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JURISDICTION IN EMPLOYMENT MATTERS UNDER BRUSSELS I: A REASSESSMENT

UGLJEŠA GRUŠIĆ*

Abstract This article examines the rules of jurisdiction in employment matters of Brussels I. It focuses on a paradox in that these rules aim to protect employees jurisdictionally, but in fact fail to accord employees a more favourable treatment when they need it most, namely when they appear as claimants. The article argues that the current rules fail to achieve the objective of employee protection, examines the reasons for this, proposes certain amendments that would improve the existing rules, and thereby engages in the debate surrounding the forthcoming review of Brussels I.

I. INTRODUCTION

The structure of Section 5 of Chapter II of Brussels I¹ is simple. On the one hand, there is one set of jurisdictional rules applicable when employees act as *claimants*. In general terms, an employee may commence proceedings:

- in the courts of the employer's domicile;²
- in the courts for the habitual place of work;³
- if there is no habitual place of work, in the courts of the engaging place of business;⁴

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¹ Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 (Brussels I or Regulation). The rules of jurisdiction in employment matters of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters done at Lugano on 30 October 2007 [2009] OJ L147/1 (2007 Lugano Convention) are identical to those Brussels I and are not analysed specifically. The relevant provisions of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels on 27 September 1968 [1998] OJ L27/1 (Brussels Convention) and the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988 [1988] OJ L319/9 (1988 Lugano Convention) are mentioned only to the extent to which they differ from those of Brussels I. This article does not deal with the jurisdictional rules of the Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1.

³ *ibid* art 19(2)(a).

² Brussels I, art 19(1).

⁴ *ibid* art 19(2)(b).

- regarding a dispute arising out of the operations of the employer's branch, agency or other establishment, in the courts for the place of that establishment;⁵ and
- on a counter-claim, in the court in which the original claim is pending.⁶

On the other hand, there is another set of jurisdictional rules applicable when employees act as *defendants*. In this case, an employer may commence proceedings:

- in the courts of the employee's domicile;⁷ and
- on a counter-claim, in the court in which the original claim is pending.⁸

A jurisdiction agreement entered into before the dispute has arisen is not given effect if it reduces the number of forums that are available to the employee or if it increases the number of forums that are available to the employer.⁹

The objective of these rules is employee protection. As recital 13 in the Preamble to Brussels I states, 'In relation to . . . employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.' The goal seems clear: the special rules should protect employees and be more favourable to their interests than the general rules.

The European Court of Justice (ECJ) judgment in *GlaxoSmithKline v Rouard*¹⁰ cast doubt upon the achievement of this objective. Mr Rouard worked for two companies in the same group. One was domiciled in France, the other in the United Kingdom. The work was performed in Africa. Following his dismissal, Mr Rouard brought proceedings in France, the French courts having jurisdiction over the French company. Mr Rouard further sought to join the UK company as co-defendant pursuant to article 6(1) of Brussels I. Had the claimant not been an employee, article 6(1) would undoubtedly have been an available basis of jurisdiction. But the ECJ found that Section 5 of Chapter II of Brussels I is exhaustive. The Court relied primarily on the wording of article 18(1): 'In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5'.¹¹ Since the provisions of this Section neither referred to article 6(1) nor prescribed a rule for co-defendants, the ECJ held that this generally available head of jurisdiction could not be invoked by Mr Rouard. Evidently, the special rules did not afford the employee any protection and were not more favourable to his interests than the general rules. On the contrary, they were less favourable.¹²

⁵ *ibid* art 18(1). Although, in theory, claimant employers can also invoke this jurisdictional rule, this is practically impossible, since employees do not have 'branches, agencies or other establishments'.

⁷ *ibid* art 20(1).

⁸ *ibid* art 20(2).

⁶ *ibid* art 20(2).

⁹ *ibid* art 21.

¹⁰ Case C-462/06, [2008] ECR I-3965.

¹¹ *ibid* paras 18-19.

¹² The rules of jurisdiction in employment matters of the Brussels and 1988 Lugano Conventions were not set out in separate, self-contained sections. Hence, art 6(1) of these

This judgment has received strong criticism throughout Europe.¹³ The European Commission has also acknowledged the problem and proposed an amendment to Brussels I that would make the rule of jurisdiction over co-defendants available to claimant employees.¹⁴ No other changes to the rules of jurisdiction in employment matters are contemplated by the Commission. The satisfaction with the general operation of these rules echoes the conclusions of the Heidelberg Report on the application of Brussels I:¹⁵ ‘No major problems [in relation to the rules of jurisdiction in employment matters] could be discovered...’;¹⁶ ‘None of the open issues [regarding the rules of jurisdiction in employment matters] are of a dimension justifying the conclusion that an amendment being drafted is self-suggesting...’.¹⁷

This article puts forward a different argument: that the jurisdictional rules of Brussels I fail to achieve the objective of employee protection, and should consequently be amended. The following section presents the evolution of these jurisdictional rules. Next the question of what the rules of private international law dealing with adjudicative jurisdiction should provide to achieve the objective of employee protection is considered, followed by a demonstration of how Brussels I fails to give employees a jurisdictional preference when they need it most, namely when they appear as claimants. Finally, possibilities for improvement are discussed.

II. EVOLUTION OF THE RULES OF JURISDICTION IN EMPLOYMENT MATTERS

The original 1968 version of the Brussels Convention did not contain any special rules on employment matters. It did, however, contain protective jurisdictional rules for matters relating to insurance (Section 3 of Title II) and instalment sales and loans (Section 4 of Title II). Yet the drafters of the Convention did consider prescribing special protective rules for employment disputes: the preliminary draft contained a provision giving exclusive jurisdiction to the courts either for the place in which the undertaking concerned was situated or that in which the work was or was to be performed.¹⁸

Conventions was an available basis of jurisdiction in employment disputes: see *Carasset-Marillier v Salahadin Imam et autres*, French Cour de cassation, 13 January 1998 <<http://curia.europa.eu/common/recdoc/convention/en/1998/27-1998.htm>>.

¹³ See S Frodl, ‘Rechtssicherheit vor Arbeitnehmerschutz?’ (2009) 21 *Österreichische Juristenzeitung* 935; J Harris, ‘The Brussels I Regulation, the ECJ and the Rulebook’ (2008) 124 *LQRev* 523; F Jault-Seseke, ‘*GlaxoSmithKline v Rouard*’ (2008) 97 *Revue critique de droit international privé* 853; S Krebber, ‘Einheitlicher Gerichtsstand für die Klage eines Arbeitnehmers gegen mehrere Arbeitgeber bei Beschäftigung in einem grenzüberschreitenden Konzern’ (2009) 19 *Praxis des Internationalen Privat- und Verfahrensrechts* 409.

¹⁴ Commission, ‘Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)’ COM (2010) 748/3, 11–12.

¹⁵ B Hess, T Pfeiffer and P Schlosser, ‘Report on the Application of Regulation Brussels I in the Member States’ (September 2007) <http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf>.

¹⁷ *ibid* para 359.

¹⁸ Jenard Report [1979] OJ C59/1, 24.

But this provision was omitted from the final draft for two reasons. First, at that time work was in progress to harmonize the choice-of-law rules for employment contracts within the EEC. It was thought that the jurisdictional rules should follow the choice-of-law rules, and therefore the adoption of the special rules of jurisdiction in employment matters was postponed.¹⁹ Secondly, there was no agreement between the drafters on the question of whether and to what extent party autonomy should be allowed.²⁰ Consequently, the general jurisdictional rules were made applicable in employment disputes.

The lack of jurisdictional protection of employees led to certain problems in practice. On the one hand, jurisdiction agreements were given full effect in employment disputes irrespective of the shortcomings of party autonomy in international employment contracts. On the other hand, the general rule of jurisdiction in contractual matters of article 5(1) of the Brussels Convention proved to be ill-suited to employment disputes.

The problem with jurisdiction agreements was revealed by *Sanicentral GmbH v Collin*.²¹ Mr Collin was a Frenchman domiciled in France who worked for Sanicentral, a German company. The employment contract, which contained a jurisdiction clause in favour of German courts, was concluded and terminated before the entry into force of the Brussels Convention; however, the employee brought proceedings in France after its entry into force. He tried to invoke a provision of French law invalidating jurisdiction agreements in employment contracts such as the one at hand. After concluding that the dispute fell within the substantive and temporal scope of the Convention,²² the ECJ held that the provisions of this instrument took precedence over the provisions of national procedural laws.²³ Since the requirements of the Convention were satisfied, the jurisdiction agreement was upheld and the French court was required to decline jurisdiction. This judgment put employees in an unfavourable position since it enabled employers to (ab)use their typically superior bargaining power and impose upon their employees the jurisdiction of the courts favourable to them. The only requirements that such jurisdiction agreements had to fulfil were the formal requirements of article 17 of the Convention.²⁴

The unsuitability of article 5(1) of the Brussels Convention for employment disputes was discussed in the groundbreaking case of *Ivenel v Schwab*.²⁵ This case concerned a dispute between Mr Ivenel, a French commercial representative, and his German employer over payment of commission and other sums of money. Mr Ivenel performed his work in France, but the commission and

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ Case 25/79 [1979] ECR 3423. See also Case 150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671.

²² *Sanicentral* (n 21) para 3.

²³ *ibid* para 5.

²⁴ See arts 12 and 15 of the 1968 version of the Brussels Convention regarding the requirements for validity of jurisdiction agreements in insurance contracts and instalment sales and loans contracts.

²⁵ Case 133/81 [1982] ECR 1891.

other sums were payable in Germany. The proceedings were brought in France. Article 5(1) conferred jurisdiction in contractual matters upon the courts 'for the place where the obligation was, or was to be, performed'. The jurisdiction of the French court thus depended on which obligation (to work or to pay) was the jurisdictionally relevant obligation, and on its place of performance. The ECJ had previously held that the obligation to be taken into account for the purposes of article 5(1) was the obligation forming the basis of the claim,²⁶ and that the place of performance of that obligation was to be determined by applying the law designated by the choice-of-law rules of the forum.²⁷ Since the basis of Mr Ivenel's claim was the employer's obligation of payment, and since under both French and German law the commission and other sums were payable at the address of the debtor, it seemed that article 5(1) could only give jurisdiction to the German courts. However, the ECJ found that this interpretation would be contrary to the Convention's objectives of proximity and protection of weaker parties. It would give jurisdiction to the courts of the country where the work was not performed and that were not closely connected with the dispute,²⁸ the courts of the country whose law was not applicable²⁹ and where the employer had his domicile. The ECJ therefore departed from the language of article 5(1) and the preceding case law, and held that the jurisdictionally relevant obligation regarding employment contracts was always the obligation that characterised the contract, namely the obligation to perform work.³⁰ It was also implicit in *Ivenel* that the place of work was to be determined autonomously and not by reference to the law applicable under the choice-of-law rules of the forum.³¹ Thus, the French court had jurisdiction.

These two deficiencies of the 1968 version of the Brussels Convention were remedied in the 1988 Lugano Convention, which expanded the 'Brussels system' to EFTA Member States. First, the problem of jurisdiction agreements contained in international employment contracts was resolved through the insertion of a rule that denied effect to such agreements entered into before the dispute had arisen.³² Secondly, article 5(1) of the 1988 Lugano Convention introduced a special rule of jurisdiction in employment matters alongside the general rule of jurisdiction in contractual matters. This special rule aimed to incorporate the ECJ case law, and particularly the *Ivenel* case. Since the ruling in this case was largely influenced by the fact that article 5(1) of the 1968 Brussels Convention did not give jurisdiction to the courts of the country whose law was applicable pursuant to article 6 of the Rome Convention,³³ the

²⁶ Case 14/76 *De Bloos v Bouyer* [1976] ECR 1497.

