A New Form of Working Relationship in The Digital Age: Crowdworking from a Private International Law Perspective

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Abstract

Among the most important working life innovations brought about by the technological developments are the new working relations. They differ significantly in their structure, compared to the classical contract types. Crowdwork, a sub-title of platform work, is among them. It is a way of working through the platform where customers and service providers meet over the internet. There is a trilateral relationship in crowdworking: the user (principal), the web-platform and the user (worker). In some crowdwork relationships, the work activity is performed completely on the computer and on the Internet, while in others the work activity is performed in the physical world. Crowdwork raises conflicting issues in terms of private international law. With crowdwork the company or person who is ordering work could be located in one state, the platform itself could be located in another state, and the workers could be located in many other states. In addition, crowdwork companies are often multinational companies. This new business relationship with an international element clearly falls within the scope of private international law. Crowdworking is characterized differently in different jurisdictions. Currently, cases are being heard around the world on the question of whether crowdworkers are "employees" or "independent contractors". It is mainly the aspects of substantive law that interest legal doctrine. However, questions of private international law are central. My study seeks to answer the question of whether current conflict of laws rules can respond to technological developments. Large multinational companies (e.g. Uber, Deliveroo.) are fighting against a recharacterization of their activities as employment relationships, on the grounds that their business model would not be profitable in this case. "Workers" are bound by standard

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contracts containing choice of court and choice of law clauses which they can not negotiate and which de facto prevent them from bringing legal proceedings. These issues are worth examining in depth from a comparative law perspective. In addition, other types of "employment relationships" are formed solely on the internet, through internet platforms, which makes it difficult to attach these activities to a particular state. For this type of fundamentally international legal relationship, it is necessary to rethink the criteria of international jurisdiction of the courts and the applicable law regarding crowdworking.

Key Words: Crowdwork, Characterization, Independent Contractors, International Jurisdiction, Applicable Law

1. Introduction

As a result of the developments in information and communication technologies (ICT) in the 21st century, digital economy has gained more importance. The digital economy is transforming societies and changing socio-economic relations.[1] In other words, the work organization and the relationship between employer and employee are altering dimensions. Especially with the COVID-19 pandemic, people started working from home instead of going to their offices and as a result, remote working became widespread.[2]

Digital work platforms offer new forms of informal employment whose attractiveness is mainly based on the possibility of obtaining freely performed paid work. More specifically, these platforms offer online intermediation services, which essentially consist of connecting clients and service providers. One category of platform work consists of tasks that take place in the real world and are powered by a website or app, such as Uber[3] (ridesharing) and Glovo[4]

1 Valerio De Stefano and Antonio Aloisi, 'European Legal Framework for "Digital Labour Platforms"', (2018), European Commission, Luxembourg, 2.

2 Uglješa Grušić, 'Remote working and European private international law' (2022) ETUI Research Paper – Policy Brief 2022/09, 2 <https://www.etui.org/sites/default/files/2022-12/Remote%20working%20and%20European%20private%20international%20law-2022.pdf> accessed 30 May 2024.

3 Uber, American international transportation network company based in San Francisco, California, connects the physical and digital worlds to help make movement happen at the touch of a button. In addition to the transport service, it is committed to providing services that individuals need, such as meal delivery and delivery of prescription medicines: Uber, About us, <https://www.uber.com/hr/en/about/> accessed 4 April 2023.

4 Glovo is a Spanish-based company that has developed a technology that connects customers with local businesses through a large network of couriers who have signed up to offer delivery services: Glovo, This is Glovo, <https://about.glovoapp.com/this-is-glovo/>, accessed 4 April 2023.

(food delivery)[5]. The other category, represented by Upwork[6] or by Amazon's Mechanical Turk[7] (MTurk), involve completion of computer tasks online.[8] In other words, the services offered via these platforms are performed entirely online like translate, graphic design, computer programming and data-entry tasks.

