How to Determine Which Jurisdiction's Employment Laws Reach Border-Crossing Staff

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The most fundamental question in cross-border employment law practice is inevitably: *Which country's employment laws reach border-crossing staff like expatriates, mobile workers and employees with international territories?* And then there is the related question: *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 two questions implicate employee "forum shopping," and employees who can "forum shop" wield "powerful ammunition in negotiations over compensation." (P. Frost & A. Harrison, "Company Uniform," *The Lawyer* (London), Dec. 11, 2006 at 21)

Both of these questions arise frequently. They get asked (or, certainly, *should* get asked) whenever a multinational employer structures a mobile job, an expatriate posting, an overseas "secondment" or just an international business trip. The questions come up when a multinational drafts cross-border employment policies and international benefits or equity plans. They come up with cross-border restrictive covenants and employee intellectual property assignments. These questions even arise when an employer contracts with overseas independent contractors, because of the risk of misclassification. And these questions become vital when an employer needs to dismiss border-crossing staff like expatriates, international secondees, mobile workers and personnel with international territories.

The complete answer to these 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 respond to these questions thoroughly requires an analysis of three topics: (1) the general rule as to whose laws reach border-crossing employees (2) refinements to the general rule and (3) the effect of a choice-of-law or choice-of-forum-clause.

Part 1: The General Rule as to Which Jurisdiction's Employment Laws Reach Border-Crossing Staff

The U.S. Army used to run a ship repair center in Hampshire, England, on the English Channel. But back in 2006, "for strategic reasons" the Army shut the shipyard down. In closing it, the Army sidestepped a British 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 staff, even if they are not unionized. (UK Trade Union and Labour Relations (Consolidation) Act 1992, as amended in 1995, § 188) When an English accountant named Mrs. Nolan sued the Army for laying her off without consulting first, the Army fought back, arguing UK labor law does not reach an overseas U.S. Army shipyard engaged in activities that are *jure imperii*, not *jure gestionis*—and besides, in the international public-sector context UK and European Union labor laws are *ultra vires.* (*USA v. Nolan*, [2015] UKSC 63 at ¶ 12 (the Army waived sovereign immunity)) The case went on for nine years and all the way up to the UK Supreme Court. In October 2015 the Supreme Court issued a 45-page opinion that upheld for Mrs. Nolan the simple rule that UK labor laws apply on UK soil: Generally, *employee protection laws are territorial to the place of employment.*

When determining which jurisdiction's laws apply in a cross-border employment scenario, always begin with the general rule that employee protection laws are territorial to the place of employment. The local employee protection laws of the place where a given employee currently works usually apply by force of public policy as "mandatory rules." The corollary or logical inverse of this rule is that employee 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 the place of the employer's headquarters—generally do not apply in overseas jurisdictions (unless expressly drawn in by an agreement between the parties).

This general rule and its corollary make sense when we understand their underlying policy. Employee protection laws tend to be strands in the legal safety net that each jurisdiction unfurls to protect staff working within its territorial borders. If some jurisdiction's safety net let certain staff working locally slip through—for example, if the employee protection laws of some country exempted foreign citizens, "inpatriates" originally hired overseas or staff working for foreign-headquartered organizations—then employers might deny these workers their minimum protections. From a public policy point of view, just because some worker happens to be an immigrant, an inpatriate or employed by a foreign organization should not give the employer a license to discriminate, pay less than local minimum wage or flout health and safety regulations (for example). And this principle applies not only to vulnerable low-wage laborers but also to highly-compensated executives. On the other hand, jurisdictions are poorly positioned to police overseas compliance with their domestic workplace regulations, so employee protection laws generally do not reach beyond their territorial jurisdiction.

- **Employee protection laws as mandatory rules***:* We are talking about "employee protection laws" as mandatory rules. Employee protection laws tend to include most all of a jurisdiction's rules regulating the employment relationship—its laws addressing, for example, pay rate, 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. Of course, employee 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 short, a given jurisdiction's mandatory employee protection laws tend to include all its laws regulating the local workplace except for (maybe) certain regulations on the structure of executive compensation, equity/stock options and non-mandatory benefits. (But actually in many jurisdictions even laws regulating compensation and equity plans are also employee protection laws.)

