CONFERENCE:
EVALUATING APPLICATION OF THE DIRECTIVE ON THE POSTING OF WORKERS WITHIN THE FRAMEWORK OF THE PROVISION OF SERVICES

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THE IMPLEMENTATION OF POSTED WORKERS' RIGHTS IN THE EUROPEAN JUDICIAL AREA

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Directive 96/71 enters into the realms of private international law, i.e. matters of conflict of jurisdiction and conflict of law. However more attention is paid to the law applicable to posted workers. This imbalance is highlighted in the introduction which is virtually entirely devoted to this very matter. Several recitals also deal with it. Conflict of law therefore appears as a key aspect as regards posting of workers. Indeed, the various speeches at this conference cover this issue one way or another. Clearly, the trickiest question is that of article 3 which covers "*Terms and conditions of employment*". This is an issue as regards applicable law and is at the very heart of the reasoning.

On the other hand, conflict of jurisdiction passes virtually unnoticed. Only one article deals with this issue in the directive, article 6, entitled "Jurisdiction". Yet, it is a prerequisite. To claim the rights enshrined by the directive, it is first and foremost necessary to identify the competent jurisdiction. This is particularly true for the employee who must be protected in this respect. He must have a jurisdiction which is easily accessible. Direct competence is therefore a key aspect for effectiveness (I). Once the case has been judged, it must be able to move at least as freely as the worker. If the obstacles are too great, effectiveness of rights will be jeopardized (II).

I – Posting of workers and direct competence

Council Regulation no.44/2001, the so-called Brussels I Convention devotes a specific and individual section to the "Jurisdiction over individual contracts of employment". This shows progress has been made, as in the Brussels Convention, which is in some way the Regulation's ancestor, the protection of the worker was only ensured by a few scarce rules, which were not in the original version but which were adopted in order to enshrine case law solutions provided by the ECJ. It was not until 2000 that the worker's situation was given specific treatment. As a comparison, consumer contracts were already dealt with in a specific section in the Brussels Convention in 1968. The provisions of this section can also apply to

posting of workers (A). The directive itself provides a vital complement as regards effectiveness of rights (B).

A-The system of the Brussels I Regulation

In theory, the Brussels I Regulation applies when the defendant is domiciled in a Member State, which is confirmed for contracts of employment by article 18.

"*Article 18*
1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.
2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State."

The employee brings an action against his employer, assumed to be domiciled in a Member State (article 1 of the directive). The Regulation makes a distinction depending on the who brings the action.

The employee's action is governed by article 19:

*"An **employer** domiciled in a Member State **may be sued**:*
1. in the courts of the Member State where he is domiciled; or
2. in another Member State:
*(a) in the courts for the place where the employee **habitually carries out his work** or in the courts for **the last place where he did so**, or*
(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated."

The employer's action is governed by article 20:

"1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled."

There is a contradiction between the place of performance and the posting of workers: it is assumed that even if the case in question deals with posting of workers, the pace where the services are provided is not the usual place of performance. Note article 2 of directive 96/71:

Definition
*1. For the purposes of this Directive, 'posted worker` means a worker who, for a limited period, **carries out his work in the territory of a Member State other than the State in which he normally works**."*

Based on the Brussels I Regulation, the employee can therefore bring an action in the Member State in which he normally works or before the courts of the Member State in which the employer is domiciled.

Furthermore, the employee is protected against agreements on jurisdiction:

"Article 21
The provisions of this Section may be departed from only by an agreement on jurisdiction:
1. which is entered into after the dispute has arisen; or
2. which allows the employee to bring proceedings in courts other than those indicated in this Section."

Therefore, the jurisdiction of the country where the workers are posted is not the competent jurisdiction.
This is the loophole which is filled by the directive.

B- The complementary jurisdiction provided by directive 96/71

Pursuant to §2 of article 3 of directive 96/71, "*the present directive does not deal with rules of private international law*".

