European Economic and Social Committee

INT/167
Jurisdiction in civil and commercial matters

Brussels, 29 October 2003

OPINION

of the European Economic and Social Committee

on the

Initiative of the Kingdom of the Netherlands with a view to the adoption of a Council Regulation amending Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters

(OJ C 311, 14.12.2002, p. 16)

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On 27 November 2002 the Council decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

> *Initiative of the Kingdom of the Netherlands with a view to the adoption of a Council Regulation amending Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters*
> OJ C 311, 14.12.2002, p. 16.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 7 October 2003 The rapporteur was **Mr Retureau**.

At its 403rd plenary session of 29 and 30 October 2003 (meeting of 29 October) the European Economic and Social Committee adopted the following opinion by 63 votes to 11 with 7 abstentions:

1. The legislative proposal

1.1 The proposal is an initiative of the Kingdom of the Netherlands (OJ C 311 of 14 December 2002, p. 16) amending a provision of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Regulation), which entered into force on 1 March 2002 and which contains implementing provisions for the Brussels I Convention (the Convention) on the same subject. This convention will continue in force in the Kingdom of Denmark, however. Moreover, the Lugano Convention (1988) will continue in force in certain non-EU countries.

1.1.1 The proposed amendment would insert a derogation clause into the Regulation with regard to jurisdiction for contracts for cross-border work.

1.1.2 Its legal basis is Articles 61(c) and 67(1) of the EC Treaty. These articles, together with Article 65, to which Article 61 refers, deal with the powers of the Council and with the right of initiative of its members with regard to jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. For a period of five years from the entry into force of the EC Treaty, as amended at Amsterdam, the Member States have the same right of initiative as the Commission, but with the entry into force of the Treaty of Nice the Commission's right of initiative will become exclusive and the members of the Council will retain only the right to ask the Commission to make proposals.

1.2 Article 20 of the Regulation reflects the rules on jurisdiction laid down in relation to proceedings connected with contracts of employment brought by an employer against an employee resident in another Member State. In principle, jurisdiction in such cases lies with the courts of the employee's home country.

1.2.1 This is a general and binding rule of assignment of jurisdiction which applies to any proceedings brought under the Regulation, but there is provision for a number of limited exceptions.

1.3 The proposed amendment would change this rule of jurisdiction for proceedings brought by an employer for judicial annulment of a contract of employment, where the court is asked to rule on the annulment and its consequences (e.g. monetary). Judicial annulment is a procedure apparently allowed in some Member States, and the authors of the proposal maintain that in the Netherlands it is even mandatory in the case of certain protected workers.

1.3.1 The proposed amendment would give the employer the option to bring his proceedings in the courts of the country where the employee habitually carries out his work, and not necessarily, as would otherwise be required, in the courts of the employee's home country. This unilateral option would, it is suggested, offer advantages for both parties.

2. General comments

2.1 The proposal does indeed offer the employer a new advantage by allowing him to choose to bring his action before the courts of the country in which the contract is carried out a rather than those of the defendant's home country, and would thus deprive the defendant of his right to choose the jurisdiction (the defendant's country of residence, his country of employment or the employer's country of establishment).

2.2 This would be an exception to the principles of jurisdiction which would appear to have been firmly established in the Regulation, the aim of which is to protect the weaker party to certain contracts which are unequal in economic terms or in terms of technical or professional competence (employer/employee, supplier/consumer, insurer/insured). The Committee endorsed the Regulation in its opinion of 1 March 2000[1].

2.3 Although social security is by definition explicitly excluded from the field of application of the Brussels Convention and of the Regulation referred to, labour law is however covered, despite difficulties in regarding it as a branch of private law.

2.3.1 This situation arose originally from the case law of the Court of Justice, which was responsible for interpreting the Convention, and which ruled that contracts of employment were implicitly covered (the first version of the Convention made no mention of them). After two revisions of the Convention employment contracts have been included in their entirety.

2.3.2 All the exceptions to the common law on contracts and to jurisdiction for employment contracts result logically from the fact that labour law is a very specific field.

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1 OJ C 117, 26.6.2000, rapporteur **Mr Malosse**.

2.3.3 Indeed, labour law is strongly influenced by a number of public policy provisions. In most Member States employees and their representatives are protected through the involvement of the authorities in conditions of training, implementation and termination of contracts (labour inspectorate, regulation of certain contractual provisions, obligatory and prohibited clauses, special protection for certain categories of employee, regulation of working conditions and contracts by sector, either by legislative means or via national or regional sectoral collective agreements) and through various other exceptions to the principle of contractual freedom.

2.3.4 Contracts of employment have in the past been excluded from efforts to establish European contract law, as they are considered to be too much bound up with the social and legal traditions of individual countries and too much subject to public policy criteria and legal and other factors. The situation will become even more complex and diverse with enlargement of the Union.

2.3.5 A large body of Community labour law continues to develop, which has an impact on the content of contracts of employment, the aim being to promote harmonisation in the interests of labour mobility in the single market, the principle of equality and a high level of protection for workers.

