ECA Piloting Safety
European Cockpit Association

Analysis of the Judgement of the Court of Justice of the European Union in cases C-168/16 and C-169/16 – Nogueira and others vs. Crewlink and Moreno vs. Ryanair[1]

Summary:
The Court of Justice of the European Union has clarified the notion of "the place where or from where" aviation workers "habitually work." The Court considers the crews' Home Base as a significant indicium for determining crew' habitual place of work. The Court considers this indicium so significant that other closer links should be demonstrated to contest the link between the home base and the effective place of work. By doing so, the Court establishes a refutable presumption that the home base is the crew's habitual place of work. At the same time the Court discards the use of other links such as the nationality of the aircraft or the place where social security is paid for the determination of the crews' habitual place of work.

The case concerns the application of the Brussels I Regulation[2] on jurisdiction but some elements indicate that the same reasoning could be use for the purposes of determining the law applicable to employment contracts.

1. Introduction

1. On 14 September 2017, the Court of Justice of the European Union (the Court of Justice) delivered a judgment on 'the question whether the concept of 'place where the employee habitually works' as provided for in Article 19(2)(a) of the Brussels I Regulation can be equated with that of 'home base,' as provided for in Regulation 3922/91.[3]

2. The Court concluded that both concepts cannot be equated but that the 'home base' constitutes a significant indicium for the purposes of determining 'the place where the employee habitually carries out his work.' This link is so significant that proof of closer connections to another place would be necessary to refute this presumption.

2. The Question from the Belgian Court

3. The case that originated the question from the Belgian Court concerns claims for compensation, after termination of the employment relationship, by aircrew, based in Charleroi (Belgium), working for Ryanair directly or through the staffing agency Crewlink.

4. At the Belgian courts, Ryanair contested the jurisdiction of Belgian courts and claimed that Irish courts were competent for the following reasons:
   - The employment contract states explicitly that work is considered to be performed in Ireland since the worker accomplishes its work mainly on board of Irish registered aircraft;
   - The employment contract establishes explicitly the competency of Irish courts;
   - The employees are subject to Irish social security;
   - The European Health insurance card was issued in Ireland;
   - Salaries are paid to an Irish financial organisation subject to Irish taxation;
   - Employees do not perform any domestic flights in Belgium, only international transportation on board of Irish registered planes;

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[1] Judgement of 14/09/2017

[2] Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

[3] Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation

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- The Chicago Convention of 07/12/44 states the principle that aircraft are subject to the country of register;
- Ryanair does not have an office in Belgium.

5. According to Ryanair, if the Court did not find enough connexions to Ireland, the Court should however not consider Belgium courts competent since contracts were not signed in Belgium but in Spain.

6. The Belgian Court examined the doctrine and case law related to jurisdiction and to applicable employment law to transport workers and identified certain (9) 'factual findings' that would link the place from which the concerned employees habitually carry out their work to Charleroi: they start and end working days there and are required to stay there for standby, medical certificates must be submitted there, aircraft are stationed there, a crew-room is available there…

7. Notwithstanding those links, the Belgian Court decided to refer the question to the Court of Justice of the EU about the possibility to equate the concept of '*place where the employee habitually works*' as provided for in Article 19(2)(a) of the Brussels I Regulation with the concept of '*home base*' as provided for in Regulation 3922/91, in order to meet the need for predictability and legal certainty when determining jurisdiction in claims by air crew. [4]

3. The issues

3.1. The "concepts" of the Brussels I Regulation cannot be equated with other concepts in other pieces of legislation

8. The question from the Belgian Court of equating a "concept" of the Brussels I Regulation to another concept contained in another piece of legislation creates a problem to the Court of Justice.

