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by

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ABSTRACT

In the first months of the year 2002 two important events affected the life of the European citizens: the introduction of the new currency and the entry into force of Council Regulation 44/2001/EC on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. The new legal instrument replaced and amended the well known 1968 Brussels Convention.

The Regulation deals not only with international jurisdiction, but also with mutual recognition and enforcement of judgements between the Member States. In one word, it grants an additional freedom: the free movement of judgements within the Member States of the Community.

It is also a very good example of the judicial activism of the Court of Justice of the European Communities. The Court, in fact, played a very important role in the field, sometimes even by ruling *praeter legem*. That is the case, for example, of individual contracts of employment, for which the actual provisions of the Regulation can be considered as a consolidated version of the case law of the Court.

After a brief analysis of the legal basis of Regulation 44/2001, this paper focuses more specifically on the various rulings of the Court on individual contracts of employment. In the light of this analysis, the provisions of the new Community instrument are then examined; the purpose of it is to understand until which extent the outcome of the various decisions of the Court has been taken into account during the negotiations of the Regulation. In its decisions on the matter, in fact, the Court tried to grant special protection to employees, which considered as the weaker party of a contractual relationship.

Key words

Individual contracts of employment, international jurisdiction, place of habitual work.

INTRODUCTION.

1. The Europeanisation of Private International Law.

The Europeanisation of private international law is becoming an important factor in the European integration process. It is not only the object of academic studies, but also of legislative acts adopted by the competent Community institutions. Thus, not only conflict-of-laws lawyers, but also EC lawyers have to focus more and more on this new trend. The increasing impact of the EC legislation on civil and trade law, in fact, shows that conflict of laws rules (including international civil procedure) are more and more important within the creation of the internal market, and that the Member States do not retain any more exclusive competence in the field.

Amongst several examples, the Community trade mark Regulation[1], the so called Brussels II Regulation on jurisdiction, recognition and enforcement in matrimonial matters[2], the Regulation on insolvency proceedings[3] and the Regulation on service of process abroad[4] can be cited[5].

The competence of the Community over the specific area should not seem awkward; a *ius commune* on international conflict of laws does exist, and it is common to the Civil law and Common law countries. This conceptual framework has developed special features in Europe: it is strongly connected to the purposes of the Community, it is limited only to its Member States and competence is given to the Court of Justice in order to guarantee uniformity of interpretation[6].

Before the entry into force of the Treaty of Maastricht, international private law legislative initiatives at EC level were confined to Conventions based on article 220 of the EC Treaty (new article 293): on this legal basis, in fact, the 1968 Brussels Convention on jurisdiction and the recognition and enforcement of judgements[7] was adopted. It is considered by academics and practitioners as a very successful one, very frequently applied on a day-to-day basis by the

[1] Council Regulation (EC) 41/94, of December 20, 1993, on the Community Trade Mark.

[2] Council Regulation 1347/2000/EC, on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses.

[3] Council Regulation 1346/2000/EC, on Insolvency Proceedings.

[4] Council Regulation 1348/2000/EC, on the Service in the Member States of Judicial and Extra-judicial Documents in Civil and Commercial Matters, now repealed by Regulation 1393/2007/EC.

[5] See also Regulation 864/2007/EC on the law applicable to non-contractual obligations (Rome II), Regulation 805/2004/EC creating a European Enforcement Order for uncontested claims.

[6] *See* B. von HOFFMANN, "The European Community and Private International Law", *in* B. von HOFFMANN (ed.), *European Private International Law*, Nijmegen, Ars Aequi Libri, 1998, p.13, at 16.

[7] Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, for a consolidated text [1998] O.J. C27/1. Hereinafter 'the Brussels Convention' or 'the Convention'.

domestic courts of the Member States for international litigation within the European Community, and for which the case law of the Court of Justice (to which competence has been given in order to ensure a uniform interpretation of the instrument) plays a major role.

After the entry into force of the Treaty on the European Union, the cooperation in the fields of justice and home affairs was introduced in the so called Third Pillar of the Union's legal framework. Only after the entry into force of the Treaty of Amsterdam, some sectors of the cooperation were brought fully under the umbrella of the Treaty of Rome: Council Regulation 44/2001/EC on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters[8] can be considered as an example of an act adopted on that new legal basis.

Such an instrument is deemed to bring legal certainty in an area of "freedom, security and justice" within the European Union, and to eliminate several divergent choices of jurisdiction rules adopted by the Member States.

2. Structure of this paper and methodological approach.

2.1. Structure of this paper.

The purpose of this paper is to examine briefly the legal basis of the recent initiatives in the field of international jurisdiction replacing the Brussels Convention (Chapter I). In the main body of the text, the specific Section 5 on employment contracts of Regulation 44/2001/EC is analysed more in detail; this, in order to know such a new instrument of Community law and to assess the importance of the case law of the Court of Justice for the development of the legislative activity of the Council in the subject-matter (Chapters II-III). Chapter IV will consider other provisions of the Regulation concerning employment contracts. Finally, some conclusion will be drawn in order to indicate possible future developments of the object of this study.

2.2. Methodological approach.

Two methodological approaches could be applied for Chapter II-III. One approach could analyse Section 5 of the new Regulation on an article-by-article basis, and see how the provisions have

[8] Council Regulation 44/2001/EC of December 22, 2000 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, [2001] O.J. L12/1. Hereinafter 'the Brussels I Regulation' or 'the Regulation'

been influenced by the different rulings of the Court of Justice on contracts of employment. The opposite approach would be to analyse every ruling of the Court and to see how they affected the provisions of the Section.

The second approach has been preferred, for three reasons. From a practical point of view, it is easier to consider the various rulings and then to see how the new provisions include the solutions that were given for specific cases; the opposite method would be far more difficult and time consuming.

Secondly, the literature on the Regulation is nearly non existent[9]. The lack of help from the current literature leads me to opt for the simpler solution.

Finally, this approach demonstrates very well what the Regulation does *not* take into account, particularly the situations which have been left unsolved. Many situations are not foreseen by it; a wide range of solutions in the field would have been welcomed, not only by several commentators, but also by practitioners.

I. LEGAL BASIS OF THE REGULATION.

I.1. The proposal of a Council Convention under article K.3(2) *litt c)* of the Treaty on the European Union.

In December 1997, the Commission forwarded to the Council a Communication[10] containing the proposals for the amendment of the Brussels Convention. The legal basis of that act was article K.3(2) *litt. c)* of the Treaty on European Union, as it was before the entry into force of the Treaty of Amsterdam: it stated that the Member States had to adopt the new Convention on a formal proposal of the Council.

One of the intentions of the Commission was to further improve the free movement of judgements within the European Union. More precisely, the Commission wanted to "enable the citizen and

[9] On the Regulation, *see* F. MARONGIU BONAIUTI, "*Forum non Conveniens*. Facing the Prospective Hague Convention and EC Regulation on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters", (1999) 1 RDE 3, at p.37; C. KOHLER, "Interrogations sur les sources du droit international privé européen après Amsterdam", (1999) 1 RCDIP 1, at 24. More recently BRUNEAU, C., "Les règles européennes de compétence en matière civile et commerciale. Règl. Cons. CE n.44/2001, 22 déc.2000", (2001) *JCP, La Semaine juridique Ed. G* I 304; CROZE, H., "Aperçu rapide du Règlement (CE) n.44/2001 du Conseil du 22 décembre 2000 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en mathière civile et commerciale", (2001) *JCP, La Semanine Juridique Ed. E* 437.

[10] *Towards Greater Efficiency in Obtaining and Enforcing Judgements in the European Union*, E.C. Commission, COM(1997) 609 final, 97/0339 (CNS), subsequently in O.J. [1998] C33/3. The proposal for a new Convention is in [1998] O.J. C33/20.

firms to take full advantage of the rights conferred on them in the Union's area. The objective [was] indeed to ensure as globally as possible *a swift, efficient and inexpensive access to justice*"[11] (*emphasis added*).

