

# A COMPARATIVE PERSPECTIVE ON THE APPLICATION OF DOMESTIC LABOUR LEGISLATION IN INTERNATIONAL EMPLOYMENT DISPUTES

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## 1 Introduction

The economic integration underlying globalisation has had a profound effect on the mobility and movement of labour across national boundaries. Apart from the peripatetic nature of certain professions many employees – because of an enterprise’s desire to rotate staff or to assign staff to specific projects or affiliates in foreign countries – perform their duties across national boundaries. The phenomenon of transnational employment raises unique legal challenges and may ultimately require visionary solutions based on harmonisation of laws through convention and perhaps protection through transnational collective bargaining. These processes, however, are slow and often cannot be expected to do more than provide baseline protection for employees. This simply means that most international employment disputes arise (and will continue to do so) at the micro level when individuals challenge an employer’s conduct in a specific country’s courts or tribunals with reliance on a specific country’s labour laws.

Two factors combine to serve as harbingers of the sometimes complex issues that arise in these cases and also to delineate the focus of this article. First, the immediate challenge arises when an individual litigant institutes action in a country and typically relies on the labour laws of the same country that do not readily or apparently have a dominant international connection with the dispute. A good recent example is to be found in *Simpson v Intralinks*<sup>1</sup> (“*Simpson*”), where the claimant lived and worked in Germany, her contract of employment contained an express choice of jurisdiction (Frankfurt) and choice of law (German), yet she brought action against her employer (with its registered office in London) under the Sex Discrimination Act 1975 and Equal Pay Act 1970 in the Employment Tribunal in the UK. Whether this

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<sup>1</sup> UKEAT/0593/11/RN

happens for reasons of cost, convenience, reality,<sup>2</sup> availability of remedies,<sup>3</sup> or a combination of these factors does not matter for our present purposes. The fact remains that domestic tribunals and courts are called on to answer difficult questions relating to jurisdiction and the law applicable to transnational employment disputes.<sup>4</sup>

Second, while contractual principles continue to be significant in the regulation of the employment relationship, domestic labour legislation nowadays provides the bulk of protection and the rights most often relied on in practice by litigants. In particular, domestic labour legislation will typically extend “fair” terms and conditions of employment. At a first level, this happens directly through minimum standards legislation, which often has overriding effect on contracts of employment, and indirectly through the promotion of collective bargaining and its prerequisite rights such as freedom of association. In addition, domestic labour legislation typically provides for protection against unfair dismissal and a prohibition against discrimination (including with respect to equal pay). Furthermore, many countries recognise the need to provide for simple, speedy and relatively cheap enforcement mechanisms in respect of these legislative rights – often through specialist tribunals created by legislation with statutorily circumscribed jurisdiction regarding the types of disputes they may hear and determine.<sup>5</sup> On top of this, domestic legislation is often silent on the issue of extraterritorial application. At the same time, discrepancies remain in the levels of protection offered by labour legislation of different countries, and it is also reasonable to assume that levels of sophistication in the often specialist institutional application of labour legislation also differ between countries.

Against this background, the focus of this article is specific – to consider, on a comparative basis, the application of domestic labour legislation in international employment disputes. In part 2 below, the problem and its possible solution will be described, for the purposes of the discussion, as a basic choice between two currently competing approaches: a private international law approach (conflict of laws<sup>6</sup> approach, with the application of legislation seen as incidental to the applicable or proper law) and a more direct interpretive approach (where the application of legislation in international employment disputes is seen purely as a matter of statutory interpretation). Then in part 3 we shall provide a comparative overview of the approaches and experiences in the UK (in the context of the European Union (“EU”)), South Africa, New Zealand and the USA. While the choice of these countries is hardly exhaustive, consideration of their approaches does provide examples

<sup>2</sup> Where, for example, the other available option would be to approach the courts of a country relatively undeveloped in comparison to the forum of a litigant’s choice

<sup>3</sup> Where, for example, the labour laws of other possible forums do not provide the same level of protection

<sup>4</sup> Of course, matters may become even more complicated if the applicable law is foreign: the content of foreign law is a matter of fact – evidence and proof – before the court which accepted jurisdiction. This may be no easy matter and often beyond the capacity of litigants and representatives

<sup>5</sup> Examples of such tribunals are the Employment Tribunals in the United Kingdom and the Commission for Conciliation, Mediation and Arbitration in South Africa

<sup>6</sup> See *Parry v Astral Operations Ltd* 2005 26 *ILJ* 1479 (LC) for an exposition of different terms used in this context

of the different possible ways the problem has been and may be approached. Part 4 will consider lessons to be learnt and part 5 will offer recommendations and a conclusion.

## 2 The problem in more detail: a choice between two approaches

If we take our cue from the insightful analysis provided by Grušić,<sup>7</sup> there are two fundamental ways of approaching the application of legislation in international employment disputes.

The first of these approaches – what may be termed a private international law<sup>8</sup> approach – is to see the application of legislation as incidental to the proper law of contract which, in the first instance, remains determinative of which country's laws apply to a dispute. This well-known approach to transnational employment disputes means we should follow the usual sequence of determining, first, the court which would have jurisdiction.<sup>9</sup> This is then followed by the identification and application of the applicable or proper law (in the absence of a choice of the applicable legal system by parties) utilising some test of “close, sufficient or dominant connection” between the relationship at issue and the legal systems of different possible countries that might apply.<sup>10</sup> This enquiry will typically entail an analysis of all the different factors relating to the particular employment relationship and consideration thereof as indicative of the proper system of law to apply to the dispute. What is important for present purposes is that in this process legislation is essentially seen to apply in two circumstances. First, where the proper law of the contract is the (domestic) law of the forum, application of domestic legislation follows as a matter of course.<sup>11</sup> Second, where the proper law of the contract is found to be foreign (also when parties have chosen a foreign system as the applicable law), domestic legislation may have overriding (mandatory) effect.<sup>12</sup> One immediate difficulty with this approach relates to the relationship between the contract of employment and often free-standing legislative employment rights. In other words, is it appropriate that the application of domestic labour legislation (of the forum), which may not be dependent on the existence of an employment contract and/or may not have an actual effect on the contract, be dependent on rules applicable to contracts? This relationship between contract and legislation will be considered in what follows.

The second approach is one that may be described as an “interpretive” approach. In terms of this approach, reliance on domestic labour legislation

<sup>7</sup> U Grušić “The Territorial Scope of Employment Legislation and Employment Law” (2012) 75 *MLR* 722-751

<sup>8</sup> This term is preferred by C Forsyth *Private International Law* 5 ed (2012) 5-6

<sup>9</sup> See a full discussion of the method of the steps to be followed to establish the proper law in K Calitz “The Jurisdiction of the Labour Court in International Employment Contracts in Respect of Workplaces outside South Africa” (2011) 32 *Obiter* 678 679; L Merrett “The Extraterritorial Reach of Employment Legislation” (2010) 39 *Industrial LJ* 355

<sup>10</sup> L Collins (ed) *Dicey, Morris & Collins on the Conflict of Laws* 2 15 ed (2012) paras 32-006–32-008

<sup>11</sup> Subject, of course, to the content and requirements contained in that legislation

<sup>12</sup> Again subject to the reservation expressed in the previous footnote

in international employment disputes is simply seen by courts and tribunals as a matter of interpretation of the legislation to determine its application to the international relationship in question (often termed “extraterritorial” application). At this stage four remarks may be made about the interpretive approach to set the scene for the further discussion. First, if one juxtaposes the interpretation of legislative rights enforced by specialist tribunals (which have limited jurisdiction) with a private international law approach described earlier, it would seem as if the interpretive approach pre-empts the private international law approach. As Lord Hoffman said in the *Lawson v Serco*<sup>13</sup> (“*Serco*”) trilogy with reference to the international application of section 94 of the Employment Rights Act 1996 (“ERA”) (UK):

