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# **The European Coordination of Employers' Liability and Workers' Compensation**

Thomas Thiede

## **I. Introduction**

Beyond the migration of workers from structurally weak countries and 1 from occupational fields with connections to foreign countries such as transportation or tourism, entirely new forms of migrant labour are increasingly gaining importance in today's professional life in Europe and elsewhere: the vast and rapid developments in information technology, the steady increase of cross-border exchange of goods and services and the necessity of a global perspective for companies demand a growing involvement in foreign countries be it a branch office, a project abroad or international co-operation within the framework of a joint venture. Simultaneously, new careers abroad are possible giving new opportunities for companies and employees alike. Such internationalisation of employment of course involves dangers and risks for all parties concerned; risks which materialise mostly in the area of workers' compensation and employers' liability.

In this context the social safeguarding of the employee must be secured 2 and a number of relevant questions arise. As the European Union does not provide material rules on cross-border employment but rules on the coordination of the Member States' social security schemes regarding *inter alia* workers' compensation, rules on the law applicable must be envisaged. Accordingly, questions to be addressed in this contribution include which state's system of social security applies under which circumstances and how such questions are adjudicated. Correspondingly the law applicable and the international jurisdiction for questions of employers' liability and when damages should be awarded to expatriates under these conditions are to be addressed. Ultimately, regard must be taken of the connections between both legal institutes when recourse rights of workers' compensation institutions are assessed.

## II. Empirical Evidence

- 3 Reliable empirical evidence for the fact-patterns addressed by this report was virtually impossible to gather since most data collections refer either to a national picture only and/or do not distinguish between migrating EU nationals, (ie persons insured under a Member State's scheme other than their place of employment, etc) and people coming from outside the European Union. This difference, which relates to the right to free entry and free movement in the EU Member States, is often omitted and both terms '(intra-EU) migrants' and 'immigrants' are used interchangeably.<sup>1</sup>
- 4 In any case a clear trend regarding intra-EU migrants is the significant increase in their number in the last decade which is clearly related to the EU integration given the free movement of people for the accessing countries and the establishment of an enlarged unified European labour market. As regards the numbers of migrants, Eurostat (European Commission, Statistical Office of the European Union) data from the first quarter of 2006 indicates that 1.5 % of EU-25 citizens live and work in a different Member State from their country of origin.<sup>2</sup> Cross-border commuting between Member States (with no residence change) has been steadily increasing over recent years, but still remains quite low. On average, only 0.2 % of the European working population commutes between Member States.<sup>3</sup> As the Eurostat's statistics on accidents at work with an absence of four days or more reveal a total of 3,906,877 cases for 2006<sup>4</sup> this would amount to approximately 60,000 cases per year where problems of cross-border workers' compensation and employers' liability may arise.
- 5 These figures from 2006 are obviously not current and are expected to be significantly higher in the present day following new policies allowing

1 However, Eurostat seems to be aware of the problem of measuring intra-EU labour mobility. See *A Franco*, Using the European Union Labour Force Survey to get Information on Migrants and their Descendants, in: Comité consultatif européen de l'information statistique dans les domaines économique et social, Migration Statistics – Social and Economic Impacts with Respect to the Labour Market (2005) 55 ff.

One may also suggest that in face of the struggles related to the EU enlargement such statistics are politically not feasible.

2 See *European Agency for Safety and Health at Work*, Literature Study on Migrant Workers (2007) 8 <[http://osha.europa.eu/en/publications/literature\\_reviews/migrant\\_workers](http://osha.europa.eu/en/publications/literature_reviews/migrant_workers)>.

3 See *European Commission*, How Mobile is the European Workforce? Facts & Figures (2006), <[http://ec.europa.eu/employment\\_social/workermobility\\_2006/index.cfm?id\\_page\\_category=FF](http://ec.europa.eu/employment_social/workermobility_2006/index.cfm?id_page_category=FF)>.

4 See: Number of Accidents at Work by Economic Activity, Severity and Sex (hsw\_aw\_nnasx) <[http://epp.eurostat.ec.europa.eu/portal/page/portal/health/health\\_safety\\_work/data/database](http://epp.eurostat.ec.europa.eu/portal/page/portal/health/health_safety_work/data/database)>; see also *European Commission*, EU Strategy 2007–2012, <<http://ec.europa.eu/social/main.jsp?catId=151&langId=en>>.

free movement of the at the time ‘new’ EU-10<sup>5</sup> nationals to work in the ‘old’ EU-15<sup>6</sup> countries. Originally only the UK, Ireland and Sweden allowed EU-10 migrants to enter and work after these countries joined the EU whereas Finland, Portugal and Spain allowed free movement only after 1 May 2006, but the remainder of the EU-15 countries still maintained restrictions. Since the beginning of 2011 complete freedom of movement for workers from the Member States which joined in May 2004 is guaranteed, eventually resulting in a significantly higher intra-European migration.

### **III. Workers’ Compensation**

#### **A. Limitation to national territory**

The industrial development in many nations in the late 19th century was accompanied by the establishment of modern social security systems<sup>7</sup> as the decomposition of pre-industrial forms of social security (eg family and agricultural village structures) forced the development of externalised solutions. Since the general trigger for the creation of these systems was to maintain social justice and peace in nation states, it should come as no surprise that the legislative outcome was purely domestic as well: the so-called welfare state correlated with the nation state and the effects (benefits in kind and cash) were limited to the nationals of the latter.<sup>8</sup> As social security law was the result of purely national social policies and primarily focused on the national economy as well as the domestic societal circumstances, it was inherently bound to the territory of the nation state. Due to this ‘nationalism’ of the social security systems, difficulties appeared in cases of individuals who were not domiciled in the nation state of their

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5 Ie Cyprus, Czech Republic, Hungary, Malta, Poland, Slovakia, Slovenia, Latvia, Lithuania, and Estonia.

6 Ie Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and United Kingdom.

7 For an ample historical discussion see, *EFD Engelhard*, Shifts of Work-Related Injury Compensation, in: S Klosse/T Hartlief (eds), *Shifts in Compensating Work-Related Injuries and Diseases* (2007) 13 ff.

8 Admittedly, benefits were not limited to citizens but to persons domiciled in the respective state, hence the common opinion that those benefits depend on citizenship in the respective state is wrong. However, the fundamental rights to create a domicile in a state and to work there was limited to nationals of that state. See eg arts 11, 12 Grundgesetz (German Constitution/Basic Law, GG). Cf E Eichenhofer, *Sozialrecht der Europäischen Union* (4th edn 2010) 75 ff; *id*, *Unionsbürgerschaft – Sozialbürgerschaft?* *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* (ZIAS) 2003, 404 ff.

employment, for example, cross-border commuters and frontier workers. In cases of accidents at work or occupational accidents, these individuals were excluded from all benefits in kind or cash, simply because they were not nationals of the state in which they had paid social security contributions and would accordingly not be entitled to receive benefits.<sup>9</sup>

- 7 This nation-state related limitation, better known as the ‘territoriality principle’,<sup>10</sup> was rendered anachronistic with the establishment of the European Economic Community (EEC) in 1957. This forerunner of the EU explicitly guarded the free movement of goods, capital, services and people as well as the freedom of establishment<sup>11</sup> and aimed at liberating the nation states’ mutually closed markets by creating a Common Market. In such a Common Market cross-border commuters and frontier workers were constitutive and, hence, the social security systems of the Member States had to be coordinated.<sup>12</sup>

## B. European coordination of social security systems

- 8 In order to accomplish the objective of a common European market, the free movement of goods, capital, services and people within the EU’s Member States was introduced.<sup>13</sup> Nowadays, art 48 TFEU (Treaty on the Functioning of the European Union) highlights the inevitable connection between the four freedoms and the coordination of the Member States’

9 Accordingly, unless bilateral international treaties resolved such problems, frontier-workers and cross-border commuters had also to take out insurance in the country of their domicile.

10 Cf F Pennings, European Social Security Law (5th edn 2010) 4 ff.

11 See arts 2 and 3 of the Treaty establishing the European Economic Community (Treaty of Rome).

12 Initially France and Germany even ventured to make social policy an encompassing issue of EC competency. On those topics and the discussions surrounding the Treaty of Rome see *Internationales Arbeitsamt/Bureau de Travail International (IAA/BIT)*, Soziale Aspekte der europäischen wirtschaftlichen Zusammenarbeit, Bericht einer Sachverständigengruppe/Aspects sociaux de la cooperation économique européenne, Rapport d’un groupe d’experts, Studien und Berichte no 46 (1956); D Collins, The European Communities. The Social Policy of the First Phase, vol 2: The European Economic Community 1958–72 (1975); J Lodge, Towards a Human Union: EEC Policy and European Integration (1978) British Journal of International Studies 107; B Henningse, Politische Rahmenbedingungen einer europäischen Sozialpolitik, in: H Braun/M Niehaus (eds), Sozialstaat Bundesrepublik Deutschland auf dem Weg nach Europa (1990) 167 ff; U Weinstock, Auf dem Weg zur Sozialunion, in: U Weinstock (ed), Neun für Europa. Die EWG als Motor europäischer Integration (1973) 163 ff; id, Europäische Sozialunion – historische Erfahrungen und Perspektiven, in: W Däubler (ed), Sozialstaat EG? Die andere Dimension des Binnenmarktes (1989).

13 And subsequently re-emphasised in art 2 Maastricht Treaty 1992.

social security systems by stating: ‘The European Parliament and the Council shall ... adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States.’

