

FORMULA

Free movement, labour market regulation and
multilevel governance in the enlarged EU/EEA
– a Nordic and comparative perspective

UNIVERSITY of OSLO
Department of Private
Law



Individual and Collective Labour Law Problems Related to the Posting of Workers Directive.

(Implementation Issues Presented in the Polish
Context before Ratification of the Rome I
Convention)

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Convention)**

Preliminary version

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Contents

- I. Introductory remarks
- II. An outline of Polish regulation related to employment of employees (Polish and foreign) in the European Union and European Economic Area
- III. The radiation theory of extension of domestic labour law regulations (*lex loci delegations*) in case of employment of Polish workers in other European Union countries and countries of the European Economic Area
- IV. Polish collective labour law and Freedom of Services and Establishment: Follow Up of the *Laval* and *Viking Line* ECJ Judgments
- V. Concluding Remarks

I. Introductory Remarks

The purpose of the present study is to present the provisions of Polish labour law on employment relationships of employees posted to work in the EU Member States and European Economic Area States and on the way Polish authorities treat employment relationships governed by the provisions of labour laws applicable in the EU Member States and the EEA States as of 1 May 2004, that is as of the day when Poland entered into the European Union, until the year 2008, when the Polish authorities ratified the Rome Convention on the Law Applicable to Contractual Obligations, opened for signature on 19 June 1980. The nature of the provisions of European labour law is that of transnational standards. Namely, these provisions aim at achieving a uniform legal situation of all employees on the common EU labour market. A uniform legal situation of employees on the common market is assured by the directives which harmonize national systems of labour law. Out of these directives special attention should be paid to Directive No 96/71/EC, which governs the legal situation of employees posted to work in the territory of another EU Member State. It is uncertain why the EU institutions issued trans-national provisions obliging EU Member States' authorities to assure that entrepreneurs who post employees to work to another Member State on a temporary basis afford such employees the same work and pay conditions as afforded to the employees of a Member State in which they habitually work. Posted employees should, inter alia, be afforded a remuneration in the amount equal to the minimum remuneration for work afforded to them by universally applicable labour law provisions issued by the authorities of the host country or by the provisions of collective agreements applicable at a particular branch, territorial unit or at an establishment situated in the location where the posted employees are temporarily employed. There are two theories expounded in the doctrine of European labour law which provide a justification for this obligation. According to one of them, the more probable one, the directives harmonizing the provisions of national labour laws applicable in the EU Member States were issued in order to protect interests of entrepreneurs operating on the common market against competition on the part of "new" EU

Member States' employers taking advantage of the freedom of movement for the purpose of providing service, introducing to the common market "cheaper" employees, that is employees treated less favourably in relation to their remuneration. The Directive on the posting of workers was adopted with a view to protect the interests of less competitive entrepreneurs whose enterprises demand more expenditures, in particular on personal costs, which include rates of remuneration for work higher than those received for the same or similar work by employees of the twelve EU Member States that joined the EU after 1 May 2004.

The other probable explanation of the harmonizing activity of the systems of national labour laws of the EU Member States refers to the necessity to expand the social aspect of the common market, where all EU citizens should be guaranteed equal rights within social relationships governed by the provisions of national labour laws. Both theories explaining the European Union's necessity to conduct a policy harmonizing the EU Member States' labour law systems complement each other to a certain extent. Even if in fact the EU institutions aim at counteracting social dumping and harmful competition against entrepreneurs resulting from this dumping, those who benefit from the provisions laying down restrictions on introducing cheap labour to the common market, which takes advantage of almost unlimited freedom of movement, are employees-citizens of the "new" Member States, posted to work in "the old" Member States.

Such a conflict between the interests of the entrepreneurs from the "new" and "old" Member States arouses a lot of attention of labour law practitioners from the "old" EU Member States. Since, as a rule, it is more active entrepreneurs from the "new" Member States post their own employees to work in "old" Member States. Almost all known cases concerning the conflict of interests involving entrepreneurs' and posted employees' interests arise from the differences between the level of remuneration and the corresponding living standards of the employees employed in "old" and the employees employed in "new" EU Member States. Entrepreneurs from the "old" EU Member States conducting business activities in "new" Member States customarily post management employees to work abroad and employ at ordinary posts employees - citizens of the state where they conduct their business activities. Such practices allow them to carry out activities competitive in nature.

The present study consists of three substantial parts. The first one (chapter II) introduces the provisions of Polish law guaranteeing employees whose employment

relationships are subject to Polish labour law regardless of the location of the work being carried out equal treatment in case of their posting to work outside the territory of Poland within the European Union. The second one (chapter III) presents the conflict of laws rules applied to employment relationships with a foreign element. In the case of employees posted to work to another EU Member State by a Polish entrepreneur the foreign element in the employment relationship is the place where the work is carried out. In the period from Poland's accession to the European Union to the ratification of the Rome I Convention the Act of 12 November 1965 – Private International Law,¹ under which employment relationships of Polish employees treated as professionals posted to work abroad on a temporary basis by Polish entrepreneurs were governed by the provisions of Polish labour law.

As for foreign employees posted to work to Poland, protection of the national labour market is guaranteed by the provisions of the Act of 20 April 2004 on the Promotion of Employment and Labour Market Institutions,² which imposes on foreigners an obligation to obtain a work permit. This obligation is not imposed on citizens of the European Union and the European Economic Area not belonging to the European Union.

The special interest on the issues feverishly discussed by European labour law practitioners revealed in the debate over judgements having the significant legal value (precedence) of the European Court of Justice of December 2007 on the *Laval* and the *Viking Line* cases. Judgements considered as threatening the national systems of labour law in the Scandinavian countries have not been noted in Poland. They have not aroused any interest among labour law practitioners. In part IV of the present I attempt at explaining the reasons for such a state of affairs. I discuss the provisions of the Polish Labour Code governing the principles and procedure for negotiations carried out by the social partners over collective labour agreements, in particular legal rules on establishing minimal wage for work rendered in Poland. I also present the provisions of the Act of 23 May 1991 on collective dispute resolution,³ which must be observed by all trade organizations and employees other than trade union members entering into a collective dispute, organizing strikes and other protest actions governed by the provisions of Polish collective labour law.

¹ Journal of Laws of 1965, No. 46, item 290 as amended.

² Journal of Laws of 2008 (consolidated text), No. 69, item 415.

³ Journal of Laws of 1991, No. 55, item 236 as amended.

The judgements of the European Court of Justice on the *Laval* and *Viking Line* cases do not affect Polish legal regulations.

II. An outline of Polish regulation related to employment of Polish employees in the European Union and European Economic Area

Polish provisions of law govern the principles of employing Polish employees by Polish employers in and outside Poland as well as the principles of employment of foreign nationals by foreign employers. Under Polish labour law provisions, a foreign employee and foreign employer as the parties to the employment relationship, obliged to perform work in Poland are free to choose a national system of labour law applicable to their employment relationship.

1) Employment of Polish employees by Polish employers in Poland and abroad.

The Polish Labour Code

The provision of Article 1 of the Polish Labour Code is formulated in a way which may suggest that the provisions of this Code are universal, as they govern the rights and obligations of employers and employees. This holds true with the proviso that the Labour Code's provisions govern the rights and obligations of employees and employers subject to the Polish system of substantial labour law. The rules of the applicability of Polish law are set out in the provision of Article 6 of the Labour Code. An *a contrario* interpretation of the said rule leads to the conclusion that all employment relationships between Polish citizens and Polish employers are governed by Polish labour law regardless of the location of the work performed (in Poland or abroad), the employee's place of residence, the employer's head office, the location of the work establishment. The provisions of the Polish Labour Code also apply to employment relationships concluded between Polish citizens and representatives of foreign states or international institutions operating in the territory of the Republic of Poland⁴ unless international agreements, treaties or arrangements provide otherwise.