It is important to consider the legal basis on which the Commission based its proposal, notwithstanding that the Preamble of Council Regulation 44/2001/EC provides the act with a different one.

One could say that article K.3 was not the most appropriate legal basis; the Convention proposed by the Commission, in fact, was an amended version of the 1968 Convention, which is based on article 220 of the Treaty of Rome (new article 293). The aim of the proposal was to provide a consolidation of the subsequent amendments and to introduce a better coordination with the Lugano Convention[12].

A modification of the previous legal basis can hardly be accepted. It should be noted, in fact, that article 293 excludes the possibility for the Member States to choose a different ground for the instruments enumerated in that article: "member States *shall* […] enter into negotiations with each other with a view to securing […] the simplification of formalities governing the reciprocal recognition and enforcement of judgements of courts or tribunals and of arbitration awards" (*emphasis added*).

Secondly, under the general principles of law, an act shall have the same legal basis as the one which it has to amend. Only the draft of a truly innovative act would allow the choice of a different legal basis. This is confirmed also by the various Accession Conventions, all based on article 220.

I.2. Legal basis of Council Regulation 44/2001/EC. Criticisms.

The entry into force of the Treaty of Amsterdam led the Member States to abandon the mentioned proposal of the Commission, and to comply with the rules of communitarisation of a wide range of subjects set out by the new Title IV (ex Title IIIa) of the EC Treaty, especially articles 61, 65 and 67.

[11] Communication, paragraph 2.

[12] Communication, I.1, p.10-12. For the Lugano Connvention between the EC and the EFTA Countries, Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, [1988] O.J. L319/9.

The Commission put forward a new proposal for a Council Regulation[13], on that new legal basis, which has to be criticised for at least three main reasons.

Firstly, article 293 still provides that Member States shall enter into negotiations with each other in order to secure "the simplification of formalities governing the reciprocal recognition and enforcement of judgements of courts or tribunals and of arbitration awards".

Secondly, article 61*(c)* states that, in order to establish an area of freedom, security and justice, the Council shall adopt measures in the field of judicial cooperation in civil matters, as provided for in article 65; the latter provides that

"Measures in the field of judicial cooperation in civil matters having cross border implications […] insofar as necessary to the proper functioning of the internal market, shall include:
(a) improving and simplifying:
- […]
- […]
- the recognition and enforcement of decisions in civil and commercial cases […];
(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and jurisdiction;

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in Member States."

Recital (1) of the Regulation recalls this provision by stating that, in order to establish "an area of freedom, security and justice, *in which the free movement of persons is ensured* […], the Community should adopt […] measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market." (*emphasis added*).

A closer look reveals that those provisions make reference to conflicts of jurisdiction, but also that the Community competence is limited only to matters related to the *free movement of persons* (*see* the heading of Title IV: Visas, asylum, immigration and other policies related to the free movement of persons).

The scope of the Brussels Regulation is much broader than the one of Title IV: it contributes to the good functioning of the internal market as a whole, and it has not been adopted only to facilitate the free movement of persons. As the Commission correctly observed, such an instrument "is indelibly linked to the whole Community process and is designed to complement the *liberties* provided for in the EC treaty with a more fluid system *for the circulation of judgements*."[14] (*emphasis added*).

It is hardly conceivable to relate the provisions on contracts, prorogation or exclusive jurisdiction, *lis pendens*, recognition and enforcement, etc., only to the free movement of persons. It is even

[13] *Proposal for a Council (EC) Regulation Concerning Jurisdiction and the Recognition and the Enforcement of Judgements in Civil and Commercial Matters*, E.C. Commission, 14.7.1999, COM(1999) 348 final, 99/0154 (CNS).

[14] Communication, Introduction, paragraph 2.

more true after a closer look to article 5(1) of the Regulation, a crucial provision which has been drastically amended, and whose scope refers also to contracts of sale of goods.

If any *effet utile* has to be given to the articles under exam of the EC Treaty, this is that the Member States agreed to transfer gradually certain sectors of the cooperation in civil and commercial matters under Community competence. It can be argued, in fact, that the material scope of articles 61 and 65 is limited only to measures related to persons, especially to family law[15].

A proposal to base the Regulation on article 95 of the Treaty of Rome[16] has also to be rejected, on the basis of a textual argument. Article 95(2), in fact, states that the provisions set in paragraph (1) of the same article do not apply to the free movement of persons, nor to the rights and interests of employed persons; certain provisions of the Regulation (at least Section 5 and 'Whereas'1 of the Preamble) would be out of the scope of the article.

I.3. Further criticisms.

A practical argument has also to be considered. The primary aims of judicial cooperation are the improvement, the simplification, the promotion of the compatibility of the rules on conflict of laws and jurisdiction, and the elimination of the obstacles to the proper functioning of the civil proceedings with cross border implications. The Regulation provides that continuity should be ensured with the Brussels Convention and as regards the interpretation of the Convention by the Court of Justice (Recital 5 and 19).

The possibility for United Kingdom and Ireland to opt-in Title IV[17], and the current opt-out of Denmark, which still relies on the Convention, do not ensure continuity, but coexistence[18] of a Community and an international instrument, over which there are still a number of reservations; thus, the territorial application of the Regulation is not likely to coincide wholly with that of the Convention (temporarily at least)[19]. And it does not guarantee simplification, but complexity

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[15] *See* J. BASEDOW, "The Communitarisation of the Conflict of Laws under the Treaty of Amsterdam", (2000) 3 CMLRev 687, at 707..

[16] J. BASEDOW, *supra*, p.707.

[17] Both States have declared at the Council Justice and Home Affairs on 12 March 1999 their intention to opt in. *See* Report on the Proposal, COM(1999) 348 final, *supra*, at p.5. *See* also F. MARONGIU BONAIUTI, *supra,* p.44.

[18] As it has already been said, under its article 76 the Regulation shall enter into force on 1 March 2002.

[19] *See* Recital n.9 of the Regulation: "a defendant domiciled in a Member State not bound by this Regulation must remain subject to the Brussels Convention". *See* Recital 21-22 and article 1(3) of the Regulation. *See* also F. MARONGIU BONAIUTI, *supra*, p.44.

(while Recital n.11 of the Preamble states that "[t]he rules on jurisdiction must be highly predictable").

The victims of this 'legislative labyrinth'[20] will be the economic actors of the internal market and the citizens, together with the Candidate Countries. For the latter, in fact, the Regulation has to be included in the *acquis* that they have to comply with, in order to become Members of the Union; furthermore, as a Community instrument, the Regulation will not require a ratification process[21].

Finally, the limitation of preliminary references under article 234 (ex 177) endangers the uniform application of the Regulation. Article 68 of the Treaty states that the Court of Justice shall decide on the interpretation of the provisions adopted under Title IV, only on the request of domestic courts against whose decisions there is no judicial remedy under national law. By doing so, neither uniformity of interpretation, nor "a swift, efficient and inexpensive access to justice"[22] can be ensured.

II. EMPLOYMENT CONTRACTS.

II.1. Scope of the analysis.

The wording of Council Regulation 44/2001/EC is the outcome of the influence of the jurisprudence of the Court of Justice over the Legislature (the Contracting Parties previously, the Council nowadays) in the field of international private law. The Regulation can be considered, so to speak, as a consolidated version of the case law of the Court and of the various amendments to the Convention in many fields (especially for *lis pendens* and exclusive jurisdiction).

Employment contracts have not been chosen randomly. Firstly, they are an essential element of one of the four fundamental freedoms provided by the EC Treaty. Secondly, even if they are not one of the fields where the Regulation is more innovative, they are a very good example of the judicial activism of the Court of Justice in the field of European private international law.

Section 5 of the Regulation, in fact, provides a very different perspective from the one which was taken into consideration in the first version of the Convention. The drafters of the 1968 Brussels Convention expressly avoided regulating these kind of contractual relations. During the

[20] C. KOHLER, *supra*, p.30.

[21] For the Brussels Convention, *see* article 63.

