

**ABA INTERNATIONAL LABOR AND EMPLOYMENT LAW COMMITTEE
ANNUAL MEETING PHILADELPHIA 9 NOVEMBER 2007**

**Employment Agreements and Cross Border Employment – Employing “Ex-Pats” Outside the
U.S.: What Obstacles Are Presented and How Do You Overcome Them**

**Governing Law and Jurisdiction in the EU and Conflict of Law Rules
Bryan Dunne, Matheson Ormsby Prentice Solicitors.**

1 INTRODUCTION

As international employment becomes increasingly more common, US employers and employees alike are now operating across an unlimited number of jurisdictions and legal systems. Whilst this is a necessary part of international commerce, it brings with it additional legal issues for both sides. The most immediate of these is determining what law governs the employment relationship, and what the appropriate jurisdiction is in which to resolve the matter in the event of a dispute. The purpose of this paper is firstly, to highlight the exact practical issues that can arise in international employment and secondment and secondly, to briefly examine the basic rules that apply to determine governing law and appropriate jurisdiction in the Brussels and Rome Conventions¹.

2 CONFLICT OF LAWS

Since the establishment of the European Union, cross border employment and secondment has been increasing year on year. Whilst this has brought huge commercial and economic benefits for both employers and employees operating within this environment, it can unintentionally create a complex legal arrangement for the parties. For example, it is not at all unusual for such an employee to be retained by a company established in one member state, for the employee to be based in a second member state, and for the employee to carry out his or her duties throughout a third or indeed a number of other member states. This is the classic conflict of law scenario.

The success of the EU has also seen numerous US employers establish operations within one member state in order to gain access to the combined EU markets. This typically involves employees either being retained directly by the parent company's EU representative entity, or being seconded by the US employer to the EU entity, and in either case having responsibility for a number of member states and carrying out the duties across those territories. The conflict of law issue applies equally in both models.

The main difficulty with such arrangements, however, is the uncertainty over what law governs an employee's contract of employment in the event of a dispute, if so closely connected with a number of different jurisdictions. Equally, it will also be unclear in which jurisdiction the dispute should be litigated. Where the parties agree in advance what governing law and jurisdiction will apply during this period, there is clarity as to how disputes will be resolved and what the employee's overall terms and conditions of employment will be during that period. However, if these matters are not addressed, considerable confusion can arise as to whether or not US or any number of EU jurisdictions' national laws will apply².

1. Both the Brussels and Rome Conventions apply generally to all civil and commercial matters, and are not just limited to employment. The rules applying to employment disputes are exceptions to the general rules, so cannot be applied outside of the employment context.

2. Bearing in mind that EU law is typically initiated at directive level to be implemented by each member state at national level, each member state's local law will vary. In addition, each member state will have its own body of law not derived from EU law. As such, there is no uniform concept of EU law that applies across the EU without any variation.

The conflict of law rules as provided for in the Rome and Brussels Conventions offer clear guidelines for identifying governing law and jurisdiction for employers and employees in such circumstances. The recognition of agreed governing law and jurisdiction clauses under both frameworks also means that employers and employees should be able to predict with realistic certainty what law will apply to such disputes, and where the dispute will be litigated.

3 THE BRUSSELS CONVENTION - DETERMINING JURISDICTION

The rules used to identify appropriate jurisdiction were originally set out in the 1968 Brussels Convention³. The Brussels Convention has since been updated to reflect some of the more important decisions of the European Court of Justice ("the ECJ") in this area since then and the various additions to the EU, by the Brussels Regulations⁴. The Brussels Convention, and the Brussels Regulations in turn, are implemented into local law throughout each EU member state. For example, the Brussels Regulations were transposed into Irish law by the European Communities (Civil and Commercial Judgements) Regulations, 2002. For this reason, the exact application may be different between any two member states, though the same basic principles will apply.

The general rule of jurisdiction under the Brussels Regulations is that a person should be sued in the courts of the state in which he or she is domiciled. Domicile means ordinarily resident, and as such a person will be considered domiciled in a particular state if he or she is ordinarily resident in that state. Similarly, the Brussels Regulations provide that a company or legal person in any such entity is domiciled where it has its statutory seat, central administration or place of business.

