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### International private law aspects of dispute settlement related to transnational company agreements: final report

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*International private law aspects and dispute  
settlement related to transnational company  
agreements*

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## INTRODUCTION AND SCOPE

### I. About the study

This is the final report of a study undertaken for the European Commission concerning “International private law aspects of dispute settlement related to transnational company agreements” (VC/2009/0157).

For the purposes of this study, a “transnational company agreement” (or “TCA”) is defined as:

“an agreement comprising reciprocal commitments the scope of which extends to the territory of several States and which has been concluded by one or more representatives of a company or a group of companies on the one hand, and one or more workers’ organisations on the other hand, and which covers working and employment conditions and/or relations between employers and workers or their representatives”.

The objective of the study is to 1°) provide a comprehensive overview of the rules to be applied as to the applicable law and the competent jurisdiction when a dispute arises on the interpretation or application of a transnational company agreement; 2°) identify the practical and legal obstacles to the way disputes relating to transnational company agreements can be settled in court; 3°) identify and suggest any actions that might be taken to overcome these obstacles and allow for disputes relating to transnational collective bargaining transnational company agreements to be settled in a satisfactory way for the parties.

The central issue in this study concerns the problem of enforcement of transnational company agreements and the private international law rules relating to this issue. In this study, enforcement is narrowed down to private enforcement. It means that excluded from the scope of study are public enforcement mechanisms involving e.g. labour inspection services or other labour administration monitoring devices.

Within the scope of study, the focus will be on judicial dispute settlement, but the report will take account of extra-judicial enforcement and compliance mechanisms where relevant for the study. In this context extra-judicial mechanisms refers to concepts such as arbitration, mediation and conciliation, as well as industrial action.

### II. Methodology and structure

The study gives a detailed analysis of the private international law rules applicable to the enforcement of TCA’s as well as an overview of problems with regard to the enforcement of the TCA’s at the national level. Its conclusions are based on an analysis of the relevant legal instruments as well as on a comparative study of some aspects of national law. The information on national law is mainly gathered through national experts, who have reported on the basis of a questionnaire. In addition, existing materials on TCA’s and on national systems have been used.

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For the specific information on member states systems, the countries that were selected are: **France** and **Germany** who host a majority of TCA's concluded at present. More importantly, they represent two distinct, prototypical models of labour law and industrial relations. With regard to the operational structure of EWCs, a distinction has to be made between two basic models. According to research of the European Trade Union Institute and the reporting of the European Foundation for Living and Working Conditions (see: [www.eurofound.eu](http://www.eurofound.eu)), the *German* model stands for EWCs composed exclusively of workers' representatives, while the *French* model is jointly composed of management and workers' representatives and is chaired, in most cases, by management. In 2005, 63% of all EWCs applied the French model and 37% applied the German model.

**Belgium** and the **Netherlands** were seen as systems building further on labour law and industrial relations concepts of France (The Franco-Belgian tradition) and Germany (the Germanic-Dutch tradition). Moreover, the law of Belgium is considered to be very relevant as major European social partners have their basis there. As regards the Netherlands, it is important to note that the national works councils' laws provide for particular enforcement rules, such as an appeal to the Enterprise Chamber. This way, workplace democracy can be considered to hold the middle between labour law and corporate law.

Furthermore, two systems without statutory works councils have been selected, such as **Sweden** and the **United Kingdom**. The latter country can also be considered as representing a distinct system in the area of collective bargaining and industrial relations. With further consideration to geographical representation, **Hungary** and **Italy** were also included in the scope of the study.

Before the final report was made, some discussion meetings with the European Commission were held in order to further narrow the scope of the study. In this context, it has been decided to confine the scope of the study mainly to private international law issues concerning TCA's and to discuss the enforcement issues in this context. The interaction between TCA's and European as well as national labour law provision is being addressed, but only in so far as this enables the identification of the specific problems and obstacles that may occur in light of the enforcement of TCA's.

In light of this, the study is structured in three parts.

1. Transnational company agreements (TCA's) represent a variety of instruments. They differ according to the parties involved, the type of obligations assumed by the parties and the topics covered. Before one can enter into the discussion of choice of law and international jurisdiction, the TCA based legal relationships and their characterisation should be briefly addressed and contextualised. Any discussion of the character of the commitment undertaken by the signatories to a TCA will be strictly limited to the aspects relevant for choice of law purposes. When necessary for this purpose, the analysis will also take into account the Community *acquis* in the field of labour law. A short outlook of a possible (pre-existing) harmonised approach is, in private international law issues,

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rather unavoidable. After a more comparative analysis, the problem of characterisation will be discussed from the point of view of private international law.

2. Subsequently, the study will continue with its main focus, the rules and instruments on applicable law as well as on international jurisdiction will be studied. The relevant provisions are described as to their content and the application to the subject matter is illustrated.

3. Furthermore, an overview will be provided of problems of enforcement of TCA's. The study is confined with these enforcement questions, mainly at national level. It is also relevant, in identifying the competent court and applicable law, to address the question which party will try to enforce the agreement in court, or seeks judicial help in its interpretation. This involves the issue of *ius standi* – meaning they have the capacity to be a party to a lawsuit. But also other practical and legal problems that may occur at the national level with regard to the enforcement of TCA's, are addressed. In particular, not only access to courts but also alternative disputes resolution mechanisms, including industrial action is being looked at. This Member State level information has been collected and produced through the use of a questionnaire that was sent to a number of national academic experts. A limited number of countries were selected, not only in terms of available know how, but also taking into account as much as possible concerns of both geographical as well as systematic representativity. The involved experts are: Nathalie Betsch (Belgium), Anne Davies (United Kingdom), Rüdiger Krause (Germany), Jonas Malmberg (Sweden), Francesco Monticelli (Italy), Sophie Robin-Olivier (France), Dora Sari (Hungary), and Nuna Zekic (The Netherlands).

The study ends with conclusions and recommendations.

## **PART I. BRIEF ANALYSIS AND QUALIFICATION OF TCA'S**

### **I. Existing research**

It must be noted that scholarly legal literature on the subject of transnational company agreements remains rather limited. The most relevant legal analyses are made by, or with cooperation of, the European Commission or the International Labour Organisation. A study of Ales and others (2006),<sup>1</sup> which gives an overview of the current developments in transnational collective bargaining in Europe, includes a discussion on TCA's. Another interesting study is that of Papadakis and others (2008) on cross-border social dialogue and agreements, which includes a discussion on transnational company agreements within and beyond the European Union context.<sup>2</sup>

Furthermore, the European Union itself has produced a set of documents and texts on the issue of TCA's. From the European Commission, there is a Commission Staff Working Document (SEC(2008/2155) on "The role of transnational company agreements in the context of an increasing international integration",<sup>3</sup> as well as the document on "Mapping of transnational texts negotiated at corporate level" (2008).<sup>4</sup>

The European Commission also organised two seminars on TCA's, one on 17 May 2006 and one on 27 November 2006. Documents and presentations used in these seminars can also be relied upon. Under the French presidency of the European Union (2008), some research has been undertaken as well. A document representing this research has been produced by Sobczak and Léonard (2009)<sup>5</sup> as well as by Carley.<sup>6</sup>

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<sup>1</sup> E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational collective bargaining. Past, present and future. Final Report, 2006*, 43 p.

<sup>2</sup> K. Papadakis (ed.) *Cross-border social dialogue and agreements*, Geneva, International Labour Office, 2008, 288 p.

<sup>3</sup> Commission Staff Working Document (SEC(2008) 2155), *The role of transnational company agreements in the context of increasing international integration*, Brussels, 2 July 2008, COM(2008) 419 final, 11 p.

<sup>4</sup> *Mapping of transnational texts negotiated at corporate level*, European Commission, Employment, Social Affairs and Equal Opportunities DG Social Dialogue, Social Rights, Working Conditions, Adaptation to Change, Brussels, 2 July 2008 EMPL F2 EP/bp 2008 (D) 14511, 37 p.

<sup>5</sup> A. Sobczak & E. Léonard, *Transnational social dialogue at the sector and the company level*, Paper to be presented at the Conference of the Regulating for Decent Work network, *Regulating for decent work: innovative regulation as a response to globalization*, Geneva, International Labour Office, 8-10 July 2009, 17 p.

<sup>6</sup> M. Carley, *Report of the French EU Presidency conference "Transnational company agreements. Dialogue, rights, anticipating corporate restructuring, actors: A new perspective"*, Lyon, 13-14 November 2008, 39 p.

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Two relevant research projects of the European Foundation for Living and Working Conditions, also concern TCA's: the first is called "Bargaining at European level? Joint texts negotiated by European Works Councils" (2001)<sup>7</sup> and the second is called "European and international framework agreements: Practical experiences and strategic approaches" (2009).<sup>8</sup>

### II. Legal qualification of TCA commitments

The characterisation of TCA commitments is an important issue in order to determine the applicable rules on private international law applying to these commitments. Closely related to this, is the question of characterization or reception of TCAs in national legal systems. It should be noted that these two issues need to be distinguished. The issue of the characterization of a TCA under national law is only arrived at after the applicable national law has been found on the basis of the applicable private international law rules. The relevant rules on the applicable law can only be applied properly after the question of characterization of TCA commitments under private international law has been answered. It should be kept in mind that characterization in private international law does not necessarily coincide with the characterization in national law. The issue of qualification of TCA commitments under national law is, therefore, a secondary qualification problem, but it nevertheless remains relevant in order to assess the possible legal and practical problems with regard to the enforcement of TCAs.

The legal qualification of TCA's and the commitments that are arising thereof, is far from evident. It must be pointed out that there is no "single notion" of a transnational company agreement. There are many kinds of transnational texts negotiated at company level, with various names, formulas and looks. Some of these texts use the word "agreement"; some use the word "declaration", or "protocol", or "global agreement". It may be that not all TCA's may comprise strictly legal or binding obligations.

TCA's show a lot of similarity with, and often qualify as, international framework agreements (IFA's). In its "Mapping" document,<sup>9</sup> the European Commission has explained that "a clear distinction of transnational texts, according to their scope and character, between "European" and "global" texts is not always possible as there is a continuum between both types and also both categories have had a quite comparable

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<sup>7</sup> M. Carley, *Bargaining at European level? Joint texts negotiated by European Works Councils*, European Foundation for the Improvement of Living and Working Conditions, 2001, 94 p.

<sup>8</sup> V. Telljohann, I. da Costa, T. Müller, U. Rehfeldt, R. Zimmer, *European and international framework agreements: Practical experiences and strategic approaches*, European Foundation for Living and Working Conditions, 2009, 95 p.

<sup>9</sup> *Mapping of transnational texts negotiated at corporate level*, European Commission, Employment, Social Affairs and Equal Opportunities DG Social Dialogue, Social Rights, Working Conditions, Adaptation to Change, Brussels, 2 July 2008 EMPL F2 EP/bp 2008 (D) 14511, p. 3-4.

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evolution over time.”<sup>10</sup> There are thus strong parallels between IFA's and TCA's. This would allow taking into account research findings on the (legal) enforcement of IFA's. However, in these studies, the exact legal enforcement of the commitments that have been undertaken by IFA signatories, remains equally an unresolved issue.

There remains thus a difficulty in drawing clear and precise conclusions as regards the exact legal qualification of TCA's as legally enforceable commitments, taking existing research into account. Statements on the legal nature of TCA commitments can, therefore, only be made on the basis of legal construction or argumentation. In this context, it is quite likely that much will depend on the actual commitments that parties themselves are willing to undertake when concluding a TCA. In other words, the role or the will of the parties would stand quite central. In practice, various responses with regard to the parties' perceived legal commitments are found.<sup>11</sup> In many cases, parties consider their commitments as legally binding commitments.

### *A. Characterisation under national law*

With regard to the labour law of various member states that have been studied, there are two main possible ways to qualify TCAs or TCA commitments. One possibility is that TCAs would qualify as collective agreements. However, the examined member states' systems show that recognition of TCAs as collective bargaining agreements under national labour law can be problematic. The systems or the examined member states are not adapted to collective agreements with a transnational element, such as a transnational scope of application or transnational parties such as international unions or multinational (groups of) employers.

On the other hand, a TCA could be qualified as a national collective agreement if all the national conditions are met (e.g. if national representative workers organisations have signed and other formal requirements have been met). France is one of the examples where existing TCAs have been recognized as collective agreements under French law.

A specific case is the **United Kingdom**. There, a TCA will count as a collective agreement under English law if it meets the definition in Section 178 TULRCA. The key elements of that definition are (i) the agreement must be made by or on behalf of one or more trade unions and one or more employers or employers' associations and (ii) it must relate to the listed matters. Thus, it would be necessary to examine each TCA to determine who the parties were and the subject matter covered. However, the effect of being a collective agreement under English law would be to render the

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<sup>10</sup> Mapping of transnational texts negotiated at corporate level, European Commission, Employment, Social Affairs and Equal Opportunities DG Social Dialogue, Social Rights, Working Conditions, Adaptation to Change, Brussels, 2 July 2008 EMPL F2 EP/bp 2008 (D) 14511, p. 4.

<sup>11</sup> European Commission, General Directorate Employment, Social Affairs and Equal Opportunities, Second study seminar “Transnational Agreements”, 27 November 2006, Working document n°3, Transnational agreements – Complementary Study, First findings, p. 6-10.



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agreement unenforceable under Section 179 unless it contained a clear statement that it was intended to be a legally enforceable contract.

Another possibility would be to qualify a TCA as an agreement concluded with the works council. This is particularly a possibility in **Germany** and the **Netherlands**, two systems that know single party works council (composed only of worker representatives) with which employers can conclude agreements recognized under national law. But it would require that the works councils are involved as signatories of the agreement.

Other forms or 'legal reception' of TCA commitments can also be mentioned. In civil law systems, the notions of contract or unilateral obligation would be relevant. The applicable general principles of contract law would then need to be followed for TCA's. The **French** report, for example, refers to the possibility to qualify TCAs as "unilateral" commitments. This notion has been used in France to give legal effect to other agreements than collective agreements, such as agreements concluded between an employer and worker representatives. Depending on their content, such commitments can be considered as unilateral acts granting rights or benefits to workers which can be relied upon before the courts.

### *B. Characterisation under private international law*

The instruments with regard to applicable law and jurisdiction which may be relevant for the present study are the Brussels I Regulation on jurisdiction in civil and commercial matters, the Rome I Regulation on the law applicable to contractual obligations and Rome II on the law applicable to non-contractual obligations. All these instruments make use of autonomous interpretation – which means that the concepts used have to be interpreted in an autonomous fashion. This interpretation is relatively independent of the interpretation of similar concepts in the legal orders of the Member States. Private international law categories have to cater for a variety of national systems. Hence, specific national requirements for the existence of a contract (e.g. consideration under English law) can not be decisive for the characterisation of a relationship as contractual under private international law. Moreover, also a dispute on the existence and validity of a contract under the law applicable to it, is 'contractual' in nature for the purpose of private international law.

Two issues of characterization have a general impact on the application of the said Regulations: firstly all three instruments restrict their scope of application to 'civil and commercial matters'. Secondly, a distinction must be made between contractual obligations and non-contractual obligation. These qualification issues are dealt with in detail in the Annex to this report. The main findings are presented here.

The concept of 'civil and commercial matters' poses restrictions on claims by and against public law entities. Theoretically the concept of 'civil and commercial matters' could also be used to exclude claims between private parties that are made in the public interest and/or represent public policy. The ECJ however, does not

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leave much room for such interpretation.<sup>12</sup> Social law is not as such excluded from the scope of application of the private international law instruments. Only when a private party acts upon special state prerogatives, can such action be considered to escape the framework established by the regulations discussed here.<sup>13</sup> Accordingly, when private entities try to enforce private law rules against other private entities, their actions come within the scope of application of these regulations.<sup>14</sup> The fact that one of the parties has incomplete legal standing in some (or all) Member States, does not seem to affect this qualification.

The distinction between contractual and non-contractual liability determines the application of Article 5(1) as opposed to Article 5(3) of the Brussels I Regulation as well as the respective scopes of application of the Rome I and Rome II Regulations. According to the ECJ, the concept of 'contractual matters' refers to obligations taken on voluntarily by one party towards another. The obligations do not have to qualify as contractual under national law. The concept is a relatively wide one. We conclude from this that the commitments of an employer as laid down in a TCA may come within the concept of contract when the commitments are claimed to be legally binding<sup>15</sup> and specific enough as to their scope and content.

The reach of the contractual commitments can go beyond the direct signatories to the TCA. Others may be bound under 'contract' through representation/agency. They may also derive rights from the TCA as third party beneficiaries. In the latter case, the commitment of the employer may not be met with reciprocal commitments from the side of the beneficiaries. Such unilateral commitments may be covered by the concept of contractual obligation as well. However, for such unilateral commitments to result in contractual relationships, it would seem that the offer must be precise enough as to both its contents and its beneficiary. Less clear is whether the offer must have been accepted.

Accordingly, many claims by unions, works councils and individual workers will be contractual in the meaning of the Brussels I and Rome I Regulations – as long as the TCA contains legally binding obligations with regard to them. A caveat must be given for automatic extension of collective agreements and/or situations of legal

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<sup>12</sup> Compare U. Magnus & P. Mankowski, *European Commentaries on Private international law: the Brussels I Regulation*, München, Sellier Europa Law Publishers, 2007, Rdnr 13, p. 51.

<sup>13</sup> Compare Case C-265/02 *Frahuil SA v Assitalia SpA*, 2004 ECR I-01543 and BAG vom 2.7.2008 – 10 AZR 355/07 – AP Verordnung Nr. 44/2001/EG Nr. 1: 'Sie (Die EuGVVO) erfasse auch arbeitsrechtliche Streitigkeiten'.

<sup>14</sup> The (private or public law) nature of the court is irrelevant in this respect. Compare Article 1(1): "This Regulation shall apply in civil and commercial matters *whatever the nature of the court or tribunal* [emphasis added]." U. Magnus & P. Mankowski, *European Commentaries on Private international law: the Brussels I Regulation*, München, Sellier Europa Law Publishers, 2007, Article 1, Rdnr 21, p. 55.

<sup>15</sup> The fact that one party to the TCA may deny the legally binding effect of the TCA does not take the TCA outside the concept of contract for private international law purpose. Compare the fact that a defense of non-existence or voidability of a contract does not change the contractual nature of the original claim.

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representation: the ECJ limits the concept of contractual obligations to those obligations which have been voluntarily assumed by the parties. Hence it is advisable to ensure either signatory status or proper representation for all parties who are meant to benefit from the TCA. Enforcement by unions or works councils of obligations which are not voluntarily taken on by the employer will not be covered by the concept of contract but will rather be covered by the concept of non-contractual liability.

Outsiders (competitors, end consumers) will rarely be able to rely on the provision on contract of the Brussels I Regulation. If they want to enforce the TCA obligations through claims of unfair competition or misleading advertising, they will have to base the jurisdiction of the courts on Article 5(3) rather than Article 5(1). Article 5(3) covers all claims which aim to establish the liability of the defendant and which do not sound in contract. Likewise the law applying to such claims will be determined on the basis of the Rome II Regulation.

### **III. Relationship with European labour law**

An examination of private international law aspects of TCA's, including enforcement issues, needs to take into account the European framework in which the TCA's operate. Applicable law rules would not be needed if there would be a comprehensive substantive law framework for TCA's at the European level. But even if such substantive rules are absent or incomplete, European law could contain specialized rules on applicable law and jurisdiction which would take precedence over the general framework of the Brussels I, the Rome I and Rome II Regulations. Absent this, the framework may still contain useful rules which may help to identify the applicable law and/or the competent court. As will be explained in the next chapter, such rules could pertain in particular to the place of performance of certain obligations.

As may be expected, given the subject matter of this study, European labour law is a particularly relevant area. However, the relationship between TCA's and European labour law is far from evident. Given the close connection with the Treaty framework on European social dialogue and the European Directive on European Works Councils, both instruments will be addressed – although rather briefly seen the scope of this study.

#### ***A. TCAs and the European social dialogue***

One could defend the view that TCA's can only be considered as 'national' agreements. They would then have no Community relevance.<sup>16</sup> Another view is that European labour provisions would be relevant. In this case Articles 138 and 139 of the EC Treaty are evident references, although this leaves complicated questions with regard to resulting legal consequences. Nevertheless, an in depth discussion of the possible 'reception' of European company-level agreements under the provisions

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<sup>16</sup> J.H. Even, *Transnational collective bargaining in Europe*, The Hague, Boom, 2008, 231.

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of, especially, Article 139 of the EC Treaty, would go beyond the ambit of the present study. In practice, the issue would seem to depend on the TCA instrument that is actually under examination. According to the findings in the European Commission's "Mapping" document,<sup>17</sup> most of the texts that are agreements do not have the legal character of a collective agreement under any national rules, although some do have this status under national law.

If TCA's are not recognized as legal instruments under EU labour law, and if national labour laws do not qualify them as collective agreements, the possibility to look at these agreements as an autonomous (European) category "*sui generis*" should be left open.

### *B. TCA's and the EWC Directive(s)*

In many cases, TCA's are concluded in the context of the activities of a European Works Council (EWC). There is thus a strong relationship between EWC's and the conclusion of TCA's.

It is well known that the EWC legislation has had a significant impact on European industrial relations.<sup>18</sup> It is thus not surprising that very often European Works Councils are the main parties in European TCA's.<sup>19</sup> Existing research shows that some EWC agreements contain explicit reference to the possibility of concluding joint texts.<sup>20</sup> However, it must be noted that TCA's, as examined in the present study, have not been envisaged by the original 1994 EWC Directive. Also the 2009 Recast Directive has left the issue outside its explicit scope.

The EWC Directive(s) may, nevertheless, be instructive, with regard to the TCA enforcement and claims qualification issues, which are relevant for the private international law discussion.

In private international law, it is important to find an appropriate connecting factor in order to determine the applicable law. The EWC legislative setting may be helpful for interpretative purposes. The question which national law may be applicable to EWC agreements can be dependent on a few factors.

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<sup>17</sup> Mapping of transnational texts negotiated at corporate level, European Commission, Employment, Social Affairs and Equal Opportunities DG Social Dialogue, Social Rights, Working Conditions, Adaptation to Change, Brussels, 2 July 2008 EMPL F2 EP/bp 2008 (D) 14511, p. 8.

<sup>18</sup> The European Works Council came into existence with the adoption of the European Directive 94/45/EC of 22 September 1994 on the establishment of an EWC or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. (OJ L 254, 30.9.1994) A Recast Directive has been adopted as Directive 2009/38/EC of 6 May 2009 recasting Council Directive 94/45/EC of 22 September 1994 (OJ L 122, 16.5.2009).

<sup>19</sup> Mapping of transnational texts negotiated at corporate level, European Commission, Employment, Social Affairs and Equal Opportunities DG Social Dialogue, Social Rights, Working Conditions, Adaptation to Change, Brussels, 2 July 2008 EMPL F2 EP/bp 2008 (D) 14511, p. 8.

<sup>20</sup> M. Carley, Bargaining at European level? Joint texts negotiated by European Works Councils, 2001, European Foundation for Living and Working Conditions, EF/01/52/EN, p. 11.

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A European study on Article 13 agreements has indicated that about 60% of these agreements specified which national law was applicable in instances where problems would arise in the interpretation or application of the agreements.<sup>21</sup> This confirms that the role of the parties is important, a finding which may also be upheld for the TCA discussion.

The EWC Directive (1994 and Recast) itself does not seem to contain an applicable law rule with regard to EWC Agreements. It would only solve this issue in an indirect way.

A useful connecting factor for an applicable national law could be the place (country) where the EWC meetings are organised. Relevant in this respect is article 6, Paragraph 2, (d) of the Directive (1994 and Recast) which provides that the EWC Agreement will determine the 'venue' of the European Works Council.

Another useful connecting factor is the central management. It is central management that bears the responsibility for the setting up of a European Works Council. Furthermore, when no EWC is being set up, the subsidiary requirements will apply as laid down in the law of the Member State where central management is situated.<sup>22</sup> Also Article 8 of the EWC Directive (1994 and Recast) refers to central management. However, with regard to EWC Agreement obligations, the EWC Directive gives a large degree of autonomy to the parties to determine the undertakings or establishments that are covered by the EWC Agreement, taking into account Article 1, 4 of the 1994 Directive (Article 1, 6 of the Recast Directive).<sup>23</sup>

These connecting factors could also play a role in the private international law disputes arising from TCA's that have been concluded within the context of European Works Councils.

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<sup>21</sup> P. Marginson, M. Gilman, O. Jacobi and H. Krieger, *Negotiating European Works Councils. An analysis of agreements under Article 13*, European Foundation for the Improvement of Living and Working Conditions, European Commission, Office for Official Publications of the European Communities, 1998, p. 17. A reading of a number of EWC Agreements shows that in many cases the law of the country in which central management (or its representative) is situated, is chosen.

<sup>22</sup> Article 7, Paragraph 1 EWC Directive (1994 and Recast).

<sup>23</sup> This provides: "Unless a wider scope is provided for in the agreements referred to in Article 6, the powers and competence of European Works Councils and the scope of information and consultation procedures established to achieve the purpose specified in paragraph 1 shall, in the case of a Community-scale undertaking, cover all the establishments located within the Member States and, in the case of a Community-scale group of undertakings, all group undertakings located within the Member States."

## **PART 2. APPLICABLE LAW AND INTERNATIONAL JURISDICTION OF THE COURTS**

### **I. Applicable Law**

#### **A. *The legal framework and lay out of the chapter***

A legal framework which is geared to the specifics of TCA's is currently lacking, both at the international, the European and at the national level.

At the international level the right of association is recognized, laying the basis for the formation of trade unions. These trade unions have the right to negotiate and if necessary, use collective action to influence those negotiations. All these rights have received recognition in both international and European law.<sup>24</sup> However, there is no unified law on collective agreements which has the capacity to govern all relevant aspects of such agreements, such as formation and admissible content, obligations under and execution of the agreement.<sup>25</sup>

European law does contain provisions regarding the social dialogue, both in the treaty (Articles 138 and 139) and in secondary legislation (e.g. the EWC Directive). But even if these provisions are applicable to TCA's (which is debated), the European system as it stands to day is partial and fragmented at best.<sup>26</sup> An important omission would be that there is no European rule which would grant direct normative effect to European collective agreements.<sup>27</sup> Article 139 refers to the implementation methods in the Member States and hence seems to leave this aspect to national law (or rather to the national laws - plural).

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<sup>24</sup> For EU law, see ECJ 11 December 2007, C-348/05, *ITF v. Viking*, and ECJ 18 December 2007, C-341/05, *Laval*.

<sup>25</sup> Compare for the international sale of goods, the Vienna Convention (CISG) 1980, UN Doc A/Conf 97/18; Misc 24 (1980); 1489 UNTS 3; 19 ILM 671, <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf>. For the specifics of a European regulation of transnational collective bargaining, see E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational collective bargaining. Past, present and future. Final Report, 2006*. Topics which are relevant in this respect are 1) the negotiating agents, 2) issues to be covered 3) procedure and formal requirements 4) normative effects and 5) relationship between levels of negotiation.

<sup>26</sup> Compare E. Ales, S. Engblom, T. Jaspers, S. Laulom, S. Sciarra, A. Sobczak, F. Valdés Dal-Ré, *Transnational collective bargaining. Past, present and future. Final Report, 2006*.

<sup>27</sup> B. Bercusson, *European Labour Law*, second edition, Cambridge, Cambridge University Press, 2009, p. 541 professes the opinion that a European collective agreement concluded under Article 139 binds the members of the signatories. Still, implementation according to national standards would be needed to produce normative effect on the labour relations covered by the agreement. Otherwise: O. Deinert, 'Self-executing Collective Agreements in EC Law' in: M. De Vos (ed), *A Decade Beyond Maastricht* The Hague, Kluwer Law International, 2003.

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In the absence of a (comprehensive) international or European framework, the formation of and legal effects of a transnational company agreement will be dealt with under national law. This conclusion redirects us towards the conflict of laws: which national law will govern the TCA; which criteria are used to determine this law? Currently, EU contains two Regulations which deal with applicable law in patrimonial matters – one (Rome I<sup>28</sup> – applicable as of December 2009) on contractual obligations and another (Rome II<sup>29</sup> – applicable since 11 January 2009) on non-contractual obligations. As we argued in the previous chapter and Annex I to this report, obligations that are voluntarily taken on by the (signatory) parties to a TCA are contractual in nature, even if these obligations are taken on towards third parties covered by the TCA. Accordingly, the law applying to a TCA as such<sup>30</sup> will be decided upon by the rules of the Rome I Regulation.<sup>31</sup>

However, TCA's may also be relied upon by outsiders – as a standard for competitive behaviour or as marketing information addressed at potential clients. When a TCA is relied upon by competitors or consumer organisations in the context of unfair competition or misleading advertising, the relationship between the claimant and the company will be non-contractual. In that case, the applicable law will be decided upon by the Rome II Regulation. Both will be discussed here, though predominantly Rome I will be analysed, as this regulation covers the relationship between the parties primarily interested in and targeted by the TCA.

National law is – by definition – inadequate to regulate an intrinsically transnational issue. But even under this proviso, national law as described in the national reports rarely has special arrangements for collective agreements within groups of companies (let alone for the transnational aspects thereof). However, national systems may be to some degree 'receptive' to TCA's: willing to lend its force to certain elements thereof. This 'reception' is mainly relevant with regard to the normative effects of a TCA.<sup>32</sup>

Traditionally, collective agreements have an obligatory part which regulates the mutual obligations of the contractual parties/signatories and a normative part which

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<sup>28</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L 177, 4.7.2008, p. 6–16.

<sup>29</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) OJ L 199, 31.7.2007, p. 40–49.

<sup>30</sup> Interestingly enough the Regulation applies to contractual *obligations*. The conflicts rules contained therein however, designate the law applying to the *contract*. For the distinction between contract and obligations arising out of a contract, see *inter alia* the Draft Common Frame of Reference (DCFR) (Principles, Definitions and Model Rules of European Private Law, Draft Common Frame Reference (DCFR), Outline edition, Prepared by the Study Group on a European Civil Code and the research group on EC Private Law (Acquis Group), München, Sellier European Law Publishers 2009).

<sup>31</sup> Malmberg points out that in some countries collective labour law may be closely related to the public interest, and might be enforced through public law means. This may be a reason to apply the theory of internationally mandatory rules, or even the public policy exception. In our opinion, this does not remove the voluntary reciprocal commitment between the signatories from the ambit of Rome I.

<sup>32</sup> Compare at the European level Deinert, 'Self-executing collective agreements in EC law' in M. De Vos, A Decade beyond Maastricht, The European social dialogue revisited, p. 38.

contains provisions with regard to the labour relations covered by the collective agreement.<sup>33</sup> It is the normative part which most distinguishes collective labour agreements from 'ordinary' civil law contracts.<sup>34</sup> National statutes on collective agreements (if available) will primarily deal with the normative aspects: Do the normative provisions automatically become part of the individual labour contract? Can only organised employees rely on the provisions of a collective agreement or does such agreement have *erga omnes* effect? Is there any (after) effect of the provisions on the individual contract after termination of the collective agreement etc. etc.

