3. COLLECTIVE ACTION IN LABOUR CONFLICTS UNDER THE ROME II REGULATION

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This contribution analyses Article 9 of the Rome II Regulation. Article 9 innovates by introducing collective action as a separate (sub)-category in the conflict of laws. However, upon closer reading it becomes evident that not collective action, as such, is to be submitted to a special conflict of laws rule, but only the non-contractual obligations arising therefrom. In so doing, the provision creates difficult issues of classification: which relationships involved in a collective action are considered to be non-contractual? Part II of this contribution deals with these technical aspects of classification under private international law. But before embarking on that mission, Part I describes the background of the special provision in Rome II and gives a conceptual framework for the phenomenon of cross-border collective action.

Part III is dedicated to the conflict of laws rules itself. The rule in Article 9 deviates from the main rule in its choice for the *locus actus*, rather than the *locus damni*, in situations where the two point to different legal systems. Moreover, rather than being open-ended like Article 4, the rule does not permit deviations based on a closer connection. Though this special rule definitely has its merits, it fails to take fully into account the collective character of industrial action. The authors describe some of the difficulties in the interpretation and application of the provision. Additionally, the roles of party autonomy and the public policy provision are addressed. In the concluding remarks, the authors take one step back to point out the limited relevance of conflict of laws. The Rome II Regulation in itself does not (and cannot) safeguard the nationally enshrined right of collective action in the transnational context. This is due in part to the

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1 This contribution is based on an earlier publication in Dutch. (See Dorssemont and van Hoek, 2008, 515–534). The translation which took place under the auspices of both authors was made possible by a research premium granted to Filip Dorssemont by the Faculty of Law of Utrecht University.
fragmented character of European private international law. More important however is the substantive threat posed by the fundamental market freedoms, as they are currently interpreted by the ECJ.

I. CONCEPTUAL FRAMEWORK

A. ARTICLE 9 OF ROME II: BACKGROUND AND STANDARD OF EVALUATION

As a result of a proposal by certain members of the European Parliament, Rome II contains a special conflict of laws rule “for a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out”. The determination of the applicable law is primarily based on “the country where the action is to be, or has been, taken”. This connecting factor is different from the one used in the main rule of Article 4, which applies to obligations arising from tort in general. Article 4 refers primarily to the law of the country where the harm occurs. These two connecting factors produce different results in tort cases with “multiple loca” like for instance a solidarity strike in the port of country A directed against a ship sailing under the flag of country B.

This difference in connecting factor causes a change in perspective. The reference to the country where the damages arise is more victim-oriented: He suffers harm (to be compensated by damages) and does so at a certain location. The reference to the locus damni will normally ensure that the victim can rely on a legal system which is geographically close to him for his entitlement to compensation. This proximity means that the victim is likely to be familiar with that legal system. Using the locus actus, the place where the allegedly tortious action took place, as a connecting factor places a stronger focus on the tortfeasor and his action. This connecting factor enables tortfeasors to adjust their behaviour to standards which are familiar to them – and sometimes to select the legal system which will apply to their (intended) action by choosing the locus of their action. That is why the choice for the locus damni, at the expense of the locus actus, is thought to be related to the greater emphasis placed by modern tort law on risk

2 Multiple loca: this refers to torts leading to damage at a different locus than where the tortious act took place. The rules also differ with respect to the extent in which the principal rule allows any exceptions; see below.

3 At least: at the moment when the tort was committed.

4 See, e.g. De Boer, 1982, 36 and the Explanatory Memorandum regarding the Dutch Act on Conflict Rules with respect to Tort, Parliamentary Document 26608, no. 3, p. 6 with respect to the (expected) coincidence of the place of residence of the injured party with the locus damni.
management and compensation through damages. The regulation of behaviour has allegedly become a less relevant objective of tort law.\(^5\)

A connecting factor based on the localisation of the damages which arise is not *per se* suitable for the regulation of the right to industrial action. The amendments proposed by the European Parliament regarding a special rule for industrial action were meant to serve as a safeguard for workers’ right to take industrial action, including the right to strike, as guaranteed by the Member States’ legal systems.\(^6\) This justification reveals the constitutional dimension of the problem. The right to take industrial action is recognised in international, European and national law as a fundamental right. But the extent of the right and the restrictions thereof may differ from Member State to Member State. Any restriction of a fundamental right must be prescribed by law. According to the European Court of Human Rights, the mere existence of a basis in domestic law does not satisfy this requirement. The rules have to be accessible, precise and foreseeable in their application.\(^7\) This safeguard applies to anyone who is entitled to exercise the fundamental right. In the case of collective action this would include workers, employers and their respective organisations as all of these may participate in collective action.