Hence, this interpretation of Article 1 read with Article 5 of the Polish Labour Code should lead to the conclusion that employment relationships of Polish citizens employed abroad by foreign employers as well as employment relationships of foreign nationals who provide work in Poland for foreign employers are not governed by Polish

⁴ A.M.Świątkowski. Kodeks pracy. Komentarz (*The Polish Labour Code. Commentary*), C.H.Beck, Warsaw 2006, pp. 19-20.

labour law unless the provisions of Polish labour law are chosen as "applicable" by the parties of employment relationships with a foreign element or indicated as the *lex loci laboris* by the connecting factor applied in the provisions of private international labour law. Needless to say that the provisions of the Polish Labour Code do not govern employment relationships of foreign employees with foreign employers when work is carried out abroad. Still, they govern employment relationships of Polish employees with foreign employers under which work is performed in the territory of the Republic of Poland within the scope set forth in separate provisions; for example in the Act of 6 July 1982 on the principles of conducting business activity in the territory of the Polish People's Republic in the area of small-scale manufacture by foreign legal and natural persons.⁵ The principles of employment of Polish citizens abroad and of citizens of foreign states in Poland are set out in the Act of 14 December 1994 on employment and measures counteracting unemployment.⁶ At the same time the Act of 23 May 1991 on work on board merchant sea going vessels⁷ lays down the principles and procedures for employment of Polish and foreign citizens on board of merchant vessels "flying the flag of Poland"

b) The Act of 6 July 1982 on the principles of conducting business activity in the territory of the Polish People's Republic in the area of small-scale manufacture by foreign legal and natural persons.

Employment relationships between Polish employees and foreign employers (legal and natural persons) – foreign enterprises conducting business activities in Poland in the area of small-scale manufacture are governed by the provisions of Polish labour law. The Act of 6 of July 1982 was amended.⁸ The amendment was introduced to the provision stipulating the applicability of Polish labour law. The wording of Article 19 paragraph 1 of the said Act, at present in force, stipulates that the provisions of Polish labour law apply within the scope of employment, terms of employment and employment relationships, social matters, social insurance and activities of trade organizations at enterprises conducted in the Republic of Poland by foreign legal and natural persons. The quoted provision – an overriding mandatory rule – is a classic example of the application of the tripartite principle in employment relationships with a

⁵ Article 22 item 2 of the Act of 6 July 1982 on the principles of conducting business activity in the territory of the Polish People's Republic in small-scale manufacture by foreign legal and natural persons. Consolidated text: Dz.U. of 1985, No 13, item 58.

⁶ Consolidated text: Journal of Laws of 2003, No. 58 item 514 as amended.

⁷ Journal of Laws No 61 item 258 as amended.

⁸ Consolidated text: Journal of Laws of 1989, No 27 item 148.

foreign element. Article 19 of the Act of 6 July 1982 clearly and explicitly defines the scope of Polish subjective labour law. It covers legal relations prior to the entering into an employment relationship, individual and collective labour law and social security law. Accordingly, the provisions of labour law in force in Poland govern employment relationships of Polish citizens - candidates for work in foreign enterprises to which the said Act applies and Polish employees employed by foreign employers (legal and natural persons) conducting business activity in Poland in the area of small-manufacture.

c) The Act of 14 December 1994 on employment and measures counteracting unemployment/ the Act of 20 April 2004 on promotion of employment and labour market institutions.

The Act of Dec.14, 1994 applies to (Article 1 paragraph 2 point 1-3):

- Polish citizens resident in Poland seeking and taking up employment or another paid work in the territory of the Republic of Poland as well as employment or another paid work with foreign employers abroad;
- foreigners who legally stay in the territory of the Republic of Poland (are citizens of European Union Member States or have a permanent resident card or who have been granted the status of refugee in the Republic of Poland) seeking and taking up employment or other paid work in the territory of Poland;
- foreigners who have been granted by a representative of the central government (*voivode*) a work permit for the territory of the Republic of Poland.

The principles and procedures for employing Polish citizens abroad at foreign employers and employing foreigners in Poland are set out by the provisions of chapter 6 of the quoted Act (Articles 46-51). This chapter contains one rule which may fall under the category of the provisions of private international labour law. This rule governs the obligations of the government of the Republic of Poland to include the periods of employment abroad in the periods of employment in Poland, as regards employees' rights pursuant to the principles in force in the state where an employee is employed and pursuant to the principles stipulated in international agreements. The provision of Article 1 of the Act of 14 December 1994 demands that the documented periods of employment abroad be included in the period of employment in Poland under two conditions: in case of an absence of other rules governing the said matter in international agreements and on condition that Polish employees employed abroad pay

contributions to the Labour Fund. Article 48 paragraph 2 of the said Act determined that upon meeting these conditions the period of employment and performing other paid work by Polish citizens in Poland and abroad is treated as the period of employment in Poland as regards employees' rights as of the day the employee notified the competent district (*powiat - county*) labour office of taking up work and undertaking to pay contributions to the Labour Fund in the amount of 9,75% of the average remuneration for each month of the employment.

The above leads to the conclusion that the Act of 14 December 1994 does not provide for any legal clues on how to choose or indicate the "applicable" national system of substantive labour law that would be applied to employment relationships of Polish employees carrying out work for foreign employers abroad. It is the provisions of the national labour law or the connecting factors applied in the international provisions of the private labour law of the countries where work is carried out that decide on the choice of the system of the „applicable” substantive labour law. The same rule applies in case of employment of foreign nationals by Polish employers at establishments located in the territory of Poland. Since the provisions of Article 1 and Article 6 of the Polish Labour Code are not automatically applied to employment relationships entered into by foreign citizens with Polish employers under which the work is performed at establishments located in Poland, the parties of such relationships may choose the system of “applicable” substantive labour law pursuant to relevant international provisions of private labour law. The provisions of Polish labour law may govern such employment relationships as *lex loci laboris* if foreign provisions of private international labour law do not provide for other connecting factors closer to employment relationships.

The reason for the presentation of the legal solutions effective under the Act of 14 December 1994 on employment and measures counteracting unemployment was that the said Act applied until 30 April 2004. As of 1 May 2004 the Act of 14 December 1994 was replaced by the Act of 20 April 2004 on promotion of employment and labour market institutions. In the part on employment of Polish employees at foreign employers abroad (chapter XVI) the Act of 20 April 2004 repeats the legal solutions previously in force. It stipulates that the documented periods of employment at a foreign employer under which the Polish employee carried out work are included in the periods of employment in Poland as regards employees' rights (Article 86 paragraph 1).

⁹ Journal of Laws of 2004, No. 69, item 1001.

