COLLECTIVE ACTION IN LABOUR CONFLICTS UNDER THE ROME II REGULATION (PART II)*

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Abstract

In this second part of our two-part contribution, we focus on the content of the choice of law rule of Article 9 and its relation to the other provisions of the Regulation. The application of the rule to some (in)famous cases – Tor Caledonia, Viking, Laval – demonstrates the difficulty in applying concepts developed to regulate individual behaviour in private law cases to the phenomenon of industrial action. The special rule of Article 9 seems to offer some protection to workers, but much will depend on its interpretation by the courts. In any case, the rule can not undo the effect of the Viking and Laval judgments which directly affect the right to strike as such.

Keywords*:* collective action/industrial action; localisation of the collective action; posting; private international law/choice of law; public policy; tortious liability

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INTRODUCTION

In the first part of our two-part study we discussed the background and the scope of application of Article 9 of the Rome II Regulation. This Article contains a special rule for the law applying to non-contractual obligations arising out of cross-border collective action. With this, the Regulation – at first sight – seems to recognise the special status of industrial relations within the system of private international law. Upon closer scrutiny, however, the provision is still very much based on private law concepts. This leads to uncertainty as to the exact scope of application of the provision and this in turn reduces its effectiveness in protecting the right to collective action in cross-border cases.

This second part of our study is dedicated to the conflict of laws rules itself. The rule in Article 9 deviates from the main rule in its choice for the *locus actus*, rather than the *locus damni*, in situations where the two point to different legal systems. Moreover, rather than being open-ended like Article 4, the rule does not permit deviations based on a closer connection. Though this special rule definitely has its merits, it fails to take fully into account the collective character of industrial action. The authors describe some of the difficulties in the interpretation and application of the provision. Additionally, the roles of party autonomy and the public policy provision are addressed. In the concluding remarks, the authors take one step back to point out the limited relevance of conflict of laws. The Rome II Regulation in itself does not (and cannot) safeguard the nationally enshrined right of collective action in the transnational context. This is due in part to the fragmented character of European private international law. More important, however, is the substantive threat posed by the fundamental market freedoms, as they are currently interpreted by the ECJ.

4. THE CONFLICT OF LAWS RULES

4.1. THE CONFLICT OF LAWS RULE, *LOCUS ACTU*S AND ALTERNATIVES

The special provision for industrial action refers to the place where the action will be carried out or has been carried out as the main connecting factor. This rule, which refers to the *locus actus*, deviates from Article 4 of the Rome II Regulation, which refers to the *locus damni*. So in cases of a double *locus* the rule for collective action makes the opposite choice from the general rule. This "opposition" against the *locus damni* was triggered by the SEKO case and has been the major driving force behind the creation of a special conflict of laws rule for industrial action. But Article 9 deviates from the main rule in other aspects as well. In the EP's proposal which introduced the special rule for collective action, the *locus actus w*as the only relevant connecting factor. In contrast, the draft regulation as proposed by the Commission provided for several alternatives to the *locus damni*. In the Commission proposal the *locus damni*

would only be relevant in the absence of a common habitual residence for both the tortfeasor and the injured party. Moreover, both connecting factors (*locus damni* and common domicile) may be ignored when the tort/delict is manifestly more closely connected to another country. This closer connection might (in particular) be based on a pre-existing relationship between the parties, such as a contract, which is closely connected with the tort/delict in question.[1] Both alternatives made it to the final version of the Regulation and can be found in the general rule of Article 4. Moreover, in accordance with Article 10 of the Commission's proposal, Article 14 of the Rome II Regulation provides that the parties themselves may designate the law applying to the non-contractual obligation. Non-commercial parties can only make such a choice *after* the event giving rise to the damage occurred.[2] None of these alternatives figured in the EP's proposal.

As we stated earlier, the European Commission considered the EP's proposal to be too rigid. Though the main aspect of the amendment, the choice for the *locus actus*, was maintained, the provision as adopted integrates several aspects of the general rule. Article 9 of the Regulation refers to Article 4 paragraph 2, and in that way integrates the reference to the common place of residence. Moreover, Article 14 regarding the choice of law can be applied to industrial action. However, the escape clause of Article 4, referring to a more closely connected country, is not applicable to industrial action. This means, amongst other things, that the law which governs the pre-existing relationship between the parties cannot be relied upon. The conflict of laws rule only operates with specified connecting factors, making it a "closed" conflicts rule. The generally recognised advantage of the use of closed conflicts rules is that the determination of the applicable law becomes more predictable and is not open to manipulation.[3] This curbs the risk of so-called forum bias: the tendency of judges to prefer the application of their own laws. The closed nature of the rule and the absence of a sub-rule referring to the pre-existing relationships, however, also make it impossible for the court to embed the industrial action organically into the system of collective employment relations in which the action is taken.[4] Therefore, the semi-closed character of the rule has both advantages and disadvantages.

