**Paneurópske právnické listy**
ISSN: 2644-450X (online)

Ročník/Volume: **4**
Číslo/Number: **1**
Rok/Year: **2021**

# Rozhodné právo pre cezhraničné činnosti v EÚ
# Applicable Law For Cross Border Activity In The EU

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**Anotácia**

Tento článok sa zaoberá rozhodným právom pri cezhraničnej práci. Otázka, ktoré právo je konkrétne uplatniteľné, môže mať zásadný vplyv na konkrétny prípad. Autor sa podrobne venuje metóde Európskeho súdneho dvora založenej na dôkazoch. Cieľom článku je prispieť k väčšej právnej istote vysvetlením jednotlivých problémov.

**Annotation**

This article deals with the applicable law when working across borders. The question, which law is specifically applicable can have a major impact on the individual case. The author goes into detail on the evidence-based method of the European Court of Justice. The target of the article is to contribute to more legal certainty with the explanations on the individual problems.

**Kľúčové slová**

Nariadenie Rím I, kolízne normy, cezhraničná práca, obvyklé miesto výkonu práce, dočasné vyslanie

**Key words**

Rome I Regulation, Conflict of Laws, Cross border work, Habitual Place of Work, Temporary Posting

## I.Introduction

The freedom of establishment and freedom to provide services enshrined in the Treaty on the Functioning of the European Union ensures the mobility of companies and workers within the EU. Freedom of movement includes the freedom of movement for workers in accordance with Art. 45 TFEU, i. e. every citizen of the Union has access to the labour market in every Member State. As a result, there are business relationships between various national companies within the European Union. When working with foreign companies, it is usually necessary to deploy workers abroad. In addition to executives who must be appropriately qualified, other technical and commercial employees of the national employer also work abroad in various ways.

The article analyzes case law and literature on recurring legal issues in cross-border employment relationships. Using an example case, individual legal problems are presented and explained. First, the author goes into the applicable law. He differentiates between employment relationships with and without an agreed choice of law. With the latter variant the determination of the applicable law depends on the particular individual circumstances and the criteria set out in the case law of the ECJ.

In addition to general explanations, the situation of drive truckers, „flying workers“ and sea workers is dealt with in detail. In an excursus, the author describes situation of employees who are temporarily posted. Explanations on the drafting of the contract and the place of jurisdiction round off the topic. He comes to the conclusion that it always depends on the individual circumstances of the individual case and that general statements can only be made to a limited extent. He attaches great importance to legal clarity, which can be achieved through agreements and contractual provisions on applicable law and the place of jurisdiction.

The provisions of the Rome I Regulation can also apply in the current pandemic situation.

## II. Example Case – Initial Situation

A German truck driver signed an employment contract with a German freight forwarding company based in Berlin in 2013. The content is that he should work as a truck driver in Sweden. The tours to be driven are only in Sweden for a larger grocery chain with different markets. As remuneration, he receives a certain daily rate for the tours in Sweden and a corresponding hourly rate for overtime. Payroll is carried out via Germany.

He retains his residence in Germany and receives a lump sum for expenses for the return trip. After the „Sweden assignment of up to 3 weeks“ he is back in Germany for about 1 week. The accommodation, the flight and the rental car are provided by the German employer. However, the accommodation only serves to ensure that the truck driver can observe his daily rest periods. The trucks are in continuous use around the clock, so that the truck driver cannot spend the rest time in the truck. He does not receive a tax, health insurance or social number. Upon request, he is informed that he is only borrowed from Germany and that the head office in Germany is responsible for everything else.

The employment contract does not regulate the applicable law, it is a typical, standardized employment contract in German. A written form clause is included, according to which changes, extensions and additions to the employment contract must be made in writing.

There is an addition to the employment contract, which shows that the employee is sent to Sweden for a limited period of 5 years at the Swedish subsidiary of the German freight forwarding company.

For health reasons, he is forced to quit the job. In Berlin, he finally concludes a typical termination agreement with a severance pay with the German employer based in Germany. The severance pay is named in accordance with German regulations and stated in gross. A comprehensive compensation clause is also agreed. There are no references to Swedish law, especially not to Swedish labor and social security law. The employer then settles the gross severance pay, deducting both the tax and – according to Swedish law – social security. Under German law only the tax is retained fo the severance pay. The employee does not agree with this. He is suing the employer for payment of the remaining severance pay at the labour court in Berlin.

The question arises of how the legal situation should be assessed.

The central problem of any activity abroad is which legal norms are to be applied in individual cases. This is of great importance for the establishment, change and termination of the employment relationship as well as for the place of jurisdiction.

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## III. Applicable Law

### III.1 Choice Of Law

The main rule of the Rome Convention is that parties can make a choice for any law, Art. 3. (1), 8 (1) Rome I Reg. The parties have freedom of contract. This follows from the Rome I Regulation[1].

The decision on the applicable law or parts thereof is the responsibility of the contracting parties in accordance with Art. 3 Rome I Reg. in conjunction with Art. 8 (1) 1 Rome I Reg. The time of the conclusion of the contract is determined autonomously by Union law[2]. It depends on when the parties manifested their agreement[3]. Freelance employee contracts are not covered by Art. 8 (1) Rome I Reg., but so-called sham employment relationships if the criteria for personal dependency exist. Legally ineffective employment relationships that have already been implemented also fall under Art. 8 (1) Rome I Reg. The choice of law contract is subject to control in accordance with the general terms and conditions[4], in particular the transparency requirement. The choice of law can be made at the time of conclusion of the employment contract, or even later, and can be changed subsequently, Art. 3 (2) Rome I Reg.