[22] Communication of the Commission, *supra*, paragraph 2.

negotiations, it was stated that a more complete set of rules could have been better achieved only after the adoption of an international instrument on substantive law[23].

The Court of Justice, ruling for the second time over a case on employment contracts under the Brussels Convention[24], gave article 5(1) a meaning which was not considered by the Contracting Parties, by referring to various criteria and to the characteristic obligation of the contract, instead of the one over which the parties litigate.

The case law evolved, sometimes even *praeter legem*. Eventually, the Contracting Parties endorsed the jurisprudence of the Court in Luxembourg in the 'parallel' Lugano Convention, and in the 1989 Accession Convention of the Kingdom of Spain and the Portuguese Republic to the Brussels Convention[25]. In the latter, which is more interesting for the scope of this paper, article 5(1) of the Convention was amended in full compliance with the will expressed by the Court in its rulings. Employment contracts now deserve the articles which constitute the whole Section 5 of the Regulation.

Paradoxically, one could even say that the Legislature (the Member States and nowadays the Council) and the Court inverted their roles. The Judges in Luxembourg have created the law and new principles; the Legislature interpreted their will by amending the Convention and by passing a new Regulation which merely endorses the case law of the Court.

Two examples can confirm this view. In *Custom Made v. Stawa*[26], the Court itself acknowledged that its interpretation of article 5(1) of the Convention had been taken into consideration by the mentioned Accession Convention of 26 May 1989; the special regime for employment contracts introduced by that agreement, in fact, had already been recognised by way of interpretation by the case law.

The Court recalled the influence of its case law also in *Rutten v. Cross Medical Ldt*[27]. After a long *excursus* on its previous decisions on employment contracts, it acknowledged that the explanatory Report to the San Sebastian Convention[28] took into account not only the interpretation given to

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[23] *See* Jenard Report, [1979] O.J. C 59/1, at 24. *See*, among many, E. KERCKHOVE, "Le contrat de travail exécuté dans plusieurs Etats membres de la Communauté", (1994) 3 *Droit Social* 309.

[24] Case 133/81, *Ivenel v. Schwab*, [1982] ECR 1891. The first dispute on employment contracts under the Brussels Convention is case 25/79, *Sanicentral GmbH v. Collin*, ECR [1979] 3423.

[25] [1989] O.J. L285/1, hereinafter also the 'San Sebastian Convention'.

[26] Case C-288/92, *Custom Made Commercial v. Stawa Metallbau Gmbh*, [1994] ECR I-2913, at paragraph 25.

[27] Case C-383/95, *Rutten v. Cross Medical Ltd*, [1997] ECR I-57, at 20.

[28] [1990] O.J. C189/1, at p. 35, 44 and 45.

article 5(1) in the *Ivenel*[29] and *Shenavai*[30] rulings, but also in *Six Constructions*[31], where the Court confirmed the need to afford proper protection to the employee.

According to the ruling given in the *Rutten* case, "the new wording of that provision following the entry into force of the San Sebastian Convention *was intended in fact to support the interpretation given by the Court* to that article in regard of contracts of employment"[32] (*emphasis added*). Bischoff comments that the Court, like "God saw every thing that he had made, and, behold, it was very good […]"[33], and had to be maintained unchanged.

II.2. The Court of Justice as a rule maker: *Ivenel v. Schwab*[34].

Employment contracts appear for the first time in the case law of the Court of Luxembourg in a dispute over the validity of a jurisdiction clause, inserted in a contract of employment between a French worker resident in France, and a German company which had engaged him to work in Germany[35]; but in *Ivenel v. Schwab* the Court opened its 'Pandora's box'[36] and overruled its previous case law on article 5(1) of the Convention, thus establishing new rules for employment contracts.

By a piece of judicial legislation, the Court excluded the application of the analytical approach established in the *De Bloos*[37] and *Tessili*[38] cases; the former ruling stated that, under article 5(1) of the Convention, the obligation which has to be taken into account in order to determine the competent *forum* is the obligation that constitutes the basis for the action. The latter, that the place of performance of that obligation must be determined by the rules of conflict of laws of the national court seized.

In the case under exam, a French sales representative brought his German principal before a French court, claiming for commission and compensation under various heads following the

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[29] *See Ivenel*, *supra*.

[30] Case 266/85, *Shenavai v. Kreischer*, [1987] ECR 239.

[31] Case 32/88, *Six Constructionss Ltd v. Humbert*, [1989] ECR 341.

[32] *Rutten*, *supra*, [1997] ECR at 21.

[33] Genesis I, 31, in J.-M. BISCHOFF, "Contrat de travail", (1997) 2 JDI 635, at 637 (quoted in French).

[34] *See Ivenel*, *supra*.

[35] *See Sanicentral*, *supra*.

[36] W.A. ALLWOOD, "Characteristic Performance and Labour Disputes under the Brussels Convention: Pandora's Box", (1987/88) 7 YEL 131.

[37] Case 14/76, *De Bloos v. Bouyer*, [1976] ECR 1479.

[38] Case 12/76, *Tessili v. Dunlop*, [1976] ECR 1473.

breach of a contract. The defendant objected that the place of performance of (at least most of) the obligations in question had to be in Germany, where the principal had his place of business.

The domestic court seized asked the Court of Justice whether the *De Bloos* and *Tessili* jurisprudence had to be applied in the case. The Court did not follow its previous jurisprudence on contractual relationships, and stroke out in a new direction; it ruled that the problem had to be examined in the light of the objectives and the general scheme of the Convention[39].

It firstly classified *proprio motu* the contract in question as a contract of employment, whereas the national court had classified it as a contract of representation, without any further specification. It stated that one of the aims of the Convention is to guarantee a close connecting factor between the national court seized and the dispute, in order to protect the defendant. It incorporated then the trends exhibited by the Rome Convention on the law applicable to contractual obligations[40] - which was still open for signature at that time and over which the Court had not, and has not, jurisdiction - into the framework of the Brussels Convention. Article 6 states that the law governing contracts of employment is the law of the country where the employee habitually carries out his work, unless it appears a closer connection with another country.

According to the reasoning of the Court, for contracts of employment the connecting factor between the court seized and the dispute is provided by the applicable law. The employee's substantive rights would be protected by the Rome Convention, but no special *régime* was granted as regard to jurisdiction. Therefore, the Court concluded that the aim of article 5 of the Brussels Convention is to assure a close connection between the cause of action and the court having jurisdiction[41]. It then referred expressly to the theory of "characteristic performance"[42], stating that in case of contracts of employment, that connection is based on the law applicable to the contract; that has to be determined by the obligation characterising the contract in question, which is *normally* the obligation to carry out work[43].

However, it is important to note that employment contracts are one of the cases where the doctrine of the characteristic performance does not apply; article 6 of the Rome Convention states, as a

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[39] *Ivenel*, *supra*, [1982] ECR at 10.

[40] Rome Convention, of October 9, 1980, [1980] O.J. L266/1.

[41] *Ivenel*, *supra*, [1982] ECR at 12.

[42] According to this theory, in absence of an express choice of law, the contract is governed by the law of the country with which it is most closely connected. It is presumed that the contract is most closely connected with the country *of the habitual residence* of the party who is to effect the performance which is characteristic of the contract (article 4(2) of the Rome Convention). The characteristic performance is "the performance for which the payment is due", *see* Giuliano-Lagarde Report on the Convention on the Law Applicable to Contractual Obligations, [1980] O.J. C282/1.

[43] *Ivenel*, *supra*, [1982] ECR at 15.

general rule, that contracts of employment are governed by the law of the place of work of the employee. This, in order to guarantee the application of the mandatory rules of the country where the employee works.

In order to support its arguments, the Court went a step further, stating that certain provisions of the Convention protect the weaker party of a contract (for example tenants, consumers or insured persons) by granting exclusive or alternative *fora*: such a protection had also to be guaranteed to employees, the party who from the socio-economic point of view can be considered as weaker in the contractual relation.

