Changes of the law applicable to an international contract of employment

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This article is a study of private international law in an area undergoing substantial development, namely, labour law. By reference to a complex international convention, it aims to clarify the status of (international) contracts of employment and, more specifically, that of employees as subjects of (international) law in the light of judicial decisions from French courts and the European Court of Justice. Whether it is intended or imposed, a change of the law governing a contract has legal, social and economic implications. It is those implications that this article aims to establish and explain. The question of the law applicable to an international contract of employment has been extensively studied, but what happens when that law gets replaced by another has so far failed to attract commensurate attention. It is in fact somewhat intriguing that this issue has seldom been raised — outside of the case of employee relocation, of course — in spite of its obvious connection with the internationalization of employment relationships (Blanc-Jouvan, 1989, pp. 67 et seq.; Coursier, 1996a, 1993).¹

In private international law, the term “law” can have at least two different meanings. In a broad sense, it refers to the law of a state, e.g. the entire body of French legislation; in a narrow sense, it refers to specific legal rules, such as mandatory rules.² Many authors have indeed identified a distinction between judicial approaches to determining the applicability of a mandatory rule and conflict, i.e. the way in which rules of public policy should apply to any international contract performed in the territory of the state where they are in force in relation to the international rules of conflict of laws. However, some “accommodation is often necessary (between the two approaches), whether this occurs between the mandatory rules of contract and the law of the contract …” (Loussouarn and Bourel, 1993, pp. 119 et seq.). Throughout the

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¹ See also the ILO’s Migration for Employment Convention (Revised), 1949 (No. 97), whose ratification by France was registered on 29 March 1954.

² See Article 3 of the French Civil Code, on mandatory rules of public policy.
following discussion, the term “law” (applicable to the international contract of employment) will be understood in its broad sense, although it must be borne in mind that certain international situations can bring applicable law into conflict with specific rules of the *lex loci contractus*. To quote Philippe Coursier: “the parties to an employment relationship … cannot evade supervision by the labour inspectorate or police authorities of the place where the contract is performed by choosing to make it subject to foreign law” (Coursier, 1996b, No. 37). Thus, the combined application of the two types of legislation would not entail any legal change in an international contract of employment.

The term “international contract of employment” can also be defined in a number of different ways. The most obvious would be to define it as a contract concluded in one country and performed in another, irrespective of the nationality or legal domicile of the parties thereto. This makes the locus of performance the determinative feature of the contract. Although a body of jurisprudence does subscribe to this narrow conception, the latter cannot — it is argued here — stand in the way of a broader definition resting upon some other legal characteristic of the contract in question. The international nature of an agreement binding an employer and an employee can thus derive from nationality or domicile. In the absence of a formal definition of an international contract of employment, and given the continuing debate on this question, the broad definition will be assumed here.

According to the rules of conflict set forth in the Rome Convention of 19 June 1980 on the law applicable to contractual obligations (hereinafter referred to as the Rome Convention) (Gaudemet-Tallon, 1981, 1989; Lagarde, 1991), an international contract of employment is governed by “the law chosen by the parties.” Such provisions of private international law are underpinned by the principle of freedom of contract, although that freedom cannot

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3 “A mandatory rule applies locally and independently of the law applicable to the contract” (Lyon-Caen and Lyon-Caen, 1993).

4 See Hautefort and Girodroux, 1999, p. 351 (No. 739).

5 For example, “the nationality of the parties, their legal domicile, the place of conclusion or performance of the contract of employment, the court having jurisdiction over such disputes as may arise thereunder, etc.” (Coursier, 1996b, No. 3).

6 There is “no legal definition” of an international contract of employment but, on account of its “distinctiveness”, “it gives rise to a conflict of laws and potentially to a conflict of jurisdictions” and “its content is powerfully original” (Lyon-Caen and Lyon-Caen, 1993).


8 Article 3 of the Rome Convention. Unification of some choice-of-jurisdiction rules had already been provided for under an international convention that was largely drawn up within the framework of the conference on international private law of The Hague, namely the Convention of The Hague of 15 June 1955 on the law applicable to international sales of goods. Conflict of laws has indeed been a long-standing and constant concern of law makers.
be invoked to deprive an employee of such protection as may be afforded by mandatory provisions. In this sense, a contract of employment cannot be regarded as an ordinary business contract along the lines of today’s liberal thinking even though the Rome Convention does uphold such traditional mechanisms of private international law as referral or public policy exceptions.\(^9\) The role of the courts thus remains essential in interpreting the intention of the contracting parties.\(^10\)

In the absence of choice, “the contract shall be governed by the law of the country with which it is most closely connected”.\(^11\) Further clarification concerning individual contracts of employment is given in Article 6 of the Convention: the applicable law is that of the country in which the employee habitually carries out her/his work. Failing geographical stability, it is that of the country in which the place of business through which she/he was engaged is situated or the country with which “the contract is more closely connected”. These principles of determination have been incorporated into Swiss law, in Article 121 of the Federal Act on Private International Law.

A change of the law applicable to an international contract of employment implies that, while the contract continues in force, a new law replaces that which applied previously. The Rome Convention provides for such situations in its Articles 3(2) and 6(2)(a). The first of the relevant provisions centres on the intention of the parties. Accordingly, the latter “may at any time agree to subject the contract to a law other than that which previously governed it”. Similarly, the relocation of the employee by way of a non-temporary assignment to another country for the performance of her/his work may, in some cases, entail a change of the legislation applicable to the contract.

The subjective standard adopted in the Rome Convention thus gives overriding importance to free choice of jurisdiction. It allows the law applicable to an international contract of employment to change either by express agreement between the parties or by expatriation. In the light of the more objective approaches taken earlier, by primary reference (or reference of principle) to the locus of performance of the contract, such situations can indeed raise a problem in labour law. Besides, the master-servant relationship that binds an employee to an employer calls for increased judicial attention to the very question of the choice of a new law while the contract remains in force. Although the employer is, in practice, unlikely to abuse her/his position of strength — and despite affirmation of the principle of

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\(^9\) Rules of international private law providing for referral of a case to the competent foreign jurisdiction or justifying the application of a public policy provision of the \textit{lex fori}.

