CODIFICATION OF PRIVATE INTERNATIONAL LAW RULES ON EMPLOYMENT CONTRACTS

BY

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I. INTRODUCTION

The need for a codification of private international law rules has traditionally been felt to be more urgent in such fields as family relations and inheritance matters than in the field of contracts. Lately, however, international contractual relationships have attracted wider interest among European legislators. The result has been more legislation in this area, with more detailed and elaborate provisions. Choice-of-law rules concerning contracts are usually found in general codifications of private international law, but they are also the subject of specific legislation.

The last two decades have witnessed the completion of several significant codifications in the field of conflict of laws. Among the socialist countries of Europe the following statutes have been adopted: the Czechoslovakian Act of 1963,[1] the Polish Act of 1965[2] and the East German Act of 1975.[3] In western Europe, Portugal reformed its private international law provisions in 1966[4] and Spain did the same in 1974.[5] Austria passed an Act on private international law in 1978.[6] Other codifications are under preparation. Of these the most

See References at the end of this paper for authors and titles quoted in the footnotes only by name or otherwise abbreviated.

[1] Act on Private International Law and Procedure, December 4, 1963. See Makarov, pp. 293 ff. (text in German and in the original language) or *Statutory PIL*, pp. 261 ff. (text in French). See generally Korkisch, *RabelsZ* 32 (1968), pp. 601 ff., and Kucera, *Clunet* 1966, pp. 783 ff.

[2] Act on Private International Law, November 12, 1965. See *Statutory PIL*, pp. 295 ff. (French text) or Makarov, pp. 185 ff. (Polish and German texts). See generally Korkisch, *RabelsZ* 32 (1968), pp. 601 ff.; Lasok, 15 *Am. J. Comp. L.*, pp. 330 ff. (1967); Rajski, 15 *I.C.L.Q.*, pp. 457 ff. (1966).

[3] Gesetz über die Anwendung des Rechts auf internationale zivil-, familien- und arbeitsrechtliche Beziehungen ("Rechtsanwendungsgesetz"), December 5, 1975. The text appears in 25 *Am. J. Comp. L.*, pp. 354 ff. (1977) both in German and in English. See generally Espig, *NJ* 1976, pp. 360 ff.; Juenger, 25 *Am. J. Comp. L.*, pp. 332 ff. (1977); Siegfried Mampel, "Das Rechtsanwendungsgesetz der DDR", *NJW* 1976, pp. 1521 ff.; Strohbach, *AW* no. 22/76, pp. 1 ff. According to *News from Hungary* no. 1979/3 (which reached the present writer only after completion of this paper), a new Code of Private International Law came into force in Hungary in 1979.

[4] The renewal of the Civil Code, November 25, 1966. See Makarov, pp. 197 ff. (text in Portuguese and in German) or *Statutory PIL*, pp. 159 ff. (text in French). See generally Neuhaus–Rau, *RabelsZ* 32 (1968), pp. 500 ff.

[5] The renewal of the Preliminary Dispositions of the Civil Code, May 31, 1974. See Makarov, pp. 259 ff. (text in Spanish and in German), or *Rev. crit. d.i.p.* 1976, pp. 401 ff. (text in French, inserted in the article). See generally Buigues, *Rev. crit. d.i.p.* 1976, pp. 397 ff.; Cremades–Maceda, *RIW/AWD* 1975, pp. 375 ff.; von Hoffmann–Ortiz-Arce, *RabelsZ* 39 (1975), pp. 647 ff.

[6] Bundesgesetz über das internationale Privatrecht (IPR-Gesetz), June 15, 1978. The

comprehensive is the one pending in Switzerland. The Swiss Draft Act on Private International Law was published in 1978.[7]

All of these codifications contain choice-of-law rules concerning contracts.[8] A separate convention on the law applicable to contractual obligations has been prepared within the EEC.[9]

In the Nordic countries, conflict-of-laws legislation regarding contracts is scanty. Denmark, Finland, Norway and Sweden are all parties to the 1955 Hague Convention on the Law Applicable to International Sales of Goods,[10] but except where sales are concerned, the private international law rules on contractual relationships are still to be found only in court decisions and legal writing.[11]

Norms concerning employment contracts follow the general pattern. Express provisions for the law governing these contracts have been rare until quite recently.[12] Problems of international labour law have, however, come into prominence as a by-product of increasing foreign investment activity and the growing impact of multinational corporations on economic life. In consequence, the need to cope with and to regulate these problems through statutory enactments has become more urgent. Nearly all of the codifications mentioned above include specific stipulations as to the law

original text is found in *RabelsZ* 43 (1979), pp. 375 ff. A French translation appears in *Rev. crit. d.i.p.* 1979, pp. 176 ff. See generally Beitzke, *RabelsZ* 43 (1979), pp. 245 ff.; comment, *Rev. crit. d.i.p.* 1979, pp. 174 ff. (by Prof. Schwind).

[7] The German and French texts appear in *Begleitbericht,* pp. 2 ff., 188 ff. See generally *Schlussbericht* and Max Gutzwiller, "Der Entwurf zu einer Kodifikation des schweizerischen Internationalprivatrechts", *ZSR* 98 (1979) I, pp. 1 ff.; Heini, *SJZ* 74 (1978), pp. 249 ff.; François Knoepfler, "Le projet de loi fédérale sur le droit international privé helvétique", *Rev. crit. d.i.p.* 1979, pp. 31 ff.; von Overbeck, *RabelsZ* 42 (1978), pp. 601 ff.; *idem, ZfRV* 19 (1978), pp. 194 ff.