Accordingly, any system to be created on the basis of art 48 TFEU must ensure that an individual does not suffer losses in his or her social security protection whilst exercising rights of freedom of movement of workers in the Member States.<sup>14</sup> 9

### C. Sources of law

In order to coordinate the Member States’ social security systems under this paradigm, Council Regulation (EC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community was adopted in 1971.<sup>15</sup> This Regulation was accompanied by implementing Regulation (EEC) No 574/72,<sup>16</sup> which covered the practical implementation (eg competent national authorities, administrative formalities, etc).<sup>17</sup> Apart from some provisions in the field of non-discrimination,<sup>18</sup> Regulation 1408/71 had a tremendous impact on the Member States<sup>19</sup> as the 10

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14 Moreover, such system must overcome the ‘joint decision trap’ of cooperative federalism being responsible for the impasse of much European policy. Such a situation exists where an unclear and multi-levelled ‘policy entanglement’ arises when a number of state actors (local, state, federal, Union) are trapped into a joint decision within one big subsidy scheme without clear rules and clear responsibilities. See F Scharpf, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, *Public Administration* 66 (1988) 239; *id*, *Die Politikverflechtungsfalle: europäische Integration und deutscher Föderalismus im Vergleich*, *Politische Vierteljahrsschrift* 26 (1985) 323 ff; G Falkner, *EG-Sozialpolitik nach Verflechtungsfalle und Entscheidungslücke*, *Politische Vierteljahrsschrift* 41 (2000) 279 ff; Pennings (fn 10) 13 f.

15 Official Journal (OJ) L 149, 5.7.1971, 2–50

16 OJ L 28, 30.1.1997, 1–235.

17 See below no 31.

18 Eg Council Directive (EEC) 86/378 of 24 July 1986 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 225, 24.7.1986, 40–42.

19 F Pennings, *Inclusion and Exclusion of Persons and Benefits in the New Coordination Regulation*, in: M Dougan/E Spaventa (eds), *Social Welfare and EU Law* (2005) 242 ff.

Community instrument restricted the national legislative and administrative powers to decide exclusively on main elements of the national social security systems. In addition, the Regulation rules were interpreted in the same way and the Court of Justice of the European Union (CJEU) solved a number of interpretation problems.<sup>20</sup>

- 11 In the course of time, the Regulation was extended considerably by amending regulations.<sup>21</sup> These amending regulations were often accepted only after lengthy negotiations, sometimes taking several years. Members States ‘tried to avoid and/or limit the costs resulting from changes to the Regulation; and for this reason, changes, if found necessary, often [took] the form of very complicated compromises – often resulting in exceptions to the main rules.’<sup>22</sup> Effectively, the relative maturity of the rules and the legislative approach towards their amendment<sup>23</sup> rendered the Regulation incomprehensible for its beneficiaries and, hence, was on the verge of seriously losing its main objective: the free movement of workers.
- 12 In 1998 the European Commission eventually issued a proposal for a new coordinating Regulation<sup>24</sup> aimed at replacing Regulation 1408/71. This proposal for simplification and modernisation was a radical and comprehensive attempt with a twofold purpose: to introduce a much shorter coordination instrument, and to modernise the existing coordination rules.<sup>25</sup> However, Council and European Parliament were notably less

20 Cf art 267 TFEU.

21 See Regulations (EEC) No 2864/72, OJ L 306, 31.12.1972, 1; (EEC) No 1392/74, OJ L 152, 8.6.1974, 1; (EEC) No 1209/76, OJ L 138, 26.5.1976, 1; (EEC) No 2595/77, OJ L 302, 26.11.1977, 1; (EEC) No 1390/81, OJ L 143, 29.5.1981, 1–32; (EEC) No 2793/81, OJ L 275, 29.9.1981, 1; (EEC) No 2001/83, OJ L 230, 22.8.1983, 6; (EEC) No 1660/85, OJ L 160, 20.6.1985, 1; (EEC) No 1305/89, OJ L 131, 13.5.1989, 1; (EEC) No 2332/89, OJ L 224, 2.8.1989, 1; (EEC) No 3427/89, OJ L 331, 16.11.1989, 1; (EEC) No 2195/91, OJ L 206, 29.7.1991, 2; (EEC) No 1247/92, OJ L 136, 19.5.1992, 1; (EEC) No 1945/93, OJ L 181, 23.7.1993, 1; (EC) No 3095/95, OJ L 335, 30.12.1995, 1; (EC) No 1290/97, OJ L 176, 4.7.1997, 1; (EC) No 1223/98, OJ L 168, 13.6.1998, 1; (EC) No 1606/98, OJ L 209, 25.7.1998, 1; (EC) No 307/1999, OJ L 38, 12.12.1999, 1; (EC) No 1399/1999, OJ L 164, 30.6.1999, 1; (EC) No 1386/2001, OJ L 187, 10.7.2001, 1; (EC) No 859/2003, OJ L 124, 20.5.2003, 1; (EC) No 631/2004, OJ L 100, 6.4.2004, 1.

22 Pennings (fn 19) 242 ff.

23 For an insightful criticism of that approach, see H Koziol, Die Vereinheitlichung des Europäischen Schadenersatzrechtes, in: FS anlässlich des 75 Jahr-Jubiläums der Österreichischen Gesellschaft für Versicherungsfachwissen (2004) 51 ff; *id*, Rechtsvereinheitlichung auf europäischer Ebene aus privatrechtlicher Sicht, in: MG Faure/H Koziol/S Puntscher-Rickmann (eds), Vereintes Europa – Vereinheitlichtes Recht? (2008) 48 ff.

24 Proposal for a Council Regulation (EC) on coordination of social security systems (1999/C 38/08) COM(1998) 779 final.

25 For further analysis of the proposal, see E Eichenhofer, How to Simplify the Coordination of Social Security (2000) 2 European Journal of Social Security (EJSS) 231; M Sakszin, Social Security Coordination: Adapting to Change (2000) 2 EJSS 169; F Pennings, The

progressive and a consensus<sup>26</sup> was reached on a much more limited version than that originally envisaged by the European Commission, and was eventually adopted in 2004 as Regulation (EC) No 883/2004 on the coordination of social security systems.<sup>27</sup> However, the Regulation was only to be applied from the date of entry into force of the implementing Regulation<sup>28</sup> and it took another six years to adopt implementing Regulation (EC) No 987/2009<sup>29</sup> covering most administrative issues.<sup>30</sup>

#### D. Scope of cover

Regulation 883/2004 has a limited approach as regards persons and 13 matters covered. The most elemental<sup>31</sup> prerequisite for its application is however a case with a foreign element, that is, the facts of the case or the parties involved must have a relation to several Member States of the European Union.<sup>32</sup>

The personal scope of coverage of Regulation 883/2004 is specified in art 2 14 Regulation 883/2004: according to this provision, the Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation

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European Commission Proposal to Simplify Regulation 1408/71 (2001) 3 EJSS 45; *id* (fn 19) 243.

26 Art 48 TFEU requires unanimity of the Council in the decision making process. In addition, the Council has to follow the co-decision procedure of art 294 TFEU involving the European Parliament. It proposed 47 amendments to the Proposal, of which the Council agreed to 37. See also fn 14.

27 OJ L 166, 30.4.2004, 1–123. Regulation 1408/71 continues to apply in all cases related to Iceland, Liechtenstein, Norway and Switzerland.

28 See art 91 Regulation 883/2004.

29 Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security system, OJ L 284, 30.10.2009, 1–42.

30 As a result both regulations were in force from May 2010.

31 For other prerequisites to be met see *Pennings* (fn 10) 25 ff.

32 See CJEU C-212/06, *Government of the French Community and Walloon Government v Flemish Government* [2008] European Court Reports (ECR) I-1683; joined cases C-95/99 to C-98/99 and C-180/99, *Khalil and Others* [2001] ECR I-7413; C-59/95, *Bastos Moriana and Others* [1997] ECR I-1071; C-153/91, *Camille Petit v Office national des pensions* [1992] ECR I-4973; joined cases C-64/96 and C-65/96, *Nordrhein-Westfalen v Uecker and Jacquot* [1997] ECR I-3171; joined cases C-225/95, C-226/95 and C-227/95, *Kapasakalis, Skiatitis and Kougiakas v Greek State* [1998] ECR I-4239; C-18/95, *Terhoeve v Inspecteur van de Belastingdienst Particulieren* [1999] ECR I-345.

of one or more Member States.<sup>33</sup> Covered are all persons abstractly<sup>34</sup> integrated into a Member State's system of social security regardless of whether or not they are able to work.<sup>35</sup> The rule extends to part-time<sup>36</sup> and former employees.<sup>37</sup> For persons changing between the status of employee and non-employee (for example, students working in the holidays) the last status achieved is decisive.<sup>38</sup>

- 15** According to art 3 Regulation 883/2004, the Regulation applies to all legislation (general and special security schemes, whether contributory or non-contributory) covering benefits in respect of accidents at work and occupational diseases.<sup>39</sup>

## **E. General rules for determining the legislation applicable**

### **1. General application of the law of the country of employment**

- 16** Article 11 Regulation 883/2001 provides for the exclusive effect of the rules determining the legislation applicable. According to these rules, in general the system of social security in the country of employment and not the system of the country of habitual residence is applied.<sup>40</sup> Accordingly, a person pursuing an activity as an employed person in a Member State is subject to the legislation of that Member State.<sup>41</sup> This extends to all cases

33 There has been only one addition to the scope of the Regulation 1408/71, namely persons from third countries. For the former situation see *S Devetzi*, Die Kollisionsnormen des Europäischen Sozialrechts (2000) 271 f; W Schrammel/G Winkler, Arbeits- und Sozialrecht der Europäischen Gemeinschaft (2002) 1 f; Pennings (fn 19), 242; CJEU joined cases C-95/99 to C-98/99 and C-180/99, *Khalil and Others* [2001] ECR I-7413.