It can be informal and therefore implied. It does not need a special shape. It can therefore be tacitly agreed as long as it is clear, Art. 3 (1) Rome I Reg. An indication can be an effective agreement on the place of jurisdiction which is only permitted under the requirements of Art. 23 Regulation (EU) 1215/2012 or Art. 17 V Lugano Convention[5].

A reference in the employment contract to a national collective agreement or a company agreement is also indicative. A tacit subsequent choice of law can also come about through the procedural behavior of the parties, especially if they agree to a certain legal system[6]. However, only explanations at the first negotiation before the German labour court are not sufficient. The collective agreement clause contained in the employment contract may also suffice.

It is controversial whether a choice of law is possible in the agreed or applicable collective agreement. Schlachter and the prevailing doctrine[7] affirm this. They argue that the need for collective bargaining also applies to cross-border activities and cannot be limited to national issues. Otherwise, the choice of law regulated in the collective agreement is subject to the principle of favorability according to Art. 8 (1) 2 Rome I Reg. On the other hand, Thüsing[8] rejects the possibility of determining the choice of law by means of a collective agreement. He argues that there can be practical problems. If the choice of law in accordance with § 3 of the German Collective Agreement Law is effective, a comparison of advantages in accordance with § 4 (3) of the German Collective Agreement Law should be carried out if a contractual choice of law is more favorable for the employee than the agreement of the parties to the collective agreement. However, there is no statutory regulation with regard to such a comparison of advantages. The collective agreement regulation also means that there is no self-determination, but an external determination of the choice of law. In addition, the collective agreement law should also apply to the employment relationship. Due to such ambiguities, he concludes that it would be „pointless“ to provide the law applicable to the employment relationship through a collective

agreement. The opinion of Thüsing from 2003 should be out of date due to Art. 8 (1) 2 Rome I Reg.[9], at least as far as his concerns about comparing the advantages.

Based on recital No. 23 of the Rome I Reg.[10], the author believes that there is nothing to prevent the choice of law from being agreed in an applicable collective agreement, as long as the worker to be protected is secured by a comparison of the advantages; legal protection for the employee can thus be guaranteed.

Only if the parties to the employment contract have not made a choice of law or there is an unclear agreement on the choice of law does an objective connection have to be made[11]. The freedom of choice in individual labour law is restricted by Art. 8 (1) 2 Rome I Reg[12].

In the example case, no choice of law was made between the parties to the employment contract. Otherwise, no agreement on a choice of law arises from the employment contract and the individual circumstances. In view of the longstanding exclusive activity in Sweden, the choice of law cannot be indicated by the employment contract drawn up in German and the typical German regulations contained therein[13]. This means that the applicable law according to Art. 8 Rome I Reg. must be determined objectively.

### III.2 No Choice Of Law In The Employment Contract

If no choice of law has been agreed or not effectively agreed, the applicable law is based on objective criteria according to Art. 8 (2)-(4) Rome I Reg.[14] According to Art. 8 (2) Rome I Reg., the law of the usual place of work applies. This is to be interpreted broadly in the case law of the ECJ[15]. The right of establishment, which has hired the employee, applies only subordinately, Art. 8 (3) Rome I Reg. For this reason, the factual characteristic of the „usual place of work“ is crucial[16]. There is no legal definition of this under Community law[17].

#### III.2.1 General Remarks

The place of work, the law of which is basically applicable to the employment relationship (lex loci laboris), is determined by the usual place of employment or activity. In the case of organizational integration into a company, this is the place of business, otherwise the place where the activity has its main focus in terms of content and time. When Article 8 (2) 1 Rome I Reg. focuses on “doing” the work, it depends on where the work is actually performed. The “organizational roots” of the employment relationship are therefore not decisive. „Ordinary“ means that the employment contract must be characterized by the assignment in the area of activity concerned. In addition, it is sufficient that the employee carries out his work from the usual place of work[18] according to Art. 8 (2) 1 Var. 2 Rome I Reg. With the addition „or otherwise from that“ in Rome I Reg. the two subsequent decisions of the ECJ were taken into account. In the Mulox / Geels[19] and Rutten / Cross[20] decisions, the ECJ made it clear through the wording “or from which” that not the places of physical presence, but in individual cases also the starting point of the the cross-border employee can be used.. According to this, if the obligation from the employment contract is fulfilled in different states, the usual place of work is the

place where or from which the employee actually fulfills the essential part of his work obligation, taking into account all circumstances of the individual case. This includes the existence of a „base of operations". This is the place to which the employee is assigned, where his work assignments are planned and coordinated, from where he works and from which he receives instructions for his daily work. As part of an overall view, it must be checked whether the location of the actual work can be localized in a particular country. The ECJ interprets this generously and maintains a link to the hiring branch in accordance with. Art. 8 (3) Rome I Reg. for subordinate, unless no usual place of work can be determined even with the broadest interpretation[21]. This can e.g. be the place where the employee has an office from which he organizes his work and where he returns after every business trip abroad (e.g. sales representatives, travel companions, maintenance engineers).