“[W]hat connection between Great Britain and the employment relationship is required to make section 94(1) the appropriate choice of law in deciding whether and in what circumstances an employee can complain that his dismissal was unfair? The answer to this question will also determine the question of jurisdiction, since the Employment Tribunal will have jurisdiction to decide upon the unfairness of the dismissal if (but only if) section 94(1) is the appropriate choice of law.”<sup>14</sup>

Second, it needs to be borne in mind that when one speaks of an interpretive approach, such interpretation may take place in two contexts: legislation may expressly provide for and circumscribe its international application,<sup>15</sup> or (as is often the case) the legislation may be silent.<sup>16</sup> Third, as mentioned and to the extent that courts follow the interpretive approach where legislation is silent, the interpretive process often is described as an enquiry into the extraterritorial application of that legislation. This could be seen as a misnomer and creates the risk that we place geography above substance. The question simply is (and should be) whether legislation applies to an employment relationship with international characteristics. Fourth, the comparative survey below will show that the interpretive approach seems to dominate. This domination does not, of course, mean that the interpretive approach is correct, let alone good. At least in respect of the UK it will be seen that this approach has been subjected to strong criticism, while the South African experience arguably does no more than graphically illustrate the dangers inherent in such an approach. This means that the comparative survey, to which we shall now turn our attention, should be seen, for now, as a mere description of different approaches and existing criticism of them.

<sup>13</sup> [2006] UKHL 3; [2006] 1 All ER 823

<sup>14</sup> Para 1 Note that Lord Hoffman here deliberately put the question in the traditional terms of the conflict of laws For “appropriate choice of law” used in the quotation one can, in light of the rest of the judgment and for purposes of this article, simply read “applicable legislation” Also in *Lawson v Serco* [2006] UKHL 3; [2006] 1 All ER 823 (para 38), and with reference to *Financial Times Ltd v Bishop* [2003] UKEAT 0147, Lord Hoffman made it clear that the assumption of jurisdiction is subject to the scope of domestic legislation: “the Regulation assumes that the employee has a claim to enforce, whereas the question was whether section 94(1) gave Mr Bishop a substantive claim” Note, however, the different approach in *Simpson v Intralinks* UKEAT/0593/11/RN described below

<sup>15</sup> As in the case of US federal discrimination legislation (discussed below)

<sup>16</sup> As in the case of the UK, RSA and New Zealand, which will be discussed below

### 3 Comparative overview

#### 3 1 Great Britain in the EU context

##### 3 1 1 *The EU context*

Convention 80/934/ECC on the Law Applicable to Contractual Obligations 1980 (“the Rome Convention”) was converted into a community instrument by the Rome I Regulation in 2008.<sup>17</sup> These instruments harmonise the rules of conflict of laws of the members of the European Union. They deal with the applicable (proper) law of international contracts and prescribe special rules for contracts where one of the parties is regarded as weaker than the other.

The position regarding employment contracts is regulated in articles 6 and 7 of the Rome Convention (applicable to employment contracts concluded until 17 December 2009) and articles 8 and 9 of the Rome I Regulation (applicable to employment contracts concluded after 17 December 2009).<sup>18</sup> The Rome Convention provides<sup>19</sup> that parties have freedom of choice of applicable law, except in the case of mandatory legislation of the jurisdiction that would have applied in the absence of choice.<sup>20</sup> If parties did not choose a legal system, the law of the country where the employee habitually carries out his work will be applicable.<sup>21</sup> If it is not possible to establish where the employee habitually carries out his work, the law of the country in which the place of business through which he was engaged is situated will be applicable.<sup>22</sup> Despite these rules, if it appears from the circumstances as a whole that the contract is more closely connected with another country, the contract shall be governed

<sup>17</sup> Regulation (EC) No 593/ 2008 of 17 June 2008 on the Law Applicable to Contractual Obligations (“Rome I Regulation”)

<sup>18</sup> The Rome I Regulation superseded the Rome Convention on 17 December 2009 in relation to all contracts concluded after this date (see arts 28 and 29(2))

<sup>19</sup> In the text the provisions of the Rome Convention are mentioned for the simple reason that most of the cases and disputes mentioned in this discussion were decided against that backdrop. The corresponding provisions in the Rome I Regulation read as follows:

- “8(1) An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded him by the provisions that cannot be derogated from by agreement under law that, in the absence of choice, would have been applicable pursuant to [Articles 8(2), 8(3) and 8(4)]
- 8(2) To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country
- 8(3) Where the law applicable cannot be determined [pursuant to paragraph 2], the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated
- 8(4) Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply”

Art 9 provides for overriding application of mandatory provisions described as “provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope”

<sup>20</sup> Art 6(1)

<sup>21</sup> Art 6(2)(a)

<sup>22</sup> Art 6(2)(b)

by the law of that country.<sup>23</sup> The Convention provides for the application of mandatory rules of a country “with which the situation has a close connection, if and in so far as ... those rules must be applied whatever the law applicable to the contract”.<sup>24</sup> The application of these mandatory rules is made subject to discretion in light of “their nature and purpose” and “the consequences of their application or non-application”.<sup>25</sup>

Recent cases in which the European Court of Justice (“ECJ”) was called upon to interpret article 6 of the Rome Convention dealt with employees carrying out their work in different countries and focused on the interpretation of article 6(2)(a) of the Rome Convention. In *Heiko Koelsch v Etat du Grand Duchy of Luxemburg*<sup>26</sup> a German citizen was employed as an international truck driver with a specific contractual choice of law in favour of the law of Luxembourg. Koelsch challenged his dismissal on the basis that German law was applicable despite this choice. The court based its decision on a broad interpretation of article 6(2)(a) – namely that the applicable law is that of the country in which the employee performs most of his duties in light of all the factors which are characteristic of his activities.<sup>27</sup> This interpretation means that courts would often not have to move on to interpret article 6(2)(b), which deals with the law of the country in which the place of business through which the employee was engaged is situated. This will only be the case when no country can be identified as the country in which the work habitually is carried out. In *Jan Voogsgeerd v Navimer SA*<sup>28</sup> the employee worked as chief engineer on ships belonging to Navimer until his dismissal in 2002. The ECJ stated that in the light of the nature of the work in the maritime sector, the court must take all the characteristic factors of such employment into consideration.<sup>29</sup> If the place where he is actually employed, where he receives instructions and where he must report before discharging his duties is located in the same country, this is where he habitually carries out his duties in terms of article 6(2)(a) of the Rome Convention.<sup>30</sup>

What these judgments show is the importance of the employee’s place of work for purposes of the application of labour law to international employment disputes in the European context. One reason for this is self-evident – the chosen wording of the Rome Convention which assigns pre-eminence to this enquiry. But for comparative purposes the argument goes further – the emphasis on the habitual place of work as determinative of applicable law is often said to be beneficial to the employee, who is the weaker party to the contract. The rationale behind this argument is that employees would be in a better position to bring claims if the law of the country where they work is the applicable law, as they would probably be more familiar with that legal

<sup>23</sup> Proviso to art 6(2)

<sup>24</sup> Art 7(1)

<sup>25</sup> Art 7

<sup>26</sup> Case C-29/10 [2011] ECR I-0000

<sup>27</sup> Para 50

<sup>28</sup> Case C-384/10 [2011] EUECJ I-000 (NYR)

<sup>29</sup> Para 38

<sup>30</sup> Paras 39-40

system. Such a system of choice might achieve this aim in a legal environment that is relatively harmonious (such as the EU), but will surely not always adequately protect an employee who is transferred or assigned to, for example, a developing or underdeveloped country with lower labour standards where he habitually carries out his work. In European terms, such an employee might well be in a better position if the law of the place of business which engaged him is implemented (or, for that matter, the law of the country with the closest connection, if different to where he works), as this would most often be his home country. This part of article 6 will now seldom come into play in the light of the ECJ's interpretation of article 6 and its hierarchical nature.

