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

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Abstract

In this first part of our two-part study (the second part will be published in the next issue of the ELLJ), the authors discuss 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 recognize 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.

Keywords*:* collective action; private international law/choice of law; tortious liability; *Tor Caledonia*, *Viking* and *Laval*; typology of cross-border collective actions

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This contribution analyses Article 9 of the Rome II Regulation. Article 9 innovates by introducing collective action as a separate (sub)-category in the conflict of laws. However, upon closer reading it becomes evident that not collective action, as such, is to be submitted to a special conflict of laws rule, but only the non-contractual obligations arising therefrom. In so doing, the provision creates difficult issues of classification: which relationships involved in a collective action are considered to be non-contractual? Part II of this contribution deals with these technical aspects of classification under private international law. But before embarking on that mission, Part I describes the background of the special provision in Rome II and gives a conceptual framework for the phenomenon of cross-border collective action.

Part III 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.

1. CONCEPTUAL FRAMEWORK

1.1. ARTICLE 9 OF ROME II: BACKGROUND AND STANDARD OF EVALUATION

As a result of a proposal by certain members of the European Parliament, Rome II contains a special conflict of laws rule "for a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out". The determination of the applicable law is primarily based on "the country where the action is to be, or has been, taken". This connecting factor is different from the one used in the main rule of Article 4, which applies to obligations arising from tort in general. Article 4 refers primarily to the law of the country where the harm occurs. These two connecting factors produce different results in tort cases

with "multiple loca" like for instance a solidarity strike in the port of country A directed against a ship sailing under the flag of country B.[1]

This difference in connecting factor causes a change in perspective. The reference to the country where the damages arise is more victim-oriented: He suffers harm (to be compensated by damages) and does so at a certain location. The reference to the *locus damni* will normally ensure that the victim can rely on a legal system which is geographically close to him for his entitlement to compensation.[2] This proximity means that the victim is likely to be familiar with that legal system.[3] Using the *locus actus*, the place where the allegedly tortious action took place, as a connecting factor places a stronger focus on the tortfeasor and his action. This connecting factor enables tortfeasors to adjust their behaviour to standards which are familiar to them – and sometimes to select the legal system which will apply to their (intended) action by choosing the locus of their action. That is why the choice for the *locus damni*, at the expense of the *locus actus,* is thought to be related to the greater emphasis placed by modern tort law on risk management and compensation through damages. The regulation of behaviour has allegedly become a less relevant objective of tort law.[4]

A connecting factor based on the localisation of the damages which arise is not *per se* suitable for the regulation of the right to industrial action. The amendments proposed by the European Parliament regarding a special rule for industrial action were meant to serve as a safeguard for workers' right to take industrial action,

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1 *Multiple loca:* this refers to torts leading to damage at a different *locus* than where the tortious act took place. The rules also differ with respect to the extent in which the principal rule allows any exceptions; see below.

2 At least: at the moment when the tort was committed.

3 See, e.g. T. De Boer, *Alternatieven voor de lex loci delicti*, Studiekring Offerhaus series IPR no. 13, Deventer, Kluwer, 1982, 36 and the Explanatory Memorandum regarding the Dutch Act on Conflict Rules with respect to Tort, Parliamentary Document 26608, no. 3, p. 6 with respect to the (expected) coincidence of the place of residence of the injured party with the *locus damni*.

4 See COM(2003)427 p. 13 and Preamble no. 16 regarding the Rome II Regulation. See also the Explanatory Memorandum regarding the Dutch Act on Conflict Rules with respect to Tort, Parliamentary Document 26608, no. 3, p. 6; L. Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, Deventer, Kluwer, 2006, no. 180; J.A. Pontier, *Onrechtmatige daad*, Praktijkreeks IPR, Deventer, Kluwer, 2001, p. 75; T. De Boer, *op. cit.*, 34 *et seq.*, 40. Anyway, it is Strikwerda (no. 185a) who suggested that the choice for the *locus actus* in the environment can also be based on arguments related to the recovery of damages and the insurability of the risk. After all: the *locus actus* of offences against the environment is usually the place of residence of the polluting company and this place of residence also determines to a large extent the company's ability to pay compensation and the obligation to take out insurance. See also T. De Boer (*op. cit.*, 34–36) emphasizes the importance of the link-up with the *place of residence* (of the victim or tortfeasor) as part of a theory that considers the law as a form of risk management. *Cf.* also S. Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity", *American Journal of Comparative Law* 2008, 17–18 or 48, consulted on http://ssrn.com/abstract=1031803. Symeonides criticizes the general details of the object of the law on tort and qualifies individual rules of law as having *conduct regulating* or *loss-distributing* properties. Regarding the first type of rules he considers the *locus delicti* to be relevant (the *locus actus* as well as the *locus damni*), for the second type that is the *place of residence* of the injuring party and the victim.

including the right to strike, as guaranteed by the Member States' legal systems.[5] This justification reveals the constitutional dimension of the problem. The right to take industrial action is recognized in international, European and national law as a fundamental right. But the extent of the right and the restrictions thereof may differ from Member State to Member State. Any restriction of a fundamental right must be prescribed by law. According to the European Court of Human Rights, the mere existence of a basis in domestic law does not satisfy this requirement. The rules have to be accessible, precise and foreseeable in their application.[6] This safeguard applies to anyone who is entitled to exercise the fundamental right. In the case of collective action this would include workers, employers and their respective organizations as all of these may participate in collective action.

The law on tort constitutes an important restriction on the right to take industrial action. After all, the exercise of the fundamental right to take industrial action often entails damage to the employer or to a third party. The aim of industrial action is to put pressure on an actor in collective labour relations by causing damage or threatening to do so. This (threat of) damage is therefore an essential part of the effectiveness of the right. If the industrial action is found to be illegal, the employer may take countermeasures against the participating workers. Such finding may also lead to a court ruling which either bans the action or orders the payment of damages *ex delictu*.[7] The question of whether a collective action is illegal or protected by law coincides to a large extent with the finding of liability in tort (or otherwise) of the participants in and organizers of such a collective action.

Legal certainty is not only a problem for workers who are involved in an international industrial action, but it is also required for industrial action which is exclusively national. In the past, national courts have recognized that a lack of legal certainty may refrain a party from exercising his fundamental right to take industrial action. One of the underlying reasons for the protection of individual participants in industrial action organized by a union is precisely the prevention of legal uncertainty. Thus, the Dutch Supreme Court ruled that an employer may not take any disciplinary action against workers involved in industrial action which can legally qualify as a strike.[8] Workers should be able to rely on the legitimacy of any industrial action initiated by the union. The German *Bundesarbeitsgericht* made a similar ruling in the sense that workers should be able to rely on the assessment of the legality made by the organizing union when they participate in an organized strike. As a result, participation in such a strike cannot qualify as a breach of contract.[9]

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5 See amendments 15 and 31, quoted in the Report by Diana Wallis (A6–0211/2005).

6 *Vontas and others v. Greece*, Application no. 43588/06, Judgment on the merits 5 February 2009, § 35 and *Apostolidi and Others v. Turkey*, Application no. 45628/99, 27 March 2007, § 70.

7 See below for a discussion on the characterization of the claim as contractual or non-contractual.

8 Dutch Supreme Court, 22 April 1988, *Nederlandse Jurisprudentie* 1989, no. 925.

9 BAG, 19 June 1973, *A.P* no. 47 under Article 9 G.G.

The applicability of the rules of the country where the rights are exercised ensures the foreseeability of the restrictions imposed by the law on torts as well as the accessibility of the relevant legal rules.[10] Hence, this conflict of laws solution makes it possible for the party who exercises his right, to anticipate the restrictions imposed by the law. But if the conflict of laws rule of Article 9 of Rome II is to meet the requirement of legal certainty for all participants in an industrial action, in our view two more requirements must be satisfied. Firstly, the result of the application of the conflict of laws rule must be highly predictable. Secondly, all participants must be able to rely on one and the same assessment of the legality of the action as such.[11] These two criteria will therefore be part of our discussion.