²⁷ Case 12/76 *Tessili v Dunlop* [1976] ECR 1473.

²⁸ *Ivenel* (n 25) para 15.

²⁹ *ibid* paras 13–15, 19.

³⁰ *ibid* para 20; see also Case 266/85 *Shenavai v Kreisler* [1987] ECR 239.

³¹ This was confirmed in Case C-125/92 *Mulox IBC Ltd v Geels* [1993] ECR I-4075, paras 12–16.

³² 1988 Lugano Convention, art 17(5).

³³ Convention on the law applicable to contractual obligations done at Rome on 19 June 1980 [1998] OJ C27/34 (Rome Convention). Art 6 of the Rome Convention provided that an employment contract was governed, in the absence of choice, by the law of the country *in which the*

drafters of the 1988 Lugano Convention decided that the rule of jurisdiction in employment matters should follow this article of the Rome Convention.³⁴ Thus, the new jurisdictional rule provided not only that ‘in matters relating to individual contracts of employment, [the place of performance of the obligation in question] is that where the employee habitually carries out his work’, but also that ‘if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged’.

However, these new jurisdictional rules of the 1988 Lugano Convention had shortcomings of their own. First, this instrument denied *any* effect to jurisdiction clauses contained in international employment contracts entered into before the dispute had arisen, irrespective of whether they were beneficial for employees or not. Secondly, the rule regarding the engaging place of business was introduced without any assessment of its appropriateness.³⁵ Moreover, this jurisdictional rule was equally available to both employers and employees.

A further step in the evolution of the rules of jurisdiction in employment matters occurred in 1989, when the Convention on the accession of Spain and Portugal to the Brussels Convention was concluded.³⁶ Although this Convention came along less than a year after the conclusion of the 1988 Lugano Convention, it significantly departed from the provisions of the latter instrument. First, the solution of the 1988 Lugano Convention regarding jurisdiction agreements was considered ‘too radical’ by the drafters of the 1989 Accession Convention.³⁷ Thus, article 17(5) of the 1989 version of the Brussels Convention provided that a jurisdiction agreement was effective in an employment dispute not only if it was entered into after the dispute had arisen but also if it was favourable for the employee. Secondly, article 5(1) of the Brussels Convention was amended along the lines of article 5(1) of the 1988 Lugano Convention, with one significant difference: the rule of the engaging place of business could be invoked only by employees and not by employers. Furthermore, it was clarified that the jurisdictionally relevant place was not only where the business that engaged the employee was situated at the moment of engagement but also where it was situated at the moment of commencement of proceedings.

The latest stage in the evolution came with Brussels I in 2001. This instrument introduced several important changes. First, the rules of jurisdiction

employee habitually carried out his work in performance of the contract. If the employee did not habitually carry out his work in any one country, the employment contract was governed by the law of the country *in which the place of business through which the employee was engaged was situated* (emphasis added).

³⁴ Jenard–Möler Report [1990] OJ C189/57, paras 37, 38, 40.

³⁵ See Swiss Institute of Comparative Law, *Convention de Lugano: Convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale faite à Lugano le 16 septembre 1988* (Schulthess Polygraphischer Verlag 1991) 164–65.

³⁶ [1989] OJ L285/1.

³⁷ Cruz–Real–Jenard Report [1990] OJ C189/35, para 27(d).

in employment matters were set out in a separate, self-contained section. Secondly, the rule extending the notion of the employer's domicile was introduced in article 18(2). Thirdly, employers lost the right to invoke the rule conferring jurisdiction on the courts for the habitual place of work. It would appear that the drafters of the Regulation were of the opinion that the objective of employee protection could be achieved only if the rules of jurisdiction in employment matters closely followed the existing rules of jurisdiction applicable in consumer and insurance disputes.³⁸ However, they failed to examine the impact that these changes would have on the jurisdictional position of employees. Similarly, the jurisdictional rules of Brussels I were simply transposed into the 2007 Lugano Convention without assessment of their impact.³⁹

To sum up, the reason for the present structure and content of the rules of jurisdiction in employment matters of Brussels I lies in their haphazard evolution. These rules were introduced and amended with the objective of employee protection in mind; the following two sections will examine whether they achieve that goal.

III. RULES OF JURISDICTION AND PROTECTION OF EMPLOYEES

Brussels I clearly introduces a jurisdictional imbalance in favour of employees. However, does this imbalance actually result in effective jurisdictional protection for employees? This section looks first at the theory of private international law and explores the concept of jurisdictional protection of employees. The practical importance of the jurisdictional favouring of claimant employees is then examined.

A. Jurisdictional Protection of Employees

There are various factors that make a forum more attractive to one party than another in an international employment dispute: operation of choice-of-law rules, existence of specialised labour courts or tribunals, system of legal fees, availability of legal aid, methods of obtaining and location of evidence, geographical proximity, neutrality (or even bias towards a party), cultural or legal tradition and the like.⁴⁰ Parties normally seek to pursue their claims or

³⁸ The rules applicable in these two types of dispute had been contained in separate, self-contained sections (3 and 4 of Title II) since the adoption of the Brussels Convention in 1968. Under this instrument, consumers and insured persons could normally be sued only in the courts of their domicile (arts 11(1) and 14(2)), and there was a rule extending the notion of the insurer's domicile (art 18(2)). See European Commission, 'Explanatory Memorandum accompanying the proposal of the Brussels I Regulation', COM (1999) 348 final, 17.

³⁹ Pocar Report [2009] OJ C319/1, paras 85–90.

⁴⁰ AT von Mehren, 'Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common- and Civil-Law Systems' (2002) 295 *Recueil des Cours* 9, 194–96.

defend their cases in the forums that are most advantageous for them according to these factors. Given that it is claimants who ordinarily select the forum when initiating proceedings, the parties' litigational positions ultimately depend upon the number and diversity of available bases of jurisdiction. The more available and diverse the bases, the greater the chance that the claimant will pursue their claim in an advantageous forum (but also that the defendant will have to defend their case in a disadvantageous forum).

As Arthur Taylor von Mehren rightly noted:

The highest ideal of procedural justice in civil matters is that . . . each party should be treated equally . . . [W]here the parties are considered essentially equal in litigational capacity and neither's claim to corrective justice is thought to be stronger than the other's, neither should be accorded a jurisdictional preference.⁴¹

Where the parties are of essentially unequal litigational capacity, however, there are compelling reasons to protect the weaker party by granting them a jurisdictional preference. Otherwise, equal treatment of the two parties could lead to unjust results.

The manner of achieving corrective justice in employment matters depends on whether employees, as a typically weaker category of litigants, act as claimants or as defendants. In the former situation, one or more bases of jurisdiction could be made available to them in addition to those available to claimants in general. In the latter situation, employers could be denied the use of some generally available jurisdictional bases.⁴² Furthermore, the judgment of a foreign court that has unjustifiably assumed jurisdiction over an employee could be refused recognition and enforcement. The purpose of such measures is to ensure that employees are able to present their claims in favourable forums, and do not have to defend their cases in inaccessible and unfamiliar forums.

The objective of employee protection, however, is not the only goal that the rules of jurisdiction in employment matters seek to achieve. These rules should accord with two further considerations: proportionality and vindication of important State interests.⁴³ Proportionality seeks to ensure, among other things, that the jurisdictional preference given to employees is not overly burdensome for employers. The forums that are made available to employees should be appropriate in terms of having sufficient connection with the parties or the claim, but also no more numerous than is required to achieve corrective justice. Moreover, barring employers from accessing certain forums should not exceed what is necessary for this purpose. The second consideration arises from the States' interests in having their courts adjudicate the disputes that touch significantly upon their policies. The choice-of-law rules for employment contracts are normally designed in such a way as to ensure the application of the law of the country that is closely connected with the employment contract in

⁴¹ *ibid* 197.

⁴² *ibid* 200–03.

⁴³ *ibid* 68.

question and interested in regulating it.⁴⁴ It follows that, in principle, the choice-of-law rules for employment contracts and rules of jurisdiction in employment matters should be complementary and, where possible, point to the law and courts of the same country.⁴⁵ This is an especially important concern given that many States have set up specialized labour courts or tribunals, often with worker representation, that are not experienced in applying foreign law. However, the importance of this concern should not be exaggerated. There are many employment disputes where the *forum* and *ius* do not coincide.⁴⁶

Therefore, in order to be jurisdictionally protected, employees should be accorded a *balanced* jurisdictional preference when they appear in court, whether as claimants or defendants.

B. Importance, in Practice, of Jurisdictionally Preferring Claimant Employees

Indisputably, Brussels I protects employees whenever they act as defendants. An employer can ordinarily bring proceedings only in the courts of the employee's domicile.⁴⁷ This guarantees that employees will not have to defend their cases in foreign, potentially inaccessible and unfamiliar courts. An employee may be sued outside his home country only if he consents to the jurisdiction of a foreign court after the dispute has arisen. Article 21 is explicit in this regard: a jurisdiction agreement purporting to confer jurisdiction over an employee on the courts of a country other than that of the employee's domicile is given effect only if entered *post litem natam*. The general requirements of article 23 must also be satisfied.⁴⁸ In practice it may be difficult to determine when an employment dispute has arisen. The Jenard Report suggests that this occurs 'as soon as the parties disagree on a specific point and legal proceedings are imminent or contemplated'.⁴⁹ The rationale of this rule is that an employee who has a specific dispute with his or her employer is in a position to assess the pros and cons of litigation in various countries. He or she will not easily give up the privilege of defending in his or her home country, and will accept the jurisdiction of a foreign court only if he or she considers that to be in his or her

⁴⁴ eg Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 (Rome I), arts 8 (safeguarding the application of the mandatory employment rules of the objectively applicable law) and 9 (giving preference over the applicable law to the overriding mandatory provisions of the forum and, under certain conditions, even of the country of performance); Second Restatement of the Conflict of Laws, paras 6, 196.

⁴⁵ See also P Nygh, *Autonomy in International Contracts* (Clarendon Press 1999) 165.

⁴⁶ See *Mulox* (n 31), Opinion of AG Jacobs, paras 26–28; see also Hess, Pfeiffer and Schlosser (n 15) paras 350–51.

⁴⁷ Brussels I, art 20(1). According to art 59, domicile of employees is to be determined by reference to the Member States' national laws. Under the Brussels and 1988 Lugano Conventions an employer was not confined to suing the employee in the courts of the latter's domicile.

⁴⁸ Schlosser Report [1979] OJ C59/71, para 161.

⁴⁹ Jenard Report (n 18) 33.

interest.⁵⁰ The same rationale underlies the employer's right to bring a counter-claim in the court in which the original claim is pending.⁵¹ By commencing proceedings in a foreign court, the employee accepts the jurisdiction of that court to entertain a counter-claim against him or her. The court in which the action against the employer is pending must have jurisdiction specifically under Section 5 of Chapter II. In addition, the general requirements of article 6(3) must also be satisfied: the counter-claim must arise from the same contract or facts upon which the original claim was based. The idea of consent also suggests that an employee can confer jurisdiction upon a court by entering an appearance.⁵²

Let us suppose for a moment that this is the only jurisdictional preference that employees receive; in other words, that the jurisdictional preference consists only in denying claimant employers the use of certain generally available bases of jurisdiction. Would this type of jurisdictional imbalance (favouring solely defendant but not claimant employees), in and of itself, lead to the achievement of the objective of employee protection? The answer largely depends on the relative practical importance of the situations where employees act as defendants compared to those where they act as claimants.