The Act on 20 April 2004 does not govern the principles of taking up work by Polish employees at foreign employers abroad. This issue is governed by foreign labour laws, that is by the provisions applicable in the country of employment (Article 84).

e) the Act on 12 November 1965 - Private International Law

The conflicts of norms of substantive labour law governing employment relationships are governed by Division X of the Act of 12 November 1965 – Private International Law (Articles 32 – 33). Pursuant to the Act, the parties of employment relationships with a foreign element have a limited choice of the “applicable” substantive labour law. The parties of these relationships have the right to select the law on condition that the substantive labour law selected as “applicable” is connected with this relationship (Article 32). Each of the connecting factors discussed in chapter I, laid down by the provisions of private international law may be used to resolve conflicts regarding conflict-of-laws rules of substantive labour law. The Parties of individual employment relationships when deciding to choose the "applicable" law may use all the connecting factors specified by private international law: personal connecting factors (citizenship, domicile, habitual residence) or objective connecting factors (the place of the conclusion of an employment contract, the place of performance of a legal activity governed by the provisions of labour law, the place of an event other than a legal activity, for example an accident at work, incurring occupational disease, industrial action resulting in legal consequences governed by the provisions of labour law, the location of the employer’s head office, the location of the work establishment, the place where work is carried out). Undoubtedly the connecting factors which are in connection with employment relationship with a foreign element are those provided for in Article 33 § 1, 2 of the Act of 12 November 1965: the place of residence or the seat of the parties at the moment of entering into an employment relationship, the place of the provision of work, the seat of the enterprise. Granting the parties of an employment relationship with a foreign element the choice of the provisions of substantive labour law the legislator allows to use connecting factors other than those provided for in Article 33 of the Act of 12 November 1965. The principle is that the parties of an employment relationship select the system of law which the parties the most closely connected to the parties. The system may be selected on the basis of a personal connecting factor, for example the past habitual residence of one of the parties in a given country.

Only in case when the parties of an employment relationship with a foreign element do not use their right to select the national system of substantive labour law being in connection with the employment relationship, by force of law such an employment relationship is subject to the law of the country indicated by one of the connecting factors set out in Article 33 of the Act of 12 November 1965. These connecting factors were not listed at random but in a specific order which should be kept in their application. The connecting factor listed first is the habitual residence common to the parties – natural persons - of the employment relationship or the location of the employee's domicile and employer's seat in the same country if work was to be, is or was carried out at the employer's seat. In the cases when the employee was to carry out, carries out or carried out work at the employer's establishment, the connecting factor will be the labour law applicable in the country where the employee resides and where the seat of the enterprise where the work was to be, is or was carried out is located. In an absence of the common habitual residence of the parties, the habitual residence of the employee and the place where the employer's seat or the seat of the enterprise are situated, Article 33 § 2 of the Act of 12 November 1965 determines as “applicable” the labour law in force in the state in which the work was to be, is or will be carried.¹⁰ This provision additionally provides that the necessary condition to subject an employment relationship with a foreign element to *lex loci laboris* is that the parties must select the applicable national system of substantive labour law in the first place. The above

¹⁰ The interpretation of Article 33 §1 sentence 2 of the Act of 12 November 1965: “the work (...) provided at the employer's enterprise” has been debated on in the Polish literature on private international law. It has been considered whether the said formulation may be construed as the work provided exclusively “in the location of the seat of the enterprise” or the work provided “under the employment at the enterprise.” See. H. Trammer, *Stosunki pracy w polskim prawie prywatnym międzynarodowym, Prawo w handlu zagranicznym (Employment relationships in Polish Private International Law. The Law of Foreign Trade)*, 1968, p.21, p. 41. The said author concludes that the actual place in the meaning of the geographical area where work is provided is of no difference for the hypothesis of the whole Article 33 of the Act of 12 November 1965 and that employment relationships of employees posted to work abroad are claimed not to be subjected to *lex loci laboris*. H. Trammer puts forward this hypothesis in order to indicate that employment relationships of Polish employees posted to work abroad are subject to the provisions of Polish labour law. In my opinion, such a conclusion may be reached on the basis of the structure of *lex loci delegations*. whereas H. Trammer's reasoning is based on an erroneous distinction between two concepts relating to the place of work: „the employer's seat” and „the employer's enterprise.” According to Article 33 of the Act of 12 November 1965 the necessary condition for subjecting an employment relationship with a foreign element (in this case the said element is the place of work located abroad) is the place of habitual residence common to the employee and the employer's seat or the employee's habitual residence and the seat of the enterprise. I claim that the latter expression refers to the location of the establishment run by the employer, who may have its seat in another state. Further, there are no indicators for an interpretation of the concepts of “employer's seat”, “the seat of the enterprise” in the meaning of the geographical area where, under the employment relationship entered into with a given employer, the place of the provision of work may be sought. The above concepts are specific enough to locate work in a given point of the geographical area - in the country where the following have been situated: the employer's seat, the seat of the enterprise or the enterprise.

restriction was not necessary since – as already mentioned – the fundamental premise for the application of the connecting factor set out in Article 33 of the Act of 12 November 1965 is the absence of the parties' choice of the “applicable”, that is connected with the employment relationship with a foreign element, national system of substantive labour law. Bearing in mind that the parties of an employment relationship with a foreign element have the right to choose "applicable" law at any time they consider the most appropriate, it can be concluded that the fulfillment of the requirement to apply the connecting factor set out in Article 33 § 2 of the Act of 12 November 1965 may be also necessary in the cases when: the parties have not used their right to choose the law; do not have their place of habitual residence in the same country, have not located in the same country the centres of vital and professional interests, which are determined by the place of habitual residence as regards the employee; while, as regards the employer, by the location of his seat or enterprise. When the aforesaid arrangements are being made the parties of the employment relationship may take up activities leading to the choice of the applicable law. The place where the work is provided may be applied as the connecting factor alternative to the connecting factor of the law applicable in the country which is the common centre of vital interests of the parties of the employment relationship with a foreign element only when the “applicable” law has not been selected. The above interrelation the connecting factors applied to rule the conflicts of law of substantive labour law may lead to the conclusions that the connecting factor set out in Division X Article 33 § 2 of the Act of 12 November 1965 – Private International Law is of an alternative nature not only with regard to the connecting factors indicated in § 1 of this provision but also with regard to the connecting factor set out in Article 32 of the said Act.

In the present study what is meant by "applicable" labour law selected by the parties is the national system of substantive labour law selected by the parties of an employment relationship with a foreign element according to the indicator set out in Article 32 of the Act of 12 November 1965. Such nature can only be assigned to the national system of substantive labour law which “is connected" with the employment relationship which is to be governed by this law. In this meaning the „applicable” system of labour law is the one that meets the necessary conditions. The first necessary condition requires that the system be freely chosen by both parties of the employment relationship with a foreign element; the second one demands that the national system of labour law selected by the parties observing the principle of freedom of choice be

connected to the employment relationship. “Be connected with” is a phrase used in literary language to determine the interrelations between the relationships of various elements connected with one another, influence or affect one another.¹¹ It follows that there must be an interdependence between the employment relationship with a foreign element and the national system of substantive labour law selected as "applicable" by the parties. Undoubtedly, the national provisions of the substantive labour law selected as "applicable" should have a decisive influence on the employment relationship they govern. The necessary condition for these provisions to exert such an influence is that the rights and obligations of the parties of the individual employment relationship be regulated in the way such relationships are regulated in the systems of law which include the national system of substantive labour law selected by the parties. The employment relationship with a foreign element should be subjected to the regulation of the "applicable" national system of substantive labour law chosen by the parties. The nature of the relationship, referred to in Article 32 of the Act of 11 November 1965 should be functional. It would be hard to imagine that an employment relationship entered into by an employer registered in the United States, subject to the provisions of law in force in this country, employing a citizen of the United Arab Emirates in France, was subject to the provisions of the Polish labour law. There is no interdependence between the parties of such an employment relationship and the national system of substantive labour law chosen by the parties as „applicable”. Neither does such an interdependence exist between the national systems of labour law conflicting with each other. The only common connecting factor for the parties of such a relationship is the place where work is provided. In my view, indicating by the parties of this employment relationship French labour law as the law "applicable" to govern the said relationship would not meet the condition under which the employment relationship with a foreign element must “be connected with” the selected national system of substantive labour law. As a matter of fact, what underlies this division of national systems of law are the differences existing in the systems of law of European countries. Legal mechanisms elaborated by the European Union used for harmonization of Member States’ national systems of labour law (directives, regulations) are conducive to the process of

¹¹ Mały słownik języka polskiego (*A Dictionary of the Polish Language*), eds. S.Skorupka, H.Auderska, Z.Łempicka, PWN, Warszawa 1968, p. 1023; Z.Kurzowa, *Ilustrowany słownik podstawowy języka polskiego (Basic Illustrated Dictionary of the Polish Language)*, Universitas, Kraków 1999, p.