Not only does national law provide which special effects are contributed to collective labour agreements (if any), national law also contains the legal requirements for attaining that special status. If such 'reception' is lacking, a collective agreement cannot by itself bind the parties to the individual labour contracts covered by it. To still attain some legal effect in the horizontal relationship, several civil law mechanisms may be used. In the legal literature (as well as the national reports prepared for this study) the following mechanisms are described.<sup>35</sup>

1. Agency. Parent companies may act as agents for their affiliates. At the side of the workers, there may even be a chain of mandates: Confederations of unions may act as representatives for the national unions, national unions as representatives for the individual workers.
2. Membership. Membership of an association may create mandate: the authorities to claim rights on behalf of the members and/or accept obligations in the name of the members.
3. Third party stipulations. This covers the situation in which the contractual parties include rights (and sometimes even duties) for third parties in their contract.
4. Unilateral commitments. In this case the reciprocal character of the TCA is denied or ignored, and a binding effect is created with regard to the employers' stipulations only.

All these models have in common, that the third party will have to rely on the original contract to enforce his or her claim. In some instances they will become a party to the original contract. Agency is most specific in this: the concept of agency

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<sup>33</sup> Compare Malmberg, *The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions*, Scandinavian Studies in Law, 2002.

<sup>34</sup> The situation in the UK is different in that the status of collective labour agreement will lead to the assumption that the agreement as such does not have legally binding force – see Davies national report. The normative effects may hence only be reached through the 'default mechanisms' described here.

<sup>35</sup> A.T.J.M. Jacobs, *Het recht op collectief onderhandelen : in rechtsvergelijkend en Europees perspectief* Alphen aan den Rijn, Samsom H.D. Tjeenk Willink, 1986; Van Hoek, *International Mobiliteit van Werknemers*, Den Haag, SDU 2000, Malmberg l.c., p. 203 ff. for 3 and 4.



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leads to the introduction of new parties to the contract as such: the represented party replaces the agent as contractual partner or as the case may be, joins the signatory party when the agent is also an independent party to the contract. Third party stipulations, on the other hand, may allow the third party to rely on the contractual stipulations in court without necessarily joining the contract as a party. In both cases, the claim will be based on the original *collective* contract – the TCA.

5. Incorporation in the individual labour contracts. Statutes on collective agreements differ in the way they create normative effect. Some legal systems treat normative provisions as objective rules binding the parties to the individual labour contract. Others rather construe individual rights through incorporation of the normative provisions in the individual labour contract. When the law does not provide for such incorporation, parties usually can. The UK, the Netherlands and Germany are examples of countries in which normative effect can be reached by way of contractual stipulation. Typically, the employer will refer to the collective agreement when entering into individual labour contracts. The collective agreement may in such conditions take on the meaning of a set of standard terms.

6. Finally, TCA's and unilateral promises can impact on the individual labour relation as indicators of good faith, fair employership, usage of the enterprise etc.

The latter two mechanisms both operate through the *individual* labour contract. One should keep in mind, however, that these general principles mentioned under 5) may also operate in other statutory arrangements: e.g. define the standard of care under tort law by referring to TCA as standard of good practice.

In this chapter, the implications of the layered structure of transnational collective bargaining shall be analyzed. First attention is given to the conflict rules with regard to the TCA as such. Next attention is given to the scope of application of the *lex causae*:

- Is the TCA treated as a collective agreement under national law: this will be referred to as the problem of 'national reception'.
- Does the *lex causae* of the TCA also govern questions with regards to the representation of the national unions by the European or international unions (or as the case may be, the national works councils by the European works council)?
- Does it also extent to the normative effect of the TCA?

These questions will be answered in the framework of the (coming) Rome I Regulation. The claim of outsiders, which would be covered by Rome II is discussed separately.

## ***B. The Rome I Regulation***

### **1. Introduction**

The Rome I Regulation was adopted on the basis of Article 65 EC as the Community successor to the Rome Convention. The exercise of transposing the Convention was at first instance seen as a technical matter.<sup>36</sup> On several issues however, the relevant provisions were changed during the course of the negotiations – sometimes after heated debate.<sup>37</sup> However, the structure of the regulation and the main provisions therein, are largely identical to those of the Convention. The regulation will apply to contracts concluded after 17 December 2009.<sup>38</sup> Any TCA concluded before this date will hence continue to be governed by the conflict of law rules of the Convention. Though in this report the Regulation will serve as the point of reference, if relevant, reference will be made to the Convention as well.

### **2. Scope of application**

According to Article 1 sub 1 the Regulation applies, “in situations involving a conflict of laws, to contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters.” The formulation of this provision is edited as to align the Rome I Regulation with the Brussels I Regulation. This means that the interpretation of the provision of Rome I will be influenced by the interpretation given to the parallel provision of Brussels I.

Both Regulations also contain a set of explicitly excluded matters, the one in the Rome I Regulation being considerably longer than the one in the Brussels I Regulation. Relevant to the topic at hand is that ‘the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party’ is amongst the excluded matters. The contractual relationship between agent and principal as such does fall within the scope of application as does any contract between principal and third party concluded through an agent.<sup>39</sup> The agency exception was already included in the Rome Convention. It may be contributed to the complexity of this issue and the wide variety of rules which exist on this topic in the member states.<sup>40</sup> These same circumstances may also explain the lack of ratifications of the multilateral

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<sup>36</sup> In its proposal the European Commission states that it will not be necessary to make a formal impact assessment as the proposal does not set out to establish a new set of legal rules – Com(2005)650, p. 3

<sup>37</sup> Compare on the individual labour contract: the original proposal in Com(2005)650, EP legislative resolution EP P6\_TA-Porv(2007)0560 and the Opinion of the Committee on Employment and Social Affairs, in the Report of the Committee on Legal Affairs, A6-0450/2007.

<sup>38</sup> Reg 593/2008, Article 28.

<sup>39</sup> A. Briggs, *Concept of Law*, second edition, Oxford, Oxford University Press, 2008, p. 164; Report Giuliano & Lagarde OJ 1980 C282/13. Agency is again one of the debated issues – the original proposal included a conflicts rule for agency.

<sup>40</sup> A. Briggs, *Concept of Law*, second edition, Oxford, Oxford University Press, 2008, p. 164 refers to the ‘irreconcilable differences between the common law and civilian analysis of agency’.

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convention on agency which was concluded in the ambit of the Hague Conference on private international law in 1978.<sup>41</sup> The EU currently has no intention to ratify this convention either.

Not only does the Rome I Regulation rely on the Brussels I Regulation for the definition of ‘civil and commercial matters’, it will do so with regard to the concept of contractual obligations as well.<sup>42</sup> As is described in detail in Annex I, the Brussels I Regulation contains a rule on special jurisdiction over contractual obligations in article 5 sub 1. From the case law on this provision it becomes progressively clear that ‘contractual obligations’ is a rather wide concept, to be construed in an autonomous way. It basically covers any obligation which is freely undertaken by one party in relation to identified others.<sup>43</sup> Based on this case law, we concluded that claims by an employee and/or trade union covered by the TCA against one of the parties to the TCA (on the employer’s side) will be classified 1) as a civil and commercial matter and 2) as contractual.<sup>44</sup> Claims by consumer organisations and/or competitors are more likely to be based on tort/non-contractual liability (and hence be covered by the Rome II Regulation).

Does the diversity in classification of collective agreements under national law change this? Both from the legal literature<sup>45</sup> and the national reports, it becomes evident that the Member States have widely divergent systems of collective labour law. Whereas in the UK a collective agreement is presumed to be non-binding, other member states may supply some of their collective agreements with public law

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<sup>41</sup> Convention of 14 March 1978 on the Law Applicable to Agency, *Entered into force 1 May 1992*), contracting states on August 2009: Argentina, France, Netherlands, Portugal. The Convention contains rules on the internal relationship between principle and agent as well as the rules on the relationship between those two and third parties.

<sup>42</sup> Compare Rome I, preamble 7 on consistency, both as to scope of application and as to provisions contained therein, between Rome I and both Brussels I and Rome II.

<sup>43</sup> See for the parallel interpretation of Rome I and Brussel I Article 5(1) : A. Briggs, *Concept of Law*, second edition, Oxford, Oxford University Press, 2008, p. 158. For: freely undertaken + in relation to identified others.p. 161 ff. Compare for a similarly wide interpretation of contractual obligations: Lando & Beale, *PECL Parts I and II*, Kluwer Law International, 2000, p. 137.

<sup>44</sup> This is supported by the Explanatory report to the Rome Convention: According to this report, the concept of contractual obligation is wide enough to include unilateral commitments e.g. certain gifts. Giuliano & Lagarde OJ 1980 C282/1, 10. See also A. Briggs, *Concept of Law*, second edition, Oxford, Oxford University Press, 2008, p. 161.

<sup>45</sup> On systems of collective labour law, see: A.T.J.M Jacobs, o.c. 1986. On the application of the Rome Convention to collective agreements see: Malmberg & Jonsson, *National Industrial Relations v. Private International Law – A Swedish Perspective*; J.P. Laborde, ‘The Contemporary Trends of Labour Law in Western Europe at the Mirror of the EC Convention on the Law Applicable to Contractual Obligations’, in *Changing Industrial Relations and Modernisation of Labour Law: Liber Amicorum in Honour of Professor Marco Biagi*, R. Blanpain & M. Weiss (eds.), New York, Kluwer Law International, 2003, p. 264 ff. European Commission, *First phase consultation of social partners under Art. 138(2) of the EC Treaty concerning crossborder transfers of undertakings, businesses or parts of undertakings or businesses*, 2007, 8. L. Paulsson, *Romkonventionen tillämplig lag för avtalsförpliktelser*, Stockholm, Norstedts, 1998, p. 83, R. Plender & M. Wilderspin, *The European Contracts Convention*, second edition, London, Sweet & Maxwell, 2001), p. 160, and U. Liukkonen, *The Role of Mandatory Rules in International Labour Law*, Helsinki, Talentum, 2004, p. 121.

enforcement mechanisms (e.g. France, Belgium). However, we argue that this does not change the classification under private international law.<sup>46</sup> If a party to a TCA tries to obtain injunctions, specific performance or damages from its counterpart, the primary (private international law) classification will be under contract. Once the applicable law is established, this law may decide how to classify the relationship under national law (secondary classification). In England, the result may be that the contract is subsumed under the heading of 'collective agreement' and deemed to be non-binding. In other countries, the internal classification may be different e.g. a contract *sui generis*, when the agreement does not fulfil to national requirements of a collective labour agreement. This does not, however, affect the primary classification under European private international law.<sup>47</sup>

France and Belgium attribute public law status to a specific category of collective agreements, in particular to those collective agreements made generally applicable by government decision. The scope of application of this public law system is determined by unilateral scope rules. If a public law rule is not designated by the conflicts rule (as part of the *lex causae*) but claims application anyway, this is dealt with under Article 9 of the Rome I Regulation. The public law rule will be treated as an 'overriding mandatory provision'.<sup>48</sup> TCA's in general do not fulfil the requirements set by the domestic law systems for recognition as collective agreements under public law. So this question is to a large extent moot. But even if TCA's would receive public law backing, this would not change the classification of the relationship between a civil law claimant and a civil law defendant for civil law remedies as being civil and commercial in nature.<sup>49</sup>

### 3. The system of the Regulation and the relevant provisions

The Regulation is based – as was the Convention before it – on the principle of party autonomy. Under Article 3 a contract shall be governed by the law chosen by the parties. In absence of a choice by the parties, the law to be applied has to be established in accordance to the rules of Articles 4 to 8. Article 4 contains the general rule, whereas Articles 5-8 contain special rules for specific contracts. The only one of interest in the current context is Article 8 that deals with individual employment contracts.<sup>50</sup> This article can not be applied to collective agreements as

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<sup>46</sup> Especially not since the relevant rules are harmonised at the European level.

<sup>47</sup> This position is not universally supported. See for example C.M.J. Clarkson & J. Hill, *The conflict of laws*, Oxford, Oxford University Press, 2006, p. 205, who would refer the question whether a specific contract classifies as an individual labour contract to the *lex causae*.

<sup>48</sup> Public law rules may also exert influence under the domestic and private international law concepts of public policy.

<sup>49</sup> Compare for collective actions: Malmberg & Jonsson, p. 221.

<sup>50</sup> The others relate to consumer contracts

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such,<sup>51</sup> but will be relevant with regard to the impact of TCA's on individual labour relations.

The normative effect of a TCA will affect the relationship between individual worker and individual employer and hence impact on the *lex causae* of the individual labour relationship. When individual employees demand enforcement of individual rights granted in a TCA, this claim will be based on the individual labour relationship. The position is more complicated when they act in their capacity of member of the works council.<sup>52</sup> The *lex causae* of the individual labour contract is primarily determined by the place where the employee habitually performs his work. In most cases the place of work will coincide with the place of establishment of the production unit. In the case of the transnational corporation or enterprise, the work force of the several production units will each be covered by their own local law.

The law designated by the multilateral conflict rules (the *lex causae*), determines 'in particular' the interpretation and performance of the contract, the consequences of a breach of obligations, the various ways of extinguishing obligations, prescription and limitation of actions as well as the consequences of nullity of the contract (Article 12).<sup>53</sup> The Regulation contains special provisions with regard to consent and material validity (Article 10) and formal validity (Article 11) as well as the issue of incapacity of natural persons (Article 13).

The Regulation (like the Convention) has universal application. This means that the law designated by the multilateral conflicts rules of the Regulation will be applied, regardless of their provenance: be they *lex fori*, the law of another member state or the law of a third country. However, the court has two possibilities to 'ignore' the applicable law. One of these consists of the public policy exception. This exception allows the court to disregard the foreign *lex causae* if the application of a provision from that law to the case at hand is 'manifestly incompatible with the public policy (*ordre public*) of the forum.' (Article 21). This provision creates a 'safety valve' for the result blind multilateral conflicts rules.

The other obstacle to unhampered application of the *lex causae* is created by the phenomenon of overriding mandatory provisions. Article 9 of the Regulation contains a definition of overriding mandatory provisions, describing them as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.' Under section 2 of the same article, courts are allowed to apply their own overriding mandatory provisions to all contracts over which these rules claim application. The application of foreign mandatory provisions is heavily circumscribed (compared to the Rome

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<sup>51</sup> Compare Giuliano & Lagarde, explanatory report to the Rome Convention; Malmberg & Jonsson, p. 230.

<sup>52</sup> See the discussion in the chapter on jurisdiction.

<sup>53</sup> The Article does not mention any third party effects.

Convention): effect may be given to the overriding mandatory provisions of the country of performance of a contractual obligation which render this performance unlawful.

The provision on overriding mandatory provisions is extremely relevant for the topic at hand. Whenever an individual labour contract governed by the law of Y is submitted to rules derived from law Z, the application of the rules of Z can be subsumed under Article 9. An example is this is the protection of a core of protective rights which is granted to posted workers under the posting of workers directive (dir 96/71/EC). As these core rights have to be granted regardless of the law applying to the individual labour contracts, the relevant provisions can be classified as overriding mandatory provisions.<sup>54</sup>

In the context of collective labour law it is often stipulated that collective agreements have their own scope of (international) application. If collective agreements from law X restrict their application to employment within the territory, these agreements will not apply to individual contracts governed by law X which are performed outside the territory. In that sense the collective agreements are 'self denying': restricting their scope of application even when they are considered to be part of the *lex causae*. However, if the same collective agreements apply to *all* employment within the territory, these agreements have an overriding character – they overrule the law applying to the individual labour contract as such. This latter aspect is regulated through Article 9.<sup>55</sup> Article 9 will be discussed *inter alia* in the context of the question whether the law applying to the TCA as such can also regulate the normative effect of the TCA in a uniform manner, regardless of the location of the labour units covered by the TCA (and regardless of the law applying to the individual contracts performed there).

#### *Lack of authoritative interpretation*

The Rome I Regulation has not entered into force yet, so there can not be any case law interpreting its provisions. But as the Brussels I Regulation is interpreted to maintain continuity with the Brussels Convention (where appropriate), information on the probable interpretation of the Rome I Regulation can be derived from the interpretation of the parallel provisions of the Rome Convention. In this case, however, that does not help us much. Whereas the ECJ was given jurisdiction to rule on the interpretation of the Brussels Convention from the very beginning, the Member States were much more reluctant to grant competence to the ECJ over the Rome Convention. Only quite recently has the ECJ required a limited competence in this field, which has not led to any case law relevant for the topic under discussion. This means the next paragraphs are based on textual analysis of the provisions combined with relevant legal literature from the member states.

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<sup>54</sup> Technically, the provisions need not apply, but the protection offered by them must be guaranteed.

<sup>55</sup> The former (presumably) through the normal multilateral rules. Neither the Convention nor the Regulation contains explicit rules on internationally mandatory rules of the *lex causae*. Based on the Giuliano/Lagarde report it can be argued that internationally mandatory labour law provision can be part of the law applying on the basis of Article 8 (article 6 RC).

### *C. The law applying to the TCA*

#### **1. Article 3 – choice of law by the parties**

Under Article 3 a contract shall be governed by the law chosen by the parties. If the contract has an international character, such choice of law will oust the law otherwise applicable and replace it in its entirety by the law chosen by the parties. This strong (conflicts of law) effect of a choice by the parties is limited in specific circumstances: if the contract is domestic but for a choice of law or a choice of forum, the choice of law by the parties cannot prejudice the application of mandatory provisions of the otherwise applicable law. Likewise, if all objective elements of the contract are situated within the EU, a choice of law for the law of a non-member state cannot abrogate the application of community law.<sup>56</sup> And finally, a choice of law in an individual labour contract cannot have the result of depriving the employee of the protection afforded to him by the mandatory provisions of the law applying in absence of such choice.<sup>57</sup> The first restriction, which will limit the effect of a choice of law in purely domestic contracts, is not relevant in the case of TCA's because transnational company agreements are by definition transnational in character. Also the proviso with regard to mandatory EU law does not affect a choice of law in a TCA as currently no binding rules on TCA's exist at EU level. Finally, the special protection offered to individual employees may be relevant for the effect of TCA's on the individual contract of employment. However, the restriction does not apply to a choice of law in the TCA as such. This means that a choice of law in a TCA seems to be honoured by the system of the Regulation.<sup>58</sup>

A choice of law can be made expressly or can be implied. In the latter case, the Regulation specifies that the choice of law must be "clearly demonstrated by the terms of the contract or the circumstances of the case". With this stipulation, which is stricter than the parallel provision in the Convention, the legislators wanted to avoid implicit choices of law being assumed too readily. A choice of law can be made at the time of conclusion, but can also be made (or changed, as the case may be) at a later date.<sup>59</sup> When making their choice, parties are free to choose any existing system of law.<sup>60</sup> There is no requirement of fair interest or any other requirement of a link between the law chosen and the relationship submitted to it. It is interesting to note that the preamble of the Rome I Regulation specifically mentions the possibility to refer to a non-state body of law or a European non-binding body of law such as a future Common Frame of Reference. The possibility to choose for the application of the CFR is not opened under the provisions of the Regulation itself. Though this option was debated (heatedly) during the negotiations on the Rome I Regulation, the regulation itself refers to a 'law' to be chosen by the

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<sup>56</sup> This restriction was introduced in the Regulation. It does not have an equivalent in the Convention.

<sup>57</sup> Article 8(1). A similar provision applies to consumer contracts (article 6 sub 2).

<sup>58</sup> As it was by the Rome Convention.

<sup>59</sup> A change as to the chosen law can not "adversely affect the rights of third parties": Article 3 para 2.

<sup>60</sup> There is some discussion as to the possibility to opt for the application of an international convention outside its scope of application – see *inter alia* preamble 7.

parties. The preamble states in para 13 that ‘This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.’ This opens up the possibility of referring to the CFR as part of the contract, but does not result in a choice of law at the conflicts of laws level. The preamble continues by stating: ‘Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.’ This means that the Community may open up the possibility to express a choice of law in the meaning of Article 3 in favour of the application of the CFR once this common frame of reference is adopted in an EU instrument.

## 2. Dépeçage

By their choice the parties can select the law applicable to the whole or to part only of the contract. The latter process is called *dépeçage*. It is generally assumed that this process can only be applied to obligations in the contractual relationship which can be separated from the other obligations without disrupting the coherence of the contract and/or the legal rules applicable to it.<sup>61</sup> In international labour law the following examples may be given: a clause on employees’ options and shares\*\* may be separated from the main obligations in the individual labour contract. Likewise, a (long term) corporate pension plan is severable from the provisions on a specific (short term) posting. For international trade contracts, the example can be given of an interest clause or index-linking clause.<sup>62</sup> Under the Rome Convention, both subjective and objective *dépeçage* had found recognition. Subjective *dépeçage* refers to a splitting up of the contract through partial choices of law by the parties. Objective *dépeçage* refers to the situation where a separable part of the contract is manifestly closer connected to another law than the law applying to the contract as a whole. The latter form of splitting up was controversial. The relevant provision in Article 4 Rome Convention has no parallel in the Rome I Regulation. Whether or not this should be interpreted as foreclosing objective *dépeçage* altogether, remains to be seen.<sup>63</sup>

The question of *dépeçage* is pertinent in the case of TCA’s. TCA’s can be analysed as multiparty contracts. Is such multi-party contract a single contract governed by a single legal system, or rather a bundle of separable contracts<sup>64</sup> or – as a midway

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<sup>61</sup> The Giuliano & Lagarde report on the (similar) provision in the Rome Convention stipulates that the parties’ choice must be logically consistent’, OJ 1980 C 282/17. See also C.M.J. Clarkson & J. Hill, *The conflict of laws*, Oxford, Oxford University Press, 2006, p. 184.

<sup>62</sup> M.V. Polak, *Dépeçage: een rechtsbegrip dat in het internationaal privaatrecht misstaat?*, Leiden, Rijksuniversiteit Leiden, 1994; C.M.J. Clarkson & J. Hill, *The conflict of laws*, Oxford, Oxford University Press, 2006, p. 184.

<sup>63</sup> B. Audit, *Droit International Privé*, fifth edition, Paris, Economica, 2008, p. 688 denies the possibility of objective *dépeçage* under the Rome I Regulation. On the possibility of objective *dépeçage* under the Rome convention, see C. Reithmann & D.Martiny, *Internationales Vertragsrecht*, fifth edition, Köln, Dr. Otto Schmidt Verlag, 1996, Rdnr 108, p. 121-122.

<sup>64</sup> Compare Germany, comparative report



position – a single contract containing severable reciprocal rights and obligations.<sup>65</sup> In our opinion a general answer can not be given as it would depend on the obligations contained therein and the parties bound by it. Can certain parts of the overall agreement be separated without disrupting the coherence of the contract as such?<sup>66</sup> Though not ideal, it might turn out that the obligatory provisions of the contract have to be separated from the normative provisions. An overview of all relationships involved and the law applying to them, may lead to this conclusion.

### 3. Article 4: Law applying in absence of a choice by the parties

If no choice is made by the parties (either express or implicitly), the applicable law is found by applying the rules of Article 4. This article has undergone considerable changes, when compared to the parallel provision of the Rome Convention. The Regulation start off with 8 specific rules for specific types of contract. A contract for the sale of goods shall, for example, be governed by the law of the country where the seller has his habitual residence. Likewise, a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence. Each of these rules are a specification – for the sake of legal certainty - of the general principle of Article 4 para 2 under which 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.<sup>67</sup> The presumptions enumerated in para 1 and 2 can be rebutted “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” (para 3). Likewise, when no characteristic performance can be established (and the contract is not covered by one of the rules of para 1), the contract will be governed by the law of the country with which it is most closely connected. (para 4).

It is generally assumed that TCA’s don’t allow for the identification of a ‘characteristic performance’. This term refers to the obligation which characterises the contract as a specific type of contract. Accordingly, the seller, who has to deliver the goods, performs the obligation which characterizes the sale of goods as a sale of

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<sup>65</sup> Compare on the background of dépeçage also Audit, o.c. p. 685.

<sup>66</sup> See for this requirement inter alia M.V. Polak, *Dépeçage: een rechtsbegrip dat in het internationaal privaatrecht misstaat?*, Leiden, Rijksuniversiteit Leiden, 1994; and C. Reithmann & D.Martiny, *Internationales Vertragsrecht*, fifth edition, Köln, Dr. Otto Schmidt Verlag, 1996, Rdnr 54, p. 66.

<sup>67</sup> Note that the Rome I Regulation refers to habitual residence, where the Brussels I Regulation uses the concept of ‘domicile’. The Concept of ‘habitual residence’ is defined in *Article 19*:

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

goods. The payment of money as such does not distinguish the sale of goods from a contract for the provision of services etc. Hence, the payment of money is rarely distinctive – or in the conflict of laws jargon “characteristic”. Collective labour agreements are complex structures containing reciprocal commitments, none of which are the simple payment of money. Both the employer and the workers’ representatives take on obligations which are characteristic for the contractual (sub)species of ‘collective labour agreement’.<sup>68</sup> A possible exception to this could be a TCA which can be construed as a negotiated unilateral declaration, containing only commitments of the parent company itself. In that case, the employer performs the only (hence characteristic) obligation. This obligation is presumed to underlie the law of his habitual residence. But even in the case of unilateral commitments, where the employers’ side has taken on all the obligations, the obligations will often be compound – to be performed in part by the parent company and in part by the subsidiaries. In these cases too, it might be hard to single out a characteristic performance. The law applicable to the TCA will have to be determined on the basis of the closest connection.

Determining the applicable law on the basis of the closest connection always leads to some uncertainty as well as international variety as to the outcome. When the Rome Convention was introduced, courts in the different Member States tended to simply extend their previous approaches to conflict of laws in contract to the interpretation of the provisions of the Rome Convention. Hence, when the Convention was converted into a Regulation, the need was felt to circumscribe the ‘closer connection’ escape of paragraph 3. Under the Regulation, the presumptions in paragraph 1 and 2 can only be disregarded when another law is ‘*manifestly* more closely connected’.<sup>69</sup> However, how a court should determine the closer connection and which circumstances can be relevant in this respect, is not stipulated in the Regulation itself, nor in its preamble.

In the general literature on private international law several ‘circumstances’ are distinguished which have to be taken into account when determining the closest connection<sup>70</sup>

- The parties to the contract and in particular their nationality and domicile.
- The stipulations of contract, for example the language, currency of payment and place of performance of the obligations therein.<sup>71</sup>

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<sup>68</sup> Malmberg & Jonsson, National Industrial Relations v. Private International Law – A Swedish Perspective.

<sup>69</sup> Compare also preamble 16.

<sup>70</sup> C. Reithmann & D.Martiny, Internationales Vertragsrecht, fifth edition, Köln, Dr. Otto Schmidt Verlag, 1996, Rdnr 127 ff. p. 127 ff. Compare, albeit in connection to an implicit choice of law by the parties: Coursier, Le conflit de lois en matière de contract de travail, Paris, LGDJ 1993, p. 70 ff.

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- Circumstances surrounding the formation of the contract, in particular the place of conclusion of the contract.
- Any relationship with other contracts such as previous relations between the same parties or interrelated contracts between different parties.<sup>72</sup>

In literature on TCA's special weight is given to nationality and domicile of the parties and to the place of establishment of the business units to which the TCA applies.<sup>73</sup>

An example may clarify this approach. Suppose a French parent company enters into a TCA for its European activities with the European works council, the relevant European trade union and one or more French unions. The place of establishment of the main signatory at the employer side will be in France, the contract covers several business units amongst which the French enterprises, and both the EWC and the French unions are signatories to the contract. In this case, the combination of connecting factors will weigh towards the country of establishment of the parent company, being France. This is helped by the involvement of local unions, a feat not uncommon with regard to TCA's entered into by French and Nordic transnational corporations.<sup>74</sup> The situation is slightly different for TCA's entered into by companies headquartered in the Netherlands, Germany and Belgium.<sup>75</sup> These often have only the EWC as a signatory party on the side of the employees. In that case, the predominance of connecting factors pointing towards the country of establishment of the parent company is less clear. Lacking a better alternative, courts may still apply the law of the country of establishment of the parent company, but the outcome is (even) less secure.

Even when we assume that the place of establishment of the parent company constitutes a strong connecting factor, there may be good reason to hold that another

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<sup>71</sup> An interesting contractual stipulation in this respect is to be found in the ENI EWC agreement of 1995 which states that it seeks 'to confirm its *Italian* [emphasis added] tradition of labour union relations at the European level': M. Carley, *Bargaining at European level? Joint texts negotiated by European Works Councils* European Foundation for the Improvement of Living and Working Conditions, 2001, p. 35-36.

<sup>72</sup> Preamble 20/21: "In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts."

<sup>73</sup> Compare also Germany, comparative report. For the criteria used to determine the closer connection in individual labour cases, see *inter alia* BAG 9 July 2003, 10 AZR 593/02 <http://lexetius.com/2003.1833> which mentions the nationality of the parties, the seat of the employer and the domicile (Wohnort) of the employee as primary factors. Additionally, the court will take into account the language of the agreement and the currency. See also BAG 12. Dezember 2001 - [5 AZR 255/00](#) - [BAGE 100, 130](#).

<sup>74</sup> Eurofound, *European and international framework agreements: Practical experiences and strategic approaches*, 2009 p. 24 ff. Nordic countries prefer unions as contractual parties to a TCA; Germany EWC-involvement.

<sup>75</sup> M. Carley (SPIRE Associates), Report of the French EU Presidency conference "Transnational company agreements. Dialogue, rights, anticipating corporate restructuring, actors: A new perspective", Lyon, 13-14 November 2008/

law is more closely connected to the TCA at hand. The place of establishment of the parent company may have no real connection to the underlying industrial relations. An example of this would be a (mainly) European Framework Agreement entered into by the EWC, European and/or international unions with an American corporation (e.g. GM or Ford). When the EFA mainly concerns industrial relations in Europe, the choice of law should refer to a European country as well, for example the Member State which hosts the EWC. These 'extra-European' cases have to be taken into account as the Rome I Regulation has universal application: it will also apply if its rules refer to a non-EU system of law.

#### **4. Main findings with regard to the *lex causae* of the TCA**

When the parties to a TCA do not include a choice of law in their agreement, the law applying to the TCA has to be found on the basis of Article 4 of the Rome I Regulation. In the absence of a obligation which characterizes the contract, the law applying to the TCA will have to be found on the basis of the closest connection. The seat of the 'leading' company in the enterprise which hosts the EWC, seems to be an important factor in establishing the closest connection. But the outcome of the conflict of laws decision will depend on the circumstances of the case, and the interpretation of the closeness rule may differ according to the court seized. This inevitably leads to legal uncertainty. Such uncertainty could be mitigated by creating an assumption in favour of the country of the establishment which hosts the EWC in the rule of Article 4 Rome I. Within the system of Article 4, such assumption could only be rebutted when another law is manifestly closer connected.

Parties themselves can end any legal uncertainty as to the law which should apply to the obligatory aspect of the TCA by expressing a choice of law in the TCA itself. Whether or not such choice of law could also pertain to the normative effect of the TCA will be discussed below.

