Internationale mobiliteit van werknemers: Een onderzoek naar de interactie tussen arbeidsrecht, EG-recht, en IPR aan de hand van de detacheringsrichtlijn

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Summary and conclusions

1 Private International Law, Community Law and Labour Law: Rationale Behind This Study

In the European Union, the rules of private international law pertaining to contracts are set out in treaties. The jurisdiction rules are recorded in the European Jurisdiction and Execution Convention, the first version of which was adopted in 1968 (the "Brussels Convention"), whilst the conflict of laws is governed by the 1980 Convention on the Law Applicable to Contractual Obligations (the "Rome Convention"). Both Conventions (now) include special provisions for individual employment contracts. The jurisdiction rules of the Brussels Convention are interpreted by the European Court of Justice, which has taken the general rule of jurisdiction relating to contracts as a basis for establishing a special scheme to govern individual employment contracts. Since the coming into effect of the San Sebastian Convention, the special arrangement has been incorporated into Articles 5 and 17 of the Brussels Convention. These new provisions may also be interpreted on a uniform basis by the European Court of Justice. The Court weighs the various interests involved in the relevant jurisdiction rule and formulates the outcome of the weighing process in decisions that apply throughout the Union. Given the combination of a common rule and a central interpreting authority, one may expect, therefore, that the law in the field of jurisdiction will be largely identical in all EU Member States.

A different situation exists in respect of the applicable law. Although there is a Convention with uniform rules in this field, that Convention – which, incidentally, came into effect as late as 1991 – may be interpreted exclusively by national courts. The European Court of Justice does not yet have any jurisdiction over matters of this kind. In the present situation, therefore, the fact that the Rome Convention has become effective does not in any way guarantee that its rules of conflict are applied uniformly in all the countries. And even if the Convention was interpreted uniformly, it still would not mean that the situation in terms of the conflict of laws would be identical in all EU Member States. First of all, a number of countries made a reservation to Article 7(1) of the Rome Convention, as a result of which Member States may give different effect to internationally mandatory rules not belonging to the *lex fori*. Moreover, the Convention does not provide for a clear defini-
tion of the term 'mandatory rule'. The decision as to whether or not to treat a specific rule as a mandatory rule has been largely left to the Member State which has adopted the relevant rule. This discretionary power on the part of Member States may well interfere with the unifying function of the Convention, particularly in those fields of law that operate on the borderline between public and private law. Labour law is a field which is a pre-eminent example of this 'grey area'. It is into this little-explored field of law that the Directive concerning the posting of workers in the framework of the provision of services has now made its entry.

If one looks at the political background to the Posting Directive, it appears that the main motive for adoption of the Directive was to combat social dumping. The phenomenon of social dumping is one of the adverse side effects of European unification, resulting from a combination of the free movement of capital and persons, on the one hand, and an incomplete process of harmonisation and co-ordination of the national systems of social law, on the other. The actual differences in overall employment conditions between the Member States lead to competition on that basis; and the imperfect co-ordination between the national systems of labour may result in the creation of groups of employees who are not protected by any of the systems effectively. The purpose of the Posting Directive is to fight these forms of social dumping by means of a special rule of conflict. The objectives of the Posting Directive are explained in greater detail in the explanatory memorandum and the recitals. The Posting Directive is designed to help advance the legal certainty of posted individuals and must prevent the freedom to provide services within the European Union from going hand in hand with unfair competition and an erosion of the legal protection of the individuals concerned. Furthermore, the Directive supplements the Rome Convention where the application and enforcement of collective agreements in international cases are concerned.

As the explanatory memorandum and the recitals expressly refer to the Rome Convention, the objectives of the Posting Directive can be seen as implying criticism of the conflict of laws in general and the provisions of the Rome Convention in particular. The Rome Convention is apparently unable to achieve or, perhaps, does not even pursue the objectives targeted by the Posting Directive. It is this 'criticism' that forms the heart of the study described in this book. The following questions were formulated: What interests play a role in international labour law, and what is their significance to the conflict of laws? Does the system introduced under the Rome Convention indeed lead to the gaps in the legal protection of posted individuals that the Commission has detected? If so, does the Posting Directive provide an adequate remedy? And, finally, what is the role of collective agreements as a source of law for international employment contracts? To answer these questions, I have studied the disciplines of labour law and the conflict of laws in France, Germany and the Netherlands. The report on that study is set out in Section II of this book. A study into the backgrounds to the Posting Directive cannot be confined to the conflict of laws, however. The Posting Directive is a piece of Community legislation, based on the provisions of the EC Treaty on the freedom to provide services. This inevitably leads to the question
of the relationship between the rules of conflict and the principles of free movement. This question is the focus of Section III. The insight gained in Sections II and III is then used in Section IV, in which the Rome Convention is the subject of further scrutiny. The point of departure for the analysis of the Rome Convention is Dutch legal practice, with special focus being placed on the provisions which define the scope of collective agreements declared to be universally applicable in the Netherlands. This concluding Section consists of summaries of the findings made in the previous Sections to the extent that they are relevant to an evaluation of the Posting Directive.

2 Systems of International Labour Law

The European conflict of laws as set out in the Rome Convention is based on the Savigny model, which means that it is built on a system of multilateral rules of conflict. These conflict rules determine which law applies to an international legal relationship or a specific aspect of such a relationship. The rule of conflict defines a connecting factor for a specific legal category: the individual employment contract in our case. Various interests may play a role in choosing the points of connection and in formulating the predominant connecting factor. For instance, great value may be attached to the principle of legal certainty and to honouring the legitimate expectations of the parties, but the prevailing emphasis may also be on protecting the weaker contractual party. Furthermore, supra-individual interests may steer the rule of conflict in a specific direction. In the field of labour law, for instance, such an interest may be the regulation of the domestic business community or, as the case may be, the domestic labour market. The fact that a rule of conflict is primarily based on the individual employment contract does not, in my opinion, preclude those formulating the connecting factor from also, or predominantly, considering the collective interests involved.

The conflict of laws of a country depends, therefore, on how the various interests involved in international legal relations are weighed. The outcome of this weighing process may vary according to country. A distinction is often made between the systems based on Roman Law, such as the French legal system, and the Germanic systems, such as German and Dutch law. In France, the conflict of laws traditionally gives a great deal of prominence to protecting the national legal order. The distinction between the multilateral rules of conflict and the unilateral scope rules is not very sharp. Moreover, the French conflict of laws also includes immigration law. Germany and the Netherlands, on the other hand, have a fairly open system of multilateral rules of conflict, with the interests of the parties and decisional harmony (Entscheidungsharmonie) playing an important role. In Germany particularly, this system is supported by a severe, dogmatic separation between the multilateral conflict rules governing private law and the unilateral scope rules governing public law. Immigration law constitutes a separate field of law in Germany.

The countries compared in this study differ not only in terms of their private international laws, but also in terms of their internal labour laws. Legislation plays a huge role in French
labour law. Like the French conflict of laws, French labour law is also characterised by a large degree of cohesion between the different aspects of labour law, all of which are comprised in one book: the Code du Travail. This Code includes rules on employment contracts and working conditions, as well as provisions of collective labour law. In addition, the Code regulates specific aspects of work in the overseas territories and of immigration law. German labour law, on the other hand, is characterised by fragmentation, the legislation being spread over a number of different statutes. A strict dogmatic separation is made between the various arrangements, with the difference between private and public law playing an important role. German labour law as a whole is dominated by the central role given to individual and collective party autonomy. Finally, the Dutch system of labour law displays a legislative fragmentation and a distinction between private and public law, similar to the German system. There are a number of respects, however, in which the Netherlands cannot be compared to Germany at all. Indeed, unlike German law, Dutch law is not based on the liberal principle of individual and collective autonomy. Although the rule of central wage policy has long gone, the Dutch system is still corporatist in nature. This means that the “social partners” (representatives of employer and employee organisations) still perform an important function in regulating industrial relations. The individual autonomy of the parties can not only be restricted in order to protect employees, but can also be set aside (as was often done in the past) in order to steer the labour market for social-political purposes.