34 See 39/76, *Bestuur der Bedrijfsvereniging voor de Metaalnijverheid v Mouthaan* [1976] ECR 1901.

35 See CJEU 182/78, *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v Pierik II* [1979] ECR 1977; C-85/96, *Maria Martinez Sala v Freistaat Bayern* [1998] ECR I-2691, para 36; C-275/96, *Kuusijärvi v Riksförsäkringsverket* [1998] ECR I-3419, para 21.

36 See CJEU C-2/89, *Bestuur van de Sociale Verzekeringsbank v Kits van Heijningen* [1990] ECR I-1755; C-413/01, *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* ECR [2003] I-13187.

37 See CJEU 143/79, *Margaret Walsh v National Insurance Officer* [1980] ECR 1649; C-389/99, *Sulo Rundgren* [2001] ECR I-3731; C-140/88 *Noij v Staatssecretaris van Financien* [1991] ECR I-387.

38 See CJEU joined cases 82 and 103/86, *Laborero and Sabato v Office de sécurité sociale d'outre-mer* [1987] ECR 3401; 99/80, *Galinsky v Insurance Officer* [1981] ECR 941; 17/76, *Brack v Insurance Officer* [1976] ECR 1429.

39 This includes *nota bene* all non-contributory systems financed exclusively by taxes: see art 70 Regulation 883/2004.

40 See E Eichenhofer, Neuere Rechtsprechung des EuGH zum Europäischen Sozialrecht, *Juristenzeitung* (JZ) 95, 1047, 1049.

41 See art 11(3)(a) Regulation 883/2004.

where the employee does not reside in the country where he is employed and to cases where the employer has his seat in another country.<sup>42</sup>

Although the Regulation does not provide a definition of the ‘place of employment’, some inference might be taken from the rules for temporary employment abroad:<sup>43</sup> the place of the actual provision of services has less importance than the place where the social and economic value of the services is eventually created.<sup>44</sup>

## 2. Special provisions for determining the legislation applicable

### a) Temporal posting abroad

In order ‘to promote freedom to provide services for the benefit of undertakings which avail themselves of it by sending workers to Member States other than that in which they are established and aiming at overcoming obstacles likely to impede freedom of movement of workers and also at encouraging economic interpenetration whilst avoiding administrative complications, in particular for workers and undertakings’,<sup>45</sup> Regulation 883/2004 includes a special provision in all cases of the temporary posting of an employee abroad.

Article 12 Regulation 883/2004 stipulates that a person pursuing an activity as an employed person in a Member State (A) on behalf of an employer normally carrying out its activities there,<sup>46</sup> who is posted by that employer to another Member State (B) to perform work on that employer’s behalf, shall continue to be subject to the legislation of the first Member State (A), provided that the anticipated duration of such work does not exceed 24 months and that the employee is not sent to replace another person. Both temporal and personal prerequisites were introduced to

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42 The decision for the application of the *lex loci laboris* to some extent represents the employee-focused approach of the Germanic (Bismarckian) countries and this thereby disregards the approach taken in Common Law and Scandinavian countries, since the latter tend to focus only on the social security of its nationals. On the reform of the Bismarckian countries see the contributions in *B Palier/C Martin* (eds), Reforming the Bismarckian Welfare Systems (2008).

43 See arts 12, 11(3)(a) Regulation 883/2004 and no 18 ff below.

44 See CJEU 13/73, *Angenieux v Hakenberg* [1973] ECR 935.

45 CJEU 35/70, *SARL Manpower v Caisse primaire d’assurance maladie* [1970] ECR 1251, para 10, and C-202/97, *Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk instituut sociale verzekeringen* [2000] ECR I-883; C-404/98, *Josef Plum v Allgemeine Ortskrankenkasse Rheinland, Regionaldirektion Köln* [2000] ECR I-9379, para 19.

46 See CJEU 35/70, *SARL Manpower* [1970] ECR 1251, para 16; C-202/97, *Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk instituut sociale verzekeringen* [2000] ECR I-883.

prevent any abuse by posting employees rotationally and thereby (legally) avoiding paying higher social security premiums in the country of actual employment.<sup>47</sup> Moreover, the employee must have pursued an activity in the original state before being sent abroad, a contractual agreement (for example, recruitment for posting abroad) not sufficing.<sup>48</sup> Finally, a temporary posting within the rule of art 12 Regulation 883/2004 is possible in all cases where the employee does not reside in the Member State of employment and is posted to a third Member State. If the possibility of posting was limited to persons who are domiciled in the Member State from which they were sent to their post abroad, the freedom of workers would be impeded. In this triangle, according to art 12 Regulation 883/2004, the law of the Member State in which the person was employed is applied.

- 20** In order to prove the applicability of the social security system of the Member State from which the employee was posted, the competent institution of the Member State whose legislation is applicable pursuant to art 2 Regulation 883/2004 shall provide an attestation that such legislation is applicable and shall indicate, where appropriate, until what date and under what conditions.<sup>49</sup> With this attestation the authorities of the Member State which posts the employee are however not bound by the decision of the competent Member State. Nevertheless this attestation certifies the ongoing protection by social security and due to this authentication the receiving Member State is barred until further notice from applying its own rules to the employee.

### **3. Pursuit of activities in two or more Member States**

- 21** The pursuit of several activities as an employed person in several Member States again creates considerable problems when assessing the law applicable to his social security: to tolerate the application of multiple social security systems would undoubtedly violate the rule in art 11 Regulation 883/2004 as multiple laws would be applied to one case.

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<sup>47</sup> No temporary posting but a pursuit of activities in two (or more) Member States exists in all cases in which an employee pursues several, independent activities in several Member States for different employers. See no 21 ff below.

<sup>48</sup> See CJEU 19/67, *Bestuur der Sociale Verzekeringsbank v J H van der Vecht* [1967] ECR 461.

<sup>49</sup> CJEU C-202/97, *Fitzwilliam Executive Search Ltd* [2000] ECR I-883; C-178/97, *Barry Banks v Theatre royal de la Monnaie* [2000] ECR I-2005; C-2/05, *Rijksdienst voor Sociale Zekerheid v Herbosch Kiere* [2006] ECR I-1079; C-168/04, *Commission v Austria* [2006] ECR I-9041.

Article 13 Regulation 883/2004 deals with this problem by stipulating primarily the law of the Member State of residence if the employee pursues a substantial part of his activity in that Member State or if he is employed by various employers whose registered office or place of business are in different Member States – or alternatively if he does not pursue a substantial part of his activities in his Member State of residence, the law of the Member State in which his employer is situated.<sup>22</sup>

In particular the first part of this rule is in accordance with art 11 Regulation 883/2004 according to which the law at the place of the substantial activity is applied. In the cases of multiple activities in several countries, the domicile of the employer could be stipulated. However, this is only possible because it is at the same time the place of employment at least for a substantial part of the activities.<sup>23</sup>

#### **4. Freedom of choice**

As set out above, the Regulation enshrines as a general rule the application of the law at the place of substantial activities as an employee and accordingly that the social security system in this Member State is the competent one.<sup>50</sup> However, the Regulation provides for certain situations in which it seems reasonable to continue the application of the original social security system.<sup>51</sup><sup>24</sup>

Article 16(1) Regulation 883/2004 allows two or more Member States, the competent authorities of these Member States or the bodies designated by these authorities to provide for exceptions in the interests of certain persons or categories of persons. Thereby, the rule allows them to adapt the rigid arts 11–15 Regulation 883/2004 to the circumstances of the individual case – and, moreover, for a certain synchronicity between the law applicable to questions of social security and those of private international law.<sup>52</sup> To this end, art 16 Regulation 883/2004 represents a notion common in all European conflict of laws codifications which allow for the choice of the law applicable and thereby indirectly influence Regulation (EC) No 593/2008: since the law applicable to the contract of individual employment could be agreed upon by the parties, the connecting factor of

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50 See no 16 ff above.

51 CJEU 101/83 *Raad van Arbeid v PB Brusse* [1984] ECR 2223, para 16.

52 See no 41 ff below.

place of employment could be chosen to some extent as well and thereby extends to the mechanisms of Regulation 883/2004 itself.<sup>53</sup>

- 26 The most common case for such a choice of law is a posting abroad for more than 24 months, not least because most employees posted abroad seem to ask for some adoption period as foreign social security systems (being applied in cases of no exception agreements) initially may not meet their expectations.

#### **F. Special provisions for determining the legislation applicable in cases of accidents at work and occupational diseases**

- 27 Articles 36–41 Regulation 883/2004 contain special rules co-ordinating all benefits in respect of accidents at work and occupational diseases provided by the respective Member States in certain pre-determined fact patterns. According to arts 36(2) and 36(3) in conjunction with art 21(1) Regulation 883/2004, an employee who has had an accident at work or has contracted an occupational disease and who resides or stays in a Member State other than the competent Member State<sup>54</sup> shall be entitled to the benefits in kind and cash of the scheme covering accidents at work and occupational diseases, on behalf of the competent institution, by the institution of the place of residence in accordance with the legislation which it applies, as though he were insured under said legislation.
- 28 Moreover, art 38 Regulation 883/2004 covers benefits for occupational diseases where a person has been exposed to the same risk in several Member States. If such a person pursued an activity which is by its nature likely to cause such diseases, the benefits that he/she or his/her survivors may claim shall be provided exclusively under the legislation of the last of those States whose conditions are satisfied. Hence the competent institution has to decide under its own law whether or not the employee has contracted an occupational disease and has to finance the benefits exclusively although the causes for the disease are spread to several other countries. Although this solution seems barely in line with other principles in insurance law<sup>55</sup> and burdens those Member States which attract the greatest degree of labour migration, one has to welcome it for the facilita-

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53 See no 51 f below; F Penning, The Place of Equal Protection on Grounds of Nationality in EU Law, in: A Numhauser-Henning (ed), Legal Perspectives on Equal Treatment and Non-Discrimination (2001) 347.