The special status this Regulation accords to industrial action is unique. This Regulation does not give any other fundamental right the same protection. In our opinion, this can be explained by the special role of tort law in restricting the right to strike. A similar situation, the exercise of a fundamental right being restricted by the law on tort, also occurs with the freedom of speech. The exercise of this fundamental right may lead to action in tort when the communication in question is thought to amount to insult, defamation, incitement to racial hatred, etc. However, the harm caused by the exercise of the right of freedom of speech will usually be collateral (and often of a non-pecuniary character) whereas the intent to cause harm is inherent to collective action. With respect to the freedom of speech, too, the question arose whether the reference to the *locus actus* is imperative to guarantee an unrestricted exercise of the fundamental right. It proved impossible, however, to reach agreement on this issue during the negotiations. Violations of privacy and rights relating to "personality, including defamation" are excluded from the Regulation's scope.[12]

1.2. INTRODUCING THE DEBATE – *TOR CALEDONIA*

It was only after a ruling by the European Court of Justice on 5 February 2004 in the *Tor Caledonia* case, that it became apparent that the application of the rules of the country where the damage occurred can frustrate the effective exercise of the

10 Restrictions to the right to strike have to be "prescribed by law" (see Article G of the Revised European Social Charter). In the case law of the ECHR this phrase refers to several requirements, amongst which the existence of a legal base for the restriction is but one. The relevant law should be "accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail": quote taken from ECHR 17 February 2004, Appl. No. 39748/98 (*Maestri v. Italy*) Report of Judgments and Decisions 2004-I, para. 30.

11 See C. Hergenröder "German private international law report" in F. Dorssemont, T. Jaspers and A. van Hoek (eds.), *Cross-Border Industrial Actions in Europe: A Legal Challenge*, Social Europe Series no. 13, Antwerp, Intersentia, 2007, 321–322, clearly supports the unity of law and all possible consequences for the right to take industrial action. Also see the notes mentioned there.

12 See Article 1 and Article 30, paragraph 2.

right to take industrial action.[13] The issue of the applicable law was by no means the subject addressed by this ruling. Its central issue was the jurisdiction of the court. The preliminary question put before the ECJ by the Danish *Arbejdsret* dealt with the interpretation of Article 5.3 of the Brussels Convention (now replaced by the Civil Judgment and Jurisdiction Regulation Brussels I[14]). The underlying case resulted from a cross-border collective labour conflict in the context of maritime transport. The facts of this case are fairly typical for industrial action initiated by the International Transport Workers' Federation (ITF).[15]

The spring of 2001 saw a Danish shipowner order all hands on deck for a voyage of the *Tor Caledonia* from Göteborg in Sweden to Harwich in Great Britain. The ship's crew was composed of Danish officers and Polish sailors. It sailed under the Danish flag. The Swedish union SEKO urged the Danish employers' organization, which was acting on behalf of the Danish shipowner, to offer the Polish sailors better collective labour conditions. The Danish employers' organization refused. The Swedish union was not amused: it blacklisted the Danish shipowner. Swedish sailors were called upon not to take up employment with the "blacklisted" shipowner. The Danish shipowner was not impressed. There were no Swedish sailors among its crew anyway. Neither was

13 European Court of Justice 5 February 2004, C-18/02. Commentators include: F. Dorssemont, "Grensoverschrijdende collectieve arbeidsconflicten. Op de grens van arbeidsconflicten en wetsconflicten" in *Arbeidsrechtelijke annotaties*, 2005, 1–32; P. Chaumette, "Fragment d'un droit des conflits internationaux du travail?", *Droit social* 2005, 295–301 and E. Pataut, "La grève dans les rapports internationaux du travail: questions de qualification", *Droit social* 2005, 303–310.

14 Reg. 44/2001, *OJ* L 12.

15 The *Tor Caledonia* case brings to mind the disputes arising from the industrial actions in European ports that led to turmoil in the nineteen seventies and eighties. On this subject: see A. Jacobs, "Towards Community Action on Strike Law?", *Common Market Law Review* 1978, 133–155; A. Korthals Altes, "Seamen's strikes and supporting boycotts" in X, *Essays on International and Comparative Law in honour of Judge Erades*, Den Haag, Nijhoff, 1983, 104–122; A. Lyon-Caen, "La grève en droit international privé", *Revue critique de droit international privé* 1977, 271–299; A. Pankert, "Les actions internationales de solidarité des travailleurs", *Revue internationale du Travail* 1977, 75–84; L. Ter Kuile, "International Issues on Collective Agreements of Seafarers" in X, *Essays on International and Comparative Law in honour of Judge Erades*, Den Haag, Nijhoff, 1983, 92–103; J. Van Schellen, *Aspecten van international stakingsrecht*, Studiekring Offerhaus series IPR no. 15, Deventer, Kluwer, 1983, 7–36. More recent legal theory is rare: see F. Dorssemont, T. Jaspers and A. van Hoek (eds.), *Cross-Border Industrial Actions in Europe: A Legal Challenge*, Social Europe Series no. 13, Antwerp, Intersentia, 2007; J. Atleson, "The Voyage of the Neptune Jade: Transnational labour Solidarity and the Obstacles of Domestic Law" in J. Conaghan, R. Fischl and K. Klare, *Labour Law in an era of globalization,* Oxford, Oxford University Press, 2002, 379–399; F. Gamillscheg, "Dimskal Shipping Co. S.A. v. International Transport Workers Federation" in W. Däubler, M. Bobke and K. Kehrmann, *Arbeit und Recht. Festschrift für Albert Gnade*, Cologne, Bund Verlag, 1992, 755–767; P. Germanotta and T. Novitz, "Globalization and the right to strike: The case for European-level Protection of Secondary Action", *International Journal of Comparative Labour Law and Industrial Relations* 2002, 67–82 and M. Orione, "L'azione de ITF nelle controversie di labori fra armatori ed equipaggi", *Diritto maritime* 1995, 630–674; A. van Hoek, *Internationale mobiliteit van werknemers*, Den Haag, Sdu Uitgevers, 2000, 488–491; A. van Hoek, "IPR. Toepasselijke recht. EVO" in G. Heerma van Voss (ed.), *Losbladig Commentaar Arbeidsovereenkomst*, Deventer, Kluwer, *s.d.*, loose-leaf, Article 1, 4.1.

the recruitment of new personnel expected soon. The call for a boycott of the Danish shipowner was supported, however, by the Swedish transport union STAF. Swedish dockworkers boycotted the loading and unloading of the *Tor Caledonia* in support of SEKO. This expression of sympathy had a big effect. The STAF's sympathy strike supported the SEKO action which in turn was an act of solidarity with the Polish sailors. The Danish shipowner had a problem.

The shipowners' organization summoned both unions before the Danish labour tribunal (*Arbejdsret)* to call off the strike. SEKO subsequently suspended the boycott. The union stated that it would accept the court's ruling. To be on the safe side, the shipowner cancelled the journey. Another ship was leased to transport the cargo. The *Arbejdsret* had serious doubts about its jurisdiction to try this case. The essence of the dispute was the interpretation of Article 5 paragraph 3 of the Brussels Convention (and the identical provision of the Brussels I Regulation). The issue was referred to the European Court of Justice for a preliminary ruling.

Article 2 of the Brussels Convention says that defendants whose place of residence is in the territory of a Member State must be summoned before the courts of that State. The place of residence of the unions in this case was Sweden. Article 2 thus did not provide the Danish court with jurisdiction to try this case. However, for defendants domiciled in a Member State, Article 5 paragraph 3 of the Convention provides for an alternative forum for "matters relating to tort, delict or quasi-delict". A defendant who is domiciled in a Member State can also be summoned before the court of the place where the harmful event occurred if that place is located in another Member State. The Danish shipowner relied on this Article to justify the jurisdiction of the Danish court. The question was, however, whether Article 5 paragraph 3 of the Convention could be used in this case.

One of the issues the *Arbejdsret* faced was whether legal proceedings limited to the lawfulness of an industrial action could qualify as proceedings relating to an obligation arising from tort. The object of the court intervention sought by the employer was to obtain a declaratory judgment and a prevention order; repression or compensation was by no means at issue. According to Danish law, the *Arbejdsret* is competent to hear cases on the legality of the action, to the exclusion of civil or commercial tribunals.[16] If so required, the latter-mentioned courts address the issue of the compensation.

Moreover, the *Arbejdsret* was not at all convinced that Denmark was the State where the harmful event had occurred. The only argument in favour of this statement was the flag. After all, the ship was boycotted in Swedish waters and not in Denmark.