One other important aspect of the EU context relates to the status of mandatory labour legislation. As mentioned earlier, even if the private international law approach to the determination of applicable law is followed, mandatory legislation of the forum may have an overriding effect on the proper law. In the EU context, Grušić<sup>31</sup> distinguishes between potential application of mandatory legislation in situations covered by the Posted Workers Directive<sup>32</sup> and those falling outside the scope of the Directive. As far as the first-mentioned is concerned, Grušić points out that the Directive contains a list of core mandatory matters (which excludes unfair dismissal),<sup>33</sup> as well as the possibility to apply "public policy provisions" in respect of non-listed matters.<sup>34</sup> At the same time, Grušić mentions that the ECJ has held that the latter provision should be interpreted strictly and it is not for Member States to determine its content unilaterally through, for example, express statements in domestic legislation that it is mandatory.<sup>35</sup> As far as situations falling outside the scope of the Posted Workers Directive are concerned, Grušić offers a number of reasons to doubt that domestic legislation may override applicable EU law.<sup>36</sup> While this experience and these remarks are, again, EU specific, they are instructive: in a world where we are quick to state that labour legislation contains mandatory rights, they challenge us to consider whether and to what extent this really is the case for the purposes of application of legislation in international employment disputes. To take the matter a little further – again in the context of the UK and the EU – Grušić points out that a distinction may be made between legislation which aims at combating the misuse of managerial authority and at the balancing of individual interests (such as dismissal law, which then is non-mandatory), and legislation which is primarily aimed at the functioning of the labour market (such as working time, wages and anti-discrimination legislation, which may be seen as mandatory). Of course, depending on context, this distinction may be neither decisive nor all-encompassing, but it presents a good point of departure.

<sup>31</sup> Grušić (2012) *MLR* 743-745

<sup>32</sup> Directive 96/71/EC of 16 December 1996 concerning the Posting of Workers within the Framework of the Provision of Services

<sup>33</sup> Art 3(1)

<sup>34</sup> Art 3(10)

<sup>35</sup> Grušić (2012) *MLR* 743-744, with reference to *Commission v Luxembourg* Case C-319/06 [2008] ECR I-4232

<sup>36</sup> Grušić (2012) *MLR* 744-747



### 3 1 2 Great Britain

The ERA is silent on whether the unfair dismissal protection of section 94(1) applies extraterritorially. In the *Serco* trilogy<sup>37</sup> the House of Lords extended the extraterritorial application of this section to specific categories of British employees working outside Great Britain. The court ruled that in the absence of an explicit extension of legislation, the presumption against extraterritorial application may be rebutted, if it is established that the intention of Parliament was that the Act should apply to certain special categories of employees working outside Great Britain. This would be the case if there was a close connection between the employment and Great Britain. The court identified these categories of employees as peripatetic employees (for example, aircraft crew) whose base is in Great Britain,<sup>38</sup> expatriate employees working for a British employer for the purposes of a business carried on in Great Britain,<sup>39</sup> and expatriate employees working for a British employer in a British enclave.<sup>40</sup> Subsequent cases (discussed below) built on this approach. Before these cases are considered, a number of other remarks made by the court in *Serco*, which are important for the present discussion, should be noted:

- (i) the only question to be considered is the construction of the legislation at issue, which must be done according to the “established principles of construction, giving effect to what Parliament may reasonably be supposed to have intended and attributing to Parliament a rational scheme”;<sup>41</sup>
- (ii) as mentioned, an interpretive approach pre-empts the private international law approach and determines jurisdiction;<sup>42</sup>
- (iii) an interpretive approach also means that there is no room for the idea of *forum non conveniens*, because once legislation applies (where jurisdiction is statutorily circumscribed), there is only that one forum with jurisdiction;<sup>43</sup>
- (iv) if the interpretive approach is followed to its logical conclusion, it means that “[t]here is no reason why all the various rights included in the 1996 Act should have the same territorial scope ... [b]ut uniformity of application would certainly be desirable in the interests of simplicity”.<sup>44</sup>

*Duncombe v Secretary of State for Children, Schools and Families*<sup>45</sup> (“*Duncombe*”) dealt with dismissed English teachers who had worked for the Secretary of State in different countries. These teachers did not fit into the *Serco* categories, as they were employed in what may be regarded as an

<sup>37</sup> *Serco Ltd v Lawson; Botham v Ministry of Defence; Crofts v Veta Ltd* [2006] UKHL 3 For a full discussion of this case see Calitz (2011) *Obiter* 684-686

<sup>38</sup> *Serco Ltd v Lawson; Botham v Ministry of Defence; Crofts v Veta Ltd* [2006] UKHL 3 para 29

<sup>39</sup> Para 38

<sup>40</sup> Para 30

<sup>41</sup> Para 23

<sup>42</sup> Paras 1, 38

<sup>43</sup> Para 24

<sup>44</sup> Para 14 See the discussion by Grušić (2012) *MLR* 724-732 about possible approaches to different statutory rights

<sup>45</sup> [2011] UKSC 36; [2011] 4 All ER 1020



“international enclave”. In searching for a principle from the *Serco* decision, Lady Hale stated:

“It is therefore clear that the right will only exceptionally cover employees who are working or based abroad. The principle appears to be that the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law. There is no hard and fast rule and it is a mistake to try and torture the circumstances of one employment to make it fit one of the examples given, for they are merely examples of the application of the general principle.”<sup>46</sup>

In *Duncombe*, factors indicating a stronger connection were the fact that the employer was based in England, that the teachers were employed under contracts governed by English law and that the teachers were employed in an international enclave with no connection with the country in which they worked. The court found that these factors indicated an “overwhelmingly closer”<sup>47</sup> connection with Britain than with the countries in which the dismissed teachers worked. Importantly, while still professing to interpret legislation, the court in *Duncombe* leaned in the direction of a private international law approach by taking connecting factors into consideration in endeavouring to establish the intention of the legislature.<sup>48</sup>

A similar approach was followed in *Ravat v Halliburton*<sup>49</sup> (“*Ravat*”), apparently still under the guise that the court was interpreting legislation.<sup>50</sup> Mr Ravat, a British citizen and resident in Great Britain, commuted between England and Libya, where he worked for 28 consecutive days in Libya for a German company, followed by 28 consecutive days at home in England.<sup>51</sup> At the time of his dismissal Mr Ravat was working in Libya. The court recognised that the matter at hand did not fall into any of the “categories” of employees covered by either *Serco* or *Duncombe*, and declared the starting point for enquiries such as these to be as follows:

“The employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works.”<sup>52</sup>

However:

“[I]t does not follow that the connection that must be shown ... must achieve the high standard that would enable one to say that [it] was exceptional ... The question of law is whether section 94(1) applies to this particular employment. The question of fact is whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain.”<sup>53</sup>

<sup>46</sup> Para 8

<sup>47</sup> Para 16

<sup>48</sup> *Grušić* ((2012) *MLR* 727) sees this as a break from the pure interpretive (statutory) approach to also accommodate a choice of laws approach

<sup>49</sup> [2012] UKSC 1

<sup>50</sup> In para 28 the court mentioned that “the connection between Great Britain and the employment relationship is sufficiently strong to enable it to be presumed that, although they were working abroad, Parliament must have intended that section 94(1) should apply to them”

<sup>51</sup> He was not a peripatetic employee as he did not travel to different places in the world, but only to Libya. He could also not be classified as an expatriate as he did not live and work in a country outside of England

<sup>52</sup> Para 27

<sup>53</sup> Para 29

Against this background, the court took several connecting factors into account. These included the fact that the employee lived in England, was recruited by a British firm (Halliburton) to work for one of its subsidiaries (a German company) in Libya, and that his dismissal was dealt with by the Human Resources Department of Halliburton in Aberdeen. The fact that the parties agreed that the English system would govern the employment relationship was another factor (although it was not regarded as conclusive).<sup>54</sup> In this case – where the employee’s home was in England – the court was of the view that the burden of showing a strong connection with Great Britain was less onerous than in the case of a person who both lived and worked in another country.<sup>55</sup> The court was satisfied that these factors indicated that British employment law was the system with which Ravat’s employment had the closest connection,<sup>56</sup> that consequently section 94(1) of the ERA applied to Mr Ravat’s employment, and that the Employment Tribunal (“ET”) had jurisdiction.

