: A Guide Through the Jungle (1995). See also, F. Juenger, Selected Essays on the Conflicts of Laws (2001) ix (Conflicts rules are"[r]egarded as an arcane science far removed from real world concerns, and characterized by an esoteric vocabulary, [private international law] attracts speculative minds whose forte is not necessarily common sense."

[6] Restatement of the Law, Conflicts of Law (ALI, 1934). P. Herzog, "The 'Conflict of Laws Revolution in New York—And Where Did It Leave Us", 50 Syracuse L. Rev. 1279, at 1279-1280 (2000).
[7] S. Symeonides, The American Choice of Law Revolution: Past, Present, and Future (Vol. 4 Hague Academy of Int'l Law Monographs, 2006), pp.10-31.
[8] Among these were Auten v. Auten 124 N.E.2d 99 (1954), Babcock v.Jackson 230 N.Y. S.2d 114 (App. Div. 1962); Long v. Pan Am. World Airways 213 N.E. 2d 796 (N.Y., 1965); Schultz v. Boy Scouts 480 N.E.2d 679 (N.Y. 1985); Cooney v. Osgood Machinery 612 N.E.2d 233 (N. Y. 1985); Padula v. Lilarn Props. Corp. 644 N.E. 2d 1001 (N.Y. 1994); see generally, Herzog, supra note 6, at 1281-1295.
[9] Symeonides, supra note 7, pp. 38-62.

compromise leaning to the more indeterminate framework of interest analysis.[10] But as Professor Herzog of Syracuse Law School and others note, this sometimes lead to a "confusing" body of conflict doctrine,[11] making it hard to predict result in future cases and offering little guidance to parties seeking to structure their relationship under predictable legal frameworks.

Both in the European Union and in the United States leading authorities now speak of the need to balance flexibility with predictability. And especially for the law of contracts, including employment contracts, party autonomy to select the applicable law, and to specify mechanisms and forums for resolving disputes, receives increasing support.[12] This has been true in New York,[13] in the U.S. generally,[14] and, as will be shown below, in Western Europe.[15] But both in the U. S. and in the EU, in the employment context, the principle of party autonomy gives way to compromise driven by concern for the protection of the weaker party, which is to say in employment law, the employee.

As will be shown below, however, the European Union has made far more progress toward the goal of a workable, predictable, and internationally accepted system of private international law than has the United States.[16] Oxford Professor Adrian Briggs, a leading UK

[10] As Dean Symeonides points out, the American Revolution led not to a monolithic analysis in the US but rather to "several parallel movements" embodying "alternative approaches that continue to vie for judicial following." Symeonides, supra note 7, at 63. A key concept in many of the cases is that the choice of law should in the absence of party choice follow the law of the state with the "most significant relationships" with the facts of the case.
[11] Herzog, supra note 6, at 1310; Hillel Y. Levin, "What Do We Really Know About the American Choice of Law Revolution 60 Stan. L. Rev. 247, 249 (2007) ; William L. Reynolds, "Legal Process and Choice of Law", 56 Md. L. Rev. 1371 (1997); Larry Kramer, "On The Need For A Uniform Choice of Law Code", 89 Mich. L. Rev. 2134, 2148-2140 (1991).
[12] Third Millenium, p. 197.
[13] Eg. Haag v. Barnes 175 N.E.2d 441 (1961); Freedman v. Chemical Const. Co. 372 N.E.2d 12 (1977) (discussing party autonomy to choose Saudi Arabian law but applying New York law because of greater New York interests where the contract was made in New York between two New York parties.); Beatie and Osborn v. Patriot Scientific Corp. 431 F. Supp.2d 367, 377-378 (S.D.N.Y., 2006).
[14] Restatement Second, Conflict of Laws Section 187 (Contracts generally), Section 196 (Contracts For Rendition of Services [Including Employment Contracts]) (ALI, 1971).
[15] Part II-A and II-B, infra.
[16] Scholars continue to debate this issue, however. Duke Symposium, Feb. 2008, "The New European Choice of Law Revolution: Lessons For the U.S."

authority on private international law explains the driving force for these developments this way: "[T]he completion of single market can only be assisted by an approach to civil jurisdiction, choice of law, and recognition of judgments which allows the parties to plan in advance and to know that their agreement is reliable. [The EU regulations] also impose requirements and restriction, and in certain respects make inadmissible arguments which the common law conflict of laws would not have excluded. Yet it is said, over and over again, that their principal justification is to provide clarity and legal certainty …."[17]

What is true for the emerging European system applies as well to the world markets for labor now emerging. This new EU system points the ways to a predictable private international law regime embracing the United States and other nations as well.

III. THE EU PRIVATE INTERNATIONAL LAW SYSTEM

Over the past several decades the European Union (and its predecessors) gradually created a Union wide regime of private international law. This regime covers three distinct topics: (1) choice of law, (2) choice of forum or jurisdiction, and (3) the enforcement of judgments. Recent developments accelerate this process.