Digital work platforms are part of a new form of *sharing economy* or *on-demand economy* or *gig economy* bringing together all the digital platforms that make it possible to connect suppliers and demandants for goods or services via the internet.[9] Service providers offering their services through the platforms are attracted by the possibility of working remotely as well as by the flexibility in time, space and organisation of this form of work. However, these advantages are opposed by the disadvantages which are essentially linked to the lack of stability, low remuneration and reduced access to social protection. The extent of these risks, however, depends on the intensity of the use of platform intermediation services to obtain paid work.[10] While it is true that some people focus their professional activity on digital work platforms, most providers only use their services on an *ad hoc* basis to supplement another source of income.

In this tripartite relationship brought about by digital economy, qualification is important in terms of determining the rights and obligations of the parties. Especially in disputes with an international element, qualification is essential for determining the applicable law and the international jurisdiction of the courts. The issue of whether the relationship between the platform and the service provider is an employment relationship has not yet been established on a legal basis. Most digital work platforms do not view themselves as an employer but as an entity or rather a system, whose role is limited to establishing the connection between the client and the service provider. The general conditions of the platforms specify, most of the time, that the service-provider is self-employed. Platform workers gain guaranteed rest time and paid holidays, at least the national or sectoral minimum wage (where applicable), safety and health protection, unemployment, sickness and health care benefits, maternity, paternity and parental leave, pension rights, benefits relating to accidents at work

5 Miriam A Cherry, Regulatory Options for Conflicts of Law and Jurisdictional Issues in the on-demand Economy (International Labour Organization 2019), 7.

6 Upwork Global Inc., formerly Elance-oDesk, is an American freelancing platform based in Santa Clara and San Francisco, California, <https://www.upwork.com/about>, accessed 5 April 2023.

7 Amazon Mechanical Turk is a crowdsourcing marketplace enabling individuals and businesses (known as Requesters) to engage a 24/7, global distributed workforce (known as Workers) to perform tasks, <https://www.mturk.com/product-details>, accessed 5 April 2023.

8 Cherry, 'Regulatory Options' (n 5), 7.

9 Florence Guillaume, 'Le Contrat de Travail International: Règles de Droit International Privé et Plateformes Numériques', in Dunand Jean-Philippe and Mahon Pascal (eds), *Les aspects internationaux du droit du travail* (Schulthess 2019), 227.

10 Guillaume (n 9), 228.

and occupational diseases from being classified as employees.[11] Therefore, the nature of the relationship between the service providers and the platform has been the subject of debate in many cases.

2. International element

The relation between platforms and their service providers is, most of the time, international or potentionally international.[12]The platforms offering services in the real world have a more localized field of activity contrary to the platforms offering services completely online. For example, an Uber driver physically performs their service by picking up a passenger from a specific geographical location and dropping them off in a specific geographical area. The relationship between the platform and the service provider is an international one, in any case, when the domicile of the persons or of the company managing and maintaining the platform is in a State other than that of the domicile of the service provider, or when the latter must execute their performance in a State other than that of their domicile.

With regard to platforms offering services entirely online, they are generally aimed at service providers located anywhere. On the internet, which is independent of the real world,[13] it is difficult to identify the international element.[14] Transactions on the internet has an international element as they have the potential to have an impact in more than one country or around the globe, or are more likely to have an international element.[15] In other words, the internet, which is referred to as the network of networks, inherently contains an international element.[16] However, automatically recognizing every transaction that takes place on the internet as having an international element may not always lead to the right results. For example, an agreement for an online service between citizens of the country on which the platform is based cannot be

11 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Pillar of Social Rights Action Plan, COM(2021) 102 final.

12 Guillaume (n 9), 232.

13 See about the characteristics of the internet Tobias Lutzi, 'Internet Cases in EU Private International Law: Developing A Coherent Approach' (2017) 66 ICLQ 687, 688.

14 Obdulio César Velásquez Posada, 'Jurisdictional Problems in Cyberspace Defamation' (2005) International Law: Revista Colombiana de Derecho Internacional, 6, 258.

15 Axel Nilsson, *Personality Rights, Defamation and the Internet*, Lund University Faculty of Law, Graduate Thesis Master of Laws Program, Sweden 2017, 19.