9. The Court considers that the articles of the Brussels I Regulation must be interpreted in a uniform way taking into consideration the specific scheme and objectives of this Regulation. The Court refers to this as the requirement for '*autonomous interpretation*': « *In order to ensure the full effectiveness of Regulation No 44/2001, in particular Article 18, the legal concepts that regulation uses must be given an independent interpretation common to all the Member States*. »[5]

10. The reason for this *independent* or *autonomous* interpretation requirement is to ensure that all Courts throughout Europe apply the rules in the same way, to head towards the unification of the rules and to avoid of the multiplication of bases of jurisdiction for a given legal relationship.[6]

11. The question from the Belgian Court of equating a "concept" of the Brussels I Regulation to a concept in another piece of legislation could therefore not be answered in the affirmative because the Court's would run the risk of using legal texts that were written with objectives or schemes different to those of the Brussels I Regulation. Only the articles of the Brussels I Regulation itself and the case law of the Court of Justice can be used to interpret the Brussels I Regulation.

3.2. A refutable presumption that the 'home base' is 'the place where the employee habitually carries out his work'

12. After having stated that concepts of the Brussels I Regulation cannot be equated to other concepts in other pieces of legislation, the Court of Justice is going to nuance this principle and states that concepts in other legal instruments such as the 'home base' in Regulation 3922/91, may play an important role in the determination of the place from which employees work.

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[4] Arrêt de la Cour du Travail de Mons du 18/03/2016, Moreno Osacar/Ryanair.

[5] C-154/11, *Mahamdia*, § 42.

[6] See §47 of the judgement

13. The Court of Justice has developed, through case law[7] a set of 'circumstantial' indicia (criteria) allowing national courts to determine the place where the transport employees habitually carry out their work. The Court of Justice reminds in its judgement[8] the aspects that national courts must take into consideration:
    - the place from which the employee carries out his transport-related tasks,
    - the place where he returns after his tasks, receives instructions concerning his tasks and organises his work, and
    - the place where his work tools are to be found.

14. In its judgement, the Court of Justice states that, for aircrew, a fourth factor or indicia could be added:
    - the place where the aircraft aboard of which the work is habitually performed are stationed.[9]

15. All in reaffirming that only 'the circumstantial method' described above can determine, for each case, the place where the employee carries out his work, the Court of Justice recognises that, in cases such as the ones referred to by the Belgian court, i.e. aircrew working out from a home base, that home base constitutes a significant indicium that is likely to "*determine the place from which employees habitually carry out their work.*'[10]

16. The Court's decision to give such relevance to the home base is based on the similarities between the definition of 'home base' in Regulation 3922/91and the Court's own indicia. Indeed the Home base is defined as:
    - the place where aircrew starts its working day and finish it
    - the place where work is organised
    - the place of residence and where the crews are at the disposal of the air carrier.

17. The Court also sees some further corresponding criteria to the Court's set of indicia for the determination of the 'place from which the employees habitually carry out their work' in the way the Home Base is considered in other articles of Regulation 3922/91:
    - the rest periods are calculated differently if taken at the home base or away
    - the home base is not determined randomly by the employer, but according to a set of rules in the Regulation

18. Considering all these factors, the Court of Justice concludes that only closer connections displayed in other applications, can *undermine* the relevance of the home base to determine the 'place from which the employees habitually carry out their work.[11]' In other words, the Court of Justice *has established a refutable presumption* that aircrew habitually work from their home base.

3.3. The presumption that the home base determines the place from which aircrews carry out their work also applies when assessing the applicable law under the Rome I Regulation

19. In their reaction to the Judgement, Ryanair commented: "*Ryanair will continue to employ its crew on Irish contracts of employment, and this decision only updates the criteria for assessing the*

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[7] The Court of justice refers, by analogy, to the following cases : C-29/10, Koelzsch & C-290/15, D'Outremont (by annalogy), C-384/10 Voogsgeerd.

[8] § 63 of the judgement

[9] § 64 of the judgement

[10] § 69 of the judgement

[11] § 73 of the judgement

jurisdiction of national courts to hear legal cases locally and does not alter the law applicable to the contract, which is determined by the Rome I regulation (593/2008) [12]." [13]

20. This view is also supported by some legal practitioners: "*It is also important to note that the case concerned the matter of where claims may be brought, not which law should apply to the contract. Contrary to some reports, the decision does not prevent Ryanair from insisting on Irish law applying to the employment contracts of foreign workers: this case relates to a court's jurisdiction to hear claims, and not governing law*."[14]

21. While it is true that this case concerns the matter of jurisdiction, there are objective reasons to think that the judgement will have undeniable effects in other areas, notably in the definition of the applicable law for aircrews.

