DEVELOPMENTS IN PIL VIEWS AND COMMENTS

Jurisdiction in Employment Matters under Brussels I bis: A Proposal for Reform

BY THE EDITORS OF THE EAPIL BLOG
23 FEBRUARY 2023

COMMENT 1

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As reported on this blog on 13 February 2023, the EAPIL Working Group on the Reform of the Brussels I *bis* Regulation has issued a preliminary position paper formulating proposals for reforming the Regulation. This is an important document, which gives the members of EAPIL and the readers of this blog a lot of food for thought.

The preliminary position paper, however, does not propose any reform to the Regulation's rules of jurisdiction in employment matters. I believe that these rules are defective in several respects and that the EAPIL Working Group and, ultimately, the EU legislator should take note of these defects and amend the Regulation accordingly. Here, I want to outline these defects, formulate my proposal for reforming the Regulation in this respect and consider whether my proposal is consistent with those advanced in the preliminary position paper.

Five Defects

The rules of jurisdiction in employment matters of Brussels I *bis* suffer from five weaknesses that undermine the proclaimed goal of these rules, namely the goal of the protection of employees as weaker parties.

As is well-known, Recital 18 provides that 'In relation to … employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.' Paradoxically, two changes that Brussels I bis introduced in 2012 with the aim of advancing the goal of employee protection are, in some circumstances, less favourable to the interests of employees than the general rules.

Article 20(2) extends the concept of the domicile of the employer, which now covers employers not domiciled within the EU pursuant to Article 63, but which have a branch, agency or other establishment in the EU in relation to disputes arising out of the operations of the establishment. This rule may disfavour claimant employees because, when it applies, national jurisdictional rules, which may be more favourable to employees than the jurisdictional rules of Brussels I bis, do not.

While, pursuant to Article 6(1), persons domiciled outside the EU can, generally speaking, be sued in the Member State courts under national jurisdictional rules, Article 21 provides that employers

domiciled outside the EU can only be sued in the courts for the habitual place of work or, absent a habitual place of work, in the courts for the engaging place of business if the habitual place of work/engaging place of business is located in the EU. The CJEU has confirmed, in Case C-604/20 *ROI Land Investments Ltd v FD*, that such employers cannot be sued in the Member State courts under national jurisdictional rules. This makes little sense from the perspective of employee protection because it puts claimant employees in a significant jurisdictional disadvantage in comparison to claimants in general.

The third and fourth defects are related to the use of the connecting factor of the engaging place of business in Article 21(1)(b)(ii). The rule of jurisdiction based on this connecting factor is not only practically useless, but also leads to considerable legal uncertainty and unforeseeability and undermines the goals of employee protection and proximity. I have presented my objections to this rule of jurisdiction in terms of legal uncertainty, unforeseeability, employee protection and proximity elsewhere, and I will not rehearse those arguments again. Here, I want to focus on the practical uselessness of this rule of jurisdiction.

The rule of jurisdiction based on the connecting factor of the engaging place of business is only applicable if there is no habitual place of work (Article 21(1)(b)(i)). The CJEU has interpreted the connecting factor of the habitual place of work very broadly in its case law on this point that covers so many different kinds of transnational employment relationships (ie itinerant commercial representatives (here and here), workers working offshore, posted workers (hereand here), lorry drivers, seamen, aircrew and agency workers). In fact, the CJEU has interpreted this connecting factor so broadly that there is very little, if any, room left for the connecting factor of the engaging place of business. This means that there is little reason to keep the jurisdictional rule based on the connecting factor of the engaging place of business. This is even more true if Advocate General Øe was correct to find in Case C-804/19 *BU v Markt24 GmbH* that 'the forum established in Article 7(5) of the Brussels Ia Regulation is, in principle, the same as that for the "business which engaged the employee", within the meaning of Article 21(1)(b)(ii) of that regulation' ([90], fn 68) and to suggest that Article 7(5) applied even if the establishment in question no longer existed at the moment of commencement of proceedings ([93]).

The CJEU held in Case 32/88 *Six Constructions Ltd v Humbert* that, if the habitual place of work is outside the EU, the jurisdictional rule based on the connecting factor of the engaging place of business is inapplicable. Article 21, therefore, fails to offer any favourable treatment to employees engaged in the EU to habitually work outside the EU. If my proposal to abolish the jurisdictional rule based on the connecting factor of the engaging place of business is not accepted, then at least the relationship between Article 21(1)(b)(i) and Article 21(1)(b)(ii), as interpreted in *Six Constructions*, should be reformed.