“europeisation” of national systems of labour law.¹² These mechanisms are the reason why national systems of substantive labour law of the EU Member States may be indicated by the parties of employment relationships with a foreign elements as “applicable”. The discussed example illustrates the possibility of the choice of “applicable” labour law on the basis of personal (citizenship) or objective (the employer’s seat, the seat of the enterprise of the place where work is provided) connecting factors applied in the national provisions of international private law or international private labour law. Despite the fact that the application of any of the connecting factors referred to above is connected with some components of the employment relationship with foreign elements, the nature of the said interdependence is formal. An assessment of this connection demands a deeper study on the question whether the national system of substantive labour law in force in France may be shaped by the provisions of the law selected by the discussed employment relationship as "applicable".

Objections against a national system of substantive such as the one provided in the discussed example should be also analysed with regard to the admissibility of the application of such a national system of substantive labour law in case it was not chosen by the parties but indicated on the basis of the connecting factor specified in the conflict-of-laws rules of international private labour law. Nearly all internal systems of private international law and international regulations of private international law presently applied to the resolution of conflicts of laws between the provisions of law applicable to contractual obligations (Rome I) in the provisions concerning conflict of laws of substantive labour law determine the place where the work is carried out as the connecting factor indicating as “applicable” the provisions in force in the place where the work is carried out (*lex loci laboris*). The question arises as to whether a national system of substantive labour law chosen as "applicable" yet rejected by the authorities supervising the compliance with the provisions of labour law due to an absence of the necessary connection with the employment relationship subjected to the provisions of labour law indicated by the parties of this employment relationship may be accepted and applied to an identical or similar employment relationship in case when such a national system is indicated by the connecting factor applied in private international law or private international labour law. This question may have only a positive answer.

¹² See Europeizacja polskiego prawa pracy (*Europeisation of Polish Labour Law*), ed. W.Sanetra, Warszawa 2004; L.Mitrus, Wpływ regulacji wspólnotowych na polskie prawo pracy (*EU Influence Upon Polish Labour Law*), Zakamycze, Kraków 2006

Connecting factors applied in internal and international provisions of private international law indicate *lex loci laboris* as the applicable law. Unlike the restricted choice granted to the parties of an employment relationship with a foreign element, neither the national nor international legislature governing the conflict of laws rules of substantive labour law introduce any additional requirements which have to be met in order to apply the chosen national system of substantive labour law. Hence, it should be assumed that *lex loci laboris* is *ex definitione* the “applicable” national system of substantive labour law since it was indicated by the legislature. As follows from the above, the discussed example French labour law chosen by the parties may prove “inapplicable” to govern the employment relationships under which the employer is subject to American law, the employee to Saudi Arabian law, while work is carried out in the territory of France if it turns out that the employment relationship is not "compatible" with the solutions of the French labour law in force. A separate issue is whether French labour law is applied to this employment relationship since this law was indicated by the connecting factor of the place where work is carried out determined in applicable conflict-of-laws rules. In such a case this law applies as *lex loci laboris*. It is not insignificant that the place where the work is carried out indicated as the connecting factor applied to govern the conflict of laws rules in internal provisions of private international law is determined as the final and decisive indicator for the choice of the applicable national system of substantive labour law. The rules set out in the Polish Act of 12 November 1965 - Private International Law may serve as an illustration to the above thesis. On account of inner contradiction among the functions which the connecting factors defined in Division X "Employment Relationships" of the Polish Act on Private International Law perform the restriction of the choice of the "applicable" national system of substantive labour law adopted in Article 32 of this Act given to the parties should be assessed negatively. The above remark is, however, of a limited importance owing to the adoption, ratification and confirmation of the Convention of the Law Applicable to Contractual Obligations (Rome I) by the Republic of Poland.

2) Employment of foreign employees in Poland

a) Citizens of the EU and EEU Member States

Foreigners, citizens of the EU Member States and the States of the European Economic Area not belonging to the European Union have the right to take up employment in Poland without having to obtain a work permit (Article 87 of the Act on

Employment Promotion and Labour Market Institutions). Employment relationships of these foreigners are governed by the provisions of the applicable labour law.

Employment relationships of employees – EU citizens with employers whose head office is situated in an EU Member State are subject to the relevant provisions of the labour law applicable in that state. When under such conditions work is provided in Poland, the provisions of chapter II of the Polish Labour Code (Articles 67¹-67⁴) determine the terms of employment and remuneration at foreign employers if these terms are less favourable than those determined by Polish labour law.

b) Citizens of other countries

The condition necessary to obtain the work permit in Poland by the citizens of other countries is that they must legally stay in the territory of the Republic of Poland. The procedures for granting the permit is governed by the Act of 20 April on Employment Promotion and Labour Market Institutions. The work permit is issued by the representative of the central government as the administrative authority (*voivode*) for a definite period no longer than 3 years. It may be extended, though. The work permit is issued on the basis of the information on the lack of possibility to employ Polish citizens obtained from the representative of the local self-government (*Starosta*) competent for the place of employment of the foreigner. One of the basic conditions for the issuance of the permit is that the parties to the employment relationship establish that the amount of remuneration will not be lower than the remuneration of Polish employees performing work of comparable type or at a corresponding post (Article 88 c section 1).

III. The radiation theory of extension of domestic labour law regulations (*lex loci delegations*) in case of employment of Polish workers in other European Union countries and countries of the European Economic Area

On the basis of the Act of September 22, 2006 on the accession to the European Union of 10 member states, which entered into the European Union on May 5, 2004, on March 28, 2007 the President of the Republic of Poland ratified the EC Convention on the Law Applicable to Contractual Obligations, open for signature at Rome on June 19, 1980. This Convention, referred to as the Rome Convention, entered into force with

respect to the Republic of Poland on August 1, 2007.¹³ In the provision of Article 6 paragraph 1 entitled “Individual employment contracts” Rome I introduces certain restrictions on the freedom of the contracting parties of employment contracts regarding the freedom of choice of (the) law. However, what underlies the resolution of conflicts of the norms of the **substantive** labour law, which are applicable to labour relations with a foreign element, is the principle of freedom to choose the applicable law laid down in Article 3 paragraph 1 of the Rome Convention. The Rome Convention was replaced with the Regulation of the European Parliament and the Council (EC) No. 593/2008 of June 17, 2008 on the Law Applicable to Contractual Obligations (Rome I).¹⁴ The Private International Law Act dated November 12, 1965,¹⁵ which applied in Poland up to the day when the Rome Convention entered into force, also accepted the freedom of the parties of a labour relation to choose the applicable national system of substantive labour law on condition that the law was connected with this relation. Notwithstanding the aforementioned freedom, labour relations of the Polish employees employed outside the boundaries of the Polish People's Republic were entirely subject to the specificity of the Polish labour law, despite the fact that by virtue of the location where the work was to be carried out, *lex loci laboris* could be taken into consideration as the regulations connected with the labour relations in which foreign elements were present owing to the location of work to be performed. In this light, the purpose of the present paper is to explain the above mentioned phenomenon, which remains in conflict with the then applicable provisions of the private international labour law.