[16] See consideration 20 of the *Tor Caledonia* ruling. It is striking that the Danish court suspended its judgment in this respect until the *Arbejdsret* had tried the issue of calling off the strike. This interesting division of tasks made it impossible to circumvent the most specialized court in the area of industrial action in favour of a commercial court.

The European Court of Justice was in favour, as was Advocate-General Jacobs, of a broad interpretation of the concept "matters relating to tort". This interpretation also includes legal disputes "concerning the legality of industrial action".[17]

Following its ruling in the *Mines de Potasse d'Alsace* case,[18] the Court held that the *locus delicti commissi* may concern the place of the harmful event (*locus actus*) as well as the place where the harmful event caused damage (*locus damni).* The Court held, contrary to the Advocate-General's opinion,[19] that the flag's nationality *can* play a decisive role in the determination of that place, if the damage occurred on board the ship. The ECJ did not decide on this latter issue itself, but referred the localization of the damage to the national courts.[20]

The (at this stage still potential) jurisdiction of the flag state led to the question of how the court of the flag state would determine the applicable law that governs the tort. If the conflict of laws rule of the court seized would also use the *locus damni* as a connecting factor, the Swedish unions would not only have to face a foreign court, but they would also run the risk that their collective action would be assessed against a legal system with which they were unfamiliar. It would involve huge risks for the organizing union, certainly in the case of sympathy action as described earlier. Firstly, the union would no longer be able to rely on a familiar law system with respect to the legality of an action it organized. Secondly, if the ship's flag were used as the main connecting factor, this would make it impossible in practice to launch any effective action against so-called flags of convenience. After all, this connecting factor would provide shipowners with the freedom to select any flag they liked and, as a result, determine the law applicable not only to the employment contracts with the crew[21] but also to any sympathy action for the benefit of this crew. A flag of convenience is selected because of economic advantages offered by the legal system in question. One such "comparative advantage" could be a low level of social protection. From a historical point of view, the repression of industrial action and unfavourable terms of employment go hand in hand. Hence, it is to be expected that flags of convenience are not conducive to the right to strike. In general, sympathy action will not be allowed.

Though Denmark is not a typical example of a flag-of-convenience country, the outcome of the *Tor Caledonia* case followed the scenario described above quite closely. The Danish *Arbejdsret* accepted jurisdiction. It concluded that the damage had occurred on board the ship and declared Danish law applicable to the action

17 See consideration 27 of the *Tor Caledonia* ruling and §§ 33–39 of the Advocate-General Jacobs' Opinion. In the same sense *Henkel* C-167/00, *ECR* 2002 I-8111.

18 C-21/76, *ECR* 1976, I -1735.

19 See in this context §§ 78–80 of Advocat-General Jacobs' Opinion.

20 See in this context considerations 41–45 of the *Tor Caledonia* ruling.

21 The flag is a dominant connecting factor for the law applying to the contract of employment of seafarers.

conducted in Goteborg in Sweden. The industrial action was declared illegal according to Danish law.[22]

1.3. THE DEBATE DURING THE *TRAVAUX PRÉPARATOIRES*[23]

The original proposal submitted by the European Commission[24] did not provide a separate rule for the law applicable to (non-contractual obligations arising from) industrial action. It is remarkable that the European Economic and Social Committee did not insist on having a special rule for industrial action either. After all, some of the Committee's members are workers' representatives.[25] The Committee's recommendation is dated 2 June 2004. It was submitted almost five months after the *Tor Caledonia* case ruling.[26] It was up to the European Parliament to introduce a separate rule for industrial action. This rule referred solely to the *locus actus*. The amendment did not provide any details on the identity of the liable parties. The European Commission, however, rejected the EP's proposal as it felt that the amendment was too rigid.[27] The amendment not only deviated from the *locus damni* in favour of the *locus actus,* it did not allow any exceptions either, contrary to the general rule, for the country of common residence of the parties or for a more closely connected country.

The Commission's rejection of the EP amendment did not stop the Council, however, from incorporating a special provision in its Common Position. Like the EP's proposal, the Common Position uses the *locus actus* as the main connecting factor. Unlike the EP proposal, the Common Position identifies its scope *ratione personae*. This clarification can be understood as an extension as well as a restriction of the EP's proposal. It stipulates that the special rule of Article 9 of Rome II *only* applies to a person in the capacity of a worker or an employer or the organizations representing their professional interests. However, contrary to the earlier EP amendment, which aimed at safeguarding the right of *workers* to take industrial action, the Common Position broadens the scope to include industrial action by employers. The 24th preamble explicitly mentions lockout as an example *par excellence* of an industrial action. The Common Position leaves room for application of the law of the country of common residence, but does not refer to the country more closely connected.

It must be noted that Latvia and Estonia objected to the Common Position at a very early stage.[28] Both countries stated that the application of the rule must remain

22 Arbejdsret, 31 August 2006, no. A2001.335.

23 The preparatory documents can be found through www.europarl.europa.eu/oeil; the filenumber being COD/2003/0168/.

24 COM (2003) 427 final.

25 Article 257 EU Treaty.

26 See CES0841/2004, OJ C 241, 28 September 2004.

27 COM (2006) 83.

28 See *OJ* C 289, 28 November 2006.

restricted *ratione materiae* to disputes which are a direct result of the exercise of the right of employers and workers to carry out industrial action. In the end, both Member States voted against the Common Position. Their joint statement of 13 September 2006 recalled that Article 9 of Rome II could not in any way restrict the freedom of services as guaranteed by Community law. It is safe to assume that this remark was prompted by the (then) pending cases of *Laval* and *Viking*.[29]

The Greek and Cypriot delegations supported the Common Position.[30] They pointed out, however, and rightly so, that Article 9 of Rome II would make some ports very attractive as a location to carry out boycott actions against so-called flags of convenience. One of the notable features of Article 9 of Rome II is that it does not exclude disputes regarding seagoing vessels. Such an exception clause does feature in numerous labour law instruments introduced by the European Community.[31]

The provision which was proposed in the Common Position ended up being included in the final version of the Regulation, which also contains two preambles specifically dedicated to this issue. These preambles are the main guideline for the interpretation of the Article. This guideline, however, gives rise to more questions than answers.

Article 9 of Rome II states the following:

> "Without prejudice to Article 4(2) the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken."

The relevant preambles are the following:

> "(27) The exact concept of industrial action, such as strike action or lockout, varies from one Member State to another and is governed by each Member State's internal rules. Therefore, this Regulation assumes as a general principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers.

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29 *International Transport Workers Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti*, European Court of Justice 11 December 2007, C-438/05, *ECR* 2007, I-10779 and *Laval un Partneri v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Bygettan, Svenska Elektrikerförbundet*, European Court of Justice 18 December 2007, C-341/05, *ECR* 2007, I-11767. For an explanation of these cases, see *infra*.

30 "The Greek and Cypriot delegations would like to point out that the application of Article 9 of Rome II of the Regulation would probably cause problems for shipping, given that vessels would be exposed to rules which varied according to the laws of the Member States of their ports of call, irrespective of whether those vessels were in full conformity with the laws of the flag State."

31 See in this context e.g. Article 1 2 c) Directive 98/59 (Collective dismissal); Article 1 5) of Directive 94/45 (European work councils); Article 1 3) Directive 2001/23 (transfer of an undertaking) and Article 3 Directive 2002/14 (Framework Directive Information and Consultation).

(28) The special rule on industrial action in Article 9 of Rome II is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States."

1.4. CROSS-BORDER INDUSTRIAL ACTION IN EMPLOYMENT LAW AND THE PRIVATE INTERNATIONAL LAW PERSPECTIVE

Private international law analyses legal phenomena which feature a "foreign element". In a period of increasing Europeanization and globalization, industrial actions were bound to become a subject of interest to private international law practitioners. However, a collective action, or the legal procedures resulting therefrom, may demonstrate a "foreign" element without the action being *per se* "cross-border" industrial action in the sense of labour law. With this last term, we refer to actions that touch upon a collectivity of workers or collectivities of workers who are located, physically, in more than one state. Such actions affect workers in more than one Member State as a result of the place(s) where the action is taken and/or the location of the workers whose interests are directly affected.