22. The Rome I Convention and Regulation provide the rules to define the law applicable to employment contracts. The general principle is that the parties can freely chose the law that would apply to the contract. Therefore, Ryanair is right to say that they could continue to offer crew Irish contracts. However, the Rome I Convention and Regulation stipulate in its article 8(1) that "*such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article."*

23. In the absence of choice, Article 8(2) states in the first place that "*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."*

24. In other words, the parties can choose any law to govern their contract but only "in addition" or "on top of" the mandatory rules of the country "*where or from where the employee habitually work*". The key is that the law of the "*place where or from where the employee works*" applies. Advocate General Saugmandsgaard Øe explained in its opinion[15] why the case-law developed in the area of applicable law could be used for the purposes of interpreting the law on jurisdiction. The Court in its judgement retain those arguments. An *a contrario* lecture of these arguments is also possible to justify the future use of the conclusions of this judgement related to jurisdiction, in the area of applicable law. The main arguments developed by the Court to justify the pertinence of cross refencing between the Rome I and Brussels regulations for determining what constitutes workers' "habitual place of work" are the following:

3.3.1 A common objective of unifying the law

25. Both the Brussels I Regulation on jurisdiction and the Rome I Regulation (and Convention) on the applicable law have the common objective of unifying the law in the field of private law.

    a. The Court of Justice explicitly says that the principle of autonomous interpretation of article 19(2) of the Brussels I Regulation does not preclude the court from taking into consideration the corresponding rules of the Rome Convention. In both sets of law, the criterion to be used is the same: "the place where the employee habitually carries out his work."

    b. The contrary, i.e. that the autonomous interpretation of the Rome convention (ad the Rome I Regulation) does not preclude taking into consideration the corresponding rules of the Brussels I Regulation seems a very likely conclusion.

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[12] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

[13] http://corporate.ryanair.com/news/ryanair-welcomes-ecj-mons-ruling-upholding-eu-law-ryanairs-position-on-member-state-jurisdiction-for-international-transport-workers/

[14] https://www.twobirds.com/en/news/articles/2017/uk/uk-employment-law-case-updates-oct-2017#2

[15] Opinion delivered on 27 April 2017 on joined cases C-168/16 and C169/16, §73 and following

3.3.2. Parallel interpretation and justification of decisions

26. The judgments used by the Court of Justice in its reasoning for determining what constitutes 'the place where the employee habitually works' (see note n°3) concern the interpretation of the Rome Convention.

    c. The fact that the Court uses those cases is not a coincidence. The Court of Justice makes clear that the concept 'the place where the employee habitually works' in the Brussels I Regulation corresponds to that of the Rome Convention.

    d. Therefore, it could be deduced that, *faced with the same question* in the context of the interpretation of the *law applicable* to the employment contract of aircrew, the Court of Justice would draw the same conclusions, i.e. confirm the existence of a presumption that aircrews are protected by the employment law of the country of their home base, unless other closer links are demonstrated. A different conclusion in the context of the determination of the applicable law would be difficult to understand.

3.3.4. The intention of the legislator when incorporating the Rome Convention into EU law was to clarify that the habitual place of work for air crews is their home base

27. Finally, the European legislator explicitly mentioned the objective to establish a connection between applicable law and aircrew's home base. Indeed, when implementing the Rome I Convention into EU law (adoption of Regulation 593/2008), the Commission changed the article on the law applicable to employment contracts which used to refer to "*the country in which the employee habitually carries out his work in performance of the contract*" to say "*the country in or from which the employee habitually carries out his work in performance of the contract.'*

28. The Commission justified this change to reflect the interpretation of the Court of Justice and to '*make it possible to apply the rule to personnel working on board aircraft, if there is a fixed base from which work is organised and where the personnel perform other obligations in relation to the employer (registration, safety checks)*'.[16]

3.4. Possible circumstances that could refute the presumption established by the Court of Justice

3.4.1.1. Bogus base:

29. If the employer arbitrarily allocates the home base without responding to the reality of the operations, home bases no longer satisfy the circumstantial method based on indicia required by the Court of Justice. By reminding the need to always fulfil the circumstantial method, the Court of Justice prevents abuses and protects the rights of the employer.

