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Comment on the ECJ decision of 10 April 2003 in Pugliese

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INTERNATIONAL AND EUROPEAN PROCEDURAL LAW

Jurisdiction and the law applicable to contracts in complex employment relationships

Comment on the ECJ decision of 10 April 2003 in *Pugliese*

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1. Habitual workplace in the case of overlapping employment relationships

In its *Pugliese* decision of 10 April 2003,[1] the ECJ addresses the treatment of complex employment relationships under European procedural law. "Complex employment relationships" exist as the result of several individual employments that, while free-standing, are nevertheless materially connected with one another.

This scenario – not uncommon in today's economy, which is increasingly characterised by cross-border transactions – occurs chiefly in the area of the law of corporate groups where workers are hired by a group company and seconded to another company within the same group at some time during or (as in the case decided by the ECJ) at the very outset of their employment. This second company concludes a separate employment contract with the worker that overlaps with the employment relationship with the first company. As a rule, both contracts of employment – the so-called *residual employment* with the first employer and *local employment* with the second employer[2] – are substantively harmonised with one another. In the instant case, the worker's salary was paid by the local employer for which the services were performed. The worker also obtained various benefits from the first employer in the way of rent allowances and home leave designed to offset the additional expenses and tax burdens associated with being posted to a foreign country.

Such complex employment relationships present legal difficulties both in their classification under international procedural law as well as in the determination of the applicable law in accordance with the 1980 Rome Convention.

The relevant European and international rules of procedure – in European law, Article 5, No. 1, clause 2 of the Brussels and Lugano Conventions as well as Article 19(1)(a) of Regulation 44/2001; in international private law, Article 6(2)(a) of the Rome Convention[3] – are all in agreement as to a default connecting factor, i.e. the place "where the employee habitually carries out his work". In a complex constellation of overlapping employments, the habitual workplace is naturally unclear; the residual and local employments taken by themselves will usually provide for different workplaces. However, the employee is in fact only working at one of the two places – namely, the workplace of the local employment. This thereby raises the question of whether the determination of jurisdiction in each of the employments should be considered separately so as to emphasise their independence, or alternatively whether there is a stronger argument for viewing the two employments as a unitary (albeit complicated) constellation – a complex employment – for which a uniform connection as regards jurisdiction consequently becomes necessary.

2. The ECJ's view on complex employment relationships

The Court of Justice adopted the latter stance in the *Pugliese* decision. It affirmed that the jobs must be seen in their connection with one another when certain conditions are present, thereby acknowledging the legal relevance of the scenario at issue. The Court answered the questions presented in the case solely with respect to the determination of the forum of the habitual workplace under European procedural law. Whether any wider ranging significance can be gleaned from the Court's reasoning remains to be seen.

A "complex employment relationship" is characterised by a number of formally independent employments concerning one and the same worker that are so closely connected that each produces effects for the other. Up to now, the treatment of such employment constellations was highly controversial, although it appears that the topic has not been broached in discussions of international civil procedure. Writings on German international private law have shown a marked preference for considering the overlapping employments separately.[4] Nevertheless, the German Bundesarbeitsgericht (Federal Labour Court, "BAG") went even one step further in a 1981 decision involving a similar case; there, it found a "unitary employment" (*einheitliches Arbeitsverhältnis*) of the worker with several employers, with the residual and local employments to a certain extent being fused with one another.[5] The BAG was strongly criticised for this decision, which it subsequently did not affirm – leaving open the legal qualification.[6] The acceptance of a "unitary employment" would transcend the actual facts in the cases with overlapping employments and is there-

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1 ECJ 10 April 2003 – C-437/00 – *Pugliese*, reprinted in this issue at p. 167 – 169.

2 On this distinction, see comment by *Franzen*, Comment on order for reference of the LAG Munich (D) of 11 February 2000, [2000/01] EuLF (E) 295, 297 (discussing the case which gave rise to the ECJ decision discussed here); *Franzen,* Kündigungsschutz im transnational tätigen Konzern, [2000] IPrax 506 et seq.

3 The German law equivalent is contained in Article 30(2)(a) EGBGB.

4 See *von Hoffmann*, in: *Soergel*, Kommentar zum Bürgerlichen Gesetzbuch, 12th ed., vol. 10, 1996, Stuttgart/Berlin/Cologne (D), para. 52 on Article 30 EGBGB; *Franzen* (*supra* note 2), [2000] IPrax 507 with further references.