#### ***D. Rights and obligations of non-signatories I: national unions and individual workers***

##### **1. The chain of mandates and third party stipulations.**

There is lively discussion as to whether Article 139 EC creates a legal obligation on the national social partners to implement agreements entered into at the European level. However, even if a duty to implement is imminent in the Treaty provision, this will not result in direct normative effect of the TCA with regard to the individual labour relationships covered by it. If we assume for the sake of argument, that such direct effect is absent in the case of TCA, the question arises how a binding effect on national actors can be construed. For a proper analysis of this question, it is important to describe the several relationships involved in creating normative effect and the law applicable to those relationships. Central in this description is the concept of representation or agency.

Agency can be defined as ‘the fiduciary relation which results from the manifestation of consent by one person to the other that the other shall act on his behalf and subject to his control, and consent by the other so to act’.<sup>76</sup> Representation can be defined as the mechanism through which the legal act performed by one person (the agent) is imputed to another (the principal).<sup>77</sup> The first definition focuses on the relationship between agent and principal, whereas the second stresses the external effects of the agency relationship. Where the power to bind the principal does not derive from contract, the literature refers to ‘legal representation’ as compared to ‘consensual representation’.<sup>78</sup>

The agency relationship itself is covered by the Rome I Regulation. Hence, in normal circumstances the habitual residence of the agent will be decisive in determining the applicable law. This may be different when the agency relationship is an element of another relationship such as an individual employment contract. In that case, the mandate aspect will (most likely) be covered by the *lex causae* of the main relationship.<sup>79</sup> The law thus designated determines the mutual rights and obligations of the agent and principal. This does not answer the question whether the principal (in this case the daughter company) has become bound by the contract (the TCA) entered into by the agent (the parent company). Unfortunately, the Rome I Regulation stipulates that its provisions do not cover “the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;” As a result, there is no European rule on this aspect.<sup>80</sup> The Hague Convention on Agency refers this question to law of the state where the agent has his business establishment or alternatively to law of the state where he acted, if this connecting factor coincides with another relevant connecting factor such as the place of establishment of the principal or the third party. This can be only indicative of the relevant choice of law considerations, however, as the Hague Convention drew a sparse number of four ratifications.<sup>81</sup> Comparative literature<sup>82</sup> on this matter reveal a wide variety of rules referring to the *locus actus* (the place where the agent has acted), the place of business of the agent,

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<sup>76</sup> Restatement 2d Agency para 1(1), cited in H.L.E. Verhagen, Agency in private international law, Dordrecht/Boston/Londen, Martinus Nijhoff Publishers, 1993, p. 9.

<sup>77</sup> Compare Verhagen, o.c., p. 9, translating definitions from the Dutch, German and French legal systems.

<sup>78</sup> Representation of legal entities by their organs is sometimes looked upon as an intermediary type of representation. It’s based in part on the articles of incorporation (which are drafted by the parties themselves) but it’s to a large extent also determined by law.

<sup>79</sup> Compare with regard to the Rome Convention, Polak, Vermogensrechtelijke meerpartijenverhoudingen, Praktijkreeks IPR, Deventer, Kluwer 1993.

<sup>80</sup> There is no other European instrument covering this subject either. The original proposal of the EC contained a special rule on agency, which also regulated the relationship between the principal and the third party. See Com(2005)650.

<sup>81</sup> The Convention entered into force in 1992, Argentina, France, Netherlands and Portugal are parties to it.

<sup>82</sup> H.L.E. Verhagen, Agency in private international law, Dordrecht/Boston/Londen, Martinus Nijhoff Publishers, 1993, p. 66 ff.

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the country of establishment of the principal<sup>83</sup>, the *lex causae* of the agency contract<sup>84</sup> and/or the *lex causae* of the contract concluded by the agent with the third party.<sup>85</sup> This strong divergence demonstrates the lack of consensus on what is considered to be the most delicate problem in the law on agency: the third party effect.

It should be kept in mind however, that the basic notion of representation should be that the agent acts within the confines of his mandate. The issue of third party protection only arises when the agent exceeds his mandate. In developing a system for TCA one should not have to depend on this kind of third party protection. Therefore, we will continue by discussing the law applying to the internal relationship between agent and principal.

On the side of the employer, the parent company may be the only signatory. When the affiliates have a separate legal identity from the parent, a signature by the parent does not legally bind its daughters. Representation would require mandate (representation or agency). French law seems to contain a special rule on legal representation for the purpose of collective negotiations by the central undertaking in a group of undertakings.<sup>86</sup> Such legal representation is however, rare. Hence, the power of attorney will have to be granted by specific mandate. Under the Rome I Regulation the extent of this mandate will be governed by the law of the place of establishment of the parent company (being the agent).

Similarly, the European trade union confederations can represent their affiliates, given a sufficient mandate. In this case, the mandate is embedded in the legal structure of the association. The bylaws of the association will play an important role in establishing the mandate requirements. The law applying to the association will be the law of its seat, though there is no uniform rule on which seat is relevant in this respect. The Member States still have different conflicts rules on legal entities, referring to either the statutory seat or the social seat. The ETUC is established in Belgium under Belgian law and so are the mayor European sectoral unions.<sup>87</sup> This means that the relationship between the European confederations and

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<sup>83</sup> This referral is largely based on the concept (in civil law) that the granting of authority to the agent is a unilateral act by the principal. The third party may be protected against apparent (but insufficient) authority by allowing a third party acting in good faith to rely on the *locus actus*. H.L.E. Verhagen, Agency in private international law, Dordrecht/Boston/Londen, Martinus Nijhoff Publishers, 1993, p. 72. Compare Article 13 Rome I which contains a similar rule with regard to incapacity.

<sup>84</sup> Sometimes with the protective proviso that the third party can invoke the *lex loci actus* with regard to apparent authority, if this is more favourable to him: Koster, Flour and Jobard-Bachelier cited by H.L.E. Verhagen, Agency in private international law, Dordrecht/Boston/Londen, Martinus Nijhoff Publishers, 1993, p. 69.

<sup>85</sup> H.L.E. Verhagen, Agency in private international law, Dordrecht/Boston/Londen, Martinus Nijhoff Publishers, 1993, p. 77 ff. The main argument here is unity within the relationship between principal and third party.

<sup>86</sup> See comparative report.

<sup>87</sup> E Franssen, Legal Aspects of the European Social Dialogue, Antwerp/Oxford-New York, Intersentia, 2002.

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their national members will be governed by Belgian law.<sup>88</sup> If no general rules of mandate are in existence (or operative in the given case), specific mandate will be required. The ensuing agency relationship will, again, be covered by the law of the place of establishment of the agent. As the European trade union federation is the agent, this again leads to application of Belgian law.

The problem of representation recurs at the national level. The European social dialogue operates through a chain of mandates.<sup>89</sup> The European workers' organisation may represent national federations, which in turn represent national unions representing individual workers.<sup>90</sup> Each of these national organisations operate under a specific national mandate. Even if the national federations would be considered to be bound to the TCA under the law applying to that specific question, this does not necessarily entail that also the national unions and the individual workers are bound to the TCA. The latter questions would depend on

- 1) the extent of the mandate of the national organisations as well as on
- 2) the third party effects of representation activities which exceed the mandate under the relevant applicable law.

If the national chain contains both a national federation and a national union, the powers of attorney of the national union is a purely national/domestic matter. All parties in the triangle (the individual workers as principals, the union as the agent and the national federation as the third party) are situated in a single state. Hence it will be impossible to construe normative effect through a chain of mandates without taking into account the law applying to the national union. This law will decide on the representative powers of the union and the formal and/or procedural requirements set for it. In case of a chain of mandates as described above, this law will also decide on the third party effects of representation in violation of the mandate.

The issue on the effect of a limitation on the mandate of the union is pertinent with regard to the normative effect of TCA's. Unions may have to follow specific rules and abide by specific rules in order for the actions to validly represent the workers. Hungarian law, for instance, seems to require a ballot for a collective agreement to become binding on the workers.<sup>91</sup> In German law there is a strict demarcation between the powers of the unions and the powers of the works council.<sup>92</sup> If unions do not respect these rules, they operate outside their mandate. Could they

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<sup>88</sup> This is different for the international trade unions which have their seat in Geneva.

<sup>89</sup> Jacobs o.c.

<sup>90</sup> Compare B. Bercusson, *European Labour Law*, second edition, Cambridge, Cambridge University Press, 2009, p. 535.

<sup>91</sup> Compare Hungary, in case the union which is a party to the agreement did not receive enough votes as the last works council election, comparative report.

<sup>92</sup> German law requires a strict separation between the two. So called mixed agreements are void, unless the responsibility of the union is clearly separable from the responsibility of the works council.

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nevertheless bind the individual workers? A first question would be whether they could under Hungarian law or German law respectively. If they could not, the second question would be whether this restriction under national law vitiates the international agreement – either because the restriction is part of the law applying to that specific issue, or as an overriding mandatory provision. In either case it seems good practice to respect the law of the place of establishment of the national unions with regard to the extent of its mandate under national law. This argument is only strengthened when we take into account the fact that unions may operate under a legal rather than a consensual mandate. Countries which grant automatic extension to collective agreements allow the unions to act on behalf of non-organized workers as well as organized workers. Their mandate is only partially consensual. This legal mandate will by necessity be covered by the national law that created it.<sup>93</sup>

Accordingly, unions operate under a national mandate, the limits of which they should respect. Though there is no clear private international law rule on the binding effect of representation outside the mandate, parties to a TCA should not rely on private international law in order to avoid national rules on representation. Under the current divergence as to the representational powers of national unions, the reference to national law for the extent of union mandate does, however, make it extremely difficult if not impossible to reach a uniform normative effect of TCA's in all the member states concerned.

This would not be very different under the concept of third party stipulation. Third party stipulations are part of the contract and are governed by the law applying to the contract as such. There seems to be no problem for a national union to accept a unilateral commitment on the side of the employer. In doing this, the union will submit to the law applying to the contract with regard to the extent of the commitments undertaken by the promisor (in this case, the employer).<sup>94</sup> However, as soon as the third party stipulation entails duties on the part of the third party, the situation becomes more complex. A national union could probably create legal obligations for itself by accepting a third party stipulation made on its behalf. However, it may not be allowed to do so on behalf of its members. The latter question would again primarily depend on the law applying to the union's mandate as such. Which law would apply to the effect of acceptance in violation of the national mandate is again unclear.

The parties to a TCA are to a large extent able to remedy the quagmire caused by the complexity of the relationships in combination with an absence of clear European rules. If they want the TCA to be binding on the daughter companies and national unions, they should ensure they have a clear and sufficient mandate for the

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<sup>93</sup> See Comparative report, France. Compare H.L.E. Verhagen, *Agency in private international law*, Dordrecht/Boston/Londen, Martinus Nijhoff Publishers, 1993, p. 120 who seems to refer situations in which the authority of the agent is predetermined by law, such as the German *Prokurat*, to the law creating the legal mandate.

<sup>94</sup> Compare for the use of the concept of unilateral commitments to create obligations from a TCA *inter alia* France comparative report.



negotiations.<sup>95</sup> Alternatively (or additionally), they could offer the result of the negotiations to the national entities for ‘ratification’. In any case, it would seem that the mandate given by the national unions to the European federation can not circumvent the national requirements for normative effect of collective agreements. Thus, the national unions can bind themselves directly or through representation<sup>96</sup>, but they may not be able to directly bind the employees. This means that TCA’s will more often than not require national implementation. This conclusion conforms with one frequently encountered in literature on TCA’s.<sup>97</sup> It also conforms with the position chosen in Article 139 EC.

## **2. Interim conclusion on representation**

There is no European rule that determines in an unequivocal and uniform way which law applies to “the question whether an agent is able to bind a principal ... in relation to a third party”. That means that it is difficult to assess the law which will determine the binding effect (or not) of TCA commitments with regards to the national unions and/or the national affiliates of the employer. This situation could of course be remedied by creating a European rule on this particular issue. However, the fact that such rule could not be agreed upon during the negotiations on the Rome I Regulation makes the prospect of success in the short term rather bleak.

In the meantime, the signatories to the TCA could circumvent this problem by ensuring specific and adequate mandate. The national unions should not however, exceed the mandate they hold with regard to the individual workers. This mandate is determined by the national law under which they operate.

The national character of the mandate of national unions limits the possibility to create direct normative effect for TCA’s through a chain of mandates. Such direct normative effect will simply not be accepted in all member states. A (less than perfect) solution to this problem would be to insert a specific duty to implement in the TCA.

### *E. Normative effect through the law applying to the TCA?*

#### **1. National reception and extraterritorial effect**

The several overviews of TCA’s entered into in Europe contain examples of TCA’s which are registered under national (French) law as being a (French) collective

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<sup>95</sup> Inter alia Bercusson 2009 stresses the importance of clear rules on internal decision making as part of legitimate representation at the European level.

<sup>96</sup> In some occasion excession of the general mandate or the union may lead to individual liability of the persons acting in its name. This would be determined by the law applying to the organisation as such.

<sup>97</sup> Compare also European Commission, General Directorate Employment, Social Affairs and Equal Opportunities. Second study seminar “transnational agreements’ 27 November 2006, Working Document no 3.

agreement.<sup>98</sup> In that case, the TCA is recognized within the national system as a collective agreement and is given the status and legal effects consequent with that. One of the results under French law is that the collective agreement is legally binding with regard to all employees of the employer who is a party to the agreement (directly or indirectly). This binding effect does not depend on union-membership of the employees. The relevant question here would be whether this binding effect extends to all labour relationships covered by the TCA. Is 'recognition' of the TCA under French law universal or rather restricted to the individual and collective labour relationships in France and/or governed by French law?

There are several reasons why the normative effect of such reception by national law might be limited geographically. Firstly, obstacles might arise under the law applicable to the TCA as such. To be recognized as a collective agreement under the national system, the TCA would have to fulfil the requirements of the national law. These may differ from state to state: the national reports show the divergence in criteria used. Criteria with regard to representativeness of the union and/or the legal capacity thereof might make it difficult to recognize contracts entered into by European federations.<sup>99</sup> Sometimes even the recognition of foreign unions might prove difficult. In this respect it is interesting to note that the French TCA's were signed by French unions alongside the several European/international actors.

The French trade unions will most likely qualify as legitimate parties to a collective agreement under French law – at least in general. And under French law, once a collective agreement is concluded, it binds the employer with regard to all his employees, regardless of the place of work. But here another dilemma arises. To what extent can national unions represent 'foreign' workers? The criteria for representativeness described in the French report include activity in the enterprise and a minimum of votes in the works council election. Such criteria will make it impossible for a French union to represent workers in the foreign undertakings of the multinational enterprise. Accordingly, the French union will have national mandate only: though the collective agreement may have 'universal' application in theory, it only applies to workers who are considered to be employed by the mother company in France. This creates a catch 22 as the French unions may not have a mandate to represent the workforce in other member states, whereas the foreign unions may not have the legal capacity to be parties to a French collective agreement. In those cases the French recognition of the TCA as a collective agreement would be partial only: it is limited to the local (= French) undertakings of the group of companies.

The problem of 'extraterritorial effect' of collective agreements can also be put in terms of conflict of laws. Can national collective agreements legitimately regulate 'foreign' labour relationships? The German report refers to a case decided by the *Bundesarbeitsgericht* in 2003 in which the application of a German collective

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<sup>98</sup> E.g. the Suez and Air France agreements.

<sup>99</sup> Compare Belgium and Germany.

agreement is made dependent on German law applying to the individual labour contract.<sup>100</sup> The case dealt with the application of a German collective agreement on social funds in the construction sector to foreign workers posted to Germany. The BAG concluded that the individual contracts were governed by Italian law. Hence the collective agreement could only apply by way of overriding mandatory provision in the meaning of Article 7 of the Rome Convention (Article 9 of the Rome I Regulation). This mandatory character was lacking, according to the BAG.<sup>101</sup>

It is not evident that this case is also relevant for collective agreements which are entered into voluntarily by the employer. In the situation discussed in the previous paragraph the German collective agreement was declared universally applicable. It claimed application to the specific case on the basis of its autonomous scope of application. It was in all respects an overriding provision: it applied independent of the will of either employer and employee, and it claimed application regardless of the law applying to the individual labour contract. The latter is only acceptable under the Rome I Regulation if the overriding provision can be considered to be crucial for safeguarding the state's public interests, such as its political, social or economic organisation.<sup>102</sup> Private agreements will as a rule not fulfil this requirement.<sup>103</sup>

But maybe they don't have to. TCA's can be distinguished by their voluntary character from collective agreements which are made generally binding by government decree. The extraterritorial effect, too, is voluntary e.g. agreed upon by the parties to the TCA. There is a certain practice of extraterritorial collective agreements outside the more recent use of TCA's. An often cited example is the collective agreement for the German Goethe Institute's world wide subsidiaries.<sup>104</sup> Demarne defends the thesis that an employer can grant rights to his employees, wherever they are actually performing their duties under the contract, as long as the collective agreement respects the local law.<sup>105</sup> She refers for this to the German '*Günstigkeitsprinzip*', which is very similar to the French '*ordre public social*' of

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<sup>100</sup> BAG judgement of 9 July 2003 – 10 AZR 593/02, AP TVG para 1 Tarifverträge Bau Nr. 261. By contrast, Demarne, p. 100, in a work predating this case, claims that German collective agreements can cover labour contracts entered into and executed abroad, given a sufficient mandate. She gives examples of existing company agreements which have such extraterritorial scope. Under the concept of *ordre public social* such agreement could better the position of the workers covered, regardless of the applicable law. The link between application of a Dutch collective agreement and application of Dutch law to the labour contract is also made by the Dutch court of appeal of Den Bosch. The decision dealt with the sector agreement for the international transport sector. Compare also for French law, Demarne p. 74.

<sup>101</sup> The facts of the case predate the entry into force of the posting directive (Dir 96/71/EC).

<sup>102</sup> And even then, other states need not recognize the overriding effect of the mandatory provision. See Article 9 Rome I.

<sup>103</sup> Compare on the use of the public policy by trade unions: ECJ 18 December 2007, C-341/05, *Laval*.

<sup>104</sup> See e.g. Demarne, *Anwendung nationaler Tarifverträge bei grenzüberschreitenden Arbeitsverhältnissen*, Frankfurt am Main, Peter Lang Verlag, 1999 and A. Van Hoek, *Internationale mobiliteit van werknemers*, Den Haag, SDU, 2000.

<sup>105</sup> Demarne, *Anwendung nationaler Tarifverträge bei grenzüberschreitenden Arbeitsverhältnissen*, Frankfurt am Main, Peter Lang Verlag, 1999, p. 74-75.

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*'principe de faveur'* as these terms are understood in private international law.<sup>106</sup> This favour-principle would allow private parties to deviate from mandatory provisions in the relevant labour laws if this offers better protection to the employees. Likewise, under the German *'Prinzip'*, a collective agreement can add to the protection which the individual worker enjoys by virtue of his individual contract but it can't subtract from it. This would mean however, that the binding effect which German law would provide to the Goethe Institute's collective agreement is conditional in two ways:

- the collective agreement does bind the employer, but may not be able to bind the worker;
- the collective agreement is to be applied subsidiary to (or at least in respect of) the laws and local collective agreements applying at the place of execution of the contract.

The *Günstigkeits*-principle could mitigate the problems of applying a German or French collective agreement to contracts governed by another legal system. However, it does not cure all ills. What it does demonstrate is that unilateral recognition in the country of origin of the TCA does not suffice to give it legal effect: the TCA also needs to be 'recognized' by the jurisdictions in which it wants to have legal effect.

The English report suggests that English courts may be willing to accept the binding character which is attributed to a TCA by the applicable foreign law. However, whether this system would recognize any direct normative effect (i.e. a mandatory character with regard to the individual employees) is unclear. The position of Germany leaves room for doubt, given the necessary link between the collective agreement and the law applying to the individual labour contract. But a more serious problem with regard the recognition of TCA's in Germany would be the strict division of powers between unions and works councils which is prevalent in Germany. A TCA which does not respect that division would be void under German law. It is unlikely that a 'foreign' TCA which likewise violates the division of powers, would nevertheless be accepted for application in the German subsidiaries.

This means that the 'reception' of a TCA is a double sided sword: there are risks and requirements at both ends which could prove to be insurmountable obstacles for creating a direct normative effect. Moreover, even when a TCA is recognized in the country of 'origin', uniform application of the TCA in the several member states affected by it can not be guaranteed. Reception may work in individual cases, but can not be relied upon as a general method of implementation in the EU.

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<sup>106</sup> See for example Demarne, o.c., p. 296, 313 ff.

## 2. Main findings with regard to the reception of TCA's

In some cases, the national system which 'hosts' the TCA might be willing to treat the TCA as a collective agreement under national law. Such 'reception' may create binding obligations both at the collective level and the individual level – if national law so provides.

However, any normative effect thus granted may be limited to the (individual and/or collective) labour relationships that have a relevant connection to the national territory. This territorial limitation may be caused by requirement of the system 'hosting' the TCA, e.g. with regard to the representativeness of the unions concerned. But also the other countries in which the TCA is to be applied may create obstacles. These may again relate to representativity requirements, but also the division of powers between the unions and the works council may create obstacles for recognition.

This means that under the current diversity of legal systems, the obstacles for mutual recognition are manifold. For that reason we do not believe that national reception can be a general method of implementation.

### *F. Applicable law in case of enforcement as part of the individual labour contract and/or company usage*

We discuss these routes for enforcement in order to paint a full picture of all possible ways in which the TCA can assert influence on the labour relationships at the individual level. However, when the individual labour contract or the unilateral prerogatives of the employer to install shop rules or usages are needed, the collective consensual element of the TCA is lost. In that respect the individual enforcement options are second best solutions. In some cases they may be effective, though. The 2006 Commission working document mentions the example of a clause in a TCA foreclosing the introduction of a probation period in the contract of an employee who has been subject to a mobility programme. This clause is deemed by the employer to be 'opposable'. This suggests that an employee could call upon the TCA to have the clause removed from the contract. Likewise, Dutch law offers opportunities to give binding effect to TCA and corporate conduct codes through the use of open norms (such as "good employership").<sup>107</sup>

If the individual contract of employment is chosen as point of entrance for enforcement of the TCA, the law applicable to the individual labour contract will be relevant for deciding on the requirements for and limits to such enforcement. The law applying to an individual labour contract is determined primarily by the law of the country where or from which the employee habitually performs his work under the contract. In most cases this will be the country of establishment of the subsidiary. Depending on the subject (individual or collective) the binding character of shop rules will also be determined on the basis of the *lex causae* of the labour

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<sup>107</sup> See Dutch report.

contracts covered or rather the law of the place of establishment of the ‘shop’. In most cases, these two laws coincide and refer to the place of establishment of the labour unit in which the work is performed. This, again, leads to divergent implementation in the several states covered by the TCA.

In short, also the individual enforcement methods lead to a fragmentation of the TCA into a transnational commitment combined with dispersed national commitments in the several states covered by the TCA.

### *G. Rights and obligations of non-signatories II: the special problem of the (European or national) works councils*

#### **1. Legal capacity and the classification of claims**

As has been documented extensively, TCA are often negotiated by European Works Councils. The same EWCs are also in a considerable number of cases one of the signatories (or even the only one) on the side of the employees. It would be tempting to treat any claim by a EWC member as contractual, and treat the position of national works councils as a matter of mandate. However, here we come across the problem of the non-existence of the EWC as a legal entity.<sup>108</sup> Any right to enter into agreements and to claim rights thereunder must be derived from statute. In some countries, the works councils have such rights.<sup>109</sup> If the works councils have the capacity to enter into agreements with the employer, the ensuing enforcement of the agreements by that same works council may – in our opinion – be classified as contractual.<sup>110</sup> As been stated above, the law applying to such contracts will be determined on the basis of the closest connection. This connecting factor will most likely refer to the country of establishment of company hosting the works council, especially if when the EWC also meets there. Alternatively, the claim could be classified as been statutory. In that case it is based on the national law regulating the European works council. This law would normally be the place of establishment of the central management of the European group of companies. In both classifications, the place of establishment of the central management of the group comes up as a important connecting factor with regard to TCA’s.

More problematic are those systems in which only the individual members of the works council may claim judicial enforcement of the works councils rights and prerogatives. In those countries, works council may not have legal capacity either to

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<sup>108</sup> Though the EWC may have limited legal capacity. The latter is quite usual, see e.g. France, Germany, the Netherlands.

<sup>109</sup> E.g. Germany: see comparative report and C. Sachs-Durand, ‘Consultation, Negotiation and Codetermination in Europe’, in: A. Veldman, F. Pennings, & Y. Konijn (Eds.), *Social responsibility in labour relations: European and comparative perspectives*, Austin / Boston / Chicago / New York / The Netherlands, Kluwer Law International (Studies in employment and social policy, 38), p. 461. In Sweden, the EWC has legal capacity, national works councils do not exist: Swedish report.

<sup>110</sup> Hence we disagree with the position described in the German report, which puts the relationship between works council and management outside the scope of application of the Rome I Regulation.

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enter into an agreement or to enforce it.<sup>111</sup> Examples can be found in the reports on Belgium, Hungary and the UK. This may create various difficulties of which the classification of the claim is but one. Countries that use the individual enforcement route, will have statutory provisions which form the legal basis of the claims by individual representatives. These statutory provisions may be available to enforce TCA provisions relating to information and consultation rights of the local (or European) works councils. The legal provisions will most likely not suffice as a basis for provisions in TCA's which address other issues. Hence another legal base for the claim is necessary.

It may be impossible to base the claim of the individual members on their contracts of employment, as the members may be employed by an affiliate whereas the TCA was entered into by the parent company. The individual members themselves may not be a direct party to the TCA either, for example because it was entered into before they became a member of the works council. If the individual employee can be deemed to be a party to the TCA, the relationship will be contractual. When the relationship is constructed to exist with the individual members of the EWC, the TCA is by necessity a multi-party contract.

As a subsidiary route, the French and Belgian reports describe the classification of TCA's as unilateral commitments of the employer.<sup>112</sup> Such unilateral commitments would result in contractual claims under the Brussels I Regulation. Given the parallelism between the Brussels I Regulation and the Rome I Regulation, this leads to the assumption that the unilateral commitment itself would be covered by the Rome I Regulation. Application of the conflict of laws rules of Article 4 would lead to application of the law of the place of establishment of the employer: in the case of unilateral commitments the promisor fulfils the characteristic performance.

There are good arguments to claim that the TCA relationship – even when construed as contractual commitments towards individual employees – should be treated separately from the underlying individual labour contracts (see also the chapter on jurisdiction). That would mean that the applicable law should be determined on the basis of the closest connection as prescribed by Article 4 Rome I. When determining the closest connection it would not seem advisable to lay much weight on the factors relating to the individual employee, since he or she is but one of the parties on the side of the employees. Accordingly, the closest connection should be based on the place of establishment and the centre of gravity of the commitments towards the community of workers and/or their representatives.

The issue of mandate of the EWC is even trickier than the mandate of the national and European confederations of unions. The EWC has a clear mandate under the

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<sup>111</sup> E.g. Hungary: WC are not legal entities, they can not enter into agreements and have limited *ius standi* (with regard to statutory prerogatives only). UK: no legal personality for works councils. Enforcement (if any) by individual workers. B: interestingly enough works council and other representative bodies may enter into agreements with the employer. However, they can not enforce them, because they lack *ius standi*. Individual workers will have to ensure enforcement.

<sup>112</sup> See also C. Sachs-Durand, *l.c.*, p. 462.

Directive, but TCA's as currently discussed are not (or at least not in their entirety) covered by the Directive. Hence there is no legal base for the mandate of the EWC in respect of the national works councils and/or the individual workers in European law. National law may provide such legal base as for example German law seems to do. However, it is doubtful that this national mandate can have 'extraterritorial' effect. The problems which arise here are similar to the ones discussed above with regard to national recognition of collective agreements. If the EWC want to bind the national works council, it would need a specific mandate. Whether the national works councils could actually provide the EWC with such a mandate, would again depend on the various national laws governing the national works councils.<sup>113</sup>

## **2. Main findings with regard to the position of the works councils**

The legal capacity of works council (even EWC) differ considerably from member state to member state. They may or may not be able to enter into agreements, they may or may not be able to defend their rights and prerogatives in court. This creates problems not only with regard to effective enforcement of TCA's but also with regard to conflict of laws. The absence of legal capacity for the EWC forces the national systems to use legal constructions in order to create enforceable effects for agreements entered into by the EWC. These constructions add to the already existing uncertainty as to the law applicable to the TCA. The problem of legal capacity could be solved by giving the EWC itself (limited) legal capacity. This could be done in the ECW directive. The uncertainty regarding the applicable law may be solved by creating a special presumption in Article 4 of the Rome I Regulation.

### ***H. Conclusion as choice of law under Rome I***

The law applicable to the TCA will most likely have to be found by applying the Rome I Regulation. This Regulation is based on party autonomy. This means that the parties to a TCA can determine the law to be applied to their agreements themselves. Choice of law has only limited effect in individual labour contracts, but this does not affect the validity of a choice of law in a collective agreement. Such choice of law will remove any unclarity with regard to the law determining the obligatory aspects of the TCA.

When no choice is expressed in the TCA (or can be implied from it), the applicable law has to be determined first by enquiring whether there is a party which perform

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<sup>113</sup> The tension between negotiation by works councils and negotiations by trade unions is a recurring theme in the literature on TCA's and similar negotiated instruments of corporate conduct. See inter alia B. Bercusson, *European Labour Law*, second edition, Cambridge, Cambridge University Press, 2009; F. Dorsemont, *Corporate Social Responsibility and (European) Labour Law*, *Friends of Foes?* in: Pennings, Konijn & Veldman (eds.), *Social Responsibility in Labour Relations*, Kluwer Law International, 2008, p. 68; and A. Jacobs, *The Revision of the EU Directive on European Works Councils*, *ibidem*, p. 472-473. See on the privileged position of the trade union: De Laat/ Van Slooten, *ILO Conventions 135 and 154 and Works Councils' Power*, *ibidem*, p. 443 ff.



the obligation ‘characteristic’ of the contract type. This party may be impossible to discern in the case of TCA’s. In that case, the Rome I Regulation refers to the law with the closest connection. That means that the law has to be found by weighing the circumstances of the case. In this process central management of the leading company plays an important role, as does the location of the workforce.

The closest connection rule is an open one. This creates flexibility, but causes uncertainty. It might be an option to supplement the rules of Article 4 Rome I with a special sub-rule on TCA’s. This sub-rule would establish the presumption that a TCA is governed by the law of the place of establishment of central management of the leading company. This presumption can be rebutted if another law is manifestly closer connected.<sup>114</sup>

The law applicable to the TCA itself can not determine the normative effect thereof. At least not in a uniform fashion. The report deals with several aspects of normative effect, inter alia representation and reception/recognition as a collective agreement by the lex causae to the TCA. This overview clearly demonstrates that under the current diversity, any binding effect of the TCA on national industrial relations will have to respect the national rules which define those industrial relations. The relevant differences between the Member States pertain to inter alia the requirements for horizontal effect of collective agreements and the division of powers between unions and works councils. The consequence of this is, that TCA’s will have to be ratified by national social partners and implemented in conformity with national standards. Only a superimposed European system may be able to change that, but this option seems unfeasible.

