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How to Know Which Jurisdiction's Employment Laws Reach Border-Crossing Staff: *A Comprehensive Guide to International Choice-of-Employment-Law and -Forum*

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For the vast majority of employment relationships around the world, choice-of-law analysis is a non-issue that we rarely ever think about. Obviously (for example), a Paris-resident baker working locally for a French bakery is protected only by French employment law. A Buenos Aires-resident banker working locally for an Argentine bank is protected only by Argentine employment law. And so on. Choice-of-law (also so-called “conflict of laws”) analysis in plain-vanilla domestic employment scenarios is so simple, so intuitive and so uncontroversial that it almost never comes up.

But choice-of-employment-law becomes a hot issue—sometimes fiercely contested in expensive litigation—in *cross-border* employment relationships, for example:

- international business travelers (employed in one country, temporarily working in another)
- expatriates and international “secondees”
- foreign hires (recruited in one country to work in another)
- international commuters (living in one country but working in another)
- foreign correspondents and overseas teleworkers (working in one country for an employer in another)
- employees with international territories (working in several countries at the same time)
- mobile or “peripatetic” employees (with no fixed place of employment—sailors, flight crews, international tour guides and the like)
- international co-/dual-/joint-employees (staff split-payrolled by, or simultaneously employed by, two employer affiliates in different countries)
- former employees accused of having breached a post-term restrictive covenant in a jurisdiction other than the final place of employment

These scenarios implicate employment across borders, and surely the most common question in cross-border employment law is: *Which country’s employment laws reach border-crossing staff?* Plus there are the follow-on questions: *Which country’s courts can adjudicate disputes between border-crossing staff and their employers?* And: *To what extent is a choice-of-law provision enforceable when it appears in an employment agreement, expatriate assignment letter, employee benefits program or compensation plan?*

These three questions get asked—or, certainly, they *should* get asked—when an employer recruits, hires, employs, rewards and dismisses an employee in any cross-border employment arrangement. These questions get asked when a multinational employer structures a mobile job, an expatriate posting, an overseas “secondment” or even a long international business trip. These questions get asked when a multinational drafts cross-border employment policies and international benefits or equity plans. These questions get asked as to restrictive covenants and employee intellectual-property assignments with cross-border territorial scope. Indeed, these questions even come up when an organization contracts with an overseas independent contractor (because of the risk of misclassification as a *de facto* employee). And these questions become vital when an employer needs to dismiss border-crossing staff, because these questions implicate “forum shopping”—and it has been said that employees who can “forum shop” wield “powerful ammunition in negotiations over compensation.”¹

The full answer to these three questions is, at the same time, both simple and complex. A simple general rule applies most of the time, but that general rule is subject to nuances, refinements, strategies, exceptions and purported exceptions. To lay out the full answer to these questions requires a rather detailed discussion analyzing three topics: (1) the general rule on the territoriality of employment protection laws, (2) nuances and refinements to the territoriality rule, and (3) contractual choice-of-law and choice-of-forum provisions and the territoriality rule. We address all three topics here.

¹ P. Frost & A. Harrison, “Company Uniform,” *The Lawyer* (London), Dec. 11, 2006 at 21.

Part 1: The General Rule on the Territoriality of Employment Protection Laws

The U.S. Army used to run an English Channel ship repair center in Hampshire, England. Back in 2006, “for strategic reasons” the Army closed the shipyard.² But in shutting it down, the Army ignored an English labor law that prohibits layoffs of 20 or more workers within 90 days unless the employer first “consult[s]” or negotiates “about the dismissals” with the employees’ representatives—even if they are not unionized.³ An English accountant called Mrs. Nolan sued the Army for laying her off without first consulting, but the Army fought back in court, arguing English labor law does not reach an overseas U.S. Army post engaged in activities that are *jure imperii* and are not *jure gestionis* (sovereign immunity concepts)—and besides (the Army argued), in the international public-sector context, UK and European Union labor laws are *ultra vires* (lacking authority).⁴

The case adjudicating these rarified legal defenses dragged on for nine years, going all the way up to the UK Supreme Court. In 2015, the Supreme Court issued a 45-page opinion that upheld for Mrs. Nolan the profoundly simple rule that local (here, English) labor law applies locally (here, in England) to protect employees who work locally (here, Mrs. Nolan).⁵ The UK Supreme Court’s *Nolan* decision is just one of thousands of employment cases around the world reinforcing the basic, obvious, intuitive and uncontroversial general rule that underlies all choice-of-employment-law: *Employment protection laws are territorial to the place of employment*. That is, the employment-protection laws of the place where you work protect you. It took the UK courts nine years to affirm that even Latin-denominated concepts as esoteric as *jure imperii*, *jure gestionis* and *ultra vires* do not override such a fundamental principle.

The corollary or inverse or outbound prong of this “territoriality” rule is that employment protection laws of all jurisdictions *other than* the current place of employment—even the place of an employee’s citizenship, the place of hire or (as in the *Nolan* case) the place of the employer’s headquarters—generally do *not* reach into overseas jurisdictions (unless expressly drawn in by an agreement between the parties). That is, if you work in jurisdiction X, then not only do jurisdiction X’s employment-protection laws protect you, but jurisdiction Y’s employment-protection laws do not.

In short, when contemplating which jurisdiction’s laws apply in a cross-border employment scenario, always begin with this basic, presumptive “territoriality” rule. Always assume, as a starting point, that employment protection laws are territorial to the place where the employee now works. Not only does the law of the place of employment control, but (per the rule’s corollary, inverse or outbound prong), employment laws of other jurisdictions do not also apply. And remember that this rule applies to all employees, vulnerable low-wage laborers as well as high-compensated executives.

This said, the territoriality rule of employment protection law is just a strong general rule or presumption that applies most of the time—there are very rare deviations where a court flatly holds the general rule does not apply.⁶ In addition, though, there are lots of nuances, refinements, strategies, partial exceptions and purported exceptions to the general rule, which we discuss in detail here. Because our discussion here grows out of the fundamental rule of the territoriality of employment protection laws, we begin by explicating the core rule itself, addressing: (A) examples of how the territoriality rule works—including United States examples and expatriate examples, (B) public policy behind the rule, and (C) the “employment protection” law concept.

² *USA v. Nolan*, [2015] UKSC 63.

³ That British labor law is the UK Trade Union and Labour Relations (Consolidation) Act 1992, as amended in 1995, § 188. (If the employees are not unionized and so do not have any standing team of worker representatives, English law requires they be allowed to designate representatives for purposes of consulting over the lay-off.)

⁴ *Nolan*, *supra* note 2 at ¶ 12.

⁵ *Nolan*, *supra* note 2.

⁶ *E.g., Sabd-Krutz v. Quad Electronics*, US DC ED Cal. case no 2:15-cv-0021-MCE-AC, op. of July 7, 2015 (non-compete enforceable under foreign state’s law where employee was hired out-of-state, does “99%” of work out-of-state and moved in-state only for personal convenience).

A. Examples of how the territoriality rule works

As an example of how the general rule on territoriality of employment protection laws works, imagine a hypothetical 14-year-old legally employed for a while in her home country, who then moves to a new country with a minimum child labor age of 16. Even if a guardian consents to applying this child's home-country employment law, obviously this girl is too young to work in the new jurisdiction. As another example, imagine an employer with staff in a state that imposes a high minimum wage. This employer obviously cannot legally pay personnel below the state minimum—even if it can lure in workers from another state with a lower minimum wage who agree, contractually, to apply home-state law. Yet another example is health and safety law: No jurisdiction will compromise its workplace health and safety laws, even for an employee inpatriate from another jurisdiction with laxer health/safety laws who is willing to apply home-country rule.