Our general rule on the territoriality of employee protection laws tends to strike Americans as heavy-handed, a quirk of protective foreign regimes hostile to employment-at-will. But actually we Americans apply this same rule ourselves. The employee protection laws of a U.S. place of employment almost always apply in the face of less-protective regulations in a different jurisdiction even if the parties had contractually selected foreign law. In the words of the U.S. Ninth Circuit Court of Appeals, 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. (*Ruiz v. Affinity Logistics*, 667 F. 3d 1318 (9th Cir. 2012), *later proceeding* 2014 U.S. App. LEXIS 11123 (9th Cir.)) Under the framework of the 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 employee protection laws than some foreign jurisdiction does, even a jurisdiction that an employer and employee may have contractually selected. As an easy example, a 15-year-old legally employed in his home country cannot legally work after he moves to a host country with a minimum child labor age of 16—even if a guardian consents to applying home country law. As another example, an employer with staff in a state that imposes a high minimum wage cannot legally pay personnel below the state minimum, even if an employee from another state with a lower minimum wage agrees to provisions invoking home state law. Yet another example is health and safety law; no jurisdiction is likely to shut off its health and safety laws just because an employee is an inpatriate.

- **Exceptions.** This said, this is just a strong general rule that applies most of the time. There are occasional but rare exceptions. (*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))

To understand how our general rule on the territoriality of employee protection laws in a place of employment works in practice, imagine a hypothetical Indian tech company that transfers an entry-level Bangalore programmer (Indian citizen with U.S. work visa) to a company branch in Palo Alto. Imagine the programmer signs a contract calling for the law of her and her employer's home country—India. India obviously has a strong nexus to this particular employment relationship, so under commercial principles this choice-of-law clause would be presumptively enforceable. (RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a)) But imagine that after the programmer's place of employment shifts to California, she continues to earn an Indian wage below 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 Indian 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-Indian-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 employee protection laws—including waivers in the guise of foreign choice-of-law clauses. (*Ruiz*, *supra*) 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 Indian wage law will be void if India's minimum wage is below the FLSA's, and a contractual selection of Indian workplace safety law will be void if Indian health and safety standards are below OSHA's. Any court holding otherwise would push this California-based employee through the safety net of American and Californian employee protection laws.

Our general rule on the territoriality of employee protection laws in an employee's current place of employment therefore applies even in the expatriate context to protect an "inpatriate" working for a foreign organization. For example, the French Supreme Court has held that New York employment law, not French law, covers French citizens working in New York even for French-owned employers. (Decision 10-28.563 of Feb. 2012, *supra*) The Ontario Superior Court of Justice similarly rejected an employment claim of a Canada-hired Canadian who got transferred to New York and then fired. (*Sullivan v. Four Seasons Hotels*, 2013 ONSC 4622) The principle here becomes particularly significant when an American employee leaves the United States, because of America's employment-at-will doctrine. An American

whose place of employment shifts abroad almost always steps out of employment-at-will and into the safety net of host country employee protections—the "indefinite employment" regime of vested rights, caps on hours, mandatory vacation, severance pay and termination protections.

Part 2: Refinements to the General Rule

Understanding the general rule that the employee protection laws in a place of employment tend to be territorial, we now turn to nuances, refinements, strategies, exceptions and purported exceptions to this general rule: (A) long business trips and mobile employees (B) wage/hour and health/safety laws (C) the Communist and Arab exception and (D) exceptional extraterritorial reach. Then, separately, we analyze the effect of a choice-of-law or choice-of-forum provision written into employment documents.