As a result of these differences in the fields of the conflict of laws and labour law, three different systems of international labour law existed in the respective countries before the coming into force of the Rome Convention.

In France, a clear parallel could be drawn between domestic labour law and the conflict of laws. Labour law formed one whole, and belonged almost integrally to the field of public policy. As a result, French law was considered to be applicable to all work performed in France. This rule was bilateralised in the course of time and culminated in a closed rule of conflict based on the territorial effect of labour law. In addition, employment contracts were subjected to the conflict rule which applied to contracts in general, based on the autonomy of the parties involved. These two principles were reconciled by means of a principle derived from domestic labour law, namely that of the ordre public social or the loi la plus favorable. These expressions refer to the fact that the mandatory nature of labour law is almost never absolute, but merely prohibits deviations which are to the disadvantage of the employees concerned. Transposed into the conflict of laws, this principle resulted in a system based on the favour principle, offering maximum protection to employees.

In Germany, too, there was a parallel between labour law and the conflict of laws. The German conflict of laws traditionally focused (to a far greater degree than that of the French) on the private interests of those involved in an international legal relationship. Consequently, the German system was much more open to the application of foreign law. This attitude was supported to some extent by Germany’s liberal, freedom-of-contract inspired interpretation of employment relations in its internal labour law. The (international) employment relationships were regarded primarily as agreements. Any restriction on the
autonomy of the parties, whether at national or international level, had to be justified and was not to go farther than was strictly necessary to achieve the intended purpose. This resulted in a rule of conflict that was highly oriented towards the individual. A choice of law by the parties was permitted, and the courts enjoyed wide discretion to depart from the standard connecting factor in view of the personal characteristics of the parties and the circumstances of the case. In both labour law and the conflict of laws, the protection of collective interests was strictly separated from the regulation of individual employment agreements.

Finally, in the Netherlands, the parallel between internal labour law and private international law only existed to a limited extent. The Dutch conflict of laws focuses on individuals and, as such, is highly similar to the German system. The conflict rule developed by the Dutch courts for employment contracts was oriented towards the individual and left room for the autonomy of the parties (just as in Germany). Both systems generally applied a strict distinction between rules of conflict and internationally mandatory rules, albeit that the distinction made between those two categories in the Netherlands was not exclusively based on the distinction between private and public law. The categorisation of the law into aspects with a strictly individual meaning and aspects with supra-individual significance was also in line with the internal fragmentation of labour law. The similarity between the Netherlands and Germany ends here, however. Dutch labour law was, and still is, corporatist in nature, and German labour law is not. This feature of domestic labour law had no real practical significance for the rule of conflict, but it did play a role with regard to the status of collective agreements, the pre-eminent corporatist instrument of legislation, in terms of the conflict of laws. That status will be discussed later in a separate Section.

Although there are clear differences between the basic assumptions of the three legal systems compared, the conflict-of-laws systems which prevailed in the three countries prior to the coming into force of the Rome Convention were largely similar in terms of the connecting factors that were considered to be of significance in international labour law. In addition to party autonomy, these factors were the habitual place of work, the actual place of work, the place of business of the undertaking, the place of business of the legal-entity employer, the place where the contract was concluded and the origin or nationality of the parties. The rule of conflict was primarily based on the locus laboris, a term that may refer to both the habitual place of work and the undertaking of which the employee concerned forms part. The differences between the legal systems can be found in (1) the role given to party autonomy; (2) the open or closed nature of the rule of conflict; and (3) the extent to which and the reason why the applicable law is set aside by the mandatory law and rules of public policy of a different provenance.

The Rome Convention has largely unified private international law in the field of employment contracts within the European Union. Differences of opinion about the role of party autonomy are generally solved by the provisions of Article 6(1) of the Rome Convention. The difficulties in applying these provisions is discussed in Section IV. The
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interpretation of Article 6(1) of the Rome Convention is not relevant, however, to the problems of the Posting Directive. In the following paragraphs, therefore, I shall confine myself to discussing the objective rule of conflict and the doctrine of internationally mandatory rules.

3 Article 6(2) of the Rome Convention

3.1 Labour Market and Non-discrimination

The objective rule of conflict which applies to employment contracts is set out in Article 6(2) of the Rome Convention. This conflict rule primarily refers to the law of the country where the work is habitually performed. In the absence of such a habitual place of work, the applicable law will be that of the country in which the place of business through which the employee was engaged is situated. All of this holds true as long as there is no other country which is more closely connected to the contract. This means that the locus laboris has a central place in the Rome Convention, albeit that the term is not defined in greater detail. The connection to the employer and the open end of the conflict rule require a more detailed explanation, too. As long as the Court of Justice does not decide these issues conclusively, there will continue to be differences between the national systems of the conflict of laws. The differences in the basic principles, as described in paragraph 2 of this Section, may again play a role in this respect. The freedom of the Member States is not unlimited, however. Article 18 of the Rome Convention includes a specific provision about the interpretation of the Convention. When interpreting the Convention, the national courts must duly consider the international nature of the provisions and the desirability of achieving uniformity in the manner in which those provisions are interpreted and applied. In doing so, the courts may consult other organisations abroad and at home. The interpretation of the objective rule of conflict is also influenced, however, by other fields of Community law, such as the jurisdiction rules and the free movement of workers. The Court of Justice does have jurisdiction in these two matters.

In view of the Court of Justice's rulings concerning the Brussels Convention, the conclusion may be drawn that the locus laboris refers to the place where or from which the employee habitually carries out his work. As for employees who have a fixed place of work and share that place with other employees (a "fixed workplace"), this is the place of business of the undertaking of which they form part. The Germans refer to the term Eingliederung in their conflict of laws. With regard to employees who are not integrated in a place of business, the Court of Justice interpreted the principle of locus laboris in the case of Rutten v. Cross by referring to the centre of gravity of the work, the centre from which they operate. The case law developed in connection with the Brussels Convention can also be taken as a basis for interpreting the term "place of business" as used in Article 6(2)(b) of the Rome Convention. The Brussels Convention and the Rome Convention do not, however, run completely parallel. Decisions in the context of the Brussels Convention
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cannot be used to clarify the issue of whether and when the established connecting factors may be set aside in favour of a closer connection with another country. Criteria to decide this issue may be derived from rulings concerning the freedom of movement within the European Union.

Employees who, in the context of the freedom to provide services, carry out work in a specific country for a short period of time will not generally enter the labour market of that country. The European Court of Justice decided as much in the Rush Portuguesa case. Employees who have been transferred for an indeterminate period of time, or who have been hired by a new employer in a different state, do enter the labour market of the host Member State. This can be inferred from the case law on the free movement of workers within the Union and in the relationship with Turkey. These two types of worker mobility differ in terms of the intention of the parties as well as the duration of the posting. There are a large number of international labour relationships for which Community law does not offer any clear guideline. This may be caused by the fact that the place of performance of the international employment contracts cannot be identified clearly, such as contracts in the field of international transport. Furthermore, Community law creates its own ambiguities, as the Court of Justice uses two different definitions of labour market. There are a number of cases where the term refers to the place where the demand and supply of work meet. This is the market where the employment contract is concluded. In other cases, however, the emphasis is on the market where the employment contract is performed. As a result, there is a group of employees who have relevant contacts with more than one labour market. This group includes temporary workers, but also workers who, though posted for a limited period of time, fill a more or less permanent position in the host country. In all those situations, the employment contract is concluded in the one labour market, whilst performance takes place in the other.