Accordingly, the TCA (and consequently the enforcement thereof) is split up in a European, obligatory part and a set of national implementation measures.

### *1. Rights of non-signatories III: consumers, competitors and (potential) sub-contractors*

#### **1. Introduction**

As regards third parties, the first question to be answered concerns the legal base on which they might base a claim for enforcement, may be bound by it or rather may object to the content of a TCA. The national experts express considerable doubt as to the legal possibilities of third parties to rely on a TCA or oppose it. They refer to several mechanisms which might be used, but all express doubts as to the chances of success. The legal concepts which are mentioned most often are unfair competition and unfair commercial practices. The latter refers to a set of rules which protect consumers against inter alia misleading advertising. Unfair competition sounds in tort. Misleading advertising and unfair commercial practices might lead to rescission

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<sup>114</sup> One point of negotiations would be whether the presumption should be displaced as soon as another law has a closer connection (compare Article 8 sub 4 on individual labour contracts) or only when the contract is manifestly more closely connected to another country (Article 4 sub 3).

of a consumer contract. However, if enforcement is done by special interest groups, their claim will be non-contractual (compare the chapter on jurisdiction). These two tortious mechanisms will be discussed briefly for the choice of law implications.

Other mechanisms are also referred to, albeit less consistently. Acquiring companies may be bound by a TCA if the TCA is considered to be a collective agreement (see the directive on the transfer of undertakings). For the choice of law complications of a transfer of undertaking, the reader is referred to the special studies on this topic commissioned by the European Commission. Other constructions mentioned in the reports are a contractual commitment by a subcontractor to respect the TCA and wrongful interference with a contract.<sup>115</sup> The former will lead to contractual obligations, whereas the latter is clearly tortious. The mechanisms will not be discussed separately.

## 2. Rome II

The Rome II Regulation was the first choice of law regulation to be adopted under the new powers conferred upon the EC by the Treaty of Amsterdam.<sup>116</sup> It is meant to complement the regimes of the Brussels I Regulation and the Rome I Regulation (then still a Convention). As such, both the substantive scope and the provisions of the Rome II Regulation should be interpreted in a manner consistent with the two said Regulations.<sup>117</sup> This requirement of consistency impacts inter alia on the concept of civil and commercial matters and the concept of non-contractual obligations. For specific information on these topics, the reader is referred to the previous chapter of this study.<sup>118</sup>

For tort and delict, the Regulation contains several multilateral conflict rules. The ones of interest to us are Article 4, Article 6 and Article 14. Article 4 contains the general choice of law rule for torts and delicts. Article 6 contains a special rule for unfair competition. Article 14 contains a rule on choice of law by the parties. Under Article 14, the parties may agree to submit non-contractual obligations to the law of their choice either by an agreement entered into after the event giving rise to the damage occurred or where all the parties are pursuing a commercial activity, by an agreement freely negotiated before the event giving rise to the damage occurred. So

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<sup>115</sup> This construction is mentioned for instance in the Belgian report.

<sup>116</sup> A. Dickinson, *The Rome II Regulation (the law applicable to non-contractual obligations)*, Oxford, Oxford University Press, 2008, p. 4 and 29.

<sup>117</sup> Recital 7. A. Dickinson, *The Rome II Regulation (the law applicable to non-contractual obligations)*, Oxford, Oxford University Press, 2008, p. 134 and 148 ff.

<sup>118</sup> It should be noted however, that the Brussels I Regulation uses a slightly different terminology from the Rome I and Rome II regulations. A. Dickinson, *The Rome II Regulation (the law applicable to non-contractual obligations)*, Oxford, Oxford University Press, 2008, p. 177. Advocate General Jacobs has described the difference between contract and tort by distinguishing the source of the obligation which was breached by the defendant, leading to liability for damages. In the case of contract, this obligation is based on agreement. In the case of tort, the obligation is based on the law. Opinion to C-26/91, ECR 1990 I-3967, Jacob Handte. A. Dickinson, *The Rome II Regulation (the law applicable to non-contractual obligations)*, Oxford, Oxford University Press, 2008, p. 179.

the Regulation is based on party-autonomy. However, choice of law by the parties is not open to all non-contractual obligations. For instance, and of direct relevance to us, it can not be applied in cases of unfair competition.

The general rule of Article 4 refers the non-contractual obligation to the law of the country in which the damage occurs (para 1). So, the *locus actus* is irrelevant, the *locus damni* is decisive. Hence, under the Regulation it will be crucial to determine where the damage has occurred.<sup>119</sup> The *locus damni* connection is replaced by the common habitual residence however, ‘where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs’ (para 2). Finally, the rule of Article 4 is open ended, leaving room for derogation from the presumptions in paragraph 1 and 2 ‘where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2’. This derogation is similar to the one found in Article 4 of the Rome I Regulation.

Paragraph 3 contains a specification of the ‘closer connection’ where it states that ‘A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.’ This rule may be relevant for example for industrial accidents. The liability for damages in those cases may be framed both in contract and in tort – at least in some jurisdictions. The Rome II Regulation tries to cater for this problem, not so much by deciding to treat the claim as non-contractual or rather contractual, but by ensuring that courts may (where appropriate) apply a single law to the issue of liability, regardless of characterisations.<sup>120</sup>

The Article which seems to have the most relevance for the enforcement of TCA’s by third parties is Article 6. This Article applies both to unfair competition and acts restricting free competition. The concept of ‘unfair competition’ covers inter alia misleading advertising and forced sales, passing off, boycott and industrial espionage.<sup>121</sup> The concept is broad enough to include both rules that protect consumers and rules that specifically protect competitors. This means that actions taken by consumer organisations based on misrepresentation will be covered by the concept. But also competitors may rely on it to fight misleading advertising. In practice, companies have already been held liable for misrepresentation under domestic law when their corporate social responsibility code did not conform to

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<sup>119</sup> Compare A. Van Hoek, in: A. Veldman, F. Pennings, & Y. Konijn (Eds.), *Social responsibility in labour relations: European and comparative perspectives*, Austin / Boston / Chicago / New York / The Netherlands, Kluwer Law International; Dickinson, *The Rome II Regulation* and the chapter on jurisdiction.

<sup>120</sup> Compare A. Dickinson, *The Rome II Regulation (the law applicable to non-contractual obligations)*, Oxford, Oxford University Press, 2008, p. 344/345.

<sup>121</sup> A. Dickinson, *The Rome II Regulation (the law applicable to non-contractual obligations)*, Oxford, Oxford University Press, 2008, p. 400 ff. See for a definition of unfair commercial practices in B2C relations: Directive 2005/87/EC OJ L 149/22.

company practice. Such a claim would come within the scope of application of Article 6 (1) and (2) for choice of law purposes.

The remainder of Article 6 deals with restrictions of competition. This mainly refers to Article 81 and 82 of the EC-Treaty and similar obligations under national competition law. The provision seems less relevant for the enforcement of TCA's.<sup>122</sup>

Article 6 (1) states that 'The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.' If the consumers are spread out over several countries, the provision will refer each group to its own law. This is referred to as the Mosaic principle. This rule does not apply where an act of unfair competition affects exclusively the interests of a specific competitor. In that case, the normal rules of Article 4 apply. The law applicable under Article 6 is not open to party autonomy, as the provision is deemed to relate to public interests, rather than private interest.

The special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it. This means that the affected market will be considered to be the 'locus damni'. The interpretation of this connecting factor is likely to be affected by the interpretation of the parallel provision of the Brussels I Regulation (see in the relevant chapter).

### **3. Conclusion as to extra-contractual liability**

The issue of extra-contractual liability is regulated by the Rome II Regulation. This regulation contains a special provision on unfair competition which could be used both by competitors and consumers in conflicts over the enforcement of TCA's. The rule refers to the market on which the competition is unduly influenced.

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<sup>122</sup> Unless of course the use of the TCA in the relationship with sub-contractors may be thought to restrict competition.

## II. Jurisdiction

### A. Introduction

#### 1. Dispute settlement and the courts

The Brussels I Regulation applies to civil and commercial matters. Social security and tax matters are excluded from its scope of application. The exact meaning of these restrictions is discussed in Chapter I and Annex I. However, Article 1 of the Regulation contains one more exception which is of relevance to the study at hand. In paragraph 2 subsection d) arbitration is excluded from the scope of application of the Regulation. This means that issues concerning the validity of an arbitration agreements and the effect of such agreements on the competence of the courts are left to the national systems and/or any applicable conventions. The main convention in this field is the New York arbitration convention of 1958 which is signed by all member states of the EU.<sup>123</sup> However, this convention contains the possibility to restrict its application to arbitration in commercial conflicts.<sup>124</sup> Several member states have made this reservation,<sup>125</sup> reducing the relevance of the convention as a harmonisation measure for ADR mechanisms in the social field in Europe.

The overview in Chapter V demonstrates that there is a large variety in voluntary and/or compulsory ADR mechanisms in the social field. We do not purport to express any preference as to the best way to solve disputes with regard to the interpretation and/or implementation and enforcement of TCA's. The current chapter is limited to questions regarding jurisdiction of the courts in transnational conflicts: if one of the parties would choose to go to court, what are the rules pertaining to international jurisdiction? And how can these rules be evaluated in their distributive function – how do they allot jurisdiction between the several 'interested' national systems.

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<sup>123</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html).

<sup>124</sup> Article 1 Section 3 read as follows: "When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity, declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

<sup>125</sup> The reservation was made by Cyprus, Denmark, Greece, Hungary and Romania. Several other member states however, have made the reservation that they will only apply the convention on the basis of reciprocity.

## 2. Structure of the Regulation

The main European instrument for jurisdiction in civil and commercial matters is the Brussels I Regulation<sup>126</sup>. This regulation deals with both jurisdiction and recognition of judgements. In this study only the first set of rules are relevant.

The chapter on jurisdiction contains a system of jurisdiction based on *general* jurisdiction for the courts of the country of domicile of the defendant (*forum rei*). This means that a defendant who is domiciled in a Member State, may - with some exceptions to be discussed below – always be sued in that Member State, regardless of the exact basis of the claim or claims against him.<sup>127</sup> The court of the domicile of the defendant is considered to be the ‘natural court’ for this defendant. The Regulation contains special provisions on the question of domicile of natural persons (Article 59) and legal entities (Article 60). Article 60 provides a set of alternatives on which domicile of legal entities can be based, referring to the statutory seat, central administration and principal place of business respectively. In this way Article 60 seeks to accommodate the different private international law systems which prevail in the EU with regard to legal entities. However broad the definition may be, it does not cover an American company which has its main establishment in the USA (e.g. GM<sup>128</sup> or Ford<sup>129</sup>). This means that when such American legal entity is a party to a TCA (rather than or in conjunction with its European headquarter-company), jurisdiction against this American legal entity has to be determined on the basis of national rules of jurisdiction.<sup>130</sup> These rules vary considerably between the Member States and are described in detail in the Study on Residual Jurisdiction commissioned by the European Commission in 2005.<sup>131</sup> But in most Member States there will be jurisdiction over the American company when this company has an establishment or branch in that state and the conflict relates to the operations of that branch or establishment.<sup>132</sup>

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<sup>126</sup> Regulation 44/2001/EC of the Council of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 OJ (L 012).

<sup>127</sup> Preamble (11) and Article 2 of Regulation 44/2001/EC and European Commission, a Strategy to Improve the Operation of the VAT System Within the Context of the Internal Market Com (1999) 348 final (7 Juni 2000), p. 13.

<sup>128</sup> See [www.gm.com](http://www.gm.com) for information on the new and old GM companies.

<sup>129</sup> See [www.ford.com](http://www.ford.com).

<sup>130</sup> Article 4 of Regulation 44/2001/EC. See also Com (1999) 348 final (7 Juni 2000), p. 13. Jurisdiction over companies domiciled in Iceland, Norway or Switzerland is determined on the basis of the Lugano Convention – a convention which is based on the Brussels Convention and almost identical in its content.

<sup>131</sup> Arnaud Nuyts, e.a. Study on Residual Jurisdiction, General Report 3 September 2007, Service contract JLS/C4/2005/07-30-CE)0040309/00-37.

<sup>132</sup> This rule pertains to separate establishments within a single legal entity. Separate legal entities within the multinational enterprise which are incorporated in one the Member States of the EU will have their domicile in the EU and jurisdiction over them will be covered by the Regulation.

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When the defendant is domiciled in a Member State the courts of other Member States may only assume jurisdiction if the Regulation so provides.<sup>133</sup> It does in the form of either *alternative* grounds of jurisdiction which form an alternative to the co-existing jurisdiction of the *forum rei*, or *exclusive* grounds of jurisdiction which oust the jurisdiction at the domicile of defendant. It is important to realize that jurisdiction is claim-dependant. Whereas choice-of-law rules try to determine the law applying to a specific legal relationship<sup>134</sup>, rules of jurisdiction decide which court is competent to hear a specific claim against a specific defendant. Even if the question which lies at the heart of the procedure concerns the validity and legal effect of a TCA, the relevant question here is whether the claim put before the court sounds in contract, tort or otherwise. It is the legal qualification (also referred to as classification or characterization) of the specific claim which determines special jurisdiction under the Regulation.

Alternative grounds of jurisdiction can be found in Article 5 and 6 of the Regulation. These articles provide for jurisdiction of a specific court over a specific dispute in which defendant is a party. In those cases, jurisdiction is granted because of a close link between the court and the action pursued and/or the need to facilitate the sound administration of justice.

A – in the context of this study topical – example of alternative jurisdiction is to be found in Article 5 sub 3 which grants jurisdiction to the courts of the place where the harmful event occurred or may occur in matters relating to tort, delict or quasi-delict. Jurisdiction at the *locus delicti* is justified inter alia by the availability of evidence at this location. Hence, the close link between an action in tort and the court at the place of the tort warrants a specific, alternative ground of jurisdiction. This extra jurisdiction is only available when the place of the ‘tort’ is situated in a Member State other than the State of domicile of the defendant.<sup>135</sup>

Article 5 deals, inter alia and as far as relevant for the current studies, with jurisdiction in matters relating to contract (sub 1), matters relating to tort, delict or quasi-delict (sub 3) and disputes arising out of the operation of a branch, agency or other establishment (sub 5). Article 6 provides for alternatives based on proficiency and the sound administration of justice. It deals with multiparty proceedings (para 1 and 2), counterclaims (para 3) and the joinder of contractual claims to rights in rem (para 4). As TCA’s involve multiple parties Article 6 para 1 and 2 are of clear

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<sup>133</sup> See Article 3 of Regulation 44/2001/EC.

<sup>134</sup> C.M.V. Clarkson & J. Hill, *The Conflict of Laws* 3d edition, Oxford, Oxford University Press, 2006, p. 456 distinguishes between characterization of the facts, the cause of action and the legal issue. Strikwerda para 44 ff would rather characterize legal relationships and legal fact patterns. This seems to represent a divide between the common law and the civil law tradition. But also as a practical matter: a narrow conflict of laws category may embrace only a single legal issue (capacity to marry), whereas the wider category encompass an entire range of issues relating to a specific legal relationship (e.g. contract or marriage or liability in tort).

<sup>135</sup> When domicile and place of tort are within one and the same Member State, it will depend on the rules on the distribution of jurisdiction in that specific Member State which court or courts in the Member State has or have jurisdiction.

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relevance to the issue at hand: is it possible to sue all interested parties on the side of the employer in a single forum? Can a national union join in the proceedings between the European works council and the employer? Hence, these paragraphs will be discussed below.

In some cases, the Regulation does not offer an alternative, but rather an exception to the *forum rei*-principle. Most notably, Article 22 provides for exclusive jurisdiction of the courts of a specific Member State over the proceedings included in the Article's paragraphs. For example, the courts of the Member State in which a public register is kept, have exclusive jurisdiction over the validity of any entries in those registers. This jurisdiction is not dependent on the domicile of either claimant or defendant and cannot be contracted away by the parties. Of interest here is the exclusive jurisdiction granted to the courts of the seat of a company, legal person or association of natural and/or legal persons on matters relating to the validity of (amongst others) the decisions of their organs (Article 22, para 2).

Article 23 and 24 deal with prorogation of jurisdiction – cases in which the defendant voluntarily submit to the jurisdiction of the court. Article 23 more specifically regards the possibility of the parties to designate the competent court themselves, either as an alternative jurisdiction or on an exclusive basis. Within its scope of application, this provision could be used by the parties to a TCA to designate a competent court or courts. Hence it is relevant to take a closer look at the requirements posed by this Article. Article 24 regulates the phenomenon of (tacit) submission by appearance. It contains the rule that a court may assume jurisdiction when the defendant has appeared and has entered a defence on the merits without contesting the jurisdiction of the court.<sup>136</sup> It operates in the context of a given court procedure and cannot be relied upon to determine in advance which court has jurisdiction to hear a claim arising out of a TCA. It will not be discussed in the remainder of this report.

With regard to consumer contracts, insurance contracts and individual contracts of employment, the Regulation contains a separate set of rules for each, based on the need to protect the contractually weaker party. These rules incorporate a similar system of general competence in the domicile of defendant combined with alternative jurisdiction in a court linked to the course of action but they deviate from the general system in several respects. For the purpose of this study only Section 5 on individual labour contract is relevant.

A last provision of relevance to the subject at hand is Article 31 which pertains to provisional measures. This competence may be used in (collective) labour cases to grant interim relief.

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<sup>136</sup> Com (1999)348 final p. 19.



### 3. Structure of this chapter

As the exclusive jurisdiction based on Article 22 ousts all other rules of jurisdiction, we will start the in-depth discussion of the several provisions on jurisdiction in Brussels I with Article 22. After this, the special Chapter on individual labour contracts will be discussed, both as to its contents and to its scope of application and its relationship to the other Regulation provisions. This chapter will continue with a discussion of the relevant provisions of Article 5 and Article 6. This concludes the overview of objective grounds of jurisdiction. In a next paragraph an overview of the requirements of Article 23 will be given. The chapter continues with a description of the competence of courts to order interim measures and rounds off with a conclusion.

### 4. Standard of evaluation

In this chapter of the report, conclusions will be drawn as to the necessity to adapt the system of the Brussels I Regulation in order to better accommodate claims for the enforcement of TCA's. Any such recommendation should be based on certain standards. In this case the relevant criteria for evaluation are:

- 1) Legal certainty and predictability. Is the rule sufficiently clear in order to allow parties to predict in advance whether or not a court will have jurisdiction?
- 2) Accessibility. Does the Regulation provide the parties with real access to justice? In this respect two elements which are specific to TCA's must be taken into account
  - a) the involvement of weaker contract parties (most notably the workers);
  - b) the involvement of entities with incomplete standing.

Both aspects lead to a preference for (alternative) jurisdiction at the home base of the workers and their representatives. Workers should be able to sue 'at home', in order to avoid the extra costs of foreign proceedings.<sup>137</sup> Parties which are not full legal entities, but are given specific standing by the law of their home country, may encounter difficulties when they want to sue abroad. This argument is valid for both unions and works council – see also the relevant chapter of this report. These problems can be avoided by giving the home state jurisdiction in cases involving works councils and/or unions.

Of course, in the case of TCA's, workers' representatives from more than one Member State may be involved. Hence, it will not be possible for all of them to sue 'at home'. This does not mean, however, that access to a court in one's home state

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<sup>137</sup> Compare the arguments used by the ECJ in the cases on the interpretation of the Brussels Convention in individual labour disputes, discussed below.

is not a relevant interest to take into account when evaluating the current rules. It merely means that sometimes other interests may prevail, when the choice for a given court must be made.

3) *Gleichlauf*. This term refers to the situation in which a court will be able to apply its own law to an international conflict, because the relevant factors for granting jurisdiction and determining the applicable law coincide. *Gleichlauf* can be preferable when, for example, the issue at hand has public policy aspects. It is also advocated when the conflict concerns legal institutions which are highly dissimilar between the several states. Collective labour law, both in the aspect of industrial relations and in the aspect of workshop democracy, is characterized by both strong public policy overtones and a considerable divergence, as the national reports to this study demonstrate. Conflict of law rules are based on the presumption of interchangeability between legal systems. If this interchangeability is absent (e.g. in the case of works councils between Germany and the UK), the multilateral conflicts rules can't be used and unilateral rules will be needed instead. Unilateral rules only determine the applicability of the *lex fori*, and hence are to a large extent forum-sensitive.<sup>138</sup> For effective enforcement of such rules, jurisdiction should be given to the 'home' court – the forum from which the applicable rules originate. A strong preference for *Gleichlauf* may lead to exclusive jurisdiction for the relevant court. Such exclusive jurisdiction is granted in Article 22 of the Convention. However, the interest of *Gleichlauf* should be balanced against the other interests involved. An important counterargument against exclusive jurisdiction can be found in the last interest to be discussed.

4) Efficient proceedings and the avoidance of conflicting judgements. In the case of TCA's, there are multiple parties involved on both sides of the agreement. Hence, it is important to check whether it is possible to join forces: i.e. to have a dispute which involves multiple parties decided by a single judge. The main provision in the Brussels I Regulation dealing with this aspect is Article 6.

## ***B. Exclusive jurisdiction over the validity of company decisions – Article 22 sub 2***

### **1. Relevance of Article 22 sub 2**

TCA's contain commitments (be it legally binding or otherwise) of transnational companies with regard to their social policies. 'Enforcement' of such agreements is only relevant when the company in question does not honour its commitments under the agreement. Most often this takes the shape of senior management and/or the board of directors of the company making a decision which contravenes the agreement or rather failing to make the decision or to take the action which is needed to implement its commitments. Relevant examples of duties arising from

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<sup>138</sup> The Rome I Regulation leaves only limited room to apply foreign 'overriding mandatory provisions' i.e. foreign rules with a unilateral scope of application. See Article 9(3).

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existing TCA's might be a duty to provide timely information to the works councils active within the group or a duty to set up a special consultation body in case of restructuring. Can the works councils - both at national and European level - stop management from going ahead with the restructuring without proper consultation?

A possible route to enforcement would be to start an action in which the decision of the management and/or board of directors (or lack thereof) is put before the court. The Brussels I Regulation contains a special provision according to which the courts of the Member State in which a company, legal person or association has its seat have exclusive jurisdiction in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or *the validity of the decisions of their organs* (Article 22 sub 2, italics by the authors). The provision is taking from the similar provision in the Brussels Convention.<sup>139</sup> For the application of this provision, the domicile of the parties to the lawsuit is irrelevant. The only relevant factor is whether the company, legal person or association has its seat in a Member State of the EU.<sup>140</sup>

Article 22 confers *exclusive* jurisdiction to the courts nominated in the several provisions. This means that other grounds for jurisdiction are excluded, amongst which the courts for the domicile of defendant (Article 2) and the court or courts chosen by the parties (Article 23). For the ECJ this exclusive character is an extra reason to interpret the provision strictly, with special attention being paid to the purpose of the special exclusive jurisdiction.<sup>141</sup> In the Hassett and Doherty case the ECJ stressed that Article 22 sub 2 should not apply to all disputes in which a decision by the organs of a company plays a role, however indirect. The provision should not cover the 'disputes which would not give rise to conflicting judgments as regards the validity of the decisions of the organs of a company, in that their outcome would have no bearing on that validity' nor to 'disputes which do not require any examination of the publication formalities applicable to a company'.

The Hassett/Doherty judgement seems to be in sync with the (earlier) national case law described in the Hess/Pfeiffer/Schlosser report. According to Prof. Pfeiffer, Article 22 receives very limited application in the Member States and is mainly used to deal with matters coming within the purview of company law *strictu sensu*. By giving exclusive jurisdiction to the courts of the Member State in which the 'seat' of

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<sup>139</sup> Article 16 sub 2.

<sup>140</sup> The seat is to be determined by using the private international law rules of the court seized of the action. These rules still diverge between the Member States where some states use the statutory seat as the determining factor, while others prefer the administrative seat. Compare U. Magnus & P. Mankowski, *European Commentaries on Private international law: the Brussels I Regulation*, München, Sellier Europa Law Publishers 2007, Article 22, Rdnr. 36 ff. p. 356 and Hess/Pfeiffer/Schlosser, *Report on the application of Regulation Brussels I in the Member States*, Study JLS/C4/2005/03, final version 2007, p. 157. So in theory different courts may place the seat of a company in different States. *Ibidem*, p. 359.

<sup>141</sup> The alternative grounds of jurisdiction are also interpreted in a strict manner, as they deviate from the main rule of '*actor sequitur rei*' (the claimant should come to the defendant).

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company is located, the provision seeks to attain what is called ‘Gleichlauf’: concurrence between jurisdiction and applicable (company) law.<sup>142</sup> This is illustrated by the facts that

- 1) the provision uses the term ‘seat’ rather than domicile and
- 2) the ‘seat’ of the company is determined by using the private international law rules of the court seized, rather than the general rule on the domicile of companies in Article 60 of the Regulation.

Accordingly, the fact that a decision made (e.g.) by the board of directors or the CEO of a company violates its commitments based on a TCA does not in itself raise questions with regard to the validity of the decision as such and/or the publication formalities of the company. Only if TCA’s affect those issues, application of Article 22 may be called into question.

TCA may contain specific obligations with regard to works council involvement in company decisions. Several national reports show that the prerogatives of works councils can be extended through agreements.<sup>143</sup> In some jurisdictions the legal obligations of the management bodies of the company to inform and consult the works council may affect the validity of management decisions which are taken without the prescribed prior consultation.<sup>144</sup> A more common sanction is the suspension of a company decision which is taken in violation of the workers’ consultation and information rights. Such suspension will take place in summary proceedings. It is extremely rare that the sanction of nullity attaches to contractual obligations with regard to information and consultation rights. Accordingly, under the current formulation of the exclusive jurisdiction it is unlikely that conflicts between management and works council would be covered by it.

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<sup>142</sup> Magnus/Mankowski (l.c., p. 356-357) mention as underlying reasons for the provision: legal certainty, the need to avoid conflicting judgements, the relevance of publicity rules for the matter at hand and concurrence between jurisdiction and applicable law. The latter is relevant given the often mandatory nature of the underlying rules.

<sup>143</sup> See e.g. Dutch national report, French report, additional information.

<sup>144</sup> Commission staff working document accompanying the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the review of the application of Directive 2002/14/EC in the EU {COM (2008) 146 final} /\* SEC/2008/0334 final \*/ contains an overview of enforcement matters with regard to consultation and information rights under this directive. According to the document Hungary, France and The Netherlands adopt the sanction of nullity to certain types of infringement of information and consultation rights. In Germany, France and the Netherlands the courts may order the suspension and/or reversal of decisions made in violation of those rights. Nullity as a sanction for contractual obligations is rare, though.

## 2. The coming revision of Brussels I

At first glance a dispute over information and consultation rights seems to fit into the category of conflicts which is described in German law as ‘*Organstreitigkeiten*’: disputes between the several organs of the company as to their respective prerogatives. One of the discussions with regard to possible amendments to the Brussels I Regulation<sup>145</sup> concerns the extension of Article 22 to such ‘*Organstreitigkeiten*’ (in as far as they are not covered currently).<sup>146</sup> Should such extension also cover disputes between works councils and management boards over information and consultation rights? We would not welcome such an extension. A first reason for this would be, that works councils are not ‘organs’ of the legal entity.<sup>147</sup> They are collective labour law instruments created in the context of work place democracy. As such they are linked to the undertaking, the *economic* entity, rather than the corporation or other *legal* entity which runs it. This difference in conceptual background has direct legal consequences, making the current rule of Article 22 is unfit to deal with conflicts between works council and management.

Article 22 sub 2 refers to the seat of the company rather than the place of business of the undertaking. The forum best suited for disputes between works councils and managements would – in our opinion – be a forum which is geographically close to the works council and which would be able to apply its own law. Works councils are constructs of national law which do not exist in every legal system. Both their prerogatives and the possibility to enforce their rights through the courts (*ius standi*), will vary between the legal systems. Though it is not impossible for courts to apply foreign law on information and consultation rights, and recognize the *ius standi* of a foreign body (not being a legal entity),<sup>148</sup> this situation is far from ideal. If any court should have exclusive jurisdiction in these matters, it should be the court of the country the law of which applies to the dispute. All exclusive jurisdictions follow this logic.<sup>149</sup> It should not be otherwise for information and consultation rights.

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<sup>145</sup> Green paper question 8.

<sup>146</sup> Compare B. Sujecki, Anwendungsbereich der ausschliesslichen Zuständigkeitsregelung zum Gerichtsstand für Gesellschaftsrechtliche Klagen, EuZW 21/2008, p. 667-668 referring to Geimer/Schütze EUZVR 2004 (2d ed) Art. 22 EuGVVO Rdnrn 141, 186 ff; Leibe/Freitag, Forderungsneitreibung in der EU 2008, para 2 Rdnr 215-216; Gottwald Münchener Kommentar Zivilprozessordnung Band 3, 3d ed 2008, Art. 22 EuGVVO, Rdnr 22 ff/ 28 ff; Magnus/Mankowski o.c. Art. 22 Rdnr 46 p. 358 insists that not all ‘internal affairs’ are included in the current scope of application of Article 22.

<sup>147</sup> See comparative report Germany (additional information).

<sup>148</sup> Compare the recognition of special consumer protection organisations and bodies under Dir 98/27/EC OJ L 166/15.

<sup>149</sup> Compare for rights in immovable property ECJ case 115/88, Mario P. A. Reichert and others v Dresdner Bank 1990 ECR, 27. In general, see U. Magnus & P. Mankowski, European Commentaries on Private international law: the Brussels I Regulation, München, Sellier Europa Law Publishers, 2007, Article 22, Rdnr 7, p. 348.

The application of national rules on information and consultation rights is usually made dependent on the place of business of the undertaking.<sup>150</sup> The ‘seat’ of the legal entity acting as employer is not in itself relevant for this. Works councils tend to meet at the place of factual economic establishment rather than at the place of the ‘seat’ of the legal entity.<sup>151</sup> Because this is where they (and the workers they represent) habitually work. Therefore the place of business rather than the seat seems to be the most convenient forum.

Should then the court for the place of establishment of the undertaking have exclusive jurisdiction in conflicts between works council and management? The German report states that Germany already assumes exclusive jurisdiction over conflicts involving German works councils. They do so by considering the issue to fall outside the scope of application; a point of view we do not share. Likewise we do not share the preference for exclusive jurisdiction. In purely internal matters the Regulation does not apply. German courts will have jurisdiction in procedures started by German works councils against the management of the German undertaking. In international cases, the national works councils will generally be able to sue ‘at home’ on the basis of the other provisions of the Regulation. This will be demonstrated below. So there is no need to create exclusive jurisdiction in the court for the place of establishment in order to grant access to justice to works councils. And there is a flip side to the medal of exclusivity: in the case of TCA’s the exclusive character may prove detrimental to the interests of the works councils because it makes it impossible to consolidate procedures against different companies within the group about the implementation and enforcement of a single TCA obligation.