We do not think that there is such a thing as the perfect conflict of laws rule for industrial action. The major differences in the conceptualisation as well as in the specific legal construction of and constraints to the phenomenon in the several legal systems make it difficult if not impossible to formulate a conflict of laws rule that does justice to all systems involved. After all, conflict of laws presupposes a minimum of comparability of substantive laws, which is difficult to find with regard to industrial

1 COM(2003)427 Article 3.

2 The Commission's proposal was more restricted because in commercial conflicts the choice of law could only be made afterwards.

3 See e.g. S. Bouzoumita, 2007, 280 on how the general exception clause in Belgian private international law can be manipulated.

4 Cf. C.W. Hergenröder, 2007, p. 317.

action. However, in our opinion the *Tor Caledonia* case had made it politically unavoidable that a conflict of laws rule for industrial action would become a major point of negotiations. For the time being, we will not try to outwit the legislator by formulating an alternative rule. Neither will we give a final judgment on the quality of the conflict of laws rule which found its way into Article 9. We would like to address, however, a number of complications with respect to the current provision. We will do so by using the cases described in Section I.

4.1. *TOR CALEDONIA, VIKING* AND THE LOCALISATION OF A BOYCOTT

The facts of the *Tor Caledonia* and *Viking* cases are typical for industrial action in maritime transport. The unions stood up for the crew's interests by organising boycotts and blacklisting port work. In addition to a strike carried out by the sailors themselves, often an unlikely event due to the poor negotiating position of these workers, the unions involved will organise different types of boycotts. Firstly, there will be refusal to engage in a contract (individually or collectively) with a blacklisted shipowner. Secondly, workers hired by other employers active in port services[5] will refuse to perform activities for the benefit of the blacklisted employer. Earlier, we discussed the need to retain the *locus actus* as primary connecting factor for collective action instead of the otherwise dominant *locus damni*. According to the *locus actus* rule, the law applicable to the relationship between the shipowner suffering from the secondary boycott and the dock workers' unions and dock workers themselves will primarily be determined by the place where the dock services are withheld. In other words: the law of the port will determine the lawfulness of the dock strike, the ship's flag is irrelevant. Greece and Cyprus rightly pointed out that this may lead to port shopping: the situation in which unions will take action in a place the law of which is supportive of collective action.[6] It is not entirely coincidental that the cases mentioned earlier occurred in Scandinavia. Scandinavian countries have a long tradition regarding industrial action, in which solidarity plays an important role.[7]

The possibility to refer to the common place of residence, which is integrated in Article 9 by reference, will not change this. After all, the types of action described above are mainly used as a weapon against employers who sail under a flag of convenience. A flag of convenience is called 'convenient' because its law places little legal restraint on the shipowner and/or provides advantages with regard to taxes and social security premiums. Typically, flags of convenience are also selected because of the poor protection the legal regime concerned provides to sailors. Such legal systems also tend

5 By 'port services' we refer to all services supplied in a port for the benefit of visiting ships, such as loading and unloading, stevedore and piloting services.

6 See above.

7 This is also evidenced in the *Laval* case.

to restrict the freedom of collective action. As a result, action is taken elsewhere in countries which are more permissive of industrial action. And such action will most often consist of or include sympathy action.[8] Therefore, the dock workers and the employer typically will lack a common residence.

Sympathy action in the Scandinavian system is usually constructed as secondary action to support the primary action of the workers in that particular industry. As we mentioned previously, dock strikes for sailors who sail under a flag of convenience do not always support an actual strike taking place on the ship itself. The primary action often serves symbolic purposes only: the seamen's union in the country where the action is taken imposes a boycott of the shipowner, which means that its members seafarers are called upon not to engage in an employment contract with the disqualified shipowner. Hence, the primary action consists of a preliminary refusal to enter into a contract. This boycott is not directed against specific job offers or ongoing contract negotiations: the refusal is purely theoretical. In the *Viking* case, the alleged tort consisted of exactly this type of primary action. Since the *locus actus* will (in future) determine the applicable law to the boycott action, the question is: where can such a general and *a priori* refusal to enter into a contract be situated?[9]