- **United States examples.** When U.S. employers branch out overseas, they often want to export employer-friendly U.S.-style employment-at-will principles (at least to U.S. expats relocating abroad). U.S. organizations often chafe at the general rule on the territoriality of employment protection laws—Americans often see the rule as heavy-handed and they often speak of it as a quirk of hyper-protective foreign regimes hostile to employment-at-will. But a frustrated U.S. employer should at least acknowledge: *We impose this very rule ourselves.*

The employment protection laws of a U.S. place of employment almost always apply in the face of less-protective regulations from some other jurisdiction, even if the parties had contractually selected foreign law. In the words of the U.S. Court of Appeals for the Ninth Circuit, laws that “seek to protect...workers” are “protective legislation” constituting public policy so deeply “fundamental” that employers and employees cannot opt out of or contract around them.⁷ Under the framework of the American Restatement (Second) of Conflict of Laws § 187(2)(b), an employee's current place of employment has “a materially greater interest” in applying the “fundamental policy” of its employment protection laws than does a foreign jurisdiction—even a jurisdiction that an employer and employee may have contractually selected.

Imagine hypothetically a Pakistani technology company transfers an entry-level Karachi programmer (Pakistani citizen with U.S. work visa) to its branch in Palo Alto. Imagine the programmer signs a contract calling for the law of her and her employer's home country—Pakistan. Pakistan obviously has a strong nexus to this particular employment relationship, so under commercial principles, this choice-of-law clause would be presumptively enforceable.⁸ But imagine that after the programmer's place of employment shifts to California, she continues to earn a Pakistani wage less than the U.S. minimum, she gets sexually harassed, she suffers an injury because of a workplace safety violation and she gets disciplined for using social media to criticize her boss. The Pakistani programmer might file claims with the U.S. Department of Labor, the EEOC, OSHA, the NLRB and California state agencies, and she might file a California state workers' compensation claim. In defending against these charges, the employer could invoke the affirmative defense of the contractual choice-of-Pakistan-law clause. But few American lawyers would bet on that defense prevailing. America's federal and California's state public policy void most prior waivers of employment protection laws—including waivers in the guise of foreign choice-of-law clauses.⁹ Just as an agreement to work for less than minimum wage would be void under the U.S. Fair Labor Standards Act, and just as an advance waiver of workplace safety law would be void under OSHA, a contractual selection of Pakistani wage law will be void if Pakistan's minimum wage is below the FLSA minimum, and a contractual selection of Pakistan's workplace safety law will be void if Pakistani health and safety standards are below U.S. OSHA standards. Any court holding otherwise would push this California-based employee out of the safety net of American and Californian employment protection laws.

⁷ *Ruiz v. Affinity Logistics*, 667 F. 3d 1318 (9th Cir. 2012), *later proceeding* 2014 U.S. App. LEXIS 11123 (9th Cir.).

⁸ Restatement (Second) of Conflict of Laws § 187(2)(a).

⁹ *Ruiz*, *supra* note 7.

- **Expatriate examples.** Of course, the general rule on the “territoriality” of employment protection laws often arises in—and usually applies to—the *expatriate* context. A business expatriate is an employee originally hired in (and originally working for) an employer in a *home* country who later moved to, and who now works for that same employer (or an affiliate) in, a new *host* country. The territoriality rule dictates that the employment protection laws of an expatriate’s new host country (the new place of employment) protect the expatriate, even where both the expatriate and the employer are from the same foreign home country. For example, the French Supreme Court has held that New York employment law, not French law, covers French citizens who work in New York even for French-owned employers.¹⁰ As another example, the Ontario Superior Court of Justice rejected an employment claim invoking Canadian law of a Canada-hired Canadian who got transferred to New York and then fired.¹¹

The rule in these cases becomes particularly significant when an American employee leaves the United States, because of America’s employment-at-will doctrine. As mentioned, the territoriality rule dictates that an American whose place of employment shifts abroad almost always steps out of employment-at-will and into the safety net of host country employment protections—the “indefinite employment” regime of vested rights, caps on hours, mandatory vacation, severance pay and termination protections.

B. Public policy behind the rule

The general rule on the territoriality of employment law emerges from a strong underlying public policy: Employment protection laws tend to be strands in the legal safety net that each jurisdiction erects to protect people who work inside its territorial borders. If some jurisdiction’s employment safety net fails to catch certain people who work locally—for example, if the employment protection laws of some country exempted foreign citizens working in-country (say, immigrants, “in-patriates,” or those working for foreign-headquartered organizations), then employers might withhold the jurisdiction’s minimum labor protections under its “mandatory rules.” From a public policy point of view, the issue becomes exploitation: Just because some worker happens to be an immigrant, an in-patriate or an employee of a foreign organization should not give the employer an excuse to pay less than local minimum wage, to flout local health and safety regulations or to violate any other local employment protection law, be it a discrimination law, a restrictive covenant law, a severance pay law or any other employment law.

And the corollary of the general rule on the territoriality of employment law (the inverse or outbound prong) also emerges from a strong underlying public policy: Jurisdictions are poorly positioned to police compliance overseas with their domestic workplace regulations. And under the principle of sovereignty, each jurisdiction has the primary and keenest interest in regulating workplaces on its own soil, protecting workers working on its own soil. A jurisdiction’s employee-protection laws generally should not reach outside its territorial boundaries.

C. The “employment protection” law concept

Under this territoriality rule, *employment protection* laws of a jurisdiction are mandatory rules applicable locally by force of public policy. Employment protection laws tend to include most all of a jurisdiction’s rules regulating the employment relationship—its laws regulating, for example, pay rate, payroll, overtime, workplace health/safety, child labor, payroll contributions, mandatory benefits, caps on hours, rest periods, vacation/holidays, labor unions/collective representation, discrimination/harassment/bullying/“moral” abuse, employee-versus-contractor classification, and restrictive covenants/non-competes/trade secrets/employee intellectual property. In addition, employment protection laws also include the full suite of laws that regulate *dismissals*—laws on “good cause” for firing, dismissal procedures, pre-dismissal notice periods, mandatory retirement, severance pay and severance releases. In the employment context, mandatory rules also include data protection (privacy) laws, which are not even employment laws.

¹⁰ French Sup.Ct. dec. 10-28.563 of Feb. 2012 (many French choice-of-employment-law cases involve so-called “French employment contracts,” which—as we discuss *infra* part 3(B)—generally compel a different result; this case did *not* involve “French employment contract”).

¹¹ *Sullivan v. Four Seasons Hotels*, 2013 ONSC 4622 (2013).

And so a given jurisdiction's "employment protection" laws or "mandatory rules" that apply by force of public policy tend to include all its local laws regulating local workplaces, except for (maybe) certain rules on the structure of executive compensation, equity/stock options and non-mandatory benefits. But that said, in some jurisdictions even laws regulating compensation and equity plans are also "mandatory rules." In short, the body of the employee-protection laws of a jurisdiction tends to include most all of its labor and employment (and data protection) laws. Only a tiny subset of a country's labor and employment law does not qualify as employee-protection law.

Part 2: Nuances and Refinements to the Territoriality Rule

The territoriality rule of employment protection laws almost always controls, except for some rare deviations where a court flatly holds against the rule.¹² But while court decisions rejecting the territoriality rule are quite rare, this rule itself is subject to six nuances, refinements, strategies, partial exceptions and purported exceptions. That is (rare exceptional cases aside), courts around the world tend to decide choice-of-employment-law disputes consistent with the territoriality rule *only after the rule has filtered through six layers of nuances or refinements*. These nuances and refinements can get complex and can compel careful legal analysis.

We might characterize the nuances and refinements to the general "territoriality" rule of employment protection laws as: (A) disputed "place of employment," (B) wage/hour and health/safety laws, (C) Communist and Arab deviations, (D) extraterritorial reach, and (E) affirmative defenses arising from the international context. We discuss those five nuances and refinements here, in part 2. Then in part 3 we address the sixth and most significant nuance or refinement: choice-of-law and choice-of-forum provisions in employment agreements.

A. Disputed "place of employment"

While the general rule on the territoriality of employment law almost always applies, *which country* is the territory whose law controls sometimes gets disputed. That is, which country is a given employee's current "place of employment" is sometimes unclear—a disputed fact question that can get complicated.

In assessing which jurisdiction's employment laws reach a given cross-border employment relationship, the first step is identifying that employee's (current) place of employment. *Place of employment* is a legal concept analogous to "residence" and "domicile." Every employee is generally held to have just one place of employment at a time. Assessing a given mobile employee's current place of employment is sometimes hard, and is sometimes disputed.