The rule of conflict described in Article 6(2) of the Rome Convention designates one legal system whose law will ultimately apply. This means that a choice must be made between the various markets involved. The basic assumption to be borne in mind is that the arrangement set out in the Rome Convention is aimed at deciding which law is to govern the employment contract as a whole. A division between conclusion and termination, on the one hand, and performance of the agreement, on the other hand, does not fit well into the system of the Rome Convention. Both the Rome Convention and Community law appear to attach greater value, in principle, to the place of performance than the place of conclusion. A choice for application of the law of the country of origin must, therefore, be well justified. In the conflict of laws, the justification can be found in the importance of safeguarding the continuity of a legal relationship. Another element that may play a role is that of the parties being familiar with the legal system of the country of origin and having based their expectations on that system. The country where the contract is performed may be of subordinate significance in a number of cases, including the situation where workers are posted abroad in the context of emergency relief in developing countries. In such a case, posted workers should be protected against the application of “exotic” legal systems.

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This argument is particularly convincing when the law of the host country offers less protection than the law of the home country. On the other hand, there are also arguments which would advocate legal integration in the host country. The labour market in the host country may become disrupted if there is a (large) group of workers who are subject to strongly deviating employment terms. Added to this is the fact that, if those employment terms are less favourable than the terms governing domestic workers, the different treatment of foreign workers is likely to be regarded as discriminatory. This latter argumentation adds elements of immigration law and equal protection of foreigners to the issue of legal integration of employees working under an international employment contract. This element also has an impact in the field of the conflict of laws.

If a job in a certain country is open only to workers of a specific foreign nationality, the job has little or no connection with the local labour market. The clearest example is the position of diplomats. Their employment relationships are governed by the law of the country which they represent. In the German ruling concerning the Berlin-based pilots, the justification for applying the law of common nationality was partly based on the fact that the (American) nationality of the employees constituted a requisite condition for conclusion of the contract. In the European Union, however, the nationality of an employee is almost never allowed to play a role in the conclusion of an employment contract, for the principle of the free movement of workers opposes this.

In terms of immigration law, mobility by European citizens within the European Union is governed by principles which differ from those that apply to migrations involving non-EU countries. If an employee must leave the host country upon termination of the employment relationship, he or she will usually fall back on the labour market in the home country. This strengthens the involvement of the home country in the employment contract. Such a direct link between an employment relationship and the right to stay, however, no longer exists within Europe. Consequently, a number of the reasons for applying the law of common nationality have little or no relevance in terms of worker mobility within the European Union. Hence, the main reasons for applying the law of the home country are the employment relationship’s continuity and a co-ordination of the legal fields which are material to the employee’s legal status. The corresponding fields of law are immigration law, as well as social security law and tax law.

This leads to the following interpretation of Article 6(2) of the Rome Convention. If an employee is transferred or posted to a company abroad, the law of the country of origin may continue to be the applicable law for a specific period of time, provided that a legal link continues to exist between the employee and the posting company. Short-term postings within the framework of the freedom to provide services are regarded as temporary for the purposes of Article 6(2)(a) of the Rome Convention. Even if the posting is not within the framework of the provision of services, however, one might argue that where the work is to be performed for an intended term of no more than one or two years, effect may be given to Article 6(2)(a) of the Rome Convention. If the stay abroad lasts five years or more, the employee will be deemed to have been integrated into the labour market of the
host Member State. An exception to this rule will only be acceptable in cases where the job concerned does not form part of the labour market in the host country as it is reserved for employees of a certain nationality only. Postings for less than five years are still characterised by clear differences, in terms of legal position, between the migrant worker and his or her co-workers. These differences occur in the fields, for instance, of social security law and international tax law. Whether a similar distinction must be made in terms of the applicable labour law will depend on the circumstances of the case. Circumstances which are particularly important in this context are those that reinforce the connection with the country of origin, such as expatriate facilities and duties of repatriation and reintegration. Nationality plays a role only in cases of postings to and by non-EU countries and in cases where discrimination is permitted under Community law.

Multilateral, neutral rules of conflict are based on the assumption that national legal systems are interchangeable. In the field of labour law, this assumption is only tenable to a limited extent: the actual protection level may vary strongly in different countries. The rule of common nationality was developed in the past to protect employees against the consequences of less developed labour law systems. The reverse situation occurs, however, when employees move from a country with a low protection level to a country with a high level of protection. In such situations, application of the law of the host country to the employment relationship involves a clear aspect of non-discrimination. This means that there are disadvantages and risks attached to a multilateral rule of common nationality, arising from de facto distinctions in protection levels between the national labour law systems. These disadvantages can generally be solved by the rules of immigration law. Immigration law can regulate the influx of foreign workers onto the national labour market. In addition, the issuance of a work permit may be made conditional upon the migrant worker enjoying a level of legal protection comparable to the one in the country where he works. This immigration element of international labour law has, however, been eliminated within the European Union. As a result, the way in which the legal position of migrant workers is regulated has become increasingly dependent on the conflict of laws. This shift in approach is felt most in countries where the two fields of law are strictly and dogmatically separated, such as Germany and the Netherlands.

3.2 Conclusion

The Rome Convention operates on the principle of the locus laboris. This principle refers to the central place where or from which the employee works. In this view, the locus laboris generally coincides with the labour market on which the employment contract is performed. Neither the criterion of the locus laboris nor that of the labour market provide a conclusive answer to the questions of how long, when and why the law of the home country may continue to be adhered to in the case of foreign postings. The EU Member States generally agree that the law applicable to employment contracts should not change if an employee is posted abroad for a short period of time. In such cases, the law applicable
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to the employment contract is different to the law of the actual place of work. If it is none-the-less considered appropriate to have certain statutory arrangements under the law of the actual workplace apply to the legal relationship with the posted worker, one cannot invoke immigration law for this purpose or, at least, not within the European Union. Both national law and the Posting Directive rely on the doctrine of internationally mandatory rules to resolve this situation.

4 Mandatory Rules

4.1 Problems of Identification

The doctrine of mandatory rules is, in principle, a unilateral method of solving conflicts of laws. This doctrine does not take the legal relationship as a basis, but instead starts from a rule of law or a set of legal rules. The rule of law is then given a specific scope which reflects the rationale behind the rule. Party autonomy plays no role whatsoever. This is inherent in the nature of mandatory rules. They generally purport to protect interests which are outside the individual legal relationship. In his preliminary advisory opinion of 1966, Koopmans observed, however, that a distinction existed between labour law and other fields of law in which mandatory rules played an important role, such as competition law and import and export rules. Export restrictions and competition rules are always mandatory in nature, but are not present in each and every legal system. The matters regulated in the different national labour law systems are, for the most part, identical. The way in which the arrangements have been given shape, however, show a great variety in both time and place. The Netherlands as well as Germany and France have rules governing dismissals, but only the Netherlands has a system whereby a public system of permits operates as a key feature in the dismissal rules. All three countries have adopted rules on wages. There is no statutory minimum wage scheme in Germany, however, whilst the Dutch Minimum Wages Act is mandatory in nature. The decision whether or not to identify a rule of labour law as a mandatory rule of law does not necessarily ensue from the nature of the subject-matter concerned. It rather depends on the value attached by the national legal system to the relevant rule and, in addition, is inspired by the domestic variations in enforcement methods. All in all, the scope and delineation of the group of mandatory rules varies from country to country. It is logical, therefore, that the European Commission has never based its proposals in the fields of international labour law within the European Community on the status which the rules of labour law have in the domestic laws of the Member States. The Commission instead looked at the subject-matter to be regulated, as it also did in the Posting Directive.
4.2 Types of Mandatory Rules and Their Scope

The doctrine of mandatory rules is not aimed at harmonising the various legal systems involved in the legal relationship. Due to the unilateral nature of the scope rule, a legal issue may have to be decided on the basis of more than one national legal system or, conversely, will not be covered by any national rule. In the field of labour law, both forms of disharmony may pose problems. If more than one rule applies to the same employment relationship, employers may have to face double obligations. This may, in certain cases, constitute a violation of the free movement of services within the European Union. On the other hand, the lack of any legislation may seriously frustrate the legal protection due to the employees concerned. This, too, is an undesirable situation from a Community law perspective, particularly with regard to issues which are subject to minimum harmonisation under Community law. Harmonisation has been implemented in, among other things, the posting-relevant fields of working conditions and working hours. From a Community law perspective, therefore, it may be appropriate to harmonise the applicable law even in fields that are traditionally regarded as containing mandatory rules of law. In most fields, the European Court of Justice chooses for application of the law of the country where the employer/service provider has its place of business. This is particularly the case with regard to arrangements relating to the employer's organisation, such as employee participation. As for the issues of safety at work, no working on Sundays and other "modalities of performance", the actual country of work must be considered to be primarily responsible for making arrangements. Finally, Community law does not preclude the host country from applying rules on minimum wages and public policy. On this point, Community law takes a neutral stance in terms of the conflict of laws: the host country may impose its own rules on work performed on its territory, but those rules do not seem to take precedence over the corresponding rules of the home country. As far as public policy rules are concerned, this is in line with the fact that, in the context of the conflict of laws, too, each country is responsible for safeguarding its own public policy.

