

*International private law aspects and dispute  
settlement related to transnational company  
agreements*

**Executive summary of the final report**

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## EXECUTIVE SUMMARY

This study was undertaken for the European Commission concerning “International private law aspects of dispute settlement related to transnational company agreements” (VT/2008/102). The objective of the study was to: 1° provide a comprehensive overview of the rules to be applied as to the applicable law and the competent jurisdiction when a dispute arises on the interpretation or application of a transnational company agreement; 2° identify the practical and legal obstacles to the way disputes relating to transnational company agreements can be settled in court, but also extra-judicial as well as regarding industrial action; 3° identify and suggest any actions that might be taken to overcome these obstacles.

The main findings, conclusions and recommendations are as follows.

### **A. Characterisation of obligations under TCA's**

TCA's come under a wide variety of documents and texts. There is no “single notion” of a transnational company agreement. Furthermore, TCA's cover a wide variety of topics and the commitments that are undertaken in TCA's, may vary from loose unilateral commitments to hard reciprocal rights and obligations. Likewise, the parties to the TCA are diverse. On the side of workers' representatives may range from European and international trade union confederations, to EWC and national unions as well as combinations thereof. This may create difficulties with regard to the characterisation of the commitments undertaken in a TCA, both in national law and in private international law.

As far as the binding character of TCA's is concerned, there may be conceptual problems with regard to the position of the national and European works councils as parties to a legally binding instrument. But quite often, TCA's themselves are unclear as to the binding character of the commitments contained therein.

☞ It may be useful for the parties to a transnational company agreement to make specific reference to the binding or non-binding character of the commitments that are undertaken.

Even when the TCA is meant to create legally binding obligation, the national report commissioned under this study show a divergence as to the exact characterisation of these obligations. TCA's may be recognized as collective agreements under the national law or rather be looked upon as unilateral commitments on the side of the employer. The characterisation in private international law does not necessarily coincide with the characterisation under national law. The terms of the relevant regulations (Brussels I, Rome I and Rome II) are interpreted autonomously in order to insure the effectiveness of the instruments and the uniform application of the rules contained therein. A first question to be answered in this context is whether claims based on a TCA are ‘civil and commercial’ in nature. We argue, based on the case law of the ECJ on the Brussels Convention and Brussels I Regulation, that there is

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no reason to exclude TCA's from the scope of application of the PIL-Regulations.<sup>1</sup> Secondly, the question arises to what extent claim based on a TCA can be deemed to be contractual in nature (again, in the context of the application of Brussels I, Rome I and Rome II). We argue that an analysis of the rules on applicable law and jurisdiction should be based on the assumption that commitments which management has undertaken in a TCA towards the workers and their representatives can in most cases be classified as contractual under the relevant instruments.<sup>2</sup> The relevant criterion is whether the TCA contains obligations voluntarily taken on by (at least one of the) parties. Hence, the concept of 'contract' is wide enough to cover commitments which are largely unilateral in character.<sup>3</sup>

Both the Brussels I Regulation and the Rome I Regulation contain special provisions for individual labour contract. The TCA as such is not an individual labour contract. When a TCA contains individualised rights, however, individual workers may try to enforce those obligations. In that case, the claim entered by the worker will be covered by the special provisions on labour contracts. This does not, however, change the classification of the TCA as such.

Likewise, outsiders (competitors, consumers) may want to rely on the TCA – e.g. as a statement of corporate governance policy. These claims have to be classified separately. When there is no contractual relationship between the signatory company and the claimant, any liability claim, even when based on statements contained in a TCA, will sound in tort.

## II. Relationship with European labour law

The relationship between TCA's and European labour law is far from evident. One could defend the view that TCA's can only be considered as 'national' agreements. Another view is that European labour provisions would be relevant. In this case Articles 138 and 139 of the EC Treaty might play a role. Nevertheless, an in depth discussion of the possible 'reception' of European company-level agreements under the provisions of, especially, Article 139 of the EC Treaty, goes beyond the ambit of the present study.

In practice, there is a strong relationship between EWC's and the conclusion of TCA's. However, it must be noted that TCA's, as examined in the present study,

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<sup>1</sup> TCA's are private law instruments entered into by private parties. Even though they may touch upon taxation and social security matters, they do not contain any public law obligations which may cause them to be excluded from the scope of application of the Brussels I and Rome I Regulations. See the relevant part of the full report.

<sup>2</sup> It should be kept in mind that when one of the interested parties goes to court and enters a claim based on a TCA, this claim will be based on the presumption that the TCA creates legally relevant obligations. It will be up to the law designated by the relevant choice of law instrument to decide whether this claim hold true.

<sup>3</sup> The legal standing of the parties on the employee's side does not seem to be decisive in this matter.

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have not been envisaged by the original 1994 EWC Directive. Also the 2009 Recast Directive has left the issue outside its explicit scope.

☞ The existing EWC legislation may be relevant in light of finding solutions for TCA issues. This has mainly relevance *de lege ferenda*.