54 Ie the Member State of employment, see art 11 ff Regulation 883/2004 (no 16 above).

55 For those see C Lahnstein, Aggregation and Divisibility of Damage: Insurance Aspects, in: K Oliphant (ed), Aggregation and Divisibility of Damage (2010) 465, 468 ff.

tion of the work of the authorities and the positive integration of the employee in the social security system.

Whether the disease is defined as an occupational disease depends on the 29 decision of the authorities of the Member State competent under the above rules. However following the Recommendation 90/326/EEC<sup>56</sup> there exists a non-binding rule aiming to further the approximation of Member States' laws. Finally in order to secure the effectiveness of national social security schemes, arts 40 (2) and (3) Regulation 883/2004 enshrine several rules regarding the equivalence of foreign and domestic preconditions in order to receive benefits. As a result, a diagnosis that a person is suffering from an occupational disease must be recognised by the Member State which, by virtue of art 38 Regulation 883/2004, is under the duty to pay benefits, even if that diagnosis was made in another Member State and in accordance with its legislation.<sup>57</sup>

In cases of an aggravation of a pre-existing occupational disease and an 30 associated reduction in earning capacity, the respective increase in benefits will be borne by the competent authorities under art 38 Regulation 883/2004<sup>58</sup> if the worker has not pursued an activity as an employed person in another Member State. If the person concerned, while in receipt of benefits, has nevertheless pursued an activity under the legislation of another Member State, the competent institution of the original, first Member State shall continue to bear the cost, however, taking the aggravation into account. The competent institution of the second Member State (ie the Member State where the aggravation took place) shall grant a supplement to the worker, the amount of which shall be equal to the difference between the amount of benefits due after the aggravation and the amount which would have been due prior to the aggravation.

## G. Administration and adjudication of claims

The coordination of the Member States' social security systems falls to the 31 Social Security Administration Offices in the respective Member States and the national rules. A separate implementing Regulation (no 12 above) lays down coordination rules for the national authorities for implementing Regulation 883/2004. For the international administrative procedures

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56 OJ L 160, 26.6.1990, 39–48.

57 See CJEU 28/85, *Alexandre Deghilige v Caisse primaire d'assurance maladie de Maubeuge* [1986] ECR 991.

58 See no 28 above.

(ie the coordination of the procedures between the separate national branches) two separate bodies were set up with Regulation 883/2004. In order to clarify all potential questions of coordination of the respective benefits and procedures, an Administrative Commission<sup>59</sup> and an Advisory Commission<sup>60</sup> were set up.

- 32** The Administrative Commission, whose general aim is to facilitate the uniform application of Regulation 883/2004 (eg by promoting exchange of experience and best administrative procedures), is not allowed to set any norms but answers all administrative questions and questions of interpretation arising from the provisions of Regulation 883/2004 and the implementing regulation and from any agreement concluded or arrangement made thereunder, without any prejudice to the rights of the authorities, institutions and persons concerned and tribunals provided for by the legislation of the Member States.
- 33** In contrast, the Advisory Committee could be empowered at the request of the Commission of the European Union, the Administrative Commission or on its own initiative to examine general questions or questions of principle and problems arising from the implementation of the Union provisions on the coordination of the national social security systems. The committee should formulate opinions on such matters for the Administrative Commission and proposals for any revisions.
- 34** Regarding the adjudication of claims, the question whether or not a court is competent to hear a case does not depend on the domicile or nationality of the claimant but on the law applicable to his claim. If the claim is to be assessed under German law, German courts are competent to hear the case; hence, the competent courts and applicable law are to a large extent synchronised.

#### **H. Rights of recourse of workers' compensation institutions and interaction with employers' liability**

- 35** Whenever benefits are provided by the institution of a Member State on behalf of the institution of another Member State (eg in cases where an employee resides or stays in a Member State other than the competent Member State: see no 27 ff above) the authority providing for benefits is entitled to reimbursement from the competent authority under art 41 in

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59 See art 71 Regulation 883/2004.

60 See art 75 Regulation 883/2004.

conjunction with art 35 Regulation 883/2004.<sup>61</sup> In the special case of occupational diseases, the reimbursement between the (potentially several) institutions where the employee has contracted the disease is distributed between the several institutions depending on the time the employee spent in the various countries of exposure to the causes of the disease.

Regarding the rights of institutions to reimbursement against liable third parties, the peculiarities and differences in the organisation of Member States' social security systems tend to pose problems some of which were addressed by the European legislator and the CJEU. As a starter, in some Member States' social security systems a branch dedicated to workers' compensation might be simply unknown.<sup>62</sup> According to art 40 Regulation 883/2004, in all Member States' systems where there is no insurance against accidents at work or occupational diseases, benefits shall be provided by the institution responsible for providing benefits in the event of sickness.

Of certainly more interest are cases in which one Member State's institution provides benefits in respect of an injury resulting from adverse events occurring in another Member State (see eg no 27 ff above). In a purely domestic dispute the institution providing benefits regularly obtains a claim of subrogation<sup>63</sup> or a direct claim against the liable third party (tortfeasor). Of course, such a right will also exist in all cases with a foreign element: according to art 85 Regulation 883/2004, any institution's claim for subrogation to the rights which the beneficiary has against the third party or direct rights against the third party shall be recognised by any other Member State.

The inherent problem with this rule becomes apparent when assessing the other applicable law to the case. Regarding some claims<sup>64</sup> by the employee against the tortfeasor<sup>65</sup> in tort law, art 4(1) of Regulation (EC) No 864/2007 states that 'the law of the country in which the damage occurs'<sup>66</sup> applies: the rights of the victim against the person who caused the injury, to which any social security institution may be subrogated, are to be determined in

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61 Such reimbursement shall be made on the basis of the actual costs, although two or more Member States' competent authorities may provide for other methods of reimbursement or waive all reimbursement between the institutions.

62 Eg in the Netherlands: see *S Linderbergh, Employers' Liability and Workers' Compensation: The Netherlands* (in this volume) no 9.

63 See eg Germany § 116 Sozialgesetzbuch (Code of Social Law, SGB) X.

64 See no 48 below.

65 Not necessarily the employer.

66 See no 60 below.

accordance with the law of the State where the injury was sustained.<sup>67</sup> In contrast, according to art 85 Regulation 883/2004, the subrogation of a social security institution and the extent of the rights to which that institution is subrogated are to be determined in accordance with the law of the Member State to which the institution belongs.

- 39** Unsurprisingly, no problems occur when there are comparable rules in both Member States regarding the claim of subrogation or the direct claim. The divergence becomes decisive, however, where, as for example in Denmark, the law at the place of injury provides for a ban on recoupment by any social security institution, including benefits under the Law on Industrial Injury Insurance.<sup>68</sup> In general, the CJEU rejected any application of these rules to foreign social security institutions as long as the ban's sole aim was to hinder double payments domestically (ie by the social security institution and by the tortfeasor and his other insurance). The consequently still existing claim is subrogated in accordance with the law of the Member State's social security institution, and the latter would recoup this institution's expenses from the tortfeasor.<sup>69</sup>
- 40** In cases of employers' liability this picture is however quite different since some Member States' laws provide for exclusions of liability for employers and fellow employees.<sup>70</sup> This exclusion goes to the core of the potential claim and prevents a claim from later being subrogated to any social security institution. Accordingly, art 85(2) Regulation 883/2004 states that for all persons receiving benefits under the legislation of one Member State in respect of an injury resulting from events occurring in another Member State, the provisions of said legislation which determine the cases in which the civil liability of employers or of the employees is to be excluded shall apply with regard to the said person or the competent institution. In other words, if an employee is socially insured in a Member State stipulating such exclusion, this exclusion will still exist if he is subsequently injured in a country where such exclusion does not exist. As a result, no claims against a liable third party come into existence and no claim could be subrogated to the social insurance institution. Turning the situation around, if the exclusion is not provided in the legislation of the country where he/she has social insurance, the insured employee

67 See no 58 ff below.

68 See *V Ulfbeck*, Employers' Liability and Workers' Compensation: Denmark (in this volume) nos 35, 84.

69 See CJEU C-428/92, *Deutsche Angestellten-Krankenkasse (DAK) v Lærerstandens Brandforsikring* [1994] ECR I-2259.

70 See K Oliphant, The Changing Landscape of Work Injury Claims, below, no 11 ff.

might claim from and the social insurer be subrogated to the claim against the employer or fellow employees as liable third parties even though an exclusion is provided in the law at the place where harm occurred.<sup>71</sup>

## IV. Employers' Liability

### A. Classification

The classification of actions falling under the title of employers' liability is 41 crucial as – depending on whether those actions are tortious or contractual – different European regulations and accordingly different substantive laws may be ultimately applied to the case. If such actions are ‘contractual’, Regulation 593/2008 (Rome I Regulation) applies, whereas in the case of non-contractual liability, Regulation 864/2007 (Rome II Regulation) would stipulate the applicable law. Both Regulations differ tremendously as regards connecting factors and may result in the application of different substantive laws. Excessive amounts of ink have been spilled on the problem of diverse classification of otherwise factually identical actions, more precisely on the questions of how classification in conflict of laws should be conducted and, moreover, how a uniform result could be achieved, so that regardless, of in which national court a claim is litigated, the same substantive law would ultimately be applied.<sup>72</sup>

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<sup>71</sup> See § 85(2)(2) Regulation 883/2004: ‘Paragraph 1 shall also apply to any rights of the institution responsible for providing benefits against employers or their employees in cases where their liability is not excluded.’