In Poland the labour relations of the employees delegated to work abroad were regulated by the resolutions of the Council of Ministers. The unpublished regulation No. 138/65 of the Economic Committee of the Council of Ministers dated June 9, 1965 on the terms and conditions for delegating and remunerating professionals delegated to work abroad by foreign trade enterprises in order to render services related to export regulated labour relations of the Polish employees (professionals/experts) employed by Polish or foreign employers abroad. The foreign element in those labour relations was the place in which the work was to be provided, or, at times, the employing entity. Foreign trade enterprises played the role of agents/organisations acting as an agent in/intermediary organisations employing Polish workers at Polish or foreign

¹Journal of Laws, dated 2008, No. 10, item 57, 58.

²Official Journal of the European Union L 177 dated July 4, 2008. The Regulation will be applied to contracts concluded after December 17, 2009 (Article 28).

³Journal of Laws, No 46, item 290 as amended.

employers.¹⁶ The work and payment conditions laid down in this Regulation were respected in the case where the employers for the Polish professionals/experts delegated to work abroad were Polish agencies of foreign trade.¹⁷ The role of Polish enterprises of foreign trade as an agent in employing Polish employees abroad was clearly ascertained in the Highest Court judicial decisions in which it was clearly and unambiguously stated that Polish employees did not remain under employment relations abroad with Polish agencies of international trade.¹⁸ The KERM regulation applied only to the Polish national employers who employed Polish employees abroad. In the cases where Polish employees provided work for foreign employers abroad, the direct employer of such employees was the Polish agency of international trade. Nearly half a century ago Polish enterprises of foreign trade acted as a temporary work agency for Polish employees and foreign employers. In the judgement of March 18, 1975¹⁹ the Highest Court stated that a legal relation established between a Polish employee (professional/expert) and a Polish foreign trade enterprise disclosed the features characteristic of an employment relation. Polish judicature was obliged to qualify the actual work agency relation in that way, as it was impossible to assume that in the legal sense an employment relation was established as a result of delegating a Polish employee to work at a foreign employer. Legal relations between Polish enterprises of foreign trade and foreign employers employing Polish employees were not subject to labour law regulations. Polish enterprises of foreign trade acting in the capacity of the direct employer were obliged, under employment relations with Polish workers employed abroad by foreign employers, by commercial contracts regulated by the

⁴According to the judgment of the European Court of Justice of December 17, 1970, Case 37/70 on *Manpower vs. Caisse Primaire d'Assurance Maladie Strasbourg* the definition of a temporary work agency is as follows: "the object of the undertaking is not to work but to engage workers to put them for consideration at the disposal of other undertakings". Polish provisions on delegating employees to work abroad may be treated as the prototype of norms regulating temporary work agency activities. L.Zappalá, *Legislative and Judicial Approaches to Temporary Agency Work in UE Law – A Historical Overview* (in:) K. Ahlberg, B. Bercusson, N. Bruun, H. Kountouros, Ch. Vigneau, L. Zappalá, *Transnational Labour Regulation. A Case Study of Temporary Agency Work*, P.I.E. P.Lang, Bruxelles-Berlin-Frankfurt a. Main-New York-Oxford-Wien 2008, pp.163-164 writes that the concept of temporary work agency was formulated in the judicature of the European Court of Justice at the beginning of 1970, when the three-lateral legal relation between the agency, user employer, and employee was introduced. A temporary work agency was defined as an entity employing an employee delegated to work at a work establishment of the user employer

⁵Judgment S.Ct. dated April 10, 1974, I PR 66/74, OSNCP 1975, issue 3, item 45.

⁶Decision S.Ct. of July 5, 1973, I PZ 34/73, OSNCP 1974, issue 2, item 39; judgment S.Ct. of September 11, 1973, I PR 105/73, OSNCP 1974, issue 5, item 97; judgment S.Ct. of March 18, 1975 I PR 23/75, OSNCP 1975, issue 2.

⁷I PR 23/75, OSNCP 1975, issue 2.

provisions of the private trade law to carry out legal actions required by user employers - foreign entrepreneurs. In the judgment of September 11, 1973,²⁰ the Highest Court clearly stated that "dismissal of an expert/professional is justified by the circumstance related to rendering service for a foreign contractor." The Highest Court came to the conclusion that "the fact of making such a demand (the demand for dismissal of a Polish employee employed as an expert/professional by a foreign employer) reveals that the realization of the demand for dismissal is not without reservations." The Economic Committee of the Council of Ministers resolution No. 138/65 entitled Polish enterprises of foreign trade which delegated Polish experts/professionals to work abroad to reduce the period of stay or to dismissal of a Polish employee from the foreign contract upon the request of the foreign entrepreneur (user employer). The consequence of the decision to reduce the period of stay was the termination of the employment contract by the Polish enterprise of foreign trade acting in the capacity of a temporary work agency. Depending on when the user employer (foreign entrepreneur) notified the Polish enterprise of foreign trade of the refusal to continue to employ the Polish expert/professional delegated to work abroad the entity employing such an employee (a Polish enterprise of foreign trade) terminated the employment relation with notice or with immediate effect. The Highest Court in the judgment of September 11, 1973 (I PR 105/73) examined whether the reduction of delegation of a Polish expert/professional upon the foreign employer's application (demand) with the breach of the provisions of the commercial contract with the Polish enterprise of foreign trade constituted a reason sufficient for immediate termination of the employment contract concluded with this employee by the Polish enterprise foreign trade. What follows from the aforementioned excerpt of the justification of the analysed judgment is that according to the Highest Court the demand of the foreign user employer for the withdrawal from the foreign contract with the breach of the provisions of the commercial contract determining the terms and conditions for employment of Polish employees abroad by specific employers is itself the reason justifying immediate termination of employment relations through the fault of the employee. The legal consequences of the failure to fulfill the obligations by a foreign entrepreneur were transferred by the foreign trade enterprise *de facto* temporary work agency on the Polish employee.

The legal situation of the Polish employees employed abroad by foreign employers was not subject to any substantial change under the subsequent unpublished

⁸I PR 105/73, OSNCP 1974, issue 5, item 97.

resolution of the Council of Ministers No. 8/72 of January 7, 1972 on pay and employment of workers of export building works and export-related services, replaced by the regulation of the Council of Ministers of December 27, 1974 on certain rights and obligations of the employee delegated to work abroad in order to perform export building works and export-related services.²¹ It was decided more explicitly than under previously applicable provisions of law that a foreign trade enterprise, called "delegating entity" prior to the Regulation of the Council of Ministers No. 8/72, which justified treating such an entity as a temporary work agency even to a greater extent than it was so treated by previous unpublished resolutions of the Council of Ministers, entered into an employment contract (for a specified period of time) with the Polish employee - "expert/professional". Employers employing in Poland an employee delegated to work abroad by a delegating entity was obliged to grant such an employee unpaid leave. Applying the current criteria for the evaluation of the situation from several dozen years ago it should be stated that a Polish employee with the status of a "professional/expert" and thus delegated to work abroad remained under two employment relations with the Polish employers during the delegation: with the parent employer, who granted him unpaid leave, with the delegating entity, which acted in the capacity of a temporary work agency, and in a legal relation with the user employer. Undoubtedly, the employment relations of the Polish employee with Polish employers were regulated by the provisions of the Polish labour law. What does need to be considered is the question whether there was an employment relation established between a Polish employee and a foreign user employer and if the answer is positive, it needs to be reflected on what provisions of national labour law were used by the parties of this legal relation for regulating the wording of the rights and obligations of the parties of this employment relation and for specifying an institution of labour law according to which the legal actions carried out by the parties were evaluated and according to which the disputes which might have occurred in the matters related to labour law were resolved. The employment relation established between a Polish employee and a foreign employer under which the employee was obliged to provide work abroad was undoubtedly an employment relation with two foreign elements: the employing entity and the location of the work provided. The question that appears is whether a separate employment relation was being established between the employee