16 Catherine Kessedjian, 'Rapport de Synthèse' in Katharina Boele-Woelki and Catherine Kessedjian (eds), *Internet Which Court Decides? Which Law Applies? Quel Tribunal Décide? Quel Droit s' Applique?*(Kluwer 1998), 143-144; Tristan Azzi, 'Atteintes en Ligne aux Droits de la Personnalité et aux Droits de Propriété Intellectuelle: Tribunal Compétent et Loi Applicable' (2014) 52 Legicom: Revue Thématique de Droit de la Communication 39.

considered international just because it takes place online. Each employment relationship performed on the internet must be evaluated case by case as a result of this evaluation, whereby the existence of the international element must be concluded.

3. Characterisation

Characterisation is a crucial step to accommodate the facts within legal categories.[17] The characterisation of the relationship between the platform and its service providers is not only useful to establish whether the protective standards of labour law can be invoked, but also to determine which rules of private international law apply.[18] Therefore, the nature of the relationship between the service provider and the platform should be clarified in order to determine international jurisdiction of courts and the applicable law.

It is necessary to determine whether the relationship between the service provider and the platform is an employment relationship, both for the protective standarts arising from labour law and to determine the applicable law in private international law.[19] The issue of whether platform workers are employees or independent contractors has been debated in many jurisdictions.[20] The platforms have been accused of misclassifying their service providers as *independent contractors* to avoid labour law obligations.[21] The lack of homogeneity between the platforms makes it difficult to unify decisions about characterisation.[22]

Some platform workers, like employees, often have limited control over their work (eg in some cases they cannot set prices, must wear uniforms, cannot choose the order of their tasks) and/or are dependent on their clients/employers in other ways (eg financially).[23] This control can be implemented through technology-assisted monitoring with the algorithm replacing a traditional manager.[24] For example, Uber has been reported to monitor the smartphones of

17 Reflecting Savigny's influence on private international law, the characterization seeks to identify the seat (Sitz) of the facts: Geert van Calster, *European Private International Law*, (2nd edn, Hart Publishing,2016), 6.

18 Guillaume (n 9), 231.

19 Ilaria Pretelli, 'Protecting Digital Platform Users by Means of Private International Law' (2021) 13 Cuadernos de Derecho Transnacional 574, 581.

20 Some EU jurisdictions have a third category of 'dependent contractor' or 'self-employed worker', which can make classification lawsuits even more complicated.

21 Asger Lund-Sørensen, 'Jurisdictional Clauses in Platform Work Contracts: A Danish Perspective' (2018) 1 Nordic Journal of Commercial Law 261, 265.

22 Guillaume (n 9), 229.

23 Marguerita Lane, 'Regulating platform work in the digital age' (OECD 2020) <https://goingdigital.oecd.org/toolkitnotes/regulating-platform-work-in-thedigital-age.pdf.>, accessed 30 May 2024, 7.

24 Lane (n 23), 7.

its drivers to map how they were using the pedals and identify good and bad acceleration and braking practices.[25] Platforms have different technical structures and subordination between the platform and its workers also varies from platform to platform. Therefore, the characterisation must be made on a case-by-case basis,[26] depending on the characteristics of the platform in question.[27]

3.1. Characterisation in the United States

Cases concerning platform work have been the subject of intense debate in the US, where common law is dominant, and a number of criteria have been developed.[28] In this context, the right to control test and the ABC test should be mentioned.

In American Law, the Fair Labor Standards Act regulating minimum wage and overtime pay defines 'employee' as an individual employed by an employer and defines 'employ' as to offer or permit to work.[29] According to this test, in order to determine whether a person is an employee or not, the degree of control exercised by the presumed employer over the performance of the work is taken into account.[30] This test analyses the following factors:

1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal;

2. Whether or not the work is a part of the regular business of the principal or alleged employer;

3. Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work;

4. The alleged employee's investment in the equipment or materials required by their task or their employment of helpers;

5. Whether the service rendered requires a special skill;

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25 Antonio Aloisi and Valerio de Stefano, *Your Boss is an Algorithm* (1st edn, Hart Publishing 2022), 59.

26 Kamila Naumowicz, 'Some Remarks to the Legal Status of Platform Workers in the Light of the Latest European Jurisprudence' (2021) 28 Studia z Zakresu Prawa Pracy i Polityki Społecznej 177, 183.