Related to this problem are those cases where a social insurer is subrogated under its own law to the claims of the employee against the tortfeasor but such claim is unknown to the social insurer liable for reimbursement. The question is essentially which law is applicable to determine the conditions and extent of the right of subrogation of a social security institution within the meaning of the regulation against the party causing an injury, where the injury has occurred in another Member State and has entailed the payment of social security benefits. Obviously, the acceptance of the national ban would treat national and foreign social insurers alike and would hence result in equality of treatment within the respective Member States.

Nevertheless, the CJEU emphasised that this question is to be solved under art 65 Regulation 883/2004 and accordingly the law applicable to the social insurer prevails rendering a potential ban in the other Member State’s law obsolete. See CJEU C-428/92, *DAK v Lærstandens Brandforsikring* [1994] ECR I-2259 and 313/82, *Nv Tiel-Utrecht Schadeverzekering v Gemeenschappelijk Motorwaarborgfonds* [1984] ECR 1389; 27/69, *Caisse de maladie des CFL, Luxembourg and Société Nationale, Luxembourg v Compagnie belge d’assurances générales sur la vie et contre les accidents* [1969] ECR 405; 33/64, *Betriebskrankenkasse der Hesepet Torfwerk GmbH v Egbertina van Dijk* [1965] ECR 134; C-397/96, *Caisse de pension des employés privés v Kordel* [1999] ECR I-5959.

<sup>72</sup> Some scholars and indeed most courts in Europe until the recent unification of European conflict of laws favoured the law at the court seised, arguing that the process of characterisation should be performed in accordance with the domestic law of the

- 42** Insofar as the Rome I and Rome II Regulations are concerned, the question of classification is addressed by a recital in a preamble to each Regulation: Recital 7 Rome I Regulation provides that ‘the substantive scope ... of this regulation should be consistent with Council regulation (EC) no 44/2001 ... (Brussels I) and Regulation (EC) no 864/2007 (Rome II)’ whereas the more applicable recital 11 of the preamble to the Rome II Regulation reads as follows: ‘The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation, non-contractual obligations should be understood as an autonomous concept’.
- 43** The latter preamble particularly mirrors the works of the Austrian scholar Rabel, who was the first to draw attention to the deficiencies of methods of classification at the time,<sup>73</sup> suggesting instead a comparative law method of qualification, promoting research of the core issues, solutions and principles of the signatory states to international conventions. In his view ‘the factual situation, which is the true premise of any conflicts rule, must be referable indifferently to foreign as well as to domestic substantive law. Hence, if legal terms are used to describe this factual situation, they must be susceptible to interpretation with reference to foreign institutions, even those unknown to the *lex fori*. ... The process required for such interpretations is necessarily of a comparative nature and has always

forum: if the forum has to characterise a rule or institution of foreign origin, it should inquire how the corresponding or most closely analogous rule or institution is characterised in domestic material law, and apply that characterisation to the foreign instruction or rule. Accordingly, if a claim is classified as tortious in the domestic law of the forum (*lex fori*), its classification as non-contractual would trigger the application of Rome II providing rules as to which law must be applied. Cf *F Kahn*, Gesetzeskollektionen: ein Beitrag zur Lehre des internationalen Privatrechts (1891) 1, 92 ff; see also *id*, Über Inhalt, Natur und Methode des internationalen Privatrechts (1899) 255; *E Bartin*, De l'impossibilité d'arriver à la suppression définitive des conflits de lois, Clunet 1897, 225, 446, 720, reprinted in: Études de droit international privé (1899); *id*, Principes de Droit International Privé, vol I (1930) 221; *id*, La doctrine des qualifications et ses rapports avec le caractère national des règles du conflit des lois (1930) 31 Recueil des Cours de l'Academie de Droit International (RCADI) 565; cf *L Collins et al* (eds), *Dicey, Morris & Collins on the Conflict of Laws* (2006) no 2-009 ff with extensive further references and examples. A second approach argues that the process of characterisation should be performed in accordance with the *lex causae*, ie the foreign internal law referred to by the conflict rule itself. Accordingly, if a claim was labelled as ‘tortious’ in domestic but ‘contractual’ in foreign law, the latter classification would prevail. Cf *F Despanet*, Des conflits de lois relatifs à la qualification des rapports juridiques, Clunet 1898, 253; *M Wolff*, Internationales Privatrecht (1954) 54; *G Pachioni*, Elementi di diritto internazionale privato (1939) 167, all with extensive further references. Neither approach, however, is sufficient for the question of classification of supranational rules like those in the regulations Rome I and Rome II. If every Member State interpreted the concepts independently – whether by its *lex fori* or the foreign *lex causae* – the unified rules would be interpreted separately and, therefore, applied incoherently.

<sup>73</sup> *E Rabel*, Das Problem der Qualifikation, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 5 (1931) 241 and references in fn 72.

been so recognized by thoughtful scholars.<sup>74</sup> Taking Rabel's approach, the rules in the Rome I as well the Rome II Regulation (and, of course, in all other unified conflict rules) must ideally be regarded as independent concepts to be interpreted by reference to the objectives of the unified rules themselves and to the general principles stemming from the corpus of the national legal systems.

Accordingly, it is necessary to identify the criteria by reference to which contractual obligations may be distinguished from tortious or other non-contractual obligations. Firstly, various judgments of the CJEU have delivered an interpretation of art 5(1) and art 5(3) of the Brussels Convention and Regulation 44/2001 (Brussels I)<sup>75</sup> and must be taken into account. Secondly, although neither Regulation contains a definition of 'contractual obligations' or 'non-contractual obligations', various provisions of each Regulation nevertheless give some indications as to the scope of each concept. Thirdly and finally, various studies on the comparative law of contract and tort over the years have shed some light on this question.<sup>76</sup>

In fact, the CJEU does not follow any specific national systematisation or approach, but has stated that concepts in conflict of laws 'must be given an autonomous meaning, derived from the objectives and schemes of the instrument and the general principles underlying the national systems as a whole.'<sup>77</sup> And although considerations relevant to determining this characterisation for the purposes of allocating jurisdiction may not necessarily be identical to those relevant to determine the choice of law issues, the massive impact of the earlier CJEU decisions must be taken into account following the explicit order of the European legislator in Recital 7 demanding consistency between the documents.<sup>78</sup>

Alongside these observations regard should be taken of two main judgments when analysing the CJEU's notion of the borderline between the two institutions. In *Kalfelis*<sup>79</sup> the court held that the expression 'matters

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74 E Rabel, *Conflict of Laws* (2nd edn 1958) 55.

75 [2001] OJ L 12, 16.1.2001, 1–23.

76 See K Oliphant (fn 70) no 11 ff.

77 CJEU 29/76, *LTU Lufttransportunternehmen v Eurocontrol* [1976] ECR 1541.

78 See no 44 above and A-K Bitter, Auslegungszusammenhang zwischen der Brüssel I-Verordnung und der künftigen Rom I-Verordnung, *Praxis des Internationalen Privat-, Wirtschafts- und Verfahrensrechts* (IPRax) 2008, 96; F Garcimartin Alferez, The Rome I Regulation: Much Ado about Nothing? (2008) *The European Legal Forum* (EULF) 61, 62; S Leible/M Lehmann, Die Verordnung über das auf vertragliche Schuldverhältnisse anwendbare Recht, *Recht der Internationalen Wirtschaft* (RIW) 2008, 528, 529.

79 CJEU 189/87, *Athanasiос Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co* [1988] ECR 5565.

relating to a tort, delict or quasi-delict' covered all actions seeking to establish the liability of a defendant and which are not related to a contract and thereby established it as residual.<sup>80</sup> In *Handte v TMCS*<sup>81</sup> the CJEU held that 'matters relating to a contract' covered only situations in which one party assumes an obligation towards another and stressed the importance of a direct contractual nexus between the parties.

- 47 As indicated, various provisions of each Regulation also give some indications as to the scope of the concept of contract and tort. A virtually perfect illustration of the above-mentioned methodology of Rabel focusing on the objectives of the rules and the general principles beyond them is the logistic system around dealings prior to the conclusion of a contract (*culpa in contrahendo*). Such liability raises difficult problems of classification both under substantive domestic law as well as under private international law as some Member States regard the pre-contractual obligation on which the cause of action is based as contractual, others as tortious, yet others as a claim *sui generis*.<sup>82</sup> Both Rome Regulations have adopted a comparative approach to classification. Instead of focusing on the national domestic systematisation and the underlying dogmas, the legislator focused on the violated duties upon which the cause of action is based. Indeed some European jurisdictions feature actions under the title *culpa in contrahendo* protecting the interests of potential negotiating partners (for example, the duty to protect against personal injury), thus being akin to tort law, whereas other actions labelled as *culpa in contrahendo* are related to the (future) contract itself (for example, a violation of the duty of disclosure) and are thus protecting against economic losses. The Rome II Regulation took up this differentiation and constructed a system to distinguish the actions based on the respective duties. Recital 30 Rome II Regulation states accordingly that 'culpa in contrahendo for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Art 12 (Rome II Regulation) covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated,

80 Cf R Plender/M Wilderspin, *The European Private International Law of Obligations* (3rd edn 2009) no 2-024.

81 CJEU C-26/91, *Jakob Handte v Traitements Mécano-chimiques des Surfaces (TMCS)* [1992] ECR I-3967.

82 See Explanatory Memorandum accompanying the EC Commission Proposal of 22nd July 2003, COM(2003) 427 final, 8; J Fawcett/JM Carruthers, *Cheshire, North & Fawcett, Private International Law* (14th edn 2008) 832 ff.

a person suffers personal injury, art 4 (Rome II Regulation<sup>83</sup>) or other relevant provisions of this Regulation should apply.'