A number of codification efforts in Europe have failed. See Hans Ulrich Jessurun D'Oliveira, "Die Freiheit des niederländischen Richters bei der Entwicklung des Internationalen Privatrechts", *RabelsZ* 39 (1975), pp. 224 ff. (Benelux Draft); comment, *Rev. crit. d.i.p.* 1970, pp. 832 ff. (French Drafts).

[8] These provisions are found primarily in arts. 9–16 of the Czechoslovakian Act, arts. 25–33 of the Polish Act, secs. 12 and 27 of the East German Act, arts. 41–3 of the Portuguese Civil Code, art. 10(5)&(6) of the Preliminary Dispositions of the Spanish Civil Code, secs. 35–45 of the Austrian Act and arts. 117–27 and 141–7 of the Swiss Draft.

[9] The EEC Draft Convention on the Law Applicable to Contractual Obligations. The last version is dated 1979 (III/120/79). An earlier version and comments thereon have been published in *European PIL of Obligations.*

The Hague Conventions on the Law Applicable to International Sales of Goods (1955) and on the Law Applicable to Agency (1978) also regulate contractual relations.

[10] See Ole Lando, "Nordic Uniform Act on the Law Applicable to International Sales of Goods", 15 *Am. J. Comp. L.*, pp. 806 ff. (1967).

[11] There is uniform legislation in Denmark, Finland, Norway and Sweden in the special field of bills of exchange and cheques, including identical choice-of-law rules based on the 1930 and 1931 Geneva Conventions.

[12] Gamillscheg, in *Int. Encycl. Comp. L.* III.28, sec. 2. See Birk, *NJW* 1978, p. 1827.

applicable to employment contracts.[13] However, these rules are not codified in the Nordic countries.[14]

In Finland, labour and employer organizations as well as governmental authorities are inquiring into the possibilities of consolidating rules on international labour relations. So far only preparatory steps have been taken to implement appropriate legislative measures.

The purpose of this paper is to examine whether and to what extent it is desirable to codify choice-of-law rules relating to employment contracts. This aim is pursued from the viewpoint of Finnish law, but to a great extent on the basis of the solutions adopted in foreign codifications.

II. THE FINNISH CHOICE-OF-LAW RULES

Several comprehensive papers on international employment relationships have appeared in Scandinavian legal writing during the last few years.[15] The central Finnish writings on this topic, two articles by Professor Antti Suviranta,[16] date from the year 1964.[17]

[13] Art. 16 of the Czechoslovakian Act, art. 32 of the Polish Act, sec. 27 of the East German Act, art. 10(6) of the Preliminary Dispositions of the Spanish Civil Code, sec. 44 of the Austrian Act, art. 6 of the EEC Draft. See also arts. 121 and 122 of the Swiss Draft. (The provisions of the socialist states regulate "employment relationships"; the others "employment contracts".)

The Portuguese Civil Code lacks express choice-of-law rules for employment contracts. Thus, the law governing these is determined in accordance with the general rules on contracts (arts. 41 and 42 of the Civil Code). See Neuhaus–Rau, *RabelsZ* 32 (1968), 509.

On the EEC Draft Regulation on the conflict of laws in employment relationships within the Community (O.J. no. C 49/26, May 18, 1972), see Philip, in *Int. L. & Econ. Order,* pp. 257 f., 261 ff.

[14] Bogdan, *SvJT* 1979, pp. 82, 91; Gaarder, p. 113; Lando, *TfR* 1979, p. 3. Bogdan (at pp. 91, 110 f.) mentions a unilateral Swedish stipulation concerning work done abroad by an employee of the state.

Legislation on merchant seamen's employment contracts is not dealt with in this paper because of its specific nature (see Gamillscheg, *Int. Encycl. Comp. L.* III.28, sec. 2). Sec. 1 of the Finnish Merchant Seamen Act of 1978 states that the Act applies to work done in a Finnish vessel or work done elsewhere temporarily on the employer's orders. If a Finnish vessel or part of it has been transferred to the disposal of a foreigner, the Ministry of Social Affairs may grant a dispensation from applying the Act (sec. 86). The Council of State may decree that the Act also applies to work performed in a foreign vessel by Finnish employees for a Finnish employer (sec. 87). The Swedish Merchant Seamen Act of 1973 includes very similar provisions (secs. 1, 59, 60).

[15] Bogdan, *SvJT* 1979, pp. 81 ff.; Carlhammar, in *Arbetsrätten i utveckling,* pp. 67 ff.; Lando, *TfR* 1979, pp. 1 ff. As to Norwegian law, see Gaarder, pp. 113 ff.

Earlier works, which do not directly concern employment relationships but which have some relevance in this connection, are: Lars A. E. Hjerner, *Främmande valutalag och internationell privaträtt,* Uppsala 1956, and N. P. Madsen-Mygdal, *Ordre public og territorialitet,* I–II, Copenhagen 1946 (with an English summary).

[16] Professor Suviranta is at present the President of the Finnish Labour Court.