A. Long business trips and mobile employees: While our general rule is that the employee protection laws in a host country place of employment almost always apply, *which country* is a given employee's current place of employment can sometimes be unclear—a disputed fact question. Using terminology in Europe's Rome I Regulation on conflict of laws, disputes sometimes arise as to which jurisdiction is "habitually" a given employee's place of "work." (*Cf.* Europe Rome I Regulation, EU Reg. 593/2008/EC (6/17/08) at arts. 8, 21)

Fortunately, on a per-employee basis these disputes are rare because the place of employment or "habitual place of work" of the vast majority of the world's workforce is obvious and uncontested: Someone's place of employment is simply the address on his business card, email signature and paycheck stub. But the place of employment of a small minority, the mobile workforce, may be debatable. What is the place of employment of a traveling employee like a flight steward, pilot, sailor or salesman with international territory—what the British call a "peripatetic employee"? 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 his 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 a very short-term expatriate assignment? What is the place of employment of a reassigned expatriate only recently arrived in a new host country? Determining place of employment in these situations turns on the facts.

B. Wage/hour and health/safety laws: In most jurisdictions *wage/hour and health/safety laws* tend to be mandatory rules that reach everyone rendering services locally—even incoming business travelers and guest workers whose principal places of employment remain overseas. That is, as distinct from other employment laws, regulations of minimum wage, overtime, caps on hours and worker health/safety tend to protect even inbound business travelers and guest workers who otherwise ostensibly remain subject to their home country's employment law. (*Cf.* EU Posted Workers Directive, 96/71/EC, at art. 1 (focusing on place "where the work is carried out"); 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.)) The policy here is straightforward: If an inbound business traveler were exempt from host-country wage/hour law because of his 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. As to health/safety, it would be seen as cruel if employers withheld otherwise-mandatory health/safety protections from staff because they happen to be guest workers.

C. The Communist and Arab exception: 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 protecting their local citizens at the expense of immigrant foreigners, or at least let non-citizen "inpatriates" opt out of national employment regulations. Public policy in these exceptional jurisdictions sees national employment law as protecting local citizens and is less concerned with extending its safety net of employee protection laws to non-citizen inpatriates (who are likely to be well-compensated and well-protected, anyway). And so local law in these jurisdictions is often more hospitable to employment-context choice-of-law arrangements with non-citizen staff.

Similarly, some employment laws in some Arab countries reach only local citizens, or at least accommodate choice-of-law provisions—for example: minimum wage laws in UAE; social security rules in 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 have been discussing the general rule that employee protection laws are territorial and so a host country's employee protection laws protect even inpatriates and immigrants whose place of employment has shifted into to the host country. We turn now to the corollary or inverse or outbound prong of our rule—the

employment laws of a given jurisdiction tend *not* to follow local citizens or residents who emigrate to work abroad as expatriates. This corollary usually applies, but there are some key exceptions. A handful of jurisdictions actually attach some or all of their employee protection laws to some local citizens, local residents or local hires who set off to work abroad. These "sticky" employee protection rules are said to have an "extraterritorial" reach because an expatriate working abroad can enforce these laws back home even though he simultaneously enjoys the protection of employment laws in the new place of employment. Where home country employment laws have an extraterritorial reach, the hapless employer simultaneously must comply with *two jurisdictions*' sets of workplace rules.

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

- *U.S. discrimination laws:* In 1991 U.S. Congress swiftly reversed the 1991 Supreme Court decision *EEOC v. Aramco* (499 U.S. 244) by passing the Civil Rights Act of 1991 (Pub.L. 102-166). Since then, the major U.S. federal discrimination laws have reached American citizens who work abroad for U.S. "controlled" multinationals—even though host-country discrimination laws usually apply simultaneously as mandatory rules that employers and employees cannot contract around. (*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)) This said through, the Genetic Information Nondiscrimination Act of 2008 does not by its terms reach abroad. (Pub.L. No. 110-233, 122 Stat. 881)