The law on tort constitutes an important restriction on the right to take industrial action. After all, the exercise of the fundamental right to take industrial action often entails damage to the employer or to a third party. The aim of industrial action is to put pressure on an actor in collective labour relations by causing damage or threatening to do so. This (threat of) damage is therefore an essential part of the effectiveness of the right. If the industrial action is found to be illegal, the employer may take countermeasures against the participating workers. Such finding may also lead to a court ruling which either bans the

\(^5\) See COM(2003)427 p. 13 and Preamble no. 16 regarding the Rome II Regulation. See also the Explanatory Memorandum regarding the Dutch Act on Conflict Rules with respect to Tort, Parliamentary Document 26608, no. 3, p. 6.; Strikwerda, 2006, no. 180; Pontier, 2001, p. 75. De Boer, 1982, 34 et seq., 40. Anyway, it is Strikwerda (no. 185a) who suggested that the choice for the *locus actus* in the environment can also be based on arguments related to the recovery of damages and the insurability of the risk. After all: the *locus actus* of offences against the environment is usually the place of residence of the polluting company and this place of residence also determines to a large extent the company’s ability to pay compensation and the obligation to take out insurance. See also De Boer (1982, 34–36) emphasises the importance of the link-up with the *place of residence* (of the victim or tortfeasor) as part of a theory that considers the law as a form of risk management. Cf. also Symeonides, 2008, 17–18 of 48, consulted on http://ssrn.com/abstract=1031803. Symeonides criticises the general details of the object of the law on tort and qualifies individual rules of law as having *conduct regulating* or *loss-distributing* properties. Regarding the first type of rules he considers the *locus delicti* to be relevant (the *locus actus* as well as the *locus damni*), for the second type that is the *place of residence* of the injuring party and the victim.


action or orders the payment of damages *ex delictu.* The question of whether a collective action is illegal or protected by law coincides to a large extent with the finding of liability in tort (or otherwise) of the participants in and organisers of such a collective action.

Legal certainty is not only a problem for workers who are involved in an international industrial action, but it is also required for industrial action which is exclusively national. In the past, national courts have recognised that a lack of legal certainty may refrain a party from exercising his fundamental right to take industrial action. One of the underlying reasons for the protection of individual participants in industrial action organised by a union is precisely the prevention of legal uncertainty. Thus, the Dutch Supreme Court ruled that an employer may not take any disciplinary action against workers involved in industrial action which can legally qualify as a strike. Workers should be able to rely on the legitimacy of any industrial action initiated by the union. The German *Bundesarbeitsgericht* made a similar ruling in the sense that workers should be able to rely on the assessment of the legality made by the organising union when they participate in an organised strike. As a result, participation in such a strike cannot qualify as a breach of contract.

The applicability of the rules of the country where the rights are exercised ensures the foreseeability of the restrictions imposed by the law on torts as well as the accessibility of the relevant legal rules. Hence, this conflict of laws solution makes it possible for the party who exercises his right, to anticipate the restrictions imposed by the law. But if the conflict of laws rule of Article 9 of Rome II is to meet the requirement of legal certainty for all participants in an industrial action, in our view two more requirements must be satisfied. Firstly, the result of the application of the conflict of laws rule must be highly predictable. Secondly, all participants must be able to rely on one and the same assessment of the legality of the action as such. These two criteria will therefore be part of our discussion.

The special status this Regulation accords to industrial action is unique. This Regulation does not give any other fundamental right the same protection.
our opinion, this can be explained by the special role of tort law in restricting the right to strike. A similar situation, the exercise of a fundamental right being restricted by the law on tort, also occurs with the freedom of speech. The exercise of this fundamental right may lead to action in tort when the communication in question is thought to amount to insult, defamation, incitement to racial hatred, etc. However, the harm caused by the exercise of the right of freedom of speech will usually be collateral (and often of a non-pecuniary character) whereas the intent to cause harm is inherent to collective action. With respect to the freedom of speech, too, the question arose whether the reference to the locus actus is imperative to guarantee an unrestricted exercise of the fundamental right. It proved impossible, however, to reach agreement on this issue during the negotiations. Violations of privacy and rights relating to “personality, including defamation” are excluded from the Regulation’s scope.\(^\text{13}\)

**B. INTRODUCING THE DEBATE – TOR CALEDONIA**

It was only after a ruling by the European Court of Justice on 5 February 2004 in the *Tor Caledonia* case, that it became apparent that the application of the rules of the country where the damage occurred can frustrate the effective exercise of the right to take industrial action.\(^\text{14}\) The issue of the applicable law was by no means the subject addressed by this ruling. Its central issue was the jurisdiction of the court. The preliminary question put before the ECJ by the Danish *Arbejdssret* dealt with the interpretation of Article 5.3 of the Brussels Convention (now replaced by the Civil Judgment and Jurisdiction Regulation Brussels I\(^\text{15}\)). The underlying case resulted from a cross-border collective labour conflict in the context of maritime transport. The facts of this case are fairly typical for industrial action initiated by the International Transport Workers’ Federation (ITF).\(^\text{16}\)