Fortunately, on a per-employee basis, questions about what is a given employee's place of employment are rare, because the place of employment of the vast majority of the world's workforce is obvious and uncontested. Usually a given worker's place of employment is, simply, the address on his business card, email signature and paycheck stub. It is the place where his office phone rings or where his work computer gets docked. But the place of employment of a small minority—the mobile workforce—gets questioned. What is the place of employment of a "peripatetic employee" like a flight steward, pilot, sailor or salesman with international territory? What about a so-called "international commuter" living in one country but with an office in another? What about an expatriate who mostly works in one country but whose assignment documentation purports to base him elsewhere? What about a so-called "stealth expatriate" who works out of an overseas hotel or at a location unknown to the employer? What about an employee whose boss tolerates working remotely from a home in a jurisdiction away from the office? Where do we draw the line between someone working temporarily abroad on a very long business trip versus an expatriate on a very short term overseas posting? What is the place of employment of a reassigned expat who worked in a home country for decades—but who moved to a new host country only yesterday? Determining "place of employment" in situations like these turns on the facts—and can be complex. According to one article:

The most contentious issue [in choice-of-employment-law analysis under U.S. law] that

¹² E.g., *Sabd-Krutz*, *supra* note 6

has arisen...in recent years seems like a final exam question in a philosophy class: Was the plaintiff even employed overseas? Routinely, plaintiffs [invoking U.S. employment law] assert that their overseas assignment was only temporary or that their work should otherwise be viewed as U.S.-based. There is no consensus test for determining where the employee was actually employed. Most courts focus on the “primary work station” test which typically results in finding overseas employment, while others opt for a “center of gravity” test, which can produce some surprising results in holding workers, who are in fact overseas, to be constructively employed stateside. Under either test, courts may look at factors such as the location of the employee’s desk or work station, what the employee’s business card says, and the duration and amount of any overseas work.¹³

Inevitably in these scenarios, someone always asks: *How long does an employee have to work in a place before it becomes the place of employment?* There is no answer, because time worked in a given workplace is only one factor in assessing place of employment. Italy is the place of employment of a secretary who was hired just yesterday to work a local job at an office in Rome—but Italy is not the place of employment of a Tokyo-based banker who has been working in Milan for the last two months, closing a deal on a long business trip.

Having said “place of employment” is a legal concept analogous to residence and domicile, understand that different jurisdictions apply different iterations of this concept—sometimes using different labels. For example, U.S. immigration law looks to whether a worker is a “U.S. employee.” Europe’s Rome I Regulation on conflict of laws looks to which jurisdiction is “habitually” a given employee’s place of “work”¹⁴ and English case law considers which jurisdiction has the strongest “connection” to an employment relationship.¹⁵ While a U.S. court will analyze the “place of employment” of (for example) a pilot, sailor or expatriate, the EU Court of Justice case might assess that pilot’s, sailor’s or expat’s “habitual place of work” while an English employment tribunal might analyze which jurisdiction has the strongest “connection” to that pilot’s, sailor’s or expat’s job. Speaking comparatively, these legal concepts do not always align perfectly. Our discussion here generally speaks to “place of employment,” while recognizing that some jurisdictions impose analogous but subtly different legal concepts.

B. Wage/hour and health/safety laws

In most all jurisdictions of the world, *wage/hour and workplace health/safety* laws tend to be mandatory rules that reach everyone rendering services locally—even an incoming business traveler or guest worker only temporarily working in a host country (an employee with an overseas place of employment and employment relationship otherwise governed by home country law). That is, laws regulating minimum wage, overtime, caps on hours and worker health/safety tend to protect even inbound business travelers and guest workers who otherwise ostensibly retain a different home-country place of employment and who are otherwise subject to home country employment law on other topics—unionization, workplace privacy, employee benefits, vacations, discrimination/harassment, dismissal and the rest. In the European Union this issue falls under the controversial “Posted Workers Directive” which extends wage/hour, health/safety (and for that matter other host-country employment protections) to incoming guest workers.¹⁶ In the United States, wage/hour law kicks in after a visiting employee has been on U.S. soil for just 72 hours, and health/safety laws may apply to everyone working stateside even for just an hour.¹⁷

The policy here as to *wage/hour* laws is straightforward: If an incoming business visitor were exempt from host-country wage/hour law because of a foreign place of employment, then a temporary short-term guest worker from a jurisdiction with looser wage/hour laws could come in and undercut locals. For example, a St. Louis employer cannot bring in a temporary guest worker from Guatemala (even with a guest-worker visa) and pay Guatemala’s minimum wage—undercutting and

¹³ K.Connelly & L.Chopra, “[Extraterritorial Application of U.S. Discrimination Laws](#),” Law 360 online (Aug. 21, 2012) (paragraph breaks omitted).

¹⁴ Cf. Europe Rome I Regulation, EU Reg. 593/2008/EC (6/17/08) at arts. 8, 21.

¹⁵ E.g., *Lodge v. Dignity & Choice in Dying*, UK EAT/0252/14(2014).

¹⁶ EU Posted Workers Directive, 96/71/EC, at art. 1 (focusing on place “where the work is carried out”).

¹⁷ U.S. Dep’t of Labor Wage & Hr. Div. Field Operations Handbook (5/16/02) at §10e01(c) (U.S. Fair Labor Standards Act covers guest workers after 72 hours in U.S.).

presumably displacing a local from St. Louis.¹⁸ The policy here as to *health/safety* laws is different but equally straightforward: It would be seen as cruel if an employer could withhold otherwise-mandatory health/safety protections from a worker who happens to be a business visitor or guest worker. For example, imagine a U.S. OSHA regulation requires that employers provide hand guards on buzz saws, and imagine a Kansas City employer gives a buzz saw missing the hand guard to an engineer visiting for the week from Germany. If the German accidentally cuts off his hand, “victim visitor status” is probably a loser defense to the inevitable OSHA charge.

C. Communist and Arab deviations

A handful of exceptional jurisdictions—mostly the five remaining Communist countries (China, Cuba, Laos, North Korea and Vietnam) but also including Indonesia and a few others—actually impose national employment laws to protect their local citizens at the expense of immigrant foreigners. Or, at least, these jurisdictions let non-citizen “inpatriates” opt out of their national employment regulations. These jurisdictions want their domestic employment protection laws to protect their local citizens, but do not seem to care whether their local employee-protection safety net stretches to protect non-citizen inpatriates (who are likely to be well-compensated and well-protected, anyway). So law in these jurisdictions either does not reach non-citizens or at least is hospitable to employment-context choice-of-foreign-law arrangements with non-citizen staff.¹⁹

Similarly, some employment laws in some Arab countries reach only local citizens, or at least accommodate choice-of-foreign-law provisions—for example: minimum wage laws in the UAE; social security rules in the UAE and Saudi Arabia; Saudi employment protections for Saudi citizens and end-of-service gratuities in a handful of Arab jurisdictions. These exceptions, though, are rare even in the Arab world.

D. Exceptional extraterritorial reach

We said that under the territoriality rule of employment protection law, a host country’s employment protection laws protect even inpatriates and immigrants whose place of employment shifts into the host country, and under the corollary or inverse or outbound prong of this rule the employment laws of a given jurisdiction tend *not* to follow workers who emigrate to go off and work abroad. But this corollary/inverse/outbound prong is merely a presumption or general principle—and is subject to some important exceptions. A handful of jurisdictions actually impose “sticky” employment protection laws that attach to certain local citizens, local residents or local hires, following them after they move away. These sticky employment laws are said to have an “extraterritorial” reach, reaching beyond the home territory.

Someone working in an overseas host country can enforce an extraterritorial home country employment-protection law (usually asserting that claim in a home-country forum) even though he simultaneously enjoys the full protection of host-country employment law. That is, the analysis here is cumulative, not “either/or”: Where employment laws reach extraterritorially, a hapless employer has to comply with *two jurisdictions’* sets of workplace laws at the same time, and must always meet the *higher* of the two jurisdictions’ employment protections. (We can put aside the scenario of a host-country employment law that *compels an employer to violate* an extraterritorial-reaching home country mandate, because that situation almost never happens in the real world. Where it does, follow host-country law.)