⁹Journal of Law No. 51, item 330 as amended see S.Kalus, Międzynarodowe stosunki pracy. Wybrane zagadnienia kolizyjne (*International Labour Relations. Selected Problems of Conflicts of Laws*), Wydawnictwo Prawnicze, Warszawa 1978, p. 39 and the following.

and the foreign employer. What unambiguously follows from the aforementioned judgments of the Highest Court is that on the basis of the Council of Ministers' resolutions from the 1960s employment relations between a Polish employee delegated to work abroad and a foreign employer were in fact not established. The regulation of the Council of Ministers of December 27, 1974 did not introduce any substantial changes within the scope of this matter. I definitely do not share the official opinions on the international private labour law claiming that employment relations of Polish employees (experts/professionals) employed abroad on the basis of the Regulation of the Council of Ministers of December 27, 1974 were regulated by the provisions of national labour law indicated during the application of the conflict of laws rules of the private international law - Article 32 and Article 33 of the Act of November 12, 1965 on the Private International Law. Polish specialists in the private international labour law did not take into consideration whether employment relations of the Polish experts/professionals employed abroad by the Polish delegating entities should be analysed within the categories developed by the provisions of the Act of November 12, 1965.²² Neither was this issue dealt with in the studies of lawyers specialising in labour law.²³

To my mind, disregarding the rules regulating the conflicts of the laws of the substantive labour law, it was assumed that the aforementioned relations were governed by the regulations of the Polish labour law in whole. The parties of these relations were not given any possibility to choose the applicable national substantive labour law despite the fact that it might have seemed that there was a possibility to choose the law between the Polish regulations and the regulations which applied in the location of the performed work. The employment relations of the Polish employees delegated to work abroad were regulated by the provisions of the Polish labour law. Hence, what needs to

¹⁰ S.Kalus, *Stosunki pracy specjalistów polskich zatrudnionych na budowach eksportowych (Labour Relations of Polish Experts Employed on Exported Construction Sites)* [in:] *Zagadnienia prawne eksportu kompletnych obiektów przemysłowych*, eds. M.Pazdan, A.Tynel, *Prace Naukowe Uniwersytetu Śląskiego*, No. 356, Katowice 1980, p. 171 and the following.

¹¹ B.Wagner, *Praca za granicą i jej wpływ na dalsze zatrudnienie w macierzystym zakładzie pracy (Work Abroad and its Impact Upon Employment in Poland)*, *Praca i Zabezpieczenie Społeczne*, 1978, No. 2, p. 63 and the following; J. Kruszewska, *Umowa o pracę za granicą w zakresie budownictwa eksportowego i usług (Employment Contracts Abroad in Export Construction Sites and Services)*, Wydawnictwo Prawnicze, Warszawa 1988. There is no information on the "applicable" labour law in the studies on labour law. The authors take for granted the assumption that employment relations of the Polish employees employed abroad by Polish employers (delegating entities/entities in charge) are subject to the regulations of the Polish law in whole. They do not pay attention to the fact that the location where work is to be performed is abroad; the foreign partner of the Polish entrepreneur employing Polish employees makes demands resulting from the provisions of the foreign law which concern working time, the norms of work efficiency, safety and protection at work.

be considered is the question whether it was consistent with the provisions of Article 32 and Article 33 of the Polish Act on the Private International Law to deprive the parties of the employment relations with a foreign entity. The Labour Code states that employment relations between employees - Polish citizens and Polish representative offices, missions and other agencies abroad shall be governed by the provisions of Polish labour law - the provisions of the Code (Article 6 § 1). Entities delegating Polish employees to work abroad did not hold the status of Polish agencies pursuant to Article 6 § 1 of the Labour Code. Owing to the location of the work to be performed their labour relations could be regulated by the provisions chosen by the parties or the provisions of the labour law which were in force in the location of the work performed. Employment contracts concluded by entities delegating Polish employees to work abroad included the phrases which indicated the will of the parties of these relations to subject them to the provisions of the Polish labour law on the matters related to remuneration for work, working time, holiday leaves, benefits granted due to accidents at work or occupational diseases.²⁴ Thus, there can be no doubt that Polish employees acceding to employment contracts drawn up by Polish employers which included the aforementioned statements on subjecting the mentioned labour law institutions to the regulation of the Polish labour law expressed their willingness to subject the employment relations abroad to the labour law applicable in Poland. Lawyers specializing in the private international law underlined that even if by way of an agreement the parties of the employment relation had chosen a law different from the Polish law, pursuant to Article 32 of the Act of November 12, 1965 on the Private International Law, the applicable law would have been the Polish labour law as the common personal law of the parties of the employment relation with a foreign element.²⁵ There are bases for serious doubts as to the validity of the above statement. The provision of Article 32 of the Polish Private International Law allows the parties of an employment relation to subject this relation to the law chosen by the parties on condition that the chosen law remains is connected with this relation. I agree with M. Pazdan,²⁶ as this statement is obvious, since the choice of the law may only be made in the case of an employment relation connected with at least two separate national labour law systems. In the case of employing a Polish employee abroad by a Polish employer

¹²S.Kalus, Międzynarodowe stosunki pracy...(*International Labour Relations*),op.cit., p. 45.

¹³S.Kalus, Międzynarodowe stosunki pracy...(*International Labour relations*),op.cit., p. 46.

¹⁴M.Pazdan, Prawo prywatne międzynarodowe (*Private International Law*), Wydawnictwo Prawnicze LexisNexis, Warszawa 2007, p. 198.

the parties of the employment relation have the right to choose between the Polish labour law and the labour law in force at the location of the work performed. Both national labour law systems are connected with the employment relation. The employment relation connected solely with the scope of Polish law is solely governed by the Polish labour law. Considering the absence of a foreign element in such a relation, there is no need to apply the conflict of norms rules regulated by the provisions of the private international labour law since the provisions of the labour law included in the legal system of another state are without prejudice to the only applicable provisions of the Polish labour law.

Connecting factors used for the specification of the applicable national substantive labour law system in the event of the conflict of norms are applied in the order established by a national legislating body or by a foreign employer. As a rule, in the case of the absence of choice by the parties of the employment relation of the applicable national labour law system, this system is specified by way of using one of the aforementioned connecting factors referred to in the common provisions of the private international law or in the specific provisions of the private international labour law. The order of these factors is regulated in the conflict of norms rules. In fact, the provisions of the private international law or the private international labour law do not create a hierarchy of the connecting factors which would be applicable to employment relations. All the connecting factors used for regulating the conflict of the substantive law may not be used as alternatives with respect to the main connecting factor, which is the parties' choice of the applicable system of law. However, on account of the degree of the connection of the alternative connecting factors with the employment relations for which these factors are to be applied, some of them are applied more often than others. So far, the conclusion that follows from the above arguments is that in employment relations what constitutes the most important connecting factor is the location of the work provided, which, in the case of conflict of laws of the material labour law, by which the provisions of labour law of the country in which the work is performed (*lex loci laboris*) are indicated as applicable. Nevertheless, the above relation is not taken into account in the common provisions of the private international law which are applied to resolutions of conflict of laws and to the choice of the applicable national substantive labour law system. Article 33 § 1 of the Polish Act of November 12, 1965 on the Private International Law determines that in the absence of the parties' choice of the applicable substantive labour law system the employment relation shall be