2.4 An option for an employer to have his employee's contract of employment annulled by a court is exceptional in most European countries, where it may either not be allowed under national law or be an exceptional procedure, and there is every reason to question the appropriateness of changing such a fundamental provision of the Regulation to accommodate such an apparently uncommon procedure.

2.4.1 Although in principle private or commercial contracts may be judicially annulled, if one of the parties considers that the other has not fulfilled his contractual obligations or if the dispute is not settled out of court, this is far from frequent in the case of contracts of employment. Contracts are usually terminated at a predetermined date, in the case of fixed-term contracts, or at the request of one of the parties, subject to compliance with the applicable clauses and rules, or, in the event of a serious fault by one of the parties, on the initiative of the other party, possibly with the involvement of the court in the event of disagreement on the reason for, or the monetary consequences of, termination of the contract.

2.4.2 Judicial annulment is resorted to exceptionally in the absence of one of the usual conditions for breaking or terminating a contract, e.g. a direct dismissal procedure which can be initiated by the employer for economic reasons or where the employee is at fault. The dismissal of certain protected workers is subject to specific rules which apply during the period of protection, and these vary from one country to another. An arrangement whereby a worker can be dismissed only by a tribunal of representatives of protected workers seems to exist only in a limited number of countries. Only the Netherlands is mentioned in the proposal.

2.5 The rules on jurisdiction of the Regulation require the plaintiff to bring proceedings before the competent court of the defendant's home country. Clauses assigning jurisdiction are not in principle allowed in contracts of employment. A clause of this kind might be allowed only with the common consent of the parties after a dispute has arisen and a procedure for termination of a contract has been initiated. It might, however, be permissible to include such a clause in a contract under certain conditions, e.g. if the employee were resident in a third country.

2.5.1 Once a decision has been taken to bring proceedings for judicial annulment of a contract, the employer is free to negotiate with the employee so as to reach agreement on jurisdiction under the conditions set out in the Regulation, and there is no obstacle to such an agreement if it appears favourable to both parties under certain circumstances, e.g. in the case of cross-border employment contracts.

2.6 But the proposal submitted to the Council would allow an employer to choose the jurisdiction, which could have serious consequences for an employee against whom an action for judicial annulment has been brought, who must be able to submit and conduct his defence against the plaintiff under the best possible conditions. The proposal would introduce a significant exception to the general procedural principles of the Regulation and might be prejudicial to the rights of the defence, if an employee did not wish to accept a clause assigning jurisdiction after a dispute had arisen to the courts of his country of employment or of the country in which the contract was concluded, but preferred that jurisdiction be assigned to the courts of his place of residence, where this was situated in a Member State subject to the provisions of the Regulation.

2.7 Only where the defendant is not resident in a country which is a party to the Regulation, and in the absence of a clause assigning jurisdiction, may the employer's national court legally exercise jurisdiction and apply the rules of its system of domestic law.

2.8 The Committee therefore considers that, under these circumstances, there is no compelling reason to make general provision for an exception to the exclusive benefit of one of the parties in an area where the Regulation lays down a general principle, although allowing an exception to be made by common consent once a dispute has arisen. This provision already takes account of situations where the exercise of jurisdiction by the courts of the country in which the contract is applied could be mutually beneficial to the interests of both parties.

2.9 With regard to the mobility of labour within the single market, the Committee considers that, if accepted by the legislative authorities, the proposal:

a) would bring about the recognition and implementation in the other Member States of a decision arising from a procedure which is relatively uncommon in labour law, even in those countries where it is allowed;

b) could be prejudicial to the rights of the defence and to the general principles protecting the weaker party to certain contracts;

c) could conflict with public policy in certain countries, e.g. if the employees in question were protected, or if the reasons for the dismissal were essentially unacceptable and the decision could therefore be neither recognised nor implemented in those countries, under the clause of the Convention allowing a state to oppose suspension of its public policy arrangements for the implementation of a foreign judgment;

d) would inhibit the courts of other Member States and their competence in, and ability to apply, contract law, which is one of the reasons quoted in defence of the proposal.

3. Conclusions

In the Committee's view, the proposal of the Kingdom of the Netherlands should not be adopted for reasons connected with legal certainty and compliance with a general procedural principle.

Brussels, 29 October 2003.

The President of the European Economic and Social Committee	The Secretary-General of the European Economic and Social Committee
Roger Briesch	**PatrickVenturini**

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N.B. Appendix overleaf.

APPENDIX

The following amendment, which was defeated, received at least one quarter of the votes cast:

Point 3

Delete and replace by the following:

" The initiative by the Kingdom of the Netherlands is inadmissible as it no longer has any legal basis under the EC Treaty. The Committee recommends that the Commission review the substantive elements of this case, taking account of the Committee's comments above."

Reason

The Treaty of Nice that has now entered into force introduced a fifth paragraph into Article 67 of the EC Treaty abrogating the right of initiative granted to Member States for a five-year transitional period following the entry into force of the Maastricht Treaty. Thus, the Dutch initiative has no legal basis and is therefore inadmissible.

The Committee's comments should be passed onto the Commission for substantive consideration.

Result of the voting:

For:	21
Against:	54
Abstentions:	2.