[17] Antti Suviranta, "Suomen työsopimusoikeuden kansainvälisiä ongelmia" (International

Professor Suviranta's contributions are influenced by Professor Gamillscheg's work *Internationales Arbeitsrecht* (1959). They are based on the distinction between norms of private law, on the one hand, and public law, on the other,[18] although Suviranta questions the feasibility of such a distinction.[19] Suviranta also adopts Gamillscheg's theory of "radiation".[20]

The main points of the two papers can be summarized as follows:

(1) *a*. The parties to an employment contract should not be allowed freely to determine the law applicable to their contractual relationship by means of a choice-of-law clause. The mandatory provisions of the Finnish Employment Act can be considered to be an expression of *ordre public*. They cannot be set aside, at least not in cases where the employment contract would be governed by Finnish law in the absence of a choice and where the law chosen would offer substantially less protection to the employee. Although a choice-of-law clause is valid in principle, a Finnish court in such a case as that just noted would have to deviate from the chosen law to the extent necessary for carrying out the intention of the Finnish mandatory provisions.[21]

b. In the absence of a choice-of-law clause the proper law of the employment contract is to be determined through the so-called individualizing method, which seeks to establish the centre of gravity of the legal relationship in each particular case.[22] In judging employment contracts, the presumption[23] is that the centre of gravity lies in the country where the work is performed. Thus, the main rule is that the applicable law is that of the country in which the employee performs his work.[24] If the work is carried out in several countries, as in the case of a lorry driver engaged in international traffic, the main rule is not sufficient. The applicable law should then be that of the country where most of the work is performed, or it should be the law of the employer's country, especially if the contract has been concluded there and the employee has been sent from there to work abroad.[25]

(2) The starting point in the application of norms of public-law character

problems of the Finnish law on employment contracts), *Lakimies* 1964, pp. 807 ff.; *idem*, "Suomen julkisen työoikeuden kansainvälisiä ongelmia" (International problems of Finnish public labour law), *Lakimies* 1964, pp. 997 ff. An article concerning workers' retirement pay appeared in the same year: Tauno Suontausta, "Kansainvälinen sosiaalivakuutusoikeus ja työntekijäin eläkelaki", *Lakimies* 1964, pp. 343 ff.

[18] Suviranta, *Lakimies* 1964, p. 997.
[19] Suviranta, *loc. cit.*, pp. 998 f.
[20] Suviranta, *loc. cit.*, p. 1001.
[21] Suviranta, *loc. cit.*, pp. 811 ff.
[22] On the Nordic concept of the individualizing method, see generally Eek, pp. 267 f.
[23] On the "presumptions" or "*in dubio* rules", see generally Eek, p. 268.
[24] Suviranta, *Lakimies* 1964, p. 813.
[25] Suviranta, *ibid.*

(such as legislation concerning working hours, paid holidays, and social benefits[26]) is that such norms are territorial. However, through the theory of "radiation", Finnish public-law provisions may apply when a Finnish employee is sent by his Finnish employer to work abroad temporarily (and, correspondingly, foreign norms may apply when work is temporarily performed in Finland).[27] The applicability of the Finnish provisions may, in Suviranta's opinion, depend partly on a time factor.[28] Also, if the laws of the place of work secure adequate protection for the employee, it may be unnecessary to apply the Finnish public-law provisions.[29]

The main rule—the application of the law of the place of work in the absence of a choice—as well as the exceptional application of Finnish law in cases where a Finnish employee is sent by a Finnish employer to work abroad temporarily, are confirmed by other Finnish writers.[30] Restrictions on the possibility of choosing the applicable law have also met with approval.[31] On the other hand, the distinction between private-law norms and public-law norms as they affect the choice of law has met with opposition.[32]

III. SOLUTIONS ADOPTED IN FOREIGN LEGISLATION

For the purposes of this paper, a comparison of the concrete solutions adopted by foreign legislation is deemed of greater interest than an analysis of the different views expressed in foreign legal writing.[33] A survey

[26] Suviranta points out that many norms are of mixed character. Suviranta, *Lakimies* 1964, pp. 998 f.

[27] Suviranta, *loc. cit.*, pp. 997 ff., esp. p. 1001. The same view is taken by Dr Suontausta as to social-security legislation. Suontausta, *loc. cit.*, p. 353.

[28] For example, the right to paid holidays develops over a fairly long period; this makes it possible to make use of the "radiation" theory more extensively in connection with these questions. On the other hand, the theory is not appropriate in connection with working hours, thus excluding the possibility of applying Finnish law to these questions when the work is performed abroad. Suviranta, *Lakimies* 1964, p. 1001.

[29] Suviranta, *loc. cit.*, pp. 1001 f.

[30] Alanen, pp. 233 f.; Hannu Tapani Klami, *Suomen kansainvälinen yksityisoikeus*, Turku 1978, p. 115. See also Berndt Godenhielm, "Internationellt privaträttsliga frågor inom patenträtten", *NIR* 1956, pp. 53 ff., at pp. 67 f.

[31] Klami, *op. cit.*, p. 117. Professor Klami considers that, in cases where the work is done in Finland, a choice-of-law clause is valid only if it places the employee in a better legal position than the Finnish law would. If the work is done abroad, however, the law of the place where the work is performed can validly be chosen even if it is detrimental to the employee. Klami, *ibid.*

[32] Klami, *op. cit.*, p. 120.