  As to how the extraterritorial reach of U.S. discrimination laws works in practice, imagine a hypothetical 42-year-old American citizen office manager formerly working in, but now fired from, the Brussels office of a Silicon Valley tech company. This American 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 would be 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 American discrimination laws reach extraterritorially to protect U.S. citizens working overseas for U.S.-controlled multinationals no longer guarantees a *U.S. remedy in U.S. courts*. In 2015 the Ninth Circuit Court of Appeals affirmed the dismissal of an American citizen employee's Title VII and ADEA lawsuit that alleged a Nike subsidiary in the Netherlands had discriminated against her. The American sued both the Dutch subsidiary and Nike 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 Nike headquarters was inappropriate on *forum non conveniens* grounds because the Dutch-based employee had an adequate remedy under local Dutch employment discrimination law. (*Ranza v. Nike and NEON BV*, U.S. 9th Cir. Ct. App. case no. No. 13-35251 (July 2015)) 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.

  - *U.S. employment laws beyond discrimination:* The extraterritorial reach of U.S. employment law is mostly confined to *discrimination law* claims. (*See Cruz v. Chesapeake Shipping*, 932 F.2d 218 (3rd Cir. 1991) (U.S. Fair Labor Standards Act [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)) This is because no federal statute in the entire U.S. Code reaches abroad unless its statutory text expressly says it does, and discrimination tends to be the only topic within American statutory employment law that expressly reaches overseas. (*Morrison v. Aust. Nat'l Bank*, 561 U.S. 247 (2010); *EEOC v. Aramco*, *supra*; *Carnero v. Boston Scientifi*c, 433 F.3d 1 (1st Cir. 2006), *cert. den*. 548 U.S. 906 (2006) (Sarbanes-Oxley [SOX] whistleblower protections do not reach abroad)) Sometimes a quirky fact scenario arises in the international context in which a claimant employee alleges a U.S. employer made employment decisions stateside with ramifications felt 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.)) These cases turn on their facts. Analytically, the issue tends not to be whether a U.S. statute reaches extraterritorially (usually it does not), but rather whether a superficially international fact scenario was, for legal analysis, actually domestic.

- *England*: English employee protection statutes tend to follow our general rule and reach only employment on English soil. And so an Englishman who works outside England for an English-controlled employer rarely can invoke English employee 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 clause itself is supposed to be governed by the English common law of contracts and English choice-of-law principles which confine English employee protection statutes to employment physically within England. (*Cf. Ravat v. Halliburton*, [2012] UKCS 1 at §§32-33)

  Case law, though, carves out a narrow but important exception by which English employment statutes reach "enclaves" of Britons working 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. These cases turn on their facts. The precise limits of this exception is always evolving, although the exception remains narrow. (*E.g., 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; Duncombe v. Sec'y of State for Children*, *Ministry of Defense v. Wallis & Anr,* [2011] lCR 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; 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 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 acts, but Australian hires who get "localized" on foreign assignments (working abroad for non-Australian-incorporated affiliates) cannot. (Australia Fair Work Act 2009 §§ 13, 14, 34, 35(2)—but Australia Superannuation Guarantee legislation applies different standards)

- *South America*: Some—not all—South American countries extend their employee protection laws abroad at least under certain scenarios in certain circumstances. Colombia, much like the England, extends its employee protection laws extraterritorially only where an overseas-working employee reports directly into management in Colombia, "subordinated" to Colombian control. (*Méndez Nieto v. Techint Int'l Construction Corp*., Colombia Sup.Ct. Justice/Labor Div., case no. SL14426-2014.(# 41948, r. 36)(Oct. 2014)) At the other extreme, article 78 of the Venezuelan labor code extends most Venezuelan employee protection laws outside Venezuela to protect Venezuelan expatriates originally hired in Venezuela but now working abroad.