Even when applying the „from" clause, the center of the actual performance must be located in a state. Otherwise, the connection to the hiring branch would be practically empty according to Art. 8 (3) Rome I Regulation. So it is not just a "place of work" or the place from which regular work starts. According to Art. 8 (2) 1 alt. 2 Rome I Reg., a normal place of work in a state can be affirmed if the employee performs a certain part of his work abroad or in a state-free area, but the essential part of the work is performed in a state ("work by a state out").

### III.2.2 Drive Truckers

In the Koelzsch case C-29/10[22] the ECJ decided that the consistent interpretation of the criterion of the „place where the employee habitually carries out his work" has the result that the rule can also be applied in cases where work is carried out in several Member States. In particular, the ECJ has made reference to the place from which the employee mainly carries out his obligations towards his employer or the place in which he has established the effective centre of his working activities or, in the absence of an office, to the place in which the employee carries out the majority of his work.

The ECJ works out different criteria:

First of all, the obligation which characterizes the contract, to carry out the work, must be taken into account. The kind of work must be taken into account, e.g. there is no need for an office when the drive trucker transports regular things from one country to another. The special characteristics of the transport business must be taken into account as regards the method of carrying it out and as regards the means or equipment used. If the employee performs his work in more than one Contracting State, the place of performance of the obligation characterizing the contract is the place where or from which the employee principally discharges his obligations towards his employer. It is necessary, in principle, to take account of the whole of the duration of the employment relationship in order to identify the place where the employee habitually works, within the meaning of that provision, and that, failing other criteria, that will be the place where the employee has worked the longest. Next, the place is important where, or from which, he in fact performs the essential part of his duties vis-à-vis his employer. In a dispute between the employee and the first employer, the place where the employee performs his obligations to a second employer can be regarded as the place where he habitually carries out his work when the first employer has, at the time of the conclusion of the second contract of employment, an interest in the performance of the service by the employee to the second employer

in a place decided on by the latter. The time factor can also be decisive and the Court established in which country the employee had worked the longest.

### III.2.3 „Flying workers“

It is controversial where the usual place of work is to be found with flying personnel who have no fixed location[23]. The ECJ last dealt with the judgment of 14.09.2017, C-168/16 and C-169/16[24] for determining the usual place of work in the aviation sector[25].

In its judgment, the ECJ clarifies that the place „where the worker usually does his job“ is the place where or from which he actually fulfills the essential part of his obligation. In order to determine this location, the national courts must take various indications into account in individual cases.

Specifically, the question in aviation for the clarification of jurisdiction arises in which Member State is the place from which the employee provides his services, to which he returns after work, where he receives instructions and where he organizes his work, where the work equipment is located and where the aircraft are stationed, where the work is usually done[26]. An evidence-based method is therefore decisive.

Although the home base is not crucial, it is an important indicator when determining or applying the above. Evidence. According to the ECJ, the design goal is to prevent circumvention strategies. It doesn't matter which country the aircraft is registered to[27].

### III.2.4 ”Sea workers“

Previously, maritime labour law was based on the law of the state whose flag the seagoing ship was flying[28]. It is not clear whether this is still the case after the ECJ's decision of 14.09.2017 C-168/16 and C-169/16 on the aviation sector. In any case, the criteria developed[29] by the ECJ in the Koelzsch judgment can be used directly when assessing the facts of work at sea[30].

If international ships, e.g. regular ships, ferries, etc. regularly return to a certain port of departure, Art. 8 (2) 1. alt. 2 Rome I Reg. should apply.[31] However, this should not be the case for workers who work on ocean-going ships[32], so that one should probably focus on the branch to be set up here in accordance with Art. 8 (3) Rome I Reg., unless there is a closer connection to another country, Art. 8 (4) Rome I Reg. In the case of constant work on oil rigs that are located on a continental shelf, the usual place of work can be assigned to the coastal state[33].

In summary, the objective connection points according to Art. 8 (2) Rome I Reg. must also be determined for workers at sea and the usual place of work determined. Also in the German § 21 (4) 1 Flag Law, reference is made to Art. 8 Rome I Reg.

### III.2.5 Interpretation

The individual terms of the Rome I Reg. must always be interpreted autonomously by the Union[34]. This ensures uniform application of the law in the member states. The principle of equality also

commands this. The norms and terms of the Rome I Reg. are to be interpreted independently of the regulation and understanding in the national legal orders.

The interpretation must be in line with the Rome II Regulation and the Regulation (EU) No 1215/2012. These regulations must therefore always be interpreted in relation to one another[35].

In addition, the general, known design methods to be observed apply, i.e. the grammatical (word-oriented), historical, systematic and teleological interpretation; the latter is based on the one hand on the recitals and on the other hand on the „effet utile“ (principle of maximum effectiveness).

The starting point of the autonomous interpretation is the wording. However, there are practical difficulties, since there are 24 different versions of the Rome I Reg. There is no binding original text of the Rome I Reg. that applies to all member states[36].

The grammatical interpretation requires a comparison of the different language versions[37]. The term “ordinary work” according to Art. 8 (2) Rome I Reg. is used among other things[38] as follows:

English version: „from which the employee habitually carries out his work in performance of the contract“[39].

German version: „in dem oder andernfalls von dem aus der Arbeitnehmer in Erfüllung des Vertrags gewöhnlich seine Arbeit verrichtet“[40]. Often, however, the term „ordinary place of work“ is used.