Omissions are more difficult to localise than actions. In 2001 the Dutch Supreme Court dealt with a case of tortious liability of a bank which had refused to give permission for the handover of monies and goods held at a subsidiary to an interested party. According the Court, this tort could be located at the place where the handover should have taken place, had permission been forthcoming.[10] A tortious omission must be localised, according to this ruling, at the place where the action should have taken place. This rule seems to hold true when there is an obligation to act on the side of the (alleged) tort feasor. In this case, however, there is no obligation to act – no one can be obliged to enter into an employment contract. In other respects, too, the case which prompted the Dutch Supreme Court's ruling must be distinguished from a general refusal to contract due to a boycott action. Such action shows more similarity to the facts of the case regarding *Besix/Wabag*.[11] In its ruling on this case the European Court of Justice addressed the localisation of an exclusivity clause, which prohibited parties to enter into agreements with other parties. Which was the place of performance of this obligation in the context of Article 5 paragraph 1 of the Brussels Convention and Brussels I Regulation? In the *Besix* case the obligation to refrain from action was, just like the refusal to contract in the case of a boycott, not restricted to a specific geographical area.[12] The Court ruled that such an obligation does not allow

8 The country where the dock is located must provide for sympathy action, as is the case in Scandinavia.

9 See with respect to this subject also Pontier 2002, 274–282.

10 Dutch Supreme Court 12 October 2001 C00/307HR *Nederlandse Jurisprudentie* 2002, no. 255.

11 ECJ 19 February 2002, C-256/00, *ECR* I-1699.

12 In the Laval case, the boycott seems to concern the Swedish activities of Laval only. This would allow the location of the boycott within a specific legal system.

for the determination of a specific place of execution.[13] The Court declared Article 5 paragraph 1 of the Civil Jurisdiction and Judgment Regulations to be not applicable to the case at hand.

Article 12 of the Rome II Regulation, which is concerned with pre-contractual liability, does not provide any solution either. This stipulation provides only for non-contractual liability which arises from negotiations prior to the conclusion of a contract. There are no such negotiations in the cases under discussion here. Even if applied by analogy, the rule provided by Article 12 of Rome II has limited use. Article 12 primarily opts for a connection to the law that would have governed the contract if it had been concluded. However, the application of the potential *lex contractus* does not do justice to the conflict at hand. The law applicable to employment contracts of seamen is often determined by using the flag as an important connecting factor. It is exactly this conflicts rule which has triggered the use of flags of convenience.[14] The industrial action discussed here is directed against the use of cheap flags. This implies that there is emphatically no agreement between the prospective (or rather fictitious) parties to the contract on the law applicable to the contract. The use of the flag as a connecting factor for the law determining the legality of such a boycott seems to us to be incompatible with the objective and logic of Article 12 of the Rome II Regulation as well as with the purpose of this type of action.

If a connection to the intended contract is out of the question, Article 12 of the Rome II Regulation refers back to the main rule in Article 4, Rome II. And, there again, we find the place where the damage has occurred as a connecting factor. But the application of this connection factor is problematic in this case, too. Because, after all, what exactly is the damage caused by the boycott? The actual leverage of the union in the case of *Viking* as well as *Tor Caledonia* is its power to prevent the ship from leaving the port. Thus the actual harm caused to the shipowner was the result of a *secondary* action. The only relation of the *primary* action to the harm suffered is that it *legitimises* the secondary action. Therefore, it may be argued that the damage caused as a result of the primary action described earlier can be localised at the place where the secondary action occurred. The added bonus of this is that both primary and secondary action will be subject to one and the same system of law.

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13 Consideration 49: "By its very nature, an obligation not to do something, which, like that in question in the main proceedings, consists in an undertaking to act exclusively with a contracting partner and a prohibition restraining those parties from committing themselves to another partner for the purpose of submitting a joint tender for a public contract and which, according to the parties' intention, is applicable without any geographical limit and must therefore be honoured throughout the world – and, in particular, in each of the Contracting States -, is not capable of being identified with a specific place or linked to a court which would be particularly suited to hear and determine the dispute relating to that obligation. …".

14 Compare the facts in *Viking*, where the Finnish shipowner was planning to substitute the Finnish flag by an Estonian flag in order to profit from the difference in labour condition between the two countries. For that reason, the Estonian flag is considered to be a flag of convenience.