[33] Besides the Nordic literature mentioned above, see generally, e.g., Däubler, *AWD* 1972, pp. 1 ff.; Gamillscheg, in *Int. Encycl. Comp. L.* III.28; Isele, in *Festschrift Ficker*, pp. 241 ff.; Szászy, *International Labour Law*.

of the legislative solutions must comprise the relevant provisions which have been included in the latest codifications of private international law, including the Swiss Draft and the EEC Draft Convention on the law applicable to contractual obligations. It is possible in these matters, as it is not in some other fields of law, to draw a parallel between rules emanating from socialist legal systems, on the one hand, and western systems, on the other. The socialist codifications are based upon the traditional method of private international law and aim at the same basic goals as the western enactments.[34]

1. *Party autonomy*

In accordance with a well-established principle, the codified choice-of-law rules concerning contractual relationships are based on the notion of party autonomy.[35] Some provisions accept a choice by the parties only if the contract has some connection with the chosen law,[36] but the majority of them carry no such general restrictions.[37] Differences also exist as to whether the choice of law must be express[38] or whether a tacit choice of law is sufficient.[39]

As to employment contracts, the very principle of party autonomy has been disputed in legal writing and case law,[40] and this disparity is also manifested in the codified rules. The East German Act, although not expressly, excludes party autonomy altogether in employment contracts.[41] On the other hand, the Czechoslovakian and Polish Acts expressly allow the parties to choose the applicable law in labour relations also;[42] so does

[34] See Juenger, 25 *Am. J. Comp. L.*, pp. 332 ff. (1977); Korkisch, *RabelsZ* 32 (1968), p. 602, pp. 647 f.; L. A. Lunz, "L'objet et les principes fondamentaux du droit international privé en U.R.S.S. et dans les autres pays socialistes européens", *Clunet* 1973, pp. 97 ff. Cf. Paul Heinrich Neuhaus, "Sozialistisches internationales Privatrecht?" *RabelsZ* 31 (1967), pp. 543 ff.

[35] Art. 9(1) of the Czechoslovakian Act, art. 25(1) of the Polish Act, art. 41 of the Portuguese Code, art. 10(5) of the Spanish Code, sec. 35(1) of the Austrian Act, art. 117(1) of the Swiss Draft, and art. 3(1) of the EEC Draft. It appears indirectly from sec. 12(1) of the East German Act that choice of law by the parties is allowed. See Espig, *NJ* 1976, p. 363.

[36] The Polish and Spanish provisions mentioned in note 8 above. See Rajski, 15 *I.C.L.Q.* 466 (1966); Buigues, *Rev. crit. d.i.p.* 1976, p. 414; von Hoffmann–Ortiz-Arce, *RabelsZ* 39 (1975), pp. 674 f. See also art. 41(2) of the Portuguese Code and Neuhaus–Rau, *RabelsZ* 32 (1968), p. 509.

[37] See Heini, *SJZ* 74 (1978), p. 257, and *Schlussbericht,* p. 215. See also generally Lando, in *Int. Encycl. Comp. L.* III.24, secs. 65–9.

[38] Art. 10(5)(1) of the Spanish Code. See also Strohbach, *AW* no. 22/76, p. 5.

[39] Art. 9(1) of the Czechoslovakian Act, art. 41(1) of the Portuguese Act, sec. 35(1) of the Austrian Act, and art. 3(1) of the EEC Draft. See also *Schlussbericht,* p. 217.

See generally on a tacit choice of law Lando, in *Int. Encycl. Comp. L.* III.24, secs. 88–99.

[40] See Gamillscheg, in *Int. Encycl. Comp. L.* III.28, secs. 8–16, and Fincke–Strohbach, *NJ* 1976, p. 257. For a more detailed analysis, see Fikentscher, *RdA* 1969, pp. 204 ff.

[41] Fincke–Strohbach, *ibid.*

[42] Art. 16(1) of the Czechoslovakian Act and art. 32 of the Polish Act. On the European socialist countries generally, see Korkisch, *RabelsZ* 32 (1968), p. 640.

the Spanish Code, reserving, however, the applicability of certain types of Spanish mandatory provisions (the so-called "lois d'application immédiate").[43] The Portuguese Code remains silent on this point.

The EEC and Swiss Drafts, as well as the Austrian Act, offer a compromise formula. According to the EEC Draft, a choice-of-law clause in a contract of employment "... shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable ... in the absence of choice".[44] The contents of the Austrian provision are essentially on the same lines as the EEC Draft.[45] The stipulation of the Swiss Draft appears more restrictive because it does not confine the limitation to mandatory rules, but in reality it leads to the same result.[46]

These latter provisions are expressions of the modern trend in the European private international law of contracts. The principle of party autonomy is still the basic rule, but where it is necessary for the protection of the weaker party of the contract, the possibilities for deviation from the law most closely connected with the contract are restricted.[47]

It should also be mentioned that the Austrian Act recognizes only an express choice-of-law clause in an employment contract, whereas, in contractual relationships generally, the choice of law may also be derived from the circumstances of the case.[48]

2. *Applicable law in the absence of choice*

In the codifications the treatment of objective connecting factors ranges from total silence[49] to quite elaborate rules.

[43] Art. 10(6) of the Spanish Code. See Buigues, *Rev. crit. d.i.p.* 1976, p. 415, and von Hoffmann–Ortiz-Arce, *RabelsZ* 39 (1975), p. 675. Cf. Cremades–Maceda, *RIW/AWD* 1975, p. 377.

[44] Art. 6(1) of the EEC Draft. See Philip, in *Int. Law & Econ. Order,* p. 260. The provision which in an earlier version of the Draft corresponded to art. 6(1) is commented on by Professor Giuliano in *European PIL of Obligations,* p. 265.

[45] Sec. 44(3) of the Austrian Act. See generally *Protokollen des Nationalrates der XIV. Gesetzgebungsperiode, Beilage Nr. 784,* pp. 135 f.

[46] Art. 117(2) cf. art. 122 of the Swiss Draft. See generally Heini, *SJZ* 74 (1978), p. 257 and *Schlussbericht,* pp. 215 f.

[47] See generally Kropholler, *RabelsZ* 42 (1978), pp. 644–54; Lando, in *Int. Encycl. Comp. L.* III.24, secs. 70–79.