An analysis of the case law on the free movement of services leads to the conclusion that labour law has various types of (mandatory) rules. The first type is linked to the workplace, the second to the employer's place of business, but there is also a third category, including public policy and minimum wage rules, whose application is largely left to the discretion of the Member States. A similar categorisation exists in domestic labour law and in - the literature on - private international law. The main example of a piece of legislation primarily aimed at (the regulation of) undertakings is the Dutch Works Councils Act. This Act applies to all undertakings of a specific size in the Netherlands. A number of other pieces of legislation in the field of labour law specifically concern the regulation of the actual work and the workplace. Examples are the Dutch Working Conditions Act and Working Hours Act. Both the Works Councils Act and the Working Conditions Act can be regarded as collective arrangements. They relate to the undertaking's organisation as such and/or the regulation of the actual workplace. They apply regardless of whether or not an individual employment contract exists, and often relate to conditions that necessarily
apply to everyone present. The special position of these rules in the conflict of laws cannot only be explained on the basis of the doctrine of mandatory rules; it also entails some sort of qualification, as the rules in question do not belong, or do not fully belong, to the domain of the law on employment contracts. Theoretically speaking, the European co-ordination problems relating to these special "choice-of-law categories" might be resolved by giving a clear description of the relevant rules in a Directive and adopting separate multilateral rules of conflict to apply to those rules.

There is a group of internationally mandatory rules, however, which does relate to the contractual aspects of the employment relationship. The special status of this group may have been induced by several reasons. Giving effect to mandatory rules is sometimes regarded as a violation of the freedom of contract, which will be justifiable only if overriding interests are involved. In terms of labour law, such an overriding interest will be deemed to exist if the labour market of the regulating country is involved in the employment relationship. As for the conflict of laws, the mandatory nature would then ensue from a liberal principle. Of more relevance in the context of transnational postings are the rules which apply to all labour carried out within the territory. The most important examples in Dutch law are the Minimum Wage Act and the General Equal Treatment Act. In both cases, the desire to apply Dutch legislation would arise from the fact that the protection level offered by foreign labour law systems differs from that offered by Dutch law. As a result, the application of foreign law may not only be contrary to the fundamental principles of Dutch law, but may also lead to a disruption of competition on the Dutch market (social dumping). Neither the safeguarding of Dutch public policy nor the protection against social dumping is compelling enough to assume an unconditional application of Dutch law. The introduction of a kind of "quality control" is sufficient for this purpose: if the foreign law offers equivalent protection, there is no need to set aside the normal rule of conflict.

This view is supported by the case law that has been developed on the freedom to provide services. Indeed, there is a major disadvantage attached to the application of the second type of rules to posted workers. Their fundamental rights and the determination of their wages are also generally regulated by the relevant rules of the home country. The risk of an accumulation of norms in this context is much more acute than is the case with provisions on working hours and safety at work. An accumulation of this kind may constitute a breach of the free movement of services. This risk will arise particularly when not only the statutory provisions of labour law apply, but there are also collective agreements in place. If application of the law of the host country forms an impediment to the freedom to provide services, that law should make way for the law of the home country, provided that said law offers equivalent protection.
5 The Status of Collective Agreements

5.1 Collective Agreements and the Rome Convention

Collective agreements are agreements concluded between employee organisations and one or more employers in respect of such issues as the employment conditions of those who work for the employers who are party to the collective agreement. Such agreements play an important role in the setting of standards for employment in all of the EU Member States. Their legal status, however, can vary strongly between Member States. The Rome Convention applies to contractual obligations, so that it only has relevance to collective agreements in so far as those agreements are to be regarded as contracts and/or as a legal source for individual employment contracts. This book focuses particularly on the latter option.

A collective agreement operates as a legal source for individual employment contracts if the two following conditions are met: (1) the provisions of the collective agreement must have a legal effect on the individual employment contract regardless of the will of the parties; and (2) the parties to the individual employment contracts must be able to invoke the collective agreement in court. Given these criteria, the Rome Convention has only limited relevance to the enforcement of collective agreements in cross-border situations. I do not believe that this is due to a flaw in the Convention. As I understand it, this is an inextricable result of the features of the – divergent – domestic laws governing collective agreements.

The collective agreement itself is regarded as an agreement in all of the three countries compared. Furthermore, in all three countries, the collective agreement has a mandatory effect on individual employment contracts. In France, this effect of collective agreements is based on the institutional model, meaning that the provisions of a collective agreement apply mandatorily to all employment contracts concluded with employers who are bound by the collective agreement. The employees concerned need not necessarily be members of the trade union which signed the collective agreement. Germany, on the other hand, requires union membership: the horizontal provisions of the collective agreement apply only to the relationship between an organised employer and an organised employee. The Netherlands adheres to the same principle, but supplements it through the provisions of Article 14 of the Act on Collective Agreements. Pursuant to this Article 14, employers bound by the collective agreement are, in principle, under an obligation to also apply the collective agreement to employment contracts with their unorganised employees. Unorganised employees may not invoke any such obligation in court, however. The collective agreement itself, therefore, does not unfold its mandatory effect in any of the countries in such a manner as to cover all employees in the industry or profession for which the collective agreement has been concluded. In Germany and the Netherlands, in particular, it serves as a legal source to a limited extent only.

All of this changes if a collective agreement is "declared universally applicable". This phenomenon is known in France as well as the Netherlands and Germany. A declaration
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of universal applicability is a declaration, expressed by special (government) decision, that the provisions of the collective agreement apply mandatorily to all relationships which fall within the scope of the collective agreement. The mandatory effect of the collective agreement hence extends to employees and employers who are not bound by the collective agreement proper. The provisions declared universally binding have the status of binding rules which may be invoked in individual employment disputes. In this sense, they constitute law in the context of private international law. In the three countries compared, the organised employers and employees cannot validly agree on the inclusion of terms in the individual employment contract which are in breach of the collective agreement. Consequently, provisions of collective agreements which have been declared universally applicable are mandatory rules under the terms of the Rome Convention. Having said this, I should immediately pose the question of whether collective agreements form part of the law applicable to employment contracts or have an autonomous international scope.

5.2 Collective Agreements: Part of the Applicable Law or Mandatory Law?

In domestic law, collective agreements form one of the major sources of the rights and obligations for parties to individual employment contracts. In some countries, the creation of labour law is even left primarily to the “social partners”. It would, therefore, be logical in the context of the conflict of laws to treat collective agreements as an integral part of the law applicable to employment contracts. In that case, the provisions dealing with employment conditions are applicable as part of the lex causae. On the other hand, collective agreements do not constitute universal law: they apply only within a specific industry, for specific categories of workers and within a specific territory. In other words, collective agreements always contain a specific set of rules as to their scope. In France and Germany, where collective agreements often have a regional effect, the scope rules must also define their territorial scope. It is logical, therefore, to have the applicability of collective agreements in international cases depend on whether the individual employment contract falls within the scope of the collective agreement. All in all, collective agreements are an integral part of the labour law, on the one hand, and contain rules with a specific, limited scope of application, on the other. The tension which inevitably exists between the two basic assumptions explained above has been resolved differently in the countries compared.