In broad terms and only for questions of conflict of laws, one may infer 48 that a 'contractual obligation' within the meaning of the Rome I Regulation denotes an obligation resulting from a voluntary agreement between the parties and is set out to protect their economic interests whereas a tort in the sense of the Rome II Regulation lacks such agreement. Nevertheless one party assumes a generally owed obligation towards the other mainly due to violations of residual extra-contractual duties.

## B. The Law applicable to contractual duties

### 1. Source of law

In litigation relating to contractual duties, the applicable law is determined by the EC Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I Regulation). In general the law applicable is determined in accordance with the rules laid down by arts 3 and 4 Rome I Regulation. These refer, primarily, to any law expressly agreed on by the parties to the contract; secondarily, to a choice of law implicitly, but clearly agreed on by the parties, and finally, in default of any such choice, to the law of the residence of the characteristic performer. For certain particular types of contracts such as employment contracts, special rules, often designed to protect the socio-economic weaker party, are laid down by arts 5–8 Rome I Regulation. 49

### 2. Scope of protection

Article 1(1) Rome I Regulation specifies that the Regulation applies, in 50 situations involving a foreign element, to contractual obligations in civil and commercial matters; it does not apply to revenue, customs or administrative matters. According to art 12 Rome I Regulation, the law applicable to a contract shall govern in particular the interpretation, performance, the consequences of a total or partial breach of obligations, including the assessment of damages insofar as it is governed by rules of law, the various ways of extinguishing obligations, prescription and limitation of actions and, finally, the consequences of nullity of the contract.

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83 See no 58 below.

### 3. General rules for determining the legislation applicable

- 51** Of the uniform rules established by the Rome I Regulation, foremost and dominant is the rule expressed in the first sentence of art 3(1) stating that a ‘contract shall be governed by the law chosen by the parties.’<sup>84</sup> Accordingly under the Rome I Regulation, the applicable law to a contract is determined primarily by reference to any express agreement on the point concluded by the parties to the contract and is commonly referred to by the term of ‘party autonomy’. Only in the absence of any express choice is reference made, secondarily, to an implied choice of the parties. Regarding the question which law could be chosen, it seems clear that under the Rome I Regulation the ‘law’ must be the law of any country, in the sense of a territory having its own legal rules on contracts. Thus it cannot be the general principles of law recognised by civilised nations or the Unidroit Principles or the (Draft) Common Frame of Reference.<sup>85</sup>

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- 84 For an in-depth analysis of these rules see inter alia *H Heiss*, Party Autonomy, in: F Ferrari/S Leible (eds), *Rome I Regulation* (2009) 1 ff; *P Lagarde/A Tennenbaum*, De la Convention de Rome au règlement Rome I, *Revue critique de droit international privé* (Rev crit DIP) 97 (2008) 727 ff; *Plender/Wilderspin* (fn 80) no 6-001; *P Stone*, EU Private International Law (2nd edn 2010) 299 ff; *K Siehr*, Die Parteiautonomie im Internationalen Privatrecht, in: FS Keller (1989) 485, 509 ff; *T Thiede*, Die Rechtswahl in den Römischen Verordnungen, 51 ff, *G Kodek*, Praktische und theoretische Anforderungen an die Rechtswahl, 85 ff both in: B Verschraegen (ed), *Rechtswahl – Grenzen und Chancen* (2010); *R Wagner*, Der Grundsatz der Rechtswahl und das mangels Rechtswahl anwendbare Recht (Rom I Verordnung), *IPRax* 2008, 377 all with extensive further reference.
- 85 Originally, in the EC Commission’s Proposal of 15 December 2005 (COM(2005) 650 final) art 3(2) would have enabled the parties to choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community. However, this provision was deleted from the Regulation as adopted. Instead Recital 12 allows for an incorporation by reference which merely introduces into the contract terms which would (still) be governed by a country’s law. Nevertheless, recital 13 allows, if the Community were to adopt, in an appropriate legal instrument, rules of substantive contract law, a provision of the instrument could enable the parties to choose to apply these rules. See *Thiede* (fn 84) 55; *Stone* (fn 84) 301; *K Boele-Woelki*, Die Anwendung der UNIDROIT-Principles auf internationale Handelsverträge, *IPRax* 1997, 161, 166; *E-M Kieninger*, Wettbewerb der Rechtsordnungen im Europäischen Binnenmarkt (2002) 286; *O Lando*, Some Issues Relating to the Law Applicable to Contractual Obligations (1996) 7 Kings College LJ 55, 63; *S Leible*, Außenhandel und Rechtsicherheit, *Zeitschrift für vergleichende Rechtswissenschaft* (ZVglRWiss) 97 (1998) 286, 317; *B Jud*, Neue Dimensionen privatautonomer Rechtswahl – Die Wahl nichtstaatlichen Rechts im Entwurf einer Rom I-Verordnung, *Juristische Blätter* (JBl) 2006, 695, 698; *P Mankowski*, CFR und Rechtswahl, in: M Schmidt-Kessel, Der Gemeinsame Referenzrahmen (2009) 389, 401; *J Kondrig*, Nichtstaatliches Recht als Vertragsstatut vor staatlichen Gerichten – oder: Privatkodifikationen in der Absichtsfalle?, *IPRax* 2007, 241, 244; *U Magnus*, Die Rom I-Verordnung, *IPRax* 2010, 27, 33.

In addition, the parties must consider three further restrictions on a choice of law. Firstly any subsequent<sup>86</sup> choice by the parties cannot prejudice the formal validity of the contract or adversely affect the rights of third parties.<sup>87</sup> Secondly, the choice is restricted where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen. In these cases the choice of the parties shall not prejudice the application of the provisions of the law of that other country which cannot be derogated from by agreement. Thirdly and finally, where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of law other than the law of a Member State shall not prejudice the application of provisions of EU law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.<sup>88</sup>

Where the parties have not chosen an applicable law in accordance with art 3 Rome I Regulation, it is clearly necessary to provide for default rules designating the applicable law. Accordingly, in the absence of any valid choice by the parties, the applicable law to a contract is determined in line with art 4 Rome I Regulation providing a list of strict rules.<sup>89</sup> The main effect of these rules is to provide a list of rebuttable presumptions in favour of the law of the characteristic performer's residence, which may be displaced by clearly establishing a closer connection with another country.<sup>90</sup>

<sup>86</sup> Such subsequent choice may be indicated after the two years where it is possible to 'remain' in the 'original social security system' system, see no 24 above.

<sup>87</sup> Such as guarantors or beneficiaries. Cf *Stone* (fn 84) 299.

<sup>88</sup> For an evaluation see *Thiede* (fn 84) 57; *J Basedow*, Materielle Rechtsangleichung und Kollisionsrecht, in: A Schnyder/H Heiss/B Rudisch (eds), Internationales Verbraucherschutzrecht (1995) 11, 34.

<sup>89</sup> '(1)... a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence; (b) a contract for the provision ... where the service provider has his habitual residence; (c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property ... law of the country where the property is situated; a distribution contract ... law of the country where the distributor has his habitual residence; (g) ... sale of goods by auction ... law of the country where the auction takes place... (2) 2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points ... of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. (3) Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. (4) Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.'

<sup>90</sup> Thus, the rule refers to the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence, and the function of the list within the provision is to indicate the party who counts as the characteristic performer in the case of certain types of contract.

#### 4. Special provisions for individual employment contracts

- 54 The operation of arts 3 and 4 Rome I Regulation is nevertheless without prejudice to several other articles of the Regulation establishing special rules for selecting the applicable law for special categories of contracts. The rules applicable to such special categories of contracts derogate both arts 3 and 4 Rome I Regulation by restricting party autonomy and establishing a specified method for selecting the applicable law in the absence of any choice of the parties.
- 55 In this context, art 8 Rome I Regulation makes special provision for individual contracts of employment. By art 8(1) Rome I Regulation the possibility of an express or implied choice of law by the parties is explicitly granted when determining the applicable law of an employment contract, but – as envisaged by recital 23 Rome I Regulation<sup>91</sup> – such choice operates subject to the rules for the protection of the employee as a socio-economic weaker party. As a result, a choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable.<sup>92</sup>
- 56 In view of the protective purpose of art 8(1) Rome I Regulation, ‘provisions that cannot be derogated from by agreement’ include but are not limited to claims for unfair dismissal,<sup>93</sup> in respect of unlawful discrimination in relation to employment,<sup>94</sup> special rules granting bonuses, maternity leave, compulsory subsidies to pregnant employees to be granted by the employer<sup>95</sup>, continuing wages during periods of employee’s illness,<sup>96</sup> part-time employment<sup>97</sup> and finally provisions such as those concerning industrial safety and hygiene which are regarded in certain Member States as

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91 Recital 23 Rome I regulation reads as follows: ‘As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules.’

92 See *Stone* (fn 84) 358 with further reference.

93 See eg *Lawson v Serco* [2006] 1 All England Law Reports (All ER) 823 (HL); *Bleuse v MBT Transport* [2008] Industrial Relations Law Reports (IRLR) 264.