\(^10\) The Labour Chamber of France’s Court of Cassation has rejected the validity of arbitration clauses inserted in international contracts of employment subject to French or foreign law (Cass. soc., 16 February 1999, RPDS 1999, p. 276; note by Hédy Sellami). It does not matter here which law governs the contract. Although this point does not relate directly to the subject under discussion, it gives some idea of the scope of the constructive authority vested in the court having jurisdiction under private international labour law.

\(^11\) Article 4(1) of the Rome Convention.
freedom of contract — it is up to the court to ascertain that any such change of law has been freely accepted by the employee. One of the Rome Convention’s main contributions may thus consist in bringing the courts to reflect upon the full meaning of an amendment aimed solely at changing the law applicable to a contract.

The Convention, however, offers only marginal scope for applying the most favourable law and gives preference to rules of conflict based on the notion of proximity (Déprez, 1995, p. 323). In other words, its provisions could lead a court ruling on a dispute to apply a less favourable new law where the employee concerned has been permanently relocated.

These considerations highlight another aspect of the Convention. Given the importance this instrument attaches to contractual freedom of choice by requiring the courts to ascertain the intention of the parties, it also appears to embody concern over the need for objective standards — such as the place of work carried out in performance of the contract — in the interest of protecting the employee. This duality — not to say this paradox — is reflected in the judicial practice of interpreting the events that bring about a change of applicable law.

Consideration therefore needs to be given to the criteria used by the courts to determine the new law applicable to an international contract of employment in the event of the employee’s expatriation or of a change in the parties’ choice of law. Here, judicial reasoning consists first in accepting that there are circumstances that may lead to a change of law and, second, in making a determination of the new law applicable on the basis of the established rules of conflict. The main point is then to ascertain the implications of the bases of jurisdiction provided for in the Rome Convention and, where applicable, their respective advantages or dangers for labour law and, more specifically, for the employee, whose protection remains the prime concern of French legislation.

To quote Jean Déprez, “the stakes are high because of the disparities that exist between various national legislations which are unequal in their protection of workers’ rights” (Déprez, 1998, No. 2).

Why applicable law may change  

Whether it results from secondment to a subsidiary or to corporate headquarters or from the conclusion of a new contract of employment, an employee’s long-term relocation entails a change of law unless the parties to the contract have agreed to make it subject to some specified jurisdiction of their own choosing. In other words, a choice of law by the parties takes precedence over an “indirect” change of the law applicable to an international contract of employment. However, “the freedom of choice of the parties is not absolute, i.e. without safeguards”.  

New law specified by agreement between the parties

Intention must be freely expressed. The court will initially have to determine whether or not it was. A French court, for example, will thus consider the rules of the general law of contract, particularly as regards the validity of acceptance, in order to determine whether the choice of the contracting parties — especially that of the employee — was made freely and without legal defects. The parties are not expected to make their choice on the basis of knowledge of the content of the chosen national labour law, but merely to have genuinely consented to it. This is a crucial point because the choice of a particular legal system may lead the parties to submit their international contract of employment to rules less protective of their respective interests.

Two situations can arise in which the court may have to rule upon the specific question of the timing of a choice of law or amendment thereof. This brings into play what is known as the “temporal criterion” in the demonstration of intention. Where a new choice of law supersedes an earlier choice while the contract of employment continues in force, the court must determine the reason for that change or, in the absence of a legally valid choice, the basic law initially applicable to the contract.

It is difficult, however, to spell out any rules of interpretation since judicial decisions in this matter tend to proceed from subjective construction (Coursier, 1996b, pp. 49 et seq.).

Lastly, according to Article 3(2) of the Rome Convention, “any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties” (see also Tell, 1998).

Determination of a choice of law from construction of the parties’ agreement

Judicial consideration of the parties’ intention is not an innovation introduced by the Rome Convention. Interestingly, however, their freedom of choice can vary in scope depending on whether the court’s approach is based on case law or not.

Reference to the spirit of the Rome Convention affords opportunity to cite judicial decisions that drew on the principles of that instrument at a time when it was still not applicable. Authors have recognized this implicit reference to the 1980 rules of conflict.

The Rome Convention on the law applicable to contractual obligations is concerned with so-called weak parties, i.e. consumers and individual employees. Under Article 6(1) of the Convention, the choice of the parties is the primary determinant of the law applicable to an international contract of employment. Before upholding the lex loci executionis, the courts therefore need to establish whether the parties intended to make their contract subject to some other law of their own choosing.
This was the approach followed by France’s Court of Cassation in its ruling of 28 October 1997. According to the judgement on the facts of the case and the terms of the appeal to the Court of Cassation, “a combination of various circumstances offered grounds for connecting” the contract of employment to “France”. Although the parties had not expressly agreed on a choice of law, “circumstantial evidence of the parties’ demonstration of intention” — e.g. the place where the contract was concluded, the parties’ nationality, the country where performance of the contract was first undertaken, and the currency in which consideration was paid — enabled the Court to make a reasonable guess as to what the intention of the contracting parties had been. This ruling drew on the Convention indirectly and the Court was able, without disregard to positive law, to uphold legislation that was more favourable to the employee who had been dismissed prior to the expiry of a probationary period of three months. It should be pointed out that judicial construction of the parties’ choice of law is confined to consideration of such intention as they may have expressed at the time of the conclusion of the contract or demonstrated in the course of the performance of their contractual obligations. One could thus cite judicial decisions which, on the basis of choice-of-law principles, have upheld the application of legislation other than that specified in an international contract of employment.

