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

Study on behalf of the European Commission VC/2009/017
Aukje van Hoek & Frank Hendrickx
Main topics

• Applicable law
• Jurisdiction of the courts
• Ius standi – standing in courts
PIL

Relevant instruments

• Rome I Regulation: applicable law with regard to contracts
• Rome II Regulation: applicable law with regard to non-contractual obligations
• Brussels I Regulation: international jurisdiction in civil and commercial matters

• Do they apply?
Characterisation issues

- Binding
- Civil and Commercial
- Contract

- NB limited relevance of national law – autonomous interpretation
Characterisation: conclusions

- Brussels I applies, as do Rome I and II
- Relationships between management and workers’ representatives is (largely) ‘contractual’
- Relationship with third parties (consumers, competitors) characterised independently, could be non-contractual
Applicable law: Rome I

Parties to the TCA

- Central (European) management
- Local subsidiaries
- International and/or European trade unions
- National (federations of) trade unions
- (E)WC’s

- Agency/mandate third party relations NOT covered by Rome I!
Applicable law: Rome I

• Article 3: party autonomy – choice of law by the parties
  – Non-national systems of law – CFR
  – Depecage

• Article 4: applicable law in absence of a choice by the parties
  – Characteristic obligation (Article 4 sub 2)
  – Closest connection
    • As a default (Article 4 sub 4)
    • As an exception (Article 4 sub 3)
Conclusions

• Party autonomy as preferred solution
• Closest connection leads to uncertainty
• Depecage: different law for different relationships within the TCA?

• NB Choice of law = obligatory aspect of the TCA
Normative effect - private international law aspects

- Effect of TCA on individual labour contracts
  - Statutory
  - Mandate/membership
  - Other

- Normative effects of collective agreements / works council agreements determined by national law: ‘reception’

- Mandate national representatives determined by national law of country of origin
Normative effect - reception

• Can a TCA under law A have normative effect on labour relations governed by law B?
  – Restrictions under law A
  – Overriding mandatory provisions under Rome I
  – Public policy objections under law B

• Conclusion: to a limited extent only (favor) and subject to conditions.
Recommendations

• Express provision on binding character
• Express choice of law in TCA – with specifications
• Explicit mandate to negotiators at European level
• Implementation at national level according to national rules
Jurisdiction

• Non-EU employers v. EU employers
• Exclusive jurisdiction and jurisdiction over individual contracts of employment
• Other:
  – Forum rei
  – Special jurisdiction Article 5
  – Joinder of claims under Article 6
  – Interim and provisional measures Article 31
Recommendations

• Insert a place of performance for specific obligations in the TCA
• Insert a non-exclusive choice of forum in the TCA
Ius standi - problems

• Legal entity with full legal capacity? Special position of works councils and unions
• Large variety in national solutions
• No party autonomy
Ius standi - solutions

- European rule on ius standi (compare Article 10 recast directive)
- European system of mutual recognition
- Avoidance through jurisdiction rules
- Unilateral acceptance of ius standi by the MS