5 BAG (D) 27 March 1981, in: 37 BAGE 1 et seq.

6 Critical, see comment of *Wiedemann*, AP Nr.1 § 611 Arbeitgebergruppe; *Franzen* (*supra* note 2), 507 and references provided therein. The BAG leaves the construction of the "unitary employment" open in its decision of 21 January 1999; see comment of *Franzen* in: [2000] IPrax 540 et seq.

fore to be rejected.

In reality, the mutual influence of the individual overlapping employments in a complex employment relationship is more nuanced. The ECJ's decision therefore opted for a pragmatic approach in line with its previous case law on work contracts. Its summary of the case law highlights three fundamental principles:

- the autonomous determination of a uniform forum for jurisdiction over the employment relationship in its entirety and over all ensuing claims;[7]

- the particular appropriateness of the court in the place where the work is performed for deciding on the claims of the parties;[8]

- the special protection that labour law accords the employee as the typically weaker of the contracting parties from the social point of view – whereby the habitual workplace is the least expensive place for the employee to commence or defend court proceedings.[9]

From these three objectives, the Court of Justice deduces that the matter must first of all be considered on the basis of the individual contract of employment. The Court does not question that the contract of employment serves as the basis for the mutual rights and obligations between the parties in the main proceedings. However, the jurisdictional link must be applied to the place where the worker actually carries out the work agreed to with the employer. If the actual place of performance is determined in a contract with another employer, it follows that jurisdiction inheres to this place for the determination of the appropriate forum as well, provided there is a sufficiently close connection between the two employment contracts.[10]

The Court recognises that the two overlapping employments can be attributed to one another in such a way that the actual circumstances of one can have legal ramifications for the other. In other words, the Court acknowledges in such case a "complex employment relationship" on the basis of the connection between both employment relationships.

3. When does a complex employment relationship exist?

Instances in which workers are simultaneously involved in several employment relationships may arise in a number of different scenarios. However, it should not always be assumed that these employments will necessarily influence one another in the sense of a complex employment relationship.

Some cases in which the same person has parallel employments are unproblematic, such as when the worker holds two part-time jobs – mornings for one employer, afternoons for another. As a rule, these parallel employments do not come to bear on one another. What is in fact necessary is that the parallel ties of the worker to a number of employers temporally overlap. Since an employee can only perform one job at a time, it would stand to reason that the various employment relationships in that case are also materially connected with one another.

That is of course also not always the case. The mere fact that two jobs overlap temporally does not necessarily lead to the conclusion that they are also materially connected. Employers may release employees from their work for a set period, promising to hold their posts open. Such is the case with statutorily regulated maternal leave or parental leave. There may not be any additional implications with regard to the first employment should the employee perform some work for a second employer during this period; indeed, the first employer may remain none the wiser.

In the majority of cases in which an employee is simultaneously involved in several overlapping jobs, these employments will naturally have substantial connections with one another. The textbook case would be the instance described at the outset of the group company that seconds its employee to another company of the same group. In the interests of promoting cooperation between allied companies, such scenarios are no longer uncommon in European corporate practice. However, a corporate nexus between the various employers connected with the worker is not necessarily a precondition for the existence of a complex employment relationship. Such a relationship can come about via a comparable degree of merging of personnel between two independent companies whose businesses are so closely connected that it makes sense to second an employee to the other company. Longer term transfers of an employee into the operations of another occur frequently in cross-border cases, where cooperation between two companies demands cultural and linguistic coordination above and beyond the basic economic issues.

In many cases, a separate employment contract is drawn up with the second company that maintains the labour law relationships to the first company, which may have agreed to additional benefits as incentives for the worker to switch to the foreign corporate partner. This case as well suggests the assumption of a complex employment relationship.

The Court of Justice does not lay out abstract rules for determining when it is appropriate to resort to the actual circumstances created by the parallel second employment in establishing jurisdiction over the first employment. The Court rules that this is reasonable *vis-à-vis* the first employer if the latter had an *interest* in the formation of the second employment contract at the time of its conclusion. The existence of such an interest "does not have to be strictly verified according to formal and exclusive criteria, but must be determined in an overall manner taking into consideration all the facts of the case". The Court lists various factors as examples that could be taken into account in this assessment.[11] The following list

[7] *Pugliese* (*supra* note 1), para. 16 (with reference to ECJ 13 July 1993 – C-125/92 –*Mulox IBC*, and ECJ 9 January 1997 – C-383/95 – *Rutten*.)

[8] *Pugliese* (*supra* note 1), para. 17.

[9] *Pugliese* (*supra* note 1), para. 18.