[48] Sec. 44(3) cf. sec. 35(1) of the Austrian Act. Cf. *Schlussbericht,* p. 217 and Gamillscheg, in *Int. Encycl. Comp. L.* III.28, sec. 17.

[49] As mentioned above, the Portuguese Code has no specific provisions for employment contracts.

(a) *The principle* lex loci laboris

The Spanish Code and Swiss Draft limit themselves to reinforcing the *lex loci laboris* rule,[50] which is widely accepted in legal writing as the main principle.[51] The place of work is also laid down as the principal connecting factor in the Czechoslovakian and Austrian Acts, as well as in the EEC Draft; but these provisions contain, in addition, more detailed regulations.[52]

According to the EEC draft provision, a contract of employment is governed by the law of the country in which the employee habitually carries out his work in performance of the contract, and this law applies even if he is temporarily employed in another country. The Austrian provision adopts the same rule, but in defining the scope of the rule it looks at the matter from a slightly different angle. Rather than stressing the temporality of the work in another country, it adopts as a criterion the fact that the employment relationship has begun in one country and continues in another. Thus, according to the Austrian provision, the law of the place where the employee habitually carries on his work continues to be applicable, if the employee is sent to work in another country. The provision, then, also covers dispatch to more permanent foreign employment, provided that this is a continuation of an already existing employment relationship.[53]

There is an alternative connecting factor in both the Austrian Act and the EEC Draft for situations where the place of work cannot be ascertained: If the employee cannot be considered to work habitually in any one country, the law of the employer's place of business applies.[54]

In the Czechoslovakian Act, the import of the *lex loci laboris* rule is restricted to a certain extent by the following exception: If the employer is

[50] Art. 10(6) of the Spanish Code and art. 122 of the Swiss Draft. On the Swiss draft provision, see generally *Schlussbericht,* pp. 222 ff.

It appears from the comments on the Swiss Draft that the idea of applying the law which in each particular case is more advantageous to the weaker party (i.e. the employee in employment contracts) has been rejected for reasons of diminishing legal certainty. *Schlussbericht,* p. 223. See also Kropholler, *RabelsZ* 42 (1978), p. 657 and Birk, *NJW* 1978, p. 1830.

[51] See Gamillscheg, in *Int. Encycl. Comp. L.* III.28, secs. 19–29.

[52] Art. 16 of the Czechoslovakian Act, sec. 44(1)&(2) of the Austrian Act, art. 6(2) of the EEC Draft.

[53] *Protokollen des Nationalrates der XIV. Gesetzgebungsperiode Beilage Nr. 784,* p. 134.

If an employee who normally works in his homeland has been sent abroad to work at a fair or exhibition or to do installation work of short duration, the employment contract, according to both the EEC Draft and the Austrian Act, clearly falls under the law of the employee's homeland. But in cases where an engineer has been sent abroad for several years to supervise construction work, the proposed EEC rule *prima facie* points to the new place of work, whereas under the Austrian Act the law of the employee's homeland still applies.

[54] Sec. 44(2) of the Austrian Act and art. 6(2)(b) of the EEC Draft. With multinational corporations in mind, the latter provision makes the connecting factor more precise: "... by the law of the country in which the place of business through which he was engaged is situated".

a collective body (*organizací*) whose place of business is in a country other than that where the work is performed, the law of the employer's place of business applies, unless the employee has his habitual residence in the country where the work is performed.[55] This means that a contract between a foreign employer and a person working in his own country is always governed by the local law, but, if the employee works outside the country of his habitual residence, the law of the employer generally applies. According to a specific provision, the employer's law also applies to contracts between a transport firm and its employees, except in cases involving air or water transport.[56]

(b) *Other connecting factors*

In contrast to the above-mentioned codifications, the Polish provision begins with a rule based on a common "personal" connecting factor. If the place of business of the employer and the habitual residence of the employee are in the same country, the law of that country applies.[57] Where these factors do not coincide, however, the law of the place of work governs the employment contract.[58] In practice, these rules usually lead to the same results as the *lex loci laboris* rule with its exceptions concerning temporary work in another country and dispatched workers.[59]

Yet another formula is offered by the East German Act. The provisions of this Act concerning employment relationships are based on the idea that such a relationship is most closely connected with the country to whose productive process the work belongs.[60] Thus, the place of business of the employer is considered the most important connecting factor, and this leads to the application of the law of the employer's place of business as the primary rule.[61] There is, however, a significant exception to this principle. If the place of work is situated in the country where the employee has his habitual residence (*Wohnsitz*), the law of that country applies.[62] This means that employment contracts between local labour and a foreign enterprise are governed by the law of the place of work, a result which is also reached through all the other previously-mentioned provisions.

The survey shows that, despite the different formulae adopted by different acts and drafts, their provisions produce similar results in practice.

[55] Art. 16(1) of the Czechoslovakian Act.
[56] Art. 16(2) of the Czechoslovakian Act. See generally Kucera, *Clunet* 1966, pp. 790 f.
[57] Art. 33(1) of the Polish Act.
[58] Art. 33(2) of the Polish Act. See generally Lasok, 15 *Am. J. Comp. L.*, p. 350 (1967).
[59] See Korkisch, *RabelsZ* 32 (1968), pp. 640 f.
[60] See Espig, *NJ* 1976, p. 365.
[61] Sec. 27(1) of the East German Act.
[62] Sec. 27(2) of the East German Act. See generally Espig, *NJ* 1976, pp. 365 f., and Strohbach, *AW* no. 22/76, p. 6.