The Court ruled that, in cases of disputes arising from contracts of employment, the obligation to be taken into account in order to establish the competent court is the obligation which characterises the contract (and not the one over which the parties litigate)[44].

II.3. The importance of the ruling.

The judgement raises certain legal difficulties, even if the policy choice of the Court was certainly desirable. It grants special protection to employees, especially by avoiding that a national court which has to rule over several claims is not compelled to find that it has jurisdiction upon certain claims but not on others, as it could have happened in the case under exam. Such a situation would be even more undesirable in case of contracts of employment, where the domestic substantive law of the *forum* would contain special provisions protecting the worker[45].

The importance of the ruling has been recognised by the Court itself and by the Contracting Parties; the latter took into account the jurisprudence established by the Court in *Ivenel*, when amending the Brussels Convention on the occasion of the accession of Spain and Portugal to the EC.

Article 4 of that instrument, in fact, added a new sentence to article 5(1), which provides that, in matters relating to individual contracts of employment, the employer *or* the employee may be sued in the court of the place where the employee habitually carries out his work.

II.4. Section 5 of the Regulation. A first analysis.

[44] As it was stated for contracts in general in *De Bloos*, *supra*.

[45] *Ivenel*, *supra*, [1982] ECR at 18-19.

The influence of *Ivenel* has been very strong, since an entire Section of the Regulation is devoted to individual contracts of employment (Section 5, articles 18-21).

It is important to note that the application of the special provisions of the Regulation for employment contracts is compulsory, while the *forum* envisaged by article 5(1) of the Brussels Convention has to be considered as an alternative one. In fact, article 18 of the Regulation states that, in those matters, jurisdiction *shall* be determined by Section 5, without prejudice only to article 4 (defendants not domiciled in a Member State) and point 5 of article 5 (disputes arising out of the operations of a branch, agency or other establishment).

The rule established in *Ivenel* has been reproduced in article 19 of the Regulation, according to which an employer domiciled in a Member State may be sued "in the courts for the place where the employee habitually carries out his work". The same rule does not apply when the employer sues the worker. According to article 20(1), in fact, he is entitled to start a proceeding only before the courts of the Member State in which the employee is domiciled; the reason of this provision is that a concern of the Court and of the Member States is to grant protection to the employee, who is considered to be the weaker party of the contractual relation.

Thus, the entry into force of the Regulation is not in favour of employers: as the law stands now and according to the doctrine of the characteristic performance, in fact, both parties can sue the other one before the same court. Article 20 of the Regulation reduces the choice of the employer to only one *forum*, providing the aforementioned doctrine with a kind of 'unilateral' application.

II.5. The Court of Justice as a rule maker (2): *Shenavai v. Kreischer*[46].

When asked to rule over a dispute concerning the recovery of architect's fees for the preparation of plans for the construction of holiday homes in the Netherlands, a German court referred a preliminary ruling to the Court of Justice. It asked whether its international jurisdiction had to be determined by reference to the obligation which was at the basis of the proceedings or to the characteristic obligation of the contract. The Court confirmed the special *régime* of employment contracts, and justified it by saying that these contracts differ from others, since

"they create a *lasting bond* which brings the worker […] within the organisational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements. *It is on account of those particularities* that the court of the

[46] *See Shenavai*, *supra*.

place in which the characteristic obligation of such contracts is to be performed is considered best suited to resolving the disputes to which *one or more obligations* under such contracts may give rise."[47] (*emphasis added*).

The Court did not apply that special treatment, since it did not include the contract in question in the mentioned category. Far from being considered satisfactory, the ruling did not give any guidelines to the domestic court, in order to decide how contracts of employment have to be defined for the purposes of the Convention. One could ask why the Court adopted this attitude, by leaving such an 'open question'. In fact, there is no Community law definition of contracts of employment: that leads to apply in different ways article 5(1) (and the Regulation) for similar situations, according to the classification made by the domestic law applicable to the contractual relation in question.

One possible reason is that it was urgent for the Court to confirm the relevance of the characteristic performance for contracts of employment, even after the entry into force of the 1978 Accession Convention[48]. That instrument, in fact, amended article 5(1) of the Brussels Convention, by going in the opposite direction of the one taken by the Court for contracts of employment. It stated that jurisdiction could be given to the court of the place of performance *of the obligation in question* ("l'obligation qui sert de base à la demande", in the French version) [49].

III. POSTED WORKERS.

III.1. Jurisdiction rules for posted workers outside the territory of the Community.

The Court of Justice had to decide whether its jurisprudence on employment contracts could be applied also in cases where an employee was posted to several countries outside Community territory.

In a dispute over several claims, opposing a company having a branch and its registered office in Belgium, and a deputy project manager, the French Cour de Cassation referred two questions to the Court of Justice[50]. It asked whether the '*Ivenel* rules' had to be applied in the case, when the main proceedings were brought before the entry into force of the mentioned 1978 Convention.

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[47] *See Shenavai*, supra, at 16.

[48] 1978 Accession Convention of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, [1978] O.J. L304/1

[49] It has to be noted that the Accession Convention was not yet entered into force in the country where the litigation was started.

[50] *See Six Constructions*, *supra*.

The preliminary reference was made because the litigation was started in the country of the domicile of the plaintiff, and not in the country where the worker had carried out his work (as it should have been in the case, according to the ruling given in *Ivenel*). In its first question, the French court asked whether the characteristic performance had to be taken into account in order to determine "the place of performance of the obligation in question", when an employer with a registered office in a Member State posted his employee to several countries outside the Community territory. According to the jurisprudence of the Court, article 5(1) should have conferred jurisdiction upon the courts of none of the Contracting States.

In order to clarify its position, the Court confirmed its *Ivenel*[51] and *Shenavai*[52] rulings. It stated again that contracts of employment differ from other contracts by virtue of certain particularities, since the worker is brought "within the organisational framework of the business of the undertaking" and "[is] linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements"[53]. As regards to those contracts, therefore, the obligation to be taken into consideration is the one to carry out the agreed work.

The Court considered the 'parallel' Convention concluded in Lugano[54] and the Rome Convention[55]. Article 5(1) of the former states that, if the employee does not habitually carry out his work in any one country, the place of performance of the obligation is deemed to be the place of business through which he was engaged.

The Court did not apply this criterion because, as it was contested by the Italian Government and by the Commission, it establishes a *forum actoris* in all disputes where the employer is the plaintiff. While answering to the second question, the Court stated that the rules on special *fora* have to be interpreted restrictively and they could not be applied in that specific case, since

> "when a court finds that [in] claims made before it […] the employee's obligation to carry out the agreed work was and must be fulfilled outside the territory of the Contracting States, it has no choice but to conclude that the place provided for in article 5(1) of the Convention cannot serve as a basis for attributing jurisdiction to a court within that territory […]."[56]

The Court, therefore, ruled that in case of contract of employment, where the obligation of the worker to carry out the agreed work has to be performed in several countries outside the territory of the Contracting States, jurisdiction is determined only in accordance with article 2.

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[51] *See Ivenel*, *supra*.

[52] *See Shenavai*, *supra*.

[53] *See Six Constructions*, *supra*, [1989] ECR at 10.

[54] *Supra*.

[55] *Supra*.

[56] *Six Constructions*, *supra*, [1989] ECR at 19.

The Court did not take into account several criticisms made by scholars to the solution given in the *Ivenel* case, and confirmed its position even without applying it for that case. It is then quite astonishing to note how easy has been for the Court to confirm the rule of its established doctrine, and then to abandon it when the employee does not work habitually in any particular place outside the Community.

III.2. The relevant provisions of the Regulation.

It appears from a first read of Section 5 of the Regulation, that the drafters took into account the ruling given in *Six Constructions*[57].

Article 19 provides special rules of jurisdiction for litigation between an employer and an employee who does not habitually carry out his work in any one country. In cases where a worker sues his employer, the employee can choose between different *fora*: the proceedings can be brought before the court of the domicile of the defendant (article 19(1)), or before the court for the place where the business which engaged the employee is or *was* situated (article 19(2)*(b)*).