A. Choice of Law

1. The Rome Convention

Starting (for our purposes)[18] with the "Rome Convention" of 1980 (not generally effective until 1991),[19] EU nation-states adopted choice of law rules for contracts based largely

[17] A. Briggs, Agreements On Jurisdiction and Choice of Law (Oxford University Press, 2008) p. 147.
[18] The antecedents of the Convention actually go back to 1967. Dicey et. al., The Conflict of Laws, volume II , chapter 32, p. 1541, paragraph 32-009 (14th edition, 2006).
[19] Convention On The Law Applicable To Contractual Obligations, opened at Rome on June 19, 1980, Official Journal L. 266 09/10/1980 p. 0001-0019, 80/934/EEC, 1980 WL 115585, effective April 1, 1991. Even before it came into affect, the Convention was incorporated into the legislation of some EC states (Germany, Luxembourg,

on the principle of party autonomy. The Convention, however, departed from the autonomy principle for certain types of contracts, most notably employment and consumer contracts. Since this framework required each participating country individually to ratify a treaty through their domestic laws,[20] this stage of the development technically retained the nation-state as the primary source of choice of law rules.[21] On the other hand, as noted by Cambridge Professor Adrian Briggs, once the Convention was in effect the question whether a document formed a contract under the Convention became a matter of European not national laws.[22] Although the Convention will soon be replaced with an EU regulation ("Rome I"), it continues in effect within the EU until 18 months after the final adoption of the now pending Rome I choice of law regulation. Further, the UK's participation in the pending new regulation remains up in the air[23] and until and unless the UK "opts in" to the coverage of Rome I, the Convention will continue to govern in the UK.[24]

Article 3 (1) adopts party autonomy as the central tenet on which the Convention rested: "A contract shall be governed by the law chosen by the parties."[25] Article 2 provides that the

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Belgium, Denmark) and provided the foundation for judicial decisions in France and the Netherlands and the United Kingdom. Dicey, supra note 8, at 1542, paragraph 32-011

[20] The United Kingdom, for example, implemented the Rome Convention by the Contract (Applicable Law) Act (1990). As permitted in the Convention, the UK further devolved the choice of British law to include Scots, Welch, and English law. See also, Rome I Regulation, infra TAN__, Art. 22(1): "Where a state comprises of several territorial units, each with its own set of rules of law with respect to contractual obligations, each territorial unit shall be considered as a country for the purpose of identifying the law applicable under this regulation." Where there is a conflict between different territorial units within a member state, the state is not obligated to apply the Convention. Art. 22 (2).

[21] Juenger at 190.("unification through multilateral treaties is no panacea"). In Europe the drive to achieve uniformity on choice of law and the forum for dispute resolution springs from a shared commitment to the a unified and common market for goods, services, and labor.

[22] Adrian Briggs, The Conflict of Laws (Oxford University Press, 2002), p. 151. Denmark has also declined to opt in to the pending Rome I regulation. Rome I, Art. ___.

[23] Infra Part II, _____.

[24] Adrian Briggs, Agreements On Jurisdiction and Choice of Law, p. 391, 10.18 (Oxford, 2008). Infra Part II-_____.

[25] Certain matters were expressly excluded including, most noteably, "arbitration agreements and agreements on the choice of court". Rome Convention Article 1 (2). The party autonomy principle by no means sprang anew from the Convention. It was already imbedded in the law of several EU nations and a leading British writer, Adrian Briggs, asserts that it was pioneered in the UK. Briggs, supra note _____.

parties were free to specify the law of a non-member nation—for example, a state of the United States. The parties' choice of law required manifestation with "reasonable certainty" but an express writing was not required. Art. 3 (1).[26] However, Art. 3 (3) embodies a compromise of party autonomy, providing it could be overridden in the case of "mandatory rules" (rules which cannot be contractually waived).

Article 6 governs individual employment contracts. Art. 6 (1) allows the parties to choose the applicable law but provides their choice "shall not have the result of depriving the employee of the protection afforded to him [sic] by the mandatory rules of law which would applicable …in the absence of choice." This limitation on party autonomy arises from the belief embedded in the European law generally that "the employee deserves legal protection *vis a vis* the employer, on account of the latter's stronger socio-economic position and superior bargaining power."[27] For example, although the British law did not directly conceptualize the concern with mandatory legislation as a limitation on party autonomy in choice of law contracts, concerns with "inequality of bargaining power" in certain contexts like consumer and employment contracts found expression in the common law idea that mandatory rules constituted directions to British judges to follow the mandatory rules whether "the contract was governed by a particular law, would be governed by a particular law but for the choice made by the parties, or without regard to the choice of law."[28]

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[26] See also Rome Convention Articles 8 and 9 concerning the formation of a choice of law agreement and Article 10 defining the governing scope of the chosen law.

[27] Maurice V. Polak, " 'Laborum Dulce Lenimen' ? Jursisdiction and Choice-of-Law Aspects of Employment Contracts" , in Enforcement of International Contracts in the European Union: Convergence and Divergence Between Brussel (J. Meeusen, M. Pertegas, and G. Straetman eds., 2004) pp.324-325 (12.4-12.5) (Research Project funded by the EU Commission including reports of fourteen professors at eleven European universities); Rome I Regulation, infra note ___, Preamble paragraph 23.

[28] Briggs, supra note 12, at 382-383 (10.03), 388 (10.13). The United States Code expresses (since 1935) a similar idea in the National Labor Reltations Act , 29 USC ____, and in the Fair Labor Standards Act, 29 USC ____. The rights conferred by these and other statutes (for example Title VII, the ADEA, and the ADA) are non-waiveable prospectively, even if an employment contract chose the law of, say, Myramar.

"Mandatory Rules" were further elaborated in Rome Convention Art. 7 (1). "When applying … the law of a country, effect may be given to the mandatory rules of ANOTHER country with which the situation has a close connection, if …under the law of the latter country, those rules must be applied whatever the law applicable to the contract." Further the law of the forum applies "where [the rules] are mandatory irrespective of the law otherwise applicable to a contract." Reading Art. 7 and the employment contract provisions of Art. 6 together, the country "in which the employee habitually carries out his work" presumptively is the "close connection" country whose mandatory employment law must be applied. This is sometimes known as the *lex loci laboris*.