Under French law, all collective agreements must include a provision on their territorial scope. This was one of the reasons why the application of collective agreements was long considered to be limited to work carried out on French territory. In the course of time, however, the position of collective agreements in the French conflict of laws changed. The assumption now seems to be that French collective agreements form part of French law. A collective agreement can also have independent effect, if the employment relationship falls within the definition of the territorial scope of the collective agreement. No clear distinction is made between the collective agreements proper and the declaration that they are universally applicable. This view of collective agreements in private international law
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fitters in with the status of collective agreements in domestic law. France has adopted an institutional system for the law governing collective agreements. As a result, it is not the individual employment relationship, but the employer that holds a central position for the purpose of determining the binding effect of a collective agreement. The difference between the collective agreement itself and the declaration of the agreement’s universal application is not so great as is the case in systems where only members are bound. To the extent that trade unions are treated as representatives of the employees, this fact seems to be founded on a political mandate rather than one arising from private law. This and a number of other features of the French law governing collective agreements, discussed in Section II, have given French collective agreements the characteristic of secondary legislation. In this light, it seems logical to treat collective agreements as part of the labour law in French private international law, too. The institutional system also has consequences for the criteria used in the scope rule of the collective agreement. The territorial scope of French collective agreements generally depends on whether the employer has an independent labour unit within the relevant territory.

In Germany, too, there is close link between the application of a German collective agreement and the applicability of German law to the employment contract. In addition, in Germany, too, a territorial effect is given to the declaration of universal application. However, the German law on collective agreements differs from the French law on a number of points which, in the end, lead to clearly different solutions in international cases. Collective agreements in German law are dominated by both collective and individual party autonomy. Collective agreements are a means of balancing the disparity of power between employers and employees. By enhancing the bargaining power of employees, they contribute to the (fair exercise of) party autonomy. They may not unnecessarily impede that autonomy. One of the results of this view is that, under German law, collective agreements cannot set any maximum standards. This emphasis on the conclusion of collective agreements as a way of exercising the fundamental freedom of contract is also found in the manner in which parties to individual employment contracts are bound by collective agreements. Ordinary collective agreements merely bind the parties to the collective agreement, and their members. German law does not have a provision such as the one laid down in Article 14 of the Dutch Act on Collective Agreements. As soon as outsiders are bound by the provisions of a collective agreement, as will be the case when a collective agreement is declared universally applicable, the nature of that collective agreement undergoes a drastic change under German law. The ensuing infringement of party autonomy will be allowed only if there are overriding reasons for doing so.

The conflict of laws governing collective agreements clearly underscores not only the fact that the law on collective agreements is highly oriented towards individuals, but also the distinction between collective agreements proper and their being declared universally applicable. Whilst domestic French law sees the location of the undertaking as a significant factor for drawing the territorial line between collective agreements, German law focuses, in principle, on the point of gravity of the individual employment relationship. This focus is of particular importance to the delineation of the different regional collective agreements.
in Germany. Collective agreements themselves permit departures from the general principle and the inclusion of specific rules for workers based abroad. The collective agreement for the Goethe Institut, for instance, repeatedly referred to in this book, illustrates as much. Extraterritorial effect is not considered permissible, however, for collective agreements which have been declared universally applicable. Declaring a collective agreement universally applicable as an act of public law will only have effect on German territory. In other words, only if there is an objective connection to the Germany territory can the infringement of the principle of party autonomy ensuing from the universal applicability of a collective agreement be justifiable (depending on the circumstances of the case). Moreover, prior to the coming into force of the Arbeitnehmer-Entsendegesetz, one of the requirements generally set was that the individual employment contract was to be governed by German law. Consequently, the applicability of Germany collective agreements with universal application to international employment contracts was subject to a cumulative condition. The Arbeitnehmer-Entsendegesetz and the Posting Directive have changed the German system in two ways. First, the employment contract need not be governed by German law anymore; second, the point of gravity of the work need no longer be in Germany, so that short-term activities within the territory are sufficient for the collective agreement to be applicable.

Under the Dutch conflict of laws, finally, collective agreements have yet another status. The Dutch courts have held that the applicability of collective agreements with universal application and the law applicable to individual employment contracts are totally different things. Provisions of collective agreements declared universally applicable are treated as mandatory rules and, hence, form no part of the lex causae. This strict two-track nature of the system is in keeping with the Dutch tradition in respect of mandatory rules. The decision to treat provisions of collective agreements as mandatory rules, in turn, fits in with the Dutch law on collective agreements. The Netherlands still adheres to the corporatist model of labour law, in which the "social partners" play a central role. The feature of collective agreements as a contract entered into on behalf of the (organised) workers is subordinate to the regulating element of the collective negotiations in the Netherlands. This can be inferred from the fact that collective agreements may set maximum standards in the Netherlands. The absence of a general hierarchy for collective agreements ensues from the primacy of collective negotiations at the level of the branch or industry.\footnote{Resolution of 1993 to declare the Collective Agreement for the Professional Haulage Industry universally applicable, DCA no. 7356 Bijv. Stcr. 4 November 1991, no. 214.} That the "social partners" can also operate with relative independence from the government is evident from the fact that industrial collective agreements are declared universally applicable almost automatically in the Netherlands. There is no political review of whether the universal application of a specific provision of the collective agreement is useful, because the system of universal application in itself is considered to be in the public interest.
The corporatism which still exists in the Netherlands also affects the position of collective agreements in Dutch private international law: provisions of collective agreements which have been declared universally applicable will apply to international employment contracts if that is in the interest of the collective negotiations as such. The weighing of the interests involved is primarily a matter for the "social partners" themselves. Their discretionary powers in this respect are subject to a number of conditions, however, the main ones arising from the prohibition under Community law against any discrimination based on nationality and against other impediments to the principles of free movement within the European Union. In my opinion, a second group of restrictions ensues from the system of the Dutch Act on the Universal Application of Collective Agreements. The scope of a collective agreement may not manifestly go beyond the purpose of declaring the agreement universally applicable. Moreover, the requirement of a "significant majority" as set out in the Act also inhibits any expansion urges that might exist. In view of that requirement, collective agreements can only be declared universally applicable if the collective agreement itself already applies to a significant majority of the employees and employers falling within the scope of the agreement.

5.3 The International Scope of Dutch Collective Agreements

Neither the Dutch Act on Collective Agreements nor the Act on the Universal Application of Collective Agreements contain any obligation to include a provision concerning territorial scope in a collective agreement. An analysis of declarations of universal application in the Netherlands has shown that a great number of collective agreements do not, in fact, contain any such provision. The collective agreements which do regulate their territorial or international scope usually centre on undertakings based in the Netherlands. They apply to employment contracts of workers associated with the Dutch-based undertaking. A number of collective agreements expressly confine their applicability to workers who have their base in the Netherlands, whilst other collective agreements make their application conditional upon the workers carrying out their work in and for the undertaking. To the extent that collective agreements make their applicability dependent on the question of whether the employees have a fixed workplace, they use what is known in Germany as the Eingliederung criterion. Collective agreements with this type of scope will rarely apply to employment relationships under foreign law; on the other hand, there may be situations where an employee fails to meet the criteria for application of a collective agreement even though he is working under Dutch law.

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2 Collective Agreement for the Body Works Industry, DCA no. 754 Bijv. Stcrrt. 22 September 1992, no. 183. Article 2(1): 'Employee' shall mean any person who performs paid work in the employ of an employer. Article 2(2): This Agreement shall not apply to (...) (c) those who are not on the payroll of the undertaking; (d) those who are on the payroll of the undertaking but who do not carry out any work for the undertaking.
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Whilst connection to the employer’s place of businesses seems to be the standard connecting factor in the law governing collective agreements, there are a number of collective agreements which have their applicability depend on the place where the work is actually carried out. The main industry which uses this connecting factor is the building industry in the broadest sense of the word (including the dredging business). This is also the only industry where a short-term change in the actual place of work affects the applicability of the collective agreement. Dutch collective agreements in the construction industry as a whole apply exclusively to work carried out in the Netherlands. Work outside the Netherlands, regardless of whether it is long-term or short-term work, falls outside the scope of the collective agreements. The advantage of this system is that separate agreements can be made for the group of posted workers, tailored to the circumstances of their posting. This can have positive results for the workers concerned, particularly if their negotiating position towards the employer is good. If posting forms part of the employer’s normal conduct of business, however, there is little or no negotiating room. The disadvantages of the territorial restrictions will then outweigh the advantages.