  Brazil extends Brazilian employee protection laws extraterritorially to protect Brazilians temporarily posted overseas. (Brazil labor code § 7062/82, article 3(11)) This doctrine is vital whenever a U.S. company calls up someone from its Brazil facility to come work in the United States. Usually this doctrine reaches only temporary foreign assignments, not permanent moves. Depending on the judge, this rule may reach only Brazilian citizens or 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. (*Elizeu Alves Correa v. Construtopic Construtora Ltda. et al*., Brazilian Appellate Labor Court case # 02541- 69.2010.503.0091 (5/16/11)) 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. (*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))

- *Emigration laws*: While all countries regulate *immigration*, some that export a lot of laborers impose restrictions on *emigration,* regulating employers that recruit locals to go work abroad or that post locals overseas as expatriates. Emigration restrictions act as extraterritorial regulations extending certain employee 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 (domestic servants and construction laborers assigned to the Middle

East, for example), these laws reach cross-border white-collar recruitments and postings. Examples:

- The Philippines regulates employers that recruit Filipinos to work abroad, requiring registrations and permits from two separate Filipino agencies and requiring standard form overseas employment agreements.
- Guinea requires that employers pay both social security and tax withholdings on behalf of Guinean secondees working abroad.
- Liberia requires a license from the Liberian Ministry of Labor to recruit locals.
- Ghana and Mozambique require paying secondees' moving and repatriation expenses—including for families. Ghana also requires employers of Ghanaian secondees dispatched abroad to contribute to the Ghanaian social security system, at least under some circumstances.

Part 3: The Effect of a Choice-of-Law or Choice-of-Forum Clause

In setting out our general rule on the territoriality of employee protection laws, we mentioned that, outside a few exceptional jurisdictions like China and Indonesia, the rule tends to apply even notwithstanding a choice-of-foreign-law clause in a written employment arrangement (be it an employment contract, expatriate assignment letter or employee benefits/compensation or equity plan). This is true regardless of whether the contractually-selected foreign jurisdiction is the country where the employee is a citizen, where the employee was hired, where management is headquartered, or anyplace else. That is, a contractual selection of even a foreign jurisdiction with a legitimate nexus to a cross-border employment relationship is usually powerless to block the mandatory application of a place of employment's domestic employee protection laws.

- *Foreign versus local law clauses:* We are talking here about contractual selections of *foreign* law. Any contractual provision that simply selects the domestic law of a host country place of employment affirmatively reinforces our general rule and so *simplifies* choice-of-law analysis. Because contractual selections of host country (place of employment) law tend to be fully enforceable, an excellent strategy in a cross-border employment arrangement is to draft a choice-of-law clause that straightforwardly selects the law of the host country place of employment. Another good strategy is to omit the choice-of-law clause entirely—just leave the law of the place of employment to apply by default. The one approach that tends to cause complications is inserting a choice-of-law clause that selects some foreign law *outside* the place of employment.

Even though choice-of-foreign-law provisions in cross-border employment arrangements inevitably introduce complications and unpredictability, these provisions remain pervasive in cross-border employment arrangements and international benefits plans, and sometimes even appear in local (one-country) employment arrangements. Inevitably, these provisions prompt the question of whether they are "enforceable." The answer is *both yes and no*: Yes, a contractual choice-of-foreign-law provision is usually fully enforceable to the extent it pulls in the selected jurisdiction's employment laws. But no, for reasons we have discussed, a choice-of-foreign-law provision is usually powerless to shut off the mandatory application of the employee protection laws in a host country place of employment.

The result: The hapless employer that inserted a choice-of-foreign-law provision into its employment documentation usually ends up having to comply with *two different sets* of employee protection laws. Meanwhile, the lucky *employee* who benefits from a choice-of-foreign-law provision gets to "cherry-pick" the more advantageous rules between two jurisdictions. And so a choice-of-foreign-law clause in an employment arrangement often backfires on the employer that drafted it.