The relative practical importance of the two types of situation can be ascertained by looking at the ECJ case law on Brussels I and the Brussels Convention. So far employees have initiated proceedings in 12 cases.⁵³ In only two cases have employers done so.⁵⁴ This suggests that situations where employees act as claimants are much more frequent than those where they act as defendants. This conclusion is corroborated by data from certain national jurisdictions. In Germany, for example, it is estimated that more than 95 per cent of employment disputes are commenced by employees, and less

⁵⁰ It should be noted that an employee who is sued in the courts of his or her domicile cannot challenge their jurisdiction by invoking a jurisdiction clause in favour of a foreign court entered into before the dispute has arisen: Cruz-Real-Jenard Report (n 37) para 27(e)(2). The special rules therefore slightly disfavour defendant employees in this respect.

⁵¹ Brussels I, art 20(2).

⁵² The fact that the rule of art 24 of Brussels I dealing with submission to jurisdiction by entering an appearance is neither contained nor referred to in Section 5 of Chapter II is irrelevant: see Case C-111/09 *Česká podnikatelská pojišťovna as, Vienna Insurance Group v Michal Bilas* [2010] ECR I-4545 noted by U Grušić, 'Submission and Protective Jurisdiction under the Brussels I Regulation' (2011) 48 Common Market Law Review 947.

⁵³ *Sanicentral* (n 21); *Elefanten Schuh* (n 21); *Ivenel* (n 25); Case 32/88 *Six Constructions Ltd v Humbert* [1989] ECR 341; *Mulox* (n 31); Case C-383/95 *Rutten v Cross Medical Ltd* [1997] ECR I-57; Case C-37/00 *Weber v Universal Ogdan Services Ltd* [2002] ECR I-2013; Case C-437/00 *Pugliese v Finmeccanica SpA* [2003] ECR I-3573; Case C-159/02 *Turner v Grovit* [2004] ECR I-3565; Case C-555/03 *Warbecq v Ryanair Ltd* [2004] ECR I-6041; *GlaxoSmithKline* (n 10); Case C-413/07 *Haase v Superfast Ferries SA* [2008] OJ C51/40. See also Case C-29/10 *Heiko Koelzsch v État du Grand Duchy of Luxemburg*, not yet published in ECR, and Case C-384/10 *Jan Voogsgeerd v Navimer SA*, not yet published in ECR, dealing with art 6 of the Rome Convention.

⁵⁴ Case 288/82 *Duijnste v Goderbauer* [1983] ECR 3663. In *Turner* (n 53), an action brought by the employee in England was followed by a vexatious action brought by the employer in Spain.

than 5 per cent by employers.⁵⁵ For employees, therefore, the jurisdictional rules applicable when they act as claimants are of a crucial practical importance.

This impression is shared by the European Commission. We must now turn briefly to the field of recognition and enforcement of judgments. Brussels I does not allow the court in which recognition and enforcement of a judgment concerning employment is sought to review the jurisdiction of the court of origin. This is in striking contrast to the rule that allows such review in matters relating to insurance and consumer contracts.⁵⁶ The explanation provided by the Commission is that any review of the foreign courts' jurisdiction would only affect employees, since it is they who generally seek recognition and enforcement of foreign judgments.⁵⁷ Leaving aside the merits of this argument,⁵⁸ suffice it to say that it clearly implies that the disputes in which employees act as defendants are so rare that the protection from wrongful assumption of jurisdiction over them is unnecessary.

Therefore, since the situations in which employees act as claimants are of a significantly greater practical importance, giving a jurisdictional preference solely to defendant employees does not suffice. Claimant employees should also be jurisdictionally preferred.

C. Conclusion

Given the theoretical and practical considerations set out in this section, in order for the objective of employee protection—proclaimed in Recital 13 in the Preamble to Brussels I—not to be mere lip service, it is not enough that the special rules accord a jurisdictional preference solely to defendant employees. It is necessary that these rules also protect claimant employees and that they are 'more favourable to [claimant employees'] interests than the general rules'. In other words, claimant employees should be put in a better jurisdictional position than other claimants in comparable situations. The following section will examine whether this is the case.

⁵⁵ A Junker, 'Vom Brüsseler Übereinkommen zur Brüsseler Verordnung: Wandlungen des Internationalen Zivilprozessrechts' (2002) 48 *Recht der internationalen Wirtschaft* 569, 575.

⁵⁶ Brussels I, art 35(1).

⁵⁷ Commission, 'Explanatory Memorandum' (n 38) 23.

⁵⁸ See eg B Ancel, 'The Brussels I Regulation: Comment' in P Sarcevic and P Volken (eds), *Yearbook of Private International Law*, vol 3 (Sellier European Law Publishers 2001) 101, 106–07; GAL Droz and H Gaudemet-Tallon, 'La transformation de la Convention de Bruxelles du 27 septembre 1968 en Règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale' (2001) 90 *Revue critique de droit international privé* 601, 648; J Hill and A Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (4th edn, Hart 2010) 455; AAH van Hoek, 'Case Note on *Krombach v Bamberski*' (2001) 38 *CMLR* 1011, 1025; Junker (n 55) 577; P Mankowski, 'Article 35' in U Magnus and P Mankowski (eds), *Brussels I Regulation* (Sellier European Law Publishers 2007) 601, 616.

IV. CLAIMANT EMPLOYEES VERSUS OTHER CLAIMANTS: IS THE OBJECTIVE
OF EMPLOYEE PROTECTION YET TO BE ATTAINED?

In order to ascertain whether Brussels I achieves the objective of employee protection, the position of claimant employees will be compared with the position of claimants generally. Specifically, the bases of jurisdiction available to claimant employees will be compared with those available to other claimants.

A. Employer's Domicile versus Defendant's Domicile

An employee may commence proceedings in the Member State where the employer is domiciled.⁵⁹ Even if an employer is domiciled outside the EU, they will be deemed to be domiciled in a Member State where they have a branch, agency or other establishment (ancillary establishment) in regard to disputes arising out of the operations of that establishment.⁶⁰ Similarly, other claimants may commence proceedings in the Member State where the defendant is domiciled.⁶¹ However, in this instance there can be no extension of the understanding of the notion of the defendant's domicile upon which other claimants can rely. The following text will therefore examine whether the rule extending the notion of the employer's domicile accords claimant employees a jurisdictional preference.

In principle, the jurisdictional rules of Brussels I apply when the defendant is domiciled in the EU.⁶² The jurisdiction of the Member States' courts over non-EU domiciliaries can normally only be assumed pursuant to the Member States' traditional rules, regardless of any ancillary establishment that such persons might have in the EU. However, the rule extending the notion of the employer's domicile brings non-EU employers with European ancillary establishments within the scope of the Regulation in regard to employment disputes arising out of the operations of those establishments. This rule aims to protect employees by guaranteeing that they will be able to commence proceedings against such non-EU employers in at least one Member State. Otherwise (the theory goes) the operation of the Member States' traditional jurisdictional rules might result in employees not being able to sue such non-EU employers anywhere in the EU.

What is, however, the practical result of the application of the rule extending the notion of the employer's domicile? This rule is applicable in situations such as the one that arose in *Six Constructions Ltd v Humbert*.⁶³ *Six Constructions* was a company domiciled in the United Arab Emirate of Sharjah. Mr Humbert

⁵⁹ Brussels I, art 19(1). Domicile of legal persons is defined autonomously in art 60. According to art 59, domicile of individuals is to be determined by reference to the Member States' national laws.

⁶⁰ *ibid* art 18(2). The Brussels and 1988 Lugano Conventions did not contain a rule extending the notion of the employer's domicile.

⁶¹ *ibid* art 2.

⁶² *ibid*. The exceptions are exclusive jurisdiction and jurisdiction agreements: *ibid* art 4.

⁶³ (n 53).

was a worker of French nationality and domicile. He was engaged through Six Constructions' Belgian branch to work outside the EU. Following his dismissal, Mr Humbert commenced proceedings in France. If the above-mentioned rule had been applied in this case, Six Constructions would have been deemed to be domiciled in Belgium: the employment dispute arose out of the operations of that company's Belgian branch because Mr Humbert was engaged through that branch.⁶⁴ The French courts would therefore have been entitled and obliged to apply the jurisdictional rules of Brussels I. Since Mr Humbert's work was performed outside the EU, the Regulation would have provided no basis for the jurisdiction of the French courts. Mr Humbert would then have been left with the option of bringing proceedings in Belgium (the country in which the employer would have been deemed to be domiciled), Sharjah (the country in which the employer was in fact domiciled) or possibly in Libya, Zaire or in another of the United Arab Emirates, Abu Dhabi (non-EU countries in which the work was performed).

If the rule extending the notion of the employer's domicile had not existed, the Member States' traditional rules of jurisdiction would have been applicable in this situation. The French traditional rules would have conferred jurisdiction upon the French courts, possibly on two accounts.⁶⁵ First, article 14 of the French Civil Code enables claimants of French nationality to sue foreign parties in France. Secondly, the second indent of article R 517-1 of the French Labour Code gives employees domiciled in France the right to commence proceedings in France when the work is performed outside any establishment. It is not clear whether the work in *Six Constructions* was performed in an establishment or not. In any event, article 14 of the Civil Code would have been sufficient to give jurisdiction to the French courts.⁶⁶ In addition, the Belgian traditional rules would have conferred jurisdiction on the Belgian courts: article 5(2) of the Belgian Code of Private International Law mirrors article 5(5) of Brussels I.⁶⁷

The question whether the rule extending the notion of the employer's domicile accords a jurisdictional preference to claimant employees cannot be answered in the abstract. This rule would not, for example, have benefitted an

⁶⁴ *Six Constructions* was decided under the Brussels Convention. It is interesting to note that, since the ECJ had to assume for procedural reasons that *Six Constructions* was domiciled in Belgium, the outcome was the same as if Brussels I, with its rule extending the notion of the employer's domicile, had been applied. The requirement that a dispute must arise out of the operations of the ancillary establishment is discussed below, 26–27.

⁶⁵ For the French traditional rules of jurisdiction in employment matters see P Mayer, 'Les clauses relatives à la compétence internationale insérées dans le contrat du travail' in *Mélanges dédiés à Dominique Holleaux* (Litec 1990) 263.

⁶⁶ Both bases of jurisdiction can be excluded by a jurisdiction agreement in favour of a foreign court: see cases cited by Mayer (n 65) 264 (for derogability of art 14 of the French Civil Code), 266–67, 271–72 (for derogability of the second indent of R 517-1 of the French Labour Code). No valid jurisdiction agreement existed in *Six Constructions* (n 53): see paras 4–5 of the judgment.

⁶⁷ See F Rigaux and M Fallon, *Droit international privé* (3rd edn, Larcier 2005) 995. Art 5(5) of Brussels I is discussed in part D of this section.

employee in the shoes of Mr Humbert. On the one hand, it would have given jurisdiction to the Belgian courts, which would in any case have been competent under traditional Belgian rules. On the other hand, it would have precluded such an employee from bringing proceedings in France pursuant to the French traditional rules. In different circumstances, this rule could confer jurisdiction upon those courts that would otherwise not have it. This is most likely to occur where the existence of a non-EU employer's ancillary establishment in a Member State does not give jurisdiction to that Member State's courts pursuant to that country's traditional rules, even over employment disputes arising out of the operations of that ancillary establishment. Given that Greece and Poland seem to be the only countries in the EU that would not give jurisdiction to their courts on this basis,⁶⁸ the rule extending the notion of the employer's domicile more often than not actually disfavours employees since it shields non-EU employers with European ancillary establishments from the Member States' traditional, often excessive, rules of jurisdiction. Another extremely rare situation where the rule extending the notion of the employer's domicile would give jurisdiction to the courts that would not otherwise have it exists where an employee is engaged by a non-EU employer through that employer's ancillary establishment situated in one Member State to work in another Member State and the traditional rules of jurisdiction of the latter Member State do not confer jurisdiction upon its courts in this situation.⁶⁹

B. Habitual Place of Work versus Place of Provision of Services

The primary rule of jurisdiction in employment matters (conferring jurisdiction upon the courts for the habitual place of work) will be compared with the rule of jurisdiction in matters relating to a contract for services. This comparison is justified given the similar nature of the two types of contract: under an employment contract, the employee carries out his or her work and receives salary in return; under a contract for services, the service provider provides services and receives remuneration in return.