27 Guillaume (n 9), 234.

28 Within the scope of our study, the law of the United States of America is only addressed in the characterisation section. The section on applicable law and jurisdiction will only include explanations according to the European Union Regulations.

29 1. 29 U.S.C. § 203(e)(1), (g) (2006); see also Alek Felstiner, 'Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry' (2011) 32 Berkeley Journal of Employment and Labor Law 143 169; Gaye Baycık, Orhan Ersun Civan, Hazal Tolu Yılmaz, Berrin Bosna, 'Platform Çalışanlarını Yasal Güvenceye Kavuşturmak: Sorunlar ve Çözüm Önerileri' (2021) Galatasaray Üniversitesi Hukuk Fakültesi Dergisi 713, 748.

30 Carissa Laughlin, 'Arbitration Clause Issues in Sharing Economy Contracts' (2017) Journal of Dispute Resolution 197, 203; Hazal Tolu Yılmaz, İş ve Sosyal Güvenlik Hukuku Bakımından Dijital Platform Çalışanlarının Hukuki Statüsü, Galatasaray University Graduate School of Social Sciences, PhD Thesis, İstanbul 2022, 98.

6. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;

7. The alleged employee's opportunity for profit or loss depending on his or her managerial skill;

8. The length of time for which the services are to be performed;

9. The degree of permanence of the working relationship;

10. The method of payment, whether by time or by the job; and

11. Whether or not the parties believe they are creating an employer-employee relationship;

12. Last but not least, whether the person to whom service is rendered (the employer or principal) has control or the right to control the worker both as to the work done and the manner and means in which it is performed. [31]

The California Supreme Court's decision on *Dynamex Operations West, Inc. v. Superior Court*[32] was based on the ABC test which states that a business wishing to classify workers as independent contractors must satisfy three elements:[33]

A) that the worker is free from the control and direction of the hirer in connection with the performance of work, both under the contract for the performance of such work and in fact;

B) that the worker performs work that is outside the usual course of the hiring entity's business; and

C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[34]

With the Dynamex case, the employer has the burden of proving that a person that works for them is not an employee.

3.2. Characterisation in Europe

In EU the essential feature of an employment relationship is that a person, for a certain period of time, performs services for and under the direction of another, in return for which remuneration is paid.[35] The EU law does not set

31 Kieran Van Den Bergh, 'United States' in Isabelle Daugareilh, Christophe Degryse and Philippe Pochet (eds), *The Platform Economy and Social Law: Key Issues in Comparative Perspective* (Working Paper, 2019.10), 130.

32 Dynamex Operations W. v. Superior Court, 4 Cal.5th 903 (2018).

33 Cherry 'Regulatory Options' (n 5),19; Dynamex Operations W. (n. 32); Christina Hießl, 'The Legal Status of Platform Workers: Regulatory Approaches and Prospects of A European Solution' (2022) 15 Italian Labour Law E-Journal, <https://illej.unibo.it/article/view/15210>, accessed 18 April 2023, 14-15.

34 Dynamex Operations W. (n. 32)

35 Case C-232/09 *Dita Danosa v LKB Lizings SIA* [2010] ECR I-11405, para 39.

additional conditions like the existence of a formal contract between the employee and the employer.[36]

In *Aslam v Uber*,[37] the London Employment Tribunal held that the Uber drivers who brought the case were 'workers', an intermediate status between employee and independent contractor.[38] The Tribunal stated that Uber had imposed a great number of conditions on the drivers, managed and instructed the drivers through the cellphone app, and overall, controlled the drivers' working conditions[39].

In Belgium, the Administrative Commission for the Governance of the Employment Relationship decided that Deliveroo food-delivery bicycle riders were employees under Belgian law.[40] The Commission stated that Deliveroo riders do not control their working time, since they must reserve their work slots more than one week in advance.[41]

The German Federal Labor Court (Bundesarbeitsgericht) ruled, on 1 December 2020, that a person working on a location-based platform is an employee.[42] In the case in dispute, the claimant controls how retail products belonging to users are presented to customers.[43] The claimant goes to the store where the product is offered, takes photographs of the product and answers questions about it. Employees according to the platform's operating model, have the option to accept or reject the work assigned to them, and the accepted work must be completed in two hours. Employees receive both wages and experience points for the tasks they complete on the platform and as experience points accumulate, employees' status on the platform becomes stronger. This allows employees to be assigned to more tasks which in turn incentivizes employees to accept more work. The claimant worked an average of 20 hours per week for a period of 11 months, earning a monthly income of approximately 1750 euros. The fact that the employee is obliged to complete the work within two hours and that the manner in which the work is to be performed is