[10] *Pugliese* (*supra* note 1), para. 21: "[T]he question whether the place where an employee performs his obligations *vis-à-vis* an employer can be treated as the place where he habitually carries out his work for purposes of the application of Article 5(1) of the Convention, in a dispute concerning another contract of employment, depends on the extent to which those two contracts are connected."

[11] *Pugliese* (*supra* note 1), para. 24.

summarises and expands on those criteria put forward by the Court:

- Was the first employer involved in the contract of employment with the second employer, giving it an interest that the contract be concluded and fulfilled by the employee? Does the formation of the second work contract trace back to an agreement made between the two employers?

- To what extent do the two contracts materially harmonise with one another? This does not just apply to the case decided here by the ECJ where the first employer assumes certain costs incurred by the plaintiff as a result of her assignment abroad; this is also typical where the termination of one employment entails certain consequences for the other.

- Routine reporting requirements could also provide strong evidence for a connection between the two employments; such requirements aim at keeping the one employer up to date as to developments and continuity with respect to the other employment relationship.

However, in order for the secondment of an employee to another employer to have a bearing on the determination of the appropriate forum, it must be of a certain minimum duration and not merely temporary in nature. This is apparent from the wording of Article 5, No. 1, clause 2 of the Brussels Convention. The literature also refers to the provision in Article 6(2)(a) of the Rome Convention under which a temporary posting in another country has no impact on the "habitual workplace".[12]

4. Complex employment relationships under European procedural law and international contract law

In a complex employment relationship, the factual circumstances existing in the local employment have an impact on the dormant residual employment. They determine the place where the employee habitually carries out his work for the connections of jurisdiction and the law applicable to the contract.

4.1. Connection to the forum of the habitual workplace

In the case of a complex employment relationship, determining the forum for the contract of employment means that a worker may sue the first employer that seconded him before the courts with jurisdiction over his actual workplace with respect to the "local" employment in the event of a dispute. The ECJ did not need to decide the question of how the connection is to be made to jurisdiction when the worker's local employment is in various places rather than in one fixed place. The connecting factor would thus be the registered office of the company which employed the worker, i.e. the place of business or branch of the worker's "local employer". Again, consideration must be given to the fact that the employee is actually integrated in the organisation of the second company, which therefore provides the relevant facts.

The rules formulated by the ECJ in *Pugliese* for the Brussels Convention hold equally true for Regulation 44/2001, which adopted the connection of jurisdiction of the habitual workplace without modification in Article 19(2)(a). However, the Regulation makes an important revision in this respect, making it explicit that the forum of the habitual workplace works exclusively in favour of the employee – keeping with the protection of the employee as the typically weaker party in the employment relationship. Only the employee can sue the employer in this forum. Conversely, Article 20(1) of the Regulation compels employers to bring proceedings before the courts of the employee's domicile. The Regulation thus solved the problem whereby the connection to the forum of the habitual workplace can also turn against an employee in certain cases: In the complex employment relationship, it may not always be desirable for the employee that his employer may sue him directly in the habitual workplace of the local employment. Future lawsuits based on Article 5, No. 1, clause 2 of the Brussels Convention are in any event expected only in connection with Denmark. For such cases and the congruently worded provision in the Lugano Convention, Article 5, No. 1, clause 2 should be interpreted in keeping with the Regulation's pro-employee approach. This accords with the thrust of the *Pugliese* decision, which the ECJ bases on the very principle of employee protection.

4.2. Does the connection also apply for Article 6 of the Rome Convention in the context of complex employment relationships?

Article 6 of the Rome Convention connects the law applicable to employment contracts primarily to the place in which the employee habitually performs his work – the same criteria as contained in Article 5, No. 1, clause 2 of the Brussels Convention and Article 19(1)(a) of Regulation 44/2001. This place determines the law applicable to the employment in the absence of a choice of law provision (Article 6(2)(a) of the Rome Convention). The notion of employee protection contained in this latter provision is further amplified by Article 6(1), pursuant to which a choice of law provision subjecting the employment contract to another law may not deprive workers of the protection afforded by mandatory rules of the law that would be applicable on the basis of the place of employment.

Under the principles of the *Pugliese* decision, it stands to reason that allowance should be made for the special conditions existing in complex employment relationships in the context of Article 6 of the Rome Convention. The considerations that swayed the ECJ to account for the influence of the actual circumstances of the local employment on the first employment apply equally for the connection of the applicable law. The proper law of the work contract is subject to change: If an employee within one and the same employment is permanently posted to another country, this results in a change in the governing law.[13] The law applicable to the first employ-

[12] See *Kropholler*, Europäisches Zivilprozessrecht, 6th ed., 1998, Heidelberg (D), para. 30 on Article 5 of the Brussels Convention.