1. Habitual place of work

An employer domiciled in one Member State may be sued in another Member State in the courts for the place where the employee habitually carries out his or her work or for the last place where he or she did so.⁷⁰ This rule is of practical

⁶⁸ See A Nuyts, 'Study on Residual Jurisdiction: General Report' <http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf>, 36.

⁶⁹ Not all Member States' traditional rules give jurisdiction to their courts on the basis of the habitual place of work: see Nuyts (n 68) 43–46.

⁷⁰ Brussels I, art 19(2)(a). The wording of art 5(1) of the Brussels and 1988 Lugano Conventions is slightly different as it does not refer to the courts for the last place where the employee habitually carried out his or her work. This should not, however, result in any practical difference between these instruments.

importance only if there is a habitual place of work in a Member State.⁷¹ If a habitual place of work does not exist, the fallback rule conferring jurisdiction upon the courts of the engaging place of business applies. If there is a habitual place of work outside the EU, neither the primary rule of the habitual place of work nor the fallback rule of the engaging place of business applies.⁷²

The habitual place of work is easily identifiable where the work is performed in one place. However, where the work is carried out in more than one place, determining the habitual place of work is problematic. The ECJ has dealt with this problem in the following three cases: *Mulox IBC Ltd v Geels*, *Rutten v Cross Medical Ltd* and *Weber v Universal Ogden Services Ltd*.⁷³

*Mulox IBC Ltd v Geels*⁷⁴ concerned a dispute between Mulox, an English company, and Mr Geels, a Dutch national with French domicile. Mr Geels, who was employed as a commercial representative, used his French home as an office and base of operations. In the first 14 months of his employment, he sold Mulox products in Germany, Belgium, the Netherlands and Scandinavia (but not France), to which countries he travelled frequently. In the last 5 months, he worked solely in France. Following his dismissal, Mr Geels brought proceedings in France. The employer argued that the place of performance was not confined to France, that it covered the whole of Europe and that consequently the French courts had no jurisdiction. The ECJ held that, where the work was performed in more than one country, the multiplication of courts having jurisdiction should be avoided. Jurisdiction should not be conferred upon the courts of each Member State in which the work was performed,⁷⁵ and jurisdiction over the whole dispute should be concentrated at 'the place where or from which the employee principally discharges his obligations towards his employer'.⁷⁶ The most important factor in determining this place was the fact that 'the work entrusted to the employee was carried out from an office . . . from which he performed his work and to which he returned after each business trip'.⁷⁷ Other relevant factors were the fact that Mr Geels was domiciled in France and that the work was carried out solely in France before the dispute arose. The French courts therefore had jurisdiction.

⁷¹ Work carried out on fixed or floating installations positioned on or above the part of the continental shelf adjacent to a Member State for the purposes of prospecting and exploiting its natural resources is regarded as work in the territory of that Member State: *Weber* (n 53).

⁷² *Six Constructions* (n 53); *Shell International Ltd v Liem* [2004] ILPr 18 (French Cour de Cassation, 21 January 2004); Cruz-Real-Jenard Report (n 37) para 23(e); T Kruger, *Civil Jurisdiction Rules of the EU and their Impact on Third States* (OUP 2008) 168, 176.

⁷³ In *Pugliese v Finmeccanica SpA* (n 53), the ECJ addressed a related question of whether the habitual place of work under a contract of employment with employer B was relevant in a dispute arising under a contract of employment with employer A, where employers A and B were related, and the employment with employer A was suspended owing to the employee's transfer to employer B. The Court held that the habitual place of work under the second contract of employment was relevant provided that employer A had an interest in the employee's work for employer B.

⁷⁴ (n 31).

⁷⁶ *ibid* para 24.

⁷⁵ *ibid* paras 20–23.

⁷⁷ *ibid* para 25.

The facts of *Rutten v Cross Medical Ltd*⁷⁸ were strikingly similar.⁷⁹ Mr Rutten, a commercial representative of Dutch nationality and domicile, commenced proceedings in the Netherlands against Cross Medical, his English employer. Mr Rutten performed some two-thirds of his work in the Netherlands, the rest being divided between the United Kingdom, Belgium, Germany and the United States. The work was carried out from an office established in Mr Rutten's home. The ECJ had an easy task: after referring to the *Mulox* case,⁸⁰ it held, in line therewith, that the habitual place of work was 'the place where the employee has established the effective centre of his working activities and where, or from which, he in fact performs the essential part of his duties vis-à-vis his employer'.⁸¹ The most important factors in identifying this place were the fact that Mr Rutten carried out two-thirds of his work in the Netherlands and that he had an office there.⁸²

Mulox and *Rutten* clarify that the most important factors for determining the habitual place of work are the location of the employee's office and the distribution of the working time among various countries. Since the 'office' and 'time' factors coincided in these two cases (ie the employees had their offices in the countries where they spent most of their working time), the ECJ had no problem in identifying the habitual place of work. However, which of the two factors is to be given greater weight if they do not coincide?

This question was discussed before the ECJ. Advocate General Jacobs, who delivered Opinions in both *Mulox* and *Rutten*, argued that the main purpose of the rule of jurisdiction in employment matters (conferring jurisdiction upon the court with a particularly close connection with the dispute) was best satisfied if the 'office factor' was given preference.⁸³ In his view, this was because the existence of an office in a place where the work was performed indicated that that place of work was more important than the others. In other words, Advocate General Jacobs equated the term 'habitual place of work' with 'principal place of work'.⁸⁴ The European Commission, on the other hand, argued that preference should be given to the 'time factor'.⁸⁵ It indicated that the term 'habitual' referred to the temporal organisation of work, and that it could not be equated with the term 'principal', which referred to the central

⁷⁸ (n 53).

⁷⁹ The reference for preliminary ruling was made because *Mulox* was decided under the original 1968 version of the Brussels Convention, which did not contain a special rule of jurisdiction for employment disputes. *Rutten* had to be decided under the 1989 version of the Convention, which did contain such a rule. The referring court was not sure whether the introduction of the special rule meant a change in the law.

⁸⁰ *Rutten* (n 53) paras 12–19.

⁸² *ibid* para 25.

⁸³ *Mulox* (n 31), Opinion of AG Jacobs, paras 29, 33; *Rutten* (n 53), Opinion of AG Jacobs, para 34.

⁸⁴ *Mulox* (n 31), Opinion of AG Jacobs, para 32; *Rutten* (n 53), Opinion of AG Jacobs, para 25. Compare P Mankowski, 'Der gewöhnliche Arbeitsort im Internationalen Privat- und Prozeßrecht', (1999) 19 *Praxis des Internationalen Privat- und Verfahrensrechts* 332.

⁸⁵ For the Commission's view see *Rutten* (n 53), Opinion of AG Jacobs, para 33.

point of work. It suggested that jurisdiction should be given to the courts of the country where 'a clear majority of days was spent'.⁸⁶

Although the ECJ refrained from addressing this issue directly, it did indirectly express its preference for the Advocate General's approach. As previously noted, Mr Geels's activities in *Mulox* did not cover France until 14 months into his employment, and then did so for approximately 5 months. Nevertheless, the ECJ failed to compare the amount of time Mr Geels had spent in various countries. It did, however, refer to the 'place where or from which the employee *principally* discharges his obligations towards his employer'⁸⁷ and then mentioned the location of the office, but not the distribution of the working time, as the relevant factor for determining this place.⁸⁸ Furthermore, in *Rutten* the ECJ referred to 'the place where the employee has established *the effective centre of his working activities* and where, or from which, he in fact performs the essential part of his duties vis-à-vis his employer'.⁸⁹ If an employee has an office, the effective centre of his or her working activities will rarely be somewhere else. The existence of an office in a country therefore creates a strong presumption that the habitual place of work is in that country.⁹⁰ This presumption is rebuttable only in exceptional cases where the other relevant factors (eg the subject matter of the dispute; the amount, value, nature and importance of work performed in another country; the employee's domicile or residence in another country) establish a particularly strong connection with the courts of another country.

*Weber v Universal Ogden Services Ltd*⁹¹ concerned an employee who did not have an office that could constitute the effective centre of his working activities. Mr Weber, a German national domiciled in Germany, was employed by Universal Ogden Services, a Scottish company, as a cook. He carried out his work on board various vessels and sea installations, initially in the Netherlands, and thereafter in Denmark. The ECJ held that, in this situation, which involved a change of the place of work, the habitual place of work 'is, *in principle*, the place where [the employee] spends most of his working time'.⁹² This place is to be determined by looking at the whole period of employment. Since Mr Weber spent the majority of his working time in the Netherlands, the Dutch courts had jurisdiction.

The ECJ acknowledged that the sole application of the quantitative, temporal criterion in this type of case might point to a court that did not have a particularly close connection with the dispute. That is why it stated that the

⁸⁶ *ibid.*

⁸⁷ *Mulox* (n 31) para 24 (emphasis added). See also *Jan Voogsgeerd* (n 53) para 33.

⁸⁸ *ibid* para 25.

⁸⁹ *Rutten* (n 53) para 23 (emphasis added).

⁹⁰ See *Mulox* (n 31), Opinion of AG Jacobs, para 33; *Rutten* (n 53), Opinion of AG Jacobs, para 34. See also *Pitzolu v Banca Gesfid SA* [2009] ILPr 27 (Italian Corte di cassazione, 9 January 2008).

⁹¹ (n 53).
⁹² *ibid* paras 50–52 (emphasis added). See also *Re Employment in More Than One State* (5 AZR 141/01) [2003] ILPr 33 (German Bundesarbeitsgericht, 29 May 2002).

place where the majority of work was carried out was ‘in principle’ the habitual place of work.⁹³ All the circumstances of the case should be taken into account in order to ascertain whether there is some other place with a stronger connection.⁹⁴ In particular, the intention of the parties should be considered. The fact that the parties intended to shift the place of work permanently from one place to another might indicate that the former had ceased, and the latter had become, the habitual place of work, irrespective of the fact that overall the majority of work was performed in the former place.⁹⁵

The importance of the intention of the parties should not, however, be limited to the *Weber* type of case. It is potentially relevant whenever an employee (irrespective of whether his or her work is performed from an office or not) is sent abroad by the employer, either to an employer’s foreign place of business, branch, subsidiary or affiliate, or to another company under a cooperation agreement or a contract of ‘hiring-out of employees’. If the parties intend the posting to be temporary (ie limited to the completion of a certain project or to a certain period of time) this supports the conclusion that there is no change in the habitual place of work. If the parties intend the posting to be permanent that supports a different conclusion.⁹⁶

In conclusion, the ECJ has interpreted the term ‘habitual place of work’ narrowly in certain respects but widely in others. The term is given narrow interpretation in the sense that there cannot be more than one habitual place of work. This is considered necessary for avoiding the multiplication of courts having jurisdiction.⁹⁷ The term ‘habitual place of work’ is thus effectively equated to ‘principal place of work’. The term is interpreted widely in that the determination of the habitual place of work is essentially a search for the place that is most closely connected with the employment dispute.⁹⁸ The ‘office’ and ‘time’ factors create presumptions that the habitual place of work is the place where the office is located or, in the absence thereof, where the employee spends most of his or her working time. If another place of work is, in the light of all relevant objective and subjective factors, more closely connected, the presumption will be rebutted in favour of that place.⁹⁹ The following text will compare the rule of the habitual place of work with the rule of jurisdiction in matters relating to a contract for services.