French version: „À défaut de choix exercé par les parties, le contrat individuel de travail est régi par la loi du pays dans lequel ou, à défaut, à partir duquel le travailleur, en exécution du contrat accomplit habituellement son travail“[41].

Spanish version: „En la medida en que la ley aplicable al contrato individual de trabajo no haya sido elegida por las partes, el contrato se regirá por la ley del país en el cual o, en su defecto, a partir del cual el trabajador, en ejecución del contrato, realice su trabajo habitualmente“[42].

A comparison of the different linguistic versions of the term „ordinary work“ shows that the versions use different expressions, so that no legal conclusions can be drawn from the terminology used. Analogous to the concept of „work“ in the sense of the working time directive, it depends on the different language versions that the employee is present[43] at the place of work; whether he actually works is not decisive.

The various linguistic versions of a Community provision must be able to be interpreted uniformly; if the versions differ – as in this case – the rule must therefore be interpreted according to the general structure and purpose of the regulation to which it belongs[44].

The historical interpretation also only helps to a limited extent. The starting point here are the recitals of the Rome I Reg. They provide information about the legislative motives and goals. They are very important[45]. However, it should be noted that the recitals are only an aid and do not have an independent, normative character. In the recitals of the Rome I Reg. there are no explanations

regarding the ordinary work. In no 19 and no 39 only the usual stay is addressed. It only states that this term should be defined. Regardless of this, however, the term habitual residence cannot be equated with the place of ordinary work. In no. 36 only the temporary work assignment is spoken of when the employee is expected to resume work in the country of origin after his work assignment abroad. Only the term "temporary" is defined here. Nothing can be deduced from this for the term "ordinary work". In the context of the historical interpretation, it must be taken into account that Article 8 of the Rome I Reg. was supplemented by the passage: „from which the employee usually performs his work in fulfillment of the contract." This closed a gap in the legislation, which the ECJ had previously concluded in the Mulox / Geels and Rutten / Cross[46] decisions by means of legal training. The legislature thereby showed that in such circumstances, the location of the operational base is fixed in the law anchored. Accordingly, the weight must be placed when determining the usual place of use. The systematic interpretation depends on the meaning of the norm, here Art. 8 (2) Rome I Reg. The ECJ derives the principle from the internal system that exceptions should be interpreted narrowly when in doubt. In addition, the systematic interpretation uses Union legal acts that relate to each other in terms of content. Based on this, it will certainly be possible to deduce that Art. 8 (3) Rome I Reg. is subordinate and constitutes an exception to Art. 8 (2) Rome I Reg. The ECJ also takes this into account by always emphasizing that Art. 8 (2) Rome I Reg. is to be interpreted broadly and Art. 8 (3) Rome I Reg., ie the branch to be closed, is subordinate[47]. In addition, the entire system in Art. 8 Rome I Reg. is to be observed with the gradation from paragraph 1 to paragraph 4. There is an obligatory test sequence. First, the principle is established in in paragraph 1 according to which the starting point of every consideration is the question of whether the parties have agreed on an effective choice of law. Only if this is answered in the negative, is it possible to test objective connecting factors to determine the usual place of work. If this provision is not possible, even with the broadest interpretation, does one come to the branch to be discontinued within the meaning of Art. 8 (3) Rome I Reg overall, exceptionally there is a closer connection to another state in relation to the states actually specified in paragraph 2 or 3 and the applicable law.

However, the teleological interpretation is crucial and of the greatest importance. It tries to concretize the content of the standard for the purpose pursued by the legislator. In the telos of the regulation, a value decision can be seen, which is to be applied to the individual cases. When it comes to teleological interpretation, the ECJ is guided "by the spirit of the regulations"[48]. The primary purpose of the regulations is seen in their respective form and expression in integration, the important legal principle of the community. In this context, the effet utile plays a major role, i.e. the principle of effectiveness. Regardless of whether this is part of the teleological interpretation or viewed as an independent interpretation method, it is important that the one with the greatest practical effectiveness is used for several interpretation options.

The telos of Art. 8 Rome I Reg. is to determine the conflict of laws which, in the interest of a smoothly functioning internal market, standardizes the conflict of law in all member states of the EU. This is intended to be predictable and to ensure that the conflict of law rules determine the same substantive law regardless of the state in which the court is located[49].

Here you can e.g. also locate the evidence-based method of the ECJ in cases C-168/16 and 169/16 of September 14, 2017. With individually developed criteria in the aviation sector, the ECJ tries to do justice to the effet utile in order to arrive at an appropriate result. In the context of the teleological interpretation, this seems appropriate. However, with the proviso that other criteria do not deviate from these specified criteria. This is due to the requirement of legal certainty and legal clarity. The ECJ also uses this evidence-based method in the transport sector, even if it does not explicitly describe it in the Koelzsch case[50].

Ultimately, it can be stated that the place where or from which the employee fulfills his obligations towards the employer must be determined taking into account the circumstances of each individual case. This can be done relatively clearly on the basis of the criteria specified by the ECJ, which are not conclusive and can be supplemented by other indications. However, as the example shows, it always depends on the parties, what they agree on in detail, how they live the employment relationship and how they proceed out of court and in court even after the termination of the employment relationship.