An employment relationship can thus undergo a “change of nationality” if, in the course of its lifetime, it develops closer affinity with the law of a state other than that whose law is supposed to govern it. This is arguably the most distinctive feature of a contract of employment in relation to other types of agreement. Much more so than a business contract, an employment relationship regulates human relations. And such bonds differ according to the people involved, their behaviour and, on the point at issue, the extent of their connections with a given country. This is what justified tying the contract to its place of performance which, in most cases, connects with the way in which

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14 See the commentary on the decision cited in note 13.
15 The Court drew on the principles of the Rome Convention, although it was not applicable to the case in point because the contract of employment had been concluded prior to 1 April 1991, the date on which the Convention entered into force in France.
16 A three-month period of probation is standard for contracts of employment concluded under Moroccan law. According to French legislation, however, a probationary period cannot exceed such duration as may be necessary to test the employee’s abilities in the light of the relevant job and qualification requirements, hence the decision that a two-month period may be unduly long. Reference to professional practice takes on decisive importance in this respect (Cass. soc., 9 June 1988, Bull. Civ. V, No. 348; Cass. soc., 21 December 1977, Bull. Civ. V, No. 727). At the end of the period, the employment relationship becomes permanent and its severance subject to specific formal requirements (which do not apply during probation), hence the advantage for the employee of having the contract of employment governed by French law.
the primary obligation is discharged.\textsuperscript{18} The approach based on judicial precedent consists in determining the parties’ express or implied choice of law from the “circumstances of the case”\textsuperscript{19} in accordance with private international law. Where their intention can be deduced from circumstantial evidence within the framework of their employment relationship, the contract is made subject to the legislation of a given state in accordance with such constructive intention (Coursier, 1996b). To quote again from Yves Chauvy’s conclusions on the case cited in note 13 above, the “law” so determined “does not only pervade the very fabric of the contract’s provisions. It also reflects the circumstances of the contract.”

German legislation is more prescriptive in its approach to international employment relationships and, in particular, to the determination of applicable law. The criteria of applicability of German law or the law of the contract’s initial status — i.e. foreign law — are set out in the Act of 26 February 1996 on mandatory conditions of employment governing internationally provided services, which entered into force on 1 March 1996 (Brauch, 1998).\textsuperscript{20}

Change of applicable legislation resulting from a choice of law

The parties to a contract of employment may express a choice of law in the course of the performance of their contract, while it is already subject to an earlier choice of law or, in the absence of a choice-of-law clause, to some objective law (typically that of the place of performance of the contract). The main issues here are, first, whether the criteria considered in judicial scrutiny of the choice of law are the same as those applied in the more straightforward situations discussed above and, second, whether the contracting parties’ intention as reflected in the expression of a choice of law can, once it has been recognized, override the law that applied initially. Either way, the courts face a difficult task on account of the resulting dualism of applicable legislation. At any rate, a choice of law intended to replace applicable objective law warrants consideration only where the contractual nature of the parties’ intention is established with certainty, i.e. on the basis of a bilateral agreement between the employer and the employee in a binding relationship of subordination to her/him.

\textbf{Probative examination of a choice of law or of the parties’ common intention}

In Alexei Boikov \emph{c. Société Black Sea and Baltic General Insurance Company LTD et Société Ingosstrakh}, the employee’s relocation led to the conclusion of successive contracts, each of them exhibiting a different position on

\begin{itemize}
\item \textsuperscript{18} Because the mandatory rules of a state govern the performance of work carried out in its territory \textit{ipso facto}.
\item \textsuperscript{19} Article 3(1) of the Rome Convention. See, in particular, Cass. soc., 16 November 1993, Bull. Civ. V, No. 269.
\item \textsuperscript{20} On the position of Spain, see Retuerto Buades (1998).
\end{itemize}
applicable law. Since the terms of the latest contract in the sequence were insufficiently explicit, the court endeavoured to find adequate circumstantial evidence for determining the signatories’ intention.

The parties had probably intended to make their relationship subject to Russian law: they did not even bother to specify what they meant by “the legislation in force” because this must have seemed obvious to them. Indeed, the agreement was concluded in Moscow between two Russian nationals who, for many years, had been bound by a contract of employment subject to Russian law and containing nothing extraneous thereto.

The French court, however, did not go along with this interpretation and, in the absence of an express choice-of-law clause, upheld the application of the law of the country of performance, i.e. French law. To understand the reasoning of the Paris court, reference must be made to the parties’ first “English” contract which was devoid of any indication as to applicable law. In such cases, international law requires the court to make a subsidiary determination of jurisdiction. This requirement, coupled with the very object of the “Russian” contract of 1992, is what justified the court’s substantive ruling.

This judicial position, however, does not command jurisprudential unanimity because it offers no explanation as to “the grounds for ruling out consideration of the clauses set forth in the second” contract (Déprez, 1997, p. 239). But what makes the position particularly vulnerable to criticism under French law is that, within a group of companies, even where the controlling company relinquishes authority over an employee hired by one of its subsidiaries, it continues to be vicariously liable by operation of Article L 122-14-8 of the Labour Code (Despax, 1961; Synvet, 1979; Mercadal, 1989, p. 978). The implications of this statutory provision suggest that the employer’s obligations (Blanc-Jouvan, 1989, p. 73) ultimately rest upon the controlling company, which is bound “to re-employ” the employee within its own operations.

German law, with its rationale based on Aktiengesellschaft,

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22 See Alfred Jauffret: Droit commercial, 23rd edition (by Jacques Mestre), Paris, Librairie générale de droit et de jurisprudence, 1997, No. 521: “In the absence of a general legal definition, a group of companies can be understood as a number of separately incorporated companies, that are related to each other by various links, generally of a financial nature, on the basis of which one of them, known as the controlling company, exercises control over the entire group, thus providing some unity of economic decision-making”. On the difficulties arising on completion of an employee’s period of transfer and the means available to the controlling company for dismissing an employee, see Cass. soc., 30 March 1999, in Semaine sociale Lamy (Paris), 1999, No. 929, pp. 9-10; No. 948 (Supplement), p. 49; D. 1999, inf. rap., p. 122; see also Cass. soc., 18 May 1999, in Semaine sociale Lamy (Paris), 1999, No. 948 (Supplement), pp. 99-100, on the application of Article L 122-14-8 of the Labour Code.