When employers that had inserted choice-of-foreign-law provisions into their employment arrangements wake up to how these provisions actually work, they often try to impeach their own provisions. In one case, for example, a California employer argued that its provision in its own boilerplate cross-border employment agreement saying "you are considered to be a California resident, subject to California's tax laws and regulations" was not a choice-of-California-employment-law clause. (*Wright v. Adventures Rolling Cross Country*, case no. C-12-0983 EMC., U.S. D.C. N.D. Cal., order of 5/3/12)) In a conceptually similar case, a "California corporation" that had inserted a clause into an agreement with its distributor in Denmark saying the distributorship contract was to "be governed and construed under the laws of the State of California, United States of America" later argued—unsuccessfully—that this clause somehow failed to extend California's dealer-protection laws to a Danish dealer. (*Gravquick A/S Trimble Nav. Int'l*, 323 F.3d 1219, 1223 (9th Cir. 2003)) Occasionally these employers succeed in impeaching their own choice-of-foreign law clauses by showing that applicable choice-of-law principles do not extend employment regulations extraterritorially, and so the clauses are illusory. For example, we 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. (*Ravat, supra*) Of course, the bigger point here is employers that omit choice-of-foreign-law clauses in the first place do not later have to try to impeach their own contractual arrangements.

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 by getting expert testimony and translations. In the end, these cases usually end up arriving at the predictable conclusion under our general rule—local employee protection laws of the host country place of employment apply anyway, by mandatory public policy, and so the foreign-law clause can only add in additional employment regulations. For example, the landmark UK *Duarte* and *Samengo-Turner* 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. The facts in each case involved some twists, but 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 kept foreign-law provisions out of their employment documentation in the first place they would have saved collateral litigation costs and ended up with essentially the same result. *(Duarte v. Black and Decker*, [2007] EWHC 2720 (QB) (UK) (1/07); *Samengo-Turner v. Marsh & McLennan*, [2007] EWCA Civ. 723 (UK) (7/07))

- **Foreign and hibernating employment contracts:** What we have been saying about choice-of-foreign-law provisions in cross-border employment arrangements also applies to a related but more exotic species, the so-called *foreign employment contract*. 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 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 "French employment contracts." Even though French statutory employment law does not reach abroad (*see* French Supreme Court case no. 10-28.537 (Feb. 2012)), French employment law takes a peculiarly 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, at least 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 employee protection laws of the place of employment also apply simultaneously.

  The cleanest way to sidestep this messy situation is to set up overseas expatriate assignments as "localizations" that cancel any underlying home country employment contract. For example, an expatriate can resign from an underlying 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 a choice-of-host-country-law clause.

Our general rule on choice-of-foreign-employment-law provisions and foreign employment contracts is merely a broad rule that applies most of the time. We need to account for a number of nuances, refinements, strategies, exceptions and purported exceptions: (A) Europe's Rome I Regulation (B) Global Employment Companies and non-mandatory benefits (C) restrictive covenants (D) forum selection clauses and (E) the "trick-the-expat" strategy. The rest of our discussion addresses these issues.

A. **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. (Rome I Reg. art. 24) European lawyers are quick to argue that our general rule on the effect of a choice-of-law clause in employment is irrelevant in Europe because the Rome regime trumps it. And then European employment lawyers go on to talk about Rome I and its predecessor Rome Convention as if they somehow empower choice-of-law clauses to block the mandatory application of the employee protection laws in a host country place of employment. A March 2005 article by German lawyers, for example, says the Rome regime leaves European workers "free to agree upon the law of the country that shall be applicable to the employment contract" and an October 2003 article by French lawyers characterizes the Rome regime as leaving "the parties to an employment contract...free to choose the governing law." In 2008, when the Rome I Regulation replaced its predecessor 1980 Rome Convention, European lawyers claimed that, now more than ever, the Rome regime ratifies and empowers contractual selections of foreign

employment law to divest the law of the place of employment.