Whilst the general rule as set out above will apply in most cases, there are certain exceptions to this. These exceptions are for the most part designed to favour a plaintiff and to protect those seen as economically or socially vulnerable. In the case of employees, for example, it is considered unfair to put an employee to the expense and additional inconvenience of having to issue proceedings outside of his or her home jurisdiction. The Brussels Regulations therefore contain a specific exemption allowing an employee to issue proceedings in any of the following jurisdictions:

- (a) the country in which he or she is domiciled;
- (b) the country in which the employee habitually carries out his or her work; or
- (c) if the employee does not habitually carry out his or her work in any one country, the country in which the business which engaged the employee was or is now situated.

This formula is clearly drafted to cover the modern nature of international employment and secondment arrangements in that it envisages an employee having his or her workplace either in the same location as the employer, in a separate country, or in any number of additional countries. This permissive approach is also in contrast with the fact that employers may only issue proceedings against an employee in the state in which the employee is domiciled. In practical terms, this may not necessarily be the same state as the one in which the employer is domiciled.

4. HABITUAL PLACE OF WORK TEST

-
- 3. The Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters ("the Brussels Convention"). The Lugana Convention is an almost identical arrangement that regulates matters between EU and EFTA member states (Norway, Iceland and Switzerland).
 - 4. These Regulations are not typically referred to as the Brussels Regulations, but this term is used here to clearly differentiate between these Regulations and the Rome Convention dealt with later below.

The application of these rules to multi-jurisdictional issues is well illustrated in *Mulox IBC Limited –v- Geels*⁵. The respondent employee was a Dutch national living in France, employed by an English registered company as its International Marketing Director. The employee used his French home as an office and place of operations, making frequent trips throughout Europe. When in May 1990, his contract of employment was terminated, he challenged the decision before a French court. The French court accepted jurisdiction under the Brussels Convention (as it was then) and ordered the employer to pay damages for breach of contract. The employer appealed the decision on the grounds that the French courts had no jurisdiction to hear the claim since firstly, the place of performance of the contract was not exclusive to any one member state and secondly, the company's registered office was in the UK. This particular point was more relevant to the original convention which provided that contract disputes should be resolved in the place where the obligation in question is performed, and that in the case of a contract of employment that was the place where the employee habitually carries out his/her work. However, the assessment is still central to the Brussels Regulations in determining where an employee habitually carries out his or her work if across a number of member states.

The court referred the point to the ECJ which ruled that the place where the obligation characterising the contract is normally performed is that where, or from which, the employee principally discharges his obligations to his employer. In order to determine the place of performance of a contractual obligation of this nature, the court took into account the fact that the employee fulfilled his duties from an office situated in that contracting state, the employee had established his residence there, that it was the state from which he carried out his activities and to which returned after each business trip. The court further elaborated that in assessing this, it should take account of the need to ensure adequate protection for the employee as the weaker contracting party.

The analysis was supported soon after in *Rutten –v- Cross Medical Limited*⁶. This case concerned a Dutch national and resident employed under a contract of employment with Cross Medical Limited, a UK registered company. This contract contained no provisions as to choice of law or jurisdiction. In the course of his work, Mr Rutten carried out two thirds of his work in the Netherlands, and the remainder throughout the UK, Belgium, Germany and the USA. However, it was stressed that he carried out the preparation and planning for his trips in his Netherlands office, to which he returned after each business trip. In 1991, Cross Medical Limited dismissed Mr Rutten which ultimately lead to a claim against this decision before a Dutch court. The matter of jurisdiction came before the Dutch Supreme Court, which also referred the matter to the ECJ for a preliminary ruling. In particular, the Dutch court asked what were the criteria according to which an employee should be regarded as habitually carrying out their work in any one country. The court ruled that an employee who carries out his work in several contracting states, "*should be deemed to habitually carry out his work in that member state where he has established his effective centre of his working activities*".