3. *Provisions permitting flexibility*

After stipulating the decisive connecting factors, the EEC draft provision on employment contracts allows deviations from the choice-of-law rules in exceptional cases. If "... it appears from the circumstances as a whole that the contract is more closely connected with another country ...", the law of that country shall apply (art. 6, sec. 2).[63] This is a specification of a similar, but more general clause in art. 4(5).

The idea of formulating rather detailed choice-of-law rules, providing at the same time for flexibility through the so-called escape clauses, has won considerable support in legal writing.[64] The drafters of the Swiss codification have also adopted this view and have included a general escape clause in their draft.[65]

Additionally, new types of provisions, inspired by the new American school of conflict of laws,[66] may affect the choice of law regarding employment contracts. These newly-developed rules concern the possible effects on the outcome in the case of *foreign* mandatory norms, which are not part of the law otherwise applicable.[67]

According to art. 7(1) of the EEC Draft.

> ... effect may be given to the mandatory rules of the law of any country with which the situation has a significant connection, if and in so far as, under the law of that country, those rules must be applied whatever the law applicable to the contract.

[63] See Philip, in *Int. Law & Econ. Order*, p. 261.

[64] "Detaillierte Einzelregeln machen ... eine Ausweichklausel ... nicht überflüssig, sondern erst recht nötig, damit eine Rechtsfortbildung möglich bleibt." Neuhaus, *Grundbegriffe*, p. 450.

"Dieser Lösungsmethode (verfeinerte Regelbildung mit Ausweichklausel) dürfte im europäischen Internationalen Vertragsrecht die Zukunft gehören." Kropholler, *RabelsZ* 42 (1978), p. 638.

[65] Art. 14 of the Swiss Draft stipulates that the law designated by the choice-of-law rules of the Act is not applicable if, having regard to all the circumstances of the case, the issue is only vaguely connected with that law and has an apparently closer connection with another law. See generally *Schlussbericht*, pp. 59 f.

On the reasoning behind the Swiss provision, see von Overbeck, *ZfRV* 19 (1978), p. 201: "Eine Möglichkeit, offen von der gesetzlichen Anknüpfung abzuweichen, erschien der Kommission besser als Lösungen, bei denen der Richter durch Kunstgriffe auf dem Gebiete der Qualifikation, des *Renvoi*, usw die Anwendung eines Rechtes, das ihm nicht zutreffend scheint, beiseite schiebt."

[66] See generally Christian Joerges, *Zum Funktionswandel des Kollisionsrechts*, Berlin–Tübingen 1971; Amos Shapira, *The Interest Approach to Choice of Law*, The Hague 1970.

[67] The application of certain types of mandatory rules which belong to the *lex fori* is widely accepted on the basis of the so-called *lois d'application immédiate* maxim. See, e.g., Lando, in *Int. Encycl. Comp. L.* III.24, sec. 73, and Neuhaus, *Grundbegriffe*, pp. 105 ff. This maxim is included in art. 17(2) of the Swiss Draft (see generally *Begleitbericht*, pp. 74 f.) and art. 7(2) of the EEC Draft. The Spanish provision on employment contracts expressly makes a reservation for the application of the Spanish "immediately applicable" norms. Art. 10(6) of the Spanish Code.

The provision further stipulates that

> [i]n considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application.[68]

The Swiss Draft has a similar provision.[69]

These provisions may especially come into operation in connection with employment contracts. They make it possible, for instance, to judge the relationship between the employer and the employee from the point of view of principle according to the law of the common home country of the parties (the country of dispatch) but to "give effect" to the mandatory rules which are in force at the place where the work is performed.

Diverging from the traditional hostility towards application of foreign norms of public-law character, the provisions just mentioned imply the application of such norms.[70] Thus, these provisions manifest a tendency to apply a broader international perspective to conflict-of-laws rules. The Swiss Draft, which in general displays an internationalist attitude, now expressly states that application of a foreign norm is not precluded by the fact that it is considered to be of public-law character.[71]

The escape clauses are not meant to govern situations where there is a choice of law by the parties.[72] The provisions concerning mandatory norms, however, may also come into play where the parties have chosen the applicable law.[73]

IV. CONCLUSIONS

Several conclusions can be drawn from the survey of the foreign legislative provisions. First, the most recent codifications show a tendency to restrict

[68] See generally Drobnig, in *European PIL of Obligations,* pp. 82 ff.; van Hecke, in *Int. Law & Econ. Order,* pp. 183 ff.; von Hoffmann, *RabelsZ* 38 (1974), pp. 405–7.

See also art. 3(3) of the EEC Draft and comments thereon by Philip, in *Int. Law & Econ. Order,* p. 259 (the present provision corresponds to art. 2, sec. 2, of the previous version).

[69] Art. 18 of the Swiss Draft. See generally Heini, *SJZ* 74 (1978), pp. 257 f.; von Overbeck, *ZfRV* 19 (1978), pp. 202–4; *Schlussbericht,* pp. 65 f.

Art. 16 of the Hague Convention on the Law Applicable to Agency (1978) also contains a comparable stipulation. See Report by I. G. F. Karsten, in *Hague Conference on Private International Law, Actes et documents de la Treizième session* (1976) Vol. IV Agency, The Hague 1979, pp. 403 ff.

[70] Philip, in *Int. Law & Econ. Order,* p. 259.

[71] Art. 13(3) of the Swiss Draft. See generally *Schlussbericht,* p. 58.

[72] This appears clearly from the text of the EEC Draft. The wording of the Swiss Draft, as it stands now, does not make this delimitation, but the provision will probably be redrafted to meet this purpose. See von Overbeck, *RabelsZ* 42 (1978), p. 610.