The disadvantages are two-pronged. First of all, strict territorial scope frustrates the continuity of the employment relationship. This objection is a real one and has long been recognised with regard to arrangements such as early retirement schemes. The problem cannot be completely solved by giving effect to the conflict-of-laws term Ausstrahlung or the labour-law term ‘after-effect’, particularly in situations where third parties are involved. Secondly, the territorial restriction of collective agreements undermines the legal protection of posted workers. The latter risk may particularly manifest itself if the employees also fall outside the scope of a similar collective agreement in the host country. A regulatory gap will be the result. A gap of this kind used to exist when an employee in the building industry was posted from the Netherlands to Germany. German collective agreements confined their applicability to employment contracts concluded under German law and, hence, did not apply to persons who worked in Germany on a temporary basis. On the other hand, the Dutch collective agreement was ineffective because the agreement itself had limited its scope. The reverse situation can also lead to regulatory gaps: between 1971 and 1996, Dutch collective agreements only applied to those who were in the employ of employers based outside the Netherlands if the employees were insured under the Dutch social security legislation, which generally happened after the work had lasted for more than one or two years.

The gap described above can be closed by adjusting the scope of one of the two collective agreements, that of the country of posting or the host country. In Section IV, I expressed my preference for the first solution. There are several reasons for that choice. Firstly, it is the only way to safeguard the continuity of the legal relationship. Secondly, there is a close connection between the labour law and social security law systems, on the one hand, and the system for collective agreements, on the other. It would be desirable, therefore, to dovetail those three systems where possible in terms of their applicability. Since neither the applicable law governing employment contracts nor that governing the social security schemes undergo any changes in the event of short-term postings, it would
be useful to allow the rights and obligations arising from the collective agreement to continue for that period of time too. The collective agreement for the building industry does now offer this option to employees posted abroad, albeit on a voluntary basis only.

The Posting Directive opts for a totally different solution and makes application of the collective agreement existing in the host country mandatory. The reason for this preference is the difference in protection levels between the different European labour law systems. Application of the collective agreement that is in place at the actual workplace protects the host country against social dumping. As stated before with respect to mandatory rules in general, ‘application’ of the collective agreement for that purpose need not necessarily mean that the agreement must be actually applied. The fact that the employee is offered equivalent protection will be sufficient. Where there is indeed equivalence between the various national systems, I believe that the co-ordination of the different labour law systems should be restored. The 1998 collective agreement for the building industry does indeed provide for such co-ordination – albeit in a limited number of cases. When collective agreements are equivalent, the collective agreement of the home country can prevail on all wage-related issues. The safety provisions of the Dutch collective agreement, however, apply to all work carried out in the Netherlands.

6   The Posting Directive

By promulgating the Posting Directive, the EC hoped to contribute to the fight against social dumping whilst not impeding the free movement of services. This means that the Posting Directive comes into play at the point where national labour law, Community law and the conflict of laws meet each other. This book studies the relevant interaction and charts the fields of tension and the problems which exist in this area. The purpose of the Posting Directive is to solve a number of the problems involved. Whether it has succeeded in fully doing so is debatable. There are a number of points where the Posting Directive creates new problems. In this final section of the book, I have taken stock of the situation as it is now.

6.1   Provisions

The Posting Directive contains special rules of conflict and jurisdiction for a specific group of workers who are active internationally. The Posting Directive concerns workers who are in the employ of an undertaking established in a Member State and are posted to another Member State. Article 1 of the Directive appears to limit the scope of the Directive to worker mobility in the framework of the provision of services within the European Community and the EEA. Article 3(2), however, shows that the Directive also applies to the assembly and installation of goods where this is an integral part of a contract for the supply of goods. This type of worker mobility would take place within the framework of the supply of goods. The situations covered by the Posting Directive have in common that they all
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involve short-term work in one country on the basis of an employment contract governed by the law of another country. In situations of that kind, the Directive provides that a large number of rules from the host country will be applicable. Enforcement of these rules is to be guaranteed by special jurisdiction rules and arrangements pertaining to the enforcement by interest groups.

The Posting Directive has been implemented into Dutch law by means of the Transnational Work (Terms and Conditions of Employment) Act. Article 1 of this Act stipulates that a number of the provisions set out in the Dutch Civil Code will apply to workers who are temporarily posted to the Netherlands. Article 2 provides that workers posted by an undertaking established in the Netherlands may, before the Dutch national courts, rely on the rights derived from the implementation of the Posting Directive in other countries. Articles 3 and 4 contain amendments to the Act on the Universal Application of Collective Agreements and the Code of Civil Procedure. The remaining Articles concern technicalities.

6.2 The Posting Directive and the Conflict of Laws

As stated above, the application of the mandatory rules doctrine to international labour law involves specific problems. The fact that the dividing line between the mandatory rules and the law that is subject to rules of conflict can vary per country causes a great deal of uncertainty. Moreover, the differences between Member States may lead to either regulatory gaps or an accumulation of rules of law. Finally, specific enforcement problems exist in respect of the mandatory rules. The Posting Directive has an impact on all of these problems, but that does not mean that they have actually been solved by the Directive.

At first sight, the Posting Directive appears to remove a number of ambiguities as to the question of which rules of labour law are to be considered mandatory in nature. The domestic rules on the matters listed in Article 3(1) of the Directive must be applied to all work covered by the Directive, regardless of the law which applies to the employment contracts of the workers concerned. The provisions in the Directive are consequently mandatory rules (in part at least). This does not automatically evoke a greater harmonisation of the laws applicable to individual employment contracts. The Posting Directive provides for a unilateral rule of conflict only: it demands application of the law of the host country with regard to the subject-matters included in the Directive, but it does not preclude the home country from also regulating these same subject-matter for the same group of workers. The Directive also keeps open the option for Member States to declare other parts of their labour law to be also applicable to all work carried out on their territories.3

The Directive therefore prevents regulatory gaps, but it also increases the chance of an accumulation of legal rules. Such an accumulation does not benefit international legal transactions and can even be in direct contravention of the freedom to provide services.

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The question as to which of the two applicable laws must make way in such situations will depend on the interpretation given by the Court of Justice to the principles involved in the free movement of services. Of decisive importance in this context is whether a parallel can be drawn with the Keck doctrine, which plays a role in the free movement of goods, and what rules should fall under that doctrine. The Posting Directive does not make this clear, as it makes no distinction between arrangements for which the host country is primarily competent and arrangements which have been declared applicable for other reasons, and on a conditional basis only. The Dutch implementation measures also fail to make that distinction.

The Posting Directive partly relates to arrangements whose applicability in international cases already depended primarily on whether the actual place of work falls within the scope of national law. The arrangements concern activities like maximum work periods and minimum rest periods (Article 3(1)(a)), health, safety and hygiene at work (Article 3(1)(e)), protective measures for pregnant women or women who have recently given birth, for children and for young people (Article 3(1)(f)). In the Netherlands, these are matters which are regulated in the legislation on working hours and working conditions. Pursuant to a separate, potentially multilateral rule of conflict, these two pieces of legislation apply to all work carried out on Dutch territory. The implementation of the Posting Directive does not change the status of the two laws under the Dutch conflict of laws. If any conflict arises in the relevant fields between the law of the home country and that of the host country, I believe that the law of the host country should prevail.