In identifying this "*effective centre of working activities*", the court must take into account the fact that the employee spends most of his working time in that contracting state in which he has an office where he organises his activities for his employer and to which he returns after each business trip abroad. The court again laid great emphasis on the fact that he had an office in the Netherlands where he organised his work for his employer and returned after each business trip. This was clearly identified as his effective centre of activities and accordingly was deemed as the place where he habitually carried out his work. The court further reiterated the need to provide proper protection to the employee as the weaker contracting party, by allowing them to bring an action in the least expensive place for the employee to commence proceedings.

The Brussels Regulations also indirectly address the situation most likely to apply to US employers. They state that if an employee enters into a contract of employment with an

5. [1993] ECR I-4075, Case C- 125/92.

6. [1997] ECR I-0000, Case C-383/95.

employer not domiciled in a member state, but which has a branch, agency or other establishment in a member state, that the employer is deemed domiciled in that member state. In effect, this therefore covers both the situation where an employee is recruited directly by an EU branch of a US employer and where an employee is employed by a US employer and subsequently seconded to an EU branch, such that in either case the employer is deemed to be domiciled within the particular EU member state, and this is covered by the Brussels Regulations.

As a matter of practice, it is obviously necessary to determine jurisdiction in every case in order to issue proceedings and progress the particular action. However, in many cases, the particular jurisdiction can also determine the success or otherwise of the action. For this reason, getting a particular dispute before one member state or another can be central to the case. For example, an employee employed by an Irish company but working in the UK will invariably prefer to have any dispute relating to termination of employment heard before an Irish court rather than a UK court due to the availability of injunctive relief to restrain dismissals which is not typically available under UK law.

This is just one example of “forum shopping” which can become an essential part of litigation strategy in such matters for both employers and employees. The flexibility offered to an employee by the Brussels Regulations gives an employee a degree of strategic control over determining the jurisdiction in order to strengthen such a claim. This is important for both advisors acting for employees in such matters but also for those representing employers in setting up such arrangements, to ensure that the contract is either clear on the jurisdiction, or that the operations support the employer’s preferred choice of jurisdiction.

5. AGREED JURISDICTION CLAUSES.

The Brussels Regulations also support parties that wish to expressly agree in advance what jurisdiction will apply to the contract of employment. Generally speaking, such clauses must be in writing in order to ensure certainty and clarity. However, if the parties can show that, even though not in writing, it is in accordance with established practice between the parties it will be upheld. Whilst the concept of established practice is perhaps more likely to apply to trade and commercial relations, where for example monthly invoices or order forms which conform to particular law in one member state over another are repeatedly issued and paid upon, this provision can still apply to a contract of employment. The rules further allow for recognition of clauses agreed by electronic communication.

One scenario that also frequently arises in such arrangements is where the agreed terms are agreed orally and conditions and are then subsequently confirmed in writing. The ECJ has considered this point and confirmed that in certain circumstances, this will be sufficient to meet the requirements. In *Galleries Segoura V BonakDarain*⁷, it ruled that these formal requirements would be satisfied if the confirmation were subsequently accepted in writing by the other party. As such, unless the employee returns a signed copy of the contract of employment, the agreed jurisdiction clause will not be enforceable.

As a matter of HR best practice, and in order to avoid the difficulties that go with not having agreed jurisdiction, all contracts of employment should therefore contain an exclusive jurisdiction clause. Where the arrangement is part of a secondment, the employer and employee may also need to specifically agree what jurisdiction shall apply during the period of secondment. As such, it would not be unusual for a US based employee to be employed under a contract providing for the exclusive jurisdiction of a particular US state, but for that clause to be suspended for the period of secondment.

7. [1976] ECR 8151.

4 THE ROME CONVENTION – DETERMINING GOVERNING LAW

The rules used to identify governing law are equally important in this context, and are set out in the Rome Convention⁸. Its purpose was to harmonise the various national rules on choice of law within the EU and in many regards may be seen as the necessary follow up to the Brussels Convention adding final certainty to the overall position. As a convention requiring formal acceptance and accession, it is specifically limited to EU member states only⁹, so does not therefore apply to relations between one EU member state and the US for example or any other third party. However, it is still clearly relevant to US employers having operations or entities within the EU, in determining disputes between such entities and employees based in other member states.