Logically speaking, we can distinguish four categories of industrial action. Most industrial actions are carried out within the confines of a single state and do not have any foreign elements. The industrial action only affects the professional interests of workers who are active in the country where the industrial action is taken. In the absence of a foreign element, the employment relations of the workers are exclusively governed by the laws of the *locus laboris*. The employer who is established in the state in which the action takes place, is the only one who suffers any damage. Such industrial action has, from the perspective of labour law, a national dimension only and – being "domestic cases" are *in principle* irrelevant from the private international law perspective.[32]

Some industrial actions can qualify as "cross-border" from either a private international law perspective or a labour law perspective. Collective action which qualifies as "cross-border" from the conflict of laws perspective but not from the employment law perspective is industrial action which only affects workers who physically work within the boundaries of one State, but where the individual labour contracts and/or the collective action features a foreign element. Action can also be cross-border from a labour law perspective only. In that case, the collective action affects a collectivity or collectivities of workers which are situated in different states. But neither the individual industrial actions as such, nor the employment contracts of the participants feature any foreign element. These cases are analysed for private international law purposes as a juxtaposition of purely domestic industrial actions.

[32] Unless the question of its lawfulness is for some reason brought before a foreign court, in which case it may be considered to be a "foreign domestic case" for the purpose of private international law.

And *last but not least,* there is the category of cross-border industrial action that can be qualified as "cross-border" from the labour law perspective as well as the private international law perspective.

Examples of the last three categories can be found in a number of high-profile cases which have featured prominently in the news of the past decade. Some of these examples also touched on the jurisdiction of the courts. They went all the way to the European Court of Justice and were recorded as a *cause célèbre*. This paper aims to focus in particular on that industrial action which can qualify as cross-border from the perspective of private international law.

1.4.1. Cross-border industrial action from a labour law and private international law perspective

The *Tor Caledonia* case described earlier serves as a classic example of industrial action that can qualify as a cross-border case from the perspective of both employment law and private international law.

Some industrial action provides evidence of solidarity between workers in different countries; for example, when workers in country B take action to improve the wages and working conditions of workers in country A. This makes the action cross-border from a labour law point of view. It is very tempting to describe the phenomenon of a sympathy strike by using the classic twin concepts "primary" and "secondary" action. These twin concepts are based on the description of one type of sympathy action which supports industrial action carried out by workers who work for another company (in another sector or, as in this case, another country).

However, a sympathy strike is not necessarily also a "secondary" action in the literal sense of being an action undertaken after primary action is taken. Sometimes the workers for whom the sympathy is declared are unable to take primary action. Workers who work on a ship that sails under a flag of convenience are sometimes unable to take action. In those cases the privileged position of dockworkers who help with the loading and unloading of seagoing vessels are a necessary precondition for any industrial action.

From the perspective of private international law, a conflict or relationship is cross-border when it touches upon several legal orders. Collective action may contain several foreign elements. The employment relations of the workers who take action and those of the workers whose interests are at issue may be subjected to different legal systems. The location of the sympathy action and the place where the damage occurred may be in two different countries. Moreover, an international federation of unions, such as the ITF, may be involved in the organization of the action.

Another example of an industrial action that can qualify as a cross-border case from the private international law as well as from the labour law perspective is the

Viking case.[33] The *Viking* case was about summary proceedings aimed at obtaining a court order banning a strike called by a Finnish union that resisted the intended reflagging of a ship sailing under the Finnish flag to a flag of convenience for its journeys to Estonia. The summary proceedings also addressed the well-observed ITF circular, which had called upon its non-Finnish members not to sign a collective labour agreement to which the crew of the ship to be reflagged were subjected. As a result, the freedom of establishment of the Finnish shipowner in the direction of Estonia was affected. This was the reason why the threat of a classic strike called by the Finnish union FSU and a particular type of boycott initiated by the ITF were tested for compatibility with the freedom of establishment laid down in Community law. The boycott concerned a call to third parties to exercise their negative freedom of contract in an organized way. As it happened, the ITF had its place of residence in London and so the ITF, as well as the FSU, were summoned to appear before an English court.

It goes without saying that the international sympathy boycott that resulted from the call to strike by the Finnish union against a Finnish shipowner only marginally touched upon English law. The case is an example of the possibilities provided by the Brussels I Regulation for shipowners to engage in *forum shopping*. In this case, the place where the Finnish action took place as well as the place where the damage occurred pointed at the jurisdiction of the Finnish courts. Considering the generous approach of the law on strikes by Finnish courts, the "courteous" choice of the shipowner for the *forum* of the defendant ITF (an English court) revealed to be a more interesting option.

1.4.2. Cross-border industrial action from an exclusive private international law perspective

Some industrial action, which does not fit the qualification of a cross-border case from the labour law perspective, may have a foreign element as a result of the nature of the employment relations involved.[34] In such a hypothesis, the industrial action touches upon an international "cross-border" employment relationship. The industrial action actually takes place within the borders of a single state or it only touches upon the operation of the national labour market.

An employment relation may feature a foreign element if a worker who usually works in country A is posted abroad or seconded to country B. Generally speaking, an employment relationship will have a "foreign element" when the *locus laboris* and the law applicable to the employment relation are not the same.[35] If workers in such

33 European Court of Justice 11 December 2007, C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti, ECR 2007*, I-10779.

34 See Lyon-Caen, *op. cit.*, 271–299.

35 Moreover, the place of residence of an employer may also give rise to conflict of laws issues such as the procedure applicable to the strike in country A which is brought before the court in country B. We will not discuss this possibility here. The concept of an "international employment contract"

international employment relations participate in industrial action, the question arises which law is applicable. Theoretically speaking, the choice should be between the law of the country where the industrial action is taken and the law applicable to the employment relationships. The law applicable to the posted workers may not be the same law that governs the employment relations of the local workers. If the seconded as well as the local workers are involved in the industrial action, the connecting factor of the *locus (non) laboris* has the advantage that the entire collectivity of workers are subjected to the same law system. The connection with the law applicable to the employment relation may lead in this case[36] to the fragmentation of the collectivity of workers. The connection with the common *locus (non) laboris* provides evidence of an institutional approach of the "community of labour", which goes beyond its contractual construction.

A recent example of such an action is the *Laval* case.[37] This case concerned industrial action carried out by Swedish unions in the building industry who wanted to put pressure on a Latvian builder who was building a school for the Swedish municipality of Vaxholm with the aid of seconded workers. The employer refused to apply the terms of employment which are commonly used in the Swedish labour market. He was pressurized into entering a Swedish collective labour agreement. The boycott called by the Swedish unions was aimed at a blockade of all Laval construction sites in Sweden. The workers who supplied the site by no means refused to enter into an agreement with Laval. They had an employment contract with a different employer. They did refuse, however, to perform their contract of employment insofar as that benefited their employer's client. That client was a blacklisted employer. The *Laval* case addressed the issue whether this industrial action was compatible with the freedom to provide services.

The industrial action took place within the Swedish borders for the benefit of workers who actually worked there. In that sense, it is not a cross-border industrial action. The outcome of this analysis would only be different if one were to support the proposition that the seconded workers are active on the Latvian labour market[38] and that the industrial action was a sympathy action for the improvement of the terms of

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is discussed in more depth and with more nuance by A. van Hoek, *Internationale mobiliteit van werknemers*, Den Haag, Sdu Uitgevers, 2000, 365–370.

36 In that case, the opposite may apply in the case of collective action against an internationally active employer. Applying the law applicable to the employment contract instead of the *lex loci laboris* will lead to a uniform treatment, if one and the same legal person employs workers in different Member States whose labour contracts are subject to the law of the country of origin of the employer. An example of this is the employment of workers by an airline company with a choice of law for the law of the company. A similar situation may exist with respect to international secondment in the building industry and in international transport by road.

37 European Court of Justice 18 December 2007, C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet et al.*, *ECR* 2007, I-11767.

38 This position is expressed by the ECJ, *inter alia* in the case *Rush Portuguesa*, European Court of Justice 27 Maart 1990, C-113/89, *ECR* I-1417.

employment of some of the workers on the Latvian labour market. Such an analysis is at odds with the *rationale* behind the industrial action. From the perspective of the Swedish unions, the industrial action was not an expression of international solidarity. The solidarity with the workers who worked on the same territory was at issue. If the qualification were to be based on a more labour market-oriented approach, the industrial action could be considered to have cross-border aspects. The Swedish unions, however, contested the artificial allocation, from their point of view, of the seconded workers on the Latvian labour market.[39] After all, the aim of the industrial action was to ensure that Latvian workers were treated as if they formed an integral part of the Swedish labour market. The criterion was that their physical presence and activities on Swedish territory would have a negative effect on the social protection commonly applied in the Swedish labour market.