Alternatively, the location of the union's call for action – whether it concerns a strike action or a boycott – may be located at the premises of the union. The location being identified as the place from which the call originated. This line of argument would, when applied to the *Viking* case, submit the call for the secondary boycott action of the ITF to English law and the call for the primary boycott by the Finnish Seamen's Union to Finnish law. A consecutive action by dock workers would be governed by the place where this action took place and might refer to yet another system of law. In other words: this line of reasoning separates the action of the unions (call for and support of a collective action) from the collective action taken by the workers. As we stated before, we do not think such a separation for choice of law purposes is conducive to the actual enjoyment of the right to collective action.

Needless to say, the argument presented earlier only refers to primary action which lacks a clear *locus actus*. If the primary action is a strike by the crew on the ship of a blacklisted shipowner, it is very possible to localise the action separately. In that case, the *locus actus* of the primary action determines, barring the exceptions of Article 4 paragraph 2 and Article 14 of Rome II, the law applicable to the primary action.

4.3. *LAVAL*, THE SECONDMENT OF WORKERS AND THE CONNECTION TO THE COMMON PLACE OF RESIDENCE

The free movement of services gives rise to a new type of labour conflict of which *Laval* is a textbook example. The Latvian company *Laval un Partneri* was responsible for construction work in Sweden and brought its own Latvian workers to Sweden, which is allowed according to the principle of the free movement of services. The individual employment contracts of the workers were subject to Latvian law. At some point, a collective labour agreement was concluded between the employer and the Latvian union, which was subject to Latvian law. The pay received by the Latvian workers was based on Latvian social and economic conditions and was substantially lower than the average pay of comparable Swedish construction workers. In other respects, too, the protection which Latvian law provided to the posted workers, was poor compared to the Swedish collective labour agreement for the construction sector. Through industrial action the Swedish unions tried to persuade the Latvian employer to sign the Swedish collective labour agreement and to agree on a wage level which would be in conformity with local standards. This would have not only led to enhancing the protection of the Latvian workers, but would also have prevented the Latvian employer taking advantage of labour costs that were lower than those paid by its Swedish competitors. In other words: it would have prevented wage competition based on pay in the Swedish labour market.

Technically speaking this was, again, a sympathy action which involved workers of suppliers, sub-contractors and other services vital for the accomplishment of the building project by Laval. The project was effectively boycotted, which made it impossible for Laval to continue the building project. This sympathy action was

localised in Sweden. By virtue of Article 9 of Rome II, the employer's claim regarding the non-contractual liability of the Swedish unions for the damage suffered by Laval was subject to Swedish law. The *locus actus* would be the decisive factor as the party causing the damage and the injured party do not have a common place of residence.

The situation could have been different if Latvian workers and/or the Latvian unions were also involved in the action. Indeed, if the habitual place of residence of the employer and the workers was in Latvia (and the union had its place of residence in Latvia, too), those parties would have a common habitual place of residence in the sense of Article 4 paragraph 2 of Rome II. This provision says that "where the person claimed to be liable and the person sustaining damage both have their habitual place of residence in the same country at the time when the damage occurs, the law of that country shall apply".

With respect to the Latvian workers who worked in Sweden, it may be argued in some cases that their habitual place of residence at the moment when the damage occurred was Sweden. When the employer is still considered to reside in Latvia, this would mean that there would no longer be such a thing as a common place of residence in the relationship between the employer and the individual workers. The involvement of the Latvian union, however, may again trigger the application of the special rule of Article 4 paragraph 2 of Rome II. As both the employer and the union are 'resident' in Latvia, Article 4 paragraph 2 would refer to Latvian law with regard to the relationship between the Latvian union and the Latvian employer. The outcome of such an assessment would only be different if it were to be decided that the employer's habitual place of residence was in Sweden, too. Or at least, was so at the time of the event causing the damage. Article 23 of Rome II provides some arguments which support this. The Article deals with the concept of habitual place of residence. The habitual residence of a company or other body, corporate or incorporate, would normally be their place of central administration. Where the event giving rise to the damage occurs, or the damage arises, in the course of operations by a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located will be treated as the place of habitual residence. There is no doubt in the *Laval* case that the damage affected business operations in Sweden. There was no such thing as an establishment in the sense of the EU Treaty, however, as Laval relied on the free movement of *services*. It is true that a Swedish subsidiary company was declared bankrupt in the aftermath of the industrial action, but this subsidiary was not a direct party to the dispute. It is therefore unlikely that the European Court of Justice would interpret the Rome II Regulation in such a way that Laval's habitual place of residence at the time of the collective action would be considered to be Sweden.