In the absence of a choice of law agreement in an international employment contract, Rome Convention Art. 6 (2) provides default rules. The presumptive default rule in Art. 6 (2) (a) makes the governing law for an employment contract the law of the country where the employee "habitually carries on [his or her] work." This makes the *lex loci laboris* control not only the application of the mandatory employment law rules, but all issues relating to the employment contract for which there is no choice of law clause. Thus the mandatory employment law of the country in which the employee habitually carries on her/his work normally applies whether or not the parties choose the law in their contract.

Alternatively, if work is not habitually carried out in any one country, Art. 6 (2) (b) provides the governing law shall be the country "in which the place of business through which [the employee] is engaged is situated." Finally, Art. 6 provides an "escape" clause of vague application: where it appears "from the circumstances as a whole that the contract is more closely connected with another country [,]" that country's law governs the contract.[29]

[29] This might apply, for example, to employment on an oil rig platform in the North Sea.

Under these provisions an international employment contract choosing, say, New York law will be effective, but an EU court may nevertheless apply mandatory (non-waivable) employment laws of the host country where employment habitually occurs in that country. This might, ironically, entitle the employee to "pick and choose" more favorable mandatory host country employment laws, while also asserting the right to application of more favorable New York employment law rules under the parties' choice of law clause. For example, an employee working in London, Brussels, or Paris might assert the right to holiday bonus pay or severance pay under the "mandatory" employment laws of the host country, and also assert the right to recover damages under New York discrimination law, the law chosen by the parties.[30]

2. The Rome I Regulation

Since 2005, the EU has been in the process of adopting the so-called "Rome I" regulation.[31] Rome I, proposed by the EU Commission in 2005, was approved with certain changes by the European Parliament on Nov. 29, 2007.[32] The EU Council scheduled, but postponed, sessions for approval and a "final text" has been posted.[33] The Rome I regulation will constitute binding EU legislation which EU nations will be obligated to apply on choice of law questions for contracts, including employment contracts, entered into after 18 months from its final adoption by the Council and Parliament. The Regulation seeks to move the EU toward a more rule-based approach to choice of law with greater party autonomy and less American style interest balancing, and thus achieve more uniform and consistent results.

[30] Polak, supra note 27, at 334-335 (12.30-12.31). As Polak concedes, however, this issue generates ambiquous results under the Rome Convention and is thought to be a matter of judicial interpretation---ultimately by the European Court of Justice.
[31] Proposal of the European Commission, 2005/0261 (COD).
[32] EU Parliament website, Texts Adopted by Parliament, Nov. 29, 2007 (COM (2005) 0650-C6-044/2005-2005/0261 (COD).
[33] 2005/0261 COD), March 31, 2008.

a. Participation of the United Kingdom and Denmark In Rome I

The United Kingdom and Denmark thus far have declined to "opt in" to the regulation under their reservation of rights to EU legislation under the Treaty of Amsterdam.[34] Although Rome I generally replaces the Rome Convention,[35] the Convention and not the Rome I Regulation will continue to apply in those two countries unless they opt in. Apparently the UK objections center on the consumer contract provisions of Rome I which in the earlier versions provided the consumer place of habitual residence as the choice of law.[36] The Confederation of British Industry website lists documents in which the CBI explains its opposition to Rome I. These objections appear to center on the fear that Rome I will introduce new "legal uncertainties" in cross-border contracts: CBI fears that uncertainty exists around the concept of mandatory laws, especially those of countries with a "close connection" to the contract. The consumer provisions are mentioned as a matter of concern, but the employment provisions are not mentioned explicitly.[37]

UK rejection of Rome I may be short-lived. On April 2, 2008 the British Ministry of Justice announced its approval of Rome I and initiated a formal comment process on the proposed regulation in the UK which closes on June 25, 2008. The report states that Rome I substantially follows the Rome Convention as to employment contracts and states that party autonomy is strengthened from the earlier version of the proposed regulation with respect to consumer contracts.[38] A press release explains the Labor Government's newly found support for

[34] See Paragraph 46 of the "Whereas" clauses of the most recently posted version of the regulation.

[35] "This regulation shall replace the Rome Convention in the Member States, except as regards the territories of Member States that fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty." Rome I regulation, Art.24 (1).

[36] Briggs, supra note 12, p. 391-393.

[37] www.cbi..org.uk/ [Company Affairs-Rome I]/

[38] See UK Ministry of Justice webcite [google UK Rome I], Consultation Paper , CP05/08, 2 April 08 and related press releases and statements.

Rome I as follows: the regulation "will clarify which law applies if a dispute arises over a contract made between people or businesses from different countries….[F]ollowing intense negotiations a substantially revised and hugely improved version has now been agreed." The Parliamentary Under-Secretary further explained that: "The original version was not right for Britain, but the new and much improved regulation will…ensure a level playing field for British business in Europe."[39] Barring a change in the political decision taken, it thus appears that the UK may indeed soon opt in to the coverage of Rome I.

Though the British Justice Ministry report describes the changes as minimal, the Rome I Regulation does not simply replicate the wording of the Rome Convention as to employment contracts.

b. Mandatory Rules / Overriding Mandatory Rules As Limitations On Party Autonomy

Both the Convention and the pending Rome I Regulation allow considerable party autonomy but condition it with respect to certain non-waivable rights. Different language is used in the two documents to express this limitation on party autonomy. These changes have uncertain effect.