The United States, Canada, England, Australia and some South American countries offer examples of exceptional jurisdictions that presume to extend at least some employment protection laws extraterritorially in at least some situations. And then there are *emigration* laws, which have a similar effect:

- ***U.S. discrimination and whistleblower retaliation laws.*** In 1991, the U.S. Congress swiftly reversed a 1991 Supreme Court decision²⁰ by passing the Civil Rights Act of 1991.²¹ Since then,

¹⁸ At least not after the Guatemalan is stateside for over 72 hours. *Supra* note 17.

¹⁹ As discussed in part 3, *infra*, this differs from how *other countries* treat choice-of-foreign-employment law provisions.

²⁰ *EEOC v. Aramco* (499 U.S. 244).

²¹ Pub. L. 102-166.

the major U.S. federal discrimination laws have reached U.S. citizens who work abroad for U.S. “controlled” multinationals²²—even as host-country discrimination laws usually apply simultaneously as mandatory rules that employers and employees cannot contract around.²³ That said, the Genetic Information Nondiscrimination Act of 2008 does not reach abroad.²⁴

As to how the extraterritorial reach of U.S. discrimination laws works in practice, imagine a hypothetical 42-year-old U.S. citizen office manager formerly working in, but now fired from, the Brussels office of a Silicon Valley tech company. This U.S. expatriate could simultaneously bring both a Belgian labor court unfair dismissal or discrimination claim and a U.S. gender, race or age discrimination charge—regardless of any choice-of-law provision in her employment contract and even if her employer’s human resources department categorized her as a “local hire” rather than a company expatriate on assignment in Belgium. Damages might (perhaps) get offset, but the Belgian and American claims are independent causes of action. This scenario is not just theoretical: For decades now, American multinationals have been defending the occasional double-barreled, two-country dismissal claim.

This said, just because the major U.S. discrimination laws *can* reach extraterritorially to protect U.S. citizens working overseas for U.S.-controlled multinationals does *not* guarantee a U.S. remedy in U.S. courts. Under recent case law, even a U.S. citizen whose place of employment is overseas and who works for a U.S.-controlled employer might *not* be able to assert a U.S. discrimination law claim in a U.S. forum either if the U.S. is deemed an inconvenient forum (*forum non conveniens*) or if the employee had selected host-country law or a host country forum:

- *Forum non conveniens*. In 2015 the Ninth Circuit Court of Appeals affirmed the dismissal of an American citizen employee’s Title VII and ADEA lawsuit alleging a Dutch subsidiary had discriminated against her.²⁵ The American sued both the Dutch subsidiary and U.S. headquarters in an Oregon federal court, but the Ninth Circuit affirmed a complete dismissal: U.S. courts had no personal jurisdiction over the Dutch subsidiary and exercising U.S. jurisdiction over headquarters was inappropriate on *forum non conveniens* grounds because the Dutch-working employee had an adequate remedy under local Dutch employment discrimination law. Because most countries now prohibit employment discrimination in some respects, expect other lawsuits in U.S. courts invoking the extraterritorial reach of America’s discrimination laws to be subject to dismissal on these grounds.
- *Choice of host-country law or forum*. Later we discuss the effect of contractual choice-of-law and choice-of-forum clauses in cross-border employment.²⁶ One effect of those clauses is that they can waive the extraterritorial reach of U.S. discrimination law. For example, in 2014 a U.S. federal appeals court dismissed a U.S. citizen’s London-arising extraterritorial claim under U.S. discrimination law because that expat had, previously, signed a contract selecting English law and English courts to adjudicate any later-arising employment dispute.²⁷

22 The principle here is that the employer is “controlled” from the United States. Generally, any U.S.-headquartered multinational will be held to be U.S.-controlled, and even certain overseas operations of non-U.S.-headquartered multinationals may be held to be U.S. “controlled” if they report up to a U.S. regional center. Several U.S. case opinions, law review articles and provisions of “EEOC Enforcement Guidance” explicate the scope of the so-called “control test” in this context.

23 Cf. 29 USC §§623(h) (ADEA abroad); 42 USC §§2000e-1(a), (c), 2000e-5(f) (3) (Title VII abroad); 42 USC §§ 12111(4), 12112(c) (ADA abroad). See generally Connelly & Chopra, “[Extraterritorial Application of U.S. Discrimination Laws](#),” *supra* note 13.

24 Pub. L. No. 110-233, 122 Stat. 881.

25 *Ranza v. Nike Inc.*, 793 F.3d 1059 (2015).

26 *Infra* part 3.

27 *Martinez v. Bloomberg LP*, 740 F.3d 211 (2014). One factor in the *Martinez* court’s decision was that English substantive law also prohibits the alleged discrimination. If a choice-of-law clause were to select a forum that does not prohibit the alleged discriminatory act, the result might be different.

While U.S. discrimination laws tend to reach “extraterritorially,” *other* American employment laws including the FMLA, FLSA, OSHA and WARN do not extend overseas.²⁸ This is because U.S. labor/employment laws (other than discrimination laws) tend to be silent on whether they reach abroad—and no federal statute in the entire U.S. Code reaches abroad unless its statutory text “clearly expresse[s]” that it does.²⁹ That said, though, sometimes an international employment fact scenario arises in which an American state or federal court applies American domestic state or federal employment law not because that particular law reaches extraterritorially, but because that court decides a domestic American employment law controls that dispute. That is, the court reasons it is adjudicating a domestic American employment matter that happens to involve some incidents overseas. These cases turn on the legal question of whether the particular dispute at issue arises under domestic American law—and, of course, on the relevant employee’s place of employment. One complex line of these cases is the evolving body of law on the overseas reach of the Sarbanes-Oxley whistleblower retaliation statute, SOX § 806—which courts have held is not an employment law, and which does not necessarily conform to choice-of-employment-law analysis. Some but not all extraterritorial § 806 cases let overseas plaintiffs invoke rights under § 806. Some but not all of those cases expressly hold that § 806 reaches extraterritorially. But the cases that extend § 806 abroad tend to anchor the specific dispute in acts done or decisions made domestically in the United States.³⁰

- **England.** English employment protection statutes tend to follow the general territoriality rule and are confined to employment on English soil. And so an Englishman who works outside England for an English-controlled employer rarely gets to invoke English employment protection laws, such as under the Employment Rights Act 1996. Indeed, even an employment contract that expressly invokes “English law” in a workplace outside England usually fails to export English employment statutes, because that English law clause itself is supposed to be governed by the English common law of contracts and English choice-of-law principles, and these confine English employment protection statutes to employment physically within England.³¹

English case law, though, carves out increasingly intricate exceptions. For example, English employment law reaches abroad into “enclaves” of Britons who work abroad directly servicing U.K. domestic entities like British foreign correspondents writing for London newspapers and Britons stationed in U.K. embassies, on U.K. military bases or at other foreign outposts—and including telecommuters working abroad from home on English business. Cases construing this exception turn on their facts; the English court decisions closely analyze specific nuances at issue in each particular scenario, significantly narrowing the precedential value of these decisions.³² The English cases adjudicating the outer limits of the exception keep evolving, although the exception remains narrow, at least in theory.

28 FMLA does not extend abroad: 29 U.S.C. § 21611(2)(A); 29 C.F.R. § 825.102, 825.105(b). FLSA does not extend abroad: 29 U.S.C. § 213(f); see *Cruz v. Chesapeake Shipping*, 932 F.2d 218 (3d Cir. 1991) (FLSA does not extend abroad); *Wright v. Adventures Rolling Cross Country*, case no. C-12-0983 EMC., U.S. D.C. N.D. Cal., Order of 5/3/12 (FLSA and California wage/hour law do not reach abroad); U.S. Dept. of Labor Wage & Hr. Div. Field Operations Handbook, *supra*, at §10e02 (FLSA does not reach U.S.-based workers working an entire workweek or more abroad). OSHA does not extend abroad: 29 U.S.C. § 653(a). WARN does not extend abroad: 20 C.F.R. § 639.3(i)(7).