It too recognises the parties' freedom to choose governing law. It states that the proper law to govern a contract shall be the law as expressly chosen by the parties or that otherwise applies by implication. This is subject to the separate provisions on mandatory local law, addressed below.

As with the Brussels Regulations used to determine jurisdiction, the Rome Convention contains clear rules to identify the appropriate law where none has been expressly chosen. In this regard, it provides that where the parties have not agreed a choice of law, the governing law shall be determined as follows:-

- (d) the law of the place where the employee habitually carries out his or her employment;
- (e) if the employee does not habitually carry out his or her employment in any one state, the law of the state in which the employee was engaged is situated; or
- (f) if it appears from the circumstances as a whole that the contract of employment is more closely connected with another member state, then the laws of that member state shall govern the contract.

In addition, the Rome Convention specifically protects mandatory provisions of local law, even where an express agreement exists on what law will otherwise apply. The mandatory rules of the member state where the employee habitually carries out his or her work will therefore apply in all cases. If, however, the employee does not habitually carry out his or her work in any one member state, the mandatory rules of law in the member state in which the place of business through which the employee is engaged is situated.

In practical terms and applying this to the employment law context, this means that if an Irish employer and French employee agree that French law shall apply to a contract of employment governing the employee's employment in Ireland, that the mandatory provisions of Irish employment law will still continue to apply. Mandatory rules are such entitlements and statutory protection that the parties cannot contract out of. This is typically limited to basic statutory protections, such as unfair dismissals, minimum wage entitlements, etc. This ensures that employers cannot apply less favourable employment standards from one member state in a second member state to the detriment of the employee.

6. RELEVANT FACTORS IN DETERMINING JURISDICTION AND GOVERNING LAW

Whilst each case will have to be judged on its own facts, and an application of the principles set out above, the starting point in any such assessment is whether or not there is an agreed and valid choice of governing law and jurisdiction clause in place. If, as in many cases, the

8. The Rome Convention on the Law Applicable to Contractual Obligations, 1980.


9. As the Brussels Convention was subsequently revised as an EU set of Brussels Regulations, it applies automatically as a matter of law.

terms are not in writing or the contract does not contain such a clause, the tests set out above must be applied.

It will be seen from the sample cases reviewed and the principles under both the Brussels Regulations and the Rome Convention that one of the key practical considerations in multi-jurisdictional employment is where the employee habitually carries out his or her work. There are various relevant factors involved which the parties may look at to assist this analysis, developed over the years from the caselaw of the ECJ and practical application of the tests. These factors will include where the employee actually lives, where the employee has his or her base or principle place of work from which he or she prepares for trips and returns after the performance of duties, where the employee pays tax and social security, the state in which the employee is paid his or her salary, the state where the person or entity to whom he or she reports is based, where or not they are the director of other entities in other jurisdictions. Whilst an employer cannot control all of these factors, it should be in a position to dictate some of them to its favour where it has neglected to agree a choice of law and jurisdiction clause in the contract. This may help to ensure that the preferred governing law and/or jurisdiction will ultimately apply.

5 **CONCLUSION**

The increase in international secondment between US and EU employers highlights the importance of preparing for conflict of rule scenarios. Given the clear statutory framework within which these matters can be addressed, and the obvious risks to employers in not taking the necessary steps to prepare, the need to draft clear terms and conditions of employment is quite obvious. In the absence of agreed clauses, employer and employees will otherwise have to fall back on the default rules provided for in the Brussels Regulations and the Rome Convention.

MATHESON ORMSBY PRENTICE 
Bryan Dunne
Matheson Ormsby Prentice
30 Herbert Street
Dublin 2
D: +353 1 644 2388
T: +353 1 619 9000
F: +353 1 619 9010
E: bryan.dunne@mop.ie
W: www.mop.ie