36 Uglješa Grušić, *The European Private International Law of Employment* (1st edn, CUP 2015), 79.

37 [2016] EW Misc B68, [97] (ET) (28 Oct. 2016); Nikola Countouris, 'Regolatory and Jurisprudential Perspectives on Platform Work: The UK Case' in Maria Teresa Carinci and Filip Dorssemont (eds), *Platform Work in Europe Towards Harmonisation?* (Intersentia 2021), 157.

38 Cherry 'Regulatory Options' (n 5), 20.

39 ibid, 20-21; Countouris, 157-158.

40 ibid, 21; Commission Administrative de règlement de la relation de travail (CRT) Feb. 23, 2018, No. 116-FR-20180209; Fabienne Kéfer, 'Platform Work: The Belgian Case' in Maria Teresa Carinci and Filip Dorssemont (eds), (n 37), 9-10.

41 Cherry 'Regulatory Options' (n 5), 21.

42 BAG, 01.12.2020 - 9 AZR 102/20; Tolu Yılmaz (n 30), 94; Gerrard Boot, 'Platform Work in Europe: The Need for a Multilevel Solution to Protect the So-Called Self-Employed' (2022) 13 European Labour Law Journal 81, 82.

43 Rüdiger Krause, 'App-Based' Work: The German Case' in Maria Teresa Carinci and Filip Dorssemont (eds) (n 37), 37-41.

determined in detail and communicated to the employee proves the subordination. In this decision, platforms' incentive systems that influence the will of employees are accepted as an indicator of subordination.

Since there is no uniformity regarding the status of platform employees, even the courts of the same country can render different judgments on this issue. Hence, our statements hereinafter will be based on the assumption that platform workers are employees.

4. International jurisdiction

If we consider these service providers as employees, how will we appoint the competent court? One of the most important problems in cross-border proceedings is the determination of the competent court. The European rules on international jurisdiction are unified by Brussels I-bis Regulation.[44] Its system and many of its provisions date back to its predecessor, the Brussels Convention.[45] This regulation contains various protective provisions in favor of the party that does not have equal bargaining power in employment, consumer and insurance contracts.[46]

Brussels I-bis Regulation has a special section (n. 5) about jurisdiction over individual employment contract. The provisions aimed at protecting the position of a weaker party in litigation under the Brussels I-bis regime can be summarised as follows:

a) A weaker party (an employee) has a choice to bring proceedings against the other party to a contract either in the court of the Member State in which that other party is domiciled or in which it is more convenient to a weaker party (most likely in the country of its own domicile) or which is otherwise closely related to the dispute.

b) Conversely, proceedings may be brought against a weaker party to the contract only in the courts of the Member State in which the 'weaker' party is domiciled.

c) Forum choice clauses in these disputes have limited binding effect against a 'weaker' party. They may be successfully invoked against a weaker party only if the conditions provided in the relevant provisions of the Regulation are met.[47]

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44 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1 and subsequent amendments.

45 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels, 27 September 1968) [1972] OJ L 299/32.

46 Recital 18 in the preamble to Brussels I-bis Regulation. See also Vesna Lazić, 'Procedural Position of a "Weaker Party" in the Regulation Brussels Ibis' in Vesna Lazić and Steven Stuij (eds), *Short Studies in Private International Law* (Springer 2017), 52; Van Calster (n 17), 29, footnote 36; Grušić, *The European Private* (n 36), 7.