The Posting Directive also covers a number of matters which relate to the contractual aspects of the employment relationship. The matters concerned include wages, paid holidays and – to a lesser extent – equal treatment. The Posting Directive has adopted a regime for these matters which is the same as the regime for workplace-related matters. Exceptions to the rules regarding wages and holidays are allowed, however, where work covering less than a month is concerned, or for assembly and installation work not exceeding eight days. I do not think that the applicability of these provisions can be explained by invoking a regulatory gap, since the relevant provisions (may) also form part of the lex causae. It is the fact that the various labour law systems are not interchangeable from an economic perspective which have given these provisions the status of internationally mandatory rules. Application of the law of the actual workplace is more or less motivated by public policy factors.

In the Netherlands, the provisions on paid holidays are set out in the Dutch Civil Code and form part of the lex causae. Under the Dutch conflict of laws, this generally precludes those provisions from being treated as mandatory rules. The same holds true for the German conflict of laws. The BAG has repeatedly held, in so many words, that Articles 6 and 7 of the Rome Convention are mutually exclusive in terms of their application: an arrangement either belongs to the lex causae or is a mandatory rule. The Posting Directive hence breaks through the two-track nature of the Dutch and German conflict of laws where the contractual matters are concerned. The double role of the rules protecting the workers are, however, akin to the old system of lois de police under the French (and Belgian) conflict
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of laws. Like the old French conflict of laws, the Posting Directive resolves situations where rules from different legal systems apply simultaneously by using the “favourable treatment” principle.

The Posting Directive stipulates that a number of arrangements existing in the host country must be given effect towards posted workers. The mandatory application of rules on working hours and working conditions, in particular, prevents the workers concerned from having to face gaps in their legal protection. A gap of that kind will not only arise if none of the legal systems has regulated the employment relationship, but also when it is impossible or difficult to enforce the law which has been declared applicable. Enforcement of the rules covered by the Posting Directive is difficult because those rules are often mandatory in nature (in a conflict-of-laws sense). Enforcement of internationally mandatory rules outside the Member State which adopted those rules is generally problematic.

Under the Savigny model of private international law, the application of foreign law is generally justified by invoking the legitimate interests of the individuals involved in the international legal relationship. The application of foreign mandatory rules, on the other hand, is often regarded as an act of support, approving foreign policy objectives. Such application is not regarded as a task for the civil courts. Article 7(1) of the Rome Convention merely makes it possible, not obligatory, to apply foreign mandatory rules, but even that concession is not acceptable to some of the Member States. It appears from the study described in this book that the countries compared show relatively little reluctance as regards taking the law of the host country into account with regard to the manner of performance of the employment contract. Apart from Article 7(1) of the Rome Convention, Article 10(2) can also be used as a basis for doing so. The objections to applying these rules are not as severe, therefore, as the objections to the application of foreign mandatory rules in general. The Rome Convention does not, however, contain any obligation whatsoever to apply those rules.

This fact of the conflict of laws is particularly onerous as regards the mandatory rules of the actual workplace. The court having jurisdiction over the temporary place of work is not competent to hear labour disputes under the Brussels Convention. In order to safeguard the effective enforcement of mandatory rules of the temporary workplace, it was necessary to supplement the conflict of laws on this point, either with a rule conferring jurisdiction on the court of the temporary workplace or with rules obliging the courts in other countries to acknowledge the claim for application of those mandatory rules. The Dutch Act implementing the Directive contains both a jurisdiction rule and an explicit set of rules relating to the recognition in the Netherlands of the rights which a worker posted by a Dutch-based undertaking may derive from the implementation of the Posting Directive into the law of the host country. The text of the Posting Directive does not indicate clearly whether the Directive contains an obligation to recognise such foreign mandatory rules.
6.3 The Posting Directive and the Law Governing Collective Agreements

In most countries, the actual terms and conditions of employment are largely determined by the agreements made between employers and employees at the bargaining level. Both the protection of posted workers and competition between undertakings established in different countries are determined largely by the applicability of national collective agreements to international services. It is in this field that the legal and factual situations in the Member States are extremely divergent. The ensuing co-ordination problems have repeatedly given rise to proceedings before the European Court of Justice. All of the proceedings, without exception, have related to situations in which both countries involved in the provision of services regulated the cross-border employment relationship by means of legislation or collective agreements. Even when collective agreements exist, however, undesired gaps may affect the legal protection if none of the collective agreements concerned are applicable and/or enforceable.

The co-ordination of collective agreements is complicated by the huge differences between the national legal systems in the field of collective agreements. As a result, there are many situations in which the Rome Convention is not a relevant tool for the enforcement of obligations imposed by collective agreements. This book specifically focuses on the question of whether collective agreements can be regarded as law under the terms of Article 6 or 7 of the Rome Convention. This will be the case if the provisions of a collective agreement affect the individual employment contracts regardless of the parties’ intentions and if the employee can rely on the collective agreement in court. In order for a provision of a collective agreement to be applicable as an internationally mandatory rule, it must also form part of the national mandatory rules of law. There are a great many contracts which are termed collective agreements in Europe but which do not meet the relevant criteria. Sometimes they are not legally binding at all, or only the parties and their members are bound. In other cases, only the parties to the collective agreement may claim compliance with the collective agreement. And, again, in other situations, the collective agreement may constitute directory law only. In none of these cases does the Rome Convention offer an instrument with which the collective agreement in the host country can be made to apply to the employment relationships of posted workers.

This problem has been resolved in part through the enforcement system created by the Posting Directive. The Posting Directive refers to collective agreements which have been declared universally applicable and which govern the industries described in the Annex to the Directive. Article 3(8) defines the term ‘collective agreements which have been declared universally applicable’ and/or similar regulatory instruments. In view of the equality-of-treatment principle, only instruments which are equally binding on domestic and foreign undertakings will fall under the definition. The rules must also be mandatory in nature, albeit that they need not be enforced by or on behalf of the individual workers or be based on the law of contract. This opens the door to bringing publicly or collectively enforced rules under the umbrella of the Directive. This aspect of the Posting Directive is not relevant to Dutch legal practice, however. What is relevant is the impact which the
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Directive has on the international scope of collective agreements which have been declared universally applicable, and the manner in which that scope is defined.

The law governing collective agreements in the countries compared shows that the scope of collective agreements is, in principle, defined by the parties to the agreement. They decide not only which geographical area will be ruled by the collective agreement, but they also directly influence the question as to what must be located in the territory defined. A declaration that the collective agreement will be universally applicable may limit, but never extend the scope of a collective agreement. If an extension is possible at all, it will be based on an entirely different statutory arrangement. In the three countries compared, the scope defined in the collective agreement will affect the application of the agreement in international cases, but that influence is not exclusive in either France or Germany. Only in the Netherlands is the question as to which law applies to the employment contract completely irrelevant to the application of the Dutch collective agreement. Provisions which have been declared universally applicable are treated as mandatory rules in the Netherlands, and the Posting Directive does not change this.

In customary Dutch practice, the scope rule of collective agreements is largely left to the “social partners”. The Netherlands have developed the customary rule of also including a scope rule for conflict-of-law purposes in collective agreements. Collective agreements in the building and construction industry have traditionally adopted provisions which have meaning only after the collective agreements are declared to be universally applicable. In the past, when drafting the scope rules, the “social partners” made their own weighing of interests to decide whether it was appropriate to apply the collective agreement to posted workers. The weighing process took place in the light of the interests underlying the system for declaring collective agreements to be universally applicable. A weighing of this kind has now been ruled out for the building and construction industry, as the Posting Directive has defined the international aspect of the scope of the collective agreements in this industry by way of a mandatory rule. All activities within the geographical area covered by a collective agreement must fall within the scope of the collective agreement. Exceptions to this rule are allowed only in situations where the Directive expressly so permits and all of this, of course, within the boundaries of primary EU legislation.