29 *RGR Nabisco v. Euro. Cmt’y*, 136 S.Ct. 2090 (2016) (“clearly expressed” at pgs. 2102-03); *Morrison v. Aust. Nat’l Bank*, 561 U.S. 247 (2010); *EEOC v. Aramco*, *supra* note 20.

30 See *Carnero v. Boston Scientific*, 433 F.3d 1 (1st Cir. 2006), *cert. den.* 548 U.S. 906 (2006) (SOX § 806 does not reach abroad); *O’Mahoney v. Accenture Ltd.*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008) (SOX whistleblower in France states a retaliation claim where alleged retaliation occurred in the U.S.); *Blanchard v. Exelis Syst. Corp.*, U.S. Sec’y of Labor Administrative Review Board [ARB], case no. 15-031 (Aug. 29, 2017) (SOX § 806 extends abroad where the claim is anchored in acts done or decisions made domestically in the United States); *Villanueva v. Core Labs*, ARB, case no. 2009-SOX-006 (Dec. 22, 2011), *aff’d on other grounds* 743 F.3d 103 (5th Cir. 2014) (SOX § 806 does not reach abroad under facts alleged).

31 *Cf. Ravat v. Halliburton*, [2012] UKCS 1 at §§32-33.

32 *E.g.*, *Seahorse Maritime Ltd. v. Nautilus Int’l*, UK EAT/0281/16/LA (2017); *Olsen v Gearbulk Services et al.*, UK EAT/0345/14 (2015); *Lodge v. Dignity & Choice in Dying*, UK EAT/0252/14 (2014); *Dhunna v. Creditrights* [2014] IRLR 953; *Ravat v. Halliburton*, *supra* note 31; *Duncombe v. Sec’y of State for Children, Ministry of Defense v. Wallis & Anr.*, [2011] ICR 495; *Blouse v. MBT Transport Ltd.*, [2007] UK EAT/0999/07 & EAT /0632/07; *Lawson v. Serco*, [2006] ICR 250; *Saggar v. Ministry of Defence*, [2005] EWCA Civ. 4133. See Sarah Ozanne, “Recent Developments in the Territorial Scope of UK Employment Law,” 16 IBA BUSINESS LAW INT’L 265 (2015).

- **Australia.** Whether Australian employment statutes reach extraterritorially turns on the facts involved and on the employment law invoked. Generally an Australian citizen hired in Australia but now working abroad for an Australian employer entity can invoke protections under Australian employment statutes, but Australian hires who get “localized” on foreign assignments—working abroad for non-Australian-incorporated affiliates—cannot.³³
- **South America.** Some but not all South American countries expressly extend their employment protection laws abroad, at least under certain scenarios in certain circumstances. Colombia, much like the England, extends its employment protection laws extraterritorially only where an overseas-working employee reports directly into management in Colombia, “subordinated” to Colombian control.³⁴ At the other extreme, Venezuelan extends most Venezuelan employment protection laws outside Venezuela to protect Venezuelan expatriates originally hired in Venezuela but now working abroad.³⁵

Brazil extends Brazilian employment protection laws extraterritorially to protect Brazilians temporarily posted overseas.³⁶ This doctrine is vital whenever a U.S. company calls up someone from its Brazil facility to come work in the United States. Usually Brazilian employment law attaches only to temporary foreign assignments, not permanent moves. Depending on the judge, though, Brazilian courts may apply this rule only for Brazilian citizens or only to those originally hired in Brazil. Brazilian courts aggressively enforce this rule. In one case, a Brazilian who had worked as a mason in Angola won overtime pay, severance pay and other benefits due under Brazilian law for work performed in Angola.³⁷ In another case a Brazilian court awarded “moral damages” under Brazilian law to a Brazilian who had worked lots of hours on a job in Angola—even though he had properly been paid for the overtime.³⁸

- **Emigration laws.** While all countries regulate immigration, some countries that export lots of laborers actually impose restrictions on *emigration*—these jurisdictions regulate employers that recruit locals to go work abroad or that post locals overseas as expatriates. Emigration restrictions act as extraterritorial employment laws that extend certain employment protections overseas. While emigration laws are meant to protect *low-wage* locals lured to work overseas positions in countries where there is a perception of worker abuse (for example, Filipino domestic servants and construction laborers lured to work in the Middle East), emigration-protection laws usually reach cross-border white-collar recruitments and postings. For example:
 - The Philippines regulates employers that recruit Filipinos to work abroad, requiring registrations and permits from two separate Filipino agencies and imposing standard form overseas employment agreements.
 - Guinea requires that employers pay both social security and tax withholdings on behalf of Guinean expatriates working abroad.
 - Liberia requires a license from the Liberian Ministry of Labor to recruit locals.
 - Ghana and Mozambique require paying expatriates’ moving and repatriation expenses—including for families. Ghana also requires employers of Ghanaian expatriates dispatched abroad to contribute to the Ghanaian social security system, at least under some circumstances.

33 Australia Fair Work Act 2009 §§ 13, 14, 34, 35(2)—but Australia Superannuation Guarantee legislation applies different standards.

34 *Méndez Nieto v. Techint Int’l Construction Corp.*, Colombia Sup.Ct. Justice/Labor Div., case no. SL14426-2014. (# 41948, r. 36)(Oct. 2014).

35 Venez. Labor Code art. 78.

36 Brazil Labor Code § 7062/82, art. 3(11).

37 *Elizeu Alves Correa v. Construtopic Construtora Ltda. et al.*, Brazilian Appellate Labor Court case # 02541- 69.2010.503.0091 (5/16/11).

38 *Mauricio da Silva v. Construtopic Construtora Ltda. et al.*, Brazilian Appellate Labor Court, Third Region case # 01006-2011-091-03-00-0 BO (11/17/11).

E. Affirmative defenses arising from the international context

In certain rare scenarios, the cross-border employment context offers an employer an international-context affirmative defense to a worker's employment law claim. For example, in the *Nolan* (U.S. Army England shipyard) case, the Army waived a sovereign immunity defense that might have been available to it by virtue of its status as a branch of a foreign government. Sovereign immunity and diplomatic defenses apparently prevail sometimes, and lose sometimes, when Cuba sends government-employed doctors to work in Brazil (generating revenue for the Cuban government), and the doctors sue in Brazilian courts demanding to be compensated under Brazilian standards.³⁹ Another example is the "Friendship, Commerce and Navigation" [FCN] treaty affirmative defense to certain employment claims theoretically available to (but only very rarely upheld for) foreign-incorporated employers sued under host country discrimination law.⁴⁰

Conceptually, these substantive affirmative defenses are unrelated to *choice-of-employment law* analysis. For example, if a Japanese employer convinces a U.S. court to dismiss a discrimination lawsuit on FCN treaty grounds, or if Cuba convinces a Brazilian labor court that a Cuba/Brazil bilateral agreement on dispatching doctors compels dismissal of a Cuban doctor's wage claim, those dismissals are because a treaty or international agreement trumps a statute. They are not choice-of-law determinations under conflict-of-laws analysis.

Part 3: Contractual Choice-of-Law and Choice-of-Forum Provisions and the Territoriality Rule

In discussing the general rule on the territoriality of employment protection laws, until now we mostly assumed the employer and employee had not agreed to select a specified jurisdiction's law to control, or court system to adjudicate, if they later get in a dispute. But choice-of-law and choice-of-forum agreements are common in the cross-border employment context, often found, for example, in employment contracts, offer letters, expatriate assignment packages, restrictive covenants, and employee compensation, bonus, benefits and equity plans.

So we turn now to the final, and biggest, nuance or refinement to the general rule on the territoriality of employment protection law: *the effect of a contractual choice-of-law or choice-of-forum provision*. We first address (A) the general rule on contractual choice-of-employment-law provisions, and then we address a number of nuances, refinements, strategies, exceptions and purported exceptions to that general rule: (B) "national" and "hibernating" employment contracts, (C) Europe's Rome I regulation, (D) non-mandatory rules and "Global Employment Companies," (E) restrictive covenants, and (F) forum selection clauses and the Recast Brussels Regulation.