Neither the provision itself, nor the *travaux préparatoires*[15] give any clues as to the application of Article 4 paragraph 2 of Rome II in the case of multiple parties causing

[15] The Commission's proposal (COM(2003)427 p. 13) only says that "This is the solution adopted by virtually all the Member States, either by means of a special rule or by the rule concerning connecting factors applied in the courts. It reflects the legitimate expectations of the two parties."

the damage and/or more than one victim with a place of residence in several countries. A similar provision in Dutch law[16] is interpreted in such a way, however, that every offender-victim combination must be considered separately for the application of the special sub-rule on common residence.[17] According to the Dutch interpretation, the conflict between Laval and the Swedish unions would be subject to the main rule (the *locus actus)*, making Swedish law applicable to their relationship. If a Latvian union had also been involved, however, the dispute between the employer and the Latvian union would have been governed by the law of the country of their common place of residence, being Latvian law. The application of the rule of common residence in the relationship between the employer and individual workers would depend on the residence of each of the workers concerned.

We consider such an interpretation to be highly undesirable in industrial action. Industrial action in cross-border cases not only requires a high level of foreseeability with regard to the applicable law, but also requires that all parties involved on the part of the employees are able to coordinate their action. In order to do so, they must be able to rely on one and the same legal system for determining the legality of the action as such. We already stated before that, in our opinion, the splitting up of an industrial action into a number of sub-questions – each subject to a different legal system – will lead to a system where industrial action will only be possible if all relevant legal systems declare it lawful. Such an accumulation of requirements is bound to dampen any enthusiasm for cross-border industrial action. It would also imply that a cross-border industrial action would be subject to more restrictions than each of the legal systems involved would impose when taken separately.

It may be argued, though, that in secondment cases, a distinction should be made between industrial action directed at the integration of seconded workers in the social fabric of the country in which they temporarily work on the one hand, and industrial action directed at the terms of employment of the seconding company as such on the other. The law of the country where seconded workers temporarily work is the most closely connected in the first case, and it may be argued in the second case that the industrial action is governed by the law of the common place of origin of the workers and the employer. Such a result can be achieved under the Regulation if the exception of Article 4 paragraph 2 of Rome II is interpreted restrictively. It should only be applied to cases where all relevant parties (workers, unions and employer) share a common country or origin. Such interpretation will lead to a situation in which the common residence rule will only be applied when there is no involvement of unions

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See for the limited value of the *travaux préparatoires* of European legislation: Freudenthal and Van der Velden 2003, 117–126.

16 Article 3 paragraph 3 Dutch Act on Conflict Rules with respect to Tort, *Staatsblad* 2001, 190.

17 That means: if only one of the possible tort feasors is involved in legal proceedings by at least one of the victims, it is decided for this combination whether the special arrangement for the consequences applies: Dutch Supreme Court 23 November 2001 *Nederlandse Jurisprudentie* 2002, no. 281 with a note by Th.M. de Boer. Also see Vonken 2002, 390–393.

and/or collectivities of workers from the country where the work is temporarily performed.[18]

4.4. PARTY AUTONOMY

If the (rather sparse) Dutch case law is any indication, parties sometimes actually make a choice of law in disputes concerning industrial action. One of the recorded cases was a choice for the *lex fori,* which was made during the trial.[19] But choices of law are also made beforehand, and as such have been recognized in Dutch legal practice. In the *Saudi Indepence* case,[20] the Dutch Supreme Court considered the choice of law for an individual employment contract of the seafarers to be relevant for the assessment of the lawfulness of strike action taken by these seamen. The latter ruling seems outdated, as it does not sit well with either Article 9 of the Rome II Regulation[21] or the protection provided by Article 6 paragraph 1 of the Rome Convention on the Law applicable to Contractual Obligations.[22] The first scenario however, in which the employer and the union make a joint choice of law during the trial, is certainly one of the options allowed under the Rome II Regulation.

Under Article 14 of Rome II, parties can agree on a choice of law for non-contractual obligations. If all the parties are pursuing a commercial activity, they can make such a choice before the event giving rise to the damage occurs.[23] A choice of law in all other cases will only be possible after the event giving rise to the damage has occurred. As neither the unions nor the workers pursue any commercial activities, a choice of law regarding the law applicable to a collective action can only be made afterwards.