23 The successive employers are often held jointly liable, which is what happened in the case in point. On the concepts of “international group of companies” and “close links”, see Jean Déprez: “Conflits de lois en matière de contrat de travail international”, in Expertises des systèmes d’information (Paris), 1 May 1998, No. 215, pp. 251-259, on Nelet c. Société Tecnol International; Compagnie Royal Air Maroc c. Jafal; Société BBCCI Overseas c. Imam.
offers a good example for understanding the concept of control within a group of companies (see Hopt, 1987).  

Commenting on the ruling discussed here, Bernard Saintourens points out that “where circumstantial evidence is set aside for failing to be sufficiently demonstrative of the common intention of the parties in making a choice of law, the counter-evidence must also firmly relate to the intention, albeit presumed, of the parties”.  

To sum up, it cannot be readily concluded that the Rome Convention and the rules of conflict it lays down are strictly applied by the French courts. Where the parties to an international contract of employment make a choice of law in the course of the performance of the contract, their choice must apparently be grounded in express intention (choice-of-law clause) and cannot be merely implied. In the face of a choice of law deemed indeterminate, the courts will resort to making a subsidiary determination of jurisdiction. At all events, the parties’ intention must be considered if the competent court is to be in a position to apply the law of a particular state and, per force, the *lex mercatoria*.

**A specific problem inherent in the employee’s subordinate status**

The issue that can arise here relates to the validity of the employee’s acceptance. Throughout the performance of a contract of employment, the employee is indeed in a binding relationship of legal subordination to the employer. Supervisory authority gives the employer power that is often disproportionate to that of the employee. It is in fact this contractual imbalance that accounts for the development of labour law. By framing and regulating the employment relationship, labour law aimed to ensure that each of the parties could discharge its obligations without interference. However, the party with the economic power also wields the decision-making power. For example, the courts recognize the employer’s determination of the place of work to be an illustration of this contractual relationship. Without going into the wider issues raised by substantive

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26 On the validity of the *lex mercatoria* relative to national law and international rules of conflict, see Paul Lagarde: “Approche critique de la *lex mercatoria*: Etudes offertes à Berthold Goldman”, Paris, Lited Droit, 1982, p. 125, sp. p. 143: “Besides, it should be noted that the flexibility of the rule of conflict of national laws on contract offers ample scope for the parties’ intention to prevail”.

27 Cass. soc., 12 May 1965 (3 rulings), JCPG 1965, IV, No. 86.

28 In a legal sense, however, the master-servant relationship cannot be equated with straightforward economic dependence (see Cass. crim., 29 January 1991, RJS 4/1991, No. 474). Two schools of jurisprudence have clashed over the rationale underlying the relationship of subordination; see Hautefort and Girodroux, 1999, pp. 1699 et seq. (No. 3802 et seq.).
amendments to a contract of employment,\textsuperscript{29} consideration must be given to the meaning of freedom of contract from the point of view of an employee who accepts a variation of the law applicable to her/his international contract.\textsuperscript{30} It is settled case law that total freedom for the employee to organize her/his own work stands in the way of the relationship of subordination.\textsuperscript{31}

The courts are sometimes in a position to verify the employee’s acceptance.\textsuperscript{32} Yet, given the extent of the employer’s powers, and despite affirmation of the principle of freedom of contract, the best they can do is to question quasi-systematically the so-called weak party’s acceptance of the employing company’s choice to make the contract of employment subject to new law which is less protective of the interests of the employee — even though the latter often gives unequivocal consent in return for particularly attractive conditions of employment.\textsuperscript{33} Indeed, since a change of applicable law constitutes a variation of the contract (a variation of the lex contractus), it is subject to acceptance by the employee. Should the latter decline to accept it, the employer would find it difficult to establish such real and serious cause as would be needed to justify termination of the employment relationship. Lastly, it should also be borne in mind that a change of law, unaccompanied by relocation, would not deprive the employee of the minimum standards of protection prescribed in the mandatory legal rules of the place where her/his work is habitually performed.

\textit{Non-temporary relocation of the employee at the employer’s initiative}

Article 6 of the Rome Convention — on subsidiary bases of jurisdiction — provides, in its subparagraph 2(a), for situations where the employee is “temporarily employed in another country”. This is without effect upon the law applicable to an international contract of employment, which remains either that of the country where the work was carried out previously or that determined by the parties’ own choice of law (Béraud, 1991).\textsuperscript{34} However, where “the effective centre of occupational activity” is permanently relocated,

\textsuperscript{29} On the scope of mobility clauses and their implications for the employee’s duty of subordination, see Cass. soc., 23 January 1996, RJS 8-9/1996, No. 907. Could this foreshadow a reversal of established case law?

\textsuperscript{30} Subordination “precludes independence or complete freedom, it entails elements of subjection” (Rep. trav. Dalloz, V: “Contrat de travail (existence — formation)”, No. 53). As pointed out by Paul Fieschi-Vivet: “the employer’s supervisory authority over the employee also extends to the latter’s career, which the employer manages in several respects, namely, discipline, hierarchy …” (quoted from “Les éléments constitutifs du contrat de travail”, RJS 7/1991, p. 417).


\textsuperscript{32} See note 21 above (Paris Court of Appeal, 7 June 1996).

\textsuperscript{33} Higher pay, bonuses and various benefits in kind are often packaged in with a variation of substantive terms of a contract of employment.

\textsuperscript{34} See the study by Jean Déprez (1998, No. 16), which presents the various options available to the employer which do not qualify as relocation.
it is the legislation of the new country of performance which should be applied.\textsuperscript{35} The employment relationship thus becomes the subject of a conflict — involving both locational and temporal dimensions — to which there is no general solution, but only ad hoc solutions (Rigaux, 1966; Batiffol, 1961, pp. 39 et seq.).\textsuperscript{36} From the point of view of French law, the peculiar nature of such situations is further strengthened because the French version of the international instrument makes reference to the concept of \textit{détachement} in connection with the employee being “temporarily employed in another country”. [Editor’s note: \textit{détachement} has generally been rendered as “relocation” in this translation.] As observed by a leading current of jurisprudence, this concept is as difficult to define as its scope is to determine.