The1980 Convention provides that a contractual choice of law "shall not have the result of depriving the employee of the protection afforded…by mandatory rules [;]" these rules are presumptively the rules of the host country (the "country in which the employee habitually carries out his [or her] work in performance of the contract").[40] Under the pending Rome I Regulation party autonomy cannot "result [in] depriving the employee of the protection afforded

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[39] Ibid.
[40] Rome Convention Art. 6 (1) and (2) (a). Art. 19 defined the related term "habitual residence" of business entities.

to him [or her] by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable …."[41] Note that the Regulation omits use of the phrase "mandatory law," using instead the phrase "provisions that cannot be derogated from" to express the idea of non-waivable rights.[42] (As with the Convention, the reference to non-waivable rights is presumptively to the "law of the country in which … the employee habitually carries out his [or her] work in performance of the contract.")[43] While this language change seems at first blush innocuous, it may also be seen to expand the realm of party autonomy in employment contracts.[44]

The Regulation elsewhere drops the term "mandatory rules" in the Convention and uses instead the phrase "Overriding Mandatory Provisions."[45] "Overriding Mandatory Provisions" are "provisions …regarded as crucial by a country for safeguarding public interests…to the extent they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable under this Regulation."[46] The forum country may apply its "Overriding Mandatory Provisions."[47] Additionally they may be applied where arising from the "law of the country where the obligations … [are performed] INSOFAR as those overriding mandatory provisions render the performance of the contract unlawful."[48] This appears to condition the

[41] Rome I Regulation Art. 8 (1).
[42] Rome I Regulation Art. 8 (1) , see also Preamble paragraph 35.
[43] Rome Regulation Art. 8 (2); see also Preamble , paragraph 34.
[44] E. O'Hara and L. E. Ribstein, "Rules and Institutions in Developing a Law Market: Views from the U.S. and Europe", draft paper Feb. 27, Ilinois Law and Economics Research Papers Series, Paper No. LE08-010 [for Tulane-Duke Symposium US/EU COL Feb. 2008], p. 14 .
[45] Compare Convention Art. 6(1) and Art. 7("Mandatory Rules') to Regulation Art. 8 (1) and Art. 9. Convention Art. 7 (1) was controversial, allowing "the mandatory rules of another country with which the situation has a close connection, if …under the law of the latter country, those rules must be applied whatever the law applicable to the contract." The UK and Germany, among others, opted out of this provision under the 1980 Convention. O. Lando and P. A. Nielsen, "The Rome I Proposal" , 3 J.of Private Int'l Law 29, at 45 (2007).
[46] Rome I Regulation, Art. 9 (1).
[47] Rome I Regulation Art. 9 (2).
[48] Rome I Regulation , Art. 9 (3)

application of "overriding mandatory provisions." The Preamble to the Regulation further states that:

> "The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with the [EC Directive] concerning the posting of workers in the framework of provision of services."[49]

The provisions of the "posting directive" referred to in the Preamble include: (1) maximum work periods and minimum rest periods, (2) the minimum paid annual holidays, (3) the minimum rates of pay, (4) the "conditions of hiring out of workers," (5) health, safety , and hygiene at work, (6) protective measures …[for]pregnant women or women who have recently given birth, or children or young people," and (7) equality of treatment between men and women and other provisions of non-discrimination.[50]

The most desirable interpretation is that the Preamble provision identifies with more specificity the locus laboris rules that must be applied whatever the parties' choice of law. However, Professor Polak, whose report is among the reports funded by the European Commision, suggested a more specific reference to the Posting Directive rules in the text of Art. 6. It is not known why the drafters of the current, and apparently final, draft of the Regulation choose to place this reference only in the Preamble.[51]

c. Rome I Choice of Law In the Absence of Choice By the Parties

[49] Preamble paragraph 34. The "posting directive" is Directive 96/71/EC of the European Parliament and of the Council of Dec. 16, 1996; OJ L 18, 21.1. 1997.
[50] Directive 96/71/EC; Polak, supra note 16, at 327-328.
[51] Polak, supra note 27, at 328, 338.

Of course it is always an option not to specify choice of law in an employment contract. Rome I continues presumptive rule of the Convention that the host country law controls—the country where the employee habitually carries out the work.[52] Where there is no habitual place of work, the controlling law is the law of the country where the place of business, through which the employee was engaged, is situated.[53] Finally, there is an escape clause: where the "contract is more closely connected" with another country, the law of other country prevails.[54] These provisions substantially replicate the provision in the 1980 Rome Convention but it is more explicit in Rome I that the escape clause does not defeat party choice of law; the escape clause is limited to situations where the parties choose not to specify the applicable law to their contract.

d. Temporary Employment Under Rome I

The 1980 Convention provided that the place of habitual employment constituted the default rule "even if [the employee] is temporarily employed in another country."[55] The pending Rome I Regulation has again added newer language: "The country where the work is habitually carried out shall not be deemed to have changed if [the employee] is temporarily employed in another country."[56] The Preamble elaborates: "work…should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad."[57] Although Professor Polak recommended a one year limit on temporary employment within Rome I Art. 6 in his report (as did the general report of the commissioned studies), [58] the

[52] Rome I Art. 8 (2).
[53] Rome I Art. 8 (3).
[54] Rome I Art. 8 (4).
[55] Rome Convention Art. 6 (2) (a).
[56] Rome I Regulation Art. 8 (2).
[57] Preamble paragraph 36.
[58] Polak, supra note 27, p.329, paragraph 12-14; Meeusen, supra note 16, at p. 16, paragraph 56.

final draft does not contain such a bright line one-year limit.[59] (The posting directive discussed above does contain a one-year reference period.)[60] Further, "the conclusion of a new contract of employment …should not preclude the employee from being regarded as carrying out [his or her] work in another country temporarily."[61]

It thus appears that an employee can be posted to another country on a temporary basis and the applicable law will remain the country of origin (habitual employment) so long as the employee is "expected" to resume working in the "country of origin." There is no bright line rule for duration of a "temporary" assignment though EU directives establish a one-year reference in the posting and social security context. A posted employee is entitled to the 7 listed provisions of the host country but the employee's contract will otherwise fall under the law of the place of habitual employment.