In conclusion, it should be noted that the links to the usual place of work and the hiring branch contained in Art. 8 (2) and (3) Rome I Reg. are not mandatory. Insofar as an overall view of the individual circumstances such as nationality of employer and employee, place of work, place of work of the employer, place of residence of the employee, contract language, currency in which the wages are paid[51], place of contract, registration of ship or plane, place of taxation[52] were determined actions of the parties to the employment contract during the employment relationship or afterwards, during a judicial procedure, etc. shows that there are closer links to another state is the right of this other state according to the escape clause of Art. 8 (4) Rome I Reg. to apply. However, this requires a substantial lecture on the individual circumstances, which should result in a closer connection to another national legal system[53].

### III.2.6 Temporary posting

A temporary posting does not lead to a change of the usual place of work, Article 8 (2) 2 Rome I Reg. The practical consequence is that posted employees work in the host country on the terms of their home country and the previous employment contract with the employer generally remains. So far it has not been clarified in terms of a specific time limit, up to which time period a „temporary“ posting can still be assumed. Here, too, it depends on the individual circumstances. According to recital 36 of the Rome I Reg., the provision of work in another country should be considered temporary if the worker is expected to resume work in his country of origin after working abroad. The concept of posting in the sense of Rome I Reg. is not to be equated with that of the posting directive, since Art. 8 Rome I Reg. does not presuppose that there is still an employment relationship between the posting employer and the employee[54]. According to the author, however, the criteria developed and laid down in the new posting directive can be applied analogously to the definition of the term “temporarily”.

According to the new, posted workers‘ directive of June 28, 2018[55], which had to be implemented by the member states by July 31, 2020[56], the following applies:

„1a. Where the effective duration of a posting exceeds 12 months, Member States shall ensure, irrespective of which law applies to the employment relationship, that undertakings as referred to in Article 1 (1) guarantee, on the basis of equality of treatment, workers who are posted to their territory, in addition to the terms and conditions of employment referred to in paragraph 1 of this Article, all the applicable terms and conditions of employment which are laid down in the Member State where the work is carried out:

- by law, regulation or administrative provision, and / or
- by collective agreements or arbitration awards which have been declared universally applicable or otherwise apply in accordance with paragraph 8.

The first subparagraph of this paragraph shall not apply to the following matters:

(a) procedures, formalities and conditions of the conclusion and termination of the employment contract, including non-competition clauses;

(b) supplementary occupational retirement pension schemes.

Where the service provider submits a motivated notification, the Member State where the service is provided shall extend the period referred to in the first subparagraph to 18 months."[57]

This is justified with the comments on No 9 – 11, in particular in No 9 as follows:

„(9) Posting is temporary in nature. Posted workers usually return to the Member State from which they were posted after completion of the work for which they were posted. However, in view of the long duration of some postings and in acknowledgment of the link between the labor market of the host Member State and the workers posted for such long periods, where posting lasts for periods longer than 12 months host Member States should ensure that undertakings which post workers to their territory guarantee those workers an additional set of terms and conditions of employment that are mandatorily applicable to workers in the Member State where the work is carried out. That period should be extended where the service provider submits a motivated notification. „

There are no specific explanations for the justification of an extension from 12 to 18 months in the amending directive. Finally, both considerations on freedom to provide services, freedom of establishment and freedom of movement for workers must be considered in detail. The extension can e.g. be justified to the fact that the stay will only continue due to an unforeseen delay or that a return is already planned within the 18-month period[58].

If the parties to the employment contract have agreed a different applicable law in accordance with the above, as this would be the case with an objective assessment, a comparison of the advantages must be carried out, cf. Art. 9 Rome I Reg. The choice of law must not result in the employee losing the protection of the right withdrawn by the choice of law[59]. This is done by means of a subject group comparison, i.e. not an individual or overall comparison, which can lead to different legal systems having to be applied[60]. Mandatory standards according to German law in the sense of Art. 9 Rome I Reg. are the official approval requirements according to § 85 SGB IX and § 9 Maternity Protection Act as well as continued payment of wages in the event of illness in accordance with § 3 Continued

Remuneration Act. The mass dismissal notice pursuant to § 17 of the Protection Against Unfair Dismissal Act also represents an interference standard under Art. 9 Rome I Reg[61]. Art. 9 Rome I Reg., however, presupposes that the facts have a sufficient domestic connection. If all connecting factors point to the application of foreign law, Art. 9 Rome I Reg. does not apply[62].

Finally, reference should be made to Art. 21 Rome I Reg. This is an exception, which presupposes that the applicable law would lead to a result that would affect the core of the domestic legal system. There must be a violation of public policy, according to which the result is so contradictory to the basic ideas of national, domestic law and the concept of justice that this would be intolerable[63]. A breach of the public policy reservation must be an obvious violation of a legal norm that is considered essential in the legal system of the executing Member State or a right recognized as fundamental there. Not every violation of a national law of the executing Member State is considered, but only an obvious violation of the fundamental rights recognized in the ECHR or in the EU legal order[64]. These principles are transferable to Art. 21 Rome I Reg., so that an actual violation of this constitutes the very big exception.