94 See eg *Williams v University of Nottingham* [2007] IRLR 660.

95 See eg Bundesarbeitsgericht (German Federal Labour Court, BAG) 12 December 2001, BAGE (Decisions of the BAG) 100, 130.

96 See eg BAG 12 December 2001, BAGE 100, 130.

97 See *A Junker*, Der Teilzeitanspruch des deutschen Arbeitsrechts – keine Eningriffsnorm nach europäischem IPR, Europäische Zeitschrift für Arbeitsrecht (EuZA) 2009, 88 with further references.

being provisions of public law.<sup>98</sup> The result of the application of these rules is not however a complete dismissal of the violating contract, but the application of the distinct rule which may result in the employee ‘cherry-picking’.<sup>99</sup>

Para 2 of the provision determines (almost in passing) the place of the characteristic performance in individual employment contracts and thus derogates art 4 Rome I Regulation: according to art 8(2) Rome I Regulation, the applicable law is that of the country in or from which the employee habitually carries out his work in performance of the contract, and this country of habitual work remains unchanged even if the employee is temporarily employed in another country.<sup>100</sup> If there is no ascertainable country of habitual residence, art 8(3) Rome I Regulation refers instead to the law of the country in which the place of business through which the employee was engaged is situated.<sup>101</sup> Ultimately both these rules are reduced to rebuttable presumptions by art 8(4) Rome I

98 See Report on the Convention on the law applicable to contractual obligations by M Giuliano and P Lagarde (Giuliano/Lagarde Report), OJ C 282, 31.10.1980, 1–50 (at 27).

99 Facing a distinct tendency of employment tribunals to stick with their national rules (see P Mankowski, Employment Contracts under Article 8 Rome I Regulation, in: F Ferrari/ S Leible (eds), Rome I Regulation (2009) 171, 202) objections against an overly wide interpretation regarding these provisions may not be unwarranted: it may be necessary to exactly determine the spatial extent of the national rules, their interpretation and overriding character. Cf *Plender/Wilderspin* (fn 80) no 11-029; *Lagarde/Tennenbaum*, Rev crit DIP 97 (2008) 727, 748. Nevertheless, with a view to mandatory rules in art 9 Rome I Regulation and the Public policy of the forum in art 26 Rome I Regulation such prerequisites ought not to be interpreted in an excessively restrictive manner as can be deduced from Recital 37 Rome I Regulation and (subtle) implicit references of the European legislator (see Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations ('Rome I'), COM (2005) 650 final, 8) to the judgments of the CJEU (joined cases C-369/96 and C-376/96, *Criminal proceedings against Jean-Claude Arblade, Arblade & fils SARL, Bernard and Serge Leloup and Sofrage SARL* [1999] ECR I-8453, para 31 and C-165/98, *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL* [2001] ECR I-2189, paras 22–36).

100 Recital 36 adds 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 his tasks abroad.

101 The reference ‘in which or, failing that, from which’ the employee habitually carries out his work in performance of the contract is evidently designed to adopt the approach followed by the CJEU under the Brussels Convention and the Brussels I Regulation: In C-125/92, *Mulox IBC Ltd v Hendrick Geels* [1993] ECR I-4075 and C-383/95, *Petrus Wilhelmus Rutten v Cross Medical* [1997] ECR I-57 the CJEU held that in cases where the employee carries out his work in more than one country, reference must be made to the place where the employee has established the effective centre of his working activities, at or from which he performs the essential part of his duties towards the employer. If there is no such centre (see eg C-37/00, *Herbert Weber v Universal Ogden Services* [2002] ECR I-2013) the whole of the duration of the employment relationship must be taken into account and the relevant place will normally be the place where the employee has worked longest, however, by way of exception, weight could be given to the most recent period of work where the employee, after

Regulation which operates where it appears from the circumstances that the contract is more closely connected with a country other than that indicated in art 8(2) or (3), and subjects the contract to the law of that other country.

### **C. The Law applicable to extra-contractual duties**

#### **1. Source of law**

- 58** In litigation relating to extra-contractual duties, the applicable law is determined by the EC Regulation 864/2007 on the Law Applicable to Non-Contractual Obligations, commonly referred to as the Rome II Regulation. The Rome II Regulation covers all non-contractual obligations in civil and commercial matters which implicate the laws of more than one state.

#### **2. Scope of protection**

- 59** The application of the Rome II Regulation is restricted by a list of specific exclusions<sup>102</sup> such as obligations arising out of family relationships and matrimonial property regimes, obligations arising under negotiable instruments, non-contractual obligations arising out of the law of bodies corporate or unincorporated regarding matters such as the creation, legal capacity, internal organisation or winding-up of companies, obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust, obligations arising out of nuclear damage and finally obligations arising out of violations of privacy and rights relating to personality, including defamation.

#### **3. General rule**

- 60** The general rule of the Regulation stipulates in art 4(1) Rome II Regulation the law of the place of the injury.<sup>103</sup> Correspondingly the applicable

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having worked at one place, then takes up his activities on a permanent basis in a different place. Cf *Stone* (fn 84) 357; *J Schacherreiter*, *Leading Decisions* (2008) no 183.

<sup>102</sup> See art 1(2) Rome II Regulation.

<sup>103</sup> An in-depth analysis to this rule is provided in vol 26 of the Tort and Insurance Law series by *T Thiede*, *Aggregation and Divisibility of Damage From the European Conflicts of Law Perspective*, in: *K Oliphant* (ed), *Aggregation and Divisibility of Damage* (2009) 427, 436.

law will be the law of country in which the damage occurs, ‘irrespective of the country in which the event giving rise to the damage occurred’<sup>104</sup> and ‘regardless of the country or the countries of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.’<sup>105</sup>

#### 4. Escape clause

This general rule is subject to particular exceptions operating on the 61 existence of common habitual residence or otherwise closer relationship of the parties to the case. Firstly, if both parties were habitually resident in the same country, the tort is governed by the law of that country. Secondly – and of most relevance to this topic – art 4(3) Rome II Regulation provides an exception, described in Recital 18 of the Regulation as an escape clause, in favour of the law of another country which has a manifestly closer relationship with the tort.

The second sentence of art 4(3) Rome II Regulation sets out that such a 62 manifestly closer connection may be based in particular on a pre-existing relationship between the parties, such as a contract. The Explanatory Memorandum<sup>106</sup> states implicitly<sup>107</sup> that such a pre-existing relationship could consist of an employment contract when considering that due to the escape clause in art 4(3), the Rome II Regulation cannot have the effect, in relation to torts, of depriving the weaker party of the protection of the law which protects him, as regards contracts, under art 6 Rome I Regulation. It is submitted that this can only mean that in case of a tort related to an existing employment contract, the conflicts rule concerning the latter would prevail and the rules expanded on above could apply which would normally result in the application of the law of the underlying contractual obligation.<sup>108</sup> In

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104 See art 4 Rome II Regulation.

105 See Recital 17 Rome II Regulation.

106 Explanatory Memorandum accompanying the EC Commission Proposal of 22nd July 2003, COM(2003) 427 final (69 2003/0168 (COD), 12–13.

107 The full wording of the paragraph – contemplating a choice of law as described in no 51 – is as follows: ‘But where the pre-existing relationship consists of a consumer or employment contract and the contract contains a choice-of-law clause in favor of a law other than the law of the consumer’s habitual place of residence, the place where the employment contract is habitually performed or, exceptionally, the place where the employee was hired, the secondary connection mechanism cannot have the effect of depriving the weaker party of the protection of the law otherwise applicable.’

108 See no 49 above.

any case, the Explanatory Memorandum expressly states that the application of the escape clause must remain exceptional, must provide a manifestly close relationship to the tort and finally that the sole aim of the provision is to ensure that one and the same relationship may be covered by the law of contract in one Member State and the law of tort/delict in another can be mitigated, until such time as the CJEU comes up with its own autonomous response to the situation.

## **D. Adjudication of claims**

### **1. Source of law**

- 63** The adjudication of claims of *inter alia* contractual and non-contractual actions<sup>109</sup> with a foreign element depends on the procedural law of the competent court. Whether or not a court is competent to adjudicate a case under its law was addressed by the European legislator as early as in 1968 by the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.<sup>110</sup> Subsequently this Convention was amended by four accession conventions eventually replaced by Regulation 44/2001 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation).<sup>111</sup> The Regulation, like the Convention before it,<sup>112</sup> lays down rules on direct jurisdiction, applicable by the court seized of the original action in determining its own jurisdiction, and the recognition and enforcement of judgments given in other Member States of the European Union in which the Regulation applies.

### **2. Scope**

- 64** Again, the scope of the Brussels I Regulation is restricted by a list of specific exclusions such as the status or legal capacity of natural persons,

<sup>109</sup> The material scope of the Brussels I Regulation to be applicable, the subject matter of the dispute must be of civil or commercial nature; for an evaluation of those terms: see CJEU 29-76, *LTU v Eurocontrol* [1976] ECR 1541; 814/79, *Netherlands v Reinhold Rüffer* [1980] ECR 3807; C-172/91, *Sonntag v Waidmann* [1993] ECR I-1963; C-167/00, *Verein für Konsumenteninformation v Henkel* [2002] ECR I-8111; C-266/01, *Tiard v the Netherlands* [2003] ECR I-4867.

<sup>110</sup> OJ L 299, 31.12.1972, 32–42.

<sup>111</sup> OJ L 12, 16.1.2001, 1–23.