The nature of relocation

According to Emmanuelle Moreau, whether relocation is temporary or lasting is a question that can be answered only post hoc, typically at the time when the dispute arises.\textsuperscript{37} It is then up to the courts to find evidence of a steady connection with the country of relocation in spite of the applicability of the law of the country of origin — i.e. the country where the company with which the employee has a legal relationship is headquartered.\textsuperscript{38} In the 1993 ruling cited here, the court did not apply the Rome Convention because the contract of employment had been concluded in 1971 and the employee relocated to Brazil in 1977. Nonetheless, it decided to uphold the law of the “country of performance of the contract of employment” at the time of its termination.

In a 1996 ruling, the Paris Court of Appeal considered the temporal dimension of employment in another country and ruled that periods of four or six years could not be considered temporary.\textsuperscript{39} This decision, however, does not lay down any rule as to the maximum duration beyond which such employment would automatically have to be considered lasting. Thus, “where subjection to national law is susceptible of variation over time” some “temporal consideration” (Mayer, 1998) is necessary but seldom sufficient.

This approach needs to be supplemented by consideration of the “psychological factor”. Indeed, a combination of circumstantial evidence suggesting no expectation of return would imply non-temporary relocation, i.e. expatriation (Rodière, 1988a, p. 9).\textsuperscript{40} But the employee’s frame of mind is always difficult to determine. Initially, it has to be deduced from the parties’ intention regarding application of the legislation of the country of relocation.

\textsuperscript{35} CJEC, 9 January 1997, JDI 1997, p. 635.
\textsuperscript{36} See “Conflit de lois dans le temps”, in Rép. intern. Dalloz, V, Nos. 68 et seq.
\textsuperscript{39} 18th Chamber, 8 October 1996, RJS 4/1997, No. 386.
\textsuperscript{40} Philippe Coursier: note on Cass. soc., 30 June 1993, JCPE 1993, tome II, 523, p. 313.
Then, this might possibly be confirmed in the light of such indications as the currency of remuneration or the nationality of the company effecting its payment. What makes this constructive exercise particularly important in the event of a dispute is that each party is bound to argue for the application of such legislation as best protects its interests. Establishing the employee’s expatriation thus amounts to restoring legal certainty following its impairment by the process of relocation and, more specifically, by transitional law.

The Belgian courts refer to “habitual performance of work”, a notion which appears in Article 5(1) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (hereinafter called the “Brussels Convention”). The Court of Justice of the European Communities has also elaborated upon that notion.

This is indeed one approach to defining the “place where the obligation grounding the plaintiff’s action was, or is to be, discharged”. According to Yves Chauvy, advocate-general of France’s Court of Cassation, the main determinant of the law applicable to a contract of employment is the “effective centre of occupational activity”.

Along similar lines, workers in stable and lasting employment in their country of relocation are required to provide the court with “objective locational particulars of the contract at the centre of gravity of the relationship” (Rodière, 1988b, p. 194). On the basis of such evidence as may be adduced, it is then up to the court to uphold the applicability of the original law or, where the evidence is irrefutable, the law of the country of non-temporary relocation where the work is performed. The Labour Chamber of France’s Court of Cassation has also made reference to the “stable” place of work carried out in performance of the contract.

As pointed out by Jean Déprez, it follows that “a relatively long stay abroad that cannot be construed in terms of temporary relocation is not necessarily a sign of expatriation (Moreau-Bourlès, 1986; Lyon-Caen, 1989), without any expectation of return, in a sense which would justify considering the employee to be exclusively subject to the law of the new country of em-

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41 See the abundant legal commentary on this point (Lyon-Caen, 1993, No. 22; Couturier, 1996; Mestre, 1991, p. 37).
43 Yves Chauvy : conclusions under Cass. soc., op. cit. (note 12).
45 Cass. soc., 10 December 1996, Bull. Civ. V, No. 429. By way of exception, the Supreme Court of Spain has reaffirmed that “the Workers’ Status Act provides that Spanish law is applicable to the contracts of Spanish workers employed by Spanish enterprises abroad if they were hired in Spain”. Spanish legislation thus uses the criterion of the place of recruitment, which is the second of the bases of subsidiary jurisdiction provided for in the Rome Convention in respect of employees who have no fixed place of work. It should be pointed out, however, that the Convention’s rules of conflict were not applicable at the time of the facts (Supreme Tribunal, 15 March 1991, in Repertorio de jurisprudencia Aranzadi, 1991, 1858).
employment” (Déprez, 1994). This author’s concern is that employees transferred to countries where “labour is cheap” might, for economic or financial reasons, be deprived of the protection they enjoyed in their country of origin. Indeed, a short-term transfer (two years), coming after 15 years of service in the country of origin, could be considered as non-temporary relocation where circumstantial evidence points to expatriation.46 The courts have demonstrated their intention to apply the Rome Convention strictly by upholding the rules of conflict, particularly that of the \textit{lex loci executionis}, i.e. the law of the place where the principal contractual obligation is discharged. This approach is not an isolated case in Community case law: for a number of years, the Court of Justice of the European Communities has favoured application of the law of the country where the employee carries out the obligation that characterizes her/his contract of employment, i.e. her/his work.47 For a time, the Court was intent upon breaking away from the De Bloos precedent and the principle of the independence of obligations.48 But the notion of “principal obligation” — i.e. the fundamental obligation undertaken by the employee — has since evolved; whereas the initial concern was to protect the employee by applying the law uniformly to the contract of employment in its entirety (Fouquet, 1995), it is now seen as a means of achieving international unification of domestic-law rules of conflict.

**Implications of relocation**

A change of the law applicable to a contract of employment gives rise to a conflict involving both locational and temporal dimensions because it changes the determinant of jurisdiction. Emmanuelle Moreau discusses this question in her commentary on the ruling of 30 June 1993 by the Labour Chamber of France’s Court of Cassation.49 Before relocation comes to be seen as lasting, there elapses a period during which the laws of two countries are supposed to be applicable, with the initial law governing the contract of employment up to the time of the transfer and the \textit{lex loci executionis} regulating the new employment relationship. The Rome Convention makes no provision for the resulting transitional situation, which can also arise out of the parties’ own choice of a new law.