governed by the law of the country in which the parties have their place or residence or registered office at the moment of entering into this relation. To my mind, there are no relevant arguments supporting *de lege ferenda* the thesis that in the absence of the choice of a law by the parties employed abroad the law applicable for the employment relation as the parties' common personal law is the Polish labour law. *De lege lata* the above statement is evidence of the tendency to extend the legal regulation applied to the employment relations without foreign elements to the employment relations in which such elements appear. This is possible and was applied by the authorities of particular Member States, which referred to "the theory of radiation" (*Ausstrahlung*, *Ausstrahlungstheorie*). The above theory was presented in German judicature at the end of the 1920s and at the beginning of the 1930s of the 20th century.²⁷ On the grounds of the aforementioned statements the theory of radiation was developed and elaborated on in the German and French academic writings. F. Gamillscheg intended to restrict its significance to this part of the labour law which was classified as a category of the public law.²⁸ Since the theory of radiation enabled the authorities of particular states to apply the provisions of the national labour law to regulate employment relations with a foreign element, it was often applied by the authorities of particular countries to regulate employment relations between employees - foreign citizens - and employers registered as conducting economic activity in those Member States of which the employed workers were citizens or in which the employees temporarily employed in (delegated to) another Member State had their permanent residence. The Polish Act of November 12, 1965 on the Private International Law was no cause for the judicature to apply the theory of radiation as it subjected the employment relations with a foreign element to a restricted choice of the parties, and in the absence of such a choice, to the law of the country in which both parties had their place of residence or registered office at the moment of entering into an employment contract (Article 33 § 1).²⁹ The Czechoslovak Code of the private international law treated *lex loci delegationis* as

¹⁵ See judgments of the Reichsarbeitsgericht of November 23, 1929; April 1, 1931; December 21, 1932 referred to in the work of I.Szászy, *International Labour Law. A Comparative Survey of the Conflict Rules affecting Labour Legislation and Regulations*, A. W.Sijthoff- Leyden 1968, p. 118.

¹⁶ F. Gamillscheg, *Internationales Arbeitsrecht (Arbeitsverweisungsrecht)*, Berlin-Tübingen 1959, p. 181-182. According to F. Gamillschega's view, the theory of radiation could be applied to social insurance relations on the grounds of the argumentation of the particular states which made the acquisition of the rights to social insurance benefits contingent upon the period of insurance.

¹⁷ In the judgment issued on April 18, 2001, I PKN 358/00, OSNP 2003, issue 3, item 59 the Highest Court declared that "the employment relation between the employee residing in Poland and the employer residing and managing an enterprise in Poland is governed by the Polish law even if the employment contract were or were to be executed in another state, unless the parties have chosen a law (Article 33 § 1 the first sentence of the Act of November 12, 1965 on the Private International Law)".

provisions applicable to regulate employment relations of the Czech employees not residing permanently in the country in which the work was provided with the Czech employers who had their registered office in the territory of the former Czechoslovakia.³⁰ The theory of radiation was also accepted before the Second World War by the French provisions of the private international law adopted on May 15, 1926. This theory played a crucial role in the judicature and academic writing concerning national and international labour law. It lay at the foundation of the expansion of the “parent” law in the employment relations on the basis of which and under which domestic employees employed by domestic employers rendered work abroad. The location of the work to be provided in the territory of the state where the provisions of the labour law were different from the provisions applied to the employment relations established between the parties towards whom *lex patriae* could be applied by virtue of the same citizenship, would have been justified if this connecting factor for the indication of the applicable labour law system could have been applied to the employment relations with a foreign element

The theory of radiation played a crucial role in the resolution of conflicts of laws of the national provisions of the substantive labour law. It was commonly applied in the Polish People's Republic, which exported work force abroad. Despite the fact that neither did the then applicable provisions, nor judicature, nor academic writings endeavour any effort to justify the automatic application of the Polish provisions of the labour law to the employment relations with a foreign element, while the then applicable provisions of the private international law granted the right to choose between *lex loci obligationis* and *lex loci laboris* to the parties of individual employment relations, by virtue of the location of the provided work in the territory of a foreign country, the national provisions of the substantive labour law were generally applied. I define this phenomenon, which was disregarded in the then literature or treated as obvious by the then authors dealing with the national labour law, as *lex loci delegations*.

IV. Polish collective labour law and Freedom of Services and Establishment: Follow Up of the *Laval* and Viking Line ECJ Judgments

¹⁸ I. Szászy, *International Labour Law...*, op.cit., p. 118.

The Polish statute regarding collective dispute resolution (enforced on the 23rd of May 1991),³¹ only recognises such a dispute if it deals with the following: forming working conditions, remuneration, social benefits or the rights and freedoms of trade union workers (who have the right to associate in a trade union Article 1 (1)). Under Article 22 workers who do not have the right to strike, have their rights and interests protected by a trade union acting on behalf of another workplace and this trade union is able to organise a solidarity strike in support. The collective dispute resolution statute is applicable to workers, trade unions and employers obligated to comply Polish labour law regulations. In accordance with the *lex loci laboris* principle this regulation usually applies in the place of work being carried out.

The situations which are exemplified in ECJ rulings, namely the *Laval* case (whereby a Swedish trade union undertakes collective action against a Latvian company, which by employing Latvian workers within Sweden pays their wages according to a trade union agreement entered into in Latvia – and where such wages are in breach of Swedish collective labour agreement regulations) could not be taken into account by the Polish collective dispute resolution statute, as the issues on hand do not form the fundamental elements of a collective dispute recognised by Polish labour law. The issue between the Latvian employer and the Swedish trade unions could have come under collective labour law regulations if the dispute had occurred in Poland and had come under the collective dispute resolution clause.

Swedish trade unions, which carried out the collective action wanted to protect the interests of Swedish workers. Such action was to make it impossible for employers employing Swedish workers to lower their wages. The aim of the collective action initiated in the *Laval* case was the prevention of any wage dumping tactics either by Swedish or foreign employers. This type of a collective action is permissible and in accordance with the Polish collective dispute resolution statute if such action was to serve the purpose of protecting workers' interests whose work agreements come under the regulation of Polish labour law. The factual content of the *Laval* case proved no local workers' interests or rights were breached. From the Polish statute perspective however, the decision handed down by the ECJ in *Laval* holds no relevance for the Polish legal order.

³¹ Official Journal No. 55, pos. 236 with amendments. See: A. M. Świątkowski, Komentarz do ustawy o rozwiązywaniu sporów zbiorowych (*Commentary on the collective labour dispute resolution statute*) (in:) Zbiorowe prawo pracy (*Collective Labour Law*), eds. K. Walczak, J. Wratny, C. H. Beck, Warszawa 2008.

An additional argument, which may be used in support of the fact the Polish collective dispute resolution statute could not be relied upon to resolve the Swedish collective action issue as seen in the cases, is the existence of Article 4 (2) of the statute and its social peace clause. The protest action undertaken by Swedish trade unions may be regarded as a dispute relating to the content of the collective labour agreement entered into between the Latvian employer and with Latvian trade unions, representing the interests of Latvian workers who are temporarily employed by their Latvian employer in Sweden. Swedish trade unions, which initiated the collective action, regarded such a collective work agreement as unsatisfactory from the Swedish labour market point of view and the demands it held. The same could be applicable if the changes to such a collective agreement or levels of wages were raised concerning Latvian workers employed by a Latvian employer and applied to the demands defined by regulations concerning remuneration for Swedish workers. If the situation as displayed in the judgment of the ECJ was determined according to the Polish statute it would be necessary to universally acknowledge that a trade organisation, which undertakes a collective action breaches the collective action ban regulated by Article 4 (2) of the statute. The statute prohibits trade unions to enter into or organise collective action disputes concerning the implementation of changes to those collective labour agreements which have been agreed to and this prohibition is in place for the duration of the normative lasting period of the agreement. In accordance with the regulation the trade union should withhold any protests until the day in which the other trade organisation (which had entered into the collective labour agreement with the employer undertaking business activities in Sweden), gives notice to such an arrangement.