⁹³ *ibid* para 50.

⁹⁴ *ibid* paras 53, 58.

⁹⁵ *ibid* para 54.

⁹⁶ For the importance of the intention of the parties see Mankowski (n 84) 334–35; P Mankowski, ‘Europäisches Internationales Arbeitsprozessrecht: Weiteres zum gewöhnlichen Arbeitsort’ (2003) 13 IPRax 21, 23–25; see also *Four Winds Charter (Societe) v Latoja* [2009] ILPr 50 (French Cour de cassation, 31 March 2009). See also para 36 in the Preamble to Rome I.

⁹⁷ *Mulox* (n 31) paras 21, 23; *Rutten* (n 53) para 18; *Weber* (n 53) paras 42, 55; *Pugliese* (n 53) para 22.

⁹⁸ *Mulox* (n 31) para 17; *Rutten* (n 53) para 16; *Weber* (n 53) para 39; *Pugliese* (n 53) para 17. See also *Ivenel* (n 25) paras 14–15.

⁹⁹ *Mulox* (n 31) para 25; *Weber* (n 53) para 58; *Mulox* (n 31), Opinion of AG Jacobs, para 33; *Rutten* (n 53) Opinion of AG Jacobs, para 34; *Weber* (n 53), Opinion of AG Jacobs, paras 49–50.

2. Place of provision of services

Article 5(1)(a) of Brussels I lays down the general rule of jurisdiction in contractual matters. It prescribes that, in matters relating to a contract, the courts for the place of performance of the obligation in question shall have jurisdiction. The ‘obligation in question’ is the obligation forming the basis of the claim;¹⁰⁰ the ‘place of performance’ is to be determined by reference to the law applicable under the choice-of-law rules of the forum.¹⁰¹

With regard to contracts for services, the second indent of article 5(1)(b) contains an exception to the general rule. It prescribes that ‘*unless otherwise agreed*, the place of performance of the obligation in question shall be ... the place in a Member State where, under the contract, the services were provided or should have been provided’.¹⁰² Therefore, even if the actual claim under a contract for services concerns non-payment, the jurisdictionally relevant obligation is ordinarily the obligation to provide services. Furthermore, the place of provision of services is ordinarily defined autonomously, and is to be determined by reference to the provisions of the contract and the facts of the case, not the applicable law.¹⁰³ In this respect, the rule of jurisdiction in matters relating to a contract for services largely corresponds to the primary rule of jurisdiction in employment matters. However, there are significant differences between the two rules.

First, the jurisdictionally relevant obligation with regard to employment contracts is always the obligation to perform work, and the term ‘habitual place of work’ is always defined autonomously. In contrast, the parties to a contract for services may agree that the exception contained in the second indent of article 5(1)(b) does not apply. In other words, they may agree that the jurisdictionally relevant obligation is the obligation forming the basis of the claim, whose place of performance is to be determined by reference to the law applicable under the choice-of-law rules of the forum. This agreement need not satisfy the general requirements concerning jurisdiction agreements laid down in article 23.¹⁰⁴ Thus, if A contracts with B to provide services in one Member State in return for payment in another Member State, the courts of the first Member State shall normally have jurisdiction over the whole dispute. However, if the parties agree that the exception contained in the second indent of article 5(1)(b) does not apply, the courts of the second Member State shall have jurisdiction over claims for non-payment pursuant to the general rule of article 5(1)(a). In contrast, the rule of the habitual place of work

¹⁰⁰ *De Bloos* (n 26).

¹⁰¹ *Tessili* (n 27). The corresponding art 5(1) of the Brussels and 1988 Lugano Conventions is identical to art 5(1)(a) of Brussels I.

¹⁰² Brussels I, art 5(1)(b), second indent (emphasis added).

¹⁰³ See Case C-381/08 *Car Trim GmbH v KeySafety Systems Srl* [2010] ECR I-1255, paras 53–57; Case C-87/10 *Electrosteel Europe SA v Edil Centro SpA* not yet published in ECR.

¹⁰⁴ See T Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (CUP 2009) 48.

does not enable an employee to sue his or her employer for non-payment of salary in a Member State other than that where the work was habitually performed. Therefore, the primary rule of jurisdiction in employment matters is narrower in this respect than the rule in matters relating to a contract for services.

The second difference stems from the fact that the exception contained in the second indent of article 5(1)(b) does not apply where the services were provided or should have been provided outside the EU. In that situation, a 'place in a Member State where . . . the services were provided or should have been provided' does not exist, and one of the requirements for the application of the second indent of article 5(1)(b) is not met. The general rule of article 5(1) (a) then regains its applicability.¹⁰⁵ Thus, if A contracts with B to provide services in a non-Member State in return for payment in a Member State, the mentioned exception does not apply. A may rely on the general rule, and sue B for non-payment in the Member State in which the payment should have been performed. In contrast, if the work under an employment contract is habitually performed outside the EU, the rule of the habitual place of work does not enable an employee to sue his or her employer for unpaid salary in the Member State in which the salary should have been paid. This is another situation in which the primary rule of jurisdiction in employment matters is narrower than the rule in matters relating to a contract for services.

With regard to the determination of the place of provision of services for the purposes of the second indent of article 5(1)(b), there is no problem if the services were provided or should have been provided in one place. The courts for that place shall have jurisdiction. As with employment contracts, the problem arises where the services were provided or should have been provided in more than one place. The ECJ has dealt with this in *Rehder v Air Baltic Corporation*¹⁰⁶ and *Wood Floor*.¹⁰⁷

These two cases concerned the determination of the place of provision of services where there were several places of performance in different Member States. The ECJ held that, in such cases, it was necessary to identify the court with the closest connection with the dispute, which it said was the court for 'the place where, pursuant to the contract, the main provision of services is to be carried out'.¹⁰⁸ Thus, with regard to commercial agency contracts, the relevant place is to be determined first by reference to the provisions of the contract.¹⁰⁹

¹⁰⁵ Brussels I, art 5(1)(c); C-19/09 *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA* [2010] ECR I-2121, Opinion of AG Trstenjak, para 86; compare K Takahashi, 'Jurisdiction in Matters Relating to Contract: Article 5(1) of the Brussels Convention and Regulation' (2002) 27 ELRev 530, 540.

¹⁰⁶ Case C-204/08, [2009] ECR I-06073.

¹⁰⁷ (n 105). For a general discussion of this problem see U Grušić, 'Jurisdiction in Complex Contracts under the Brussels I Regulation' (2011) 7 J Priv Intl L 321.

¹⁰⁸ *Rehder* (n 106) paras 37-38; *Wood Floor* (n 105) para 33.

¹⁰⁹ *Wood Floor* (n 105) paras 38-39. See also P Mankowski, 'Commercial Agents under European Jurisdiction Rules' (2008) 10 Yb Priv Intl L 19, 31-42.

In the words of the ECJ, the search is for ‘the place where the agent was to carry out his work on behalf of the principal, consisting in particular in preparing, negotiating and, where appropriate, concluding the transactions for which he has authority’.¹¹⁰ A commercial agent normally performs these activities in his or her office. If the contract does not enable the determination of the place of the main provision of services (eg because several places or none were specified), and if the agent has already provided services in accordance with the contract, account should be taken of the place where the agent has in fact for the most part carried out his or her activities in performance of the contract.¹¹¹ The relevant factors, such as the time spent and the importance of the activities carried out in various places, will also normally point to the agent’s office. If the two above mentioned criteria are not helpful, the place where the agent is domiciled (again ordinarily the place where his or her office is located) will be deemed to be the relevant place.¹¹² Sometimes, however, the place of the main provision of services cannot be determined. For example, the relevant services in the case of passenger air transport are, by their very nature, performed in an indivisible and identical manner from the place of departure to that of arrival of the aircraft. One place of the main provision of services does not therefore exist.¹¹³ In such cases, jurisdiction is conferred upon the courts for each place of provision of services.¹¹⁴

3. Habitual place of work versus place of provision of services: conclusion

The criteria for determining the habitual place of work and the place of provision of services for the purposes of the rules of jurisdiction of Brussels I are inherently the same. As discussed, the habitual place of work is interpreted as the principal place of work, and the place of provision of services as the place of the main provision of services. In both situations, the purpose of determining these places is to confer jurisdiction upon the court most closely connected with the dispute. The fact that the search for the habitual place of work is facilitated by the existence of presumptions created by the ‘office’ and ‘time’ factors reflects the relatively specific nature of the rule of jurisdiction for employment contracts. The more general nature of the rule of jurisdiction in matters relating to a contract for services (which covers a range of widely distinct contracts) does not allow an *a priori* elevation of one or more factors to the status of presumptions. However, with regard to commercial agency contracts, which are akin to international employment contracts entered into by

¹¹⁰ *Wood Floor* (n 105) para 38.

¹¹² *ibid* para 42.

¹¹⁴ *ibid* paras 44–45, 47. If the services consist in a negative obligation that is not subject to any geographical limits, there is no jurisdictionally relevant place of provision of services: Case C–256/00 *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG (WABAG)* [2002] ECR I–1699 (the parties undertook to act exclusively and not to commit themselves to other parties anywhere in the world).

¹¹¹ *ibid* para 40.

¹¹³ *Rehder* (n 106) para 42.

commercial representatives, the location of the agent's office weighs more than other factors. This supports the conclusion that the criteria for determining the two places are inherently the same.

Therefore, the primary rule of jurisdiction in employment matters and the rule of jurisdiction in matters relating to a contract for services correspond closely. However, there are three differences between the two rules. First, the relevant obligation for establishing jurisdiction over an employment dispute is always the obligation to perform work, and the term 'habitual place of work' is always defined autonomously. In contrast, the parties to a contract for services may agree that the exception contained in the second indent of article 5(1)(b) does not apply. If they do so agree, the general rule of article 5(1)(a) allows the service provider to bring the claim for non-payment in the place where the payment should have been performed. Secondly, the fact that the place of payment of salary is in a Member State is always irrelevant for jurisdictional purposes. In contrast, if the services were provided or should have been provided outside the EU, the exception contained in the second indent of article 5(1)(b) does not apply. If the place of payment happens to be in the EU, the general rule of article 5(1)(a) then allows the service provider to bring the claim for non-payment at that place. Thirdly, if the habitual place of work cannot be determined, the fallback rule of the engaging place of business applies. In contrast, if the place of the main provision of services cannot be identified, the service provider may sue the other party in the courts for each place of provision of services.

Do the differences between these two rules result in claimant employees being in a better or worse jurisdictional position than claimant service providers? The first difference may open an additional forum to service providers. However, this depends on the agreement of the parties. Since the parties to an employment contract may also agree to expand the number of forums available to the employee, the first difference has no practical importance apart from the fact that a jurisdiction agreement must satisfy the general requirements of article 23, while an agreement on not applying the exception contained in the second indent of article 5(1)(b) need not. The second and third differences are of practical importance. They open additional forums to service providers but not to employees in comparable situations. The primary rule of jurisdiction in employment contracts is therefore slightly less favourable for claimant employees than the generally applicable rule of jurisdiction in matters relating to a contract for services is for claimant service providers.

C. Engaging Place of Business

An employee who does not or did not habitually carry out his or her work in any one country may commence proceedings against the employer domiciled in one Member State in another Member State where the business that engaged

him or her is or was situated.¹¹⁵ No corresponding basis of jurisdiction is available to other claimants. As discussed, if the place of the main provision of services cannot be determined, a party to a services contract may bring proceedings in the courts for each place of provision of services.