Although the Rome Convention gives precedence to the intention of the parties in determining a change of the law applicable to an international contract of employment, a variation of the \textit{locus executionis} is not without effect. This is where the courts play a critical part in maintaining legal certainty by


48 CJEC, 6 October 1976, Case 14-76, \textit{A. De Bloos, SPRL v. Société en commandite par actions Bouyer}, ECR 1976, p. 1497. Thus, depending on whether the employee’s claim relates to, say, paid leave entitlements or prior notice, jurisdiction might differ.

upholding the parties’ choice of law or, failing that, the objective rule of conflict. Besides, provision is also made for flexible means of determining applicable law. These are based on the investigation of such “connections” as may exist between the contract itself and a given state and appear to be making inroads into the rigid system of conflict set up under the Rome Convention.

**Determination of the new law applicable to an international contract of employment**

Article 6(2) of the Rome Convention provides for a subsidiary basis of jurisdiction that could be termed “special”, namely, the place where the contract’s characteristic obligation is discharged. This basis can be disregarded, however, where the court makes a “general” subsidiary determination of jurisdiction in terms of Article 4, which stipulates that “the contract shall be governed by the law of the country with which it is most closely connected”. Some authors look upon this as a fall-back provision available to the courts for overruuling the application of objective law in favour of alternative legislation offering better protection to the employee. This admittedly appears to be the provision’s main point. Under Dutch law, which is particularly protective of employees, the criteria used in determining applicable law are the place where work is carried out and the nationality of the employer.50

**Strict application of the principles of the Rome Convention**

In private international law, the “laws of the case” — i.e. the national legislations that naturally come into conflict on account of their “objective and direct connection” with a contract51 — are referred to as subsidiary jurisdictions that may be upheld where the contracting parties fail to make a choice of law of their own.

The most appropriate way of presenting the judicial approach taken here may be to outline its advantages and disadvantages. But such a presentation would not be impartial for it tends to highlight the risks inherent in the system of conflict. These, in turn, stem from a long-standing and therefore firmly established position whereby the “centre of gravity” of a contract of employment is understood to be the place where it is performed. The contract is thus treated as an ordinary business contract involving financial or economic, but rarely human, interests.

**Legal certainty of the employment relationship**

Although the courts tend to favour the *lex loci executionis* as the body of law governing a contract of employment, the parties’ choice remains one of their main concerns. There have thus been cases in which the courts have

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50 *Dossiers internationaux Francis Lefebvre — Pays Bas* (Paris), Nos. 3115 et seq.
Changes of the law applicable to an international contract of employment

ruled in favour of the application of Article 6(2) of the Rome Convention while simultaneously recalling the primacy of the parties’ freedom of choice.

Certainty based on the lex loci executionis

In a 1976 judgement on the interpretation of the Brussels Convention, the Court of Justice of the European Communities had already reasoned in terms of “the contractual obligation forming the basis of the legal proceedings”. In the Tessili case, the litigation centred on an obligation of warranty and its payment. Some authors interpreted this ruling as a sign of the political will of Member States to unify their legislation on the law applicable to contracts, the obligation being deemed payable at the domicile of the obligor or at that of the obligee, depending on the legal system concerned.

In its De Bloos judgement, the Court noted the variety of “contractual obligations” that could serve as grounds for legal action. An employee might thus institute proceedings before several jurisdictions according to what those obligations were. Confronted with this so-called independence of obligations, the Court has since favoured submission of the entire contract of employment to a single jurisdiction, i.e. that of the place where it is performed which can very well match that chosen by the parties.

These developments reflect the long-standing wish of judges, practitioners and governments to establish uniform international rules of conflict, legitimated by judicial practice. The Rome Convention should thus be seen as part of a drive for unification both in terms of the contract itself — in that it rejects dispersion of the actions inherent in its performance — and in legislative terms, with the entry into force of rules of conflict of laws.

In the 1970s, long before the Rome Convention came into force, French jurisprudence had already recognized the advantage of determining applicable law by reference to the place where the contract is performed. As pointed out at the time by Jean Audinet, this was “the simplest, most logical and


53 See the Court’s judgement on Case 133/81, Roger Ivenel v. Helmut Schwab, ECR 1982, p. 1891; see also that of 28 September 1999 on Case C-440-97, GIE Groupe Concorde and Others v. The Master of the vessel “Suhadiwarno Panjan” and Others, ECR 1999, p. I-6307: “On a proper construction of Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters … the place of performance of the obligation, within the meaning of that provision, is to be determined in accordance with the law governing the obligation in question according to the conflict rules of the court seized”.


55 See, for example, Cass. com., 9 November 1959, D. 1960 somm., p. 99, upholding a judgement to the effect that “the contract of employment must, as a matter of principle, be governed by the law of the place where it is performed”. 

effective solution”, making it unnecessary to “dissect the contract” (Audinet, 1976, No. 15 and No. 65).56

Such thinking implies that performance of a contract of employment in Paris makes it subject to French law.57 In its ratio decidendi for a 1997 judgment, the Court of Cassation explained that “French law applies to a contract of employment which was, at the time of its conclusion and in the absence of any extraneous element, governed by foreign law if, at the time of termination of the said contract, the employee was carrying out her/his work in France”.58 Even though the only consequence of lasting relocation — during performance of the contract — is the employee’s physical transfer to another country, this makes the contract of employment international and entails ipso facto a change of applicable law. It matters not whether the parties continue to think themselves subject to the lex contractus if they have not explicitly stated this. The Labour Chamber of the Court of Cassation made a similar ruling the following month.59 In this case the Court took no account of the various circumstances invoked by the defendant to challenge its finding, including the fact that remuneration was paid in United States dollars.