### III. Applicable law

The law applicable to the TCA itself (and the obligations undertaken therein) will have to be found by applying the Rome I Regulation. This Regulation deals with the law applying to contractual obligation. It is based on party autonomy. This means that the parties to a TCA can designate the law to be applied to their agreements themselves. A choice of law expressed in the TCA will (have to) be respected on the basis of Article 3 of the Regulation. Choice of law has only limited effect in individual labour contracts, but this does not affect the validity of a choice of law as between the parties to a collective agreement. Such choice of law will remove any uncertainty with regard to the law determining the obligatory aspects of the TCA.

☞ Parties to a TCA may express a choice of law in the TCA itself. This will remove any uncertainties as to the law applicable to the obligatory aspects of the TCA.

☞ Under the Rome I Regulation a choice of law should refer to an existing system of law. However, if a European optional framework on TCA's would be created, this instrument may be chosen by the parties if the framework itself so provides.

When no choice is expressed in the TCA (or can be implied from it), the applicable law has to be determined first by enquiring whether there is a party which perform the obligation 'characteristic' of the contract type. This party may be impossible to discern in the case of TCA's. In that case, the Rome I Regulation refers to the law with the closest connection. That means that the law has to be found by weighing the circumstances of the case. In this process, central management of the leading company plays an important role, as does the location of the workforce covered by it. When the TCA is understood as a unilateral commitment of the employer, the choice of law rule will primarily refer to the law of the country of establishment of the employer.

The closest connection rule is an open one. This creates flexibility, but also causes uncertainty. There are several ways to remedy this – either by EU action or by the parties to the TCA.

☞ The EU legislator may consider supplementing the rules of Article 4 Rome I with a special sub-rule on TCA's. This sub-rule could establish the presumption that a TCA is governed by the law of the place of establishment of central management of

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the leading company. This presumption could than be rebutted if another law shows a manifestly closer connection.<sup>4</sup>

As was mentioned above, the parties to the TCA can end all uncertainty by expressing a choice of law in the TCA itself.

The law applicable to the TCA itself can not determine the normative effect thereof. At least not in a uniform fashion. The report deals with several aspects of normative effect, inter alia representation and reception/recognition as a collective agreement by the law governing the TCA. This overview clearly demonstrates that under the current diversity, any binding effect of the TCA on national industrial relations will have to respect the national rules which define those industrial relations. The relevant differences between the Member States pertain to inter alia the requirements for horizontal effect of collective agreements and the division of powers between unions and works councils. The consequence of this is that TCA's will have to be ratified by national social partners and implemented in conformity with national standards. Only a superimposed European system may be able to change that, but this option seems unfeasible. Accordingly, the TCA (and consequently the enforcement thereof) is split up in a European, obligatory part and a set of national implementation measures.

☞ Parties to a TCA must ensure proper mandate from all relevant national bodies. To ensure normative effect on individual contracts of employment, the TCA is best implemented at the national level.

The above deals with the position of management, workers and their representatives. When outsiders (competitors, consumers) want to rely on the TCA – e.g. as a statement of corporate governance policy – these claims have to be classified separately. Most likely they will sound in tort. In that case the Rome II Regulation applies to the claims. Claims based on unfair competition are covered by Article \*\* thereof, which refers to the country where the unfair competition takes place.

## II. Jurisdiction

Jurisdiction in international matters is covered by the Brussels I Regulation. This Regulation covers jurisdiction of the courts. Arbitration is explicitly excluded from its scope of application.

Article 2 of the Regulation gives jurisdiction to the country of domicile of the defendant. This provides the parties on the side of the employees with a clearly defined forum. Hence the Article fulfils the requirement of legal certainty and predictability. However, it might not offer efficient protection to individual workers and workers representatives established in other member states. Especially because

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<sup>4</sup> One point of negotiations would be whether the presumption should be displaced as soon as another law has a closer connection (compare Article 8 sub 4 on individual labour contracts) or only when the contract is manifestly more closely connected to another country (Article 4 sub 3).

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the legal standing of works councils and unions may differ considerably from state to state, it seems advisable to offer these parties the option to sue in their respective home states. Though suing ‘at home’ has the disadvantage of in order to ensure effective access to justice. Article 2 alone does not fulfil that need.

Article 22 grants exclusive jurisdiction over certain matters to the court most closely connected to the issue. Currently TCA are not caught by any of the provisions contained therein. Though some Member States advocate exclusive jurisdiction on matters involving works councils, we would not support this in the case of TCAs because it makes it impossible to consolidate proceedings against several employers within the group.

Article 5(1) and 5(5) may be useful in creating alternative jurisdiction in the home state of the workers involved. Article 5(5) however, mainly pertains to the groups of undertakings that operate under a single legal entity. If the group consists of different companies, it is doubtful that Article 5(5) can be used. In that case, only Article 5(1) remains as an option for introducing claims against the parent company in a court for the place of establishment of the daughter or vice versa. This provision grants jurisdiction to the court for the place of performance of the obligation on which the claim is based. Complex obligations such as the ones undertaken in TCA may be difficult to locate. First the exact content of the obligation will have to be determined. Once this obligation is identified, the place of performance thereof need to be established. If the parties have not designated this themselves, the place of performance has to be determined in accordance to the law applying to the obligation in question. These two steps may lead to divergence in outcome between courts and (at the very least) complicate the application of the provision. Hence it seems advisable to specify the place of performance of the main obligations arising from a TCA – either in an EU instrument<sup>5</sup> or in the TCA itself. The places which seem to qualify are the establishment of the parent company and/or representative of a non-EU company under the EWC Directive on the one hand and the place of establishment of the effected secondary establishments in other member states, with regards to obligations pertaining to them. Only the latter would provide the workers with an extra ground for jurisdiction against the parent company.