Also noteworthy is that the court addressed the impact of the fact that the employee worked for a German company in Libya and, in so doing, addressed one of the realities of international employment:

“The vehicles which a multinational corporation uses to conduct its business across international boundaries depend on a variety of factors which may deflect attention from the reality of the situation in which the employee finds himself. As Mr Christie said in the employment tribunal, it is notorious that the employees of one company within the group may waft to another without alteration to their essential function in pursuit of the common corporate purpose.”<sup>57</sup>

The development in Britain to protect employees working extraterritorially thus started off with a cautious approach by the House of Lords in terms of which only certain categories of employees were regarded as being included, and was further developed in *Duncombe* and *Ravat* to comprise the principle of a “stronger connection” with Great Britain.

In *Clyde v Bates van Winkelhoff*<sup>58</sup> the Court of Appeal interpreted the approach in *Ravat* to entail that a comparative exercise identifying a stronger connection will only be appropriate if the employee works in one country outside England. A stronger connection with England will then have to be proved. However, if the employee works both in England and another country, there is no need for a comparative exercise and all that is needed to be proved is a strong connection with England.<sup>59</sup>

At this juncture it is necessary to pause and consider three points. First, *Serco* (and, by implication, its progeny) has been subjected to trenchant criticism as plainly incorrect.<sup>60</sup> More importantly, what is clear about these developments is that both the interpretive approach and the private international law approach have largely been collapsed into one. In short:

<sup>54</sup> Paras 30-34

<sup>55</sup> Para 29

<sup>56</sup> Para 33

<sup>57</sup> Para 30

<sup>58</sup> [2012] EWCA Civ 1207

<sup>59</sup> Paras 96-98

<sup>60</sup> Grušić (2012) *MLR* 738-741, 747

under the guise of statutory interpretation (which, arguably, has been reduced to mere rhetoric in *Duncombe* and *Ravat*) the court will in effect determine the proper law (through a strong or stronger connection approach) to determine both jurisdiction and the application of legislation (as part of that proper law). So one cannot help but wonder whether continued debate about this matter is much ado about nothing. While the answer to the first of these questions in the UK context might seem to be “yes”, the apparent reason for this would be potential disharmony between the approach of domestic courts and the approach dictated by binding international (European) instruments.<sup>61</sup> But it is also arguable that there are other more fundamental reasons why clarity about, and the label of, the actual approach followed might still matter, reasons that will become apparent once the experiences of other jurisdictions are considered.

To complete the UK picture, we need to consider *Simpson v Intralinks*.<sup>62</sup> The claimant lived and worked in Germany; her contract of employment<sup>63</sup> contained an express choice of jurisdiction (Frankfurt) and choice of law (German), yet she brought action against her employer (with its registered office in London) under the Sex Discrimination Act 1975 and Equal Pay Act 1970 in the Employment Tribunal in the UK, which declined jurisdiction. On appeal, the Employment Appeals Tribunal (“EAT”) held that

- (i) *Serco* and its progeny, while instructive, were not applicable – section 94(1) of the ERA was not in issue, while it cannot be said that a proper interpretation of article 6(2) of the Rome Convention depended on the close connection test of *Serco*, *Duncombe* and *Ravat*,<sup>64</sup>
- (ii) the choice of jurisdiction was invalid as measured against the provisions of the Brussels I Regulation No 44/2001 of 22 December 2000 (“Brussels I Regulation”),<sup>65</sup>
- (iii) this meant, in terms of article 19 of the Brussels I Regulation, that the employer could be sued in the UK (and the ET had jurisdiction),<sup>66</sup>
- (iv) proof of a contract of employment is a necessary step for a claim under the two pieces of legislation at issue and this meant the Rome Convention applied.<sup>67</sup>

<sup>61</sup> It is that the “stronger connection” approach in the UK – although similar – is not in line with the approach dictated by art 6 of the Rome Convention and art 8 of the Rome I Regulation

UKEAT/0593/11/RN

<sup>62</sup> Entered into before the Rome I Regulation came into effect

<sup>64</sup> *Simpson v Intralinks* UKEAT/0593/11/RN paras 41-42

<sup>65</sup> Para 32 The Brussels I Regulation regulates jurisdiction in contractual disputes at EU level. Art 20 provides for an agreement on jurisdiction “which is entered into after the dispute has arisen”, which was not the case here

<sup>66</sup> *Simpson v Intralinks* UKEAT/0593/11/RN para 34 Art 19 of the Brussels I Regulation allows an employer to be sued in the courts of a member state where he is domiciled

<sup>67</sup> *Simpson v Intralinks* UKEAT/0593/11/RN In the words of the EAT (para 1):

“Section 6 of the Sex Discrimination Act 1975 and Section 1 of the Equal Pay Act are both applicable only where there is either a contract of employment as such or a contract ‘personally to execute any work or labour’” (See s 82 of the Sex Discrimination Act 1975 and s 1(6) of the Equal Pay Act 1970)

See also para 54

- (v) the *lex causae* (proper law) of the contract was German law, as this was the choice of the parties (in terms of article 6 of the Rome Convention);<sup>68</sup>
- (vi) although the employee had to prove the existence of a contract of employment in terms of German law, this did not preclude the application of the two pieces of UK legislation, because of their status as mandatory rules of law (in terms of their wording and article 7 of the Rome Convention);<sup>69</sup>
- (vii) there is no territorial limitation in those two pieces of legislation to prevent their application in the present (international employment) dispute;<sup>70</sup>
- (viii) this meant the matter was remitted to the Employment Tribunal on the basis that it has jurisdiction and has to apply German law (partly) to determine the existence of the contract (and possibly compensation) and UK legislation (partly) to determine discrimination and infringement of the Equal Pay Act to resolve the dispute.<sup>71</sup>

On the face of it, *Simpson* provides a clear break from the earlier interpretive approach in favour of a private international law approach in the broader EU framework. At the same time, proper consideration of the impact (and correctness) of *Simpson* requires consideration of a number of issues: first, the fact that there was a clear choice of law in *Simpson*; second, the significance of the Employment Appeal Tribunal's finding that the existence of a contract is a prerequisite for application of the discrimination statutes in question with concomitant applicability of the Rome Convention (which is also the case with ERA, yet not dealt with in *Serco*, *Duncombe* and *Ravat*); and finally, that *Simpson* concerned discrimination law which, in the view of the court, is basically the same across the EU and, in the view of Grušić, is clearly mandatory. At the same time, the decision serves as reminder of the two different possible approaches yet still leaves the question: which one is preferable (not necessarily correct, but preferable)?<sup>72</sup> It is submitted that the answer to this question is best considered with reference to the remaining jurisdictions – South Africa, New Zealand and the USA.