3. "Rome II"—Choice of Law in Non-Contractual Matters

Although our focus is on choice of law for cross-border employment contracts, another EU regulation already exists for choice of law issues arising from non-contractual obligations.[62] Rome II applies to, among other matters, torts cases. Enacted on July 11, 2007 Rome II becomes effective on January 11, 2009.[63] It applies to "events giving rise to damage."[64] The UK will be covered.[65] Of course in the U.S. a number of tort claims can arise in employment

[59] A one year limit is applied to other aspects of cross-border assignments in the EU. For example maintenance of social security status in the country of origin is limited to 12 months. Regulation1408/71 – Art. 14 (1) (a) . H. Verschueren, "Cross Border Workers in the European Internal Market: Trojan Horses for Member States' Labor and Social Security Law?", 24 Int'l J. of Comp. Labour and Industrial Relations , Issue 2 (2008), p. 21
[60] Posting Directive, supra note 39, 96/71/EC, Art. 3(6).
[61] Preamble paragraph 36.
[62] EU Regulation 864/2007, 2007 O.J. (L 199) 40 known as "Rome II."; see generally, Briggs, supra note 12, at 417-420, paragraphs 10.70-1074.
[63] Rome II, Art.32.
[64] Rome II, Art. 32. Rome II will apply to events occurring on or after August 20, 2007 and in that sense is already in effect. Briggs, supra note 12, at 417, paragraph 10.70.
[65] Rome II, Art. I, (4). Denmark will not be covered.

settings, including wrongful discharge in violation of public policy, and defamation.[66] And many non-contractual claims can arise from statutes including discrimination claims and whistleblower claims like those in Sarbannes-Oxley.[67] Rome II covers both torts occurring within and outside the EU.[68] It is thus a "dramatic step in the federalization or 'Europeanization' of private international law…in the EU member states, a step that has been described as the European conflicts revolution."[69]

Party autonomy again plays a role. Although Rome II generally makes the law of the place of damage controlling,[70] it permits an express choice of law by the parties **after** the injury.[71] Where the defendant and plaintiff share a country of "habitual residence" at the time the damage occurs, the law of the country of joint habitual residence applies.[72]

Moreover, an escape from the place of damage and place of common domicile rules applies where the tort is "manifestly more closely connected" with another country.[73] "A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract that is closely connected with the tort/delicti in question."[74] Thus arguably applies to employment contracts.[75]

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[66] Privacy rights and defamation, however, are excluded from Rome II. Art. I, (2) (g).
[67] __U.S.C.___.
[68] Symeonides, "Rome II and Torts Conflicts: A Missed Opportunity", 56 Am. J. of Comparative Law TAN 5-6____(2008)
[69] Ibid.
[70] Rome II, Art. 4. This is known as the lex loci damni. One American commentator calls this "nothing but a restatement of the traditional lex loci delicti rule , with its 'last event' subrule." Symeonides 56 Am. J. of Comparative Law ___ (2008). Dean Symeonides' article sharply criticizes the rule as "equally unfair to the plaintiff in some cases as to the defendant in others." 56 Am. J. Comp. Law at TAN 80-81.
[71] Rome I, Art. 14 (1) (a).
[72] Rome II, Art. 4 (2). Art. 23 defines the place of habitual residence.
[73] Rome I, Art. 4 (3). "Where it is clear from all the circumstances of the case that the tort/delicti is more closely connected with a country other than that indicated in paragraphs 1 and 2, the law of that other country shall apply."
[74] Ibid.
[75] Preamble paragraph 31 provides: "To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice of law applicable to non-contractual obligations….Protection should be to weaker parties by imposing certain conditions on the choice."

Art. 16 ("Overriding Mandatory Provisions") of Rome II allows the law of the forum to control in "situations where they are mandatory …." Exceptions based on "public policy and overriding mandatory provisions" may prevent the application of the law otherwise provided in Rome II where "exemplary or punitive damages of an excessive nature" are awarded.[76]

B. Brussels I—Choice of Forum / Jurisdiction

Choice of law raises vexing questions for cross-border employment contracts, but there are two other components of the EU private international law system to consider: choice of jurisdiction/forum, and recognition of judgments. We continue with the question of the forum or jurisdiction to resolve a dispute arising out of an employment contract. The Brussels Convention of 1968[77] was the beginning of the European regime for harmonizing the law of jurisdiction. It was followed by the Lugano Convention in 1988.[78] Both of these required the ratification of each European participant and were analogous in that sense to the Rome Convention. Together the two jurisdictional/recognition conventions form the backdrop for the Brussels I Regulation which now largely replaces them.[79] Brussels I was effective March 1, 2002. Again it applies to the UK but not Denmark.[80]

In general Brussels I allows suits in the EU country where the defendant is domiciled.[81] However, other bases for jurisdiction exist in the Regulation. Under Article 5 (5) contract defendants may also be sued in the place of performance.[82] A company domiciled in one EU state may be sued in another EU country in which it maintains a branch office from which the

[76] Ibid.
[77] Convention of Sept. 27, 1968 on Jurisdiction and Enforcement of Judgment in Civil and Commercial Matters (aka EXX Convention), OJ L./299/32.
[78] Convention of Sept. 16, 1988 On Jurisdiction and Enforcement of Judgment in Civil and Commercial Matters (aka EVEX Convention),
[79] Council Regulation EC No. 44/2001 of Dec. 22, 2000.
[80] Brussels I, Art. I (3).
[81] Brussels I, Art. 2
[82] Brussels I, Art. 5 (1).

dispute arose.[83] And, under Art. 4, a defendant not domiciled in any EU state is subject to the rules of jurisdiction of each EU state (rather than Brussels I),[84] and any plaintiff domiciled within any EU state may utilize the courts of that country to the same extent as its citizens.[85] This apparently means that if an EU state like France allows its citizens to sue defendants not domiciled in the EU, any person domiciled in France may use the courts of France to sue defendants not domiciled in the EU.