The recent ECJ judgment in *Jan Voogsgeerd v Navimer SA*¹¹⁶ sheds light on the meaning of the concept of the engaging place of business. Although this decision concerned the interpretation of article 6(2)(b) of the Rome Convention, it is nevertheless relevant for the present discussion, since the concepts used in the European private international law instruments must be interpreted consistently.¹¹⁷ 'Place of business' refers not only to the employer's domicile but also to any entity, including a branch, agency or other establishment with no legal personality, that possesses a sufficient degree of permanence, and over which the employer exercises effective control so that its acts are attributable to the employer.¹¹⁸ Some authors argue that 'place of business' also refers to independent employment agencies.¹¹⁹ However, the fact that the jurisdiction is given to the courts for both the place where the engaging place of business is located at the moment of commencement of proceedings and for the place where it was located at the moment of engagement¹²⁰ goes against such a broad interpretation. An employer cannot be exposed to litigation in foreign countries just because an employment agency, which might have been used a long time ago, is transferred from one Member State to another. 'Place of business' therefore seems to encompass the employer's domicile and 'branch agency and other establishment' in the meaning of article 5(5) of Brussels I.¹²¹ The term 'engaged' refers to active

¹¹⁵ Brussels I, art 19(2)(b). The wording of the Brussels Convention is slightly different. It states that an employee who 'does not habitually carry out his work in any one country . . . may also [sue his employer in the courts of the engaging place of business]' (emphasis added). The use of the word 'also' led some authors to a wrong conclusion that the courts of the engaging place of business were available alongside the courts for the habitual place of work: see AE Anton and PR Beaumont, *Private International Law: A Treatise from the Standpoint of Scots Law* (2nd ed, Green 1990) 183, fn 29; A Briggs, '*Mulox v Geels*' (1993) 13 YbEurL 520, 523–24; H Tagaras, '*Mulox v Geels*' [1995] Cahiers de droit européen 188, 190.

¹¹⁶ (n 53).

¹¹⁷ *ibid* Opinion of AG Trstenjak, para 83. See also *Koelzsch* (n 53) para 33.

¹¹⁸ *Jan Voogsgeerd* (n 53) paras 54–57; *ibid* Opinion of AG Trstenjak, paras 78–81. See also Jenard–Möler Report (n 34) para 43.

¹¹⁹ See CE Mota and GP Moreno, 'Section 5: Jurisdiction over Individual Contracts of Employment' in Magnus and Mankowski (eds) (n 58) 326, 339.

¹²⁰ This results from the wording 'where the business which engaged the employee *is or was* situated'. A problem of interpretation might arise if the relevant business moves from country A (where the employee was engaged) to country B and then to country C (where it is situated at the moment of commencement of proceedings). Can the employee then sue the employer in country B? The wording of art 19(2)(b) of Brussels I is wide enough to support this conclusion. However, this should not be allowed, as the courts of country B would more often than not have no connection with the dispute. See R Kidner, 'Jurisdiction in European Contracts of Employment' (1998) 27 *Industrial Law Journal* 103, 112.

¹²¹ See *Jan Voogsgeerd* (n 53), Opinion of AG Trstenjak, para 83. See also Cruz-Real-Jenard Report (n 37) para 23(c), fn 1.

engagement of employees, which is manifested by the conclusion and negotiation of the employment contract.¹²²

The rule of the engaging place of business is applicable where an employee does not or did not habitually carry out his or her work in any one country.¹²³ Given that the ECJ has widely interpreted the term ‘habitual place of work’, equating it to ‘principal place of work’, there are not many situations in which the rule of the engaging place of business will be applicable. It is of practical importance primarily where the employee’s work is not carried out from an office, and where the working time spent in various countries does not establish a habitual place of work in any of those countries. The rule of the engaging place of business is also applicable where an employee works in two or more places of equal importance. It is possible to imagine an employee who works, for example, in France and Italy, maintains offices in both countries, and spends roughly the same amount of time in each office performing the same type of work. Another example is an employee who has no office and divides his or her working time equally among several places performing the same type of work. Such situations, however, are extremely rare.

The work performed by employees engaged in international transport seems to fall under the rule of the engaging place of business. Indeed, two jurisdictional cases involving work of this kind have already been referred to the ECJ. *Warbecq v Ryanair Ltd*¹²⁴ concerned a dispute between an air hostess of Belgian nationality and domicile and an Irish airline. The referring court (the Tribunal du travail de Charleroi) wanted to know whether a habitual place of work existed where the work was performed partly on the ground and partly on an aircraft flying the flag of the employer’s country. Another case, *Haase v Superfast Ferries SA*,¹²⁵ concerned a dispute brought by a seaman who worked on a ship that was used for regular passenger services between Germany and Finland. The referring court (the Landesarbeitsgericht Mecklenburg-Vorpommern) again wanted to know if there was a habitual place of work in such a situation.

Since the references in these two cases had not been made by the authorized courts, the ECJ had no jurisdiction to render preliminary rulings.¹²⁶ Although

¹²² *ibid* paras 45–50; *ibid* Opinion of AG Trstenjak, paras 65–70.

¹²³ This rule is not applicable where there is a habitual place of work outside the EU: see n 72. It is also not applicable where the whole of the employee’s work is carried out in a single Member State, but not habitually in any one place within that Member State. By analogy with Case C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-3699, the court for each place of work would have jurisdiction over the whole employment dispute; see also Jenard-Möler Report (n 34) para 39.

¹²⁴ (n 53).

¹²⁵ *ibid*.

¹²⁶ Pursuant to the then extant version of art 68(1) of the EC Treaty, only a court or a tribunal of a Member State against whose decisions there was no judicial remedy under national law could make references for preliminary ruling to the ECJ regarding the interpretation of the provisions of Brussels I. The Tribunal du travail de Charleroi and the Landesarbeitsgericht Mecklenburg-Vorpommern did not meet these criteria.

the employees in these two cases did not have offices, they seem to have had effective centres of their working activities. In the first case, this was arguably Charleroi airport, at which Ms Warbeck performed her ground duties and to which she returned after each flight. A passenger may sue the airline both at the place of departure and the place of arrival of the aircraft.¹²⁷ Proper performance of work by the air crew members at those two places is therefore essential for the proper performance by the airline of its contracts of passenger air transport. Given that an air crew member typically works on aircrafts flying from one airport (ie one place of departure) to various destinations (ie various places of arrival), the essential part of such an employee's working activities is performed at the place of departure. In the second case, the effective centre of the employee's working activities was arguably the place in Germany from which the ferry was departing to Finland and to which the employee returned after each trip. Admittedly, the employee in *Superfast Ferries* worked on a ship connecting only two places in two different countries, and it cannot be said that the provision of services in one of those places was more important. However, the facts that the employee's activities were directed from the place in Germany, that the employee had his domicile there and that the ship seems to have had its home port there, point to that place as the effective centre of the employee's working activities. If the ECJ were to adopt such a wide interpretation,¹²⁸ the practical relevance of the rule of the engaging place of business would be limited to cases where the connections between the vessel and its base were very weak (eg cases involving seamen working on ocean liners, cruise ships or cargo ships).

A reason why the ECJ has interpreted the term 'habitual place of work' widely, and thereby marginalized the rule of the engaging place of business, is that this rule does not meet the objectives of proximity and employee protection. First, there is no guarantee that the courts of the engaging place of business will have a sufficiently close connection with the dispute. Suppose an English company were to use its Belgian business to engage European employees for work on a cruise ship. If a dispute arose some time after the engagement, the likelihood that the Belgian courts would have a close connection with the dispute would be low, particularly if the employee had no other connection with Belgium. The likelihood would be even lower if the business that engaged the employee were transferred from one country to another (eg from Belgium to France). The employee might then commence proceedings either at the place where the business that engaged him or her was situated at the moment of engagement (Belgium) or at the place where that business was situated at the moment of commencement of proceedings

¹²⁷ *Rehder* (n 106).

¹²⁸ See *Jan Voogsgeerd v Navimer SA* (n 53) paras 31–41; *ibid*, Opinion of AG Trstenjak, paras 56–60; compare the decision of the Tribunal du travail de Charleroi of 6 September 2007 in the *Warbecq* case <www.juridat.be>. The Belgian court held that Ms Warbecq had not habitually worked in any one country, and consequently applied the rule of the engaging place of business.

(France). The courts for neither place would be particularly likely to have a close connection with the dispute.¹²⁹ Secondly, the engaging place of business is determined unilaterally by the employer and usually corresponds with the employer's domicile. That is why this rule is not in employees' interests.

In summary, by interpreting widely the term 'habitual place of work' the ECJ reduced the application of the rule of the engaging place of business to a few situations of relatively marginal importance. Even when it is applicable, this rule results in the concentration of the entire employment dispute in the courts of the engaging place of business.¹³⁰ This is clearly less favourable for employees' interests than the multiplication of competent courts to which the rule of jurisdiction in matters relating to a contract for services leads in comparable situations (ie where the place of the main provision of services does not exist).

D. Branches, Agencies and Other Establishments

An employee may sue an employer domiciled in one Member State, regarding a dispute arising out of the operations of that employer's branch, agency or other establishment, in another Member State in the courts for the place where that ancillary establishment is situated.¹³¹ Claimant employees are in the same position as other claimants in this regard since this basis of jurisdiction is equally available to both categories.

The requirement that the dispute must arise out of the operations of an ancillary establishment will be discussed here in more detail.¹³² Initially, the ECJ interpreted this requirement rather strictly. It held that the concept of 'operations' comprised three types of actions:

- actions concerning the management of the ancillary establishment 'such as... the local engagement of staff to work [at the place where the establishment was situated]';
- actions relating to contractual obligations entered into in the name of the parent company at the place, and to be performed in the country where the establishment was situated;
- actions relating to non-contractual obligations arising out of the local activities of the ancillary establishment.¹³³

It is remarkable that the courts for the place where the ancillary establishment was situated would have had jurisdiction in these three situations on other

¹²⁹ See *Mulox* (n 31), Opinion of AG Jacobs, para 37; *Rutten* (n 53), Opinion of AG Jacobs, para 37.

¹³¹ Brussels I, arts 5(5) and 18(1).

¹³² For the requirement that a defendant domiciled in a Member State must have an ancillary establishment in another Member State see L Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, Sweet & Maxwell 2008) paras 11–310, 11–311; JJ Fawcett and JM Caruthers, *Cheshire, North & Fawcett: Private International Law* (14th edn, OUP 2008) 258–60.

¹³³ Case 33/78 *Somafer SA v Saar-Ferngas AG* [1978] ECR 2183, para 13.

bases as well.¹³⁴ It is therefore not surprising that the ECJ has subsequently given a wider interpretation to this requirement. With regard to the second type of action in particular, the Court held in *Lloyd's Register of Shipping v Campeon Bernard*¹³⁵ that it was not necessary for the contractual obligations entered into by the ancillary establishment to be performed in the Member State in which the establishment was situated. In order for a contractual claim to be regarded as arising out of the operations of the ancillary establishment, it is enough that the contract was either concluded or negotiated¹³⁶ through that establishment.

Such a wide interpretation means that, whenever an employer's ancillary establishment concludes or negotiates an employment contract on behalf of its parent, the employee may sue the employer under the contract in the courts for the place where that establishment is located, regardless of where the work is in fact performed. This also means that the rule of jurisdiction over defendants dealing through branches, agencies or other establishment covers almost all situations in which the rule of the engaging place of business is applicable. The difference between the two rules is that the former is always applicable, whereas the latter is applicable only if there is no habitual place of work. The rule of the engaging place of business is therefore of practical importance only in rare situations where the place of business that engaged the employee is transferred from one place to another after the engagement. The employee may sue his or her employer at either place under the rules of the engaging place of business. An equivalent option does not exist under articles 2 and 5(5) of Brussels I.¹³⁷

E. Other Bases of Jurisdiction

The ECJ has held that claimant employees cannot invoke the basis of jurisdiction over co-defendants (article 6(1)), which basis is generally available to other claimants.¹³⁸ The reasoning of the ECJ extends to all other bases that are neither contained in Section 5 of Chapter II of Brussels I nor referred to therein. The only exception is submission to jurisdiction by entering an appearance.¹³⁹ Special rules of jurisdiction therefore put claimant employees in a less favourable position in this respect.