### 3.2 South Africa

In *Kleynhans v Parmalat*<sup>73</sup> (“*Kleynhans*”) and *Parry v Astral Operations*<sup>74</sup> (“*Parry*”) the South African Labour Court applied the rules of private international law<sup>75</sup> to determine whether South African employees working in foreign countries would be protected by the Labour Relations Act 66 of 1995 (“LRA”). The Labour Court in these cases took all the connecting factors into

<sup>68</sup> *Simpson v Intralinks* UKEAT/0593/11/RN paras 45, 54

<sup>69</sup> Paras 46-48, 54

<sup>70</sup> Para 54

<sup>71</sup> Para 56

<sup>72</sup> In contexts other than the EU where the Rome Convention may be binding

<sup>73</sup> 2002 9 BLLR 879 (LC)

<sup>74</sup> 2005 26 ILJ 1479 (LC)

<sup>75</sup> See a discussion of this approach of the Labour Court in K Calitz “Globalisation, the Development of Constitutionalism and the Individual Employee” (2007) *PER* 4 19

consideration to establish which legal system would be applicable and in both cases found that South African law was the proper law, despite the workplace being in Mozambique (*Kleynhans*)<sup>76</sup> and Malawi (*Parry*). This constituted a break with previous cases in which the workplace was regarded as the only factor determining jurisdiction as well as the applicable law in terms of an interpretive approach.<sup>77</sup> However, in *Astral Operations Ltd v Parry*<sup>78</sup> (“*Astral*”) – a decision which currently provides binding precedent in the South African context and requires close consideration – the Labour Appeal Court reverted to the approach that was followed before the *Kleynhans* and *Parry* decisions. This approach entailed that in the absence of express provision for extraterritorial application, the Act was not applicable to workplaces outside South Africa.<sup>79</sup> In this case, the employment contract was concluded in South Africa with a South African company in respect of a position termed General Manager: Africa Operations. The agreement contained no express choice of law and, at best, referred, where applicable, to “relevant legislation”. Services were provided in Malawi to a company registered in Malawi (albeit a subsidiary of the South African company). The Malawian company was sold, the employee repatriated to South Africa and, despite being informed that he will be retrenched (due to the closure of the Malawian business), remained in the employment of the South African company. The employee continued to render services to the South African company in respect of its African operations for a month or so after repatriation, at which time he was retrenched. The employee instituted four claims against the employer in the Labour Court, three of which are important for present purposes: first, a claim for contractual damages (based on unlawful termination); second, a claim for unpaid salary, notice pay, leave pay, relocation allowance and severance pay;<sup>80</sup> third, a statutory claim for the maximum allowable compensation for unfair retrenchment.<sup>81</sup>

The Labour Appeal Court held that the Labour Court did not have jurisdiction to hear these claims, apparently for the following two reasons:

- (i) to the extent that the claimant relied on statutory rights, the approach laid down by the old Appellate Division in respect of the territoriality of application of the old Labour Relations Act 28 of 1956, namely that there

<sup>76</sup> EA Fredericks “The Proper Law of the International Contract of Employment: Interpreting the Kleinhans Decision” (2006) 18 *SA Merc LJ* 75 80 criticises this approach according to which the workplace was regarded as but one of several connecting factors and argues that the workplace should be held to be the most important connecting factor in order to ensure certainty. The authors will argue that a more flexible approach should be followed.

<sup>77</sup> *Chemical and Industrial Workers v Sopedog* 1993 14 *ILJ* 144 (LAC); *Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry* 1995 1 SA 563 (A)

<sup>78</sup> 2008 29 *ILJ* 2668 (LAC)

<sup>79</sup> Para 19

<sup>80</sup> Presumably in terms of the Basic Conditions of Employment Act (and possibly contract)

<sup>81</sup> In terms of the LRA

- is only jurisdiction if the “locality of the undertaking”<sup>82</sup> fell within the borders of the Republic, should be followed (and that, in the case at hand, this test clearly indicated Malawi as the locality of the undertaking); and
- (ii) to the extent that the claimant relied on contractual rights, the Labour Court only has jurisdiction in disputes arising from employment contracts by virtue of section 77(3) of the Basic Conditions of Employment Act 75 of 1997 (“BCEA”)<sup>83</sup> which means that if the Act does not apply (because of the “locality of the undertaking”), there can be no such jurisdiction to begin with.

What is clear from the judgment is that the court followed a similar approach to that of the *Serco* line of decisions, at least in the sense that the application of legislation was seen to be a matter of statutory interpretation to determine the extraterritorial application of legislation. At this point it already is easy to list the fundamental problems which exist with the *Astral* judgment. First, the current LRA contains no express wording about its possible territorial application, let alone wording similar to the wording (which included the word “undertaking”) contained in the old LRA. Second, the *ratio* for the decision in *Genrec Mei (Pty) Ltd v Industrial Council for the Iron Steel, Engineering & Metallurgical Industry*<sup>84</sup> (“*Genrec Mei*”), the authority relied on by the court, primarily concerned the jurisdiction of industrial councils in terms of the old LRA, not the extraterritorial application of the Act itself. Third, to the extent that the court also relied on provisions in the LRA which limit the jurisdiction of the Commission for Conciliation, Mediation and Arbitration (“CCMA”) to the Republic, this seems mistaken. Any provision in the LRA to the effect that the CCMA has jurisdiction within the borders of the Republic (as a matter of geography) at best begs the question whether the CCMA has jurisdiction in international employment disputes and cannot be the answer to that question. In any event, the CCMA had no role to play in this case. Fourth, the rights contained in labour legislation (including the right not to be unfairly dismissed) acquires special importance *via* section 23(1) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), which extends as a fundamental right the right to fair labour practices to “everyone”. The judgment shows no appreciation of the absence of a constitutional dispensation when earlier judgments relied on as precedent were handed down, nor how laws (especially those giving effect to the Constitution) should be interpreted to promote the spirit of the Constitution. Not surprisingly – given the pre-emptive effect of its interpretive ruling – the judgment shows no appreciation of the possible mandatory effect of labour legislation (especially in the light of the Constitution), the question relating to possible differential territorial

<sup>82</sup> This approach was followed in *Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry* 1995 1 SA 563 (A). The locality of the undertaking was equated to the place where the employees worked, namely on an oil rig at sea. Even though the undertaking was established in South Africa, this was not a factor that could benefit employees due to the constrained interpretation of “locality of the undertaking”.

<sup>83</sup> This section gives concurrent jurisdiction to the civil courts and the Labour Court in respect of any matter that arises out of a contract of employment.

<sup>84</sup> 1995 1 SA 563 (A).

application of different legislative provisions, nor of the importance and possible impact of the interaction or otherwise between contractual rights and (possibly) free-standing legislative rights. On the upside, two remarks may be made. First, whatever its deficiencies, the judgment does provide a measure of certainty and guidance to lower courts and tribunals. Second, the judgment makes it clear that the enquiry into the locality of the undertaking is a question of fact, which would mean that at least some of the factors one would expect to be considered in any enquiry of this sort would and should be taken into account. Unfortunately, this does not help much if the focus of the enquiry remains inappropriate.

What is important is that the judgment shows the dangers of an interpretive approach to the application of legislation in international employment disputes where that legislation is silent on the issue. What will happen (as was the case in both the UK and in South Africa) is that courts will come up with tests and approaches under the guise of interpretation. Sometimes we can walk away (as is the case in the UK) and state that in their application and practical effect there is enough of an overlap between the private international law and interpretive approaches to provide some certainty and probably a fair result. Sometimes (as was the case in South Africa) one cannot help but feel that the (interpretive) approach followed is unjustified as such, deviates fundamentally and too much from the notion underlying the private international law approach (searching, as it does, for a “stronger” connection) and probably prevents a fair result because it prevents consideration of important factors. Although much is to be said for the certainty inherent in precedent, this simply cannot override the proper interpretation of legislation aimed at imposing fairness on the employment relationship.

The stifling effect of the test laid down in *Astral* is illustrated by the most recent reported instance of its application by the Labour Court in *Global Outdoor Systems v Du Toit*<sup>85</sup> (“*Global Outdoor Systems*”). In *Global Outdoor Systems* the employee was a South African citizen who was approached by Global Outdoor Systems Ltd (“GOS Ltd”) in South Africa to work in Nigeria for GOS (Nigeria), a subsidiary of GOS Ltd. GOS Ltd was originally incorporated in the British Virgin Islands and its head office was located in Johannesburg, South Africa. Although negotiations with the employee took place in South Africa, the contract was signed at a later stage in Nigeria. The contract between the employee and GOS Ltd contained a choice of law and choice of jurisdiction – in favour of Mauritian law and the courts of Mauritius respectively (the reason being that the employer was in the process of relocating to Mauritius). However, at the time when the dispute was referred, GOS Ltd had not yet relocated to Mauritius. The employment contract stipulated that the employee had to report to both the managing director of GOS (Nigeria) and the international general manager of GOS (Ltd). After fourteen months of working in Nigeria the employee was dismissed after a

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<sup>85</sup> 2011 32 *ILJ* 1100 (LC)



disciplinary hearing in Johannesburg, South Africa.<sup>86</sup> He referred a dispute of unfair dismissal (in terms of the LRA) to the South African CCMA, which accepted jurisdiction. On review to the Labour Court it was held (without discussion) that the “locality of the undertaking” was Nigeria, that the LRA did not apply and, consequently, that the CCMA did not have jurisdiction.<sup>87</sup> Had this case been adjudicated on the basis of the private international law approach, the outcome would certainly have been that there was a sufficiently close connection with South Africa for the South African legal system to be applicable. Even on the interpretive approach of *Serco*, the employee could have been regarded as an expatriate with exceptionally strong ties to South Africa. Both these approaches would have resulted in an outcome that is more just towards the employee, who is the weaker party in the relationship.