Employment contracts, however, fall within the special provisions of Art. 18-21. Article 18 provides, however, that the rules for employment contracts are "without prejudice" to jurisdiction under Art. 4 and Art. 5 (5) as reviewed in the preceding paragraph. In addition to those bases for jurisdiction, employers can be sued: (1) where they are domiciled (in accordance the general rule), (2) in the country in which the employee "habitually carries on [his or her] work," or (3) if there is no one habitual country of employment in the EU country "where the business which engaged the employee is or was situated."[86] Under Article 18 (2) an employer is "deemed" domiciled in the EU state in which it has a "branch, agency, or establishment."[87] Thus Brussels I provides many bases for jurisdiction against an employer.

This treatment contrasts with the limited jurisdictional provisions for suits against employees. "An employer may bring proceedings only in the courts of the [EU country] in which the employee is domiciled."[88]

The parties may, however, vary these jurisdictional rules for employers and employees by agreement. Article 23 generally allows the parties to select a jurisdiction with exclusive authority

[83] Brussels I, Art. 5 (5).
[84] Brussels I Art. 4 (1).
[85] Brussels I, Art. 4 (2).
[86] Brussels I, Art. 19.
[87] Art. 18 (2).
[88] Art. 20 (1).

to adjudicate disputes ("prorogation"). But, once again the European philosophy that employees require special protections as the weaker party in the relationship finds expression.[89] Thus, Article 21 provides that the jurisdictional provisions for employment contracts may be varied "only" by an agreement entered AFTER the dispute has arisen, or by an agreement allowing THE EMPLOYEE to bring suits in courts not covered by the employment provisions of Brussels I.[90]

1. Rome I and Brussels I As A Coherent System

Nothing in the Brussels Convention or Regulation binds the courts of non-EU nations. However, as a practical matter in cross-Atlantic postings, the provision for jurisdiction over employers in the EU country where the employee habitually performs the work will most often confer jurisdiction in the EU. Nothing prevents parallel jurisdiction in, say, the courts of New York, but doctrines such as comity , **forum non conveniens**, and "**closest connection**" should most often cause a U.S. court to decline to hear the case.

The provisions of Rome I for contractual choice of law and Brussels I for jurisdiction/forum selection contain obviously congruent concepts for employment contracts. Rome I makes the place of habitual employment the presumptive choice of law for employment contracts.[91] Brussels I confers jurisdiction in the Member state (among others for purposes of claims against employers) "where the employee habitually carries out [his or her] work."

[89] Brussels I, Preamble paragraph (14): "The autonomy of the parties to a contract, other than an insurance, consumer, or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds for jurisdiction laid down in this Regulation."

[90] The Brussels Convention contains similar provisions in Article 17 (employers can invoke jurisdictional agreements only if signed after the dispute arose).

[91] The American Restatement Second follows a similar rule for employment contracts: in the absence of an effective choice of law by the parties, the law of the state "where the contract requires that the service…be rendered" presumptively applies. It is overcome only where "with respect to the particular issue, some other state has a more significant relationship…." Restatement Second, Conflicts of Laws, Section 196. As Comment a explains: The

C. RECOGNITION / ENFORCEMENT OF JUDGMENTS

Brussels I provides a baseline rule that a "judgment given in a Member State shall be recognized in the other Member States without any special procedure being required."[92] Similarly, foreign judgments appear immune from attack on the merits: "Under no circumstances may a foreign judgment be reviewed as to its substance."[93] This principle resonates with the American Full Faith and Credit Clause but is more consistently carried out in the EU without the confusing jurisprudence surrounding the U.S. constitutional rule.[94]

The Regulation further provides for enforcement in other Member states through application in the courts of that other EU nation.[95] Jurisdiction for enforcement purposes "shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement."[96] With certain exceptions, the judgment must not be reviewed on the merits nor on the question whether the judgment court was correct in concluding it had jurisdiction.[97]

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importance…of the place where the services, or a major portion of the services, are to be rendered depends somewhat upon the nature of the services involved. This place enjoys greatest significance when the work is more or less stationary and is to extend over a considerable length of time. This is true for a contract of employment on the ordinary labor force of a particular factory…..By way of contrast the place where the services are to be rendered is of lesser importance when the services are to be of relatively brief duration, such as when a workman is employed to do a minor job in a given state, or when the employee's duties will require [him or her] to travel with fair frequency between two or more states. Even in these later situations, the place where the major portion of the services is to be rendered, provided there is such a place, is the contact that will be given the greatest weight in determining with respect to most issues, the state of the applicable law." New York at times has apparently followed the *lex laboris* rule. Denihan v. Finn-Iffland & Co. 256 N.Y. Supp. 801 (1932).

[92] Brussels I Regulation, Art. 33 (1).

[93] Article 36.

[94] [Foreign Judgments Act].