47 Lazić, 53.

4.1. Jurisdiction agreements

Allowing the parties to choose the jurisdiction creates legal certainty and predictability and party autonomy is therefore of paramount importance in private international law.[48] Brussels I-bis Regulation also permits, in principle, jurisdictional agreements to achieve these objectives.[49] Within this scope art 25 of Brussel I-bis Regulation gives the parties the possibility of agreeing on jurisdiction of the courts of Member States. Pursuant to art 23 of Brussels I-bis Regulation, a jurisdiction agreement will be given effect in an employment dispute only if it is entered into after the dispute has arisen or if it allows the employee to bring proceedings in courts other than those indicated by the default rules.[50]

Platforms frequently include jurisdiction and arbitration[51] agreements in their general terms and conditions. The general conditions of the platforms are presented on the basis of 'take it or leave it'.[52] In other words, platform users do not have the right to negotiate these terms. These general terms and conditions are very long and dense and contain a lot of legalese.[53] Since platform work often involves an international element, especially when the work is performed online, employees are forced to accept these general terms and conditions without bargaining, which are not mostly in the language that they can speak. The Brussels I-bis Regulation specifically regulates jurisdiction agreements in employment contracts in order to protect the weaker party and only allows jurisdiction agreements in limited circumstances.

4.2. Rules on Jurisdiction of Brussel I-bis Regulation

Brussels I-bis Regulation gives employees access to more forums than employers.[54] When the employer is the claimant, an employee domiciled in a Member State may be sued only *in the courts of the employee's domicile* but when the employee is the claimant, an employer domiciled in a Member State may be sued: in the courts of the employer's domicile; in the courts of the place where or from where the employee habitually carries out his/her work (or in the

48 Lund-Sørensen (n 21), 267.

49 Recital 19 of the preamble of Brussels I bis Regulation reads as follows, 'The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation'.

50 Grušić, *The European Private* (n 36), 126-127.

51 It should be noted that arbitration agreements regarding platform work are outside the scope of this study but for detailed information on the subject see Laughlin, 196-217.

52 Lund-Sørensen (n 21), 268.

53 Cherry 'Regulatory Options' (n 5), 25.

54 Grušić, 'Remote Working' (n 2), 3.

courts for the last place where he did so); if there is no habitual place of work, in the courts of the engaging place of business.

For example an employer who is domiciled in Belgium hires an employee who is domiciled in Croatia and habitually carries out their work in Croatia, can sue the employee only in Croatia while the employee may bring proceedings in either Belgium and Croatia. The rules in the Brussels I-bis Regulation are clear, but it is necessary to clarify what we should understand by habitual place of work. Where work is carried out at a single location, the habitual place of work can be easily identified.[55] In the case of peripatetic work, work carried out in more than one jurisdiction, it will be difficult to determine the habitual place of work.[56] The Court of Justice of the European Union (CJEU) has issued several decisions[57] to determine the habitual place of work for this type of work. The long and the short of the matter, the term 'habitual place of work' is effectively equivalued with 'principal place of employment'.[58] In these decisions, the CJEU has taken into account the duration of the employee's employment and whether the employee has an office in a country. However the term is interpreted widely in that the determination of the habitual place of work is essentially a search for the place that is most closely connected with the employment dispute.[59]

55 Grušić, *The European Private* (n 36), 110.

56 In this context, digital nomads can also be mentioned. Digital nomads are professionals who perform work digitally over the internet to have a lifestyle of constant travelling or expat living. In this digital era the digital nomad lifestyle is attracting people. Some Countries are creating special visas for these new type of employees. For example Estonia is about to give visa for digital nomads allowing workers living temporarily in Estonia to have the right to reside there for 365 days while benefitting from a Schengen visa, Guillaume (n 9), 240–241 footnote 168; see also Ekaterina Chevtaeva and Basak Denizci-Guillet, 'Digital Nomads' Lifestyles and Coworkation' (2021) 21 Journal of Destination Marketing and Management 1, <https://www.sciencedirect.com/science/article/abs/pii/S2212571X21000810> accessed 10 April 2023; Hannonen Olga, 'In Search of a Digital Nomad: Defining the Phenomenon' (2020) 22 Information, Technology and Tourism 335, 336. To maintain their lifestyle while constantly traveling the world, digital nomads engage with works that create digital goods using digital tools, Caleece Nash, Mohammad Hossein Jarrahi, Will Sutherland and Gabriela Phillips, 'Digital Nomads Beyond the Buzzword: Defining Digital Nomadic Work and Use of Digital Technologies' in Gobinda Chowdhury, Julie McLeod, Val Gillet and Peter Willett (eds), *iConference 2018: Transforming Digital Worlds* (Springer 2018), 209.