But no, this is not how the Rome regime really works. Actually the Rome regime codifies our general rule. 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-of-foreign-law clause or foreign employment contract. (Rome I Reg. arts. 34, 37; *compare* Rome Convention articles 3(3), 6, 7) Rome I defines "overriding mandatory provisions" as laws "the respect for which is regarded as crucial by a country for safeguarding its public interests." (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)) 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." (Rome I art. 8(1)) 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." (Rome I arts. 8(1), (4))

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 have a so-called "foreign employment contract") usually gets to "cherry-pick" the more favorable employee protection laws of either the contractually-selected jurisdiction or the host country "in which the employee habitually carries out his work" (Rome I Reg. art. 8(2))—or both. Not surprisingly, French appeals courts in Grenoble and Paris have overridden choice-of-law clauses calling for Texas and German law, imposing stricter rules under the French employment code to protect expatriates working on temporary assignment in France. Similar results come from courts across Europe. And even though Rome I is an intra-European arrangement, it reaches contractual selections of employment laws of non-European jurisdictions like United States. (Rome I Reg. art. 2)

In short, a European lawyer involved in a cross-border choice-of-employment law issue is likely to argue that under Rome I, an "individual employment contract" is "governed by the law chosen by the parties." When someone makes this argument, acknowledge that yes, this point is indeed completely consistent with the *first sentence* of Rome I article (8)(1). But then raise that same provision's *second* sentence, which imposes our general rule on the territoriality of the employee protection laws of a host country place of employment even in the face of a contractual selection of foreign law. (This said, we are generalizing here about a pan-European treaty—unusual scenarios adjudicated in far-flung courts across Europe occasionally yield to unexpected outcomes.)

B. Global Employment Companies and non-mandatory benefits: Our general rule about the territoriality of employment laws reaches *employee protection regulations*. And so a choice-of-foreign law clause in an employment arrangement might block host-country laws that are *not* employee protection regulations. Parties to a cross-border employment relationship might select home-country laws that govern discretionary human resources topics outside the realm of local "mandatory rules" like, for example, terms governing a stock option or equity plan. There is a U.S. case law authority dismissing a U.S.-based employee's claim over terms in a restricted share plan because the plan contains UK choice-of-law and UK choice-of-forum provisions. This principle grounds "Global Employment Companies"—so-called GECs, entities that multinationals set up to employ a corps of career expatriates working around the world. This principle explains why choice-of-home-country-law clauses are common in international compensation and equity award agreements.

Yet the employment law topics most likely to be discretionary and susceptible to a choice-of-foreign-law clause tend only to be 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.

While selecting the law of a home or headquarters country can be important in designing a GEC or a cross-border compensation or equity agreement for highly-compensated expatriates, remember that this contractual selection usually works only as to those few employment topics that are not "mandatory rules." Even a choice-of-law clause confined to a high-ranking executive's bonus plan, equity award agreement or compensation arrangement will not divest host-country "mandatory rules" like, for example, laws on vacation and sick leave. GECs and cross-border compensation plans do not evade our general rule on the mandatory application of host country employee protection laws.

C. **Restrictive covenants:** Restrictive covenants (non-competes, non-solicits, confidentiality and employee inventions commitments) raise special challenges in cross-border employment. Laws that enforce restrictive covenants tend to be "mandatory rules" 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, a California court will almost never defer to a New York or English choice-of-law clause to enforce an employment-context non-compete against a defendant whose place of employment is California. And it works the same way in reverse—English courts, for example, almost never defer to New York or Maryland choice-of-law clauses when

interpreting restrictive covenants as to staff working in England. *(Duarte; Samengo-Turner (supra))*

As to post-term restrictive covenants, the practical enforcement issue usually comes down to complying with the restrictive covenant rules and public policy of the jurisdiction where the employer seeks enforcement, which often ends up being the place where the employee goes off to breach the covenant, and may be neither the home nor host country during employment.

D. **Forum selection clauses and the Recast Brussels Regulation:** We have been addressing choice-of-law clauses that invoke a legal regime other than that of the forum country. A separate but related issue is *choice-of-foreign-forum* clauses that seek to force the parties to an employment arrangement to resolve disputes before a contractually-selected forum other than the local labor courts of the employee's place of employment —arbitration or a foreign jurisdiction's courts. The challenge with an employment-context clause selecting a forum other than host country labor courts is that, outside the U.S., special-jurisdiction labor courts tend to enjoy mandatory jurisdiction over employees who work locally—just as, within the U.S., special-jurisdiction workers' compensation agencies, unemployment compensation agencies, equal employment agencies and the NLRB (albeit not general jurisdiction courts) mandatory jurisdiction that a choice-of-forum clause generally cannot block.