[95] Brussels I Regulation Art. 38 (1). In the UK the registration must occur in England, Wales, Scotland, or Northern Ireland as the UK as such does not have separate courts. Art. 38 (2).

[96] Brussels I, Art. 39 (2).

[97] Briggs, supra note 17, at 332, paragraph 8.66. Article 34 of the regulation states several grounds for not recognizing a judgment: defaults without appearance if the defendant was not served, irreconcilabilty of the judgment with a prior judgment, and where recognition would be "manifestly contrary to public policy" in the forum state. The public policy proviso, however, does not apply to the jurisdiction of the court of origin. Article 35 (3).

Curiously, Article 35 provides an exception to recognition where the judgment conflicts with the special jurisdictional rules for insurance, consumer, and certain miscellaneous matters, but not employment contracts.[98] It thus appears that a judgment in an employment contract case, even if the judgment court lacked jurisdiction under the restrictive rules of Brussels I, must be recognized and enforced in other EU states.[99] This conclusion follows as well from Article 35 (3)'s admonition that "the jurisdiction of the court of the Member State of origin may not be reviewed," and "[t]he test of public policy …may not be applied to the rules relating to jurisdiction."

D. Taking Stock: The EU Private International Law System: Rome I and Brussels I as a Whole

The EU system embodied in Brussels I and pending Rome I Regulation fail the test of perfection but advance the cause of predictability for the parties while at the same time protecting the special interests of employees. One imperfection stems from the curious omission of employment contracts from the list (i.e., consumer and insurance) of judgments that can give rise, in an enforcement or recognition proceeding, to a challenge to the jurisdiction of the court granting the judgment; Brussels I should be amended to add employment contracts to the generic categories included in Article 35 (1) allowing challenges to the jurisdiction of the court which issued the judgment. Another flaw is the failure to provide for jurisdiction in the place of habitual employment in a case brought by an employer.[100] Surely if the place of employment works when the employee initiates jurisdiction, it should also work when the employer first pulls

[98] Brussels I, Art. 35 (1): "Moreover a judgment shall not be recognized if it conflicts with Sections 3, 4, or 6 …" Section 3 (Articles 8-14) deals with insurance contracts, Section 4 (Articles 15-17) deals with consumer contracts, and Section 6 (Article 22) deals with misc. matters. The Article 35 exception to recognition thus appear to omit Section 5's (Articles 18-21) provisions for jurisdiction for disputes over employment contracts.

[100] Polak, supra note 27, at 326, paragraph 12-8.

the trigger. Jurisdiction should not depend on who sues first. Further, limiting employer suits to the country of the employee's domicile might result, for example, in an American company being forced to sue in the Netherlands (if that was the employees domicile), even though Belgium law applies (if the employee worked in Brussels) under the presumption for the *lex loci laboris*. Amending Brussels I to center jurisdiction presumptively in the place of habitual employment would square the jurisdictional principle with the choice of law rule, and allow the court most familiar with the controlling law to interpret and apply it in the typical case. Additionally, Professor Polak's suggestion of a one year bright line cut-off for "temporary" employment makes sense from the standpoint of predictable results.[101]

The fundamental compromise on party autonomy in employment contracts under Rome I and Brussels I presents additional problems. Rome I's insistence that the non-waiveable employment rules of the *lex loci laboris* condition party choice of law autonomy, while unassailable in principle if one accepts the European premise that the employee is the weaker party, seems vague in its precise application and the relationship to the "overriding mandatory rules." Are the postal directive specification of rules exclusive and should they be more explicitly referenced in the text rather than left merely in the Preamble? Further, what happens if the law chosen by the parties offers **more** protection to the employee on a specific point than the *lex loci laboris*? Must the court with jurisdiction compare the lex laboris with the law chosen by the parties to determine the applicable law on the specific issue? Or would it be more predictable and workable for the court to simply apply any mandatory labor rules of the place of employment to the dispute, in lieu of the corresponding rules of the chosen nation-state law? Further, if the law chosen by the parties is, say, New York law, what is the status of federal rules that require extraterritorial application to U.S. citizens employed by entities controlled by U.S.

[101] Polak, supra note 27 at 333, paragraph 12-25.

corporations?[102] These matters should be clarified in future amendments to the two EU regulations.

Still, taken as a whole, the Rome I and Brussels I private international law regime constitutes a major step toward predictable and workable rules that parties to a cross-border contract can rely on.

IV. A BRIEF AND CONTRASTING LOOK AT THE U. S. REGIME

Many similarities exist between U.S. and EU conflicts principles, but in general the U.S. regime is less certain in its application. Under the Restatement Second, the presumed law for employment contracts is the law "where the contract requires the services, or major portion of the services, be rendered."[103] An escape clause exists (as in the EU Rome I Regulation); if "some other state has a more significant relationship to the transaction and parties …."[104]

As with the EU regulations, the parties under the Restatement Second enjoy a conditional right to party autonomy on choice of law: the choice will be disregarded if the chosen state "has no significant relationship to the parties" and if there is "no other reasonable basis" for the choice.[105] The chosen law may also be put aside if "contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue."[106] As with the EU law, the parties may make different choices of law for different issues arising under their contract.[107]

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[102] Eg, Title VII of the 1964 Civil Rights Act, as amended (42 U.S.C. Section ____, or the Age Discrimination In Employment Act as amended (42 U.S.C. Section ____).
[103] Restatement Second, Conflict of Laws, Section 196.
[104] Ibid.
[105] Restatement Second, Conflict of Laws, Section 187.