Also for such cases, when the employer is the plaintiff, the already mentioned rule applies; article 20(1) states that an employer may bring proceedings only in the courts of the State in which the employee is domiciled.

Some comments to those provisions have to be made. Firstly, those rules are applicable both in cases where the worker does not habitually carry out his work in any one country within and/or outside the territory of the Community, provided that the defendant is domiciled within the Community. In fact, the special rule provided in article 19(2)*(b)* regulates all the cases where the employee does not habitually carry out his work in any one country[58], without further specifying if those countries have to be part of the Community or not.

Needless to say that, if the defendant is not domiciled within the territory of the Community, article 4 of the Regulation applies (*see* article 18(1)).

Article 19(2)*(b)*, anyway, is not a special rule which excludes the application of the general rule of article 19(1) for the cases under exam: this comes out from the literal interpretation of the article and from the ruling given by the Court in *Six Constructions*. It also comes out from one of the

[57] *See* particularly article 19(2)*(b)* and article 20(1) (again) of the Regulation.

[58] The corresponding provision of the Rome Convention is article 6(2)*(b)*: "[…] a contract of employment shall, in the absence of choice of [law], be governed: […] if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated."

underlying ideas of the employment contracts *régime*, which is to avoid that mandatory rules and collective agreements applicable to the contract of employment are disregarded, when the worker is engaged in one country and posted in a different one.

The *fora* are then alternative: the worker may choose to sue the employer in the place which can be considered the more appropriate. He may also sue the employer in the courts for the place where the business which engaged him *was* situated, when such a business moved or ceased to exist[59].

III.2.1 A good solution?

It appears that, as a general rule, when the worker does not habitually carry out his work in any one country, both the worker and the employer can start to litigate before the court for the place where the defendant is domiciled (article 19(1) and 20(1)).

This can be considered as not being always a desirable solution, when the employee is the defendant and has never worked in the place of his domicile, particularly when he has never worked in any of the Member States. In these cases no favourable rules are granted to the worker, who should be allowed to litigate in front of a court which is as close as possible to a place which has a connection with the contract. Furthermore, under article 20(1), the employer shall bring proceedings *only* in the courts of the State in which the employee is domiciled. It happens then that a case shall be solved before a court which has no connection at all with the contractual relationship between the parties.

The fear of the creation of a *forum actoris* could also be contested for certain cases, like the situations similar to the one previously examined. It appears from a deeper analysis of the ruling in *Six Constructions*, that the worker was not wholly carrying out his work outside the Contracting States[60], but he was required to return periodically to Belgium to report to the company; he was thus performing a part of his job at least in one Contracting State[61]. The Court could have easily considered Belgium as one place where the characteristic obligation was performed.

Neither the Court nor the Regulation seem to have taken into account those kinds of situations. Under the reservations exposed *infra*, the possibility given to the employer to start a proceeding in

[59] The opportunity of the last part of the provision is far from being shared, since it is far from providing the litigation with a connecting factor with the *forum* seized.

[60] *Six Constructions*, *supra*, [1989] ECR at 11.

[61] *See* A. BRIGGS, "The Brussels Convention", (1989) 9 YEL 323, at 324.

the court for the place where the business which engaged the worker is situated, would have provided both parties with a closer court to the litigation and to the worker than the one provided by article 20(1). It would also have increased "the chance of the courts for the place where the worker [also] works having jurisdiction"[62].

Finally, the Regulation explicitly provides the worker with a wide choice of *fora*.

The choices provided by the Convention seem to be more favourable for the employer than for the worker. It is not very understandable why the worker would start a proceeding in the court for the place where the business which engaged him was situated, whereas this place could be very far from him and from the place where he has been working.

III.3. The alternative *forum* provided by article 19(2)*(b)*. Further criticisms.

The provisions of the Regulation stick to what has been ruled in *Six Constructions* and do not solve the problems that the decision left unsolved[63]. If the case under exam has been taken into consideration during the negotiations of the Regulation, as it seems to be the case, it is necessary to say that the drafters considered as a general rule what was established for a very specific case, where there were reasons for doubting whether the defendant was established in a Member State[64] and where the worker was not working only outside the borders of the Community[65].

The result is that, as the law stands now and after the entry into force of the Regulation, the competent *forum* for the cases where the worker does not habitually carry out his work in any one country can have no connection with the litigation, with the place of performance, and with the parties. The only way to disregard the provision under exam is either to apply the rules of article 19(1) and 19(2)*(a)*, or to depart from it by an agreement on jurisdiction, in compliance with article 21 of the Regulation.

Furthermore, by applying the *Ivenel* doctrine of the characteristic performance for cases where the worker does not habitually work in any one country, under article 19(2)*(b)* the characteristic

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[62] A. BRIGGS, *supra*, p.326 (in a more general context).

[63] For a critic of the ruling, *see* A. JEAMMAUD, "Rapport de travail international et compétence prud'homale", (1989) 11 *Droit Social* 729. At p. 734, the author says that "c'est bien la teneur de [l'arrêt *Six Constructions*] qui limite ses mérites et compromet son avenir".

[64] *Six Constructions*, *supra*, [1989] ECR at 3. This point was not considered by the Court, since in proceedings for a preliminary ruling the Court of Justice must rely, as regards to the facts of the proceedings, on the conclusions arrived at by the domestic court.

[65] The point was completely put aside and not considered by the Court: *see Six Constructions*, *supra*, [1989] ECR at 11 and 22. *See* also BRIGGS, *supra*.

obligation is deemed to be performed at the registered office of the company which engaged the worker, even if neither the employee nor the employer have been required under the contract to perform any obligation at that place[66]!

This provision is unfair and *non conveniens*. Even if this rule does not create a *forum actoris*, as it is the case of article 5(1) of the Lugano Convention, the solution is not even in accordance with the thirteenth Recital of the Regulation, which calls for rules of jurisdiction more protective and favourable to the interests of the worker than the general ones. It would be certainly difficult to propose a satisfactory and comprehensive solution; nevertheless, the Regulation could have taken into account a wider range of situations.

For instance, it could have distinguished between those employees who work outside the Community and those who partially or totally perform their activities in the territories of the Member States.

The solution proposed by Advocate General Tesauro in his opinion for *Six Construction*[67] could have been also taken into account. He recommended several ways which could have lead to the application of article 5(1) of the Convention and, only as a last resort, to the application of article 2.

The Advocate General considered the criticisms put forward by the commentators for the doctrine of the characteristic performance. He criticised the solution adopted for employment contracts, asking the Court to reconsider it. Complying with the doctrine would impede the application of article 5(1), every time the employee works outside the Community; it would deprive the plaintiff of the choice between the general rule of the *forum* of the domicile of the defendant and the special one provided in article 5(1).

The solution proposed by the Advocate General, and endorsed by the author, is to use a gradual approach, in order to distinguish different situations and to see until where it is possible to apply the rules which are in conformity with the spirit and the objectives of the Convention (and, in a few months time, of the Regulation).

It is useful to consider which is the obligation upon which the action is based. That could be the obligation of the employer to pay a certain amount of money; in those cases, the place of performance of the obligation could be the place where the worker is resident (provided that he

[66] *See* the opinion of Advocate General Jacobs for case C-125/92, *Mulox IBC Ltd v. Geels*, [1993] I-4075, at paragraph 36.

[67] The Advocate General made a proposal for the cases where the worker performs his activities only outside the Community; but it could also be taken into account for the cases where the employee works both inside and outside the territories of the Member States, or in different countries within the Community. *See Six Constructions*, *supra*.

keeps his residence in the Community), if that is the place provided by the rules of conflict of laws of the court seized. If it would not be the case, it would then fall under the general rule of article 2.

The solution exposed by article 19(2)*(b)* should be avoided for several reasons.