57 Case C-125/92 *Mulox IBC Ltd v Geels* [1995] ECR I-04075; Case C-383/95 *Rutten v Cross Medical Ltd.* [1997] ECR I-00057; Case C-37/00 *Weber v Universal Ogden Services Ltd.* [2002] ECR I-02013; Joined Cases C-168/16 and C-169/16 *Sandra Nogueira v Crewlink Ireland Ltd and Moreno Osacar v Ryanair* [2017] ECLI:EU:C:2017:688 . For a detailed assessment of the decisions see Grušić, *The European Private* (n 36), 109-115.

58 Grušić, *The European Private* (n 36), 114.

59 ibid.

5. Applicable law

Rome I Regulation[60] determines the law applicable to individual employment contracts. As in the Brussels I-bis Regulation, the Rome I Regulation also includes provisions protecting the weaker party.[61] Recital 23 of the preamble of Rome I Regulation reads as follows, '[a]s regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict of law rules that are more favourable to their interests than the general rules'.

5.1. Choice of the Law Applicable to the Individual Employment Contract

Since the technique of geographical localisation encounters limits in the environment of digital work platforms, it is necessary to check whether a subjective criterion, based on the autonomy of the parties, is likely to improve legal security. In some legal systems, party autonomy is completely prohibited or limited, while in others it is accepted provided that it is in compliance with mandatory rules or public policy.[62] In EU private international law employees are recognized to have less bargaining power, and the concern is that choice of law provisions might not work to their advantage.[63] Rome I Regulation seeks to set a 'minimum standard of employment protection that cannot be undermined by the chosen law'.[64]

According to art 3 of the Rome I Regulation,

> A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

However, art 8 of Rome I Regulation on individual employment contracts sets minimum standards for the validity of this choice.

According to art 8(1) of Rome I Regulation,

> An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the

60 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, [2008] OJ L 177.

61 On the reasons underlying the protection of the employee see Marìa Campo Comba, *The Law Applicable to Cross-Border Contracts Involving Weaker Parties in EU Private International Law* (1st edn, Springer 2021), 30–33.

62 Grušić, *The European Private* (n 36), 39.

63 Miriam A. Cherry, 'A Global System of Work, A Global System of Regulation?: Crowdwork and Conflicts of Law' (2019) 94 Tulane Law Review 1.

64 Cherry, 'A Global System of Work' (n 63), 37.

> absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

Therefore a limited choice of law is allowed in individual employment contracts.[65] In other words, when parties have chosen the law applicable to their employment contract, the judge must firstly determine which law would be objectively applicable according to the following paragraphs of article 8 of Rome I Regulation and afterwards compare that law to the chosen law to conclude whether the chosen law offers the same or a better protection to the employee than the mandatory provisions of the objectively applicable law.[66]

The general terms and conditions of the platforms provide, almost systematically, for choice of law clauses designating the applicable law in the State where the registered office of the company that manages and maintains the platform. However these general terms of service are drafted by the legal advisors of the platforms, and they primarily take into account the interests of the platforms. The service provider will often have to accept these non-negotiable terms and conditions in order to become a part of the platform. Thus, it is necessary to determine the relevant mandatory provisions for pending action and then compare which ones offer a better protection to the employee.

5.2. Objective Connecting Factors: The Law Applicable in the Absence of Choice

When the parties have not chosen the law applicable to their contract, the law applicable to the individual employment contract will be designated by the conflict rules contained in paragraphs 2, 3 and 4 of art 8 Rome I Regulation. According to these paragraphs,

> (2) To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.
>
> (3)Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.
>
> (4)Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

65 Campo Comba (n 61), 119.

66 ibid.

As it is understood from the provision, geographical connections such as the habitual place of work and the engaging place of business determine the applicable law.

6. Localisation using traditional rules

The classic connecting method of private international law aims to determine the seat (le siège) of the legal relationship in question.[67] The objective is, therefore, to localize the legal relationship in a space, within the borders of a State. We have mentioned local connections such as habitual place of work in the explanations on both international jurisdiction and applicable law. However, it will be extremely difficult to locate a transaction carried out in the digital space of the internet in a physical space.