Strictly speaking, the Posting Directive does not extend the scope of national collective agreements, but the parties to the collective agreements have lost their say in determining the connecting factors to be used in their scope rule. As a result, the collective agreement may become applicable in situations not intended by the parties. The question of whether such application is necessary with a view to the interests to be served by a declaration of universal application has also become irrelevant. These two points constitute a clear break with customary practice in the field of collective agreements. The Transnational Work (Terms and Conditions of Employment) Act, which is the law implementing the Posting Directive in the Netherlands, therefore correctly includes the provision concerning the territorial scope of collective agreements in the building and construction industry directly in the Act on the Universal Application of Collective Agreements.
National law and national collective agreements must be applied with due regard to the case law developed in the field of the free movement of services. If application leads to an impediment to the freedom to provide services, national law may be given effect only if a number of conditions have been met. One of these conditions is that the employee must be confronted with a situation where he does not enjoy equal protection under the law or the collective agreement of the home country. Therefore, the law of the host country applies conditionally. It may be enforceable with regard to the one employee and be unenforceable towards the other, depending on the situation in the home country.

Violations of the free movement of services could be avoided in the past by not applying the national collective agreements to foreign undertakings and their posted workers. This solution has been blocked by the Posting Directive, as it obliges the host country to offer posted workers from another country the protection which exists under its domestic law, including the collective agreements which have been declared universally applicable. This means that the Posting Directive causes a conflict of obligations, particularly with regard to the wage-related provisions of collective agreements. I expect that the European Court of Justice will have to be addressed a number of times before this conflict is resolved. I would like to refer to two of the problems that may arise from the application of collective agreements in transnational cases.

The first problem, much discussed but not yet resolved, concerns the level at which the review of equality must take place. National collective agreements appear in many shapes whilst still offering similar protection. This problem can be illustrated by means of the so-called “cafeteria model”, an emerging type of collective agreement in the national law governing collective agreements. Under that model, the collective agreement provides for a number of options: the composition of the package of employment conditions may vary per employee, but the overall level of protection offered by the different packages is equivalent. If a collective agreement under the cafeteria model is to be compared to another collective agreement, it will not suffice – or be useful – to simply compare the end-of-year bonuses or the number of paid holidays. The review must concern the entire package, in which wages can to a certain extent be exchanged for time off.

A review at this general level is also advocated when collective agreements from different countries are to be compared. A study of collective agreements in the building industries of Belgium and the Netherlands has shown that the agreements concerned offer divergent forms of protection, but that they offer comparable levels of protection if they are looked at as a whole. This was sufficient reason for the employer and employee organisations of the two countries to include a system of mutual recognition in their national collective agreements. Where transnational work is concerned, the collective agreement which applies in principle is that of the home country. In his Opinion in the Arblade case (judgment of 23 November 1999), Advocate-General Dámaso Ruiz-Jarabo Colomer also advocated a general review of the level of protection. In so far as the choice for application of the host country’s collective agreement is connected with the fight against social dumping, an overall equivalence of the collective agreements will suffice anyway.
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A comparison of specific rules cannot be justified, therefore, by referring to the fight against social dumping, but such a comparison will result on a higher level of protection for the employees. In a model which puts the interests of the employees first, as is done in Article 6(1) of the Rome Convention, the comparison generally made is one between groups of provisions. The rules of one system protecting workers against loss of income in extreme weather conditions might then be combined with the remuneration for loyalty to the industry as provided for by the other system. The Court of Justice has thus far addressed this problem only in the context of the freedom to provide services, where the only relevant rules are those which form a restriction on the free movement of services. The provisions concerned usually consist of administrative obligations and virtually always of rules on funds. In cases in which the home country operates a scheme similar to the fund of the host country, the Court of Justice has always blocked the application of the law of the host country. The important factor has been whether the schemes applied by the two countries involved had identical objects and/or aims. It seems, therefore, that the Court applies a comparison of groups in order to answer the question of whether a specific scheme provides for a prohibited duplication. This does not mean that such a comparison must also be made for purposes of interpreting the Posting Directive, as that would imply that the arrangement agreed between the Belgian and Dutch parties to the respective collective agreements as concerns transnational work in the building industry would be in breach of the Posting Directive. I do not believe that this is the intention.

There is a complication which has not yet been given any attention by legal authors. This complication is caused by the relationship in domestic laws between industrial collective agreements which have been declared universally applicable and corporate collective agreements. Both in Germany and in the Netherlands, parties bound by a corporate collective agreement are not bound by industrial collective agreements which have been declared universally applicable; this arises either by operation of law or by way of a virtually automatic exemption. The level of protection guaranteed under corporate collective agreements is not reviewed. If equality is required with regard to foreign corporate collective agreements, this might lead to a more favourable treatment for domestic undertakings. Several options are conceivable to resolve the problem. One might say that a foreign company should also be granted the exemption if it is bound by a corporate collective agreement, regardless of the contents of that agreement. Even requirements as to the parties to the collective agreement, such as the requirement that the collective agreement must have been concluded by a recognised, independent trade union, may not be stricter for foreign undertakings than for our own, national undertakings. A “recognition” of foreign corporate collective agreements does not guarantee, however, that the posted workers will enjoy the same protection as the employees in the host country. Another solution would be for the foreign undertaking to guarantee only the lowest level of protection provided under the industrial or corporate collective agreements that apply within the industry. A third solution would be to change the domestic law on collective agreements and to subject corporate collective agreements concluded by undertakings in the host country to a substantive review as part of the exemption procedure. Whatever the final solution will be,
both the adherence to the collective agreement itself and the sanctions imposed on any violation of the collective agreement must be identical for both domestic and foreign employers (see Article 3(8) of the Directive).

7 Final Conclusion

There is a class of labour law rules which takes the actual workplace as a basis for its applicability in internal situations. The rules in question relate to such aspects as safety, working hours and related matters. It is in these areas that a process of harmonisation has taken place within the European Community. As a consequence, there is agreement at the European level about the minimum level of protection which the law must guarantee the employees in those areas. On the other hand, in international situations, a gap may arise as regards enforcing these rules: the court having jurisdiction over the temporary place of work cannot derive any competence in the principal action from the Brussels Convention, and enforcement by foreign courts will involve problems because of the mandatory nature of this type of rule. Gaps of this kind undermine the objective of the minimum European harmonisation. The Posting Directive and the Dutch Act implementing that Directive offer a solution to the problem. They contain a supplementary jurisdiction rule. From the perspective of the conflict of laws, the Dutch statutory provision about the application of foreign mandatory rules appears to be much more interesting. There is a connection, therefore, between the free movement principles, European harmonisation and the application of domestic or foreign mandatory rules. I believe that this connection should merit special attention in the future. The Posting Directive provides a valuable addition to the existing conflict of laws on this point.

This positive assessment does not apply to the entire Directive. The Posting Directive also subjects contractual aspects of the employment relationship to the law of the country where the temporary work is carried out and, hence, contains a clear anti-conflict-of-laws aspect. The Directive undermines the mutual co-ordination of the applicability of legal systems by taking the territorial effect of (parts of) the labour law as a point of departure. This aspect will be particularly problematic if the collective agreements also provide for such territorial scope. The Directive makes this obligatory for a number of industries listed in the Annex. Moreover, it is permissible under the Directive to extend the territorial scope at the national level to other matters and other industrial sectors. This anti-conflict-of-laws tendency has been partly reversed by the case law developed by the Court of Justice in respect of the freedom to provide services. In addition, the provision in Article 4 of the Directive about public disclosure and the exchange of information also contributes to simplifying the transnational provision of services.

How the balance will tip depends primarily on the developments in the years to come. Not only the Court of Justice's interpretation of the Posting Directive and the free movement of services are important in this respect, but attention will also have to be paid to
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developments in the national law governing collective agreements. The agreement made between the Dutch and Belgian employer and employee representatives has had a positive effect on the co-ordination of national collective agreements and has improved the dovetailing of the aspects of collective agreements, labour law and social security law in international cases. If the number of such agreements increases as a result of the Posting Directive, I believe that the ultimate effect of the Directive will be a positive one, both for the employees and for the international providers of services.