The fifth defect concerns the use of arbitration agreements contained in individual employment contracts. It is unclear if such arbitration agreements should only be enforced under the same or similar conditions that apply to jurisdiction agreements. This problem arises because, on the one hand, arbitration is expressly excluded from the subject-matter scope of Brussels I bis (Article 1(2)(d)), but, on the other hand, arbitration agreements, if effective, deprive employees of the

regulation's jurisdictional protection. There is evidence that digital platforms are taking advantage of this legal uncertainty and inserting arbitration agreements in contracts with their workers (see, for example, *Aslam v Uber BV* in the English employment tribunal at [35]).

Proposal for Reform

My proposal for reforming the rules of jurisdiction in employment matters of Brussels I *bis* contains three elements.

First, the international scope of application of these rules should be reconsidered. The goal of employee protection would be better satisfied if the rule extending the concept of the employer's domicile applied without prejudice to the right of claimant employees to rely on national jurisdictional rules against employers not domiciled within the EU pursuant to Article 63, even if they have an establishment in the EU. Similarly, the availability of the courts for the habitual place of work or, absent a habitual place of work, of the courts for the engaging place of business should not prejudice the right of claimant employees to sue employers domiciled outside the EU under national jurisdictional rules.

Second, the rule of jurisdiction based on the connecting factor of the engaging place of business should be reformed in one of the following two ways. The considerations of effectiveness, legal certainty, foreseeability, employee protection and proximity speak in favour of abolishing this jurisdictional rule. If this were to happen, a new rule could be introduced instead of it, which, by analogy with the jurisdictional rule over contracts for the provision of services (Art 7(1)(b) second indent, as interpreted in cases like Case C-204/08 *Rehder v Air Baltic Corporation*), would, absent a habitual place of work, give jurisdiction to the courts for each place where some significant work was carried out.

Alternatively, if the abolition of the rule of jurisdiction based on the connecting factor of the engaging place of business is consider too radical, the goal of employee protection would be better satisfied if this rule were available in two situations: where there is not a habitual place of work at all or where the habitual place of work is outside the EU.

Third, a recital should be introduced that would clarify that arbitration agreements cannot undermine the jurisdictional protection provided to employees.

Consistency with the Preliminary Position Paper

The preliminary position paper contains two relevant proposals.

Proposal 11 is that the EU lawmaker should extend Article 7(1) and 7(5) of Brussels I *bis* to defendants domiciled in third states. The proposal, however, does not clarify whether the application of Article 7(1) and 7(5) to defendants domiciled in third states would lead to a disapplication of national jurisdictional rules. I believe that the drafters of the preliminary position paper should clarify whether they perceive this inevitable consequence of their proposal (see Case C-604/20 *ROI Land Investments Ltd v FD*) as a welcome development. But even if they do, the objective of employee protection would still point towards the extension of the concept of the

employer's domicile and of the extension of the rules based on the connecting factors of the habitual place of work and the engaging place of business without prejudice to the right of claimant employees to rely on national jurisdictional rules.

Another proposal is that the rules of jurisdiction for consumer contracts should cover tort claims. The UK Supreme Court had asked the CJEU in Case C-603/17 *Bosworth and Hurley v Arcadia Petroleum Limited* whether a claim not arising directly out of an employment contract or the applicable employment legislation, but in relation to the employment contract (ie a claim in fraud or conspiracy), triggered the application of the protective jurisdictional rules. Advocate General Øe adopted a wide definition of the concept of 'matters relating to individual contracts of employment'. Since the CJEU found in *Bosworth* that there was no relationship of subordination, it did not deal with this question asked by the UKSC. If the EU legislator accepts the preliminary position paper's proposal, it should further be clarified that the concept of 'matters relating to individual contracts of employment' is of equally wide scope.

Finally, my proposal for reforming the international scope of application of the rules of jurisdiction in employment matters and the effect of arbitration agreements contained in individual employment contracts can be extended to contracts involving other weaker parties contracts and, therefore, considered in any reform proposal of the rules of jurisdiction for weaker parties of Brussels I bis.

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1 COMMENT ON "JURISDICTION IN EMPLOYMENT MATTERS UNDER BRUSSELS I BIS: A PROPOSAL FOR REFORM"

Andreas Bucher
24 February 2023

Interesting, however still consideerably complicated. Should the position not be that weaker party would be better protected if the grounds of jurisdiction would be easier to apply.
Thus, the habitual place of work, and, in the absence, the workers habitual residence (within the EU) may be just fine.
Similarily, the consumer's place of habitual residence would be the best protection and not do harm to big companies that are in mot cases prepared to accept such jurisdiction, contrary to what many academics argue out of their books.

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