[73] Philip, in *Int. Law & Econ. Order,* p. 259.

party autonomy in employment contracts. Secondly, there is considerable unanimity as to certain choice-of-law rules. And, thirdly, a new, more liberal approach in conflict-of-laws questions in general, manifesting itself in the most recent drafts, has an effect on employment relationships.

1. *Concord in certain rules*

Despite charges of introducing "politics" into private international law,[74] the protection of the weaker party has come to be regarded as one of the central elements in international contract law.[75] This development is manifested in the latest codifications, especially in provisions which expressly restrict party autonomy in employment contracts. The tendency is justified. The unequal bargaining power of the parties, which has led to protective national legislation in favour of the employee, has also to be taken into consideration in judging the validity of a choice-of-law clause.

There is some support for an exclusion instead of a restriction of party autonomy in employment contracts,[76] but an intermediate solution seems to be preferable. The exclusion of party autonomy would imply specific rules at least for certain types of employees—especially highly-qualified specialists[77]—and this would, again, raise problems of characterization. In so far as the principle of party autonomy does not endanger the rights of the employee, it should be maintained. Thus, a choice-of-law clause by the parties should be considered valid in principle, but only to the extent that it does not deprive the employee of the protection afforded him by the mandatory provisions of the law which would be applied in the absence of choice. This is the position embodied in the latest codified rules (the Austrian Act and the EEC and Swiss Drafts), and it also corresponds to the views presented in Finnish legal writing.[78]

Whether the choice-of-law clause should be express or whether it could be inferred from the circumstances of the case is a question that has not

[74] See references in Mänhardt, pp. 29 ff. See also Kropholler, *RabelsZ* 42 (1978), p. 660.

[75] See arts. 120(2) and 122 of the Swiss Draft. See also von Hoffmann, *RabelsZ* 38 (1974), p. 396; Kropholler, *RabelsZ* 42 (1978), p. 634; *Schlussbericht*, p. 222.

[76] See Lando, *TfR* 1979, pp. 38–41, who is ready to accept party autonomy only if the employee is a highly-qualified specialist. Even then the chosen law must, in his opinion, have a real connection with the contract or the parties. See also Kropholler, *RabelsZ* 42 (1978), pp. 646, 656. Of the codifications, only the East German Act excludes party autonomy in employment contracts.

[77] See Bogdan, *SvJT* 1979, p. 110 note 89; Lando, *TfR* 1979, pp. 38–41.

[78] See II above. In other Nordic countries, Bogdan (*SvJT* 1979, pp. 109 f.) holds the same view. Gaarder (p. 113) and Philip (p. 317) are also for restricted party autonomy in employment relationships. Siesby (in *European PIL of Obligations*, pp. 206 ff.) favours the restriction of party autonomy in weak party contracts in general. Cf. Jokela, in *European PIL of Obligations*, p. 119.

been discussed in Finnish legal writing. Another question that is still open is whether there should be a connection between the chosen law and the contract of employment or the parties to it or whether a "neutral" law could be chosen.[79] Requirements for a choice-of-law clause should be stricter in a weak party contract than they are generally. There are, therefore, grounds for maintaining—in accordance with the Austrian Act—that the choice of law pertaining to an employment contract should be express. However, it is not necessary to reject a choice of a neutral law, for the parties may have a justifiable interest in choosing such a law.[80] The rights of the employee would at any rate be safeguarded through the application of the mandatory provisions of the law otherwise applicable, if the chosen neutral law would give him less protection.

As to the objective connecting factors, basic rules are well established. Regardless of the fact that the place of work is in some formulae regarded only as a secondary point of contact, the *lex loci laboris* principle remains the main rule. Uncontested in Finnish legal writing,[81] the principle meets the demands of both conventional and more modern theoretical thinking in the field of contracts.[82]

A considerable measure of unanimity also seems to exist as to certain exceptions (or extensions) to the *lex loci laboris* rule, despite the different wordings in the legislative acts. First of all, temporary work abroad does not bring about a change in the applicable law; the law of the country where the employee habitually carries on his work still governs the employment contract. Secondly, in cases where the employee works in different countries and does not habitually carry on his work in any one country, the law of the state where the employer has his place of business applies, at least if the employee has been dispatched from there. These rules correspond to the views expressed in Finnish legal writing.[83]

2. *Are additional provisions needed?*

Codification of the above-mentioned rules would undoubtedly promote legal certainty and predictability. The formulae adopted in recent foreign legislation and drafts would provide useful patterns. Thus the codification

[79] Bogdan (*SvJT* 1979, p. 110) and Lando (*TfR* 1979, pp. 39 f.) are against the possibility of choosing a neutral law.

[80] See *Schlussbericht*, p. 215.

[81] The principle is also adopted in other Nordic countries. Bogdan, *SvJT* 1979, p. 113; Gaarder, p. 113; Lassen, *Juristen* 1959, p. 465. See Lando, *TfR* 1979, pp. 38–44; Philip, pp. 345 f.

[82] See Kropholler, *RabelsZ* 42 (1978), pp. 641, 656.

[83] As to other Nordic countries, see Bogdan, *SvJT* 1979, p. 115; Gaarder, p. 115; Lando, *TfR* 1979, p. 40; Lassen, *Juristen* 1959, p. 465; Philip, p. 346.

could further harmonization of conflict-of-laws rules on an international level as well.