Outside the U.S., clauses in expatriate agreements and compensation/equity plans purporting to select some forum other than local host-country labor tribunals rarely block the mandatory jurisdiction of host-country labor courts. In London today, for example, many American financial services expatriates are working under arbitration and U.S.-court clauses of dubious enforceability if these expatriates were to sue their employers in a UK Employment Tribunal. (*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)

Of course, an employee might bring a claim in a contractually-selected foreign forum if he wants to; the issue is that if an employee subject to a foreign-forum selection sues in host country labor court, the foreign-forum selection clause rarely is grounds for dismissal. This said, through, a foreign-forum selection clause might be enforceable in an employment dispute if the parties sign the clause *after* the dispute arises, or if the place of employment is one of a handful of jurisdictions, like the Malaysia and the United States, with statutes authorizing employment arbitration.

In employment-context choice-of-forum scenarios, European employment lawyers invoke articles 20, 21 and 22 of the so-called "Recast Brussels Regulation" on employment-context choice-of-forum clauses within Europe. (EU Regulation No. 1215/2012 *repealing* Regulation 44/2001) These articles of this Regulation merely codify our general rule that employees outside the U.S. usually need not litigate employment disputes outside their place of employment, even if a choice-of-foreign-forum clause purports to require otherwise. In its 2015 decision in *Petter* (*supra*), 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.

All this said, a choice-of-forum clause in an employment agreement or compensation/equity plan will always be enforceable if it simply selects the courts and agencies of the host country place of employment.

E. **The "trick-the-expat" strategy:** An expatriate consultant at a major HR consulting firm used to recommend inserting into Americans' expatriate assignment agreements a U.S. choice-of-law and U.S. choice-of-courts clause, even knowing how unlikely these clauses are to block overseas host-country employee protection laws and the mandatory jurisdiction of foreign labor courts. His theory: Some American expatriates, particularly those posted into poor countries, may be so innately skeptical of overseas justice that a choice-of-U.S.-law (or forum) clause might dissuade at least less-sophisticated expatriates from asserting legal rights granted by their host country. This consultant predicted that some American expatriates might believe a U.S. choice-of-law/forum clause means what it says, that any dispute has to get resolved under the employer-friendly regime of U.S. employment-at-will. A choice-of-U.S.-law clause might blind at least less sophisticated expatriates to the fact that "mandatory rules" of a foreign host country place of employment grant unwaivable substantive and procedural rights that tend to be better (for the expatriate) than what American law provides.

These days, though, expatriates are increasingly likely to research their rights on the Internet. Expect them to figure out that choice-of-law and choice-of-forum clauses in the cross-border employment context are largely powerless to block host-country mandatory rules that go beyond employment-at-will.

This said, in some cases a home-country-law or forum selection is said somehow to act as an acknowledgment between an expatriate and employer that their mutual intent, even if non-binding, is to resolve any disputes under home-country rules. Some expatriates might accept this— even if host country law does not force them to.

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Which jurisdiction's employment laws reach border-crossing staff? Analyze border-crossing choice-of-employment-law questions strategically. Because employee protection laws are "mandatory rules" applicable by force of public policy, host-country employment law—the law of the current place of employment—usually applies. In addition but not instead, home-country workplace rules rarely but occasionally also apply, such as where a home-country statute has "extraterritorial" reach or where the parties contractually selected home-country law.

While these general principles usually control, the issues here are nuanced, particularly when the parties signed a choice-of-foreign-law clause. Do not be dazzled by these clauses—yes, choice-of-foreign-law provisions may succeed at pulling in the selected jurisdiction's law, but no, these clauses rarely exclude host country employee protection laws. In many cross-border employment scenarios the best drafting strategy might be either to omit any choice-of-law provision entirely, or else simply to select the law of the place of employment.