[106] Ibid.
[107] Restatement Second, Conflict of Laws, Section 187, comment I (as revised 1988).

Unlike the European Rome I Regulation, however, the Restatement Second does not have special provisions for party autonomy in employment contracts. Thus any limitation in the United States on the parties' ability to contract out of certain state labor and employment law standards, for example a state minimum wage, arises not out of the conflicts doctrine per se, but rather out of the otherwise applicable state labor standards regulation directly (in the place of employment).

Unlike the EU Rome I and Brussels I regulations, the Restatement Second binds no states. It can be interpreted and applied, even where adopted by the states, differently. Not surprisingly, employment law cases yield divergent approaches and results in the United States. A few of these will illustrate this point.

One interesting case arose in the S.D.N.Y.[108] A New York corporation hired an American, plaintiff Curtis, as manager for its diamond related activities in Venezuela. Curtis worked in Venezuela from 1977 to 1985 becoming a citizen of that country but being paid from New York. After plaintiff's termination he moved to North Carolina and commenced an action against his former New York employer. Curtis claimed "vacation bonus," "seniority compensation," unemployment compensation, interest and attorney's fees under Venezuela employment laws. In addition to these statutory claims under Venezuelan law, Curtis claimed breach of his contract with the New York employer as to relocation expenses and a contractual bonus payment. Applying New York conflicts law the Court stated that, though the "law in this area is somewhat unsettled," the New York courts would apply the foreign labor standards statutes as to employment in that foreign country. Thus Venezuelan labor standards rules were applicable since that country had a "significant relationship" to the contract and were not "repugnant" to New York public policy merely because they conferred "greater benefits" than

[108] Curtis v. Harry Winston Inc. 653 F .Supp. 1504 (SDNY, 1987).

did New York law. On the contract claims, however, the Court held New York had "the most significant relationship" since the contract was negotiated in New York, Curtis was paid from New York, and since defendant had its principle place of business in New York. (Applying New York statute of frauds law, the court then held the oral contract enforceable since it was capable of being performed within one year.)

The *Curtis* case contrasts with *Randall v. Arabian American Oil Company*. [109] In that case Randall (a Virginia citizen) applied in the U.S. for a job with a Delaware Corporation in Saudi Arabia where he worked 8 years. The Fifth Circuit held that, though Saudi law applied to plaintiff's wrongful discharge case, the exclusive jurisdiction provisions of that law could not dislodge the jurisdiction of the American court in a dispute involving U.S. citizens concerning an employment contract negotiated in the United States.

This writer reviewed ten other cases arising in an employment setting that raised choice of law issues. Most followed a "most significant relationship" analysis.[110] Only one followed the

[109] 778 F.2d 1146 (5th Cir. 1985).

[110] Dailey v. Transitron Electronic Corp. 475 F.2d 12 (5th Cir. 1973) (Texas law applied in wrongful discharge case involving employment in Mexico where both parties were U.S. citizens, where the employee negotiated his contract with officials of the American parent company, and the contract was partially performed in Texas; but the decision was based on what the court inferred from these facts was the parties'intent.); McKinney v. National Dairy Council 491 F. Supp. 1108 (D. Mass, 1980) (In a dispute over which states' statute of frauds rule would apply to a discharge claim alleging breach of an employment contract, New York had the most significant relationship because plaintiff's contract was negotiated there, the first seven years of performance occurred there, and New York was plaintiff's domicile when the contract was made; the court, however, that plaintiff failed to make these arguments on a timely basis and applied the law of the Massachusetts forum in upholding a jury verdict for plaintiff based on a breach of the covenant of good faith and fair dealing claim under Massachusetts law.); Abston v. Levi Strauss 684 F. Supp. 152 (E.D. Tex., 1987) (Texas had most significant relationship to fired salesman's where plaintiff lived there during 11 years of his employment and the bulk of his sales were in the state, rejecting argument that law of state of major portion of performance controlled in dictum); DeSantis v. Wackenhut Corp. 793 S.W. 2d 670 (Tex., 1990) (overruling parties' choice of Florida law in dispute over non-competition agreement, Texas had most significant relationship interest because plaintiff executed contract there, and place of performance was Texas; additionally application of another's state's law in dispute over non-competition agreement in Texas would violate Texas public policy.); Nunez v. Hunter Fan Co. 920 F. Supp. 716 (S.D. Tex, 1996) (In dispute over alleged wrongful discharge of manager of Mexican plant hired by Delaware Corporation Texas had most significant relationship where plaintiff accepted defendant's offer of employment in Texas where negotiation had occurred and place of employment in Mexico was not controlling); McGough v. Nalco Co. 496 F. Supp. 2d 729 (Ill. App. 2007) (W. Va. law governed dispute over non-competition agreement where that state had most significant relationship based because that was

locus of performance rule without invoking other factors.[111] Another held that the parties' choice of law trumped the place of performance in a dispute over post-employment restrictions though it did not change the result.[112]

Each of the American cases can be justified in terms of providing a rational, interest-based analysis. They are, however, far less predictable ex ante than the EU rules embodied in the Rome Convention and Rome I Regulation. It is time for the United States, too, to recognize that conflict of law issues require a rule-based approach, and one that is consistent across the states, as is now the case in Europe. World-wide labor markets and the need for predictable consequences in international employment contracts require no less.

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where employee was working in alleged breach of the agreement and where employee allegedly disclosed trade secrets.).

[111] Mixing Equipment Company v. Philadelphia Gear Inc. 312 F. Supp. 1308 (E.D. Penn., 1970).

[112] Ferrofluids v. Advanced Vaccum Components 968 F.2d 1463 (First Cir. , 1992).