Again according to Article 14, a choice of law by the parties shall not prejudice the rights of third parties. It is not entirely clear in this context who is meant by "third parties". We assume here that the term refers to anyone who is not a party to the choice of law agreement. Such an interpretation would prevent the union which is a party in a law suit from making a choice of law which affects the legal position of the

18 An interesting example of this would be the 2009 case of Polish truck drivers who went on strike in the Netherlands in support of collective action taking place in Poland. The action was allegedly aimed at the reinstatement of some co-workers of the workers taking the action, who had been fired by the Polish employer. See on this incident inter alia BN/DeStem 2 april 2009 "Verdachten van incident bij bedrijf Schavemaker weer vrij".

19 See e.g. President of the District Court of Amsterdam 30 November 1978, *Schip & Schade* 1979, 75 (Tropwind).

20 Dutch Supreme Court 16 December 1983, *Nederlandse Jurisprudentie* 1985, no. 311.

21 The law which applies to the individual employment contract does not seem to play a role under the Rome II Regulation for the determination of the law applicable to a non-contractual obligation arising from industrial action.

22 A choice of law in an individual employment contract cannot derogate from the protection enjoyed by a worker under the law applicable without such choice of law. This rule will recur in Article 8 of the Rome I Regulation. The entry into force of the Rome Convention in the Netherlands took place after the judgement in the *Saudi Independence* case.

23 Neither individual workers nor unions are involved in commercial activities.

workers involved and/or other unions which took part in the industrial action. If the *Viking* case is taken as an example, it should not be possible for a choice of law agreed upon by the Swedish union to affect (the law applying to) the relationship between the employer and the ITF. The position of the workers involved in the industrial action should not be negatively affected by this choice of law either. In theory Article 14 seems to offer a sufficient safeguard against this.

It is very doubtful, however, whether this 'immunisation' against choice of law by the other participants will also work in practice. If a court, applying the law chosen by the parties to the dispute, decides to grant a court order to ban the industrial action, this ban will undoubtedly also affect the other participants. The fact that the court order may be given in summary proceedings and/or by way of a provisional measure does not necessarily change this. And neither does to *inter partes* effect of civil judgements. Indeed, some legal systems prohibit the participation in an industrial action once this action has been banned by the court. In that case all workers and unions involved in the labour conflict are affected by the court order, even if they're not a party to the procedure and hence, not a party to the choice of law.

If the 'immunisation' indeed works, this causes yet another problem. In that case the choice of law option may lead to the further fragmentation of the interdependent set of relationships arising from industrial action. After all, the law may be different for each plaintiff-defendant combination, depending on the agreement reached.

In spite of these objections, a choice after the fact may fulfil practical purposes. Moreover, the European legislator did not opt for an exception to the application of Article 14 – as they did with regard to *inter alia* unfair competition.[24] We can only hope that the restrictions incorporated into the provision will be interpreted in such a way that the negative side-effects are smoothed out as much as possible. This might be achieved by accepting the (direct or indirect) effect of the choice of law on all parties to the collective action, but only in as far as it does not negatively affect ('prejudice') their right of collective action. The fact that in most cases the employer will be party to the agreement (and hence, in contrast to the workers and other co-organizing unions, not a third party), helps to interpret the provision in a way which is conducive to collective action.

4.5. CORRECTIONS TO THE RESULT OF THE MULTILATERAL CONFLICTS RULE: PUBLIC POLICY

The Regulation contains several provisions which may be read as corrections to the multilateral system of conflict of laws rules. Article 16 also provides for the application of overriding mandatory provisions found in the forum law. Article 17 deals with rules of safety and conduct applicable at the place and time of the tortious event. Finally, Article 26 deals with public policy. We will not go into all these provisions

[24] Article 6 paragraph 4. See also Article 8 on the infringement of intellectual property rights.

here. One point we would like to address, though, is the use of public policy as a means to safeguard the protection of fundamental rights.[25]

The right to take industrial action is now recognised both in Europe and internationally. Case law on recognition of judgments under the Brussels Convention and Brussels I Regulation shows that such fundamental rights are part of public policy taken as a ground to refuse recognition of a foreign judgment.[26] Likewise, in the conflict of laws, human rights may be part of public policy as a ground for refusing the application of foreign law. According to Article 26 of Rome II, courts may only rely on public policy if the *application* of foreign law is *manifestly* incompatible with the public policy of the forum. This means that there are two further conditions. Firstly, it is not the foreign rule of law as such, but the result of the application of that rule to a specific case which must be incompatible with the public policy of the forum. Secondly, the gap between the result of the application and the standards internal rules of the forum must be wide and deep for an application of Article 26 of Rome II to be successful.