In the example, the application of Swedish law can be assumed after the employee has performed his work exclusively in Sweden for more than 7 years. It does not matter that the employee went to Germany for a week after work to spend his time there. Both the actual center of activity in Sweden and the time component speak for the usual place of work in Sweden. The employer therefore correctly paid social security under Swedish law. In addition, Reg.(EC) 883/2004[65] is used to determine the social security law for posted workers. Based on the territorial principle, the national social security law of the state in which the work is carried out for more than 24 months must be applied, Art. 11 (3) a), Art. 12 (1) Reg. (EC) No. 883/2004. The employer was also obliged to pay the social security contributions due to these regulations. However, the question arises as to whether the German termination agreement concluded was thereby fulfilled. According to the ideas of German case law, fulfillment occurs when the employer pays the social security contributions for both the employer and employee share. In Sweden, however, only the employer's share has to be deducted not the employee share. Based on this, the termination agreement was not yet fulfilled.

In addition, there is the other question, which cannot be assessed here[66], whether the employer should not have informed the employee in the termination agreement or when the termination agreement was concluded about the applicable law and the Swedish social insurance to be paid, so that he may be liable to pay compensation.

### IV. Drafting Contracts

Depending on the duration of the assignment abroad, there are different contract models. In the case of a real posting – as in the present case – the employee does not conclude another employment contract abroad. He is actually incorporated into a third-party organization – here the Swedish subsidiary – in order to work there. For assignments abroad of up to three years – in the example even 5 years – there is a typical posting. However, if it is only a short assignment of a few days abroad, you are on a business trip, which can be arranged by the employer within the framework of the right of management[67].

Most of the time, the operational organization abroad is a dependent representation or branch of the employer. However, it can also be a foreign company that is not legally linked to the employer. The posting is a temporary amendment agreement to the main performance obligations, in particular the temporary relocation of the place of work to the area of application, possibly the work content, working hours and remuneration – in the present case daily rate, etc. -.

In addition to posting, there is also the international transfer model. The domestic employment relationship is suspended, at the same time an active employment relationship is concluded with the organization abroad[68]. The employee has two employers, so to speak. This two-contract model is chosen because there are official requirements according to which an employment contract abroad is a prerequisite for the stay holding and work permit. The consequence of the dormant employment relationship in Germany is that it's subject to social security contributions is terminated after some time. The central regulatory aspect is the question of when and how the employee should return to the home company after the end of the assignment abroad. Coordination between employers and employees is required to ensure that work can be resumed smoothly at home. For the sake of clarity and legal certainty, it is recommended to fix a contractual regulation in writing.

If the employee concludes a contract with the foreign organization of operations within the framework of this model, local, foreign law applies exclusively to this contractual employment relationship. This according to the German as well as the European conflict rules. It is conceivable to declare German law applicable in this foreign employment contract. However, this is not advisable since the local courts do not know the German legal system and therefore are reluctant to apply it.

### V. Place Of Jurisdiction

Another question arises for the employee concerned, where he must assert his claims in court. It is about international procedural responsibility. Whether the court to be brought up has international jurisdiction depends on the procedural law of the respective country[69]. For the Member States of the European Union, international jurisdiction is based on regulation (EU) No 1215/2012 of the European parliament and of the Council of 12.12.2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[70]. According to Art. 21 Reg. 1215/2012, the employee can sue the employer both in the Member State in which he resides and in the court of the place where he usually did his work.

The usual place of work for employees who work in several member states is where or from where the employee fulfills the essential part of his contractual obligations[71]. The determination of this usual place of work is determined in accordance with the criteria set out in Art. 8 (2) Rome I Regulation.

If he has not usually done his work in the same country, he can also bring an action before the court where the branch that hired him is located[72]. If the employer wants to take legal action against the employee, he can do so according to Art. 22 Reg. 1215/2012 exclusively at the employee's place of residence. The place of residence is decisive at the time the action is brought. A different jurisdiction agreement is ineffective, unless it was concluded after the dispute arose or opens an additional jurisdiction[73].

In the example, the employee could take legal action against the employer before the German labour court in Berlin according to Art. 21 Reg. 1215/2012.

## VI. Conclusion

The question of which law is to be applied in a cross-border employment relationship cannot be answered easily and generally. Rather, it is necessary to take into account all individual circumstances of the respective case and the provisions of the Rome I Regulation. The graded test sequence of Art. 8 Paragraphs 1 to 4 of the Rome I Reg. must be observed. Above all, the case law of the ECJ, in particular the teleological interpretation using the evidence-based method, should be taken into account in order to come to appropriate solutions. Outlook: Right from the start, special emphasis should be placed on thorough, contractual – legally compliant – preparation for both employers and employees in order to avoid any unpleasant surprises and disappointments.

These statements are based on the maxim that the EU internal market is an area without internal borders in which the free movement of people and, in the present case, the free movement of workers is guaranteed in accordance with Art. 45 TFEU. Due to the corona pandemic, there are de facto border closings and entry restrictions within the EU member states with regard to the spread of the Covid virus or Covid mutations. This has a massive impact on the free movement of all EU citizens. When national border measures are introduced, internal and external free movement must be guaranteed. It is not justified on the one hand to allow travel within a member state and on the other hand to prohibit workers from other EU countries from entering the member state in order to be able to work there. The need for coherence in the EU must be respected. As part of a proportionality test, it must be clarified whether internal and external regulations can be treated differently for objective reasons. A weighing of interests must also be carried out.