A. The general rule on contractual choice-of-employment-law provisions

The general rule on contractual choice-of-employment-law provisions is: These provisions successfully pull in the law of a contractually-selected jurisdiction that is not the place of employment, but these provisions are powerless to shut off the mandatory application of the employment protection laws of the host country place of employment. For example, consistent with a line of cases in France, a worker whose place of employment is France who signs a choice-of-law clause calling for the law of Andorra, Austria, Belgium, Italy, Texas or the U.K. simultaneously enjoys both a *contractual* right to invoke protections under Andorran, Austrian, Belgian, Italian, Texas or U.K.

³⁹ *Nolan*, *supra* note 2 at ¶ 12; "Slave Labor: Cuban Doctors Rebel in Brazil," New York Times, Sept. 29, 2017, at A1.

⁴⁰ *E.g.*, *Sumitomo Shoji v. Avagliano*, 457 U.S. 189 (1982); *Papaila v Uniden Am.Corp.*, 51 F.3d 54 (5th Cir. 1995); *Fortino v. Quasar*, 950 F. 2d 389 (7th Cir 1991).

law and a French *statutory* law right to invoke French employment protection laws.⁴¹ The worker is positioned to “mix and match” or “cherry-pick” the more employee-protective rules between the two regimes.

- **Policy behind the rule.** We have already discussed the policy behind this rule. As discussed, the employment protection laws of a place of employment generally apply by force of public policy as “mandatory rules.” Imagine (for example) if a worker in a jurisdiction that imposes a high minimum wage and tough workplace safety and discrimination laws signs an agreement purporting to agree to work for less than minimum wage and purporting to waive local workplace safety and discrimination laws. Obviously that waiver is almost surely void, because the jurisdiction’s employment protection laws—here, its minimum wage, safety and discrimination laws—apply by force of public policy as “mandatory rules.” And if that waiver is void, so is a choice-of-law clause *disguised* as a waiver: If this worker signed a choice-of-law provision selecting the law of some jurisdiction with a low minimum wage and with loose workplace safety and discrimination laws, that choice-of-law provision would have the effect of waiving host country minimum wage, safety and discrimination laws. The choice-of-foreign law clause would be a disguised waiver, just as void as an overt waiver.

That said, we have mentioned some rare exceptions—some Communist and Arab-world jurisdictions enforce choice-of-foreign-employment law clauses in some contexts.⁴²

- **Choice of foreign law versus choice of host-country law.** A choice-of-employment-law provision that simply selects the law of a host country place of employment does not raise this problem. That law already applies, anyway. A canny employer strategy in cross-border employment is to use a choice-of-law provision that affirmatively selects the law of the host country place of employment (either by naming that jurisdiction or by saying “the law of the place of employment applies”). Some courts—including at least one U.S. federal appeals court⁴³—hold that a contractual selection of host country place-of-employment law actually shuts off otherwise-extraterritorial employment laws of foreign jurisdictions.⁴⁴ U.S. discrimination law has been held *not* to reach an American citizen working abroad for a U.S.-controlled employer who has contractually selected host-country law.⁴⁵

The rest of our discussion here on employment-context choice-of-law provisions addresses contractual selections of *foreign* employment laws. Provisions that select the law of a *host country* place of employment do not trigger the issues we discuss here.

The upshot of the general rule on contractual choice-of-law provisions in the international employment context is that a choice-of-foreign-employment-law provision often backfires on the employer that originally drafted it and insisted on it. This provision can force a hapless employer to comply with two employment law regimes simultaneously—all the employment laws of the contractually-selected foreign jurisdiction plus all the employment protection laws of the host country place of employment. Usually this employer would have been better off with no choice-of-law clause at all (at least then, only one set of employment laws would apply).

41 *Cour de Cassation* (French Civil Supreme Court, Social Section) case no.14-18.566 (Jan. 13, 2016) (French employment law applies notwithstanding UK-law clause); *Cour de Cassation* case no. 14-16269 (Oct. 28, 2015) (French employment law applies notwithstanding Belgium-law clause); *Cour de Cassation* case no. 09-66571 (Feb. 9, 2012) (French employment law applies notwithstanding Texas-law clause); *Cour de Cassation* case no. 01-44654 (Mar. 12, 2008) (French employment law applies notwithstanding Italy-law clause); *Cour de Cassation* case no. 99-45821 (Nov. 12, 2002) (French employment law applies notwithstanding Austria-law clause); Grenoble Court of Appeal case no. 00-3363 (Mar. 24, 2003) (French employment law applies notwithstanding Andorra-law clause); Grenoble Court of Appeal case no. 3799-95 (Feb. 24, 1997) (French employment law o applies notwithstanding Texas-law clause).

42 *Supra* part 2(C).

43 *Martinez, supra* note 27 (2nd Cir. 2014).

44 On extraterritorial-reaching employment laws, see *supra* part 2(D).

45 *Martinez, supra* note 27 (2nd Cir. 2014). See also generally *New Zealand Basing Ltd. v. Brown*, CA12/2015 [2016] NZCA 525 (2016) (New Zealand Court of Appeal enforces a Hong Kong choice-of-law clause to dismiss claims under New Zealand age discrimination law brought by employee airline pilots residing in New Zealand without a New Zealand place of employment—opinion ¶ 21: “the majority of the pilots’ work occurs outside of New Zealand airspace”).

Not surprisingly, when employers that had inserted choice-of-foreign-law provisions into employment arrangements figure out how their provisions actually work, they sometimes scramble to impeach their own provisions. In one case a California employer argued its provision selecting California “regulations” that apply to a cross-border employment relationship somehow did not extend California law. The provision said: “You are considered to be a California resident, subject to California’s tax laws and regulations,” but the employer argued that clause somehow did not act as a choice-of-California-law clause.⁴⁶ In another case, a California corporation had inserted a provision into an agreement with a Denmark distributor saying the distributorship contract was to “be governed and construed under the laws of the State of California, United States of America.” That company later argued—unsuccessfully—that this clause somehow did not export California’s dealer-protection laws to protect its Danish dealer.⁴⁷

Occasionally an employer succeeds in impeaching its own choice-of-foreign law provision, for example by showing applicable choice-of-law principles do not extend employment regulations extraterritorially, making the provision illusory. We already mentioned that choice-of-English-law clauses in cross-border employment arrangements do not usually extend English law abroad because English employment statutes tend to be domestic to England.⁴⁸ English employers sometimes argue their ill-considered choice-of-English-law clauses do not extend English law to overseas employment relationships, on this ground.

The point, however, is that no employer should stick a provision into its own employment contracts that it will later want to impeach. If employers simply omit choice-of-foreign-law provisions from employment contracts, or else if they contractually select host-country (place of employment) law, they will not later find themselves impeaching their own agreements.

Another drawback to choice-of-foreign-law provisions in cross-border employment agreements is the complication and expense of collateral litigation. These provisions almost always complicate cross-border employment disputes, imposing extra costs either when employers try to impeach them or when the clauses force judges to confront proof-of-foreign-law issues and solicit expert testimony and translations. Ultimately these cases tend to arrive at the predictable conclusion under our general rule, anyway (these cases almost always affirm that a contractual choice-of-law provision pulls in the contractually-selected jurisdiction’s law without shutting off place-of-employment protection laws). For example, two landmark UK decisions explored whether a U.S. state choice-of-law clause (one case involved a New York law clause and the other a Maryland law clause) in executive compensation arrangements requires a UK court to defer to U.S. state law in interpreting a restrictive covenant to be enforced in the UK. After collateral proceedings and expert testimony to determine what foreign (U.S.) law required, at the end of the day both UK courts predictably ruled that UK, not U.S. state, public policy and “mandatory rules” control restrictive covenants enforced on UK soil, when the UK rules are more protective than the U.S. rules. If the employers in these cases had simply omitted foreign-law provisions from their employment documentation in the first place, they might have saved significant collateral litigation costs and ended up with essentially the same result.⁴⁹

B. “National” and “hibernating” employment contracts

Having discussed the general rule on contractual choice-of-foreign-employment law provisions, we turn to various nuances, refinements, strategies, partial exceptions and purported exceptions to the rule. First among these is what we might refer to as “national” employment contracts. In some circles outside the United States, lawyers, human resources professionals and even rank-and-file workers talk about employment contracts as if they somehow acquire their own nationality or citizenship or passport. For example, a German employer might hire a German worker under what a German boss would call a “German employment contract” and might later transfer that worker to (say) Mexico, giving him what the boss would call a “Mexican employment contract.” At that point

⁴⁶ *Wright v. Adventures Rolling Cross Country*, case no. C-12-0983 EMC., U.S. D.C. N.D. Cal., order of 5/3/12).