### 3 3 New Zealand

Similar to the UK and South Africa, the New Zealand Employment Relations Act 2000 is silent as to whether it has extraterritorial application. The New Zealand experience shows a mix of the interpretive and contractual approaches by courts dealing with employment matters.

The Court of Appeal held in *Jardine Risk Consultant v Beal*<sup>88</sup> that the contract between the parties would determine which legal system would be applicable. In this case an employee who initially worked for an employer in New Zealand was subsequently seconded to work for the same employer in the UK, where he was dismissed for misconduct. He initiated proceedings in the Employment Court in New Zealand, claiming that his dismissal was substantively and procedurally unfair and that New Zealand law was applicable.<sup>89</sup> The question was whether UK law or New Zealand law was applicable. The Appeal Court found that New Zealand law would be applicable as an analysis of the facts indicated that (although the contract was varied to contain elements of British law) the parties did not expressly alter their original contract in terms of which the law of New Zealand would be the governing law.<sup>90</sup>

Another interesting example of a private international law approach where work was performed in New Zealand is *Musashi Pty Ltd v Moore*.<sup>91</sup> In this case the employee was a resident in New Zealand, employed in New Zealand and had to perform his work in New Zealand. His contract was a standard form contract used irrespectively of whether employees were stationed in Australia or in New Zealand. The Employment Court stated that the proper law of a contract can be determined “first by express selection by the parties; second, by inferred selection from the circumstances; or, failing either of these, by

<sup>86</sup> This was a factor taken into account in *Ravat v Halliburton* [2012] UKSC 1 discussed above to indicate that the employment had a sufficiently close connection with the UK

<sup>87</sup> The court did not deal with the choice of law (not necessary)

<sup>88</sup> [2000] 1 ERNZ 405

<sup>89</sup> Para 4

<sup>90</sup> Para 21; C Bevernage “New Zealand” in W Keller & T Darby (eds) *International Labor and Employment Laws II B* 3 ed (2008) 71-1 71-13, 71-14

<sup>91</sup> [2002] 1 ERNZ 203 (EC)

judicial determination of the system of law with which the transaction has the closest and most real connection”.<sup>92</sup>

As the contract contained certain references to the state of Victoria in Australia, the court held that the proper law of the contract was that of Victoria (inferred selection),<sup>93</sup> but that New Zealand was the *forum conveniens* and that the dispute about unfair dismissal could be determined by the labour tribunal in New Zealand,<sup>94</sup> applying Australian law. Some New Zealand tribunals have thus taken rules of private international law into consideration to establish whether New Zealand employment legislation will be applicable to employees working in foreign countries.<sup>95</sup>

An example of an interpretive approach is to be found in *Mehta v Elliot (Labour Inspector)*<sup>96</sup> in which the court had to decide whether the Wages Protection Act 1983 (“WPA”) could have extraterritorial application. At issue was the prohibition on a demand for a premium from a prospective employee in return for an offer of employment.<sup>97</sup> In this case the employer required a prospective employee in India to pay an amount as advance payment for an offer of employment in New Zealand. The court considered the general presumption against the extraterritorial application of statutes and stated that nothing in the WPA indicates that the legislature intended the Act to apply extraterritorially.<sup>98</sup> In this regard, the court mentioned that in Britain this presumption has been watered down, but that a stricter approach has been followed in New Zealand and Australia.<sup>99</sup> The court endeavoured to establish the legislature’s intention by referring to the history and context, as well as the legal, social and economic policy aspects of the legislation. The court found that at the time of the adoption of the Act there were certain malpractices in New Zealand which the legislation endeavoured to address in that employers circumvented minimum wage agreements by requiring employees to pay certain premiums back to the employer. The court stated that these reasons are not applicable to situations outside of New Zealand and that it was intended to prevent malpractices in New Zealand itself.<sup>100</sup>

Although this case does not concern a workplace outside New Zealand, it is significant that the judge endeavoured to establish the intention of the legislature by taking history, context, social and economic conditions into consideration. The court also examined international conventions to establish whether the legislation should have extraterritorial application, but found that

<sup>92</sup> *Musashi Pty Ltd v Moore* [2002] 1 ERNZ 203 (EC) para 38

<sup>93</sup> Paras 46-48

<sup>94</sup> Para 56

<sup>95</sup> J McKinnon “Dismissal Protections in a Global Market: Lessons to be Learned from *Serco Ltd v Lawson*” (2009) 38 *Industrial LJ* 101

<sup>96</sup> [2003] 1 ERNZ 451

<sup>97</sup> S 12A of the WPA

<sup>98</sup> *Mehta v Elliot* [2003] 1 ERNZ 451 para 59

<sup>99</sup> Para 62. The court referred to *Brannigan v Commonwealth of Australia* (2000) 110 FCR 566 (FC) in which it was held that the Federal Court of Australia lacked jurisdiction to determine the matter at hand because the relevant Acts (the Racial Discrimination Act 1975, Sex Discrimination Act 1984 and the Disability Discrimination Act 1992) did not state expressly that they operated extraterritorially

<sup>100</sup> *Mehta v Elliot* [2003] 1 ERNZ 451 paras 53, 56-58

the WPA was not adopted to give effect to international instruments, rather to address a specific domestic problem.<sup>101</sup>

Patullo and Myburgh<sup>102</sup> are of the opinion that insofar as Judge Colgan did take the above factors into consideration, his interpretation was too restrictive and that he overemphasised the general presumption against extraterritoriality. The authors argue that by construing section 12A of the WPA as having no extraterritorial reach, the social policy underpinning the provision is wholly undermined in respect of vulnerable migrant workers relocating to New Zealand.

In the New Zealand context both the private international law approach and the interpretive approach have been subjected to criticism. McKinnon makes the point that private international law rules are complicated, may require the application of foreign law by non-experts (presiding in employment tribunals) which may (as was the case in *Musashi*) lead to incongruous results. In her view, the New Zealand Employment Relations Act 2000 should rather be amended to explicitly include certain categories of employees who perform their work outside New Zealand.<sup>103</sup> As such, she is apparently also not in favour of an interpretive approach which endeavours to establish the intention of the legislature where that legislation remains silent.

Patullo and Myburgh have also suggested that legislation in New Zealand should be amended to expressly provide for extraterritorial application or not, so that there could be certainty. However, the authors warn that in adopting such an approach, “judicial caution is necessary to avoid asserting an exorbitant and stifling extraterritorial reach for local legislation”.<sup>104</sup> Apparently this concern is based on the principle of comity in terms of which respect should be shown for the sovereignty of other countries.