Yet article 6 entitled "Jurisdiction" stipulates that "*In order to enforce the* ***right to the terms and conditions of employment guaranteed in Article 3****, judicial proceedings may be instituted* ***in the Member State in whose territory the worker is or was posted****, without prejudice, where applicable,* ***to the right, under existing international conventions*** *on jurisdiction, to institute proceedings in another State".*

The transposition into French law is provided by article R 1412-5 of the French Labour Code (*Code du travail*): "*When an employee is temporarily posted to the national territory by a* ***company established in another Member State*** *of the European Community, claims pursuant to rights recognized in matters listed under article L. 1262-4 can be brought before* ***the industrial tribunal in the territorial jurisdiction of which the service is or was provided.***
When the service is or was provided in the territorial jurisdiction of several industrial tribunals, claims may be brought before any of these jurisdictions".

NB: this text is also applicable when the employer is domiciled in a non member State (art. 1(4)).
The issue is therefore clear: a further forum is provided which can be invoked by both the worker and the employer. There is thus the combined solution offered by the Brussels I Regulation or common law depending on the defendant's domicile.

Note however that the competence of the jurisdiction is limited solely to the matters listed in the directive. **This is to check that the provisions of the law of the jurisdiction where the workers are posted are complied with**.
The reason for this additional competence is thereby clearly outlined.

- The judge of the country in which the workers are posted is the best placed in terms of knowledge of the law and access to it. Therefore for practical reasons the situation will be much easier.

- Similarly, the judge is in a better position to assess the workers working conditions, e.g. material conditions. He may access the workplace easily or at least is well placed to do so.

- Lastly, the posted worker is granted access to the local jurisdiction, during the time he is posted temporarily. If he seeks to invoke his rights locally he can do so, without having to travel. This is clearly beneficial for the worker and is perfectly justified.

Therefore this solution clearly protects the worker.
Once a case has been judged, the employee will often have to make it enforceable in another Member State. However, the directive makes no mention of this.

II –Free movement of judgements

There are two situations in the European judicial area. A simplified movement of decisions between Member States is installed by Regulation No 44/2001. Employment law clearly falls within its scope (A).
However it is possible to go further still. In certain cases, a true free movement is installed between Member States. Employment relations are not the main issue but rather the consumer. But incidentally, certain instruments can be used by the employee (B).

A – Simplified free movement: the Brussels I Regulation system

The system created is based on improved efficiency and mutual trust. All Member States judges are deemed to apply rules emanating from the Regulation in a satisfactory manner. Only a minimum control will be carried out in the Member State in question.
Indeed, the Regulation clearly outlines the realms of this control.

The simple rule as regards recognition is that there should be no special procedure.

Article 33

"1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.
2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.
3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question."

The employee often needs to enforce the judgement against the employer (articles 38 et seq.). However, in this case a specific procedure is required.

Article 41

"The judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. ***The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application****."*

The first phase is not adversarial, but is more a case of managing an administrative file.
In France, article **509-2 of the French Civil Procedure Code** states that:

"C*laims for the recognition or declaration of enforceability, on the territory of the French Republic, of foreign enforceable instruments, in application of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, are brought before the* ***Senior Registrar of the Tribunal de grande instance (Regional Court)***."

The Senior Registrar must check that the file is complete:
Article 53
1. A party seeking recognition or applying for a declaration of enforceability shall produce a ***copy of the judgment*** *which satisfies the conditions necessary to establish its authenticity.*
2. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55. (certificate in annex V or equivalent document).

The principle is the free movement of the decision. If the foreign decision is enforceable, the decision does not need to be justified.

Article 509-5 of the French Civil Procedure Code
"*The decision* ***refuting*** *the claim for a declaration of enforceability must be justified"*.

In France an appeal may be made before the Court of Appeal, and here procedure is adversarial.

Article 43
"1. The decision on the application for a declaration of enforceability may be ***appealed*** *against by either party.*
2. The appeal is to be lodged with the court indicated in the list in Annex III.
3. The appeal shall be dealt with in accordance with the rules ***governing procedure in contradictory matters****.*
5. An appeal against the declaration of enforceability is to be lodged ***within one month of service thereof****. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of*

service, either on him in person or at his residence. No extension of time may be granted on account of distance."