Firstly, under a teleological interpretation, it departs from one of the basic principles of the Convention, that is to grant a connective criterion between the litigation and the court seized. It would be evident in a situation as the one envisaged in *Six Constructions*, where, according to the national court and the Court of Justice, the employee has never worked in the country where he was recruited or where the company had its registered office.

Article 19(2)*(b)* is, then, inconsistent (a) with the *ratio* underlying the provisions under exam, (b) with a systematic reading of the Regulation and (c) with the legal position in almost all the Member States[68].

The Court of Justice, in fact, had recourse to the concept of the characteristic performance for employment contracts in order to provide the parties with an alternative *forum* (a), which is *closer* to the interests of the employee[69].

When the Regulation lays down special rules in favour of the weaker party of a contract (b), then, those rules hardly bring the parties to litigate in the courts of the State where the stronger party is domiciled. The Regulation should also give a real choice to the employee, since article 19(2)*(b)* is in many cases only a duplicate of the general rule provided by article 2(1)[70]. In the future, this provision will probably be rarely invoked by employees, because it may be considered as a disincentive, more than a provision that gives a useful alternative to article 2(1) of the Regulation.

Finally, with regard to employment contracts, the analysis of the state of the law in the different Member States (c) shows that an alternative to the defendant domicile is the court where the employee carries out his work; domestic legal systems tend to afford the worker a wide choice and a *forum* as close as possible to his place of work.

For a case as *Six Constructions*, article 19(2)*(b)* of the Regulation leads again to the defendant's domicile or to a place where the defendant is situated. Both the general rule of article 2 and the one which should grant an alternative and special protection to the weaker party of the contract give jurisdiction nearly to the same courts, depriving the employee with a true alternative.

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[68] *See* the opinion of Advocate General Tesauro for *Six Constructions*, [1989] ECR 351. Not all the points of the Advocate have been considered, since the subsequent amendments of the Convention and the new Regulation have to be taken into account.

[69] *Ivenel*, *supra*, [1982] ECR at 15-17.

[70] The domicile of the employer and the place where the business which recruited the worker is located can be considered as two different ways of saying the same thing.

According to Advocate General Jacobs, "such a result would […] be as illogical as saying that Mr Smith and Mr Jones are both equally deserving of promotion and that, in order to avoid making a difficult choice between them, the promotion should be given to Mr Brown, whose merits are considerably less"[71].

III.4. Proposed solutions.

It is not understandable why the fact that the employee works in several places outside the territory of the Community can deprive him of a convenient *forum*.

Two situations can be envisaged. The rules for individual contracts of employment could take into account the situations where the employee invokes the performance of only one obligation, and the ones where more than one obligation is at stake. In both cases the connection between the court which has jurisdiction and the place where the work is carried out is impracticable, since the obligation which characterises the contract has been performed outside the territory of any Member State, and it is no more possible to find an habitual place of performance. The question is how the litigation could be connected with a convenient *forum*.

The first case could bring back the court to the application of the general rule provided by the Court in *De Bloos*; that is, to give jurisdiction to the court of the place of performance of the obligation over which the parties litigate[72].

In the more complex second situation, the application of the rules created for the *Ivenel* case would be far more difficult; in fact, the close connection between the place where the work is carried out, the applicable law and the *forum* having jurisdiction would not be possible, because the places where the work is carried out are outside the Community.

It could be, then, either applied the *De Bloos* jurisprudence, or, in a subsidiary way, the general rule of jurisdiction provided in article 19(1) of the Regulation. This last solution would also be, in a certain way, in accordance with what the Court said in *Ivenel*[73]: in the absence of the application of the substantive rules on international contracts of employment provided by article 6 of the Rome Convention, article 4(2) of the same instrument would lead to apply the law of the habitual residence of the employee. The close connection between the applicable law and the *forum* which

[71] Opinion of Advocate General Jacobs, Case C-125/92, *Mulox IBC Ltd v. Geels*, [1993] ECR I-4075, at paragraph 35.

[72] The place of performance has to be determined according to the rules of conflict of laws of the court seized, *see De Bloos*, *supra*.

[73] *Ivenel*, *supra*.

has jurisdiction would be respected[74] and the worker would have a genuine alternative, in accordance also with the Preamble of the Regulation.

III.5. Jurisdiction rules for posted workers within the territory of the Community.

The provisions considered in *Six Construction*[75] and by the San Sebastian Convention have been taken into account also for cases where the employee does not habitually carry out his work in any one country within the territory of the Community.

At a first sight, those cases could seem easier to be solved than the ones where the employee works outside the Community; in fact, the application of the principles of the Convention, as interpreted by the Court (and, in few months, of the Regulation), cannot be put under discussion.

Nevertheless, another problem arises and has to be taken into account both by the Court and by the Legislature: that is the risk of the existence of concurrent jurisdictions. It is clear that, if one wants to apply the general rules on employment contracts and to comply with the doctrine established by the Court in the *Ivenel* case, the problem would be to decide which are the countries where the employee worked. According to the '*Ivenel* jurisprudence', this would lead to a multiplication of the competent *fora*, since the employee performed the characteristic obligation in different countries.

The Court considered that this situation shall be avoided, in order to impede the existence of an undesirable proliferation of jurisdiction and, eventually, of conflicting decisions[76]. One could say that article 19(2)*(b)* can apply in these cases, but article 19(2)*(a)* of the Regulation can be considered as an instrument to solve the problem, by localising only one competent court.

The aforementioned concern can only be partly shared. A wide choice of *fora* would be in compliance with the objectives of the Regulation and more favourable to the worker, who is generally the plaintiff in employment litigation, but would also lead to uncertainty and unpredictability of the *forum* where the defendant could be sued.

A compromise between the two options envisaged would be to give jurisdiction to the courts of each country where the employee has worked, provided that competence for the whole litigation between the parties is given to the court seized, and not only for the obligation which has to be

[74] *Ivenel*, *supra*, [1982] ECR at 15.

[75] *See Six Constructions*, *supra*.

[76] For non contractual matters, *see* case C-220/88, *Dumez France and Tracoba v. Elaba and others*, [1990] ECR I-49, paragraph 18. *See* also *Mulox*, *supra*, [1993] ECR at 21.

performed in the country of that court[77]. This solution would bring the national judge to presume that the whole characteristic obligation has been performed in only one of the countries. It would give the same result as article 19(2)*(a)*, and it would be less audacious than the presumption of article 19(2)*(b)*, which could apply even in cases where the employee has never worked in the place where the business which engaged him is or was situated.

Another problem, which also arises from the application of paragraph *(a)*, relates to the question of the mandatory character of the principle *accessorium sequitur principale*, contained and applied by the Court in the *Mulox* case[78]. The question, for instance, could arise in cases when the worker sues the employer only for the performance of a secondary obligation which has to be performed in a secondary place.

After the entry into force of the Regulation, the answer of the Court is rigid as the one which has been given in *Mulox*: "[article 19(2)(a) of the Regulation] cannot be interpreted as conferring concurrent jurisdiction on the courts of each Contracting State in whose territory the employee performs part of his work"[79].

III.6. The Mulox case[80].

The case is a good example of how the Court dealt with the aforementioned situations, which can be considered as the *id quod plerumque accidit* nowadays in the labour market.

The Cour d'Appel of Chambéry referred a preliminary ruling for a litigation opposing a company incorporated under English law, whose registered office was in London, and Mr Geels, a former employee residing in France. Mr Geels had established his office in France and had sold Mulox products in Germany, Belgium, the Netherlands and Scandinavia, to which he travelled frequently. As from January 1990, the employee had worked only in France.

The company had claimed that the court seized by the worker lacked international jurisdiction, on the grounds that the place of performance of the obligation of the worker was not confined to France, that the contract was covered by English law and that the defendant was established in the United Kingdom.

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[77] *See* A. HUET, "Contrat de travail", (1994) 2 JDI 539, at 541-542.