[13] *Heldrich,* in: *Palandt*, Kommentar zum BGB, 62nd ed., 2003, Munich (D), para. 7 on Article 30 EGBGB; *Martiny*, in: *Reithmann/Martiny*,

ment contract is thus to be linked to the habitual workplace of the local employment as a consequence of its influence on the first job within a complex employment relationship.

However, this solution is usually not in the interests of the parties in terms of the residual employment: The parties will elect the form of the complex employment relationship for the very fact that they want the first employment to be maintained for the period of secondment to the other employer. A worker posted abroad assumes that the job in his home country – i.e. the residual employment – will not be subject to fundamental changes aside from its suspension as a consequence of the foreign assignment. Conversely, the first employer also assumes that this first employment is to be synchronised with its various business operations in which the seconded worker remains embedded.

The change of governing law that results when a worker accepts a long-term position with a foreign employer may be avoided by means of a choice of law provision in which the parties agree that the law originally governing the contract be maintained in spite of a foreign workplace. In many cases such a choice of law is express or can be deduced from the circumstances (e.g. by reference to statutory or ordinary collective agreement provisions applicable in the employee's home country). But even in the absence of such factors, the implied agreement to the continuing relevance of the law applicable to the first employment contract and of the labour law standards of rules and protections contained therein can be inferred from the nature of the complex employment relationship – the secondment of the employee to the foreign employer while the first job is suspended and held open for the absent worker.[14][14]

In this way, the worker will by no means be deprived the protection available at the habitual workplace as stipulated by the second employment. This flows from the protection rule of Article 6(1) of the Rome Convention, which preserves the mandatory rules of the labour law applicable at the place of employment. It is only logically consistent that the employee be accorded the level of protection available at his actual workplace *vis-à-vis* his first employer. To this extent the influence of the actual workplace prevails over the first employment relationship. This result corresponds to the common interests of both employers in a complex employment relationship that the worker will carry out his responsibilities at a habitual workplace that is uniformly determined.

As a result, the residual employment is thereby subject not only to its original governing law which remains in effect between the parties by means of a choice of law provision, but also in a complementary fashion to the mandatory rules of protection of the labour law applicable at the workplace of the second employment.

Internationales Vertragsrecht, 5th ed., 1996, Cologne (D), para. 1345 (towards the end); *von Hoffmann* (*supra* note 4), para. 41 on Article 30 EGBGB.

14 The decision of the BAG of 21 January 1999 (*supra* note 5), in which an employee was seconded to an Argentinean subsidiary, makes the alternative set of issues perfectly clear. None of the parties can be interested in changing the law governing the employment contract. The employee is not, since it would run counter to his interests if for instance the first employer were able to fire him on the basis of lower levels of protection against dismissal afforded at the habitual workplace. The employer is not, since it would otherwise be unable to motivate the worker to accept a secondment to another employer in a foreign country.

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Brussels Convention[1] Article 5(1) – Court for the place of performance of the contractual obligation – Contract of employment – Place where the employee habitually carries out his work – First contract fixing the place of performance of the work in one Contracting State – Second contract concluded with reference to the first contract and under which the employee carries out his work in another Contracting State – First contract suspended during the performance of the second

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Article 5(1) of the Brussels Convention must be interpreted as meaning that, in a dispute between an employee and a 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, with respect to whom the employee's contractual obligations are suspended, 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 existence of such an interest must be determined on a comprehensive basis, taking into consideration all the circumstances of the case.

Article 5(1) of the Brussels Convention must be interpreted as meaning that, in matters relating to contracts of employment, the place where the employee carries out his work is the only place of performance of an obligation which can be taken into consideration in order to determine which court has jurisdiction.

Facts: *The applicant in the main proceedings concluded a contract of employment with the Aeritalia Aerospaziale Italiana SpA ('Aeritalia'), a company incorporated under Italian law, on 5 January 1990. The applicant was engaged to work from 17 January 1990 at Aeritalia's establishment in Turin (Italy). On that day, the applicant asked her employer to suspend her employment owing to her transfer to a post with Eurofighter Jagdflugzeug GmbH ('Eurofighter'), a company incorporated under German law and established in Munich (Germany), in which Aeritalia held some 21 % of the shares. By letter of 18 January 1990 Aeritalia acceded to that request with effect from*

1 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, at 36) two questions on the interpretation of Article 5(1) of that Convention, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, at 1 and - amended version - at 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, at 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, at 1).