These decisions are not directly grounded in the Rome Convention, but the principles underlying its rules of conflict arguably underlie judicial reasoning as well.60

Certainty requiring priority consideration of the intention of the parties

Legal certainty is a right of each and every citizen. Its purpose is to secure the predictability of the legal process of a relationship.61 Each party can thus anticipate developments and uphold her/his rights. Where an international contract of employment specifies the law applicable to the relationship it establishes, it is up to the courts to ascertain that the law thus specified truly accords with the intention of the parties or with whatever their intention may have become at the time of relocation. It is therefore disappointing to observe that the courts sometimes recall the parties’ choice as they would some

56 Pierre Mayer (1998) speaks of “fragmentation of the dispute”.
59 Cass. soc., 13 January 1998, RJS 4/1998, No. 427: “the contract was governed by French law, being the law of the country where the contract was performed”.
61 To quote Gérard Couturier (1991): “To contract is to anticipate”.
citation of principle, without giving any real explanation of their grounds for doing so.\textsuperscript{62}

At all events, judgements typically open with a reminder of the precedence accorded to consent jurisdiction: “In the absence of an explicit and unequivocal choice by the parties of the law applicable to their contractual relations, the contract is governed by the law of the place where it is habitually performed”.\textsuperscript{63}

Judicial form requires that the absence of a choice of law should be consistently noted.\textsuperscript{64} In principle, recognition of a valid choice of law — be it explicit or implicit — rules out consideration of any subsidiary basis of jurisdiction.\textsuperscript{65}

As in the case just cited, the law chosen by the parties may also happen to be that of the place where the work is being carried out in performance of the contract. Here, the Rome Convention did not introduce any significant change in the rules of conflict, though it did have the effect of reversing judicial reasoning. Indeed, instead of giving precedence to the place of performance except where the parties have chosen a law more favourable to the employee, the courts now make a subjective determination in which the \textit{lex loci executionis} is seen as a subsidiary option. Although both approaches lead to the same outcome, it is tempting to ponder the effects of those of the Convention’s provisions which might induce a court to uphold a rule of conflict favouring recognition of the parties’ choice of law specifically on the basis of verification that each of the parties fully subscribes to the change of law applicable to their international contract of employment. The need to take account of the employee’s subordinate status and its effect on acceptance might then become one of the concerns of the court in determining the new law.

\textbf{Determination of a law that may go against the employee’s interests}

In 1976, French jurisprudence recognized the inadequacy of objective law in the light of specific cases that failed to be settled satisfactorily, such as

\textsuperscript{62} See Paris Court of Appeal, 18th Chamber, 7 June 1996, note by Jean Déprez: RJS 4/1997, p. 239.

\textsuperscript{63} See Paris Court of Appeal, 18th Chamber, section D, 8 October 1996, RJS 4/1997, No. 386.

\textsuperscript{64} Cass. soc., 17 December 1997, RJS 2/1998, No. 150: “... whereas the parties had not, at the time of the employee’s transfer to France, chosen the law applicable to this contract ...”. Along the same lines: “having established that the parties to a contract of employment concluded between an employee of Bangladeshi nationality and a company based in Luxembourg had not specified the law applicable ...” (Cass. soc., 13 January 1998, RJS 4/1998, No. 427).

\textsuperscript{65} Lyon, Labour Chamber, 14 November 1994, Juris-Data No. 053873: “The employee’s dismissal for misconduct is subject to the foreign law of Gabon, being the place of performance of the contract of employment concluded between this French employee and a French company, which provided for his transfer to its African subsidiaries, because a clause of the contract stipulated that, in order to take account of the particular legislation of each State, the legal rules in force at the employee’s duty station should apply and because Gabon was the place where the contract of employment was being performed at the time it was terminated”.

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62 See Paris Court of Appeal, 18th Chamber, 7 June 1996, note by Jean Déprez: RJS 4/1997, p. 239.

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“that of an employee temporarily relocated abroad, that of an employee transferred by the enterprise employing her/him ... or that ... whose work involves constant travel” (Audinet, 1976, No. 66).66

Even though the 1980 Rome Convention appears to address these reservations in its Article 6, the rules it lays down can lead the courts to uphold the application of legislation that is less favourable to the employee. This is what happened in the case cited above, wherein the law of Gabon was ruled applicable.67 Though this was effectively the jurisdiction chosen by the parties, there are grounds for doubting its unreserved acceptance by the employee, who thereby forfeited the protection of French law. The Court’s reasoning would, in the absence of the parties’ choice of that law, have led to the same conclusion upholding the legislation of the place of performance.

Relocation entails a change of law. This turns the discussion to an issue that has so far received little attention, namely, Article 4 of the Rome Convention. According to this provision, “the contract shall be governed by the law of the country with which it is most closely connected”. Similar wording appears in Article 6(2) which provides for the possibility that the contract may be “more closely connected with another country” than that where the employee was recruited or habitually works. Given the current judicial position, the application of this provision could have the effect of avoiding changes of law altogether. The drafters of the Convention deserve to be commended, however, for providing the courts with this means of determining a law better suited to the spirit of a contract of employment.68

The law with which the international contract of employment is “most closely connected”

By seeking to establish such connections, which are often inherent in the employee’s expatriation,69 the courts may ultimately be in a position to uphold the applicability of a law that is more protective of the employee’s interests.

66 Jean Déprez reiterated this criticism in 1990 in “La loi applicable au contrat de travail dans les relations internationales”, RJS 3/1990, p. 119, sp. p. 124: “Even in the absence of material obstacles, its application may be conducive to unfavourable outcomes for the employee, including changes of questionable justification in her/his initial status, especially in the event of relocation”.


68 See, in particular, Antoine Kasiss: “Le nouveau droit européen des contrats internationaux”, Paris, Librairie générale de droit et de jurisprudence, 1993, pp. 342 et seq.: “On careful consideration, one wonders whether apparent adherence to the principle of proximity might not conceal an ulterior aim, namely, not the establishment of the closest possible connection but protection of the employee”.