¹³⁴ Brussels Convention, arts 5(1) and 5(3); Brussels I, arts 5(1), 5(3), 19.

¹³⁵ Case C-439/93, [1995] ECR I-961.

¹³⁶ See Case 218/86 *SAR Schotte GmbH v Parfums Rotschild SARL* [1987] ECR 4905, Opinion of AG Slynn; *Lloyd's Register of Shipping* (n 135) para 20; *Anton Durbeck GmbH v Den Norske Bank Asa* [2003] QB 1160 (CA) para 40.

¹³⁷ A Briggs and P Rees, *Civil Jurisdiction and Judgments* (5th edn, Informa 2009) 282–83. See also K Hertz, *Jurisdiction in Contract and Torts under the Brussels Convention* (Jurist og Økonomforbundets Forlag 1998) 183.

¹³⁸ See above, 2.
¹³⁹ See n 52. The situation is different under the Brussels and 1988 Lugano Conventions: see n 12.

F. Jurisdiction Agreements

Claimant employees are given a significant jurisdictional preference with regard to jurisdiction agreements. A jurisdiction agreement is given effect in an employment dispute either if it is entered into after the dispute has arisen or if it allows the employee to bring proceedings in the courts other than those indicated by the default rules of jurisdiction, provided that the general requirements of article 23 are also satisfied.¹⁴⁰ Suppose an employee habitually works in England for a French company. If the parties agree *ex ante* on the jurisdiction of the Belgian courts, such an agreement will be effective only if the employee invokes it. Any provision of national law that aims to make such an agreement void¹⁴¹ does not apply.¹⁴² In contrast, in disputes that do not involve a weaker contractual party, jurisdiction agreements are given full effect provided that they satisfy the requirements laid down in article 23 of Brussels I.

G. Conclusion

In certain respects, the rules of jurisdiction in employment matters of Brussels I give claimant employees a jurisdictional preference. Most notably, jurisdiction agreements are given effect against employees under very strict conditions. This guarantees that employers will not be able to abuse their typically superior bargaining power and reduce the number of forums available to employees. This is undoubtedly a very important aspect of jurisdictional protection.

However, the crucial aspect of protection is the existence of the relatively numerous and diverse bases of jurisdiction that claimant employees can invoke. Only thereby are the chances of employees pursuing their claims in favourable forums increased and safeguarded. Brussels I fails in this respect. First, the rule of general jurisdiction and the primary rule of jurisdiction in employment matters are somewhat less favourable for employees than the generally applicable rule of general jurisdiction and the rule of jurisdiction in matters relating to a contract for services. Secondly, the fallback rule of the engaging place of business is deprived of almost any practical importance. Thirdly, the generally available bases of jurisdiction that are neither contained in Section 5 of Chapter II of the Regulation nor referred to therein are not available to claimant employees. The examination of the rules of jurisdiction in employment matters therefore reveals that claimant employees are overall not given a jurisdictional preference. In many respects they are even put in a less favourable position than other claimants. Given the theoretical and practical

¹⁴⁰ Brussels I, art 21; Schlosser Report (n 48) para 161.

¹⁴¹ eg British Employment Rights Act 1996, s 203.

¹⁴² *Sanicentral* (n 21); *Elefanten Schuh* (n 21). Compare A Layton and H Mercer (eds), *European Civil Practice* (Sweet & Maxwell 2004) 620.

importance of according a jurisdictional preference to claimant employees, Brussels I fails to achieve the objective of employee protection.

V. RECOMMENDED AMENDMENTS

As discussed, the reason for the current structure and content of the rules of jurisdiction in employment matters of Brussels I lies in their haphazard evolution. If this instrument is really to achieve the objective of employee protection, the existing rules need to be amended in a more systematic manner. The first part of this section explores ways of improving the existing rules. The second part examines the possibility of introducing new rules that would enhance the protection of employees.

A. Improving the Existing Jurisdictional Rules

The shortcoming of the rule of general jurisdiction is that the rule extending the notion of the employer's domicile often disfavours claimant employees. Admittedly, this rule does guarantee that employees will be able to sue non-EU employers with European ancillary establishments, regarding disputes arising out of the operations of those establishments, in at least one Member State. However, the rule also shields such non-EU employers from the Member States' traditional, often excessive, rules of jurisdiction. There is no reason why this kind of jurisdictional protection should be accorded to non-EU employers with EU ancillary establishments. Rather, such non-EU employers should be treated as all other non-EU defendants, and be amenable to suit in the Member States' courts pursuant to the traditional rules of jurisdiction. Article 18(2) of Brussels I should therefore be amended by inserting a provision explicitly stating that the rule extending the notion of the employer's domicile applies without prejudice to article 4. The European Commission, however, plans to abolish the traditional jurisdictional rules completely through the extension of the scope of the existing jurisdictional rules of Brussels I to third States' domiciliaries.¹⁴³

The primary rule of jurisdiction in employment matters (conferring jurisdiction upon the courts for the habitual place of work) could be amended to reflect the fact that the ECJ has effectively equated the term 'habitual place of work' with 'principal place of work'. The ECJ's interpretation has already been implemented in Rome I.¹⁴⁴ Article 8(2) of this Regulation, dealing with the applicable law for employment contracts in the absence of choice, refers to the 'country in which or, failing that, from which the employee habitually

¹⁴³ Commission, 'Proposal for a Regulation on jurisdiction' (n 14) 9.

¹⁴⁴ See Commission, 'Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)', COM (2005) 650 final, 7.

carries out his work in performance of the contract'.¹⁴⁵ Arguably, the essence of the ECJ's interpretation could have been better expressed if the reference to the place 'in which or from which the employee *principally* carries out his work' had been made instead. Nevertheless, in order to achieve the desirable convergence between the two instruments, it is better to amend article 19(2)(a) of Brussels I along the lines of article 8(2) of Rome I. Indeed, the European Commission has proposed the following wording for the recast Brussels I: 'an employer may be sued . . . in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so'.¹⁴⁶

As discussed, there are two differences between the primary rule of jurisdiction in employment matters and the rule of jurisdiction in matters relating to a contract for services, which result in a somewhat less favourable position of claimant employees in comparison to other claimants. The first difference stems from the fact that the obligation of payment of salary is always irrelevant for jurisdictional purposes. In contrast, where the place of provision of services is outside the EU, the obligation to pay remuneration in a Member State represents a basis of jurisdiction of that Member State's courts over the claim for non-payment. Should the rules of jurisdiction in employment matters be amended to enable claimant employees to bring claims for non-payment of salary in the courts for the place of payment if the habitual place of work is outside the EU?¹⁴⁷ Although such a rule would contribute to equating the jurisdictional position of claimant employees and other claimants, the answer must be negative. Such a rule would not accord with the considerations of proportionality and vindication of important State interests. The chances of the place of payment of salary being sufficiently connected with the dispute and the law of that place being applicable where there is a habitual place of work in another country are low. Moreover, this rule would not be particularly protective of employees' interests. An employer might unilaterally determine the place of payment of salary and thereby seek the benefit of litigating in a favourable forum.

The second relevant difference between the two rules is that, in the absence of a habitual place of work, an employee can commence proceedings only in the courts of the engaging place of business. In a comparable situation, a service provider may sue the other party in the courts for each place of provision of services. In order to equate the position of claimant employees and other claimants in this respect, the forum of the engaging place of business should be abandoned. If this were done, an employee who does not

¹⁴⁵ Art 8(2) of Rome I also prescribes that the 'country where the work is habitually carried out shall not be deemed to have changed if [the employee] is temporarily employed in another country'. See also recital 36 in the Preamble to this Regulation.

¹⁴⁶ Commission, 'Proposal for a Regulation on jurisdiction' (n 14) 32.

¹⁴⁷ *Six Constructions* (n 53), Opinion of AG Tesouro, paras 14–15.

habitually perform his or her work in any one country should be able to commence proceedings in the courts for each place of work, provided that there is a sufficient connection between that place and the dispute. Thus, if there is no habitual place of work because two or more places of work are equally important,¹⁴⁸ the employee should be able to commence proceedings in each of those places. However, if the habitual place of work does not exist because no place of work in any country is sufficiently connected with the dispute,¹⁴⁹ the employee should not be able to commence proceedings in any place of work.

There are further reasons for abandoning the rule of the engaging place of business. The ECJ has deprived this rule of almost any practical importance by widely interpreting the term 'habitual place of work' and giving a broad scope to the rule of jurisdiction over defendants dealing through branches, agencies and other establishments. Moreover, the rule of the engaging place of business does not accord with the consideration of proportionality and employee protection. The chances of this place being sufficiently connected with the employment dispute are low; moreover it is a place that is determined unilaterally by the employer. It is for these reasons that the Netherlands and Belgium, which have otherwise implemented the solutions of Brussels I in their national jurisdictional codes, have decided not to introduce the rule of the engaging place of business.¹⁵⁰

Seemingly, this rule accords better with the consideration of vindication of important State interests. Rome I prescribes that, in the absence of a habitual place of work, the employment contract is presumed to be governed by the law of the country where the place of business through which the employee was engaged *is* situated.¹⁵¹ However, there are many situations in which the habitual place of work is absent and the *forum* and *ius* do not coincide. First, if the engaging business is transferred from one place to another after the engagement, the employee may commence proceedings in the courts for either place. In contrast, only the latter place seems relevant for the choice-of-law purposes.¹⁵² Secondly, the rule of Rome I that points to the law of the country of the engaging place of business can be departed from whenever it appears from the circumstances as a whole that the employment contract is more

¹⁴⁸ eg where an employee maintains offices in several places of work and divides his or her working time equally among these places performing the same type of work, or where an employee who has no office divides his or working time equally among several places performing the same type of work. See also *Mulox* (n 31), Opinion of AG Jacobs, para 35.

¹⁴⁹ eg cases involving seamen working on ocean liners, cruise ships or cargo ships.

¹⁵⁰ The Dutch reporter for the 'Study on Residual Jurisdiction' (n 68) explains that this rule 'has not been introduced into Dutch civil procedure because it was considered unnecessary': General Report <http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_netherlands_en.pdf>, 18.

¹⁵¹ Rome I, art 8(3).

¹⁵² Compare art 19(2)(b) of Brussels I, referring to 'the place where the business which engaged [the employee] *is or was* situated', with art 8(3) of Rome I, referring to 'the place of business through which the employee was engaged *is* situated'.

closely connected with another country.¹⁵³ Since there are no guarantees that the country of the engaging place of business will be sufficiently connected with the employment contract, the chances of departure from the rule are relatively high. Thirdly, parties to an employment contract may, under certain restriction, choose the applicable law.¹⁵⁴

Finally, some of the bases of jurisdiction that are neither contained in Section 5 of Chapter II of Brussels I nor referred to therein should be made available to claimant employees. This applies primarily to the rule of jurisdiction over co-defendants. Indeed, the European Commission has proposed making this jurisdictional rule available to claimant employees.¹⁵⁵

If the amendments proposed here were adopted, the rules of jurisdiction in employment matters would cease to be less favourable for claimant employees than the general rules. However, the special rules would not thereby become more favourable. The following part of this section will explore the possibility of introducing additional bases of jurisdiction.