[78] *See Mulox, supra*. For an overview on the application of the principle, *see* J.-M. BISCHOFF, A. HUET, "Jurisprudence - Convention de Bruxelles du 27 septembre 1968", (1987) 2 JDI 465, at 470.

[79] *See Mulox*, *supra*, [1993] ECR at 23.

[80] *See Mulox*, *supra*. It is important to note that the case was brought before the Court of Justice before the entry into force in France of the San Sebastian Convention.

The French court asked whether article 5(1) of the Convention, as interpreted by the Court for cases of contracts of employment, required that the obligation characterising the contract had to be performed wholly and solely in the State of the court seized of the dispute, or if it was sufficient that part of the obligation – possibly the main one – had been performed in the territory of that State.

The Court recalled once more its jurisprudence on employment contracts[81]. In order to guarantee the existence of a close relationship between the dispute and the domestic court and to avoid any multiplication of courts having jurisdiction, the Court applied what it had already said in an *obiter dictum* of the *Shenavai*[82] case, that is the principle *accessorium sequitur principale*[83]. It recalled that the court which has jurisdiction is the one of the place where the worker performs his obligations. It ruled that, if the employee performs his work in more than one Contracting State, the place of performance of the characteristic obligation is the place where, or from which, the employee principally discharges his duties[84].

The ruling has a corresponding provision in the San Sebastian Convention and in article 19(2)*(a)* of the Regulation. These provisions state that an employer may be sued "in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so […]".

III.7. Comparison between article 19(2)*(a)* and 19(2)*(b)*.

It appears from the rulings examined, that it is very important to distinguish situations where the employee works habitually in one place and where he does not. A comparative analysis of article 19(2)*(a)* and 19(2)*(b)* is then necessary.

Subparagraph *(a)* and *(b)* differ for two main reasons. The former shall apply only in cases where the employee works within the EC, otherwise it would give jurisdiction to the courts of a country

[81] The Court referred to *Ivenel*, *supra*, [1982] ECR at 20, to *Shenavai*, *supra*, [1987] ECR at 11, and *Six Constructions*, *supra*, [1989] ECR at 10. The recall of the previous jurisprudence should not be underestimated. The Court did so mainly for two reasons. First, it wanted to confirm its doctrine after the ruling given in *Six Constructions*. Secondly, because it wanted to recall that the special rule for individual contracts of employment was still valid after the 1978 Convention and before the entry into force of the San Sebastian Convention. Article 5(1), as amended, provided that the competent court is the one of the place of performance of the obligation in question.

[82] *See Shenavai, supra*.

[83] *Mulox*, *supra*, [1993] ECR at 21.

[84] *Mulox*, *supra*, [1993] ECR at 19-21 and 24-26.

which is not a Member State. Subparagraph *(b)*, on its part, can be applied in cases where the employee works also outside the Community.

Another difference is that the former provision does not take into consideration the fiction that the *forum* of the place where the business through which the worker was engaged is favourable to the employee.

Subparagraph *(b)* is not favourable for the parties, nor in compliance with the structure of the Regulation, since it provides only a formal connection to the litigation, without any substantial relation with the dispute. Under subparagraph *(b)* it would be possible, for example, that an employee is engaged in country A by a company which then transfers its seat to country B: it would confer jurisdiction also to the courts of country A, with which the case does not have any genuine connection, or with country B, even though the employee has never worked there.

This provision, finally, could be even considered as being in favour of the employer. An enterprise which wants to fire one of his employees, for example, could post him in one or more different countries, in order to substitute the *forum* of the place where the employee habitually works with the *forum* of the place of the business which engaged him[85]. If paragraph *(b)* has to be applied, thus, it should be desirable that a part of the work at least is done in the place where the business which engaged the employee is (or was) situated.

Article 19(2)*(b)* should not be considered favourably; no connection with the litigation and no protection of the employee are granted. How can the protection of the worker and Recital 13 of the Regulation be respected?

Even if it can be considered as a good one, also subparagraph *(a)* can be subject to slight criticisms. Under this provision, it is possible that the employee habitually works in one or more than one country. Is far from being clear the difference between an employee who habitually carries out his work in different countries according to subparagraph *(a)* and a worker who does not habitually carry out his work in any one country; the provision is not very clear, when it states that the competent court is the one of the last place where the employee habitually worked. Being a factual appreciation, only the domestic courts could clarify the distinction, taking into account the circumstances of specific cases.

III.8. The definition of the place(s) where the employee habitually carries out his work.

[85] *See* P. LAGARDE, (1994) 3 RCDIP 569, at 576.

The main difference between subparagraph *(a)* and *(b)* is contained in the word 'habitually'. The Regulation does not help for determining the meaning of the word: should be taken into consideration the time spent in one place, the nature of the activities performed, the object of the litigation…? Under paragraph *(a) in fine*, it can happen that the employee works habitually in more than one place: it would be then difficult to determine only one competent court.

This lack of clarity in such crucial provisions is not in compliance with one of the most important objectives of the Regulation, which is to "[allow] the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued"[86].

Whether paragraph *(a)* or *(b)* applies is of great importance, since under the former the worker (normally the plaintiff) can start a proceeding in the place where he habitually works, which is normally the place of his residence; paragraph *(b)*, on the other hand, would give jurisdiction to the court of the domicile of the defendant, leading to the same result as article 19(1).

III.8.1. Rutten v. Cross Medical.

In favour of a wide interpretation of the wording of article 19(2)*(a)* is the ruling given by the Court in *Rutten v. Cross Medical*[87]. It can be considered still worth of consideration under the Regulation, since the new provision is only slightly different from the current version of article 5(1) of the Convention.

A conflict arose between a Dutch national and his employer, a company whose registered office was in London. Mr Rutten carried out his work not only in the Netherlands, but also – for one third of his working hours – in other European countries and in the United States of America. He had his office in his home country, to which he returned after each business trip.

The Hoge Raad asked the Court of Justice how had to be determined the place where the employee habitually carried out his work, within the meaning of article 5(1), as amended by the San Sebastian Convention[88].

Firstly, the Court recalled once again its whole jurisprudence on employment contracts and the importance of an autonomous interpretation of the Convention, which ensures uniform application

[86] *Mulox*, *supra*, [1993] ECR at 11. *See* also, in the same case, the written observations of the German Government, p. I-4081 and Recital 11 of the Regulation.

[87] *Supra*.

[88] *Supra*.

of the provisions in all the Contracting States[89]. Such a long *excursus* is not understandable, since the San Sebastian Convention amended article 5(1), fully in accordance with the well established case-law of the Court: as the Court admitted, the Accession Convention not only left "the rationale and purpose of [article 5(1)] unaffected, but, moreover, the new wording of that provision […] was intended in fact to support the interpretation given by the Court to that article in regard to contracts of employment"[90].

The most interesting part of the ruling is contained in paragraphs 23-27, where the Chamber seized defined which is the meaning of the words 'place where the employee habitually carries out his work'. This place is the one

"where the employee has established the effective centre of his working activities and where, or from which, he in fact performs the essential part of his duties *vis-à-vis* his employer.
[…]
When identifying that place in the particular case, which is a matter for the national court in the light of the facts before it, the fact that the employee carried out almost two-thirds of his work in one Contracting State – the remainder of his work being performed in several other States – and that he has an office in that Contracting State where he organised his work for his employer and to which he returned after each business trip abroad, as was the case in the main proceedings, is relevant.

[…T]hat is the place where the employee established the effective centre of his activities under the contract of employment concluded with his employer. That place must, therefore, be deemed, […], to be the place where the employee habitually carries out his work"[91].

That is because that place is the one

"where it is least expensive for the employee to commence proceedings against his employer or to defend himself in such proceedings. The courts of that place are also best placed and, therefore, the most appropriate to resolve the dispute relating to the contract of employment"[92].

It is then necessary to determine the effective centre of the professional activities of the worker: it is not very difficult to find one 'centre of gravity'[93].