This may lead to the type of problems illustrated by the Dutch *Saudi Indepence* case.[27] In that case, the lawfulness of a strike in the Rotterdam port was considered to be subject to the law of the Philippines. At the time, this legal system subjected the right of industrial action to far-reaching restrictions, including formal requirements.[28] According to Advocate-General Franx in his conclusion preceding this ruling, these restrictions on the exercise of the fundamental right were not incompatible with (Dutch) public policy.[29] Indeed, unconditional fundamental rights are a rarity and, in this case, the relevant international instruments allow for a certain regulation of exercise of the right of industrial action. As a result, incompatibility with public policy becomes a matter of the *degree* to which the right is subjected to restrictions. Moreover, not every difference between the applicable law and the law of the *forum* as regards the restrictions on the freedom to take industrial action presents an incompatibility with public policy. It depends on the extent of the discrepancy between the legal systems as well as on the closeness of the connection between the legal issue and the *forum*.

In the *Saudi Indepence* case, the Dutch Supreme Court considered the application of Philippine law to be compatible with Dutch public policy. This conclusion was reached in spite of the rather far-reaching restrictions imposed on the right of collective action under Philippine law. A major argument for this was that the connection of the industrial action to the Netherlands was very weak. Neither the shipowner, nor the seamen had any relevant connection to the Netherlands. The action was taken

25 On the content of public policy in private international law and the internal market, see also Van Hoek 2009, 55–90.

26 European Court of Justice 28 March 2000, C-7/98, *Jur.* 2000, p. I-1395 (Krombach v. Bamberski). On this ruling, see e.g. Van Hoek 2001, 1011–1028; Gundel 2001, 2380–2383; Lowenfeld 2004, 229–248; Strikwerda 2004.

27 Dutch Supreme Court 16 December 1983, *Nederlandse Jurisprudentie* 1985, no. 311.

28 We have no information on the current state of the law in the Philippines.

29 Conclusion of Advocate-General Franx, *Nederlandse Jurisprudentie* 1985, no. 311 p. 1094–1095.

in a Dutch port in a typical example of "port shopping", which involves calling for an industrial action in a port with favourable organisational and legal conditions. In those cases, the country in which the port is situated does not have any direct socio-economic interest in supporting the action, while it may have an economic interest in stopping it. After all: no port wants to become a preferential location for industrial action by seafarers. In other words, the application of the restrictive Philippine laws did not harm the interest of the country of the forum.

Very probably the *Saudi Indepence* case would be decided differently if it were to be put before the Supreme Court today. First of all, under the Rome II Regulation, the law applying to non-contractual obligations arising out of industrial action is primarily determined by the *locus actus*. As a result, the involvement of the Dutch section of the ITF in the seamen's strike in Rotterdam as well as any action on land will be governed by Dutch law. In this respect, Rome II supports this form of "port shopping" described earlier. Secondly, since the *Saudi Independence* judgment, the right of industrial action has received wider recognition as a fundamental right. An example of the recognition of industrial action as a fundamental principle in European law can be found in the *Laval* and *Viking* cases. Foreign laws which affect the essence of this right will probably be considered incompatible with public policy, even if the connection with the European legal order is relatively weak.[30]

5. SOME CONCLUDING REMARKS

Rome II is innovative owing to its introduction of industrial action as a special (sub-) category in conflict of laws. With this, the Regulation seems to recognize the special status of industrial relations within the system of private international law. This contrasts with the European Court of Justice's approach in *Tor Caledonia* in which collective action subsumed under the general civil law category of "non-contractual obligations" for jurisdiction purposes. This approach taken by the ECJ comes as no surprise. After all, the existing instruments on jurisdiction and applicable law (Brussels and Rome) are based on civil law categories. The rules of Brussels I do not include a separate category for "industrial action". Nonetheless, the European Court of Justice has in the past created a special jurisdiction rule for individual employment contracts in order to accommodate the special characteristics of this type of contracts (as opposed to commercial contracts). This rule was created by a rather free interpretation of the rule for contracts in general. The special rule was subsequently incorporated the Convention and elaborated upon in the Brussels I Regulation. This demonstrates that the absence of special rules in the text of a European instrument does not necessarily stop the European Court of Justice from interpreting general rules in such a way that it effectively introduces new sub-rules for special sub-categories. Apparently, the ECJ did not find it necessary to do so in the *Tor Caledonia* case. In as sense it is ironic that

30 See on public policy and human rights A.A.H. van Hoek, 2008 and the literature cited therein.

it was precisely this ruling which led to a special provision for industrial action in the Rome II Regulation.