⁴⁷ *Gravquick A/S Trimble Nav. Int’l*, 323 F.3d 1219, 1223 (9th Cir. 2003) (for our purposes here, the dealer-protection laws in this case are analogous to employment protection laws, and the dealer relationship is analogous to an employment relationship).

⁴⁸ *Ravat*, *supra* note 31.

⁴⁹ *Duarte case*, [2007] EWHC 2720 (QB) (UK) (1/07); *Samengo-Turner case*, [2007] EWCA Civ. 723 (UK) (7/07).

the worker might claim to work, simultaneously, under both contracts, with the “German contract” subject to German law (whether it has an express choice-of-law clause in it or not), extending German employment protections into the Mexican workplace.

This scenario seems to arise particularly frequently with so-called “French employment contracts.” Even though French statutory employment law does not otherwise reach abroad,⁵⁰ French employment law takes a particularly territorial view of employment contracts. So when a French expatriate originally hired under a so-called “French contract” sets off to work outside France—even if he signs a new host country employment agreement and even if his underlying “French contract” gets suspended or “hibernated”—French employment laws likely attach, which comes up, for example, if the employer later fires the expatriate during the assignment. Upon dismissal, the hibernating “French contract” springs to life and imposes French employee-protection laws as if by a choice-of-French-law clause (even if the “French contract” has no explicit choice-of-law clause). Of course, in these situations the territoriality of host-country employment law means that the employment protection laws of the place of employment also apply simultaneously. (The cleanest way to tidy up this situation is to structure overseas expatriate assignments as “localizations” and to cancel any underlying home country employment contract. An expatriate can resign from a preexisting home country employment arrangement and simultaneously sign onto a new one in the host country that extends retroactive service credit. Another solution is to amend the underlying home country contract to add an express choice-of-law clause selecting the law of the new host country place of employment.)

For our purposes here—analyzing the effect of contractual choice-of-law provisions in cross-border employment—the point is that what we might call a “national” employment contract is essentially an employment contract *with an express or implicit selection of the national employment law regime*. That is, what Europeans refer to as a “French employment contract” or a “German employment contract” essentially means an employment contract with an express or implicit choice-of-French-law or choice-of-German-law clause. Even when a home country national employment contract “hibernates” while the employee works abroad under a separate host-country employment arrangement, the national employment contract can impose home-country law because it acts as a contractual selection of home country law. (Again, a strategic employer can tidy up this situation.)

C. Europe’s Rome I Regulation

When a conflict-of-employment-law question arises in Europe, European lawyers talk about “Rome.” European Union member states are subject to a choice-of-law arrangement called the Rome I Regulation that “replaces” the earlier 1980 Rome Convention.⁵¹ European lawyers are quick to argue that the general rule we have set out on contractual choice-of-foreign-employment law provisions does not apply in Europe, because the Rome regime trumps it. European lawyers talk about Rome I and its predecessor Rome Convention as if they somehow empower a choice-of-foreign law clause to block the mandatory application of host country (place of employment) protection laws.

For example, a March 2005 law firm news alert by German lawyers characterizes the Rome regime as leaving European workers “free to agree upon the law of the country that shall be applicable to the employment contract,” and an October 2003 law firm news alert by French lawyers portrays the Rome regime as leaving “the parties to an employment contract...free to choose the governing law.” Further, in 2008—when the Rome I Regulation replaced its predecessor 1980 Rome Convention—European lawyers claimed that the then-new Rome I Regulation, more than ever, ratifies and empowers contractual selections of foreign employment law to divest the law of a host country place of employment.

But no, this is not how the Rome regime works. In fact, the Rome regime merely codifies the general rule we have set out on contractual choice-of-foreign-employment law provisions. The texts of both the original 1980 Rome Convention and now the 2008 Rome I Regulation affirm that “overriding mandatory provisions of the law of the forum” (place of employment) trump any choice-

⁵⁰ See French Supreme Court case no. 10-28.537 (Feb. 2012).

⁵¹ Rome I Reg. art. 24.

of-foreign-law clause or foreign employment contract.⁵² Rome I defines “overriding mandatory provisions” as laws “the respect for which is regarded as crucial by a country for safeguarding its public interests.”⁵³ Rome I requires that a contractual choice-of-employment-law provision not “depriv[e] 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.”⁵⁴ And under Rome I, a choice-of-foreign-law clause cannot override the law of any “country” “more closely connected with” the “circumstances [of employment] as a whole.”⁵⁵

This means that in Europe, just as in most of the world, an employee lucky enough to get a contractual selection of foreign employment law (or to have what we called a “national” employment contract of a foreign country) usually gets to “mix and match” or “cherry-pick” the more favorable employment protection laws of either the contractually-selected jurisdiction or the host country place of employment “in which the employee habitually carries out his work”⁵⁶ —or both. Consistent with this, as mentioned, a worker whose place of employment is France who signs a choice-of-law clause calling for the law of Andorra, Austria, Belgium, Italy, Texas or U.K. simultaneously enjoys both a *contractual* right to invoke protections under Andorran, Austrian, Belgian, Italian, Texas or U.K. law and a French *statutory* law right to invoke French employment protection laws.⁵⁷

In short, in discussing contractual choice-of-foreign-employment law provisions, expect Europeans will claim that because of Rome I, an “individual employment contract” is “governed by the law chosen by the parties.” The best response to this argument is: *Yes, this is indeed consistent with the first sentence of Rome I article (8)(1). But that same provision’s second sentence then goes to impose the general rule on territoriality of employment protection laws of a host country place of employment even in the face of a contractual selection of foreign law.* To that point, the European may fall back and point out that under the Rome regime, an employer and employee are indeed free to choose an employment law regime other than that of the host country place of employment as long as, when a dispute later arises, both parties reaffirm that their selected jurisdiction’s law applies. This certainly is true—but *so what?* When an employment dispute erupts that a worker realizes he can win if he invokes laws of his host country place of employment law, assume he will.

D. Non-mandatory rules and “Global Employment Companies”

We already said that the general rule on the territoriality of employment law applies to *employment protection laws* (“mandatory rules”).⁵⁸ This principle also applies to our general rule on contractual choice-of-employment-law provisions. That is: Choice-of-law provisions in the international employment context pull in the law of a contractually-selected jurisdiction that is not the place of employment; however, these provisions are powerless to shut off the mandatory application of the *employment protection laws* or “mandatory rules” of a host country place of employment. But that said, a choice-of-foreign-law provision might indeed shut off host country employment laws that do *not* amount to mandatory employment protection laws. This means that parties to a cross-border employment relationship might select home-country laws that govern discretionary human resources topics like, for example: equity plan rules, executive compensation doctrines, and some (but not all) regulation of non-mandatory benefits like rules on voluntary pensions, medical insurance plans, certain tax and social security totalization treaties, and some (but not all) rules applicable to discretionary bonuses. There is U.S. case law authority dismissing a U.S.-based employee’s claim contesting terms in a restricted share plan because that plan contained UK choice-of-law and UK choice-of-forum provisions.

Because choice-of-foreign-law clauses can be enforceable as to non-mandatory topics mostly relating to compensation and benefits plans, choice-of-home-country-law clauses are common, and often effective, in international compensation/benefits plans and equity plans, particularly those for

52 Rome I Reg. arts. 34, 37; *compare* Rome Convention articles 3(3), 6, 7.

53 Rome I Reg. at art. 9(2) (1); *cf.* art. 21 (choice-of-law clause cannot override any rule “manifestly incompatible” with “public policy” of “forum” court).

54 Rome I art. 8(1).

55 Rome I arts. 8(1), (4).

56 Rome I Reg. art. 8(2).

57 *Supra* note 41.