1.4.3. Cross-border from an exclusively employment law perspective

Particular industrial action can be said to be cross-border from an employment law perspective only. Industrial action instigated by the ETUC, for example often consists of action carried out (more or less) simultaneously in different Member States. The private international law practitioner will consider such action as a cluster of national actions, each of which is devoid of any foreign element. The cross-border nature of the industrial action may be the exclusive result of workers taking industrial action in more than one state for an *identical* claim. Such a claim may touch upon an interest held in common or primarily concern the interests of some members of the collectivity of workers. The pan-European strike waves which were triggered by the intended liberalization of the port services can serve as an example of the first sub-category. Another example would be industrial action taken in support of European social dialogue.

Lyon-Caen remarked that the submission of the legality of cross-border industrial action to the *lex loci laboris* has an atomizing effect. The action taken by the "international" collectivity of workers is connected to distinct legal orders. The same criterion that was qualified earlier as having a unifying effect may make a truly cross-border industrial action of the type described here very difficult and even impossible.[40] After all, it is unlikely that the legal systems of all legal systems of the Member States involved will allow participation in such industrial action. In practice, the national unions involved in such cross-border action specifically

[39] This localization of seconded workers in the labour market of the Member State of origin largely goes back to the ruling in *Rush Portuguesa*, European Court of Justice 27 Maart 1990, C-113/89, *ECR* I-1417, consideration 15. See on this M. Houwerzijl, *De detacheringsrichtlijn: over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG*, Deventer, Kluwer, 2005, 72 *et seq.*

[40] See Lyon-Caen, *op. cit.*, 291–292.

determine the type of action and procedure in conformity with the legal systems of their own countries.[41]

2. THE DIFFICULT ISSUE OF CLASSIFICATION: THE SCOPE OF ARTICLE 9 OF ROME II

2.1. THE CONCEPT "INDUSTRIAL ACTION"

Article 9 states that "Without prejudice to Article 4 of Rome II the law applicable to a non-contractual obligation is in respect of the liability of a person in the capacity of a worker or an employer or the organizations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken". The Regulation does not provide any more detailed description of the concept "industrial action". Before we address the issue of whether this concept should be interpreted autonomously or *lege fori*, we would like to discuss the question whether "industrial action" must be taken to refer to a social phenomenon or to the exercise of a (fundamental) right. The difference between these two approaches is considerable. In the first interpretation the category will cover a sociological concept (or rather a social reality). In the second interpretation Article 9 is restricted to a legal category. According to the latter interpretation, industrial action is the exercise of freedom recognized and protected by the internal rules of a country, which is enjoyed by workers and employers in order to defend specific interests with the help of well-defined means of pressure. If the actors choose other objectives or other means of action, their action cannot be brought under the legal category of "industrial action".[42]

The EP's original amendment refers in its justification to the industrial action as the object of a fundamental right. The reference to the industrial action as a fundamental right did not recur in the statements of the Council accompanying the Common Position.[43] It only states that the legislator's intervention was prompted by a desire to find a balance between the interests of all parties concerned. It is doubtful that this would be enough to conclude that the concept of industrial action refers to a sociological category.[44] It is more likely that the category of industrial action refers

41 See W. Warneck, "Transnational industrial action – already a reality?" in F. Dorssemont, T. Jaspers and A. van Hoek (eds.), *Cross-Border Industrial Actions in Europe: A Legal Challenge*, Social Europe Series no. 13, Antwerp, Intersentia, 2007, 75–84.

42 The distinction between the sociological and legal approach is a relative one. Labour law has a long tradition of basing certain concepts on social reality. Such neologisms are only waiting to be given a legal meaning, which may then deviate from the sociological one.

43 See *OJ* C no. 289, 28 November 2006.

44 This interpretation may be assumed to be very bold. It could lead to the collective employment relations being used as a cover-up for all kinds of illegal practices in order to subsume them under a rule which deviates from the main regime.

to a legal concept. Subsequently, the question can be raised which legal order should provide the definition of this concept.

There is no doubt that this question is relevant. The law on industrial action is by no means harmonized. The European Community has no regulatory powers whatsoever to lay down rules on this subject.[45] Comparative law research shows that the differences between Member States with respect to the permitted means of action are considerable.[46] The most common species of the right to take industrial action is the strike. Other action, however, can also be legitimate. In the past, the Dutch Supreme Court has recognized go-slow strikes and work-to-rule as legitimate forms of industrial action.[47] Under Swedish law, a boycott and a blockade are considered a legitimate means of collective action.[48] Thus, there are substantial differences between the Member States' internal rules with respect to the type of action they allow. A similar divergence can be discerned with regard to *inter alia* the objectives of the action and the procedural requirements.[49]

These differences are not only a matter of substance. They are also based on differences with regard to the source of law underlying the qualification. A number of countries, including France, Spain and Italy, have laid down the right to strike in their Constitution.[50] Such a constitutional right often only applies to specific forms of industrial action. Action falling outside the constitutional recognition will not be considered as legitimate collective action. As a rule, constitutional recognition is restricted to the classic walkout. In these jurisdictions there is no such thing as a general category of "industrial action" which could be either legitimate or illegitimate. Forms of action not covered by these constitutions are subject to the rules on breach of contract, tort law and sometimes even criminal law. The legality of industrial action depends on their qualification as an industrial action protected by the Constitution.

Preamble 27 to Rome II states: "The exact concept of industrial action, such as strike action or lockout, varies from one Member State to another and is governed by each Member State's internal rules. Therefore, this Regulation assumes as a general principle that the law of the country where the industrial action was carried out applies with the aim of protecting the rights and obligations of workers and employers". The

45 See Article 137 *in fine* EU Treaty. Novitz contests the possibility of adopting a directive regarding the right to strike and the right of a lockout by virtue of other articles of the Treaty (T. Novitz, *International and European Protection of the right to strike*, Oxford, Oxford University Press, 2003, 162).

46 See F. Dorssemont, "Labour Law Issues of Transnational Collective Action – Comparative Report" in F. Dorssemont, T. Jaspers and A. van Hoek (eds.), *Cross-Border Industrial Actions in Europe: A Legal Challenge*, Social Europe Series no. 13, Antwerp, Intersentia, 2007, 245–273.

47 See Dutch Supreme Court, 30 May 1986, *Nederlandse Jurisprudentie* 1986, no. 688.

48 See N. Bruun, "Swedish Labour Law Report" in F. Dorssemont, T. Jaspers and A. van Hoek (eds.), *Cross-Border Industrial Actions in Europe: A Legal Challenge*, Social Europe Series no. 13, Antwerp, Intersentia, 2007, 208.

49 See F. Dorssemont, *op. cit.*, 245–273.

50 See F. Dorssemont, *op. cit.*, 245–249.

preamble appears to refer to the Member States' internal rules, not only with respect to the right to take industrial action but also for the definition of this category itself. This fits in with the situation described earlier where the admissibility and qualification are one and the same. The phrase is, however, somewhat confusing from a private international law perspective.

According to the national conflict of laws, the issue of the qualification is usually subject to the *lex fori:* the court applies its own private international law to see which conflict of laws rule is applicable. The input of national private law concepts is indispensable for this. That does not mean, however, that the private international law categories are identical to the ones used in domestic law. The private international law qualification must take into account the differences between the legal systems involved. For example, in the Netherlands the legal relationship between a company and its director appointed in accordance with the articles of association is considered to be an employment relationship. This does not automatically mean that the conflict of laws rule for employment contracts must be applied, or that a conflict between a foreign company and its director is covered by the rules on jurisdiction in employment contract cases. After all, the private international law classification is applied in a different context and serves different purposes than the classification under domestic law.[51]

An even more important reason not to base the classification on the national restrictions of the concept "industrial action" is the EU origin of the conflict of laws rule. As a rule, concepts used in European laws must be interpreted autonomously.[52] The reason for this is that only an autonomous, European interpretation will ensure the identical application of the European rule in different Member States. If the definition of a concept is left to the Member States' internal rules, the Regulation usually says so *expressis verbis*.[53] In private international law cases, autonomous interpretation has been used by the ECJ in the context of the Brussels Convention and Regulation. The Rome II Regulation, too, is based on the principle of autonomous interpretation. This can be deduced from preamble 11, which explicitly refers to the autonomous interpretation of the concept of a "non-contractual obligation". We consider it unlikely that preamble 27 was meant to create an exception to this rule: the wording is much too ambiguous to draw such a conclusion. As one can tell from the second sentence of the preamble, the difference in the scope of the right to take industrial action in

51 See on this C. Van Lent, *Internationale intra-concernmobiliteit*, Deventer, Kluwer, 2000, 120–121 and A. van Hoek, "IPR. Bevoegdheid, EEX-Vo." in G. Heerma van Voss (ed.), *Losbladig Commentaar Arbeidsovereenkomst,* Deventer, Kluwer, *s.d.*, loose-leaf, Article 18, 1.