The Member States justify the border measures with the protection of public order and security. Human health is a precious good, in the author's opinion the greatest good that needs to be protected. The Covid incidence figures in each member state and region are definitely a criterion for reviewing and deciding whether measures need to be taken to further spread the virus and virus mutations, including border controls and more difficult entry requirements. However, this line of argument is not a carte blanche. The internal market and freedom of movement in the EU market are cornerstones of European unification. Border controls are not a legal vacuum. If workers are not allowed to enter the country to work or if it is disproportionately difficult, this can be resolved in court. Then of course the questions of the place of jurisdiction and the applicable law arise. In the author's opinion, the above statements can be applied without restriction. The pandemic situation has no influence on the Rome I Regulation and the provisions on choice of law and employment relationships contained therein. If difficulties can arise in individual cases because the employee concerned cannot be located in the member state of the place of jurisdiction, this must be accepted.

It may appear that, as a result of the pandemic, the core values of the internal market are no longer valued as much as they should be. In any case, there must be no blanket restrictions or disregard for the rights of EU workers. Only clearly defined, transparent and temporary measures may be taken with regard to the Covid incidence values. This is the only way to ensure that the free movement of workers in the EU member states will continue to be guaranteed in the future.

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**Paneurópske právnické listy**
ISSN: 2644-450X (online)

Ročník/Volume: **4**
Číslo/Number: **1**
Rok/Year: **2021**

**Poznámky pod čiarou**

[1] see the consolidated version REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I); the conflict of laws law according to the Rome I Regulation applies to all member states with the exception of Denmark. Denmark continues to apply the Convention on the law applicable to contractual obligations (Rome Convention) – Convention 80/934/EEC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980.

[2] see ECJ 18.10.2016, Nikiforidis, C-135/15, available at: http://curia.europa.eu/juris/document/document.jsf text=&docid=184541&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1 (last accessed 06.02.2021).

[3] see ErfK/Schlachter, chapter 535 Art. 3,8,9 Rome I Reg. para 1.

[4] see ECJ 28.07.2016, C-191/15 Amazon, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=182286&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1 (last accessed 06.02.2021).

[5] see ECJ 19.07.2012 – C-154/11 Ahmed Mahamadia / Algerien, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=125230&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1 (last accessed 04.02.2021).

[6] see ECJ 20.05.2010 T-258/06 – Germany v Commission, available at:=T-258%252F06&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=5156685 (last accessed 04.02.2021).

[7] see ErfK/Schlachter, chapter 535, Art. 3,8,9 Rome I Reg., para. 7; Schlachter, Monika, in Journal NZA 2000, 57; Däubler in Journal NZA 1990, 673; Löwisch/Rieble, TVG-Kommentar, Grundlagen, para 74.

[8] see Thüsing, Gregor, Rechtsfragen grenzüberschreitender Arbeitsverhältnisse, in Journal NZA 2003, 1303ff. (1305).

[9] Note: The Rome I Regulation was enact on the 17.06.2008, see supra, footnote 1.

[10] No 23 Rome I Reg.: In contracts where one party is considered weaker, the weaker party should be protected by conflict of law rules that are more favorable to them than the general rules.

[11] see below 3.2.1 and 3.2.2.

[12i] see ECJ of 15.03.2011, C-29/ 10 (Koelzsch) available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=84441&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1 (last accessed 04.02.2021).

[13] see however the case of the German Federal Labour Court of 19.03.2014 – 5 AZR 252/12 (B).

[14] see Czerwinski, Marvin, The law applicable to employment contracts under the Rome I Regulation, p. 155 ff.

[15] see footnote 12, para 43 .

[16] see e.g. the German Federal Labour Court 11.12.2003 – 2 AZR 627/02 (Belgian traveling salesman, available at: https://lexetius.com/2003,3586 (last accessed 04.02.2021).

[17] see Wurmnest, Wolfgang, Arbeitsrecht, internationales, in HWB-EuP 2009, 1-3, available at: http://hwb-eup2009.mpipriv.de/index.php/Arbeitsrecht,_internationales (last accessed 04.02.2021).

[18] see Mankowski, Peter, in F. Ferrari, S. Leible, Rome I Regulation. The Law Applicable to Contractual Obligations in Europe, Sellier, Munich 2009, p. 177.

[19] see Judgment of the Court of 13.07.1993, Mulox IBC Ltd v Hendrick Geels. Case C-125/92, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61992CJ0125 (last accessed 04.02.2021).

[20] see Judgment of the Court of 09.01.1997 Petrus Wilhelmus Rutten v Cross Medical Ltd. – Case C-383/95, available at: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=100700&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6239834 (last accessed 04.02.2021).

[21] see ECJ 15.03.2011, C-29/ 10 (Koelzsch) para 43, see supra footnote 12.

[22] see ECJ 15.03.2011, Koelzsch C-29/10, see supra footnote 12.

[23] see ErfK/Schlachter, chapter 535, Art. 3,8, 9 Rome I Reg., para. 12.

[24] see ECJ of 14.09.2017, C-168/16 – Nogueira and Others v Crewlink Ireland Ltd and Miguel José Moreno Osacar v Ryanair Designated Activity Company Joined Cases C-168/16 and C-169/16; available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=194429&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4910616 (last accessed 04.02.2021).

[25] This was about the question of the competent court; however, the explanations on the usual place of work can be transferred to Art. 8 (2) Rome I Reg., since labor conflict and procedural law form a functional and interpretation unit and decisions of the ECJ always apply to both legal complexes.

[26] see supra, footnote 24, para 61-64.