### 3 4 The USA

The USA experience is interesting for a number of reasons. First, any discussion of the extraterritorial application of US federal labour legislation must start with a reminder that there is no general protection against unfair dismissal. Employees are employed “at-will”, which means that an employment relationship of indefinite duration can be terminated by the employer or employee for any reason, subject to certain limited exceptions.<sup>105</sup> This also means that consideration of the application of US labour legislation to international employment disputes has to focus on the experience in other

<sup>101</sup> Paras 56-58

<sup>102</sup> L Patullo & P Myburgh “The Territorial Scope of New Zealand Employment Law: Quarter Acre or Global Village?” (2003) 9 *New Zealand Business Law Quarterly* 281-285

<sup>103</sup> McKinnon (2009) *Industrial LJ* 115-116

<sup>104</sup> Pattullo & Myburgh (2003) *New Zealand Business Law Quarterly* 282-286

<sup>105</sup> There are some exceptions such as where the employee was dismissed in breach of contract, where the employer agreed that the contract would only be terminated for just cause and a fair procedure (*Duldulao v Saint Mary of Nazareth Hospital Center* 115 Ill 2d 482, 106 Ill Dec 8, 505 NE2d 314 [Ill 1987]); where there is an implied covenant of good faith and fair dealing (*Dare v Montana Petroleum Marketing* 687 P2d 1015 [Mont 1984] and *Kerr v Gibson's Products Co* 733 P2d 1292 [Mont 1987]), and if the dismissal was in violation of public policy (*Firestone Textile Co Division, Firestone Tire & Rubber Co v Meadows* 666 SW2d 730 (1983))

areas covered by legislation, notably discrimination and collective bargaining rights contained in the National Labour Relations Act 1935 USC 151-169 (“NLRA”). Second, as we shall see, the US experience provides examples of legislation expressly providing for extraterritorial application of legislation (in the sphere of discrimination) and of a different test (as opposed to a “connection” or “locality” test used in other jurisdictions) in the sphere of the National Labour Relations Act.

Anti-discrimination legislation protects employees in various ways, including protection against dismissal on the grounds of race, colour, religion, sex, national origin, pregnancy, childbirth, or related medical conditions (Title VII of the Civil Rights Act 1964 § 42 USC), age (the Age Discrimination in Employment Act 1967 § 29 USC 621 (“ADEA”)) and disability (the Americans with Disabilities Act 1990 § 42 USC (“ADA”)). These statutes each contain an express clause to the effect that they are extraterritorially applicable,<sup>106</sup> but only to American citizens employed by American companies or foreign entities controlled by US entities. To establish whether a company is controlled by another company, the “integrated employer test” will be applied.<sup>107</sup> At the same time, all the anti-discrimination statutes contain a clause to the effect that an employer does not have to comply with these Acts, if compliance “would cause such employer or corporation employed by such employer to violate the laws of the country in which such workplace is situated”.<sup>108</sup> The principle of comity is clearly respected in terms of this clause known as the “foreign law defence”.<sup>109</sup>

Due to increasing numbers of American citizens working for American employers abroad, there have also been calls for the extraterritorial extension of the National Labour Relations Act.<sup>110</sup> This Act protects the right of employers and employees to organise and to bargain collectively, but is silent on whether it is applicable extraterritorially. In the light of the Supreme Court’s decision in *EEOC v Arabian American Oil Co*<sup>111</sup> (“*Aramco*”), courts are very conservative when it comes to applying labour legislation extraterritorially. This judgment established a strict test for extraterritoriality based on the point of departure that legislation is only meant to apply in the USA unless, through a process of

<sup>106</sup> ADESA 29 USC § 630(f)

<sup>107</sup> The following factors will be taken into consideration:

- (i) interrelation of operations between the foreign employer and a US company;
- (ii) the extent of common management between the foreign employer and a US company;
- (iii) the degree of centralised control of both companies’ labour operations; and
- (iv) common ownership or financial control between the two companies

<sup>108</sup> Age Discrimination in Employment Act 1967 § 29 USC s 623(f)(1); Title VII of the Civil Rights Act 1964 § 42 USC s 2000e-1(b); ADA: Americans with Disabilities Act 1990 § 42 USC § 12112(c)

<sup>109</sup> For example, *Kern v Dynallectron Corp* District Court, ND Texas, Fort Worth Division 577 F Supp 1196 (1983) concerned a matter where the employer required a helicopter pilot who was employed in Saudi-Arabia to convert to Islam. The employee brought a claim against the employer based on discrimination on religious grounds. The District Court for Northern Texas accepted the employer’s “foreign law defence” since, in terms of the law of Saudi-Arabia, pilots who are not converted to Islam and who fly over Mecca would be beheaded. Conversion to Islam was seen by the court as a *bona fide* occupational requirement, one of the justification grounds for discrimination.

<sup>110</sup> 29 USC §§151-169 (2006)

<sup>111</sup> 499 US 244 (1991)

statutory construction, there is an “affirmative intention ... clearly expressed” that legislation should apply extraterritorially.<sup>112</sup>

Against this background, two Circuit Court judgments have considered the extraterritorial application of the NLRA. In *Asplundh Tree Expert Co v NLRB*<sup>113</sup> the third Circuit ruled that US employees who worked for a US firm and who performed temporary work in Canada were not covered by the NLRA. In this case a few employees jointly complained about working conditions and briefly withheld their work, upon which some of them were dismissed. The court held that as the act of dismissal took place outside the USA, the presumption against extraterritorial application (as per *Aramco*) must be adhered to. A different result was reached by the eleventh Circuit in *Dowd v International Longshoremen's Association*.<sup>114</sup> In this case members of an American trade union endeavoured to persuade Japanese dockworkers to refuse to unload fruit being exported from US harbours where a non-unionised workforce was employed. In the USA this action would constitute a contravention of the NLRA, which prohibits secondary boycotts. The court applied the “effects” test: if extraterritorial conduct had an effect in the USA and if the conduct intended to have that effect, the conduct would not be regarded as extraterritorial.<sup>115</sup> The court held that the NLRA did apply, as the conduct of the union leaders in Japan had an effect on employers in the USA – at least one vessel with cargo diverted to a US harbour with a unionised workforce.<sup>116</sup> In *Timberlane Lumber Co v Bank of America*<sup>117</sup> – albeit in a different context – the effects test was slightly qualified by requiring that asserting international jurisdiction should hold up to standards of international comity, which may be addressed by requiring the effect to be substantial. There is currently no certainty about the extraterritorial application of the NLRA, nor about possible legislative extension of the NLRA to apply extraterritorially (with a foreign law defence) as in the case of anti-discriminations laws. It should, however, be borne in mind that at least one commentator has already described Congress as being “trigger happy” and infringing the sovereignty of foreign states by extending US anti-discrimination laws.<sup>118</sup>

#### 4 Lessons to be learned

The comparative survey shows that the situation that most often confronts courts and tribunals in international employment disputes concerns the application of domestic labour legislation where that legislation is silent on its applicability in the international context. Against this background, the only broad guidance available to courts and tribunals typically is seen to be the universally accepted principles that there is a presumption against

<sup>112</sup> 248

<sup>113</sup> 365 F3d 168, 170 (3d Cir 2004)

<sup>114</sup> 975 F2d 779, 788 (11th Cir 1992)

<sup>115</sup> *Hartford Fire Ins Co v California* 509 US 764, 794-799 (1993)

<sup>116</sup> *Dowd v International Longshoremen's Association* 975 F2d 779 782 (11th Cir 1992)

<sup>117</sup> 549 F2d 597 (9th Cir 1976)

<sup>118</sup> DG Barella “Checking the ‘Trigger-Happy’ Congress: The Extraterritorial Extension of Federal Employment Laws Requires Prudence” (1994) 69 *Ind LJ* Art 8

extraterritorial application, and that there should be respect for the laws of other countries (the idea of comity of nations). Experience also shows that courts and tribunals accept this challenge as one of pre-emptive interpretation.

As much as one would like to argue that the private international law approach, which is in essence based on contract, should be followed and, perhaps, as much as this approach might be correct in the EU context, it is at least arguable that this approach will and should, at best, find limited application in other jurisdictions. For example, in the South African context it is fairly easy to argue that matters concerning basic conditions of employment are contractual by their very nature and that a private international law approach should dominate, despite the baseline provisions being contained in legislation (the Basic Conditions of Employment Act). This is so simply because, if contractual conditions are less beneficial than the Act, the Act expressly states that its provisions should be read into the contract, while if conditions are more beneficial, this will be the result of a contract. But protection against unfair dismissal (in terms of the LRA) and unfair discrimination (in terms of the Employment Equity Act 55 of 1998) are different matters entirely. Persons need to be employees to qualify for protection by legislation, but this does not expressly require a valid contract in the common law sense of the word. Put differently: while a contract of employment will make you an “employee” for purposes of legislation, the absence thereof does not necessarily disqualify you from protection. In South African labour legislation the focus is the employment relationship, not the contract of employment.<sup>119</sup> Furthermore, there is strong authority (from our Supreme Court of Appeal) for the proposition that protection against unfair dismissal is not an implied term of the contract of employment.<sup>120</sup> This does not mean the private international law approach is irrelevant (as to which, see below). It is simply difficult to see how this approach could be controlling in a world dominated by often free-standing legislative employment rights which find justification for their existence in the deficiencies of the contract of employment and are designed to impose fairness on an employment relationship (rather than contract) widely recognised to go beyond contract.