52 See e.g. with respect to the concept of an obligation arising from a contract in the Brussel I Regulation and the Jurisdiction and Judgement Regulations: European Court of Justice 20 January 2005, C-27/02, *ECR* I-481 *Engler v. Versand*, consideration 33.

53 See e.g. the description of the notion of "worker" in the Secondment Directive (Ri 96/71/EU OJ EU 1997 L 18, Article 2 paragraph 2) and the notion of "place of residence" in the Brussel I Regulation (Vo 44/2001 OJ EU 2000 L 12, Article 59).

the Member States' internal rules is quoted rather as a justification of the special provision of Article 9 of Rome II. Therefore, it seems safe to assume that the concept of "industrial action" in Article 9 of Rome II must be interpreted autonomously.

To shed some light on the issue of interpretation, it may be interesting to see whether a comparison of some of the different language versions can shed any light on this. Unfortunately, this question must be answered in the negative. The translation of the relevant private international law category seems to rely heavily on terminology which is derived from the national context.[54]

International law may provide some indications to clarify the enigma. The right to take industrial action is a fundamental right recognized in several international instruments. We would like to mention in this respect ILO Treaty no. 87, the International Covenant on Economic, Social and Cultural Rights,[55] the (revised) European Social Charter[56] and (Article 11) of the European Convention on Human Rights (ECHR). The European Court of Human Rights opted for a broad interpretation of Article 11 of the ECHR in its *Dilek* ruling, formerly known as the *Satilmis* ruling.[57] The ECHR's interpretation can be considered "progressive" in two ways. Notwithstanding that it is the freedom of assembly and association of unions which is promoted by Article 11 of the ECHR, the Court concluded that the right to strike is such an important instrument for the defence of workers' interests that every restriction of this right must also be tested for compatibility with Article 11, § 2.[58] Furthermore, the objections submitted by the Turkish government that the strike, in this case the refusal of some civil servants to report to work as toll-booth cashiers,

54 The Dutch language version does not refer to 'strike' but to the mere generic term of "*collectieve actie*" (literally "collective action"). This fits into the broad recognition of the right of industrial action by the Dutch Supreme Court, The German language version is also based on the broad category of "*Arbeitskampfmaßnahmen*". The French language version however reduces the category of industrial action to the two best-known varieties. The workers have the "*grève*" and the employers the *lock out*. The English language version refers to the concept of "industrial action". This concept is more narrow than the Dutch *collectieve actie*, because the use of the adjective 'industrial' reduces the concept to the professional context. The use of this term limits the collective labour dispute to the relationship between employers and workers without regard to sympathy action and action against the government. Finally, the Italian language version used the phrase "*danni causati da un'attività sindacale*". The use of the term "*sindacale*" seems to reflect an organic view of industrial action. According to this view, a collective action is primarily an action which originates from an organization. Such an interpretation seems to exclude wild cat strikes and is also unfortunate as the lock out is rarely organized by an employers' organization.

55 Article 8, paragraph 1 *sub* d of the Treaty of 16 December 1966, *United Nations Treaty Series* vol 993, I-14531.

56 Article 6, paragraph 4 of the Revised Charter of 3 May 1996, *Council of Europe Treaty Series* no. 163, which can be consulted electronically through the Treaty Office of the Council of Europe, http://conventions.coe.int.

57 ECHR 17 July 2007, nos. 74611/01, 26876/06 and 27628/02.

58 In ECHR 21 April 2009, no. 68959/01 *Enerji Yapi-Yol Sen v. Turkey* (application no. 68959/01), the Court seems to have adopted at least implicitly that the right tot strike is an essential and not just an important means to defend workers' interests. Hence, it is inherent in the freedom of association.

could not qualify as *a strike* was not accepted by the Court either. It held that Article 11 ECHR safeguards a more comprehensive right to take industrial action.

These treaties are useful for finding the essence of the right to take industrial action, but their usefulness only goes so far in defining the concept for private international law purposes. After all, all they do is provide for the internationally recognized minimum standard. This does not necessarily mean that they present a good view of the different variations of the concept in European Member States. For the conflict of laws rule to be useful in the cases for which it was created (such as the *Tor Caledonia*, *Viking* and *Laval*), the concept of "industrial action" must be more comprehensive. Also that industrial action which is eventually declared inadmissible according to the applicable law, for example because the action cannot be subsumed under the right to strike laid down in the Constitution, will have to be covered by the conflict of laws rule of Article 9 of Rome II.

In the cases put before it, the European Court of Justice seems to be in favour of a more inclusive approach to the concept "industrial action". The *Viking* and *Laval* cases addressed very different and varying means of action. Earlier we explained that, in addition to the threat to take classic industrial action, the *Viking* case was an organized effort to exercise negative freedom of contract at a collective level. The *Laval* case showed a different type of boycott. All these are treated as expressions of the right to collective action. The European Court of Justice even takes it one step further by considering that a blockade is also covered by the general principle of European law on the right to take industrial action.[59] The European Court of Justice's recognition must be regarded as more comprehensive in other respects too. The central issue in the *Viking* and *Laval* cases was a sympathy action: an action purporting to improve the fate of workers who are attached to a different employer or a different branch of economic activity. In the *Viking* case non-Finnish unions supported the boycott called by the Finnish union (the *primary action*). In the *Laval* case, different Swedish unions supported the strike by the construction workers' union, which themselves called the collective action in order to better the working conditions of the seconded Latvian workers.[60] The *Tor Caledonia* case also dealt with a sympathy strike.

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59 See consideration no. 107 in the *Laval* ruling. In the outcome of the cases, this qualification seems to have little significance, though. The relevant questions were 1) does the action in question pose an obstacle to one of the economic freedoms? and 2) can the action be justified for reason of protection of workers?

60 The industrial action in the *Laval* case could be related to the protection of workers' interests in more than one way, according to the European Court of Justice: the action was aimed at a pay rise for seconded workers and was concerned with workers' interests in that respect. On the other hand, the Court also recognizes the workers' interest in being protected against competition regarding terms of employment. It means that Swedish unions also defended the interests of Swedish workers). See consideration 103 and compare considerations 74 and 76.

2.2. THE NON-CONTRACTUAL OBLIGATION

Even if we accept a more comprehensive interpretation of the concept of industrial action, it does not mean that we have solved the qualification problems with respect to Article 9 of Rome II. Article 9 of Rome II (exclusively) refers to "a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organizations representing their professional interests for damages". The restriction to non-contractual obligations presents special obstacles with respect to industrial action. After all, the two major parties involved in industrial action, the workers and their employer, are bound by the contract they concluded with each other. The classic form of industrial action, the strike, presents a temporary suspension of the obligation of the worker to execute the work which the parties have agreed upon. In this respect, every strike implies a temporary breach of contract. Accompanying actions, however, such as sit-ins and gate protests, are not intrinsically linked to the performance of the contract. They can be tortious and even illegal.

The situation is even more complicated for the unions. Strikes and other forms of industrial action are important levers in the collective bargaining process. The European Court of Justice emphazised this aspect in its rulings in the *Viking* and *Laval* cases.[61] A successful strike will therefore, in general, lead to the signing of a collective labour agreement between the employer or employers' organization and the union or unions involved in the industrial action. In this respect, the strike is part of the pre-contractual relationship between these parties.