69 The connections may be maintained, strengthened or simply become apparent as a result of relocation.
Determination of the “proper law”

Elaborating on the wording of the Rome Convention, the advocate general of France’s Court of Cassation has referred to “indications of intention to contract”, from which the “close connections” between the contract of employment and the law of a given country may be established. Though the relevant legislation often turns out to be that of the country where the contract is performed, it can also be the lex contractus or that of a state with which the contract continues to entertain a special relationship. For example, connections may be traced through continued subordination to a controlling company or the payment of wages or various allowances.

One author speaks of “proximity connections” being maintained with the country of origin even though the work may no longer be carried out there (Déprez, 1995, 1991). Where this occurs, on account of the constancy of the “umbilical link”, the dispute can be properly settled accordingly. A court can therefore no longer uphold the lex loci executionis without having first verified whether or not a closer connection with another country may have survived. Such was the interpretation offered by Jean Déprez in 1995 on the implications of the relevant provision of the Rome Convention. However, he regrets that “the criterion of the location where the work is carried out [which] is highly attractive, does not make it any easier to determine the contract’s submission to another law on the basis of Article 6(2) in fine of the Rome Convention” (Déprez, 1997, p. 241).

Towards application of the law most favourable to the employee

Interestingly enough, a number of recent rulings have favoured strict application of Article 6(1) of the Rome Convention by upholding “the mandatory rules of the law which would be applicable … in the absence of choice”. This, of course, refers to legislation that protects the employee. On this point, the terms of the Convention are abundantly clear.

This is the first of the options that the Rome Convention gives the courts for protecting the interests of the employee even though she/he may not be subject to the law — in the broad sense — of the state concerned. Indeed, Article 7 of the Convention recalls the applicability of “the mandatory rules of the law of another country with which the situation has a close connection” and those of “the law of the forum” that also govern the contract “irrespective of the law otherwise applicable”. The application of mandatory rules entails no legal change in an international contract of employment. For example, the provisions of Luxembourg’s law on statutory conditions of employment have

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been considered mandatory.\textsuperscript{72} As Philippe Coursier points out, “the question of the law of the contract is independent from that of the application of mandatory rules” (Coursier, 1996b, No. 36). In other words, the different types of regulation need to be distinguished and their application confined to their respective spheres in accordance with the legislator’s original intention.\textsuperscript{73}

By determining as “the proper law” the law with which the contract of employment is closely connected, applicable law can be matched to the new circumstances of an expatriate employee. Thus, where relocation entails a change of the law applicable to a contract of employment, it may — against every expectation, since the point is to implement a flexible procedure for determination, be it objective or subjective — lead to the application of new law other than that of the country where the performance characteristic of the contract is effected. It has been argued, however, that the mere fact of upholding mandatory rules suffices to provide the employee with adequate protection.\textsuperscript{74}

Jurisprudential authorities have long taken a critical view of the effects of subsidiary determinations of jurisdiction. The 1998 case, in which the Rome Convention was not applicable to the facts, offers a good example of the risks inherent in strict application of the rules of conflict, which can lead to extreme judicial severity that is not always fully understood. Thus, “the provisions of Article L 122-14-8 of the [French] Labour Code concerning repatriation and severance pay” were ruled inapplicable to an employee recruited by a French company and subsequently hired by a Gabonese subsidiary.\textsuperscript{75} Seen as a substantive rule of international private law, this article — which was eminently protective of the worker dismissed by the subsidiary — appears to have been severely restricted in scope.\textsuperscript{76}

 Nonetheless, although their objectives may be similar — i.e. protection of the employee — the proposed legal approaches are often at variance with one another. For example, Vincent Heuzé was in favour of “the law of minimum protection”, often that of the place of performance, as a way of demonstrating his dislike for freedom of choice by the parties (Heuzé, 1998).

In the circumstances, it may be helpful to end this discussion with an observation by Yves Chauvy who argues that “chosen law and the law of the country of performance alternate according to the attitude of the parties, but not in complete freedom because of the operation of mandatory legal standards, while the notion of close connections gives the courts discretionary powers with which to counter rigid bases of jurisdiction: concern with the
Changes of the law applicable to an international contract of employment

355

protection of employees is thus in the process of distinguishing a special law of contracts of employment from the general law of contract”.

Concluding remark

Determination of the law applicable to an international contract of employment confronts the courts with a difficult task. When it comes to establishing a change of law, its causes and its consequences, the safest way out is to apply the prescriptions of the Rome Convention strictly. Where a choice of law can be established with certainty, its application is to be upheld, failing which the formerly applicable law must give way to the lex loci executionis.

References


Despax, Michel. 1961. “Groupe de sociétés et contrat de travail”, in Droit social (Paris), No. 12 (Dec.), pp. 596 et seq.


### Appendix

**Liste of abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>Cass. com.</td>
<td>Commercial Chamber of the Court of Cassation</td>
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<td>Cass. crim.</td>
<td>Criminal Chamber of the Court of Cassation</td>
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<tr>
<td>Cass. soc.</td>
<td>Labour Chamber of the Court of Cassation</td>
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<tr>
<td>CJEC</td>
<td>Court of Justice of the European Communities</td>
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<tr>
<td>D. [year]</td>
<td>Recueil Dalloz-Sirey</td>
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Changes of the law applicable to an international contract of employment

ECR  European Court Reports (Luxembourg, Office for Official Publications of the European Community)
JCPE  Juris-classeur périodique, édition Entreprise (Paris, Editions Juris-classeur)
JCPG  Juris-classeur périodique, édition générale (Paris, Editions Juris-classeur)
JDI  Journal du droit international (Paris, Marchal et Godde)
OJEC  Official Journal of the European Communities (Luxembourg, Office for Official Publications of the European Communities)
Juris-Data  Editions du Juris-classeur database
Rép. intern. Dalloz  Répertoire droit international, Dalloz (Paris, Editions Dalloz)
RCDIP  Revue critique de droit international privé (Paris, Editions Sirey)
RJS  Revue de jurisprudence sociale (Paris, Editions Francis Lefebvre)
RPDS  Revue pratique de droit social (Paris, La vie ouvrière)