Upon closer scrutiny, Rome II does not provide for an autonomous connection to the *lex locus damni* for (the legality of) industrial action as such. The special provision only applies to the non-contractual obligations which may arise as a result of an intended or actual industrial action. The industrial action operates as a sub-category within the main category of tort. The assessment of the lawfulness of an industrial action in the context of a contractual dispute might still be subjected to the *lex contractus*. As a result, the actions of the unions who (intend to) organise an industrial action may be governed by a different legal system than the actions of individual workers who (intend to) participate in the industrial action. This lack of consistency may harm, in our view, the effective exercise of the right to take industrial action in cross-border cases.

So the scope of application of the provisions of Rome II poses problems with regard to legal certainty and consistency. But the rules present problems in other respects, too, when tested against legal certainty as described earlier. After all, the rule incorporated in Article 4 paragraph 2 of Rome II regarding the common place of residence may lead to the fragmentation of the collective event in a number of individual legal relationships. When different actors on the side of the workers have different domiciles, the law applied to judge their respective contributions to the collective action may differ. The same applies to Article 14 of Rome II regarding choice of law by the parties: some parties may join the choice of law, while others may not. All these examples show that private international law is indeed a branch of 'private' law and is not well adjusted to problems arising from employment law which are more collective-orientated.

The most important deviation from the main rule that was introduced by Article 9 of Rome II is that the *locus actus* has priority over the *locus damni*. This reversal particularly affects the legality of (sympathy) action in international maritime transport. The outcome of the *Tor Caledonia* case in Denmark, in which the legality of sympathy action taken in Sweden was tested against Danish law as the *lex loci damni*, shows the need for this new rule. Article 9 of Rome II enables the crew themselves to engage in "port-shopping". Moreover, the provision enhances the position of the unions when they want to organise sympathy strikes. So the interference of the European Parliament (which introduced the special provision) seems to have resulted in a victory for the unions. But what was won in private international law was – to some extent – lost in substantive law, at least for situations which come within the purview of the (European) internal market. According to the ECJ, cross border sympathy action may hamper the freedom of establishment and/or the free provision of services. In those situations, the exercise of this fundamental right is open to strict European scrutiny.

Article 9 of Rome II provides evidence of the willingness of the European legislator to respect the right of industrial action as recognised in the Member States. This

fundamental right, which falls outside the regulatory scope of competence of the EU, should be safeguarded from restrictions imposed by instruments of secondary EU law. In that respect this Regulation does not stand on its own. The preambles and Article 2 of the so-called Monti Regulation[31] also stressed the neutral character of that particular instrument with respect to the level of protection granted to the right or the freedom of industrial action in the Member States. This provision was preceded by the 22nd preamble in the Posting of Workers Directive 96/71, which expressed the heartfelt wish that the directive was to be without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions. And lastly, also the Services directive pays homage to the autonomy of the Member States with regard to collective labour actions.[32]

By their nature, such provisions in secondary EU law cannot safeguard the right of industrial action against the impact of the fundamental freedoms as they are laid down in the EC Treaty. The recognition of the right to industrial action as a general principle of EU law may mitigate the unimpaired application of fundamental freedoms to the detriment of workers' rights, but even this cannot neutralise the (treaty-based) economic freedoms. The Court rulings in the *Laval* and *Viking* cases are clear examples of this. In these cases, the European Court of Justice encouraged the referring court to balance the exercise of the right to industrial action as recognised in national law against the fundamental freedoms recognized in the EC Treaty. Both cases contain evidence that at times the European Court of Justice is quite willing to perform this review itself. We will not go into the merit of the test performed by the ECJ in the *Viking* and *Laval* cases. What this case law demonstrates, however, is that the protection provided by conflict of laws for the right of industrial action does not suffice, whereas the willingness to respect national autonomy in secondary legislation does not provide any guarantee either.[33]

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31 Regulation no. 2679/98, *OJ EU,* 1998, L 337, 12 December 1998.

32 Directive 2006/123 dedicates several provisions of the preamble to the right to collective action: see in particular no. 14 and 15.

33 The limited importance of the preamble to the Posting of Workers Directive is strikingly illustrated by the fact that neither the Court nor the Advocate-General referred to it in the *Laval* case, notwithstanding the major importance of this Directive for the test for compliance with the freedom of services.

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