Once the collective labour agreement is concluded, the parties to that agreement are in a contractual relationship. A number of countries lay down an implicit peace obligation for the duration of the collective agreement. The collective agreement itself may also provide for a no-strike clause. In those cases industrial action which is taken during the collective labour agreement's term can be regarded as a violation of a contractual obligation by the organizing union (presuming it is a party to the collective labour agreement). Thus, the liability for damages caused by industrial action in breach of a peace agreement may arise in contract, rather than tort.

Sympathy action presents a special case. Such action, which occurred in the *Tor Caledonia*, *Viking* and *Laval* cases, sees one collectivity of workers taking action in favour of another collectivity of workers. The best known action of this type is the action in which dockworkers refuse to unload a ship in order to enforce better terms of employment for the crew of the ship against which the action is directed. In that case there is no contractual relationship whatsoever between the workers taking the action and the employer against whom the action is directed. That relationship is purely non-contractual. There are several examples in the case law of national courts

61 European Court of Justice 11 December 2007, C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti, ECR* 2007, I-10779 consideration 60 and European Court of Justice 18 December 2007, C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet et al.*, *ECR* 2007, I-767, consideration 99.

in which such transnational sympathy action has actually given rise to claims based on tort against the organizing unions.[62]

The words of Article 9 of Rome II do not provide a *prima facie* clarification of the type of claims it covers. The stipulation mentions the liability of persons *in their capacity as employer and worker.* This suggests that the provision is also intended to govern the relationship between the employer and worker. Therefore, the existence of an employment contract between the parties would not by and of itself have to preclude the application of Article 9 of Rome II.

This interpretation of the scope of Article 9 of Rome II is supported by Article 4 paragraph 3 of Rome II. Paragraph 3 contains a general exception with respect to the conflict of laws rule of Article 4, paragraphs 1 and 2. The provision provides: "Where it is clear from all the circumstances of the case that the tort or delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question." Traditionally, this type of "accessory allocation" is thought to apply to claims for compensation from passengers against a transport company arising from accidents. These two parties are bound by a transport contract, but compensation for injury can also be claimed by virtue of the rules on tort (if fault can be attributed). Causing bodily harm is, in general and save disculpatory circumstances, unlawful irrespective of the existence of a contractual relationship.

Industrial action, too, can result in divergent claims based on either contract or tort (or both). The tortious character of blockades and sit-ins may not be difficult to construe. It is doubtful, however, that the stoppage of work during a strike can also be considered unlawful without having recourse to the (existence of an) employment contract. Moreover, the usefulness of Article 4, paragraph 3 of Rome II as an explanatory tool for the scope of Article 9 of Rome II is limited, as Article 4, paragraph 3 of Rome II does not apply to claims related to industrial action. This means that the exact scope of Article 9 of Rome II still remains unclear.

2.3. THE SCOPE *RATIONE PERSONAE*

Article 9 of Rome II restricts the scope *ratione personae* to a person in their capacity as a worker or employer and the organizations that represent their professional interests. The European Commission made an interesting remark on the Common Position of

[62] See the following cases brought by shipowners against unions due to a boycott: Tribunal of the Chamber of Commerce of Antwerp, 31 May 1977, *European Transport Law* 1977, 64 *et seq.* English Court of Appeal, 13 October 1978 *European Transport Law* 1979, 870 *et seq.*; Tribunal de Grande Instance de Nantes, 28 June 1979, *European Transport Law* 1981, 243 *et seq.*; Appeal Court of The Hague, 23 April 1982, *Schip en Schade* 1982, no. 79; Tribunal de Grande Instance de Boulogne, 28 November 1980, *European Transport Law* 1981, 201 *et seq.*, 24 April 1997, *European Transport Law* 1997, 434.

the Council when it said that it regretted that the words of Article 9 of Rome II failed to state that its application was restricted to liability claims between the actors mentioned there.[63] We take this to mean that the European Commission held the view that the EP's amendment was not intended to apply to disputes arising from industrial action between the actors mentioned in the Article as the liable parties and *third parties*. The Common Position reflects the idea that the aim of the amendment is to safeguard the balance of power between employers and workers. This also suggests that the Article's scope should be restricted to disputes between the persons it mentions.

Such an analysis deserves some comment. Firstly, employers may be considered "third parties" in certain cases of industrial action. This is the case when the employer whose workers are taking collective action, is not the actual target of the action and may be in no position to answer the claims made by the workers and their organization. Examples of this would be the sympathy action targeted against a blacklisted employer. Another example is industrial action carried out for the promotion of workers' interests against a government policy which can harm these interests. This would often be a policy of the State, but these days it could also be an EU policy – the protests against the plans for liberalization of port activities (the port package) being a point at hand. Secondly, Article 9 of Rome II only defines its scope in relation to the subject of the dispute and the identity of the defending party. This implies that there is no reason whatsoever why Article 9 of Rome II should be restricted to disputes between the persons it mentions. Any different conclusion would enable employers or their organizations to "break" an industrial action by involving a third party who also suffers damage as a result of the industrial action. This may be travellers in dispute in public transport and other consumers of the goods or users of the services (the supply of which is disrupted by the action) but also suppliers and sub-contractors who have a contractual relationship with the employer whose company is the object of the strike. Though we would not like to deny these parties a claim, if they have one under domestic law, the law applying to the right to collective action should not be made dependent on the party who is challenging this right.

2.4. MAIN ISSUES AND PRELIMINARY ISSUES

The last complication to be addressed with respect to the application of Article 9 of Rome II is caused by the problems regarding the preliminary question. These problems are related to the issue of how, by whom and under which circumstances the lawfulness of a strike can actually be brought before a court (or any other adjudicating body). The comparative law study we conducted in 2006 shows substantial differences between the domestic laws of the Member States.[64] These national differences are the

63 COM (2006) 566.

64 F. Dorssemont, T. Jaspers and A. van Hoek (eds.), *Cross-Border Industrial Actions in Europe: A Legal Challenge*, Social Europe Series no. 13, Antwerp, Intersentia, 2007. See in particular Van Hoek, 2007, 431 *et seq.*

result of differences not only in the definition of the right to take industrial action in the domestic law, but also as regards the available remedies or the lack thereof.

Proceedings relating to the right to strike in the Netherlands are conducted, almost without exception, between employers and unions as claimants and defendants respectively. They are taken in summary proceedings and aim at retrieving a court order against the unions ordering them to refrain from taking action or to stop an ongoing action. These remedies are based on tort.

The opposite situation can be found in Belgium, where proceedings, if they are brought at all, are always conducted against individuals. As a rule, these proceedings do not concern the question whether the right to strike itself is exercised in an unlawful way, but rather concern the "incidental and collateral activities" such as a sit-in or a blockade.[65] At most, the court discusses whether a particular action can be regarded as the exercise of the right to strike. Belgian unions do not have full legal capacity and cannot be held liable for non-contractual faults.[66] They are deprived of the legal capacity to act as a party in a procedure based on tort. The Regulation does not affect this internal rule in any way. The 25th preamble says explicitly that the special rule of Article 9 of Rome II is without prejudice to the legal status of unions.

Yet another system is used in the Scandinavian countries. Denmark has a special procedure to try cases on the legality of industrial action, to which only unions and employers can be a party. This was the procedure which led to the preliminary ruling in the *Tor Caledonia* case. Sweden, too, has a declaratory remedy enabling the court to assess the lawfulness of an industrial action.[67]

The lawfulness issue can be the *main issue* in Denmark, Sweden and the Netherlands in a procedure involving *collectivities*. Subsequently, the answer to the lawfulness issue will affect the legal status of the individual participants in the action. If the call for the industrial action by the unions satisfies all legal requirements, the workers will be protected against any reprisals taken by the employer. A number of countries seem to support a reversed logic: the union's liability for the call to strike or for the support of an action carried out by workers is made dependent on the question whether the workers involved are exercising their right to strike in conformity with the relevant statute or constitutional provisions. The primary issue of lawfulness of the strike as such is placed at the level of *individuals*. In these countries strikes are regarded primarily as an individual problem regarding the suspension of the obligation to work

65 See S. Bouzoumita, "Belgian private international law report" in F. Dorssemont, T. Jaspers and A. van Hoek (eds.), *Cross-Border Industrial Actions in Europe: A Legal Challenge*, Social Europe Series no. 13, Antwerp, Intersentia, 2007, 277–278 and P. Humblet, "Belgian labour law report" in F. Dorssemont, T. Jaspers and A. van Hoek (eds.), *Cross-Border Industrial Actions in Europe: A Legal Challenge*, Social Europe Series no. 13, Antwerp, Intersentia, 2007, 95 *et seq.*

66 See in this respect F. Dorssemont, *Rechtspositie en syndicale actievrijheid van representatieve werknemersorganisaties,* Bruges, die Keure, 2002, 464–468.