<sup>112</sup> In contrast to the prior Convention, the Regulation is directly applicable in the Member States under art 288 Treaty of the Functioning of the European Union (TFEU).

rights in property arising out of a matrimonial relationship, wills and succession, bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings and finally social security and arbitration.<sup>113</sup>

### **3. Rules for international jurisdiction in relation to contracts of employment**

As the original version of the 1968 Brussels I Convention did not provide **65** any tailored rules for individual employment contracts, the CJEU discerned the purpose of protecting employees on account of their weaker socio-economic position and accordingly adopted special rules for international jurisdiction in relation to contracts of employment setting aside the original general regime.<sup>114</sup> Building on these rulings, the 1989 version of the Brussels Convention made specific provisions for individual contracts of employment and the present-day Brussels I Regulation extracted the respective judgments in arts 18–21 of the Regulation.

According to art 18(1) Brussels I Regulation, the rules on jurisdiction over **66** individual contracts of employment operate without prejudice to art 4 Brussels I Regulation,<sup>115</sup> on defendants not domiciled in a Member State, and to art 5(5) Brussels I Regulation<sup>116</sup>, on secondary establishment of the defendants. Article 18(2) Brussels I Regulation combines both models, for example an employer who is not domiciled in any Member State but has a branch in a Member State; such employer is – with regard to disputes arising out of the operations of the branch – deemed to be domiciled in the Member State of secondary establishment.

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113 See art 1(2) Brussels I Regulation.

114 See CJEU C-383/95, *Rutten v Cross Medical Ltd* [1997] ECR I-57; 133/81, *Roger Ivenel v Helmut Schwab* [1982] ECR 1891; 266/85, *Shenavai v Kreischer* [1987] ECR 239; 32/88, *Six Contructions v Humbert* [1989] ECR 341; *Stone* (fn 84) 138.

115 Art 4 Brussels I Regulation reads as follows: '(1) If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall ... be determined by the law of that Member State. (2) As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force ... in the same way as the nationals of that State.'

116 Art 5 Brussels I Regulation reads as follows: 'A person domiciled in a Member State may, in another Member State, be sued: ... (5) as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated'.

- 67** As regards actions against an employer who is domiciled in a Member State, art 19(1) Brussels I Regulation mirrors the general rule in art 2 Brussels I Regulation<sup>117</sup> and confers jurisdiction on the courts of the State in which the defendant employer is domiciled. Article 19(2)(1) Brussels I Regulation confers jurisdiction also on the courts of another Member State for the place where the employee habitually carries out his work or the last place where he did so. If the employee does not or did not habitually carry out his work in any one country, art 19(2)(b) instead vests jurisdiction to the courts of another Member State for the place where the business which engaged the employee is or was situated.
- 68** Conversely if an employer brings proceedings against his employee, the policy of protecting the socio-economic weaker party is clearly reflected in art 20(1) Brussels I providing that the employer may only sue the employee in the courts of the Member State where the employee is domiciled and thus bars the possibility of bringing proceedings at his workplace.<sup>118</sup> Moreover, art 20 Brussels I Regulation does not provide any alternative jurisdiction for the employer to sue, but, however, permits by way of exception in art 20(2) Brussels I Regulation an employer to submit a counterclaim in the court in which a claim by the employee is pending.
- 69** Finally, art 21 Brussels I Regulation admits freedom of choice with respect to the determination of competent courts in matters of individual employment contracts. Such choice may prevail also over the aforementioned rules in arts 18–20 Brussels I Regulation but – to ensure the effectiveness of the protective policy – is subject to two exceptions. Firstly an agreement is allowed when it is entered into after the dispute has arisen and permitted only insofar as it allows the employee to bring proceedings in additional courts.

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<sup>117</sup> The basic rule of the Brussels I Regulation concerning direct jurisdiction is enshrined in art 2 Brussels I Regulation providing that ‘persons domiciled in a Member State shall ... be sued in the courts of that Member State.’ The rationale behind this long-standing rule in favour of the defendant’s domicile was analysed excellently by the CJEU in 17 June 1992, C-26/91, *Handte* [1992] ECR I-3967 noting that the rule reflects the purpose of strengthening the legal protection of persons established within a particular ‘national’ jurisdiction, and rests on the assumption that a defendant can normally most easily conduct his defence in the courts of his domicile. See also CJEU C-440/97, *Groupe Concorde v ‘Suhadiwarno Panjan’* [1999] ECR I-6307. Moreover, the defendant presumably keeps most of his assets at his domicile and enforcement against his property can most easily be effected there. Thus, the rule tends to concentrate both adjudication of the merits and enforcement of judgment in the same country, thereby avoiding unnecessary procedural complications.

<sup>118</sup> Such action would be possible without this exception under art 5(1) Brussels I Regulation according to which a person could be sued in the courts for the place of performance of the obligation in question. See also CJEU 32/88, *Six Constructions v Humbert* [1989] ECR 341.

## **E. Rights of recourse and interaction between employers' liability and workers' compensation**

Given the potentially applicable Regulations to claims based on employers' liability, one of the essential questions in this report was which law governs recourse between the liable employer and the social security institution (which has already provided benefits). Given the different Regulations and the potentially divergent laws applicable, the likelihood was high that the redress between employers liable in one country and social security institutions handing out benefits in another was not entirely coordinated. 70

Reality being the antithesis of expectation, none of the initial fears transpired. As set out previously<sup>119</sup> art 85 Regulation 883/2004 stipulates that the subrogation of a social security institution and the extent of the rights to which that institution is subrogated are to be determined in accordance with the law of the Member State to which the institution belongs and thereby postulates a specific conflict rule for the law applicable to the recourse of a social security institution. According to art 23 Rome I Regulation and art 27 Rome II Regulation, neither Regulation shall prejudice the application of provisions of EU law which, in relation to particular matters, lay down conflict of law rules relating to contractual or non-contractual obligations. As art 85 Regulation 883/2004 is most obviously a provision of EU law and lays down a rather specific rule for the law applicable to the recourse of a social security institution, it prevails accordingly. 71

## **V. Alternatives, Evaluation and Conclusions**

The interaction between workers' compensation and employers' liability revealed itself as a fine machinery which – against initial doubts – works incredibly well. However the approach chosen by the European legislator remains open to criticism. The current coordination of European social security involves two Regulations each consisting of more than 100 articles, a multitude of decisions rendered on the topic by the CJEU and, given the rejection of a more simplistic approach in the latest, revised version of the more recent Regulation,<sup>120</sup> is bound to become more labyrinthine with its maturation. Moreover, the current distributive 72

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<sup>119</sup> See no 35 ff above.

<sup>120</sup> See fn 21 above.

model, that is, the handling of claims by separate institutions in all Member States, results in excessive bureaucracy and correspondingly exorbitant costs.

- 73 A radical alternative<sup>121</sup> to the existing conflicts based model – merely stipulating a Member State's material law – could be an 'Intra-Community Model' for social security consisting as an original European Social Security System. Such a 'post-coordinative' model was developed and promoted by Pieters in the 1990s at a time when the Union consisted of 12 Member States; accordingly Pieters subsequently named his idea as 'The thirteenth state'.<sup>122</sup> He envisaged an autonomous, comprehensive, contribution based, 'unitary' European Social Security System (ESSS) which would address migrant workers only. Although membership of the ESSS could be optional, Pieters envisaged opening the system after a period of initial implementation thus allowing the ESSS to be in direct competition with the social security system in the Member States. Such a new start would also have the advantage that the implicit social security debt of earlier generations would not have to be borne by the current contributors. Since the maturation of the ESSS would be in a rather distant future one could upgrade benefits to create an attractive scheme.

It is questionable whether such a system would be in the range of competences of the European legislator. As art 48 TFEU provides, the European Parliament and the Council shall make arrangements to secure aggregation and payment of benefits to persons resident in the territories of Member States.<sup>123</sup> Such undertaking undoubtedly presupposes Member States' social security systems independent of European legislation.<sup>124</sup> Moreover, the proposal's definition of a migrant worker remains rather unclear. Are migrant workers only those who work more than two weeks, two months or two years in a country other than his original workplace? If such a strict limitation is envisaged, the proposal could be rendered practicable but would in any case exclude a smaller or greater group of potential applicants resulting in some remainder of the current coordination system. This would essentially result in doubling the current bureaucracy as contacts between the ESSS and the Member States would have to be coordinated as well. If this is to be avoided, an opt-in of virtually

<sup>121</sup> Inspired by the history of legal integration: see K Zweigert, Grundsatzfragen der europäischen Rechtsangleichung, ihrer Schöpfung und Sicherung, in: FS Dölle (1963) 401 ff; S Leibfried, Social Europe, Zentrum für Sozialpolitik (ZeS) Arbeitspapier No 10/91 (1991) 33.

<sup>122</sup> See D Pieters/S Vansteenkiste, The Thirteenth State (1993) 14 ff.

<sup>123</sup> See no 8 above.

<sup>124</sup> Eichenhofer (fn 8) 486.

everyone ever paying a work-related visit to a Member State must be permitted to join which would clearly violate the competence set out above. Finally, due to the distant maturity of the ESSS, benefits could indeed be upgraded and thereby elevate the attractiveness of the system. This however would result in a currently carefully-avoided intra-firm inequality. Two sorts of social protection would co-exist in one work setting.<sup>125</sup>

The current state of coordination of workers' compensation and employers' liability constitutes a whole area of law which is extremely well developed and apparently operates well enough for all parties concerned as for several decades migrant workers, their employers and social insurers have been protected and have become familiar with a system which, despite its at times complicated character reveals upon close inspection its ability to function sufficiently well.

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125 Cf *Leibfried*, ZeS-Arbeitspapier No 10/91 (1991) 34.