### **3. Main findings as to Article 22 sub 2**

Exclusive jurisdiction has only a very limited role to play in the enforcement of TCA’s. Only if the TCA would directly affect the way decisions in a company can validly be made, their enforcement may to come under the heading of Article 22 sub 2. This may change if the scope of application of the provision of matters relating to company decisions would be broadened.

The effect of an exclusive jurisdiction is that it ousts all other grounds for jurisdiction. It is exactly this effect which led the ECJ to interpret provisions which grant exclusive jurisdiction narrowly. Any extension of the scope of application of Article 22 should therefore be extremely well argued. There is no convincing argument to extend the scope of Article 22 to include disputes between works

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<sup>150</sup> Dir 2002/14/EG uses the terms ‘undertaking’ and ‘establishment in a MS. It does not refer to legal entities and/or contractual parties to the labour contract. This distinction seems to blur somewhat upon implementation: Commission staff working document accompanying the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the review of the application of Directive 2002/14/EC in the EU {COM (2008) 146 final} /\* SEC/2008/0334 final \*/

<sup>151</sup> Compare Article 7 of the recast EWC Directive (2009/38/EC) for European works councils.

councils and management. On the contrary, the provision seems ill suited for these disputes as it refers to the seat of the legal entity rather than the place of business of the undertaking (which is a more appropriate forum for this type of disputes). Hence we would advise against widening the scope of application to include TCA commitments. We don't favour the inclusion of a exclusive jurisdiction rule for information and consultation rights either: it is not necessary to ensure access to justice and it has a negative effect on the possibility to consolidate actions arising out of a TCA.

### **C. *Jurisdiction over individual contracts of employment: Section 5 (Articles 18-21)***

#### **1. Contents of Section 5**

Since the replacement of the Brussels Convention by the Regulation, jurisdiction over individual labour contracts is regulated in a separate Section. This is a deviation from the Convention, as in the Convention special jurisdiction in labour contracts was dealt with in the same paragraph as the special jurisdiction for contracts in general whereas choices of forum in labour conflicts were dealt with in the general provision on choice of forum. With the creation of a special Section the provisions on labour contracts were brought in line with the provisions on consumer contracts and insurance contracts, both contract types in which one of the parties is deemed to be contractually weaker and less able to bargain. The re-codification of the rules on jurisdiction led to substantive changes as well, again leading to an increased parallelism with rules regarding the other two 'weak party contracts'.

The Section, like the general rules of the Regulation, is based on the *forum rei* – principle, giving jurisdiction to the courts for the country of establishment of the defendant. However, the Section works with a slightly extended concept of the *forum rei*: 'Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.'<sup>152</sup> This provision is relevant for US companies which have a (dependent) branch or establishment in the EU in which they employ workers. When the EU subsidiary is an independent legal entity, the provision does not apply – jurisdiction over the EU legal entity will have to be determined separately.

According to Article 19 "An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or

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<sup>152</sup> Article 18 sub 2.

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2. in another Member State:

(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.”

Accordingly, the employee is granted an alternative to the *forum rei*, referring primarily to the habitual place of work and alternatively to the place of business through which he was engaged.

This rule deviates from the rule on contracts in general which is laid down in Article 5 sub 1 under a) of the Regulation. According to that provision a person domiciled in a Member State may, in another Member State, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question. Under this provision, jurisdiction will depend on the specific obligation of the defendant which the plaintiff seeks to enforce. Accordingly, a claim for specific performance by party A may be sued in a different court than the claim for payment of the contractual fee by the contractual counterpart B.<sup>153</sup> This case specificity is lacking under Article 19: jurisdiction under that provision depends on the place of performance of the obligation which characterises a contract of employment – being the provision of dependent labour. Who is suing who and for what exactly, is irrelevant under Article 19.

The special rule for labour contracts was developed through case law on and subsequent amendments to the Brussels Convention. Hence, there is ample case law explaining – in particular – the concept of ‘habitual place of work’.<sup>154</sup> Where the employee performs his work in more than one Contracting State, that place refers to the place where the employee has established the effective centre of his working

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<sup>153</sup> Under the Regulation – and in contrast with the situation under the Convention - contracts for the sales of goods and the provision of services also have a single place of performance based on the performance of the characteristic obligation.

<sup>154</sup> It is likely that this case law will continue to be relevant for the interpretation of Article 19 sub 2 (compare i.a. Regulation preamble 19, ECJ Case C-180/06, Renate Ilsinger v Martin Dreschers, 2009 ECR, para 41 and ECJ Case C-111/08, SCT Industri AB i likvidation v Alpenblume AB, 2009 ECR para 22-24) . After all, Article 19 uses a similar terminology as Article 5 sub 1 of the Convention when it refers first to the place of work and second to the place of business of the employer. However, it should be kept in mind that the role of the alternative *fora* is different under the Regulation. When an employer wishes to sue the employee, he may only do so in the court of the state of domicile of the employee. Neither the alternative forum for the place of work nor the forum for the place of business can be used by the employer. This was different at the time the ECJ gave its judgements on the interpretation of the Convention provision. The unilateral character which the additional connecting factors acquired in the Regulation may influence their interpretation (compare on the differences between the Convention and the Regulation with regard to labour contracts: Case C-462/06, ECJ 22 May 2008, ECR I-3965 GlaxoSmithkline).



activities and where, or from which, he in fact performs the essential part of his duties vis-à-vis his employer.<sup>155</sup> If a worker is sent to different member states to perform similar activities, no such centre may be identifiable. In that case, the place of work refers to the country in which the employee has worked the longest.<sup>156</sup> So the 'habitual place of work' is given a very extensive meaning, leaving almost no room for the application of the second sub-rule of Article 19 which refers to the place of business of the employer.<sup>157</sup>

Section 5 continues with a rule on counterclaims (Article 20 sub 2) and rounds up with a provision on choice of forum by the parties. According to Article 21 a choice of forum which deviates from the rules of Section 5 is only valid in as much as it is either entered into after the dispute has arisen or allows the employee to bring proceedings in courts other than the ones designated by Section 5.

## 2. Relationship between Section 5 and the other rules on jurisdiction

According to Article 18 sub 1. 'In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.' The provisions of Section 5 must be understood as forming a '*lex specialis*' with respect to the other provisions on jurisdiction. This means that the general rules of the regulation are replaced by the special rules of Section 5. The general provisions cannot be relied upon unless Section 5 explicitly refers to them. Such reference is made to Article 4 (dealing with jurisdiction to defendants domiciled outside the Member States) and Article 5 sub 5 (dealing with special jurisdiction over disputes 'arising out of the operations of a branch, agency or other establishment). However, no reference is made to Article 6 sub 1 on joint defendants, neither is Article 5 sub 3 (on torts) referred to. Finally, Articles 23 and 24 (on choice of forum and tacit submission) are not mentioned either, though choice of forum is. This raises the question whether the parties to a dispute involving an individual labour relationship can still rely on those provisions.<sup>158</sup>

In the case of GlaxoSmithkline the ECJ had to decide on the applicability of Article 6 sub 1 in a conflict in which an employee was suing two (alleged) former employers, both being part of the same international group of companies, for

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<sup>155</sup> Case C-125/92, ECJ 13 July 1993 ECR I-4075 (Mulox v. Geels) paras 20 and 26. Case C-383/95, ECJ 9 January 1997 ECR I-57 (Rutten v. Cross) para. 23.

<sup>156</sup> Case C-37/00, Herbert Weber v Universal Ogden Services Ltd., 2002 ECR I-02013.

<sup>157</sup> Especially the judgment in the case of Weber v. Ogden Services, in which the court gave jurisdiction to the court of the country in which the employee had worked the longest, has met with considerable criticism in legal literature. In this judgement the Court seems to abandon one of the major principles of the law of jurisdiction being that jurisdiction has to be predictable and easily identifiable.

<sup>158</sup> Compare on the relation between Section 3 (jurisdiction in matters of insurance) and Article 24: ECJ Case C-111/09, Česká podnikatelská pojišťovna v. Michal Bilas.

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damages related to unfair dismissal.<sup>159</sup> This procedural tactic, in which several companies are sued for a single incident, is not uncommon in cases involving transnational corporations. The transfer of ‘international’ employees to different legal entities within a single multinational conglomerate regularly leads to confusion as to the legal counterpart to the employment contract. In those cases it is common to sue all relevant parties at the employer side (e.g. the company who is responsible for transfers and dismissals as well as the company where the employee is actually posted). Evidently it is in the interest of the employee to be able to sue all parties in a single forum since the claims against the several employers are closely related.<sup>160</sup> Article 6 sub 1 normally would offer such opportunity. However, according to the ECJ this provision is not applicable to individual labour contracts as it is not mentioned in Article 18 sub 1.

The strict interpretation of the regulation given by the ECJ in the GlaxoSmithkline case<sup>161</sup> blocks recourse to Article 6 whenever one of the cases to be joined involves obligations arising out of an individual labour contract. If several employees want to start a court procedure to enforce obligations arising out of a TCA, the court seized will have to have jurisdiction in each individual case (based on either Article 2 or Article 19). The same argument is valid when the unions want to involve individual employees in their claim for enforcement: jurisdiction in the case in which the employee is the claimant can not be established on the basis of Article 6.

It is not entirely clear whether it is also no longer allowed to rely on Article 23 (choice of forum) and Article 24 (tacit submission) in those cases. The Commission seems to be of the opinion that the special provisions of Section 5 only derogate from the provisions of Section 1 and 2.<sup>162</sup> In that view, recourse to Article 23 and 24

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<sup>159</sup> Para 9: “Mr Rouard requests that those companies be ordered jointly and severally to pay him various amounts of compensation and damages for non-compliance with the dismissal procedure, dismissal without genuine and serious cause and wrongful breach of his employment contract.”

<sup>160</sup> Imagine splitting up the cases and having court A decide on the claim against the alleged employer A and court B on the case against employer B. what if court A decides that employer A is not the relevant contractual counterpart, whereas court B would decide the same with regard to employer B. Such judgement would have to be deemed irreconcilable as they would leave the employee without any form of legal recourse. Compare also the comment on Article 6(1) below.

<sup>161</sup> Case C-462/06, ECJ 22 May 2008, ECR I-3965. This interpretation is not very favourable for the weaker contract party. Compare B. Sujecki ‘Anwendbarkeit der EUGVVO auf Arbeitsverträge, EuZW 12/2008, p. 371-372.

<sup>162</sup> The Commission proposal refers only to Section 2 of the Regulation. For the controversy in a single book: see Magnus/Mankowski, Brussels I, Article 24 Rdnr 24 p. 445 argues in favour of tacit submission for weaker contract parties. However the same book denies recourse to Article 24 for labour contracts in the comment on Article 21 (Rdnr 2, p. 343).

would still be allowed. A question to that effect is currently pending before the ECJ.<sup>163</sup>

### 3. Scope of application of Section 5

The different language versions of the Regulation use slightly different descriptions for the type of claims covered by Section 5. Some refer to matters regarding individual contracts of employment,<sup>164</sup> others refer to individual obligations arising out of a labour contract,<sup>165</sup> still others refer both to the contract and to the obligations arising therefrom.<sup>166</sup> There is no specific case law on the scope of application of Section 5, so any problems arising in this context can only be discussed on a provisional basis, using case law on other topics to draw an analogy. The issues which determine the scope of application of the Section are:

- What contracts constitute an individual labour contract?
- Which claims arising in the context of an individual labour relationship are covered by Section 5?

As was mentioned before, the special jurisdictional rule for individual labour contracts was first developed by the ECJ. In this context the court observed that “contracts of employment, like other contracts for work other than on a self-employed basis, differ from other contracts - even those for the provision of services - by virtue of certain particularities: they create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements.”<sup>167</sup> Accordingly, the element of dependent labour and the inclusion in the organisational framework of the employer would constitute important characteristics of a individual labour contract.<sup>168</sup>

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<sup>163</sup> ECJ, Case C-111/09, *Česká podnikatelská pojišťovna v. Michal Bílas*. The relevance for this study is minor, however. The tacit submission only works during a given procedure, and can not be planned in advance. The choice of forum provision of Article 23 is mainly used, as far as individual labour contracts are concerned, to establish the formal requirements and to establish consent. The validity of the choice of forum is limited by Article 21.

<sup>164</sup> E.g. the French and Italian versions: ‘Compétence en matière de contrats individuels de travail’, ‘Competenza in materia di contratti individuali di lavoro’.

<sup>165</sup> E.g. the Dutch text: ‘Bevoegdheid voor individuele verbintenissen uit arbeidsovereenkomst’.

<sup>166</sup> See e.g. the German version: ‘ein individueller Arbeitsvertrag oder Ansprüche aus einem individuellen Arbeitsvertrag’.

<sup>167</sup> Case 266/85, *Hassan Shenavai v Klaus Kreischer*. 1987 ECR 00239, para 16. compare also *Magnus/Mankowski* Article 18 Rdnr 4, p. 328

<sup>168</sup> Compare P.H.L.M. Kuypers, *Forumkeuze in het Nederlands internationaal privaatrecht*, Deventer, Kluwer 2008, p. 468.

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Noteworthy is the reference made by the ECJ to mandatory rules and collective agreements applicable at the place of work. In the early case law, the territorial character of (some?) mandatory rules of labour law constituted an important argument for granting jurisdiction to the court for the place of work. In later case law the emphasis of the court shifted towards the position of the worker as the weaker party to the contract – thus increasing the parallel with consumer contracts and contracts of insurance. This parallel may be important with regard to the question whether unions may also make use of Section 5 when they want to enforce labour laws and/or collective labour contracts for the benefit of the workers. If the case law on insurance and consumers contracts is taken as an indication, the answer may be negative.<sup>169</sup> According to the ECJ the protective rules of the special sections for weaker contract parties are meant to create a jurisdictional benefit for those weaker parties. The weaker party should not be kept from enforcing their rights by the costs and complications of having to sue abroad. As soon as a professional party tries to enforce claims arising out of a consumer contract or an insurance contract, this protection is no longer needed. Hence, according to the ECJ those professional parties cannot rely on the special provisions and the court seized will have to base its jurisdiction on Section 1 and 2 of the Regulation instead.<sup>170</sup>

In the case law on consumer contracts and insurance contracts, the professional party generally acted on its own behalf, either as reinsurer of certain risks or as an assignee of the claims based on the individual contract. It is uncertain whether the ECJ will use the same reasoning in cases in which labour unions act in the name of and/or on behalf of individual employees. It is relatively certain, however, that an independent enforcement claim by labour organisations will not be covered by Section 5.<sup>171</sup> It would therefore depend on the construction of the course of action of the unions under national law – as agents of named or unnamed employees or rather public interest enforcement bodies – whether the claims put forward by the unions are classified as contractual under Section 5, contractual under Article 5 (1) or even non-contractual under Article 5(3).<sup>172</sup> To illustrate this point, reference can be made to the French report, in which prof. Robin Olivier describes the ‘action de substitution’, the action in defence of special groups (amongst which foreign workers, temporary workers) and the collective enforcement action as three types of

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<sup>169</sup> Compare P.H.L.M. Kuypers, *Forumkeuze in het Nederlands internationaal privaatrecht*, Deventer, Kluwer 2008, p. 468, 469-470.

<sup>170</sup> Case C-167/00, *Verein für Konsumenteninformation v Karl Heinz Henkel*, 2002 ECR I-08111; ECJ Case C-89/91, *Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*, ECR 1993 I-00139 (on consumer contracts); ECJ Case C-412/98, *Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)*, ECR 2000 p. I-05925 and ECJ Case C-77/04, *Groupement d'intérêt économique (GIE) Réunion européenne and Others v Zurich España and Société pyrénéenne de transit d'automobiles (Soptrans)*, ECR p. I-4509 para 17, 20, 24, disp. 1.

<sup>171</sup> They might have to use Article 5(3) instead, compare VKI v. Henkel.

<sup>172</sup> Compare VKI v. Henkel. At this point of the report, it still remains to be seen whether the claim of the unions would sound in contract (Article 5 sub 1) or tort (Article 5 sub 3). See below. In the Green Paper on consumer collective redress, interestingly enough, the private international law part only refers to Article 5.1 as a legal base for jurisdiction of the consumer organisations. Com(2008) 794 final p. 16 para 58.

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action in which unions may seek the enforcement of (rights under) a collective agreement. The first two are classified as 'individual actions' aimed at the enforcement of workers' individual rights, the third is deemed to be a 'collective action'. The distinction determines *alia* the subject matter jurisdiction of the *Conseils de Prud'hommes* and the *Tribunal d'Instance* or *Grande Instance* respectively. In contrast, German law does not seem to allow the enforcement of normative provisions of collective agreements by unions on behalf of individual workers at all. Enforcement is only open to the unions in case of a violation of the collective order as a whole.<sup>173</sup> This dependency on national law does not sit well with the proclaimed need for autonomous interpretation of the concepts used in the Regulation.<sup>174</sup>

A final point of relevance with regard to the scope of application of Section 5 is the restriction to obligations arising out of a contract. This point was raised in several cases dealing with the relationship between Article 5 sub 1 (on contracts) and Article 5 sub 3 (on non-contractual liability) as well as several cases on unilateral commitments in the context of consumer contracts. These cases will be discussed more extensively below. As regards the enforcement of TCA's under Section 5 of the Regulation the questions raised do not concern the existence of the labour contract as such.. Rather, it is important to determine whether commitments made by the employer on a unilateral basis or in a contract with other parties, are obligations arising out of the individual labour contract in those scenarios where individual workers want to keep their employer to his promise.

As far as collective agreements are concerned, national systems use different theories to explain the binding effect of normative provisions vis-à-vis the individual labour contracts of both organized and non-organized workers. Under the incorporation theory normative provisions of collective agreements are incorporated into the individual labour contracts coming within their scope of application. This concept is used in the Netherlands, with regard to organized workers.<sup>175</sup> In France however, the binding effect of the collective agreements is based on a statutory concept in which the collective agreement is considered to be an external binding rule limiting the freedom of the parties to the individual contract.<sup>176</sup> Several countries use the concept of incorporation through referral to allow reliance on

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<sup>173</sup> R. Krause, German report Part A, Question 1 f) aa)

<sup>174</sup> Compare for the different remedies for consumers the Green Paper On Consumer Collective Redress Com (2008) 794 final, para 24. The Green Paper distinguishes several types of action for redress: the individual action (by a single consumer or by several consumers who join their individual actions), the group action (being a special procedure to consolidate actions, with either an opt-in or an opt-out possibility), the action pursued by a collective interest organisation (representative action) and test case mechanism. Compare also the evaluation study on consumer collective redress, p. 25 para 3.1. [http://ec.europa.eu/consumers/redress\\_cons/finalreportevaluationstudypart1-final2008-11-26.pdf](http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf)

<sup>175</sup> Compare Dutch Statute on Collective agreements WCAO Articles 12 and 13.

<sup>176</sup> French report Question 1 h).

normative provisions of collective agreements by non-organized workers.<sup>177</sup> In all instances, however, the claim of the worker against the employer is intimately related to the contractual relationship between the two. It should not matter for private international law purposes, whether the claim is constructed as being contractual or statutory under national law, as long as the rights which the worker claims are granted to them by virtue of their status as a worker.<sup>178</sup>

Claims against third parties (e.g. the mother company of the employer) fit into this pattern less easily. We have to examine the concept of ‘contract’ more closely to determine the applicable provision. But even if some kind of contract can be construed between the mother company (signatory to the TCA) and the individual employee of a subsidiary company, this contract will most likely not be an individual labour contract. It will lack the above mentioned characteristics of a labour contract. The same is true when individual workers act in their capacity as workers’ representatives in the EWC. Their claim is either statutory (based on the Directive) or based on an agreement (TCA or the agreement with the special negotiating body). The basis of the claim is related to their position as workers, but can not be identified as arising from the individual contract of employment.

#### 4. Main findings as to Section 5

In the context of the enforcement of TCA’s it should be clear that collective labour agreements as such are not covered by Section 5 – the Section is limited to *individual* labour contracts. Enforcement of TCA’s would only come within the scope of application of Section 5 if the obligation for which enforcement is sought can be considered to be an obligation arising out of an individual labour contract. This would first and foremost be the case with provisions which grant rights to individual workers vis-à-vis their employer. However, Section 5 only applies when the enforcement is claimed by the workers themselves (and maybe by the unions as their representatives). General enforcement actions by trade unions will not come within the scope of application of Section 5. The distinction between individual enforcement and collective enforcement is not very clear and may vary from state to state. A further clarification on this issue may be useful.

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<sup>177</sup> Incorporation through referral. See for the position of ‘outside employees’: the national reports and in particular The Netherlands, Germany Question 1d). For all employees, see UK report Question 1e). Compare also Malmberg The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions in Wahlgren/ Malmberg *Scandinavian Studies in Law* (Sc.St.L.) 2002 para 5.3 p. 205.

<sup>178</sup> Compare the question whether statutory protection offered to workers leads to ‘obligations arising out of a individual labour contract’. The answer seems to be affirmative, as far as the rights conferred upon the workers accrue to him/her based on their status as worker. This construction does not imply that the normative provisions of the TCA would become part of the individual contract (incorporation model). Compare France report. Kuypers o.c. p. 468 would include all claim which are closely related to the labour relationship as falling within the scope of application of Section 5 (include lease constructions, and tort claims for industrial accidents)

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A special problem is created by systems which do not grant *ius standi* to the works council as such, but only to the individual members thereof. These members (as far as they represent the work force) will be employees of one of the companies within the group covered by the TCA. Claims of these delegates against their own employer may be covered by Section 5, especially when they claim individual benefits. Claims against the parent company under which the EWC resides, will not be covered by Section 5. However, no case law on this is available yet. Another point of uncertainty is the position of individual workers acting on behalf of the workforce, in their capacity as representatives. These claims will most likely not be covered by Section 5, but again, case law is lacking.

Section 5 has an exclusive character. Jurisdiction can not be based on the other provisions of the Regulation, unless Section 5 specifically refers to them. Problematic in this respect is the exclusion of Article 6 sub 1 which facilitates the joinder of interrelated claims against different defendants in a single procedure. The current revision process on the Brussels I Regulation offers an excellent opportunity to remedy this situation.

### ***D. Alternative Fora under Article 5: contract, tort and disputes related to branches and establishments***

#### **1. Introduction**

Article 5 offers alternative *fora* for different types of claims or disputes. These alternatives are offered when a defendant is domiciled in a Member State but a specific close link can be established between the claim or dispute and another Member State. The special jurisdictional grounds which are relevant for our purposes are the jurisdiction in matters relating to contract (sub 1) and tort (sub 3) and jurisdiction over disputes arising out of the operation of a branch, agency or other establishment (sub 5). In the previous chapter we have discussed the distinction between obligations in contract and obligations in tort. We will not repeat that discussion here, but focus on the rules applicable to contracts and torts. The scope of application of the special jurisdiction over branches, agencies and other establishments, however, will be discussed in the context of that provision.

#### **2. Jurisdiction under Article 5(1): contractual obligations**

Upon the replacement of the Brussels Convention by the Brussels I Regulation, Article 5(1) has undergone a transformation. Not only was the individual labour contract removed from its scope of application, the singular rule of the Convention was replaced by a composite rule which gives different connecting factors for different types of contract. For TCA's only the general rule seems relevant – the

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sub-rules pertaining to contracts for the sales of goods and contracts for the provision of services respectively.<sup>179</sup>

Article 5 sub 1 under a) gives jurisdiction to the court for the place of performance of the obligation in question. The obligation in question would be the obligation which was allegedly breached by the defendant and on the breach of which the claim is based. If for example, someone claims damages for non-performance of the contract, the obligation to perform is the obligation in question, not the obligation to make good the damages caused by the non-performance.<sup>180</sup>

The jurisdiction under Article 5(1) is restricted to the specific claim and any ancillary matters. The ECJ accepts the rule “*accessorium sequitur principale*”.<sup>181</sup> And as is explained above, obligations which replace the original contractual obligation (e.g. damages in case of non-performance) share the place of performance of the original obligation. However, if one contract contains several independent obligations – and TCA’s will most likely do so – the place of performance of each of these must be separately assessed. If jurisdiction can be established with regard to only one of these obligations, the court must decline jurisdiction with regard to the other claims. If the claimant wants to seek redress on all counts in a single court, they should address a court with a wider jurisdictional base e.g. the courts of the country of domicile of the defendant.<sup>182</sup>

To assess the place of performance, the courts will defer primarily to the contract itself.<sup>183</sup> If this determines a place of performance, the national court for that place has jurisdiction – if the place of performance is situated in another Member State than the State of domicile of the defendant. However, there should be a genuine link to the designated place of performance and the actual performance of the contract. If not, the designated place of performance is treated as an indirect choice of forum, which must be tested against the requirements of Article 23.<sup>184</sup> If the contract does not contain any indication as to the place of performance, this place has to be decided by first establishing the law applying to the contract and then determining

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<sup>179</sup> There is no case law on the criterion for distinguishing between the main rule of para 1 sub a) and the special rules of para 1 sub 2.

<sup>180</sup> Pocar Report to the revised Lugano Convention <http://www.bj.admin.ch/etc/medialib/data/wirtschaft/ipr.Par.0029.File.tmp/ber-pocar-e.pdf> para 44; Case 14/76, A. De Bloos, SPRL v. Société en commandite par actions Bouyer, 1976 ECR 1497.

<sup>181</sup> Case 14/76, A. De Bloos, SPRL v. Société en commandite par actions Bouyer, 1976 ECR 1497.

<sup>182</sup> Clarkson/Hill p. 74.

<sup>183</sup> A. Briggs, *The Conflict of Laws*, Oxford, Oxford University Press, 2008. For a contrary opinion see Pocar Report to the revised Lugano Convention para 45 referring to Case 56/79, Siegfried Zelger v Sebastiano Salintri, 1980 ECR 00089.

<sup>184</sup> Case T-106/95, Fédération française des sociétés d'assurances (FFSA), Union des sociétés étrangères d'assurances (USEA), Groupe des assurances mutuelles agricoles (Groupama), Fédération nationale des syndicats d'agents généraux d'assurances (FNSAGA), Fédération française des courtiers d'assurances et de réassurances (FCA) and Bureau international des producteurs d'assurances et de réassurances (BIPAR) v Commission of the European Communities, 1997 ECR II-00229.



the place of performance of the obligation under the applicable law. Accordingly, and contrary to most provisions in the Regulation, the place of performance of the contract under Article 5 (1) (a) does not receive an autonomous interpretation.<sup>185</sup>

If an obligation has to be performed in several locations, spread out over more than one Member State, the literature offers divergent views as to the application of the provision. One opinion would give jurisdiction to the courts for each place of performance, albeit over only the part of the claim which is related to that specific place of performance.<sup>186</sup> Others would deny jurisdiction to any of those courts, based on the assumption that Article 5(1) can not be applied when a singular place of performance cannot be identified.<sup>187</sup> The ECJ meanwhile has decided that “where there are several places of delivery within a single Member State”, “the court having jurisdiction to hear all the actions based on the contract for the sale of goods is that in the area of the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal place of delivery, the plaintiff may sue the defendant in the court for the place of delivery of his choice”.<sup>188</sup> This leaves open the situation in which a single obligation has to be performed in several Member States.

The application of Article 5(1) to obligations arising out of a TCA can be illustrated by some examples taken from existing TCA’s.

#### *a) Information and consultation rights*

Several TCA’s contain obligations to consult the interested works councils at national or European level before undertaking major reorganisations. One stipulation, cited in the questionnaire reads:

“where a reduction in the staff of a subsidiary or a business unit within the Group becomes inevitable, the Group undertakes to inform the Group’s European Works Council thereof....” Here an obligation lies with the Group. This obligation will probably have either the place of establishment of the Group or the place of establishment of the works council as place of performance under the applicable law.<sup>189</sup> Most likely, the two will coincide. The Air France TCA contains an

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<sup>185</sup> The contract of employment was the first contract to receive an autonomous interpretation of the place of performance. Under the Regulation, the same is valid for the sales of goods and the provision of services, leaving only a limited scope of application of the ‘default rule’.

<sup>186</sup> A. Briggs, *The Conflict of Laws* 2<sup>nd</sup> edition, Oxford, Oxford University Press, 2008, p. 79, referring to Case C420/97, *Leathertex Divisione Sintetici SpA v Bodeltex BVBA*, 1999 ECR I-06747.

<sup>187</sup> C.M.V. Clarkson & J. Hill, *The Conflict of Laws* 3<sup>d</sup> edition, Oxford University Press, 2006, p. 75 referring to Case C-256/00, *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG) and Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzschmar GmbH & KG (Plafog)*, 2002 ECR I-01699.

<sup>188</sup> Case C-386/05 *Color Drack*, 2007 ECR I-3699.

<sup>189</sup> Thought it would serve the protection of workers’ rights better if the obligation is to be performed at the place of establishment of the Works Council.

obligation for 'Air France' to supply information to staff members or their representation in sufficient time for treatment of the matter at hand". The exact place of performance of this obligation will depend on who holds the information that is needed (parent or subsidiary) and which staff representative (European, national and if the latter: in which country?) needs to be consulted in the circumstances. But again, the options would in most cases refer to either the place of establishment of the parent, or the place of establishment of the relevant business unit. Finally, if several representative bodies located in different member states have to be informed by the parent company, the question arises if this obligation constitutes a single obligation with more than one place of performance, or rather separate obligations towards the several representative bodies, each to be performed in its own separate place. We tend to assume the latter, as each of the commitments can be separately violated.

**b) Data protection**

TCA's may contain clauses pertaining to data protection. One such clause reads: "Registration, filing and use of employee data is treated with strict confidentiality and in accordance with local legislation." This clause would primarily have to be respected by the party that collects, stores and uses the data. As the clause itself already suggests, this puts an obligation on the management of each business unit with regard to 'local' data. Central management may have independent obligations but the extent of these will depend on the corporate structure. A duty to exert influence on local units to respect confidentiality seems however implicit in the TCA itself. This latter duty may be located both in the seat of central management (where the decision to influence is or is not taken) or in the seat of the local unit (where the influence is exerted).<sup>190</sup> Again, the choice will depend on the interpretation of the primary obligation and its place of performance under the applicable law.

**c) Subcontracting**

The Club Méditerranée TCA contains a clause on subcontracting stating inter alia that "The terms under which subcontractors are hired fully comply with social legislation and collective agreements concluded in the country in question." The main duty under this provision lies with the local companies, which have to ensure compliance with certain standards by the subcontractors hired by them. The place of performance would be the country in which the local companies are established (or rather the country for which the subcontractor is hired). The duty imposed on the

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<sup>190</sup> Compare A.A.H van Hoek, *Transnational Corporate Social Responsibility: Some Issues with Regard to the Liability of European Corporations for Labour Law Infringements in the Countries of Establishment of Their Suppliers*, in: A. Veldman, F. Pennings, & Y. Konijn (Eds.), *Social responsibility in labour relations: European and comparative perspectives* Austin / Boston / Chicago / New York / The Netherlands, Kluwer Law International. (Studies in employment and social policy, 38), pp. 147 ff

central management of the group (again) mainly consists of exerting influence through the corporate structures.