67 See J. Malmberg, "Swedish private international labour law report" in F. Dorssemont, T. Jaspers and A. van Hoek (eds.), *Cross-Border Industrial Actions in Europe: A Legal Challenge*, Social Europe Series no. 13, Antwerp, Intersentia, 2007, 418.

and, as a result, they are qualified as a *contractual* issue. These differences also affect national private international law qualifications.[68]

In the *Tor Caledonia* case the question was raised whether a procedure between the unions and the employer on the legality of the strike under the Danish system could be subsumed under Article 5, paragraph 3 of the Brussels Convention. This provision deals specifically with non-contractual liability. The (positive) answer of the ECJ is however in our view not decisive for the qualification of the legality issue for choice of law purposes. In the *Tor Caledonia* case, the ECJ restricted itself to the relationship between the parties to the dispute, being the organizing union and the injured employer. This relationship was purely non-contractual as the case concerned a boycott against a blacklisted employer by workers employed elsewhere. If the lawfulness of the action had been addressed in a procedure on unfair dismissal (addressing whether participation in a specific industrial action can be regarded as a valid reason for dismissal) the European Court of Justice would undoubtedly have qualified the claim as contractual. Indeed, the qualification regarding *jurisdiction* depends on the basis of the claim, which is largely dependent on the parties to the specific procedure. We contest that this should also hold true when we address the issue of *applicable law.* If the applicable choice of law rules were made dependent on the proceedings in which the legality of the action was (first?) put before the court, this would result in legal uncertainty for the parties who (want to) participate in such an action and lead to a restriction of their right to take industrial action in a cross-border context.

This uncertainty is exacerbated by the difficulties as regards preliminary and main questions. The following examples may illustrate this. In the first scenario the employer responds to a strike by dismissing the workers involved in the action. The employer then relies on the illegality of the strike to justify his actions. In the ensuing procedure the issue of the legality of the action can be regarded as a preliminary question. The legality of the dismissal is the main issue. In another scenario the legality of a sympathy action, which is put before a court as the main issue, is made dependent on the question whether the primary action (with which the sympathy was expressed) is justified, which is the preliminary question. Hence, we are continually facing the question whether the law applicable to the main question should also be applied to the preliminary question. As European private international law lacks a section providing for the general principles underlying this field of law, the question of how to deal with the preliminary question is left to the Member States. The study quoted earlier shows that a number of countries do not subject the question of the legality of the industrial action discussed earlier to a separate law system, but to the law that governs the main issue. This system of dependent allocation of preliminary questions, again,

68 The comparative survey quoted earler, which was reported in 2007 in *Cross-border Industrial Actions in Europe: a Legal Challenge,* clearly shows how these differences in perspective affect in the private international law qualification.

results in the splitting up of a single industrial action into a number of sub-issues and sub-results, each governed by their own system of law. The consequence of this could be that an industrial action is declared illegal in a procedure on the dismissal of the workers who participated in the action, whereas the same action is permitted when it is considered in the light of the relationship between the employer and the organizing union. It is our view that such a splitting up seriously undermines the possibilities of taking industrial action in cross-border cases. The organization of industrial action would then only be safe if all the legal orders that are directly or indirectly involved would permit it.

2.5. THE RIGHT TO STRIKE AS A "CIVIL AND COMMERCIAL MATTER"

It must be anathema to employment law lawyers with some sense of history to consider the right to take industrial action as a "civil or commercial matter". Therefore, we do not want to make any principled statements as to the nature of the right to strike as such, but only address it as part of our discussion on the scope of the Rome II Regulation (including Article 9). A specific paragraph on this issue is required due to the special character of the right to take industrial action. On the one hand, we are dealing with an internationally recognized fundamental right; while on the other hand, the right to take industrial action is strongly related to public order. The way actions such as picketing, sit-ins and blockades are conducted places them under the same heading as demonstrations and as such they can directly affect public order and safety. The same applies to strikes in essential services such as garbage collection, the fire brigade, health care and the police. Both aspects make the right to strike a matter of public policy. Hence, the question may be raised whether the right to take collective action can and should be subjected to a multilateral conflict of laws rule, or rather be excluded from the scope of application of the Rome II Regulation.[69] The answer of the European legislation seems to be the former, as Article 9 demonstrates, unless some action can be considered to fall outside the scope of application of the Regulation as such.

The concept of "civil and commercial matters" was used earlier to define the scope of application of the Brussels Convention. In this context it has been interpreted by the ECJ on several occasions. This case law shows that also cases with a public policy or public law aspect may be covered by the category "civil and commercial matters." The only relationships the European Court of Justice has excluded from its scope concern the relationship between the government institutions, officials and/or civil servants and private citizens. And even those are only excluded when the former use

[69] See A. van Hoek, "Private international law aspects of industrial action – comparative report on private international law" in F. Dorssemont, T. Jaspers and A. van Hoek (eds.), *Cross-Border Industrial Actions in Europe: A Legal Challenge*, Social Europe Series no. 13, Antwerp, Intersentia, 2007, 435–436 and 443–444.

their special prerogatives.[70] This implies that, at most, the right of civil servants to strike may be excluded from the scope of Rome II.[71] Collective action against private employers would be covered. This also holds true, in our view, when, such as is the case in Italy[72] and Belgium,[73] there are special legal provisions regarding industrial action taken in essential services. After all, the distinctive criterion for the application of the Regulation is not whether the *services* are part of the public law domain, but whether the *employer* relies on special public law powers.[74]

The special nature of the right to take industrial action, including the special position of some services, will therefore not be expressed by (restricting) the scope of Article 9 of Rome II, but rather in the conflict of laws rule itself. In this respect, overriding mandatory provisions and the exception of public policy will have to be taken into account. Furthermore, Article 17 which enables the consideration of the rules on safety and conduct that prevail at the place and time, might come into play as well.

3. CONCLUSIONS

In this 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 industrial action. With this, the Regulation – at first sight – seems to recognize 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.

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70 See European Court of Justice 15 February 2007, C-292/05, *Lechouritou, ECR* 2007, I-1519 and the case law quoted. In most of the cases brought before the European Court of Justice the plaintiff is a Member State, only in some cases have Member States acted as defendants. *Henkel v. VKI* was a dispute between two civil parties. This was already enough to subject the case to the Civil Jurisdiction and Judgement Regulation: European Court of Justice 1 October 2002, C-167/00, *Verein für Konsumenteninformation v. Karl Heinz Henkel, ECR* 2002, I-8111.

71 The explanation regarding the proposal by the Commission (COM(2003)427, p. 8) expressly refers to case law on the Civil Jurisdiction and Enforcement Regulations and the Brussels I Regulation with respect to the substantive scope of the Regulation.

72 See P. Venturi, "Italian private international law report" in F. Dorssemont, T. Jaspers and A. van Hoek (eds.), *Cross-Border Industrial Actions in Europe: A Legal Challenge*, Social Europe Series no. 13, Antwerp, Intersentia, 2007, 333.

73 See Humblet, *op. cit.*, 97.

74 There are no ECJ cases on the Brussels Convention or the Brussels I Regulation in which a private organization relies on special prerogatives. Any organization having special government prerogatives would propably have to be considered as part of the government according to EU law. See European Court of Justice 12 July 1990 C-188/89, *ECR* I-3313, *Foster v. British Gas* and see Chalmers, 2006, 380.

In the second part of our contribution, which will appear in the next issue, we will focus on the contents of the choice of law rule of Article 9 and its relation to the other provisions of the Regulation. Again technical difficulties will be discussed, but the rules will also be tested against the standard of evaluation described in paragraph I-A:
1. Are the rules clear enough in their application in order to create legal certainty as to the legality of the collective action?

2. Can the individual workers and the organizing unions rely on a single standard for the legality of the collective action as such?

The answers to these questions will be given in the following issue.