The ECJ ruling in the *Viking Line* is of no relevance to Poland's collective labour law. The call made by the ITWF for the national trade union organisation to withhold from carrying out any negotiations with the Finnish employer concerning the collective labour agreement (which in turn regulates the conditions and wages), who at the time was relocating the company enterprise to Estonia, holds no relevance for the Polish Labour Code or for the general negotiating practices in collective agreements. Article 241² § 2 of the Labour Code (which regulates the way in which collective labour agreements in Poland can be entered into), obliges the party seeking to initiate a collective labour agreement to notify all trade organisations authorised to represent those workers' interests who will come under the initiated collective work agreement. It is important to remember collective agreements in Poland regulate the working

conditions, remuneration as well as rights and responsibilities of all workers, regardless of whether they are members of a trade union. It is enough they be employees of an employer who is party to such a collective agreement (Article 239 § 1 Labour Code). A trade union or the employer may initiate a proposal of entering into a collective labour agreement. Carrying out negotiations in the said agreement is possible thanks to one of the specified parties. It is, however, not an obligation. Polish labour law regulations do not obligate social partners to enter into collective labour agreements. The collective labour agreement regulations, which tend to benefit the workers' position more than other general labour laws do, means social partners (especially trade unions) are more inclined to initiate collective labour law negotiations. Even if no initiation is forthcoming in entering into a collective labour agreement, laws are still in place to regulate the rights and obligations of workers and employers.

The context of individual work contracts may be regulated and in many cases is regulated by the Labour Code laws, by other statutes or legal acts legislated by the state. Parties to an individual work contract (the employer and the employee) fulfil and define the context of the rights and obligations within the contract, which are generally defined by labour law regulations. There are also rules about preventing a bias privileging treatment of a worker. Article 18 § 1 of the Labour Code clearly states that in an individual work contract “the contractual clauses in the work agreement or in a different contract upon which a work relation is established cannot be less beneficial to an employee than what is specified by labour law regulations”. Poland has a lower percentage of workers who are members of trade unions than Nordic countries. Therefore collective labour agreements are not as common in Poland. It is for this reason that calling upon a trade union to carry out boycotting actions against an employer (by way of refusing to negotiate) would not result in the same legal consequences as were anticipated by trade unions in the *Viking Line* case (namely the impossibility of amending the context of individual work relations). Furthermore the Polish legislator makes it impossible to boycott a party, which has initiated negotiations for the possibility of entering into a collective labour agreement. Article 241² § 3 of the Labour Code makes it impossible for a party that is authorised to carry out negotiations and authorised to enter into a collective labour agreement, to refuse to negotiate. The national trade organisation would not be permitted to appeal to international trade union associations, as was expressed in the ECJ ruling in the *Viking Line* case. Instead if the employer summoned the trade unions to negotiate for a collective labour agreement,

they would be obliged to carry out such negotiations. In accordance with the demands stipulated in Article 241³ § 1 of the Labour Code, each negotiating party has the obligation to carry out such negotiations in good trust and with consideration given to the legitimate interests of the other party. Should one of the parties fail to fulfil such an obligation during the collective labour agreement negotiations, the other party has the right to retract from the negotiations. Because in Poland trade unions are usually the initiators and the party with the higher degree of interest in wanting to enter into a collective labour agreement, the abovementioned regulations are often taken advantage of by the employer in order to retract from the negotiations, to which they have been called upon by trade unions.

The ECJ decision in the case of *Laval* has made a great impact on Scandinavian authorities in the field of regulating minimum wages. Scandinavian countries have tended to pass on the responsibility of establishing minimum wages and other wage concerns to social partners. A grand example of this approach whereby state authorities hold no interest in wage concerns is in the lack of the requirement for social partners to document wage level decisions.³²

Poland in its wage level decisions and approaches is diametrically different to that of the Scandinavians. State authorities define the general regulations enforced in establishing minimum wages. Social partners are part of the decision making process of establishing such levels. The statute which regulates minimum wages, passed on the 10th of October 2002, allows for the socio-economic Tripartite Commission, through negotiations, to establish minimum wages annually (Article 2 (1)). The Ministry Council forms the basis upon which negotiations are carried out, which are then passed onto the Tripartite Commission (Article 2 (1) point 1).

Matters regulated by individual labour law, especially in issues dealing with the establishment of minimum wages by state authorities, have not been affected by the decision handed down by the ECJ in matter of *Laval*. The case has not resulted in any

³² This has been decided by the ECJ, the international body called upon by the Council of Europe to monitor whether member state authorities abide by the international standards established by the European Social Charter of 1961 and by the Revised European Social Charter of 1996. Considering Article 4 § 1 of the Charter (fair remuneration), Scandinavian authorities inform the European Committee of Social Rights of not conducting statistics regarding the level of remuneration. Social partners responsible in Scandinavian countries for establishing the level of remuneration do not have a responsibility to gather such data. For further analysis of Article 4 § 1 of the ECH or the RECH see: A. M. Świątkowski, Charter of Social Rights of the Council of Europe, Studies in Employment Law and Social Policy, Kluwer Law International 2007, pp. 92 and following.

consequences on state authorities in establishing minimum wages nor has it affected the legal mechanism in which minimum wages are established in Poland.

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The issues raised in this part of the study are both abstract and practical in their nature. They have been undertaken with in order to fulfil the obligations stipulated by the editor of this volume. The concepts have been raised in an attempt to show that the decisions handed down by the European Court of Justice in the matter of *Laval* and *Viking Line* did not cause a revolution within the Polish labour, collective or individual law. The Polish legal system, albeit somewhat antiquated, lies in accordance with the assumptions raised that formed the basis upon which the rulings were made in the cases in question.

V. Concluding remarks

Polish authorities conduct a policy typical of nearly all “new” EU Member States. In principle, the Polish government is of the opinion that the Polish provisions of labour law apply to employment relationships of Polish employees employed by Polish employers regardless of the place where the work is carried out. Polish employers are obliged to determine in the employment contract concluded for a fixed term with Polish employees posted to work abroad the duration of the work abroad, the currency in which they will receive the remuneration throughout performance of work abroad, inform them of the benefits allocated due to the posting to work abroad as well as the terms of the employees’ return to Poland (Articles 29¹ § 1-2 of the Polish Labour Code). As an exception to the aforesaid rule for the governing of employment relationships between Polish employees and Polish employers, Chapter II a of the Polish Labour Code (Articles 67¹-67⁴) lays down the terms of employment of foreign employees posted to work in Poland by employers having their seat in an EU Member State. Foreign employers were obliged to guarantee the posted employees the terms of employment not less favourable than those resulting from the provisions of the Polish Labour Code. Legal regulations determined in the Act of 14 November 2003 - amending the Polish Labour Code ³³ concerning the matters on remuneration for work came into force on the day of Poland's accession to the European Union (1 May 2004). They may have practical application for employees posted from EU Member States

³³ Journal of Laws of 2003, No. 213, item 2081.

where the applicable provisions of labour law are less favourable to the terms of employment and pay than the Polish provisions.