Thereafter, an appeal can be brought before the Court of Cassation or its equivalent.

Article 44

"The judgment given on the appeal may be contested only by the appeal referred to in Annex IV."

In any event these matters should be dealt with rapidly.

Article 45

"1. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in ***Articles 34 and 35. It shall give its decision without delay****.*

2. Under no circumstances may the foreign judgment be reviewed as to its substance."

Articles 34 and 35 mention exceptions justifying non recognition or non enforceability. The main reason being international public policy. A foreign decision can be refuted if deemed harmful to the essential principles of legal order of the Member State in question.

However, these various exceptions are rarely used. The system is efficient and decisions move freely. Statistics show that approximately 98% of decisions are recognized and enforced.

However, Community institutions have decided to go one step further by creating a specific free movement of certain decisions.

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B – Free movement of decisions

Free movement of decisions signifies that the authorities of the Member State in question have no control over the decision. Previously, under Brussels I Regulation control was minimal. In the following cases there is no control.

Currently, this approach is limited and rare. It only applies in specific cases, which are those which cause the least difficulties.

The system is based on certification: the authorities of the Member State which made the judgement certify it, stating that it fulfils certain conditions set out by the Community Regulations themselves. A minimum level is set by the text and the Member State which made the judgement certifies that this minimum level is attained, decisions then benefit from free movement. This solution clearly represents an advantage for the employee as it means simplicity, rapidity and low costs. It also means that the employee does not have to deal with jurisdictional authorities of another Member State.

Several Regulations implement this mechanism. The first one that comes to mind as regards the worker is **Regulation (EC) No 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure**

Article 2 defines the scope.

"1. This Regulation shall apply, in cross-border cases, to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed EUR 2000 at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interest, expenses and disbursements. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta jure imperii)."

So far so good. The text is applicable, but paragraph 2 specifies that:
"2. This Regulation shall not apply to matters concerning:
(f) employment law;"

The reason behind this exclusion is quite unclear. It is linked to the specificities of employment law which are treated distinctly in several Member States.

However, **Regulation (EC) No 805/2004 of the European Parliament and the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims** does apply to employment law.
It too abolishes all control procedure in the Member State in question.

Article 5 Abolition of exequatur
"A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States ***without the need for a declaration of enforceability and without any possibility of opposing its recognition****."*

The decision simply needs to be **certified in the Member State of origin**. In France, the Senior Registrar of the jurisdiction which gave the judgement is competent (article 509-1 of the French Civil Procedure Code)
Article 6
The main requirements for certification as a European Enforcement Order are set out in article 6 of the Regulation:
"1. A judgment on an uncontested claim delivered in a Member State shall, upon application at any time to the ***court of origin****, be certified as a European Enforcement Order if:*
(a) the judgment is ***enforceable*** *in the Member State of origin; and*
(b) the judgment does not conflict with the rules on jurisdiction as laid down in ***sections 3 and 6 of Chapter II of Regulation (EC) No 44/2001****;"*

The competence of the court of origin must not be "incompatible" with the Brussels I Regulation section on individual contracts of employment. These protective provisions must thus have been complied with.

The claim must be uncontested. This reflects the notion that free movement only applies for the simplest of situations, which are uncontested.

According to article 3,
“A claim shall be regarded as uncontested if:
*(a) the debtor has **expressly agreed** to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; or*
*(b) the debtor has **never objected to it**, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; or*
*(c) the debtor has **not appeared** or been represented at a court hearing regarding that claim **after having initially objected** to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin; or*
*(d) the debtor has **expressly agreed to it in an authentic instrument**.*
2. This Regulation shall also apply to decisions delivered following challenges to judgments, court settlements or authentic instruments certified as European Enforcement Orders.”

Using this specific mechanism presents clear advantages for the employee. Nonetheless it is important to point out that the employee, posted or not, is treated rather incidentally and marginally, which is a constant in Community private international law. Employees have given rise to much less interest than consumers, also deemed the weaker party in international contract law, whose situation appears far more enviable in this particular context.