**d) *Working time/equal opportunities and other workers' rights***

One TCA specifies that 'Working hours are set according to the current laws and the industry norm. ... Overtime is voluntary and as a rule restricted to no more than 12 hours per week. Another contains the commitment that the company will 'refrain from any discrimination if national law does not expressly provide for the selection based on certain criteria'. Both type of provision will have to be performed by the actual employer in the actual workplace. Hence the possibility to comply rests with the local companies, the parent company (or central management as the case may be) can only exert influence. Hence, there are several places of performance for the several obligations on the local level. The obligation resting on central management could be located either at headquarters or locally at the non-performing company or branch.

**e) *Profit sharing***

Profit sharing is special in that is aimed at creating individual rights for individual employees. Assuming the TCA is specific enough to lead to directly enforceable obligations (which the Air France/KLM TCA is not), individual employee could claim these benefits against their employers under Section 5 (only). If the duty to pay rests with the central entity, it would depend (again) on the law applicable to the relationship whether payment should be made at the domicile of the debtor or at the domicile of the creditor.

**f) *Restructuring: closure of facilities, outsourcing, mergers etc.***

When it comes to obligations regarding restructuring, a careful examination is needed as to the specific obligation taken on by the employer. The obligation not to close a specific plant could be located in the place of establishment of that plant. However, if the obligation consists of the duty not to close any facilities without prior consultation of the relevant workers' representative bodies, the actual obligation relates to information and consultation rights, rather than the restructuring itself.

**3. *Main findings with regard to contractual obligations (Article 5 sub 1)***

Jurisdiction under Article 5 sub 1 is claim dependent. Hence it will depend on an exact reading of the TCA involved which obligation undertaken by which party underlies the claim. The law applicable the obligation in question will decide on its place of performance unless the parties to the TCA already stipulated this *locus* in the TCA itself. This creates uncertainty with respect to complex transactions as the

ones under study here. However, the practical relevance may be limited: in most cases the obligations concerned have to be performed either at the domicile of the parent company (or central management) or at the place of establishment of the daughter company, the subsidiary or the business unit. Often there is already another ground for jurisdiction in these locations.<sup>191</sup>

As already mentioned in passing, parties to a contract may include the place of performance in the TCA itself, this way avoiding the detour of having to establish it under the applicable law. However, if the designated place of performance has no relationship to the actual place of (possible) performance and is made for the purpose of establishing jurisdiction only, it is treated as a choice of forum clause and has to comply with the requirements of Article 23 (see below).

When the place of performance is not agreed upon by the parties, it will be determined by the applicable law. This need not be national law, but could also be the relevant EU legislation. It might be worth considering the inclusion of a provision on the place of performance of the duty to consult the workers in the various directives granting consultation and information rights. Alternatively, a place of performance could be included in Article 5 sub 1 of the Brussels I Regulation – as it has been done for sales of goods and provision of services.

#### **4. Jurisdiction in tort, delict and quasi-delict (Article 5 sub 3)**

Article 5(3) grants jurisdiction to the court for the place where the harmful event took place. In case the harmful act is performed in one Member State and the direct damage is sustained in another, the claimant may choose either jurisdiction.<sup>192</sup> So the defining criteria are act and damage. If damage is sustained in more than one country, the courts for each of these countries have jurisdiction but only over the damage sustained locally.<sup>193</sup> All damage can be claimed at either the locus actus or the courts for the domicile of the defendant.

In the relationship between workers and workers' representatives as plaintiffs and parts of the company structure as defendants, we considered it unlikely that Article 5(3) can play a major role in establishing jurisdiction. As demonstrated above, if a promise agreed upon in a TCA and made towards workers' representatives and/or workers' communities is legally binding and specific enough with regard to the beneficiaries thereof, a claim based on that promise would probably qualify as being

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<sup>191</sup> Leaving aside the complication that the legal entity may not have its seat at the place of establishment of the business unit. However, even this may not cause undue problems as the Brussels I regulation contains an autonomous notion of domicile of legal entities.

<sup>192</sup> Case 21/76, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, 1976 ECR 01735. C.M.V. Clarkson & J. Hill, *The Conflict of Laws* 3d edition, Oxford, Oxford University Press, 2006, p. 78; A. Briggs, *The Conflict of Laws* 2<sup>nd</sup> edition, Oxford, Oxford University Press, 2008, p. 79.

<sup>193</sup> Case C-68/93, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, 1995 ECR I-00415.

‘contractual’. The situation is different when ‘outsiders’ rely on the TCA as representative of company policy. If false statements are uttered (because the company does not live by its promise), this might be construed as unfair competition or misrepresentation/misleading advertising.

The *locus* of a tort is relatively easy to establish when the tort consists of an act causing physical damage to persons or goods. The localisation of a tort is more difficult in case of a failure to act (omission) and in case of more abstract and compound obligations. Suppose a daughter company violates the wording or spirit of a corporate social responsibility obligation taken on by a multinational enterprise, and collective interest groups want to hold the parent company responsible in court. It is not immediately apparent how the *locus delicti* should be identified in such cases: Which behaviour constitutes the tort and where should it be localised? How should the damage be identified and localised? If one looks at literature on transnational liability within multinational enterprises<sup>194</sup> it becomes obvious that localising the tort in those cases isn’t easy. VandeKerckhove discusses several theories on the localisation of torts committed by parent companies vis-à-vis the creditors of a daughter company. In those cases, the *Handlungsort* (or *locus actus*) is often located at the seat or headquarters of the parent company, where the decision is taken.<sup>195</sup> However, sometimes the seat or headquarters of the daughter company whose behaviour is affected thereby, is considered as such.<sup>196</sup> The *Erfolgort* (or *locus damni*) may again be situated at the seat of the daughter company - the ‘*Erfolg*’ or damage being the influence on the decision-making process within the daughter company, but also at the place where the act impacts on the interest of third parties - in her case mainly creditors. Transposed to cases involving TCA’s, the liability of the parent corporation for behaviour of its daughter companies can be construed to be based on corporate behaviour of the parent (1), affecting the decision making process of the primary perpetrator – the daughter (2) – which in its turn

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<sup>194</sup> E.g. K VandeKerckhove, *Piercing the Corporate Veil: A Transnational Approach*, Alphen aan de Rijn, Kluwer Law International, 2007 and R.C. van Dongen, *Identificatie in het Rechtspersonenrecht: Rechtsvergelijkende Beschouwingen over “Piercing the Corporate Veil” in het Interne en Internationaal privaatrecht van Nederland, Duitsland, Zwitserland, New York en Texas*, Deventer, Kluwer, 1995.

<sup>195</sup> Or formulated differently: where the parent company failed to observe its duty of care, resulting in the tort of negligence.

<sup>196</sup> Depending on the specific duty violated other places may also qualify as *locus actus* e.g. the place in which false appearances of creditworthiness were created. See K VandeKerckhove, *Piercing the Corporate Veil: A Transnational Approach*, Alphen aan de Rijn, Kluwer Law International, 2007, p. 658.

leads to the infringement of rights of third parties (3). Depending on the facts of the case, this may lead to three different *loci delicti*.<sup>197</sup>

As stated before, jurisdiction under the Brussels I Regulation should not depend on the way national law would construe liability in a specific instance – its rules are based on autonomous concepts. The complex issues of liability within corporate structures may in time result in specific concepts of torts with regard to company behaviour. Currently however, there is not enough case law of the ECJ to ascertain the exact application of the provision to the conflicts at hand.<sup>198</sup> However, it seems safe to assume that the damage caused by misrepresentation and unfair competition would be located on the market which is influenced by the tortious behaviour.<sup>199</sup> This would hold true for all actors who can be held liable for misrepresentation, which may be in some cases both the parent (communicating the social responsibility standard and hence causing the (mis)representation) and the daughter (turning the representation into a misrepresentation by violating the code of conduct or TCA). If the *locus actus* with regard to the parent company is construed to be located at the place where the decision (not to influence or interfere) of the parent is taken, this connecting factor will often coincide with the place of domicile of the company.<sup>200</sup> In that case, Article 5(3) does not create an alternative, as the provision can only be applied when the ground for special jurisdiction refers to another member state than Article 2. When either the actions of the parent company or the damage caused by it can be located at the place of establishment of the daughter who violates the TCA, this would create an extra ground for jurisdiction in case the

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<sup>197</sup> See A.A.H. Van Hoek, 'Transnational corporate social responsibility: Some Issues with regard to the liability of European corporations for labour law infringements in the countries of establishment of their suppliers', in: A. Veldman, F. Pennings, & Y. Konijn (Eds.), *Social responsibility in labour relations: European and comparative perspectives*, Alphen aan de Rijn, Kluwer Law International, 2008 (pp. 147-170). The classification of parent/daughter liability differs between jurisdictions and between type of liability. Piercing the corporate veil is most often construed as a part of company law, but other classifications do occur as well. The parent company may be held liable for its daughter company through agency constructions or identification, but may also attract an independent tortious liability for lack of supervision. Moreover, special rules on liability and identification may be present in bankruptcy law, labour law and environmental law. See extensively on this issue K VandeKerkhove, *Piercing the Corporate Veil: A Transnational Approach*, Alphen aan de Rijn, Kluwer Law International, 2007 and R.C. van Dongen, *Identificatie in het Rechtspersonenrecht: Rechtsvergelijkende Beschouwingen over "Piercing the Corporate Veil"* in het Interne en Internationaal privaatrecht van Nederland, Duitsland, Zwitserland, New York en Texas, Deventer, Kluwer, 1995.

<sup>198</sup> A.A.H. Van Hoek, 'Private international law aspects of collective action - comparative report', in: F. Dorssemont, T. Jaspers, & A.A.H. van Hoek (Eds.), *Cross-Border Collective Action in Europe: A Legal Challenge*, Antwerpen/Oxford, Intersentia, 2007, p. (425-468) 425 and Van Hoek/Dorssemont, 'Collective action in labour conflicts under the Rome II Regulation' in E. Ales (ed), forthcoming on the localisation of the tort of instigation a collective action. In the SEKO/DFDS case the ECJ seems to define the tort committed by the union in restricted terms: the tort allegedly committed by the plaintiff consisted of illegally instigating and supporting a boycott action. This support may, but need not be, localised in the same place as the actual boycott itself.

<sup>199</sup> Compare Article 6 of the Rome II Regulation and A. Dickinson, *The Rome II Regulation* Oxford, Oxford University Press 2008 p. 412 ff

<sup>200</sup> Though the two criteria are not necessarily identical. Compare above on domicile under the Regulation.

parent company and the daughter company are established in different member states.<sup>201</sup>

Accordingly, for consumers and competitors relying on the statements made, the market on which the company operates seems to be the most relevant criterion to assess the *locus* of the harmful event (damage). If this market encompasses more than one Member State, each state will have jurisdiction over the damage done within the territory. At least, this seems to be the combined result of the Shevill case (on defamation) and the Henkel case (on unfair contract terms). According to the ECJ “The concept of ‘harmful event’ within the meaning of Article 5(3) of the Brussels Convention is broad in scope so that, with regard to consumer protection, it covers not only situations where an individual has personally sustained damage but also, in particular, the undermining of legal stability by the use of unfair terms which it is the task of associations such as the VKI to prevent.”<sup>202</sup> In this case a German provider was operating on the Austrian market and the Austrian consumer organisation applied for an injunction on the use of unfair contract terms before an Austrian court. The *locus delicti* could be considered to be Austria, since this was where legal stability was undermined by the violation of consumer rights.<sup>203</sup>

## **5. Disputes arising out of the operations of a branch, subsidiary or other establishment (Article 5 sub 5)**

Under the main rule of Article 2 a legal entity – like a natural person – may be sued in the courts of the member state where the entity has established its ‘domicile’. According to Article 60 of the same Regulation ‘a company or other legal person or association of natural or legal persons is domiciled at the place where it has either its statutory seat, its central administration, or its principal place of business. Thus the Regulation creates jurisdiction in the place of primary establishment of a legal entity. But under the freedom of establishment, companies may very well have secondary establishments in other member states as well. Article 5(5) deals with this type of situation: a person domiciled in a Member State may, in another Member State, be sued: “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”. The relevance of this provision for TCA’s would be: can interested parties sue the parent company at the place of establishment of its daughter companies or subsidiaries and vice versa.

There are several cases in which the ECJ had to interpret the predecessor of this provision in the Brussels Convention. From that case law it can be deduced that Article 5(5) requires a three step test:

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<sup>201</sup> And no jurisdiction can be established through Article 5(5). See below.

<sup>202</sup> Para 42. The interpretation of the ECJ is based in part on the rationale of Dir 93/13 Article 7. This European basis is - for the most part - lacking in labour law.

<sup>203</sup> Compare Pocar, Report to the revised Lugano Convention, para 60 and Dickinson, p. 412 ff.

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- 1) Is there an establishment (branch, agency or other) in another Member State?
- 2) Which can be considered to be a branch, agency or other establishment of the company which is actually sued?<sup>204</sup>
- 3) And finally, does the dispute ‘arise out of the operations’ of this branch, agency or other establishment?

The first criterion refers to a continuous and stable presence within a Member State, the availability of an infrastructure and the possibility to enter into binding commitments. The test applied is largely similar to the one used to determine ‘establishment’ (rather than services) in the context of the internal market provisions.<sup>205</sup> In the context of this study we mainly deal with multinational corporations. There will be several ‘places of business’ in several Member States, each of which has its own business premises and its own work force, maybe even its own works council and collective agreement. So the criterion of establishment will be easily met.

The problem with application of Article 5(5) lies with the second criterion. This is tested along two slightly different lines. In the case of *De Bloos v. Boyer* the ECJ stressed the relevance of a hierarchical relationship between the parent entity and its subsidiaries. In the cases of *Blanckaert and Somafer* more weight was given to the fact that a ‘subsidiary’ manifested itself as such towards third parties. If these could assume, based on the appearances created by the company, that any business with the parent could be negotiated through the subsidiary, Article 5(5) would apply. The ECJ took the latter to its maximum when it allowed a creditor to sue a daughter company in the place of establishment of the parent company – the latter being treated for the specific conflict as a ‘branch’ of the daughter company.<sup>206</sup> This judgement seems to be atypical and was heavily criticized from disrespecting the separate legal entities of the parties involved. Its line of reasoning has not been relied upon since.<sup>207</sup> It seems safe to assume that as a rule Article 5(5) is meant to cover situations in which a single legal entity has several places of establishment located in different Member States. Only in exceptional circumstances can it be

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<sup>204</sup> Case 33/78, *Somafer SA v Saar-Ferngas AG*, 1978 ECR 02183.

<sup>205</sup> Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, 1995 ECR I-4165.

<sup>206</sup> Case 218/86, *SAR Schotte GmbH v Parfums Rothschild SARL*, 1987 ECR 4905.

<sup>207</sup> Though admittedly it has not been reversed either.



applied when the several ‘establishments’ of a multinational enterprise have separate legal entities.<sup>208</sup>

The dispute concerned should relate to the operation of the branch which is referred to in order to establish jurisdiction over the company. Accordingly, if one would want to sue a company established in France in the court for the place of establishment of a German subsidiary, the case at hand should specifically concern the German subsidiary. That being said, Article 5(5) covers claim in both contract and tort. It is well established that the employment relationships of workers employed at the German subsidiary concern the ‘operation of the branch’.<sup>209</sup> Hence if the German subsidiary would break a commitment made in a TCA vis-à-vis its own workers, any claim against the company based on this breach would be covered by Article 5(5). Likewise, if the breach of commitments by the German subsidiary would constitute an unfair commercial practice by the said subsidiary, again, the claim against the legal entity as such (being the parent undertaking) could be pursued in Germany.

## 6. Main findings as to the special jurisdictions under Article 5

From the above, it becomes evident (again) that jurisdiction rules are case specific. General jurisdiction will depend on who is the claimant and who is the defendant. Special jurisdiction will depend on the cause of action. In contractual matters, the specific claim against the defendant will determine which obligation is at issue. The place of performance of this specific obligation will in turn determine jurisdiction under Article 5(1).<sup>210</sup> The concept of contract seems wide enough to encompass the majority of enforcement claims made by workers and/or their representatives against the companies that are signatory to or otherwise bound by the TCA. Article 5(3) seems mainly relevant for claims of third parties (consumers, competitors). As most of the claims under this heading will be related to misrepresentation and/or unfair competition, Article 5(3) seems to refer to the court or courts for the market or markets on which these ‘torts’ take place. But the application of Article 5 to liability within the corporate structure is wrought with complications, as the exact formulation of the tort committed may determine the *locus* thereof. Finally, Article 5(5) can be used if a dependent subsidiary breaks its commitment under the TCA. In that case the claim entered against the legal entity can be entered at the place of establishment of the branch office, even if the entity itself is domiciled elsewhere.<sup>211</sup> It is very doubtful whether the provision can be used to sue daughter companies who

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<sup>208</sup> We would not advocate an interpretation under which the parent company who enters into a TCA on behalf of the entire conglomerate, acts as a representative of its daughters in such a way as to establish jurisdiction against the daughters in the place of establishment of the parent company – at least as far as the interpretation and implementation of the TCA is concerned.

<sup>209</sup> So inter alia the reference made to Article 5(5) in Article 18.

<sup>210</sup> Pocar, Report to the revised Lugano Convention para. 44; C.M.V. Clarkson & J. Hill, *The Conflict of Laws* 3d edition, Oxford, Oxford University Press, 2006, p. 73

<sup>211</sup> To be precise, the domicile of the legal entity and the place of establishment of the branch office have to be in different Member States.

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have separate legal entities, in the place of establishment of the parent company and vice versa. This restriction strongly reduces the use that can be made of the provision for the enforcement of TCA's.

In all cases, Article 5 can only be used against defendants domiciled in a Member State in order to sue them in another Member State. If the jurisdiction based on the special provision would refer to the state of domicile of defendant, the special jurisdiction rule doesn't apply. If the rules in Article 5 refer to a non-Member State, the provisions can't be applied either and jurisdiction has to be based on Article 2 (and in multiple party cases Article 6). Jurisdiction under the special provisions of Article 5 is claim specific. It does not provide a basis for jurisdiction against other defendants and/or on other grounds. If parties want to consolidate proceedings, they should do so in a court with a more general base of jurisdiction (either the courts for the domicile or the court chosen by all relevant parties). See also below on Article 6.

The main problems caused by Article 5 directly concern the interpretation of the provisions as applied to TCA commitments, not the rules as such. If the parties to the TCA want to avoid the existing uncertainty as to the application of Article 5(1) they could include specific provisions on the place of performance of the specific obligations in the TCA itself. Likewise the European legislator may consider introducing provisions on the place of performance of certain obligations as well.

### *E. Multiparty dispute ( Article 6 sub 1)*

Article 6 contains several alternative grounds for jurisdiction – and in this respect resembles Article 5. Most of the provisions of Article 6 relate to multiparty disputes (or rather, disputes with more than one claimant and/or defendant). The most relevant one for our purposes is Article 6(1) which relates to multiple defendants. The second and third subsections refer to third party proceedings and counter-claims respectively. There is no separate provision for multi-claimant proceedings (e.g. group actions).

Article 6(1) states that a defendant may be sued, where there are a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The requirement of the close connection was introduced in the text upon converting the Convention into a Regulation and derives directly from earlier case law on Article 6 of the Convention.<sup>212</sup>

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<sup>212</sup> Case C-98/06, *Freeport plc v Olle Arnoldsson*, 2007 ECR I-08319, para 37; Case 539/03, ECJ 13 July 2006 ECR I-6535 (*Roche Nederland e.a.*) para 21; see also Case 189/87, *Kalfelis*, 1988 ECR 05565, para 13; Case C-51/97, *Réunion européenne SA and Others v Spliethoff's Bevrachtungskantoor BV and the Master of the vessel Alblasgracht V002*, 1998 ECR I-6511, para 48.

In the context studied here the provision could be relevant when unions and/or works councils want the summons both the contracting party / parent company and the daughter who is in default in order to demand proper performance of the TCA. Two relatively recent cases are especially relevant for the interpretation of this provision: Freeport C-98/06 and Roche Nederland BV C-539/03. In these cases the ECJ declined to give a general interpretation of the concept of ‘irreconcilable judgments’ in the context of Article 6(1).<sup>213</sup> It simply stated the limits of application of Article 6(1) to the cases at hand. The Freeport case concerned a situation in which a contract was concluded between Mr Arnoldsson and a company within a multinational group (Freeport plc). This contract contained specific commitments (payment of a sum of money) towards Mr. Arnoldsson which were to be honoured by another, yet unnamed company within the same group. This second company was later identified as Freeport AB.<sup>214</sup> As Mr Arnoldsson was not paid by either company, he sued both the original contract party and the beneficiary of the contract in the domicile of the latter. Freeport plc objected to the jurisdiction of the court of AB’s domicile. One argument put forward by Freeport plc concerned the difference in legal base between the two claims: as Freeport AB denied being bound under contract, the claim against Freeport AB might sound in tort.<sup>215</sup> According to the ECJ this difference in legal base does not by and of itself block the application of Article 6.<sup>216</sup> Hence, an action in tort could be closely related to an action in contract as long as the (other) requirements for application of the provision are met. These requirements were elaborated upon in the Roche case.

The Roche case also concerned corporate behaviour. In this case several companies belonging to a multinational enterprise are accused of concerted infringement of a European patent held by the claimant. The actual infringements are attributable to several companies established in different EU Member States, and take place on the local markets. The case is brought before the Dutch *Hoge Raad* (Supreme Court) which refers several questions to the ECJ – all pertaining to the scope of application

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<sup>213</sup> To be specific: to ECJ refused to choose between the interpretation of the similar condition for application of Article 28 on related actions or the concept of ‘irreconcilable judgments’ in Article 34 on recognition of judgments (or yet another interpretation): see Roche Nederland para 22.

<sup>214</sup> The contract concerned the development of commercial real estate. The company which was to become owner of the real estate, Freeport AB, was yet to be established.

<sup>215</sup> The ECJ did not answer the question whether the claim would be covered by Article 5(1) or rather Article 5(3) as this was not relevant to the present case. Para 32

<sup>216</sup> In this judgment the ECJ basically overrides part of its earlier judgment in Reunion/Spliethoff – although it claims to be ‘distinguishing’ the two cases. Compare Hess/Pfeiffer/Schlosser, p. 104.

of Article 6.<sup>217</sup> The ECJ observed that, even if the concept ‘irreconcilable’ judgments in Article 6(1) must be understood in the broad sense of ‘contradictory decisions’, there is no risk of such decisions being given in the case at hand. In order for decisions to be regarded as contradictory it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of law and fact.<sup>218</sup> In this case the infringements that the companies were accused of might differ slightly from case to case. Moreover: Each infringement would be a separate act by a separate legal entity taking place in different Member State. Hence, there is no ‘unity of facts’. At the same time, the ECJ found no ‘unity of law’. Even though the European patent has a EU-base, the exact scope and content is dependent on the country in which protection is sought. If act A, committed in A under the legal system of A is found to be in breach of the European patent as protected under law A by a court in A, any finding that a similar act by B committed in B under the legal system of B does not infringe the patent is not in itself irreconcilable with the earlier finding in A.

The judgment in the Roche case has attracted extensive criticism.<sup>219</sup> Some authors state that the Roche case should be interpreted restrictively and be read in the light of European patent law and the complications caused by the exclusive competence granted under Article 22 for procedures in which the validity of the patent is contested. This may limit its general interpretative value. However, from the wording of the judgment it would seem that the requirement with regard to the unity of law and fact has indeed a more general validity.<sup>220</sup>

In the context of the enforcement of TCA’s this would mean that unions and workers’ representatives are not free to summons all companies which are covered

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<sup>217</sup> (1) ‘Is there a connection, as required for the application of Article 6(1) of the Brussels Convention, between a patent infringement action brought by a holder of a European patent against a defendant having its registered office in the State of the court in which the proceedings are brought, on the one hand, and against various defendants having their registered offices in Contracting States other than that of the State of the court in which the proceedings are brought, on the other hand, who, according to the patent holder, are infringing that patent in one or more other Contracting States?’

(2) If the answer to Question 1 is not or not unreservedly in the affirmative, in what circumstances is such a connection deemed to exist, and is it relevant in this context whether, for example,

- the defendants form part of one and the same group of companies?
- the defendants are acting together on the basis of a common policy, and if so is the place from which that policy originates relevant?
- the alleged infringing acts of the various defendants are the same or virtually the same?’

<sup>218</sup> Roche Nederland Para 26.

<sup>219</sup> See inter alia B. Hess, T. Pfeiffer & P. Schlosser, report on the Application of Regulation Brussel I in the Member States, Heidelberg, Institut für Ausländisches und Internationales Privat- und Wirtschaftsrecht, 2007, para 827-828.

<sup>220</sup> Compare on the application of Article 6(1) to cross border collective action – Case C-438/05, International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti, 2007 ECR I-10779 and A.A.H. Van Hoek, ‘Private international law aspects of collective action - comparative report’, in: F. Dorssemont, T. Jaspers, & A.A.H. van Hoek (Eds.), *Cross-Border Collective Action in Europe: A Legal Challenge*, 2007 Antwerpen/Oxford, Intersentia, (425-468), p. 442.

by the TCA in the domicile of any one of them. There has to be a close connection between the claims made against those companies. Based on the Freeport case, it is not necessary to prove at the stage of establishing jurisdiction under Article 6, that all companies covered by the TCA are bound under contract. So discussions as to the power of attorney of the parent company need not arise.<sup>221</sup> But the necessity to show a close connection reduces the choice of competent courts considerably. In case of breach of an obligation in a TCA, one might want to sue both the company who is actually in breach of its obligations and the parent company/signatory party who failed to implement the TCA properly and/or instruct and supervise its ‘offspring’. Such a combination of actions seems to have a single breach of obligations as its common factual base. Irreconcilable judgements could ensue if more than one court would have to judge the same fact pattern for conformity with the TCA. Hence we would advocate the use (and defend the availability of) Article 6(1) to this case.

The situation is different when several daughter companies are sued in the domicile of one of them for individual breaches of the TCA. That case would lack a common factual base and hence would not be covered by Article 6(1).

As is already discussed above, Article 6(1) can not be applied to establish jurisdiction when a claim is covered by Section 5 on individual labour contracts. The jurisdiction in those cases has to be established according to the provisions included in or specifically referred to in that Section. This does not, however, preclude that other related claims which themselves fall outside the scope of application of Section 5 are joined to the claim based on the individual labour contract. If the claim of the individual employee is instituted in the place of domicile of the individual employer (in conformity with Section 5), other claims may be entered against other defendants, as long as these are closely connected to the first claim in the meaning of Article 6(1). In practice, this would mean that the individual workers may sue both their employer and the parent company for breach of related commitments under a TCA in the domicile of their employer. The other way around is not allowed under the current text.

## **F. Choice of forum (Article 23)**

### **1. Introduction**

Both the Brussels I Regulation and the Brussels and Lugano Conventions allow the parties to a conflict and/or legal relationship to choose the court which is to settle their legal dispute. This choice not only *creates* jurisdiction for the court designated by the parties, but it also (if parties so wish) *ousts* the jurisdiction of the otherwise competent court or courts. This principled choice in favour of party autonomy with regard to jurisdiction is elaborated in Articles 23 and 24 of the Regulation. Article

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<sup>221</sup> As they would if jurisdiction were to be based on Article 5(1) – see above.

23 deals with choice of forum, Article 24 with tacit submission. Tacit submission refers to the situation in which a defendant enters an appearance in a lawsuit without (first) objecting to the jurisdiction of the court. In that case, the court may assume jurisdiction even when it would not have jurisdiction otherwise. Choice of forum refers to explicit submission by way of agreement. Article 23 deals both with the basic acceptability of such agreement and with the formal requirements thereof. With this, the Regulation covers important aspects of choice of forum, albeit not all.

From the point of view of TCA's, Article 23 is more relevant than Article 24: is it possible to agree on the competent court for disputes arising out of a TCA in advance? How could such choice of forum be effected and who would be bound by it? We will discuss all these elements in turn.

## 2. Scope of application of Article 23

Article 23 only applies when the parties to a particular legal relationship, one of whom is domiciled in a Member State, agree to confer jurisdiction to a court of a Member State. So there has to be a double link to the EU. Forum choices which do not fulfil these requirements may be valid under national law and/or international agreements.<sup>222</sup> They are however not, or only to a very limited extent, covered by the Regulation.<sup>223</sup>

A choice of forum by the parties may not contravene the provisions of Article 22 and Articles 13, 17 and 21 respectively. The first proviso means that a choice of forum is not allowed when a EU court has exclusive jurisdiction under Article 22. This restriction could become relevant if the provision on corporate matters in Article 22 would be extended to include lawsuits between management and workers' representatives. Currently, it does not seem they have any practical relevance for TCA's.

The second proviso refers to the special protective measures with regard to consumer contracts, contracts of insurance and individual employment contracts. The weaker contractual party is protected against unfavourable forum choices by restricting the validity of a forum choice to

- choices made after the dispute has arisen or
- choices which allow the weaker party to bring proceedings in courts other than those indicated by the objective rules of the regulation.

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<sup>222</sup> E.g. The Hague choice of forum convention.

<sup>223</sup> Article 23 contains a provision with regard to the effects on other EU courts of a choice of forum in favour of an EU-court by non-domiciled parties.

This means that a choice of forum in a labour contract can only have limited effects with regard to the individual worker: he may hold the employer to the agreement, but not the other way around.

Article 23 pertains to a choice of forum: an agreement between parties to a specific legal relationship to grant jurisdiction to a EU-court. It does not apply to 'indirect' choices of forum. With this term we refer to provisions in contracts that designate the place of performance of the obligation or obligations arising out of the contract. Such stipulations on the place of performance may create jurisdiction under Article 5 sub 1. However, they are not choices of forum in the meaning of Article 23. Hence, they do not have to fulfil the formal requirements which Article 23 sets for choices of forum proper. In this way, the special requirements of Article 23 could be circumvented by rephrasing a choice of forum into a stipulation regarding the place of performance. The ECJ has prevented this by subjecting provisions that designate fictitious places of performance for the purpose of establishing jurisdiction to the requirements of Article 23 anyway.<sup>224</sup>

### 3. Choice of forum: specificity and consent

A choice of forum must pertain to 'disputes which have arisen or which may arise in connection with a particular legal relationship'. The requirement is understood to (inter alia) safeguard the consensual character of a choice of forum: a choice of forum provision is only valid if the parties could predict to a reasonable extent which disputes would be covered by it. A general clause to refer any and all present and future disputes between the parties to a specific court, would not be valid under Article 23.<sup>225</sup> Likewise the ECJ is rather strict on the matter of consent. The main aim of (the formal requirements of) Article 23 is 'to ensure that the consensus between the parties is in fact established'.<sup>226</sup> Authors seem to agree on the fact that the matter of (primary) consent is by and large covered by the Regulation and hence has an autonomous meaning.<sup>227</sup> This does not hold true for issues of 'secondary' consent – with which we refer to the question to what extent third parties can be

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<sup>224</sup> C-106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL*, 1997 ECR, I-00911, para 31-35; Case C-440/97, *GIE Groupe Concorde and Others v The Master of the vessel "Suhadiwarno Panjan" and Others*, 1999 ECR, I-6307, para 28; U. Magnus & P. Mankowski, *European Commentaries on Private international law: the Brussels I Regulation*, München, Sellier Europa Law Publishers 2007, Article 23 Rdnr 41, p. 387 and Article 5 Rdnr 147, p. 163.

