A Prehistorical analysis
In principio erat PIL

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Menu

- The *Spaak* Report **(1956)** : Developping « European ressources » while avoiding PIL
- Free movement of workers : Article 45 **(1957)** and Regulation 1612/**68** ☹
- The Rome Convention **(1980)** → Regulation 593/2008
- The approach to labour migration in *Rush Portuguesa* ☹ ☹ (1990)
- The case law of the ECJ prior to the (implementation) EC Directive 1996/71 ☹ ☹ ☹

The Spaak Report

- Rapport des chefs de délégation aux Ministères des Affaires étrangères (Spaak = president of the Comité intergouvernemental-Messina Conference 1955)
- ***regional*** divergencies and competive advantages do not *per se* constitute a problem for the development of a « social » market economy : **divergencies are beneficial to equilibrium** (« ne faussent pas la concurrence »)

The Spaak Report

- Caveat :

-limited harmonisation (equal pay work of men an women; working time (*durée hebdomaidaire*), period of paid annual leave

- « l'action des syndicats en vue d'obtenir l'alignement dans les conditions de travail »

-Free movement of workers as a subsidiary solution to promote social cohesion (le développement équilibré et la pleine utilisation des ressources européennes)

a) Action at the level of less developped regions (« fonds d'investissement », « re-conversion of the economy » and « re-adaptation of the workforce »

b) Free movement of workers is NOT the best solution for the region of origin (→ drain of active population)

c) Free movement of workers should be *dissuaded* by the principle of equal pay national and migrant workers (law and trade unions)

d) Migration of workers through services is being identified as a problem (transport services) : a period of transition is necessary :

«ce qui caractérise le transport c'est qu'il amène jusque sur le territoire d'un autre pays les conditions de salaires, de coûts, de taxation, qui prévalent dans un autre »

- CONCLUSION : Spaak avoids a conflict of laws through harmonisation AND by favoring local development AND by denying the difference between migrating workers and national workers

Free movement of Workers

- 1957 : Article 48 of the EEC Treaty does not define « freedom of movement of workers » in an exhaustive way (it *does* entail :

a) the abolition of discrimination as regards employment, remuneration and other conditions of work and employment

b) Right to « stay in a Member State for the purpose of *employment* in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action »

Free Movement of Workers : exclusion of PIL

- Regulation 1612/68 seems to *restrict* free movement to an employment contract concluded by a worker of a sending State with an employer of a Host State

« Any national of a Member State, shall, irrespective of his place of residence, have the right to **take up an activity** as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State."

"He shall, in particular, have the right to **take up available employment** in the territory of another Member State with the same priority as nationals of that State"(Article 1)

- QUESTION : does taking up an activity or available employment in the Host State implies concluding an employment contract with an employer of the Host State? (Cf. article 2 Regulation 1612/68 and *per analogiam* Article 39. 3 a) and b) EC Treaty)
- "Whereas the (**fundamental)** right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in **fact** and in **law**" :

The Rome Convention **(1980)** → Regulation 593/2008

- Scope Rome Convention « contractual obligations in any situation involving a choice between the laws of different countries » (**1**) → not a transnational exercise of the free movement of workers
- Main rule : Contractual Autonomy **(3)** and in absence of a choice : the law with which the contract is most closely connected (**4**)
- In absence of a choice :

A) Law applicable to individual emplomentcontracts : the law of the country in which the employee **habitually carries** out his work in performance of the contract, even if he is **temporarily** « employed » in another country

B) If the employee does not habitually carry out his work in any one country -→ the law of the country in which the place of business through which he was engaged is situated (**6)**

UNLESS it appears from circumstances … **that the contract is more closely connected with another country**

----→ Law of the service provider, sending State or the State of origin

(Regulation 593/2008 : « from which »)

The Rome Convention **(1980)** → Regulation 593/2008

- CAVEAT The Lex *contractus* is NOT the ONLY applicable law:

a) **Some** rules safeguard the application of the law of the Service Provider/Some rules safeguard the application of the law of the Host State/ or the application of the *Lex fori* (which can coincide with that of the Host State due to Article 6 PWD)

b) The **nature** of the alternative applicable rule is relevant: mandatory provisions, *overriding* mandatory provisions, public policy provisions (Who qualifies the nature? →Giuliano-Lagarde : *iudex fori*? *Commission v. Luxembourg :* ECJ?)

c) **Some rules** CAN be applied, other rules SHOULD be applied (« effect *may* be given »; « may not/nothing shall restrict »)

The Rome Convention **(1980)** → Regulation 593/2008

- The mandatory law (« that cannot be derogated from ») of the service provider ***should*** be applied irrespective of the choice of law (**6**) (cf; Article 3 7) PWD which is not restricted to mandatory law)
- The **overriding mandatory** provisions of a closely connected country (*Host State*) *may* be applied **(7) (***caveat* : nature/purpose and consequences) (new Rome I definition is very close to **national** public policy provisions : « crucial for safeguarding its *public* intrests », it defines closely connected)

Article 3 1) PWD : should be applied, but restricts these rules *ratione materiae* and *ratione fontis*

- The **overriding mandatory** provisions of the *lex fori* **need** to be applied without any reservation (! Article 6 PWD)
- *Enigma* : of the « Plusquam public policy provisions » of the *Lex fori* : PIL public policy provision **(16) (**Trstenjak is unclear on the issue)

CONCLUSION : *forum* shopping is crucial for the benefit of the provisions of the Host State

CONCLUSION : any « progressive interpretation » of the Rome Convention or the Regulation cannot override the PWD (**article 20 Rome Convention-23 of the Regulation) :** an insubordination of domestic judges is precluded, insofar as the ECJ now interprets the Regulation

The approach to labour migration in *Rush Portuguesa* ☹ ☹ (1990)

- *Cf.* Tonia Novitz
- The ECJ tends to construct posted workers as an *accessorium* of the *principale* (service provider): labour law is being attributed an ancillary function in respect of the freedom to provide services (the Court thus tend to construe posting outside off the free movement to work)
- The judgement of the Court is not based on sound legal reasoning, but on an ill-founded ontological argument : « without at any time gaining access to the labour markety of the Host State »
- CRITIQUE : How can you disrupt the labour maket, without having acces to it? (cf. data in Schlachter)
- The Court provides false hope as far as « extension of Host State legislation » is concerned, SINCE this application will have to be Treaty- proof

The case law of the ECJ prior to EC Directive 1996/71 ☹ ☹ ☹

- The ECJ has clearly indicated that labour law restrictions to the freedom to provide services need to be Treaty-proof ever since SECO (3-02-1982) (*Vander Elst Arblade, Mazzoleni, Finalarte*)

a) No discrimination

b) Overriding reasons relating to public interest

c) Equivalence test

d) Proportionality test