[27] ibid., para 76.

[28] see e.g. German Federal Labour Court 24.09.2009, NZA-RR 2010, 604.

[29] see supra 3.2.2.

[30] opinion of the advocate general, 12.09.2011 in the case Voogsgeerd C-384/10, para 58.

[31] see ErfK/Schlachter, chapter 535, Art. 3,8,9 Rome I Reg. para 12.

[32] see Palandt/Thorn, Art. 8 Rome I Reg. para 10.

[33] see ECJ of 27.02.2002 – C-37/00.

[34] see e.g. ECJ of 18.10.2016, supra footnote 5, para 28; ECJ of 17.07.2008, C-66/08, Kozlowski, para 42 and ECJ of 24.05.2016, C-108/16, Dworzecki para 28.

[35] see recital no 7 of the Rome I Reg.

[36] see ECJ of 06.10.1982, C-283/81, CILFIT para.18 ff.

[37] see ECJ of 27.10.1977 – C-30/77, para 13/14.

[38] The author limits himself to the English, German, French and Spanish versions. A comprehensi ve list of the language versions would go beyond the scope of the article.

[39] see the English version available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF (last accessed 04.02.2021).

[40] see the German version, available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:DE:PDF (last accessed 04.02.2021).

[41] see the French version, available at: https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32008R0593&from=DE (last accessed 04.02.2021).

[42] see the Spanish version, available at: https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:32008R0593&from=DE (last accessed 04.02.2021).

[43] see Hanau, Hans, Zum Flexibilisierungspotenzial der Arbeitszeitrichtlinie, in the Journal EuZA 2019, 423-440 (427).

[44] ECJ of 27.10.1977, C-30/77 Brouchereau, para. 13/14.

[45] see ECJ of 28.10.2010, C-203/09, para 40 Volvo Car Germany, para 40; ECJ of 10.10.2013, C-306/12, para 20 Spedition Welter.

[46] see supra footnote 19 and 20.

[47] see supra the explanations under 3.2.1.

[48] see ECJ Rs. 26/62, van Gend & Loos, Slg. 1963, p.1 para. 27.

[49] see recital no. 6 of the Rome I Reg.

[50] see the explanations supra, chapter 3.2.2.

[51] see also German Federal Labour Court 03.05.1995 – 5 AZR 15/94-18/94.

[52] see Palandt/Thorn, Art. 8 Rome I Reg. para 13.

[53] see State Labour Court Rostock judgment of 19.03.2014, Az. 2 Sa 172/13 – which had denied a closer connection when working on a cruise ship, after Italian law had been expressly agreed in the employment contract and the employee did not speak enough about the circumstances could have established a closer connection to another national legal system.

[54] see ErfK/Schlachter, chapter 535, Art. 3,8,9 Rome I Reg., para 13.

[55] see DIRECTIVE (EU) 2018/957 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the frame work of the provision of services, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0957&from=EN (last accessed 04.02.2021).

[56] see Article 3 of the Directive (EU) 2018/957, Transposition and application, The Member States shall adopt and publish by 30 July 2020, the laws, regulations and administrative provisions necessary to comply with this Directive.

[57] Art. 1a of the Directive (EU) 2018/957, supra footnote 55.

[58] see Riesenhuber, Karl, Die Änderungen der arbeitsrechtlichen Entsenderichtlinie, in NZA 2018, 1433-1439 (1438), available at: https://beck-online.beck.de/Dokument?vpath=bibdata%2Fzeits%2Fnza%2F2018%2Fcont%2Fnza.2018.1433.1.htm&pos=13&hlwords=on (last accessed 04.02.2021).

[59] see German Federal Labour Court 11.12.2003, 2 AZR 627/12.

[60] see Schaub/Linck, § 7 para 9.

[61] see ErfK/Schlachter, chapter 535 Art. 9 Rome I Reg. para. 23ff.

[62] see Thüsing in Journal NZA 2003, 1303.

[63] see German Federal Civil Court of 20.09.1993, II ZR 104/92, BGHZ 123,268 (270).

[64] see advocate general Kokott, opinion of 3. 7. 2014 – Rs. C-302/13, AS flyLAL-Lithuanian Airlines.

[65] see Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

[66] This has nothing to do with the labour conflict law dealt with here; the facts of the case are also not meaningful enough for a well-founded assessment.

[67] see German Federal Labour Court 29.08.1991 – 6 AZR 539/88.

[68] see Thüsing, supra footnote 8, NZA 2003, 1303f.

[69] see Roß-Hirsch in Handbook Internationales Arbeitsrecht, Rechtssichere Gestaltung, Durchführung und Beendigung von Mitarbeitereinsätzen im Ausland, Bundesanzeiger Verlag GmbH, Berlin, 2014, chapter A – Einsatz von Arbeitnehmern im Ausland, p. 30.

[70] see the consolidated version available at: https://eur-lex.europa.eu/eli/reg/2012/1215/oj (last accessed 04.02.2021), short form Reg. No 1215/2012.

[71] see ECJ 14.09.2017, C-168/16, see supra footnote 24.

[72] see ECJ 22.5.2008, C 462/06 available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=67748&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1 (last accessed 04.02.2021).

[73] see ECJ 19.07.2012 – C-154/11 Ahmed Mahamadia / Algerien, see supra footnote 9; ECJ 14.09.2017, C-29/16, see supra footnote 5.