B. Introducing New Jurisdictional Rules

Many countries have adopted special rules of jurisdiction for employment disputes. A study on residual jurisdiction of the Member State courts conducted in 2007 illustrates the multitude of existing approaches.¹⁵⁶ Out of 27 Member States, only 7 do not have a jurisdictional rule of this kind. Jurisdiction is asserted on various bases, such as the location of the habitual place of work, the place of business that engaged the employee, the place of conclusion of the contract, the place of payment of salary, common nationality of the parties, and the employee's domicile or habitual residence. The bases of jurisdiction not contained in Brussels I will be examined in the light of considerations of proportionality, vindication of important State interests and employee protection.

The shortcomings of the place of contracting rule are too well known to be repeated here. There are no guarantees that the country where an employment contract was concluded will be sufficiently connected with, or interested in adjudicating, disputes arising out of it. Moreover, employers might easily manipulate this connecting factor and thus seek the benefit of litigating in the forums favourable for them. The same concerns apply to the place of payment of salary. Common nationality of the parties will frequently confer jurisdiction on the courts of the country that is closely connected with, and interested in adjudicating disputes arising out of, employment contracts between its nationals. However, the problem arises in defining 'nationality' of legal persons, which a majority of international employers are. 'Nationality' of legal

¹⁵³ Rome I, art 8(4).

¹⁵⁵ Commission, 'Proposal for a Regulation on jurisdiction' (n 14).

¹⁵⁶ Nuyts (n 68) 43–46.

¹⁵⁴ *ibid* art 8(1).

persons is usually determined by connecting factors such as the place of incorporation or corporate seat.¹⁵⁷ Since these connecting factors also determine the domicile of legal persons, the common nationality rule would ordinarily not open an additional forum to claimant employees. On the other hand, this jurisdictional basis would effectively give employers access to the courts of their domicile, which obviously does not accord with the objective of employee protection. Finally, employee's domicile or habitual residence has a rather tenuous connection in cases involving frontier workers and whenever the employee changes his or her domicile or habitual residence after the termination of employment but before the commencement of proceedings.¹⁵⁸

However, there seems to be one situation where the connecting factor of employee's domicile or habitual residence accords with the mentioned considerations. This situation exists when an employer actively seeks out an employee in the latter's home country for work abroad, and the parties foresee that the employee will retain strong connections with his or her home country and return to that country after the termination of employment. A rule that confers jurisdiction upon the courts of the employee's domicile where the employer takes the initiative to recruit the employee away from his home State is applied in the United States,¹⁵⁹ but it is only active seeking out of employees that meets the requirements of the 'minimum contacts' doctrine and the 'purposeful availment' test. The case law of the US courts shows that these tests are satisfied, for example, where the employer advertises in local newspapers and contacts employees locally (either directly or through an agent),¹⁶⁰ uses a local employment agency,¹⁶¹ actively recruits employees locally for work abroad¹⁶² and so forth. Mere hiring of a national employment agency is not enough.¹⁶³ Jurisdiction is also not allowed where it is the employee who initiates contact.¹⁶⁴

Introducing a rule of jurisdiction of this kind in Brussels I appears to be consistent with the spirit of that instrument. The rationale of the 'seeking out' rule is the existence of a sufficiently strong connection between the *defendant*

¹⁵⁷ F Vischer, 'Connecting Factors' in K Lipstein (ed), *International Encyclopedia of Comparative Law*, vol 3 (JCB Mohr (Paul Siebeck) 1972) ch 4, 14.

¹⁵⁸ Art 115(2) of the Swiss Private International Law Act, which adopts this solution, has been criticized on the ground that any judgment rendered on this basis has no chance of being recognised abroad, which makes the protection that it provides illusory: A Bucher, 'Les nouvelles règles du droit international privé suisse dans le domaine du droit du travail' in *Le droit social à l'aube du XXIe siècle: melanges Alexandre Berenstein* (Payot 1989) 147, 149.

¹⁵⁹ E Scoles and others, *Conflict of Laws* (4th edn, Thomson West 2004) 395–96; see also para 17.042(3) of the Texas Civil Practice and Remedies Code.

¹⁶⁰ *Runnels v TMSI Contractors, Inc* 764 F 2d 417 (5th Cir 1985); *Clark v Moran Towing & Transp Co* 738 F Supp 1023 (ED La 1990); *Mabry v Fuller-Shuwayyer Co, Ltd* 50 NC App 245 (1981).

¹⁶¹ *Moreno v Milk Train, Inc* 182 F Supp 2d 590 (WD Tex 2002).
¹⁶² *Shah v Nu-Kote International, Inc* 898 F Supp 496 (ED Mich 1995); *Babineaux v Southeastern Drilling Corp* 170 So 2d 518 (LaApp).

¹⁶³ *Conti v Pneumatic Products Corporation* 977 F 2d 978 (6th Cir 1992).

¹⁶⁴ *Farbman v Esskay Manufacturing Co* 676 F Supp 666 (WD NC 1987); *Speckine v Stanwick Int'l Inc* 503 F Supp 1055 (WD Mich 1980).

and the forum, which rationale also underlies some of the existing rules, such as the rule of general jurisdiction of article 2(1) and the rule of special jurisdiction of article 5(5). Admittedly, the link between the defendant and the forum under the proposed 'seeking out' rule would usually not be as strong as under the mentioned rules of the Regulation. Nevertheless, the objective of employee protection justifies the introduction of such a rule. A parallel can be made with consumer contracts in this respect. A consumer's domicile represents a relevant connecting factor whenever the supplier seeks out the consumer in his or her home country.¹⁶⁵ The proposed 'seeking out' rule for employment disputes is essentially based on the same idea.

If this new rule of jurisdiction and the amendments proposed in the first part of the section were introduced, employees would arguably be accorded a disproportionate jurisdictional preference. In order to avoid tilting the jurisdictional scale excessively in employees' favour, an additional basis of jurisdiction could also be made available to claimant employers: namely, claimant employers could be restored the right to initiate proceedings in the courts for the habitual place of work.¹⁶⁶ Several arguments support this proposition.

First, habitual place of work is a basis of jurisdiction that best satisfies the considerations of proportionality and vindication of important State interests. The court for this place is usually *the* proper forum for resolving an employment dispute. Moreover, this basis does not favour either party *a priori*, as the habitual place of work can be in the employee's or the employer's country, or in a third country. What is important is that the employer cannot unilaterally change the habitual place of work and thereby obtain the benefit of litigating in a favourable forum. As previously discussed, there must be a combination of objective and subjective factors on both the employee's and the employer's side in order for the change of place to occur.¹⁶⁷ Secondly, both the Brussels Convention and the 1988 Lugano Convention enabled employers to commence proceedings in the courts for the habitual place of work. There is no empirical evidence that this rule has had the effect of putting defendant employees in an unfavourable position.¹⁶⁸ Thirdly, denying claimant

¹⁶⁵ Brussels I, arts 15(1)(c) and 16(1).

¹⁶⁶ The introduction of this jurisdictional basis is also advocated by M Polak '“*Laborum dulce lenimen*”?' Jurisdiction and Choice of Law Aspects of Employment Contracts' in J Meeusen, M Pertegás and G Straetmans (eds), *Enforcement of International Contracts in the European Union: Convergence and Divergence Between Brussels I and Rome I* (Intersentia 2004) 323, 326.

¹⁶⁷ In order to ensure that employees are given a jurisdictional preference, employers could be given the right to sue employees in the forum of the habitual place of work only during the employment relationship, and not once this has come to an end. Such a restriction was envisaged in art 8(2)(ii) of the 2000 preliminary draft Hague Convention on jurisdiction and foreign judgments in civil and commercial matters: see PE Nygh and F Pocar, 'Report on the Preliminary Draft Convention on jurisdiction and foreign judgments in civil and commercial matters' (Preliminary Document No. 11, August 2000) <<http://www.hcch.net/upload/wop/jdgmpl11.pdf>>, 55–56.

¹⁶⁸ 'Explanatory Memorandum' (n 38) does not mention any practical reason for denying claimant employers the right to commence proceedings in the courts for the habitual place of work.

employers access to the courts for the habitual place of work has led to practical problems in some Member States. In the Netherlands, for example, employers who wish to terminate an employment contract have the option to petition for judicial rescission instead of dismissal. In some cases, judicial rescission is mandatory.¹⁶⁹ Employers from Member States such as this therefore have considerable practical problems with terminating employment contracts with employees who work in one of these Member States but live elsewhere (for example, frontier workers).

In particular, the possibility of introducing new rules of jurisdiction should be examined in the context of the forthcoming review of Brussels I. The European Commission has proposed to change this instrument radically by expanding the scope of its jurisdictional rules to persons not domiciled in the EU.¹⁷⁰ But a simple extension of the existing rules to claims against third States' domiciliaries would not be adequate from the standpoint of employee protection. Admittedly, the position of employees who habitually work for foreign companies within the EU would be improved. These employees would be guaranteed the right to initiate proceedings in at least one Member State.¹⁷¹ However, the position of claimant employees who habitually work for foreign companies outside the EU would be considerably worsened, since those employees would lose the right to invoke traditional, often excessive, rules of jurisdiction. Consequently, they could not normally commence proceedings in the EU since the relevant connecting factors (employer's domicile and habitual place of work) would be located outside the EU. Furthermore, the simple extension of the existing rules could put EU employers in an unfavourable position whenever their employees move out of the EU after the termination of employment. In this situation, such employers might not be able to bring proceedings anywhere in the EU. These considerations therefore support the introduction of the two additional rules of jurisdiction (the 'seeking out' rule for claimant employees and the rule of the habitual place of work for claimant employers) proposed above.

VI. CONCLUSIONS

The objective of protecting employees by rules of jurisdiction cannot be achieved unless employees are accorded a jurisdictional preference when they

¹⁶⁹ See the Netherlands' initiative to amend Brussels I by making the courts for the habitual place of work available to employers in proceedings for termination of employment contracts, [2002] OJ C311/16, which was rejected by the European Parliament: Parliamentary documents P5_TA(2003)0353 and A5-0253/2003. See also Written Question E-0785/02 by B Pronk and others to the Commission of 19 March 2002 and the Commission's Answer of 21 March 2002 [2002] OJ C309E/47; Written Question E-1517/02 by M Smet to the Commission of 29 May 2002 and the Commission's Answer of 10 July 2002 [2003] OJ C92E/62.

¹⁷⁰ Commission, 'Proposal for a Regulation on jurisdiction' (n 14) 9.

¹⁷¹ Not all Member States currently give jurisdiction to their courts on the basis of habitual place of work: see n 69.

act both as claimants and as defendants. Indisputably, Brussels I protects defendant employees since it denies employers the use of most of the generally available bases of jurisdiction. However, not only does the Regulation fail to accord a jurisdictional preference to claimant employees, it actually puts them in a less favourable position in comparison to other claimants. First, the rule of general jurisdiction in employment matters and the rule of the habitual place of work are somewhat less favourable for employees than the corresponding generally applicable rules of general jurisdiction and the rule of jurisdiction in matters relating to a contract for services. Secondly, the rule of the engaging place of business is deprived of almost any practical importance. Thirdly, the generally available bases of jurisdiction that are neither contained in Section 5 of Chapter II of the Regulation nor referred to therein, particularly the rule of jurisdiction over co-defendants, are not available to claimant employees. Given the theoretical and practical importance of according jurisdictional preference to claimant employees, Brussels I overall fails to achieve the objective of employee protection. The reason for this lies in the haphazard evolution of the relevant rules.

Bearing in mind the forthcoming review of Brussels I, and in particular the possible widening of the scope of its jurisdictional rules to persons not domiciled in the EU, the time is ripe for a systematic reassessment of the rules of jurisdiction in employment matters. The existing rules need to be improved. However, merely amending them will not suffice. Additional rules of jurisdiction could be introduced: one in favour of claimant employees (the 'seeking out' rule), another in favour of claimant employers (the rule of the habitual place of work). These changes would contribute to more evenly balanced protection of employees.