<sup>225</sup> Case C-214/89, *Powell Duffryn plc v Wolfgang Petereit*, 1992 ECR I-1745, para 31.

<sup>226</sup> Case 24/76, *Estasis Salotti di Colzani Aimo e Gianmario Colzani s.n.c. tegen Rüwa Polstereimaschinen GmbH*, 1976 ECR 01831 and Case 25/76, *Galeries Segoura SPRL v Rahim Bonakdarian*, 1976 ECR 01851, para 6. U. Magnus & P. Mankowski, *European Commentaries on Private international law: the Brussels I Regulation*, München, Sellier Europa Law Publishers 2007, Article 23 Rdnr 75 p. 399.

<sup>227</sup> B. Hess, T. Pfeiffer & P. Schlosser, report on the Application of Regulation Brussel I in the Member States, Heidelberg, Institut für Ausländisches und Internationales Privat- und Wirtschaftsrecht, 2007, para 376 and 377, p. 159 states that the remaining issues are sometimes submitted to the *lex causae*, sometimes to the *lex fori*. The Hague Convention opts for the law of the chosen forum. A major issue here is the admissibility of choices of forum in standard terms.

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bound (or can rely on) a choice of forum agreed upon by others.<sup>228</sup> In several cases the ECJ subjected this question to the law applying to the law applying to the underlying relationship.<sup>229</sup>

The question has mainly been discussed in the context of bills of lading. These instruments are used in maritime transport. They contain the transportation contract but also function as a identification of the person who is entitled to demand delivery of the goods. The party who claims the goods may not be a direct party to the bill of lading.<sup>230</sup> Also on the side of the transport operator the signatory party may not be the party held responsible in case of damage or loss.<sup>231</sup> Hence, bills of lading operate in an extremely complex multiparty situation. These parties may be linked in different ways to the bill of lading, e.g. through representation, assignment and/or third party stipulation.

Bills of lading often contain a choice of forum clause. The interesting question (also in the context of this study) will be who can benefit from and/or be held bound by the choice of law in the instrument which is central to the multiparty relationship. The ECJ seems to refer this question to the 'relevant national law'. In the Tilly Russ case the ECJ decided:<sup>232</sup>

“As regards the relationship between the carrier and a third party holding the bill of lading, the conditions laid down by article 17 of the Convention are satisfied if

- the jurisdiction clause has been adjudged valid as between the carrier [the party performing the actual transport – AH/FH] and the shipper [the party who handed over the goods for shipment and signed the transportation contract AH/FH] and if,
- *by virtue of the relevant national law*, the third party, upon acquiring the bill of lading, succeeded to the shipper 's rights and obligations.”

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<sup>228</sup> Compare on this issue P.H.L.M. Kuypers, *Forumkeuze in het Nederlandse internationaal privaatrecht*, Deventer, Kluwer 2008, p. 193 e.v.

<sup>229</sup> Magnus/Mankowski, *Brussels I, Article 23 Rdnr 82 p. 402*. B. Hess, T. Pfeiffer & P. Schlosser, *Report on the Application of Regulation Brussel I in the Member States*, Heidelberg, Institut für Ausländisches und Internationales Privat- und Wirtschaftsrecht, 2007.

<sup>230</sup> A forwarding agent may be the party, whereas the owner of the goods holds the bill of lading. Or the bill of lading may be held by the purchaser, but be signed by either a forwarding agent or the seller.

<sup>231</sup> Compare the facts in the Tilly Russ case 71/83.

<sup>232</sup> Case 71/83, *Partenreederei ms. Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout*, 1984 ECR, 2417.



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If the third party is not bound indirectly, his consent must be established under the rules of the Regulation – which *inter alia* insists on certain formal requirements.<sup>233</sup>

Hence, just like in the context of Article 5, the questions relating to agency and other aspects of third party accession to a contract are not dealt with autonomously, but referred to the ‘relevant national law’. Which law would be relevant in this respect, is beyond the scope of the jurisdiction convention/regulation.<sup>234</sup> Moreover, it is as yet unclear whether the third party should succeed to all rights and obligations under the contract for the choice of forum to be transferred too.<sup>235</sup>

In the report on the application of the Regulation Brussels I in the Member States by Hess, Pfeiffer and Schlosser the current situation is heavily criticized and a suggestion is made to the effect that a (regular) third party holder of a bill of lading claiming rights thereunder can rely on, but is also bound by a jurisdiction clause validly agreed upon by the original parties.<sup>236</sup>

The case law on third party beneficiaries in a contract seems to deviate somewhat from the above. This case law concerns insurance contracts, in which the insurer is thought to be the stronger party and the policy holder, insured person and beneficiary (which could be three different parties) are deemed to need protection. The policy holder would be the signatory to the contract. The other two are not privy to it. According to the ECJ third party beneficiaries may rely on a choice of forum validly agreed upon between the insurer and the policy holder.<sup>237</sup> In this respect, no reference is made to national law.<sup>238</sup> However, it would seem that normally only national law can decide whether or not a particular party is actually a third party beneficiary under the contract and which are the consequences of that status: can third party beneficiaries only derive rights from the contract or are they bound by it as well when they claim rights under it?<sup>239</sup>

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<sup>233</sup> Case C-387/98, *Coreck Maritime GmbH v Handelsveem BV and Others*, 2000 ECR, I-9327, para 17.

<sup>234</sup> Case C-387/98, *Coreck Maritime GmbH v Handelsveem BV and Others*, 2000 ECR, I-9327, para 28.

<sup>235</sup> B. Hess, T. Pfeiffer & P. Schlosser, *Report on the Application of Regulation Brussel I in the Member States*, Heidelberg, Institut für Ausländisches und Internationales Privat- und Wirtschaftsrecht, 2007 para 290, p. 130.

<sup>236</sup> See para 279, p. 128 ff; for the proposal para 292/293, p. 132.

<sup>237</sup> Compare for bills of lading in which a third party is already named as beneficiary: B. Hess, T. Pfeiffer & P. Schlosser, *Report on the Application of Regulation Brussel I in the Member States*, Heidelberg, Institut für Ausländisches und Internationales Privat- und Wirtschaftsrecht, 2007, p. 128 para 279 noot 406 in which it is stated that a third party who is named in the bill of lading as a beneficiary would “of course” be bound by its provisions. *Idem* para 293 p. 132.

<sup>238</sup> Compare P.H.L.M. Kuypers, *Forumkeuze in het Nederlandse internationaal privaatrecht*, Deventer, Kluwer 2008, p. 196, when the formal requirements of the Regulation are met, national law can not impose extra requirements.

<sup>239</sup> The position of national parties as regards the TCA seems to be a lot less ‘obvious’ than the position of the insured person and the beneficiary in insurance – which third parties are specifically mentioned in the relevant provisions of the Regulation.

In the case of insurance, the latter question is moot as the system of the Regulation does not allow a choice of forum clause in an insurance contract to bind the weaker parties. Hence, neither policy holder, nor beneficiary can be held bound by it.<sup>240</sup> A similar reasoning would apply with regards to employees covered by the TCA – they may be able to rely on a choice of forum in a TCA (if they are assumed to be third party beneficiaries under the TCA), but can not be bound by it. With regard to national unions however, it would seem that they can be bound by the choice of forum when they claim rights as third party beneficiaries. It remains to be seen, how the ECJ would interpret the formal requirements of the Regulation in that specific case.<sup>241</sup>

#### 4. Choice of forum: formal requirements

The regulation is exhaustive with regard to formal requirements: when a choice of forum fulfils the conditions of the regulation, it cannot be invalidated for reasons of form under national law. In its current state, the regulation contains several forms in which a choice of forum can be concluded. The choice of forum should be

- a) in writing or evidenced in writing;
- b) in a form which accords with practices which the parties have established between themselves or
- c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade and commerce.

Of these three, the third one is obviously irrelevant for TCA's as TCA's can not be deemed to be agreed upon 'in international trade and commerce'. Though it is possible for social partners to develop a practice amongst themselves, the option under b) should not be relied upon either: this option only 'works' when business partners have regular dealings with one another leading to contractual relationships. Moreover, the practice must be such to allow consensus on the choice of forum to be derived from it with sufficient certainty.<sup>242</sup>

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<sup>240</sup> With some exceptions, which are not relevant here. See Reg. Article 13. On the position of the beneficiary, see inter alia Case C-112/03, *Société financière et industrielle du Peloux v Axa Belgium and Others*, 2005 ECR I-3707.

<sup>241</sup> Kuypers assumes that in case of 'accession' to the agreement, the accessor accepts the choice of forum contained therein and no additional formal requirements need be fulfilled. o.c., p. 215.

<sup>242</sup> U. Magnus & P. Mankowski, *European Commentaries on Private international law: the Brussels I Regulation*, München, Sellier Europa Law Publishers 2007, Article 23 Marginals 109 ff. p. 413 ff.

The formal requirements of Article 23 are aimed to provide sufficient certainty that the choice of forum is based on true consensus – especially if it is not agreed upon in the course of trade or commerce. In line with this emphasis on consent by the parties, the ECJ is only willing to accept a choice of forum clause in standard contract terms under specific conditions:

- the contract itself should refer to the standard term with sufficient clarity and precision and
- the general conditions have to be communicated to the other party together with the offer in which the reference is made so that
- the general conditions can be checked by a party exercising reasonable care.<sup>243</sup>

## 5. Choice of forum in collective agreements

In a recent case before the Bundesarbeitsgericht (BAG) the question was raised whether an employer had become bound by a choice of forum in a collective agreement which was applicable to him by extension.<sup>244</sup> The BAG referred to the Regulation for this and decided, in our opinion rightfully so, that the choice of forum was not concluded in conformity with Article 23 of the Regulation and hence could not bind the employer. What seems to be lacking here is consent on the side of the employer. The question whether a choice of forum in a collective agreement could bind the employee (through extension or otherwise) will not arise, as such choice of forum clauses can not be opposed to the employee by virtue of Article 21. Whether a clause in a collective agreement between a parent company and a European federation of unions would bind the daughter companies and/or the national unions, will depend on whether their position can be subsumed under agency of third party stipulations.

Currently the binding effect of jurisdiction clauses against non-signatories is unclear as this question is largely remitted to the ‘applicable national law’. Accordingly, there is no uniform answer in all European cases, but the answer may differ depending on the *lex causae*. As will be demonstrated in the next chapter, there might also be a lack of uniformity as to the conflicts rule which will decide on the applicable law as not all situations leading to third party involvement are covered by the Rome I Regulation. Hence it might be wise to develop a uniform rule on third party effect of jurisdiction clauses in TCA’s. This could be construed in a similar

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<sup>243</sup> U. Magnus & P. Mankowski, *European Commentaries on Private international law: the Brussels I Regulation*, München, Sellier Europa Law Publishers 2007, Article 23 para 97, p. 408 with references to; Case 24/76, *Estasis Salotti di Colzani Aimò e Gianmario Colzani s.n.c. v Rüwa Polstereimaschinen GmbH*, 1976 ECR I-01831, 1842.

<sup>244</sup> BAG 2 July 2008, 10 AZR 355/07 available through the website of the BAG: <http://www.bundesarbeitsgericht.de/>.

fashion to the one proposed for bills of lading: if a party claims direct (contractual) benefits from a TCA, it will be bound by a jurisdiction clause in that TCA.

Of course, this binding effect does not pertain to claims by individual workers due to the protection offered by section 5 of the regulation. Also, the parties to the TCA may choose to alter the effect of a choice of forum e.g. by stipulating that the choice of forum is not exclusive, or optional for the benefit of one party (or 'side'), or only pertains to specific claims.

To be effective, any choice of forum should be in writing, or at least confirmed in writing. It seems unwise to rely on standing practice between the parties.

### G. *Interim relief (Article 31)*

Based on Article 31 'Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of the State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.' This provision, which was taken virtually verbatim from the Convention, gives additional jurisdiction for a specific type of remedy. The provision applies when the conflict has arisen, but has not been decided on the merits yet.<sup>245</sup> Which measures (injunctions or otherwise) are available, depends on the law of the court seized. However, not all measures taking in summary proceedings (e.g. the Dutch *Kort Geding* or the French *référé*) under national law are deemed 'provisional' under the Regulation. According to the ECJ Article 31 only covers measures which are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is or can be sought elsewhere.<sup>246</sup> Especially when payment of a sum of money is ordered by way of provisional measure, precautions must be taken in order to assure the temporary character of the measure.<sup>247</sup>

The country reports mention several types of interim measures which may be ordered in the context of the social dialogue and/or information and consultation rights.

Several countries acknowledge the right of the works council to demand a court order that stops management from implementing a decision taken in violation of

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<sup>245</sup> U. Magnus & P. Mankowski, *European Commentaries on Private international law: the Brussels I Regulation*, München, Sellier Europa Law Publishers, 2007, Article 31 para 5/6, p. 525.

<sup>246</sup> Case C-261/90, Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG (Reichert II), 1992 ECR I-2149; Case-391/95, Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another, 1998 ECR I-7091; Case C-104/03, St. Paul Dairy Industries NV v Unibel Exser BVBA, 2005 ECR I-3481.

<sup>247</sup> Van Uden C-391/95 and Mietz C-22/96, ECJ 27 April 1999, ECR I-2277. In general on the temporary character: Case C-125/79, Bernard Denilauler v SNC Couchet Frères, 1980 case 125/79, 1980 ECR 1980 I-01553.

their participation rights. In other cases courts may order consultation under threat of a penalty. In our opinion these measures come under the heading of Article 31: they are meant to preserve a situation (stop implementation or prevent a decision) in order to safeguard a right (the right of information and consultation which might be irrevocably damaged if management was allowed to go ahead despite the violation).

Any court may order the measures which are available in its national law. However, in order to qualify for recognition under the Regulation the court that orders the measure must either have jurisdiction on the merits or demonstrate a real connecting link between the subject-matter of the measure sought and the territorial jurisdiction of the forum. This latter requirement is deemed to be fulfilled if the measure has to be (or can be) enforced within the territory. The Article also applies in individual labour cases.<sup>248</sup>

## *H. Conclusions and recommendations as to jurisdiction*

### **1. Summary of the findings**

#### *Introduction*

In the EU the rules of jurisdiction in patrimonial matters such as contracts and torts have been unified by the Brussels I Regulation. The Regulation applies to civil and commercial matters, with some specific exceptions. As disputes relating to the enforcement of a TCA must be deemed to be civil and commercial in nature, and as this topic is not excluded in Article 1, the Regulation applies. It should be kept in mind, however, that the Regulation does exclude arbitration from its scope of application. This means that the validity of arbitration agreements, their effect on jurisdiction of the courts and the recognition of any ensuing arbitral awards are not covered by the Regulation.

The Regulation distributes jurisdiction among the courts in the Member States for defendants who are domiciled in a Member State. The Regulation does not contain rules which attribute jurisdiction to EU-courts over defendants who are domiciled outside the EU, except in the case of choice of forum and exclusive jurisdiction under Article 22. Those defendants will be covered by national law (and in the case of defendants domiciled in one of the EFTA countries: by the Lugano Convention).

#### *Exclusive jurisdiction over the validity of company decisions - Article 22 sub 2*

Under the Brussels I Regulation, jurisdiction is based on the principle of the *forum rei*, meaning that in general the courts for the place of domicile of the defendant has

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<sup>248</sup> U. Magnus & P. Mankowski, *European Commentaries on Private international law: the Brussels I Regulation*, München, Sellier Europa Law Publishers 2007, Article 31 para 16 p. 528 with regard to consumers in: Case C-99/96, Hans Hermann Mietz v Intership Yachting Sneek B.V., 1999 ECR 1999 I-2277.

general jurisdiction over the defendant (article 2). This rule is only deviated from in cases in which there is a strong policy interest in granting exclusive jurisdiction to another court (article 22). For the purpose of this study only the exclusive jurisdiction in the seat of a corporation over issues regarding the existence and validity of the legal entity itself and decision taken by it, seems to have some relevance. Closer scrutiny reveals however, that this exclusive jurisdiction is interpreted strictly and mainly pertains to the relationship between ‘organs’ of the legal entity. It does not relate to disputes between works council and management over information and consultation rights. In our opinion, there is no reason to change this: the jurisdiction rule provided under Article 22 is unfit for disputes between works councils and management as it refers to the seat of the legal entity, rather than the place of establishment of the business entity for which the works council is established. Moreover, an exclusive jurisdiction in these matters might frustrate the effective settlement of multiparty disputes.

### *Jurisdiction over individual contracts of employment - Section 5*

The Regulation contains a special section on individual contracts of employment which replaces the general rules of jurisdiction. Under that special regime, the employer may only sue in the place of domicile of the employee. The employee however, has a choice to sue either in the place of domicile of the employer or in the habitual place of work (simplified rendition). The normal alternatives of the regulation are not available to these parties, with the exception of Article 5 sub 5 (jurisdiction at the place of establishment of a branch, agency or other establishment, see above). There is no absolute clarity as to the outer limits of the concept of ‘individual contracts of employment’, but from case law on other weak party contracts it can be deduced that the special provisions only apply to disputes in which the employee itself is a party. Section 5 will cover any claim by an individual employee against his employer, in which the employee invokes the TCA. It will (most likely) not cover direct claims by the employee against a signatory, not being his direct employer. Hence, the relevance of Section 5 for the enforcement of TCA’s is limited.

### *Forum rei – Article 2*

Claims which are covered by neither Article 22 nor Section 5, will be covered by the general system of the Regulation. This system awards general jurisdiction to the courts of the country of domicile of the defendant (*forum rei*). The *forum rei* rule lays much weight on the role of the contestants in the legal procedure: who is suing who. In the most likely event – as far as enforcement of TCA’s is concerned – that parties from the company structure (rather than parties from the side of the workers’ representatives) are the defendants, the rule would refer to the place of establishment (as defined in the Brussels I Regulation) of the company being sued. Hence, if the parent company is sued, the courts for the country of domicile of the parent has general jurisdiction. If a subsidiary with independent legal identity is being sued, the courts for the country of domicile of the subsidiary have general jurisdiction. Companies that are domiciled outside the EU are not covered by the rules on

jurisdiction of the Regulation. Parties are referred to national law on this issue. As a rule the national rules of attribution are slightly more extensive than the European rules, which mainly distribute jurisdiction among the EU Member States.

### *Alternative grounds for jurisdiction in Article 5*

Besides the *forum rei* rule of general jurisdiction, the Regulation contains several heads of specific jurisdiction – grounds of jurisdiction which can be used as an alternative for specific claims or procedural situations. These alternatives create a (limited) possibility of forum shopping for the claimant, who can choose which head of jurisdiction to use in a specific case. All alternative grounds of jurisdiction have to be interpreted restrictively, as they contain exceptions from the main rule of Article 2 (*forum rei*).

The main provision containing alternative grounds of jurisdiction is Article 5. This article contains special rules of jurisdiction for (inter alia) contractual obligations, for tort, delict and quasi-delict and for disputes arising out of the operations of a branch, agency or other establishment.

For the establishment of jurisdiction under Article 5 sub 1 or sub 3, a distinction must be made according to the legal base of the claim. Both 'contract' and 'tort' are autonomous concepts. 'Contract' covers all obligations taken on voluntarily by one party towards another (identifiable) party. This concept is wide enough to cover unilateral commitments. Accordingly any claim by a signatory to a TCA against other signatories based on the binding character of the commitments there under will sound in contract. Claims by 'outsiders' (competitors, consumers) will most probably sound in tort. Less clear is the position of local subsidiaries or local unions and works councils. Their claim can be contractual if they are indirect parties to the contract through third party stipulation or representation.

As far as representation is concerned, the ECJ accepts a contractual base between principal and third party, even in the case of an undisclosed principal, as long as

- 1) the relationship between the agent and the principal provides a sufficient basis for representation and
- 2) the third party was aware of the fact that the contract was made on behalf of another party.

There is an autonomous element in this definition as not all national laws would create a contractual relationship between third party and undisclosed principal. However, the court would have to refer to the 'relevant applicable law' to see whether or not there is a sufficient contractual base for representation.

Likewise, claims between beneficiaries and signatories with regard to third party stipulations are contractual in nature. It is up to the applicable national law however, to decide on the effect of third party stipulations.

Accordingly there is some uncertainty as to the application of Article 5 to the national entities which are covered by the TCA without being signatories to it. The

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'obvious' classification seems to be a contractual one, but it is up to the national law applicable to the third party stipulation and/or the relationship of representation, to decide to what extent third parties can derive benefits from and/or become bound by the TCA. This referral to national law is even more prominent with regard to forum clauses – see below.

The court having jurisdiction under Article 5 sub 1 is the court for the place of performance of the obligation under dispute. Hence, Article 5 does not create general jurisdiction over the defendant, and not even general jurisdiction over all disputes arising out of the TCA. Every independent original obligation in the TCA may have a different place of performance, leading to a different competent judge. Jurisdiction over one obligation does not create jurisdiction over other obligations but must be established independently over each one of them. Like all alternative grounds of jurisdiction, the provision is only applicable if the place of performance is located in a member state other than the country of domicile.

The place of performance of a contractual obligation may be stipulated in the contract itself. If not, this place will be identified by the law applicable to the contract (except in case of the sale of goods and the performance of services). Most obligations taken on in a TCA have to be performed in the place of establishment of either the parent company and/or the daughter company. In those cases, Article 5 sub 1 may not add much to the jurisdiction already established through Article 2, Article 5 sub 5 and Article 6.

Claims by outsiders would most likely be based on unfair competition and/or misleading of the public. Under Article 5 sub 3 the claimant may choose to sue either in the place where the wrongful act is committed (*locus actus*) or the place where the direct harm is sustained (*locus damni*). In the case of misleading publicity the *locus actus* is likely to coincide with the place of establishment of the company using the TCA for publicity purposes - in which case it does not apply. The *locus damni* would be the market on which the public is misled and/or the unfair competition takes place. Depending on the circumstances of the case this may create an extra competence. If several markets are targeted by the TCA (which will most likely be the case), there is jurisdiction in each of these markets, but for local harm only.

In the relationship between parent and subsidiary, also Article 5 sub 5 is relevant. This provision confers jurisdiction on the court of the place of establishment of a 'branch, agency or other place of establishment' of a company over disputes 'arising out of the operations' of that branch, agency or other place of establishment. This provision only applies if the branch is located in another member state than the parent entity itself. It is mainly useful in case of dependent branches, its application to the relationship between legal entities within a group of enterprises being contested. The restriction to disputes arising out of the operations of the branch etc. limits the jurisdiction to matters which specifically concern the local branch or subsidiary. This includes disputes regarding the employees of the local branch and disputes regarding the relationship between the local works council and local management.



### *Multiple defendants – Article 6 sub 1*

A relevant possibility in the case of TCA's would be the possibility to join suits against several defendants in the domicile of one of them (article 6 sub 1). A requirement for using this provision is that the claims against the several defendants are so closely related that it is expedient to hear them together to avoid the risk of irreconcilable judgments. We infer from the case law of the ECJ that there has to be a sufficient equivalence in the legal and factual basis of the disputes, for a reliance on Article 6 sub 1 to be honoured. This limits to possibility to join claims against several subsidiaries in the domicile of one of them. But the provision will allow parent and daughter to be sued simultaneously in a single court over non-performance of their duties with regards to the daughter entity. Likewise, the provision could be used to join the claims against the European or international trade union with claims against a national union, provided they pertain to the same subject matter.

### *Choice of forum – Article 23*

The regulation allows parties to the TCA to choose the forum which will have jurisdiction to judge disputes arising between them over the interpretation and enforcement of the TCA. The requirements for a valid choice of forum are largely contained in the Regulation itself. Most of these provisions are aimed to ensure true consent of the direct parties to the choice of forum. However, the Regulation does not provide rules with regard to the effect of a choice of forum on third parties. These may claim rights under the contract be it through transfer of rights, through representation or through third party stipulation. Though the case law on this is sparse and not entirely clear it would seem that third party beneficiaries may rely on a choice of forum and can be bound by it (unless the latter conflicts with the protective rules for weaker contract parties). Cases of transfer of rights and representation, however, are referred to the 'relevant applicable law'. Accordingly national law will decide whether the consent of the original contract party/signatory can be imputed to the party claiming benefits under the contract. The question which national law would be relevant, goes beyond the scope of application of the Brussels I Regulation and has, till now, not been dealt with by the ECJ.

### *Provisional and interim measures – Article 31*

Finally, the Regulation contains a special provision on provisional, including protective, measures. This provision may be relevant inter alia to stop companies from implementing a company decision which violates the information and consultation rights of the works council under the TCA. But it can be used for other interim measures as well, as long as these are intended to preserve a factual or legal situation in order to safeguard rights which can be enforced elsewhere. If the court which grants the interim measures does not have jurisdiction on the merits, its interim measures can only be recognized elsewhere if there is a sufficiently close relationship between the measures sought and the territorial jurisdiction of the court.

In practice this often will mean that the measure will have to be executed or enforced within the territory.

## **2. Evaluation of the current system and recommendations**

Article 2 of the Regulation provides the parties on the side of the employees with a clearly defined forum. Hence the Article fulfils the requirement of legal certainty and predictability. However, it might not offer efficient protection to individual workers and workers representatives established in other member states. Especially because the *ius standi* of works councils and unions may differ considerably from state to state, it seems advisable to open up the possibility to sue ‘at home’ in order to ensure effective access to justice. Article 2 alone does not fulfil that need.

Article 22 grants exclusive jurisdiction over certain matters to the court most closely connected to the issue. Currently TCA are not caught by any of the provisions contained therein. Though some experts advocate exclusive jurisdiction on matters involving works councils, we would not support this in the case of TCA’s because it makes it impossible to consolidate proceedings against several employers within the group.

Article 5(1) and 5(5) may be useful in creating alternative jurisdiction in the home state of the workers involved. Article 5(5) however, mainly pertains to the groups of undertakings that operate under a single legal entity. If the group consists of different companies, it is doubtful that Article 5(5) can be used. In that case, only Article 5(1) remains as an option for introducing claims against the parent company in a court for the place of establishment of the daughter or vice versa. This provision grants jurisdiction to the court for the place of performance of the obligation on which the claim is based. Complex obligations such as the ones undertaken in TCA may be difficult to locate. First the exact content of the obligation will have to be determined. Once this obligation is identified, the place of performance thereof need to be established. If the parties have not designated the place of performance themselves, it has to be determined in accordance with the law applying to the obligation in question. These two steps may lead to divergence in outcome between courts and (at the very least) complicate the application of the provision. Hence it seems advisable to specify the place of performance of the main obligations arising from a TCA – either in an EU instrument<sup>249</sup> or in the TCA itself. The places which seem to qualify are the establishment of the parent company and/or the EU representative of a non-EU company under the EWC Directive on the one hand and the place of establishment of the affected secondary establishments in other member states, with regards to obligations pertaining to them. Only the latter would provide the workers with an extra ground for jurisdiction against the parent company.

If both parent and daughter company have breached their obligations under a TCA, both parties can be sued in the domicile of one of them under the condition that the

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<sup>249</sup> Both the directives on information and participation and the Brussels I Regulation may qualify in this respect.

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claims against the two are closely related. Unfortunately, this extra possibility is currently lacking in claims based on individual employment contracts. The current revision of the Brussels I Regulation offers an excellent opportunity to remedy this.

Another important provision for enforcement of TCA commitments is the possibility to ask for interim measures. Also courts that have no jurisdiction to decide on the merits, may order interim measures. However, there has to be a sufficient link between the measure asked and the court seized. Normally, the court will assume jurisdiction when the measure has to be executed within the territory. If works councils or unions want to stop the implementation of a management decision at plant level, the courts for the place of establishment of that plant would most likely assume jurisdiction. The remedies to be provided will have to be based on the local law (*lex fori*).

Finally, the parties to the TCA may include a choice of forum agreement in the TCA (or enter into such agreement at a later date). It seems advisable to make such choice of forum a supplementary one. In that case the parties may seize the court chosen, but may also approach a court having jurisdiction by virtue of the other provisions of the Regulation. A choice of forum does not affect the competence to order interim measures.

### **PART 3. ENFORCEMENT ISSUES**

The issue of enforcement is discussed in light of the responses to the questionnaire that has been used in this study. Different aspects are involved, such as the problem of “*ius standi*”, alternative dispute resolution (ADR) and industrial action, in particular the right to strike.

When enforcement issues are concerned, reference should be made to autonomous procedures of enforcement. TCA’s can provide for enforcement mechanisms or procedures that can or have to be used by the parties when a question of interpretation or application or more generally a dispute, would arise in light of the TCA commitments that are made. Furthermore, reference can also be made to existing transnational practices. TCA signatories may wish to refer to established practices of dispute settlement in the context of transnational industrial relations or in the context of the multinational enterprise itself or the EWC in which the TCA has been negotiated and concluded. In short, a variety of autonomous transnational procedures may be available, which may be more effective compared to both court settlement and settlement under national alternative dispute resolution mechanisms.

Another relevant reference concerns the difference between disputes over rights versus disputes over interests. The traditional view is that interest disputes (bargaining or economic disputes) must be opposed to legal disputes. Interest disputes can arise out of the failure of the social partners to agree in collective bargaining on the establishment of new, or the modification of, norms. Normally, only rights disputes would be able to arise before courts.<sup>250</sup>

#### **I. Court settlement and *ius standi***

##### **A. The relevance of *ius standi***

With regard to court settlement, the issue of “*ius standi*”, or legal standing, is relevant. The problem of “*ius standi*” concerns the question whether a relevant actor has the capacity or is recognised to claim a certain right before the courts. This discussion is particularly relevant for TCA commitments, seen the wide variety of signatories and stakeholders that are involved.

Many European oriented TCAs are concluded in the context of the activities of European works councils. It is, therefore, relevant to examine the legal standing of European works councils and their members.

With regard to the legal standing of European works councils, it is important to take the composition of these bodies into account. EWCs are in many cases of a bi-partite composition (composed of both management and worker representatives). But also

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<sup>250</sup> Cf. A. Gladstone, ‘Settlement of disputes over rights’, in R. Blanpain (ed.), *Comparative labour law and industrial relations in industrialised market economies*, 2007, Wolters Kluwer, 690-691.

single party EWCs exist (worker representatives only). This has an influence on the question whether or not a (European) works council is to be seen as representing the interest of the employees only. This may have an impact on the possibility for European works councils to take legal action and represent worker interest.

According to existing findings on EWCs “the choice of composition is clearly linked to the industrial relations system of the country in which the company has its HQ.”<sup>251</sup> Legal standing is strongly dependent on the national legislation of the Member States and the particularities of the national industrial relations system. It would appear, therefore, proper to provide some insight into the *ius standi* problem of national works councils.

### **B. Insights into national works council *ius standi***

With regard to the legal standing of national works councils, it is relevant to distinguish different kind of systems.