To the extent that the interpretive approach does (and, perhaps, should) dominate, experience shows that courts and tribunals have to be creative against the backdrop of the very broad (virtually non-existent) guidance provided by the two principles alluded to earlier (territoriality and comity of nations). Not surprisingly, experience shows mixed results – from a common sense and apparently fair result achieved in the British context, to the rather fickle, largely baseless and geography-inspired test formulated by the South African Labour Appeal Court. In the light of this, and also in the light of the fact that tribunals need clear guidance, a common theme in many jurisdictions is a call for legislative intervention, based on recognition that employment statutes should in limited and clearly circumscribed circumstances apply to

<sup>119</sup> See *Kylie v CCMA* 2010 7 BLLR 705 (LAC) and *Discovery Health v CCMA* 2008 7 BLLR 633 (LC)

<sup>120</sup> *SAMSA v McKenzie* 2010 5 BLLR 488 (SCA)



international employment relationships – the more so where legislation may justly be described as mandatory.

But how should this be done? One example from the USA in the sphere of discrimination law is for the legislature to fashion a tailor-made scope of international application for the specific right in question. For example, in the South African context the definition of “employee” could – as in the USA – be amended to include “a South African citizen working for a South African company or a company interrelated to such a company in a foreign country”. But there are difficulties associated with this approach, both in the South African context<sup>121</sup> and as a general matter of interpretation. Here we should remind ourselves of the experience in Britain in relation to the repealed section 196(3) of the ERA (which until 1999 provided for international application of dismissal law in respect of employment outside Britain). This experience was described thus in *Serco*:

“The interpretation by the courts of what became section 196(3) had a somewhat chequered history and in *Wilson v Maynard Shipbuilding Consultants AB* [1978] ICR 376; 386 Megaw LJ said that the legislation (in ‘deceptively simple-looking words’: see p 384) had thrown up some problems which he did not think Parliament had foreseen. He invited Parliament, if it thought that courts were interpreting the section in a way which frustrated its intention, to reconsider the matter and amend it. Parliament’s imaginative response, twenty years later, was to leave the matter entirely to the judges.”<sup>122</sup>

The above word of caution is also applicable to the New Zealand experience, where the inconsistent approach of the courts has resulted in stringent criticism from authors who recommended that labour legislation be amended to explicitly state whether the specific Act applies extraterritorially or not.

One clue to a better solution comes from the EU experience of “international codification” and raises the possibility (in a non-EU context) of codifying the private international law approach. In the European context there are reservations about the hierarchical reliance on single and arguably inappropriate factors in the Rome Convention and Regulation.<sup>123</sup> Perhaps the better solution lies in a compromise between the interpretive and private international law approaches as evidenced by the *de facto* result in *Serco* and its progeny. Where legislation becomes part of the employment contract, there is no reason why the private international law approach cannot be made part of that legislation by inclusion of a discretionary international application of that legislation coupled to a list of possibly connecting factors<sup>124</sup> (not necessarily exhaustive and based on the standard contractual approach) to guide that discretion. And where labour legislation provides for free-standing rights, such a loosely bound discretion will not only work towards a fair result, but

<sup>121</sup> The South African Constitution (s 23(1)) extends the right to fair labour practices to “everyone” and does not limit it to “citizens” as certain other rights in the Constitution do

<sup>122</sup> *Lawson v Serco* [2006] UKHL 3; [2006] 1 All ER 823 para 8

<sup>123</sup> See the argument in part 3 1 1 above that the emphasis in the Rome Convention and Rome Regulation 1 on the place where the employee habitually works may be appropriate in a legal environment that is relatively harmonious such as the EU, but will be detrimental to an employee who habitually works in a developing country with less protective labour legislation than his country of origin

<sup>124</sup> Factors such as applied by the Labour Court in *Kleynhans v Parmalat* 2002 9 BLLR 879 (LC); *Parry v Astral Operations* 2005 26 ILJ 1479 (LC); *Duncombe v Secretary of State for Children, Schools and Families* [2011] UKSC 36; [2011] 4 All ER 1020 and *Ravat v Halliburton* [2012] UKSC 1



will militate against the introduction of tests as fickle as the “locality of the undertaking” which has taken hold in South Africa. Furthermore, while much is to be said for uniformity of application, there is the possibility of adapting this list of factors in the light of the status of the legislation in question. And there is no reason not to make the idea of respect for other countries’ laws part of the discretion. At the same time, it has to be conceded that this may not be possible in jurisdictions such as Britain, which labours under binding international instruments.

## 5 Recommendations and conclusion

An approach which creates a balance between a private international law and an interpretative approach, and between flexibility and certainty, could be ensured by listing certain connecting factors which a tribunal or court should take into account in deciding whether South African labour law applies to an international employment contract. Such a list could consist of the factors that courts took into account in the decisions discussed above. The list could be included in an amended Code of Good Practice: Who is an Employee?<sup>125</sup> which was issued in terms of section 200A(4) of the LRA and which deals with the question of who should be entitled to the protection of South African labour legislation. Section 203(2) of the LRA provides that NEDLAC may change any code of good practice, and section 203(4) provides that a person interpreting or applying the LRA must take into account any relevant code of good practice. Section 203 further provides that a Code of Good Practice may provide that the code must be taken into account in applying or interpreting any employment law. The advantage of including such a list in the Code is that no legislative process would be required.

Should the Labour Court or CCMA rule, in the light of the proposed list of connecting factors, that the LRA is applicable, this would mean that both the Labour Court and the CCMA, which are created by the LRA, could exercise jurisdiction. However, the court or CCMA will first have to establish whether the judgment will be effective before the court could assume jurisdiction.<sup>126</sup>

It should be made clear in the code that the fact that domestic legislation does not explicitly provide for extraterritorial application does not imply that the LRA and other employment legislation cannot under any circumstances be applicable. At most there could be a rebuttable presumption against extraterritorial application.

The code could make provision for considerations of comity. Should the application of South Africa’s labour laws have an impact on the country where the employee works (such as retrenchment of a large number of employees), this should be taken into consideration before the tribunal or court exercises its discretion to apply South African law. Guidance should also be given on what should be regarded as mandatory law.

<sup>125</sup> N 1774 in GG 29445 of 01-12-2006

<sup>126</sup> Calitz (2011) *Obiter* 678, 679-682

The above recommendations establish a test based on the British approach, which is essentially a combination of the interpretive and private international law approach. This test should easily be digested by specialist tribunals. Grappling with guided discretions is what labour lawyers, arbitrators and judges do and do well. Labour law is based on fairness and fairness is ultimately a factual argument which cannot be predetermined and is best made within agreed parameters that often seem narrow, but are always surprisingly broad.

### **SUMMARY**

An analysis of different methods of dealing with the application of domestic legislation in international employment disputes in the chosen jurisdictions indicates that two broad approaches are followed, namely a private international law approach and an interpretive approach. It is recommended that South Africa should follow a combination of these approaches, as is done in Britain, instead of the strict interpretive approach followed currently. This would entail that in deciding whether legislation is applicable, the court should take connecting factors into consideration. More specifically, it is further recommended that the definition of “employee” in the Code of Good Practice: Who is an Employee? be amended to provide guidelines to the Labour Court and the CCMA regarding connecting factors.