The solution given in the ruling has to be accepted. Paragraph *(a)* of the Regulation, nevertheless, states that the employee can sue his employer before the courts of the Member State where he habitually carries out his work "*or in the courts for the last place where he did so*" (*emphasis added*). This rule disregards then the principle considered in *Rutten*, that is the establishment of one only place where the employee can habitually work, and can be subject to criticisms.

[89] *Rutten*, *supra*, [1997] ECR at 12-18 and at 22.

[90] *Rutten*, *supra*, [1997] ECR at 21.

[91] *Rutten*, *supra*, [1997] ECR at 23, 25-26.

[92] *Rutten*, *supra*, [1997] ECR at 24.

[93] *See* L. IDOT, "Convention de Bruxelles. Compétence en matière contractuelle", *Europe* March 1997, comm. n. 93.

This provision is also somehow contradictory in this regard, since if the employee works in more than one place, such places can not be considered as being 'habitual' any more: the centre referred to in paragraph 23 of *Rutten* should be "*par définition unique et non dispersé*"[94].

The criteria to determine the habitual working place should refer to the time spent in one place, even when the worker does not perform the most important part of his activities in that place. A mixed criterion – time spent in one place and kind of activities – would give a strong discretionary power to the domestic court and could sometimes lead to a *forum* which has no strong connection with the litigation[95].

This interpretation can be supported by the wording of the ruling of *Rutten*, where the Court stated that, when identifying the place of habitual work, "it is necessary to take into account the fact that the employee *spends most of his working time in one of the Contracting States* […] where he organises his activities[…] and to which he returns after each business trip abroad"[96]. That means that the Court considers important the time spent in one place, which is normally where the employee established the effective centre of his activities. The criterion suggested by the Court to the domestic judges also complies with the main concerns of the Regulation: proximity to the litigation, protection of the employee and one single competent *forum*. A quick reference to the real world confirms this view. Only in very extreme cases it could happen that the employee is a 'Flying Dutchman' who works only with a wireless phone, or with a laptop in hotel rooms or in airports[97].

A strict interpretation of article 19 (2)*(a) in fine*, and *a fortiori* of paragraph *(b)*, should then be accepted. As Advocate General Jacobs said, it is important to make "a determined effort to identify a principal (or habitual) place of employment. It will thus be possible to ensure that jurisdiction is conferred on the courts of a country which has a genuine connection with the dispute […]"[98], and which would be in compliance with the general structure of the Regulation.

III.9. Conclusion.

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[94] J.-M. BISCHOFF, "Contrat de travail", (1997) 2 JDI 635, at 636.

[95] *Contra*, H. TAGARAS, "Chronique Convention de Bruxelles", (1999) 1-2 CDE 178, at 182-183.

[96] *Rutten*, *supra*, [1997] ECR at 27.

[97] J.-M. BISCHOFF, *supra*, p.636.

[98] Conclusions of the Advocate General in *Mulox*, *supra*, [1993] ECR at 37. *See* also T. HARTLEY, "Article 5(1): employment contract – work in several countries", (1994) 5 ELR 540, at 545.

One could say that, for the time being, the Court and the wording of the Regulation do not bring much light on the cases where a litigation arises between an employer and an employee who does not carry out his work in only one country.
The case law and the Regulation leave the debate nearly in "the same confused state as it was before, and in the future some unfortunate litigant is going to have to pay for it. But of course, as the Court airily observed, a plaintiff can always bring his action in the courts for the place where the defendant is domiciled. Quite."[99]

FINAL REMARKS.

The entry into force of the Treaty of Amsterdam brought conflict of law rules and judicial cooperation within the competence of the European Community. Such an initiative for a closer harmonisation has to be welcomed in order to complete a true internal market within the Community; despite the reservations made on its legal basis, Regulation 44/2001/EC brings a contribution to conflicts of jurisdiction rules.
Concerning employment contracts, article 20 of the Regulation provides the characteristic performance - which has been the basis for the first establishment of a special regime for these contracts - only with unilateral application: employers are not allowed to sue employees in the court for the place where they carry out their work, but only in the court of their domicile. On the other hand, workers have a wider choice provided by article 19: they can choose between the courts of the State where the employer is domiciled, the court of the place where they habitually work, or the one for the place where the business which engaged them is or was situated. It is possible to derogate to these rules only by agreements complying with article 21.
Without undermining the importance of the new rules, some improvement could be made in the Regulation, especially in the Section analysed in this paper. As a preliminary remark, it could be noted that the objectives of certainty, predictability and protection for the worker are undermined by an external factor. That is, the provisions contained in article 68 of the EC Treaty. According to its paragraph (1), the request of preliminary rulings to the Court of Justice on the interpretation or on the validity of acts of the institutions of the Community based on Title IV is limited to the domestic courts against whose decisions there is no judicial remedy under national law. Under this provision, the parties of a proceeding where a clarification on the interpretation or on the validity

[99] A. BRIGGS, *supra*, p.328.

of the Regulation is needed, shall wait until their case is brought before the highest domestic courts. The provision can not be considered as a mean of protection of the interests of the workers (and of both parties, though), that Section 5 is deemed to provide.

Secondly, no indication is made of how contracts of employment have to be defined for the purposes of the Regulation under Community law, since the definitions of these situations and of other professional activities is still left to national laws[100]; as it has already been said, the distinction is far from being only a theoretical one. A solution could be either to harmonise labour laws or a uniform interpretation of the notion of contracts of employment[101].

It is obscure, then, why the employer is not allowed any more to start a trial before the court of the place where the employee carries out his work; the only possible reason is that the Council wanted to avoid any possibility of a *forum actoris* for the employer. The same result, though, could have been achieved by allowing him to sue only before the court of the place where the employee habitually carries out his work (leaving thus unchanged the actual provision of the Convention).

As it has already been pointed out, the rules concerning the employee can not be considered as fully satisfactory. In a *de jure condendo* perspective, a gradual approach should be adopted in cases where the employee does not habitually carry out his work in any one country (within or outside the Community); the solution proposed by the Advocate General for the *Mulox* case[102] could be a valid alternative. The *forum* for the place where the business which engaged the employee is or was situated should be considered as an *extrema ratio*, if not deleted.

Finally, the adoption of special rules on enforcement, similar to the ones provided for insurance and consumer contracts, should also be taken into consideration; the addition of Section 5 in the wording of article 35(1) could grant the full and effective protection of the employee provided by the rules on jurisdiction, and is also in compliance with the wording of *consideranda* 13 and 14 of the Preamble.

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[100] The Court has not defined contracts of employment for the application of the Brussels Convention. It appears that the notion is left to national legal systems; in *Shenavai* (*supra*, [1987] ECR at 11), for example, it relied on the indication made by the national court. One could ask whether the Court will comply with its consolidated jurisprudence on the interpretation of the relevant provisions of the EC Treaty (Title III, Chapter 1) or not, after the entry into force of the Regulation. *But cf.* J.-P. BERAUDO, "Convention de Bruxelles du 27 septembre 1968. Règles de compétence spéciale. Le contrat de travail", *Juris Classeur Europe*, fasc. 3021, p.1 at p. 4-5, and A. NUYTS, "La compétence en matière de contrat de travail" *in The European Judicial Area in Civil and Commerial Matters, in* R. FENTMAN, A. NUYTS, H. TAGARAS, N. WATTE (eds.), Bruxelles, Bruylant, 1999, p.33, at 42.

A recent ruling excluded agency from the scope of application of employment contracts, *see* case C-420/97, *Leathertex Divisione Sintetici s.p.a. v. Bodetex BVBA*, [1999] ECR I-6747.

[101] W.A. ALLWOOD, *supra*.

[102] Opinion of Advocate General Jacobs, *Mulox*, *supra*, [1993] ECR at 37.

One could hope that the adaptation of the existing legislation, as new experience is gathered, is encouraged by the fact that in future there will be no more need for ratification proceedings of a new (Amending or Accession) Convention; in fact, one of the main consequences of the communitarization of judicial cooperation is that any subsequent piece of legislation will be adopted according to the procedures set up by the Treaty.