58 *Supra* part 1(C).

highly compensated executives. This principle grounds “Global Employment Companies” (GECs), subsidiary entities that a multinational sets up to employ a corps of career expatriates working around the world. This said, in designing a cross-border compensation/benefits plan, equity plan or GEC, remember that the contractual selection of home country law tends to be enforceable only as to topics that do not amount to “mandatory rules.” Even a choice-of-law clause in a bonus plan, equity award agreement, compensation arrangement for highly compensated executives or GEC constitutional charter will not divest host-country “mandatory rules” like, for example, laws on vacation, sick leave and dismissals. Neither cross-border compensation plans nor GECs get an exemption from the general rule on the mandatory application of host-country *employment protection laws*.

E. Restrictive covenants

Restrictive covenants—non-compete agreements, customer and employee non-solicitation agreements and confidentiality agreements—as well as employee invention/intellectual property assignments raise special challenges in cross-border employment. Laws that enforce restrictive covenants tend to be “mandatory rules” (employment protection laws) that apply by force of public policy, so the restrictive-covenant interpretation rules of a host country place of employment tend to apply by force of law. For example, never expect a California court to defer to a contractual provision selecting New York or English law to enforce an employment-context non-compete against a worker whose place of employment is California (in California, employment-context non-competes are void).⁵⁹ It works the same way in reverse—English courts almost never defer to foreign (say, New York or Maryland) choice-of-law clauses when enforcing restrictive covenants on staff who work in England.⁶⁰

When enforcing a post-term restrictive covenant after an employee has left the job, the practical issue usually comes down to complying with the restrictive covenant rules and public policy of the jurisdiction where the original employer seeks enforcement, which often ends up being *the place where the employee has gone off to breach the covenant*, and may be neither the home nor host country during employment.

- **Example.** Imagine an employee originally hired in Paris had signed a Europe-wide non-compete containing a French choice-of-law clause who then got transferred to work for a while in Florida. Later, this employee quit, moved to London, and started working for an English competitor, flagrantly violating the non-compete. If the original employer now tries to enforce the non-compete, which jurisdiction’s law applies? France’s? Florida’s? Or England’s?

As a strategic matter, to win an enforceable remedy, the original employer here is probably best advised to try to enforce the non-compete in London under English law, ready to show the provision complies with English non-compete public policy. (In this example the original employer might have to convince a London court that the non-compete complies with *both* British and French law, because of the choice-of-French-law clause—which show this employer would have been better off omitting that pesky clause in the first place.)

Theoretically there might be other litigation approaches possible, and there might be arguments that any of these three jurisdictions’ laws apply. But in the real world, if the original employer wants fast specific performance (a quick, binding injunction) or an enforceable money judgment (in a place where the employee has assets), the best strategy very likely will be for the employer to frame a restrictive covenant enforcement action under the law of the place where the employee has gone off to breach—and to sue in that jurisdiction’s local courts.⁶¹

F. Forum selection clauses and the Recast Brussels Regulation

⁵⁹ *E.g. Ruiz* (9th Cir. 2012), *supra* note 7, but see *Sabd-Krutz* (US DC ED Cal. 2015), *supra* note 7.

⁶⁰ *Duarte* (UK 2007), *supra* note 49; *Samengo-Turner* (UK 2007), *supra* note 49.

⁶¹ See, e.g., *Digicel v. Carty*, [2014] JMCC Comm 14 (Jamaica Sup.Ct. Judicature) at ¶¶ 36, 78 (Jamaican court asked to enforce restrictive covenant against employee who had been employed in the United States—the covenant covered competition across “the Caribbean or Central America” and the plaintiff employer saw the breach occurring in Jamaica).

We have been addressing choice-of-law clauses that invoke a legal regime other than the law of the place of employment. The follow-on issue is the enforceability of an employment-context agreement that calls for private arbitration⁶² or for adjudicating disputes in a foreign court—that is, the enforceability of a contractual choice-of-foreign-*forum* provision that purports to require the employer and employee resolve any disputes in their contractually-selected forum and not in the local labor courts of the host country place of employment. (We are not addressing the scenario of a worker subject to a forum selection clause who *voluntarily* brings a claim in a previously-agreed forum, nor are we addressing the scenario of an employer and employee embroiled in a dispute who mutually agree on a forum to hear their claim. And of course we are not dealing with forum-selection provisions that choose the local labor courts of the host country place of employment. None of those scenarios present enforceability problems.⁶³)

Employment-context forum-selection provisions that call for a forum other than host country (place of employment) labor courts tend to be unenforceable abroad, because outside the United States, special-jurisdiction labor courts tend to assert mandatory jurisdiction over employment disputes with staff who work locally (whose place of employment is in-country). This principle is familiar even in the otherwise-arbitration-friendly United States, because certain U.S. worker-rights agencies (for example, state workers' compensation agencies, unemployment compensation agencies, equal employment agencies, the EEOC, OSHA and the NLRB) can have mandatory jurisdiction over certain employment disputes. When they do, an arbitration or choice-of-foreign-forum provision may be unenforceable.

Outside the United States, a provision in an employment or expatriate agreement (or compensation plan) that purports to select arbitration or to empower some forum other than local host-country labor courts tends not to block the mandatory jurisdiction of labor tribunals in the place of employment. In London today, for example, many U.S. financial services expatriates are working under arbitration and U.S.-court clauses of dubious enforceability. If an American expat working in London has signed an arbitration or U.S.-courts clause but nevertheless sues the employer in an English Employment Tribunal, the employer might not expect to win a dismissal by invoking the forum-selection clause.⁶⁴ That said, a few rare jurisdictions are exceptions. Malaysia enforces employment-context arbitration agreements, for example. And in 2017 Brazil amended its labor code and now purports to allow arbitration agreements in employment contracts.⁶⁵

In employment-context choice-of-forum scenarios, Europeans invoke articles 20, 21 and 22 of the so-called “Recast Brussels Regulation” on employment-context choice-of-forum clauses within Europe.⁶⁶ These provisions of this EU Regulation merely codify our general rule that employees outside the United States rarely have to litigate employment disputes outside their host country place of employment, even if a choice-of-foreign-forum clause purports to require otherwise. In a 2015 decision, the UK Court of Appeals invoked the Recast Brussels Regulation to block a choice-of-Massachusetts-courts clause in a U.S.-headquartered employer's equity plan.⁶⁷

62 The references here to *private* arbitration distinguish the *court-mandated* alternate dispute resolution procedures under certain countries' labor courts.

63 Indeed, a provision that selects the labor courts of the host country place of employment can be an excellent employer strategy, because it might divest the jurisdiction of foreign courts that otherwise could adjudicate “extraterritorial” employment claims. *E.g.*, *Martinez*, *supra* note 27 (2nd Cir. 2014); *New Zealand Basing Ltd*, *supra* note 45 (New Zealand 2016).

64 *E.g.*, *Petter v. EMC Europe Ltd & Anor*, [2015] EWCA Civ 828 (UK Court of Appeal grants “anti-suit injunction” to block choice-of-Massachusetts-courts clause in U.S.-headquartered employer's “share incentive scheme” equity plan).

65 Brazil CLT (Consolidated Labor Laws) *revised* 2017, at art. 507-A: “For employees [earning at least double minimum wage], employer and employee are free mutually to agree on a binding arbitration clause, as provided under the Law 9.307/96 [Brazil arbitration law].”

66 EU Regulation No. 1215/2012 *repealing* Regulation 44/2001.

67 *Petter*, *supra* note 64.

Conclusion

Which jurisdiction's employment laws reach border-crossing staff? Because employment protection laws are "mandatory rules" applicable by force of public policy, host-country employment protection law—the law of the current place of employment—usually controls. In addition but not instead, *home*-country workplace rules rarely but occasionally also apply simultaneously, such as where a home-country statute has "extraterritorial" reach or where an employer and employee have contractually selected home-country law. While these general principles usually prevail, international choice-of-employment-law and -forum issues can get complex.

Work through these situations strategically, accounting for the various nuances, refinements, strategies, exceptions and purported exceptions. When drafting cross-border employment agreements, benefits plans or expatriate arrangements, the best drafting strategy might be either to omit any choice-of-law or forum-selection provision entirely, or else simply to select the law and courts of the place of employment.