If both parent and daughter company have breached their obligations under a TCA, both parties can be sued in the domicile of one of them under the condition that the claims against the two are closely related. Unfortunately, this extra possibility is currently lacking in claims based on individual employment contracts. The current revision of the Brussels I Regulation offers an excellent opportunity to remedy this.

Another important provision for enforcement of TCA commitments is the possibility to ask for interim measures. Also courts that have no jurisdiction to decide on the merits, may order interim measures. However, there has to be a sufficient link between the measure asked and the court seized. Normally, the court will assume jurisdiction, when the measure has to be executed within the territory. If works

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<sup>5</sup> Both the directive on information and participation and the Brussels I Regulation may qualify in this respect.

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councils or unions want to stop the implementation of a management decision at plant level, the courts for the place of establishment of that plant would most likely assume jurisdiction. The remedies to be provided will have to be based on the local law (*lex fori*).

Finally, the parties to the TCA may include a choice of forum agreement in the TCA (or enter into such agreement at a later date). It seems advisable to make such choice of forum a supplementary one. In that case the parties may seized the court chosen, but may also approach a court having jurisdiction by virtue of the other provisions of the Regulation. A choice of forum does not affect the competence to order interim measures.

### III. Enforcement issues

The issue of enforcement of TCA's is very complicated. There exists a wide variety of law and practice in the studied member states.

It remains unclear how TCA's can be enforced at the national level. If a TCA qualifies as a national collective agreement, the appropriate national enforcement rules and mechanisms can be used. However, it remains unclear what can be done with regard to TCA's that do not qualify as collective agreements, like mostly seems the case.

☞ A certain amount of leeway seems to be available for the parties to transnational agreements in defining their own procedures and practices with regard to dispute resolution.

### IV. *Ius standi*

There is considerable difference between the Member States with regard to the legal capacity of unions and works councils. This creates specific problems in the case of transnational agreements and their enforcement. It seems that there are four ways to address the problems described above, or at least to mitigate their effect.

☞ One solution could lie in creating a European rule on the standing of workers' representative bodies. The EWC Directive already provides a rule on *ius standi* (cf. Article 10 of the EWC Recast Directive), but it remains unclear whether this provision also pertains to TCA's that have been concluded in the margin of EWC activities. The issue might be taken into account when implementing the Recast Directive.

☞ When harmonisation at the European level is impossible, another option would be the creation of a system of mutual recognition. The system that exists with regard to *ius standi* of consumer organisations could be a source of inspiration for this.<sup>6</sup>

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<sup>6</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests, OJ L 166/51.

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Again, the question of finding a legal base and method requires further study. To begin with, the Commission could make information on the respective enforcement rights of national unions and works council more readily available.

☞ The problems of *ius standi* and mutual recognition can, to a large extent, be avoided by providing jurisdiction in the home base of the workers' representatives concerned. If a national works council could choose to file suit in the courts of its home country, the question of mutual recognition would probably not arise.

☞ It is perhaps more realistic to give as much as possible relevant national stakeholders, such as national unions or national works council representatives, the possibility or right to introduce legal proceedings (and thus standing) before the national courts where they are situated or organised. This would require an initiative at the level of the respective national jurisdictions (i.e. the Member States). A European contribution would probably be helpful, for example in the sphere of coordination. A European legal basis for this could be found in Article 140 EC Treaty, under which the European Commission can encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this chapter, particularly in matters relating to the right of association and collective bargaining between employers and workers.

### **V. ADR and industrial action**

Some of the studied member states would allow the use of alternative dispute mechanisms for conflicts arising in the context of TCA's. But they are generally not designed to deal with TCA issues.

When looking at member states' alternative dispute resolution mechanisms, a main point of attention is the wide variety of mechanisms. Perhaps more important than the lack of uniformity in Europe, is the fact that it remains unclear to what extent alternative dispute resolution systems are available for disputes arising from TCAs and what the consequences would be of the intervention of such alternative institutions.

On the use of industrial action with regard to TCA commitments, a distinction can be made between disputes over rights versus disputes over interests. While it is generally accepted that the latter issues can be the subject of industrial action, it is not evident to assume that binding agreements between social partners can be enforced through industrial action.

☞ Attention should be drawn to the possibility for TCA signatories to create or call on autonomous mechanisms of alternative dispute settlement, which can be agreed upon in TCAs.

However, it is important to realise that the validity of such agreements and their effect upon the jurisdiction of the courts may not be uniform throughout Europe. Arbitration falls outside the scope of application of the Brussels I Regulation.