1°) Systems with single party works councils that give *ius standi*: At the national level, only two of the studied countries have single party (national) works councils. In **Germany**, national works councils are exclusively made up of employees.<sup>252</sup> Also in the **Netherlands**, works councils are composed solely of workers representatives.<sup>253</sup> In these systems, works councils have legal standing before the courts, although they do not have full legal personality. The same regime is applied to European works councils.

2°) Systems with a mixed composition of works councils with legal personality and *ius standi*: In **France**, national works councils are bodies that are composed of workers representatives and presided by management. These bodies have legal personality. In that capacity, they have access to the courts. The same regime is applied to European works councils.

3°) Systems with a mixed composition works councils without legal personality or *ius standi*: In **Belgium** and **Italy**, works councils do not possess legal personality. But the workers representatives have access to the courts. In **Belgium**, the national union of which the workers representatives are a member, may also take legal action regarding works council related legal issues. The latter option is the main practice.

4°) Systems with no works councils: In **Sweden**, workplace representation for employees in Sweden is organised through the local union at the workplace. There is

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<sup>251</sup> A preparatory study for an impact assessment of the European Works Councils Directive VT/2007/98, Main Report, Submitted by the European Policy Evaluation Consortium EPEC (led by GHK Consulting with support from Technopolis France), p. 17.

<sup>252</sup> M. Schmidt and M. Weiss, International Encyclopaedia of Labour Law, Germany, ELL Suppl. 340 (July 2008), 223.

<sup>253</sup> A.T.J.M. Jacobs, International Encyclopaedia of Labour Law, Netherlands, ELL Suppl. 276 (2004), 178, paragraph 248.

no other channel. Nevertheless, European Works Councils are legal persons in Sweden and have standing in court. In the **United Kingdom**, there are not statutory works councils. However, a EWC has capacity to take a case to court where management is not complying with an agreement setting up the EWC but the legislation does not address the question of whether they have capacity to form contracts with the employer on other matters. It is possible that if the EWC was created under the law of another Member State which did give it legal personality, this would be recognized by the English courts. Furthermore, anyone with legal personality can in principle have access to the courts if he or she has a legal claim.

It remains relevant, in these national contexts, to point out the importance of the composition (joint or single party) of works councils with regard to *ius standi*. Either the works council as a body itself has *ius standi*, or the works council representatives – jointly or individual – have *ius standi*, or trade unions.

### C. *The EWC Directive and ius standi*

With regard to the issue of *ius standi* in the context of European works councils, reference should be made to Article 10, Paragraph 1, of the 2009 Recast Directive, which provides:

“Without prejudice to the competence of other bodies or organisations in this respect, the members of the European Works Council shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.”

This provision leaves some room for interpretation. It can be argued that the provision is limited to establishing the competence of the members representing the employees on the European Works Council to represent (all) the employees of the undertaking or group of undertakings.<sup>254</sup>

However, in the Commission’s second stage consultation document with regard to the Recast directive, the view was expressed that “it might therefore be useful to explicitly recognise the European works council as the representative of the undertaking’s or group’s employees.”<sup>255</sup> This seems to suggest that the purpose of the provision was to provide for a representative competence for the EWC as such. The second stage consultation document makes this statement against the background that “European works councils are called upon with increasing frequency to represent European employees’ interests in dealings with authorities or

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<sup>254</sup> This finds support in the Proposal for a European Parliament and Council Directive on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) COM(2008) 419 final, p. 8.

<sup>255</sup> Consultation of the European social partners on the revision of Council Directive 94/45/EC of 22 September 1994, Brussels, 20 February 2008, C/2008/660, p. 7.

other parties outside the undertaking, also in disputes relating to competition law.”<sup>256</sup> For example, in the case of *Schneider*, the “Comité Européen du Groupe Legrand” was accepted as a supporting party before the Court of First Instance in a competition law procedure.<sup>257</sup> Nevertheless, it is relevant to note that the provision of the Recast Directive only refers to the “members” of the EWC, in other words the worker representatives. It does not refer to the legal capacity to the EWC as a body. This solution seems logical as in many cases, EWCs are bipartite, meaning composed of both management and labour.

The provision leaves some additional questions. Unclear is how the words “to represent collectively the interests of the employees” must be interpreted. Does this merely refer to the fact that EWC worker representatives represent the collectivity of the workers? Or does it imply that EWC workers representatives can only act collectively and not individually on behalf of the workers? This may be relevant in a situation in which there is disagreement among EWC worker representatives about what is the better interest of the workers. It can be assumed that this is something to be addressed by the internal rules of the relevant EWC with regard to the workers representatives.

Regardless of the exact interpretation of Article 10 of the EWC Recast Directive, the question remains what the relevance of this provision is for the enforcement of TCA’s. The provision does not seem to lead to an obligation for Member States to provide for *ius standi* of EWC members for the purpose of enforcement of TCA provisions even when these have been concluded in the framework of EWC activities. Disputes over TCA’s might be outside the scope of Article 10 as it only refers to the competence of the EWC and/or its members to apply “the rights arising from this Directive”. However, the provision might induce the Member States which have not done so yet, to provide for a certain measure of *ius standi* also outside the exact scope of application of the Directive. In addition, a broad interpretation of the phrase ‘the rights arising from this directive’ would allow to bring TCAs back into the scope of the provision, in so far as they are integrated in or annexed to EWC agreements.

#### **D. Unions and *ius standi***

It is important to address the legal standing of trade unions, as the question arises whether unions are given *ius standi* before the courts, if they would wish to enforce TCA commitments in this manner.

A distinction can be made according to whether or not a legal system provides for the legal personality of unions. In systems in which trade unions have legal personality, the legal standing is mainly based on this legal capacity. In **France**,

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<sup>256</sup> Consultation of the European social partners on the revision of Council Directive 94/45/EC of 22 September 1994, Brussels, 20 February 2008, C/2008/660, p. 7.

<sup>257</sup> Case T-77/02, 22 October 2002.

**Hungary**, the **Netherlands** and **Sweden**, national trade unions possess legal personality and have legal standing before the courts.

In systems in which trade unions lack legal personality, the issue of legal standing is usually addressed in and court access is granted by alternative provisions. In **Belgium**, **Germany** and **Italy** trade unions are traditionally associations without legal personality, but they receive a statutory based capacity to act before the courts. In the **United Kingdom**, where a trade union is not a corporate body, it does have capacity to make contracts and to sue and be sued in its own name.

One of the main problems seems to lie in the fact that national systems are not adapted to accept *ius standi* for international trade unions or for foreign trade unions. This seems to depend on whether these organizations have legal personality under the law applying to them and, on that basis, are allowed to act before the national courts of a given member state.

#### *E. Some conclusions on ius standi*

When looking at the examined Member States, it appears that one of the main problems concerns the wide variety of solutions. For example, in some Member States, trade unions have legal personality, in others they have not. The same goes for national works councils and European works councils. Furthermore, it is not clear to what extent a stakeholder with *ius standi* in one Member State, also receives *ius standi* in another Member State.

With regard to European and international employee's or employers' associations, a first question to be answered is whether these associations are actually incorporated under a national law. Once this is established, a similar problem of recognition of the legal entity and its legal standing in other member states arises.

With regard to management, the situation seems to be that companies mostly have legal personality, although this is not a general rule (e.g. for subsidiaries or establishments of a company). Furthermore, legal personality attaches to the company itself and not to management bodies. It means that not all relevant stakeholders can easily and independently be taken before a court (or have *ius standi*).

It seems that there are four ways to address the problems described above, or at least to mitigate their effect.

One solution could lie in creating a European rule on the standing of workers' representative bodies. The EWC Directive already provides a rule on *ius standi* (cf. Article 10 of the EWC Recast Directive), but it remains unclear whether this provision also pertains to TCA's that have been concluded in the margin of EWC activities. The issue might be taken into account when implementing the Recast Directive.



When harmonisation at the European level is impossible, another option would be the creation of a system of mutual recognition. The system that exists with regard to *ius standi* of consumer organisations could be a source of inspiration for this.<sup>258</sup> Again, the question of finding a legal base and method requires further study. To begin with, the Commission could make information on the respective enforcement rights of national unions and works council more readily available.

The problems of *ius standi* and mutual recognition can, to a large extent, be avoided by providing jurisdiction in the home base of the workers' representatives concerned. If a national works council could choose to file suit in the courts of its home country, the question of mutual recognition would probably not arise.

It is perhaps more realistic to give as much as possible relevant national stakeholders, such as national unions or national works council representatives, the possibility or right to introduce legal proceedings (and thus standing) before the national courts where they are situated or organised. This would require an initiative at the level of the respective national jurisdictions (i.e. the Member States). A European contribution would probably be helpful, for example in the sphere of coordination. A European legal basis for this could be found in Article 140 EC Treaty, under which the European Commission can encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this chapter, particularly in matters relating to the right of association and collective bargaining between employers and workers.

## II. Alternative dispute resolution

Previous studies have already concluded that plurality is the dominant trend in the optional or compulsory nature of non-judicial formulas for the settlement of disputes as defined in each national legal system.<sup>259</sup> The responses to the questionnaire in the present study, confirm this.

In **Belgium**, a distinction must be made with regard to arbitration. The employer may settle disputes by arbitration. But it should be noted that arbitration is almost never used as a dispute-resolution mechanism in Belgium. In the area of collective labour law, the particular legal problem of the Belgian law is that employees' and employers' organisations as well as works councils, for that matter, do not have access to arbitration since they do not have legal personality.

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<sup>258</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests OJ L 166/51.

<sup>259</sup> F. Valdés Dal-Ré, Synthesis report on conciliation, mediation and arbitration in the European Union countries, March 2002, §17. This report was drafted on the basis of the national reports prepared by the members of the group of experts given the task of preparing a study, sponsored by the European Commission Directorate General of Employment and Social Affairs, on "comparative analysis and proposal of a possible voluntary European system of conciliation, mediation and arbitration".

### PART 3. ENFORCEMENT ISSUES

The Belgian system provides for conciliation services. These services are organised by the government, under the authority of the Ministry of labour. Independent conciliators can be called upon in case of a conflict over interests. In principle, disputes over TCAs would not be excluded from this.

In **France**, no specific alternative dispute settlement mechanism can be really used to enforce TCAs. Conciliation exists in the first stage of the procedure before employment tribunals. Judicial mediation is possible before all courts. In other words, these solutions would imply a court intervention in the first place.

Arbitration would be available to solve dispute between signatories of a TCA. It would require that the parties agree on having their dispute arbitrated. Enforcement would require exequatur by a court. But there is no specific arbitration for labour law disputes: rather, arbitration is prohibited to solve disputes between a employer and his employee before the contract is terminated.

In **Germany**, arbitration could be referred to by the parties, as far as disputes relating to collective agreements are concerned. If a TCA could be qualified as a collective agreement this system would thus be applicable. This, however, is not possible if a TCA would be qualified as a works council level agreement. Mediation is theoretically possible but has only little significance in German labour law.

In **Hungary**, the Labour Code provides three options for the settlement of “collective labour disputes”: 1) negotiation between the parties, 2) negotiation with the participation of a mediator (mediation), 3) and the use of arbitration. With the notion of “collective labour disputes”, the law means disputes arising between either the employer and the works’ council, or the employer (employer’s organisation) and the trade union in connection with disputes do not qualify as legal disputes. Although there are various specific conditions laid down in the law, the different systems and the wording of the Labour Code seem to be sufficiently broad and flexible to include the disputes related to TCAs.

In **Italy**, a compulsory out-of-court conciliation is a precondition for admissibility of an application to the court, but the Italian law on procedure expressly provides that this process applies only to individual disputes. Furthermore, local or central government authorities may, in practice, conciliate and/or mediate in labour disputes even when the law does not provide for them to do so, acting either on their own initiative or at the request of the parties. This is now recognised government practice for safeguarding major public or collective interests at local or national level. As far as arbitration is concerned, this is designed only for individual disputes and does not play a role in collective disputes.

In **The Netherlands**, collective agreements can set out specific bodies of conciliation and mediation (for specific branches of industry or for certain enterprises) before which violations of the collective agreement may be brought. The Dutch Code on Civil Procedure provides for regulations on arbitration, but it is not a very current practice in the Netherlands to use it in labour dispute cases.

### PART 3. ENFORCEMENT ISSUES

In the **U.K.**, a public body called ACAS (Advisory, Conciliation and Arbitration Service) offers conciliation, mediation and arbitration services for the parties to a collective dispute. The use of ACAS is entirely voluntary so both sides to the dispute would have to agree to involve ACAS. Normally conciliation is the first stage, with mediation or arbitration reserved for disputes which cannot be resolved by conciliation. Where “there exist appropriate agreed procedures for negotiation or the settlement of disputes” ACAS may not provide arbitration unless those procedures have failed or some special reason justifies the resort to arbitration. In principle, all kinds of matters may be brought before ACAS, but ACAS only has power to offer conciliation or arbitration where a ‘trade dispute exists or is apprehended’.

In sum, when looking at member states’ alternative dispute resolution mechanisms, a main point of attention is the wide variety of mechanisms. Perhaps more important than the lack of uniformity in Europe, is the fact that it remains unclear to what extent alternative dispute resolution systems are available for disputes arising from TCAs and what the consequences would be of the intervention of such alternative institutions. Such finding might lead the parties to a TCA to prefer autonomous dispute resolution mechanisms that are tailor made for the type of transnational disputes at hand.

### **III. Industrial action**

On the use of industrial action with regard to TCA commitments, a relevant distinction to be mentioned, is the one between disputes over rights versus disputes over interests. While it is generally accepted that the latter issues can be the subject of industrial action, it is not quite clear for all examined member states concerned whether binding collective agreements can be enforced through industrial action.

Due to the lack of clarity in the area of strike law in some countries like **Belgium**, **France** and **Italy**, the legal opinion in seems to be that industrial action could be used with regard to the enforcement of TCA commitments. In France, however collective action is recognised in so far as it consists in strike action.

Other countries, with more precise boundaries of strike law, laid down in case law or in legislation, would give a more nuanced approach. They seem to pay attention to the distinction between disputes over rights versus disputes over interests.

In **Germany**, a strike is only considered lawful as a (necessary) pressure on the employer for the purpose to conclude a collective agreement. Once the agreement is concluded it is unlawful to enforce this existing agreement with measures of industrial actions.

In **Hungary**, under the Strike Act, workers are entitled to use the right strike to assure their economic and social interests. Although is interpreted broadly, strikes in contradiction (or for the enforcement) of a (binding) agreement are, in principle, unlawful.

A similar response is found in **The Netherlands**. In general, the subject matters of industrial action can include TCA disputes, knowing that this would be subject to an *ultimum remedium* test under the existing case law. If the aim of a strike is to force the employer to bargain about a TCA or to implement a non-binding commitment made at international level in a national level agreement, then this would probably be legally possible. But if the aim is to sort out legal obligations arising from the TCA, so that the strike would be going over rights, it is not quite evident yet whether that would be legal.

As regards the **U.K.**, it can be said that English law does not recognise a distinction between disputes of right and disputes of interest. The lawfulness of collective action in English law does not really depend on collective agreements. Instead those involved in the collective action must be acting 'in contemplation or furtherance of a trade dispute', as defined by the law. Seen the scope of this legal definition, if the TCA promises workers some particular set of terms and conditions, and the employer does not comply, it would be possible to engage in collective action because there would be a trade dispute within the meaning of this section. Of course, the union or strike organiser would have to comply with the other provisions of English law governing industrial action too (ballots, notices etc.).

#### **IV. Enforcement by third parties**

The issue of enforcement of TCAs by third parties, including subcontractors and competitors, seems to be one of the most unclear issues. The overall assessment in the studied countries is that the rule of relativity of the contract applies. This means that third parties can only have rights or obligations deriving from a transnational company-level agreement if they become a party and thus expressly gave their consent to the agreement.

Some minor openings with regard to third party enforcement may be found, but rather at a theoretical level. A possibility which, theoretically, cannot be excluded, is that TCA signatories may be held liable to third parties for violation of certain statutory provisions pursuant to general principles of tort law. Somewhat less theoretical may be a reference to consumer protection or competition law. French law imposes both criminal as well as civil sanctions on misleading product advertising, which may include misrepresentation concerning modalities of production. An interesting reference is also Germany, although it remains also questionable whether under German law a competitor can rely on TCA provisions. According to (older) case law a competitor can file for an order compelling a company to refrain from violating a collective agreement on the ground of the Unfair Competition Act, if the company uses the violation to achieve an advantage in competition and if the interests of the competitor are affected. But since a reform of the Unfair Competition Act in 2004 it is uncertain whether this case law is still valid.

## CONCLUSIONS AND RECOMMENDATIONS

This study was undertaken for the European Commission concerning “International private law aspects of dispute settlement related to transnational company agreements” (VT/2008/102). The objective of the study was to: 1° provide a comprehensive overview of the rules to be applied as to the applicable law and the competent jurisdiction when a dispute arises on the interpretation or application of a transnational company agreement; 2° identify the practical and legal obstacles to the way disputes relating to transnational company agreements can be settled in court, but also extra-judicial as well as regarding industrial action; 3° identify and suggest any actions that might be taken to overcome these obstacles.

The main findings, conclusions and recommendations are as follows.

### I. Characterisation of obligations under TCA’s

TCA’s come under a wide variety of documents and texts. There is no “single notion” of a transnational company agreement. Furthermore, TCA’s cover a wide variety of topics and the commitments that are undertaken in TCA’s, may vary from loose unilateral commitments to hard reciprocal rights and obligations. Likewise, the parties to the TCA are diverse. On the side of workers’ representatives may range from European and international trade union confederations, to EWC and national unions as well as combinations thereof. This may create difficulties with regard to the characterisation of the commitments undertaken in a TCA, both in national law and in private international law.

As far as the binding character of TCA’s is concerned, there may be conceptual problems with regard to the position of the national and European works councils as parties to a legally binding instrument. But quite often, TCA’s themselves are unclear as to the binding character of the commitments contained therein.

☞ It may be useful for the parties to a transnational company agreement to make specific reference to the binding or non-binding character of the commitments that are undertaken.

Even when the TCA is meant to create legally binding obligation, the national report commissioned under this study show a divergence as to the exact characterisation of these obligations. TCA’s may be recognized as collective agreements under the national law or rather be looked upon as unilateral commitments on the side of the employer. The characterisation in private international law does not necessarily coincide with the characterisation under national law. The terms of the relevant regulations (Brussels I, Rome I and Rome II) are interpreted autonomously in order to insure the effectiveness of the instruments and the uniform application of the rules contained therein. A first question to be answered in this context is whether claims based on a TCA are ‘civil and commercial’ in nature. We argue, based on the case

law of the ECJ on the Brussels Convention and Brussels I Regulation, that there is no reason to exclude TCA's from the scope of application of the PIL-Regulations.<sup>260</sup> Secondly, the question arises to what extent claim based on a TCA can be deemed to be contractual in nature (again, in the context of the application of Brussels I, Rome I and Rome II). We argue that an analysis of the rules on applicable law and jurisdiction should be based on the assumption that commitments which management has undertaken in a TCA towards the workers and their representatives can in most cases be classified as contractual under the relevant instruments.<sup>261</sup> The relevant criterion is whether the TCA contains obligations voluntarily taken on by (at least one of the) parties. Hence, the concept of 'contract' is wide enough to cover commitments which are largely unilateral in character.<sup>262</sup>

Both the Brussels I Regulation and the Rome I Regulation contain special provisions for individual labour contract. The TCA as such is not an individual labour contract. When a TCA contains individualised rights, however, individual workers may try to enforce those obligations. In that case, the claim entered by the worker will be covered by the special provisions on labour contracts. This does not, however, change the classification of the TCA as such.

Likewise, outsiders (competitors, consumers) may want to rely on the TCA – e.g. as a statement of corporate governance policy. These claims have to be classified separately. When there is no contractual relationship between the signatory company and the claimant, any liability claim, even when based on statements contained in a TCA, will sound in tort.

## II. Relationship with European labour law

The relationship between TCA's and European labour law is far from evident. One could defend the view that TCA's can only be considered as 'national' agreements. Another view is that European labour provisions would be relevant. In this case Articles 138 and 139 of the EC Treaty might play a role. Nevertheless, an in depth discussion of the possible 'reception' of European company-level agreements under the provisions of, especially, Article 139 of the EC Treaty, goes beyond the ambit of the present study.

In practice, there is a strong relationship between EWC's and the conclusion of TCA's. However, it must be noted that TCA's, as examined in the present study,

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<sup>260</sup> TCA's are private law instruments entered into by private parties. Even though they may touch upon taxation and social security matters, they do not contain any public law obligations which may cause them to be excluded from the scope of application of the Brussels I and Rome I Regulations. See the relevant part of the full report.

<sup>261</sup> It should be kept in mind that when one of the interested parties goes to court and enters a claim based on a TCA, this claim will be based on the presumption that the TCA creates legally relevant obligations. It will be up to the law designated by the relevant choice of law instrument to decide whether this claim hold true.

<sup>262</sup> The legal standing of the parties on the employee's side does not seem to be decisive in this matter.

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have not been envisaged by the original 1994 EWC Directive. Also the 2009 Recast Directive has left the issue outside its explicit scope.

☞ The existing EWC legislation may be relevant in light of finding solutions for TCA issues. This has mainly relevance *de lege ferenda*.

### III. Applicable law

The law applicable to the TCA itself (and the obligations undertaken therein) will have to be found by applying the Rome I Regulation. This Regulation deals with the law applying to contractual obligation. It is based on party autonomy. This means that the parties to a TCA can designate the law to be applied to their agreements themselves. A choice of law expressed in the TCA will (have to) be respected on the basis of Article 3 of the Regulation. Choice of law has only limited effect in individual labour contracts, but this does not affect the validity of a choice of law as between the parties to a collective agreement. Such choice of law will remove any uncertainty with regard to the law determining the obligatory aspects of the TCA.

☞ Parties to a TCA may express a choice of law in the TCA itself. This will remove any uncertainties as to the law applicable to the obligatory aspects of the TCA.

☞ Under the Rome I Regulation a choice of law should refer to an existing system of law. However, if a European optional framework on TCA's would be created, this instrument may be chosen by the parties if the framework itself so provides.

When no choice is expressed in the TCA (or can be implied from it), the applicable law has to be determined first by enquiring whether there is a party which perform the obligation 'characteristic' of the contract type. This party may be impossible to discern in the case of TCA's. In that case, the Rome I Regulation refers to the law with the closest connection. That means that the law has to be found by weighing the circumstances of the case. In this process, central management of the leading company plays an important role, as does the location of the workforce covered by it. When the TCA is understood as a unilateral commitment of the employer, the choice of law rule will primarily refer to the law of the country of establishment of the employer.

The closest connection rule is an open one. This creates flexibility, but also causes uncertainty. There are several ways to remedy this – either by EU action or by the parties to the TCA.

☞ The EU legislator may consider supplementing the rules of Article 4 Rome I with a special sub-rule on TCA's. This sub-rule could establish the presumption that a TCA is governed by the law of the place of establishment of central management of

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the leading company. This presumption could than be rebutted if another law shows a manifestly closer connection.<sup>263</sup>

As was mentioned above, the parties to the TCA can end all uncertainty by expressing a choice of law in the TCA itself.

The law applicable to the TCA itself can not determine the normative effect thereof. At least not in a uniform fashion. The report deals with several aspects of normative effect, inter alia representation and reception/recognition as a collective agreement by the law governing the TCA. This overview clearly demonstrates that under the current diversity, any binding effect of the TCA on national industrial relations will have to respect the national rules which define those industrial relations. The relevant differences between the Member States pertain to inter alia the requirements for horizontal effect of collective agreements and the division of powers between unions and works councils. The consequence of this is that TCA's will have to be ratified by national social partners and implemented in conformity with national standards. Only a superimposed European system may be able to change that, but this option seems unfeasible. Accordingly, the TCA (and consequently the enforcement thereof) is split up in a European, obligatory part and a set of national implementation measures.

☞ Parties to a TCA must ensure proper mandate from all relevant national bodies. To ensure normative effect on individual contracts of employment, the TCA is best implemented at the national level.

The above deals with the position of management, workers and their representatives. When outsiders (competitors, consumers) want to rely on the TCA – e.g. as a statement of corporate governance policy – these claims have to be classified separately. Most likely they will sound in tort. In that case the Rome II Regulation applies to the claims. Claims based on unfair competition are covered by Article \*\* thereof, which refers to the country where the unfair competition takes place.

### IV. Jurisdiction

Jurisdiction in international matters is covered by the Brussels I Regulation. This Regulation covers jurisdiction of the courts. Arbitration is explicitly excluded from its scope of application.

Article 2 of the Regulation gives jurisdiction to the country of domicile of the defendant. This provides the parties on the side of the employees with a clearly defined forum. Hence the Article fulfils the requirement of legal certainty and predictability. However, it might not offer efficient protection to individual workers and workers representatives established in other member states. Especially because

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<sup>263</sup> One point of negotiations would be whether the presumption should be displaced as soon as another law has a closer connection (compare Article 8 sub 4 on individual labour contracts) or only when the contract is manifestly more closely connected to another country (Article 4 sub 3).



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the legal standing of works councils and unions may differ considerably from state to state, it seems advisable to offer these parties the option to sue in their respective home states. Though suing ‘at home’ has the disadvantage of in order to ensure effective access to justice. Article 2 alone does not fulfil that need.

Article 22 grants exclusive jurisdiction over certain matters to the court most closely connected to the issue. Currently TCA are not caught by any of the provisions contained therein. Though some Member States advocate exclusive jurisdiction on matters involving works councils, we would not support this in the case of TCAs because it makes it impossible to consolidate proceedings against several employers within the group.

Article 5(1) and 5(5) may be useful in creating alternative jurisdiction in the home state of the workers involved. Article 5(5) however, mainly pertains to the groups of undertakings that operate under a single legal entity. If the group consists of different companies, it is doubtful that Article 5(5) can be used. In that case, only Article 5(1) remains as an option for introducing claims against the parent company in a court for the place of establishment of the daughter or vice versa. This provision grants jurisdiction to the court for the place of performance of the obligation on which the claim is based. Complex obligations such as the ones undertaken in TCA may be difficult to locate. First the exact content of the obligation will have to be determined. Once this obligation is identified, the place of performance thereof need to be established. If the parties have not designated this themselves, the place of performance has to be determined in accordance to the law applying to the obligation in question. These two steps may lead to divergence in outcome between courts and (at the very least) complicate the application of the provision. Hence it seems advisable to specify the place of performance of the main obligations arising from a TCA – either in an EU instrument<sup>264</sup> or in the TCA itself. The places which seem to qualify are the establishment of the parent company and/or representative of a non-EU company under the EWC Directive on the one hand and the place of establishment of the effected secondary establishments in other member states, with regards to obligations pertaining to them. Only the latter would provide the workers with an extra ground for jurisdiction against the parent company.

If both parent and daughter company have breached their obligations under a TCA, both parties can be sued in the domicile of one of them under the condition that the claims against the two are closely related. Unfortunately, this extra possibility is currently lacking in claims based on individual employment contracts. The current revision of the Brussels I Regulation offers an excellent opportunity to remedy this.

Another important provision for enforcement of TCA commitments is the possibility to ask for interim measures. Also courts that have no jurisdiction to decide on the merits, may order interim measures. However, there has to be a sufficient link between the measure asked and the court seized. Normally, the court will assume jurisdiction, when the measure has to be executed within the territory. If works

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<sup>264</sup> Both the directive on information and participation and the Brussels I Regulation may qualify in this respect.

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councils or unions want to stop the implementation of a management decision at plant level, the courts for the place of establishment of that plant would most likely assume jurisdiction. The remedies to be provided will have to be based on the local law (*lex fori*).

Finally, the parties to the TCA may include a choice of forum agreement in the TCA (or enter into such agreement at a later date). It seems advisable to make such choice of forum a supplementary one. In that case the parties may seized the court chosen, but may also approach a court having jurisdiction by virtue of the other provisions of the Regulation. A choice of forum does not affect the competence to order interim measures.

### V. Enforcement issues

The issue of enforcement of TCA's is very complicated. There exists a wide variety of law and practice in the studied member states.

It remains unclear how TCA's can be enforced at the national level. If a TCA qualifies as a national collective agreement, the appropriate national enforcement rules and mechanisms can be used. However, it remains unclear what can be done with regard to TCA's that do not qualify as collective agreements, like mostly seems the case.

☞ A certain amount of leeway seems to be available for the parties to transnational agreements in defining their own procedures and practices with regard to dispute resolution.

### VI. *Ius standi*

There is considerable difference between the Member States with regard to the legal capacity of unions and works councils. This creates specific problems in the case of transnational agreements and their enforcement. It seems that there are four ways to address the problems described above, or at least to mitigate their effect.

☞ One solution could lie in creating a European rule on the standing of workers' representative bodies. The EWC Directive already provides a rule on *ius standi* (cf. Article 10 of the EWC Recast Directive), but it remains unclear whether this provision also pertains to TCA's that have been concluded in the margin of EWC activities. The issue might be taken into account when implementing the Recast Directive.

☞ When harmonisation at the European level is impossible, another option would be the creation of a system of mutual recognition. The system that exists with regard to *ius standi* of consumer organisations could be a source of inspiration for this.<sup>265</sup>

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<sup>265</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests, OJ L 166/51.

## CONCLUSIONS AND RECOMMENDATIONS

Again, the question of finding a legal base and method requires further study. To begin with, the Commission could make information on the respective enforcement rights of national unions and works council more readily available.

☞ The problems of *ius standi* and mutual recognition can, to a large extent, be avoided by providing jurisdiction in the home base of the workers' representatives concerned. If a national works council could choose to file suit in the courts of its home country, the question of mutual recognition would probably not arise.

☞ It is perhaps more realistic to give as much as possible relevant national stakeholders, such as national unions or national works council representatives, the possibility or right to introduce legal proceedings (and thus standing) before the national courts where they are situated or organised. This would require an initiative at the level of the respective national jurisdictions (i.e. the Member States). A European contribution would probably be helpful, for example in the sphere of coordination. A European legal basis for this could be found in Article 140 EC Treaty, under which the European Commission can encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this chapter, particularly in matters relating to the right of association and collective bargaining between employers and workers.

### **VII. ADR and industrial action**

Some of the studied member states would allow the use of alternative dispute mechanisms for conflicts arising in the context of TCA's. But they are generally not designed to deal with TCA issues.

When looking at member states' alternative dispute resolution mechanisms, a main point of attention is the wide variety of mechanisms. Perhaps more important than the lack of uniformity in Europe, is the fact that it remains unclear to what extent alternative dispute resolution systems are available for disputes arising from TCAs and what the consequences would be of the intervention of such alternative institutions.

On the use of industrial action with regard to TCA commitments, a distinction can be made between disputes over rights versus disputes over interests. While it is generally accepted that the latter issues can be the subject of industrial action, it is not evident to assume that binding agreements between social partners can be enforced through industrial action.

☞ Attention should be drawn to the possibility for TCA signatories to create or call on autonomous mechanisms of alternative dispute settlement, which can be agreed upon in TCAs.

However, it is important to realize that the validity of such agreements and their effect upon the jurisdiction of the courts may not be uniform throughout Europe. Arbitration falls outside the scope of application of the Brussels I Regulation.