However, codification of only those rules which restrict party autonomy and lay down the objective connecting factors could hardly meet the requirements of the rapidly changing world. New types of problems are constantly arising,[84] and atypical situations demand special treatment. A small country, where practical experience in the field of international employment contracts is still relatively scarce, should be particularly cautious in introducing hard and rigid rules on this matter. Therefore, if the choice-of-law rules should be codified, they should be accompanied by an escape clause drafted along the lines of art. 14 of the Swiss Draft or similar to the last sentence in art. 6(2) of the EEC Draft, in order to ensure adequate flexibility.[85]

There are many problems relating to international employment contracts which are not solved by traditional choice-of-law rules. In cases where the applicable law is not that of the place of work, not only norms of the *lex causae* but also certain local provisions necessarily affect the employment relationship.[86] Local provisions regulating working hours and health conditions are among those which necessarily apply, regardless of the *lex causae.* But some other questions, such as minimum wages, are not so easily classified as coming within the sphere of local public policy or falling under the scope of the applicable law.[87] These questions are heterogeneous and can hardly be regulated in a general way.[88] To cope with these problems, it would be desirable to have a flexible provision allowing the application of certain types of foreign norms which do not belong to the law governing the contract, along the lines of art. 7 of the EEC Draft or art. 18 of the Swiss Draft.[89]

This, in turn, would presuppose an affirmative attitude towards application of foreign norms which can be characterized as public-law norms.[90]

[84] The Hague Convention on the Law Applicable to International Sales of Goods (1955) is at present being modified because it does not take into account consumer sales, a recent development in national legislations.

[85] See III.3 above.—Philip, in *Int. Law & Econ. Order* at p. 261, gives an example of an exceptional situation where a flexible rule is needed.

[86] See Gaarder, p. 114; Lando, *TfR* 1979, pp. 43 f.

[87] E.g. Gamillscheg, in *Int. Encycl. Comp. L.* III.28, sec. 37, cf. Lando, *TfR* 1979, p. 43. On the differing views regarding holidays, see Gamillscheg, *loc. cit.,* sec. 36. See also Isele, in *Festschrift Ficker,* pp. 253, 257 f.

[88] See Birk, *NJW* 1978, pp. 1830 f.

[89] See III.3 above.—Jokela, in *European PIL of Obligations,* p. 120, writes affirmatively on art. 7 of the EEC Draft.

[90] See Lando, *TfR* 1979, p. 36, and Bogdan, *SvJT* 1979, p. 121 (but cf. p. 82). See also generally Lando, in *Int. Encycl. Comp. L.* III.24, sec. 159, and *idem,* "The Substantive Rules in the Conflict of Laws: Comparative Comments from the Law of Contracts", *Texas Int. Law Journal* 1976, p. 505.

The taking up of a conscious stand with this orientation would simplify problems relating to international employment contracts, and would make it possible to focus attention on the social function of a material provision rather than its place in legal systematics.[91]

3. *Important problems left open*

A comprehensive codification of private international law seems to be out of reach in Finland. The expertise in the field as well as the available fund of experience in international cases is limited in quantity. The only feasible approach seems to be gradual conflict-of-laws legislation linked with codification of substantive norms.[92]

Rules concerning international employment contracts seem to be an appropriate object of partial codification. The traditional choice-of-law rules relating to them are sufficiently well-established (both on a national and an international level) to be codified. The proposed flexible provisions, for their part, would even as a separate piece of legislative enactment have a considerable effect on the development of Finnish private international law in general. Moreover, codification would clarify the conflict-of-laws rules which are known to be somewhat indigestible for lawyers who are not expert in this field.

From the point of view of an "internationalist", one whose special interest lies in private international law,[93] the codification, then, would seem desirable. The reaction of those particularly concerned with labour law may, on the other hand, be different, for the suggested rules would solve only a limited part of the problems related to employment relationships. Collective agreements, which are of great practical importance in most employment relationships, need special treatment.[94] The proposed rules would leave untouched, e.g., the applicability of collective agreements to work done abroad, as well as the interplay between norms based on these agreements, on the one hand, and statutory norms deriving from a different legal system, on the other. There are also questions pertaining to procedure and other fields of law which would have to be considered in order to arrive at a complete picture of the position of an employee in an

[91] Däubler, *AWD* 1972, p. 5.

[92] Cf. Neuhaus, *Grundbegriffe,* p. 442 (against partial codification of private international law).

[93] See Francescakis, *Rev. crit. d.i.p.* 1974, pp. 295 f.

[94] See Gamillscheg, in *Int. Encycl. Comp. L.* III.28, sec. 40.

Collective agreements in international contexts are discussed in Scandinavian legal writing by Bogdan, *SvJT* 1979, pp. 92–107; Carlhammar, in *Arbetsrätten i utveckling,* pp. 65 ff.; Lando, *TfR* 1979, pp. 44 f.; Per Jacobsen, "Danish Collective Labour Law and its Development in Recent Years", 22 *Sc. St. L.,* pp. 123 ff. (1978).

international employment relationship.[95] The tools of private international law do not suffice to solve all of these problems.[96] To a large extent the task is one that falls to the labour-law specialists.

The fact that not all of the problems can be solved through the suggested rules does not, however, mean that the codification would altogether lack importance. So many different types of legal norms come into play in connection with employment relationships that it is unlikely that a coherent codification of rules pertaining to international labour relations will ever be attained. Yet even a partial codification would serve a purpose, and the proposed rules would leave room for further development.

[95] See Birk, *NJW* 1978, p. 1830; Bogdan, *SvJT* 1979, pp. 85–90. See also Morgenstern–Knapp, 27 *I.C.L.Q.*, pp. 792 f. (1978).
[96] Francescakis, *Rev. crit. d.i.p.* 1974, pp. 295 f.

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