In this context, we need to create a dichotomy. It will undoubtedly not be the same case in platform work models where the work takes place entirely online and where the work takes place in a physical environment. Indeed it is easier to localize work that takes place in a physical environment according to these rules than work that takes place entirely on the internet. The service is generally performed in the presence of the service provider and the client. For example, the driver picks up the customer and takes them from one place to another. In this context, the use of the internet only faciliates the linking of the various parties and has no significant impact on the application of the rules of private international law.[68]

On the other hand, there are platforms like Upwork, where localization is a big problem, where the service takes place entirely on the internet. When the work is performed online, the habitual place of work means the location of worker with their computer connected to the internet[69]. However, online work is not necessarily carried out on the territory of a single State. Crowdworkers may work from any location. For digital nomads the service can be carried out in several different countries during a trip, which makes any localisation to the habitual link impossible. Besides, the service provider generally performs several successive performances for the platform. If it must be concluded from all of these services that it is not possible to determine the center of gravity of the worker's activity, the other connecting criteria such as the place of domicile or habitual residence of worker, the place where the establishment, domicile or habitual residence of the employer is located must apply.[70] The location of the employee's domicile or habitual residence will not always be easy in practice (in

67 Guillaume (n 9), 239.
68 ibid, 240.
69 ibid.
70 ibid, 241.

the example of digital nomads). It is doubtful that protective function of rules on international jurisdiction and applicable law is fulfilled when the employee has an itinerant lifestyle.

To sum up, the traditional connecting factors are therefore very difficult to apply when the service is provided entirely online. Even the possibility that the employee fictively determines the place of the performance takes place in the contract will not solve the problem. It would be preferable to recognize that this type of legal relationship takes place in a digital environment that is disconnected from any territorial link, while seeking another means of determining the forum and the applicable law.[71]

7. As a conclusion: some solutions

Crowdwork, which is the product of the technological age, has raised various problems in both substantive law and private international law. Especially transactions on platforms where the entire service takes place on the internet, often have an international element and therefore fall within the scope of private international law. In the crowdwork, where there is a tripartite relationship, it is important to characterize the relationship between the service provider and the platform. If the service provider is characterized as an employee in this relationship, the protective measures arising from labour law will also apply to the service provider. Moreover, the platforms have been accused of misclassifying their service providers as independent contractors to avoid labour law obligations. Characterization is therefore very important, but it is difficult to draw general conclusions as the technical characteristics of the platforms differ from one another. However, there is no uniformity regarding the status of platform employees, even the courts of same country can render different judgments on this issue.

The status of platform workers is a grey area in private international law. Assuming that these service providers are employees, they will be subject to the Brussels I-bis and Rome I Regulations. These regulations, which are related to international jurisdiction and applicable law respectively, contain provisions protecting the employee, who is considered to be the weaker party. These Regulations also include geographical connecting factors such as the employee's habitual place of work but on platforms like Upwork, where the work takes place only on the internet, using these geographical connecting factors undermines predictability. Especially in the case of digital nomads, these geographical connecting factors may point to incidental locations and may not fulfill the objective of protecting the weaker party. Therefore, it is difficult to apply the

71 ibid, 243.

classical conflict of laws rules to these employees. Even the characterization has not been established on a clear basis yet.

According to a solution argued in the doctrine, these employees should be protected sectorally such as seafarers which have fallen outside and apart from the territorial jurisdiction of national regulation.[72] As a matter of fact, these platforms do not harm the labour market, and these platforms increase job opportunities. Ensuring predictability and legal security to platforms and granting legal status to employees will be in favor of the labour market.[73] According to another proposal, online dispute resolution (ODR) methods should be provided for these disputes.[74] The objective of this online dispute resolution platform is to provide a simple, effective, fast and inexpensive out-of-court solution to disputes arising from online transactions. An online dispute resolution system would also be attractive for digital employees who are often discouraged from submitting their low-value claims to judges or arbitrators.

72 Cherry (n 66), 50.
73 Baycık and others (n 29), 791.
74 Guillaume (n 9), 254.