3.4.1.2. Temporary base / posting

30. Employees working temporarily out of their home base or posted may continue to be subject to their original home base's law. This could only be possible if the temporary base is genuinely temporary and the crewmember is expected to return to the home base of origin.

4. Jurisdiction clauses in employment contracts are only valid if they give additional choices to the employee

[16] COM(2005) 650 final, Proposal for a Regulation on the law applicable to contractual obligations (Rome I), Brussels, 15.12.2005

31. Contrary to the Rome Convention on the law applicable to contracts, the parties to an employment contract cannot choose the jurisdiction that will apply to disputes.

32. The Court reminds that the provisions in the Brussels I Regulation on cases related to jurisdiction on employment are intended to protect the "weaker party" by means of "specific" and "exhaustive" rules that are more favourable to their interests. In other words, the jurisdiction clauses cannot derogate to the rules in the Regulation except for allowing employees additional choices.

33. The parties can only agree on a different jurisdiction after a dispute has arisen.

34. The clauses that limit the choice of employees or change the rules in the Brussels I Regulation, such as the ones contained in the disputed Ryanair and Crewlink contracts, should therefore be considered as null and void.

35. The country where Social Security is paid does not determine the place where employees habitually carry out their work

36. The Court of Justice considers that the European legislation on the coordination of social security (Regulations 883/2004 and 987/2009) has different objectives than article 19 of the Brussels I Regulation. While, as stated above, Brussels I aims at obtaining uniform criteria that can be used by all courts for the determination of jurisdiction in employment matters, and protecting the weaker party of the contract by means of rules of jurisdiction that are more favourable to his interests, Regulations on Social Security Coordination aim at facilitating free movement of persons and contributing towards improving persons' standards of living and conditions of employment.

37. Although those objectives are not opposed, they are not necessarily the same and the interpretations of the rules according to the different objectives could lead to different decisions. Ryanair's arguments that Irish courts are competent because crew pay social security in Ireland is therefore dismissed.

38. It should be noted that the Court does not address the claim that there could be a connection between the place where they pay taxes and the place from which they habitually work. There could be different reasons for this. One could be that the Court considers that the same reasoning to disregard other concepts in other pieces of legislation applies to taxes as well. Another reason could be that the court abstains itself from taking a stance in a subject which is not of EU competence.

5. The country where an aircraft is registered does not determine the place where employees habitually carry out their work

39. The Court of Justice rejects the argument that the country where the aircraft is registered could determine the place from which aircrew work, but without really explaining. The Court of Justice only refers to paragraph 65 of the judgement where it says that '*the concept of 'place where or from which the employee habitually performs his work' cannot be equated with any other concept referred to in another act of EU law*.'

40. The absence of justification could be explained by the fact that the Court of Justice already ruled in Voogsgeerd[17] that the flag of the vessel where seamen are employed cannot determine the place where the employee habitually performs his work.

41. Ryanair's argument that their crews are subject to Irish law because they work on Irish aircraft is therefore dismissed.

[17] see note 7 above

6. Conclusions

42. This Judgement constitutes a landmark for aircrew employment. The Court of Justice reaffirms its case law that jurisdiction and 'the place where or from which the employee habitually carries out his work' must to be assessed according to a circumstantial method based on objective facts to prevent abuses and protect the rights of employees.

43. At the same time the Court understands the need to give clarity, predictability and legal certainty to disputes related to aircrew employment by, on one hand, establishing a refutable presumption that the home base is the crew's habitual place of work and, on the other hand by rejecting the relevance of certain other indicia such as the exclusivity jurisdiction clauses in contracts, the nationality of the aircraft or the affiliation to a social security scheme.