The spring of 2001 saw a Danish shipowner order all hands on deck for a voyage of the *Tor Caledonia* from Göteborg in Sweden to Harwich in Great Britain. The ship’s crew was composed of Danish officers and Polish sailors. It sailed under the Danish flag. The Swedish union SEKO urged the Danish employers’ organisation, which was acting on behalf of the Danish shipowner, to offer the Polish sailors

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\(^\text{13}\) See Article 1 and Article 30 paragraph 2.


\(^\text{15}\) Reg. 44/2001, OJ L 12.

better collective labour conditions. The Danish employers’ organisation refused. The Swedish union was not amused: it blacklisted the Danish shipowner. Swedish sailors were called upon not to take up employment with the “blacklisted” shipowner. The Danish shipowner was not impressed. There were no Swedish sailors among its crew anyway. Neither was the recruitment of new personnel expected soon. The call for a boycott of the Danish shipowner was supported, however, by the Swedish transport union STAF. Swedish dockworkers boycotted the loading and unloading of the Tor Caledonia in support of SEKO. This expression of sympathy had a big effect. The STAF’s sympathy strike supported the SEKO action which in turn was an act of solidarity with the Polish sailors. The Danish shipowner had a problem.

The shipowners’ organisation summoned both unions before the Danish labour tribunal (Arbejdsret) to call off the strike. SEKO subsequently suspended the boycott. The union stated that it would accept the court’s ruling. To be on the safe side, the shipowner cancelled the journey. Another ship was leased to transport the cargo. The Arbejdsret had serious doubts about its jurisdiction to try this case. The essence of the dispute was the interpretation of Article 5 paragraph 3 of the Brussels Convention (and the identical provision of the Brussels I Regulation). The issue was referred to the European Court of Justice for a preliminary ruling.

Article 2 of the Brussels Convention says that defendants whose place of residence is in the territory of a Member State must be summoned before the courts of that State. The place of residence of the unions in this case was Sweden. Article 2 thus did not provide the Danish court with jurisdiction to try this case. However, for defendants domiciled in a Member State, Article 5 paragraph 3 of the Convention provides for an alternative forum for “matters relating to tort, delict or quasi-delict”. A defendant who is domiciled in a Member State can also be summoned before the court of the place where the harmful event occurred if that place is located in another Member State. The Danish shipowner relied on this Article to justify the jurisdiction of the Danish court. The question was, however, whether Article 5 paragraph 3 of the Convention could be used in this case.

One of the issues the Arbejdsret faced was whether legal proceedings limited to the lawfulness of an industrial action could qualify as proceedings relating to an obligation arising from tort. The object of the court intervention sought by the employer was to obtain a declaratory judgment and a prevention order; repression or compensation was by no means at issue. According to Danish law, the Arbejdsret is competent to hear cases on the legality of the action, to the exclusion of civil or commercial tribunals.17 If so required, the latter-mentioned courts address the issue of the compensation.

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17 See consideration 20 of the Tor Caledonia ruling. It is striking that the Danish court suspended its judgment in this respect until the Arbejdsret had tried the issue of calling off the strike. This interesting division of tasks made it impossible to circumvent the most specialised court in the area of industrial action in favour of a commercial court.
Moreover, the *Arbejdsret* was not at all convinced that Denmark was the State where the harmful event had occurred. The only argument in favour of this statement was the flag. After all, the ship was boycotted in Swedish waters and not in Denmark.

The European Court of Justice was in favour, as was Advocate-General Jacobs, of a broad interpretation of the concept “matters relating to tort”. This interpretation also includes legal disputes “concerning the legality of industrial action”.¹⁸

Following its ruling in the *Mines de Potasse d'Alsace* case,¹⁹ the Court held that the *locus delicti commissi* may concern the place of the harmful event (*locus actus*) as well as the place where the harmful event caused damage (*locus damni*). The Court held, contrary to the Advocate-General’s opinion,²⁰ that the flag’s nationality can play a decisive role in the determination of that place, if the damage occurred on board the ship. The ECJ did not decide on this latter issue itself, but referred the localisation of the damage to the national courts.²¹

The (at this stage still potential) jurisdiction of the flag state led to the question of how the court of the flag state would determine the applicable law that governs the tort. If the conflict of laws rule of the court seized would also use the *locus damni* as a connecting factor, the Swedish unions would not only have to face a foreign court, but they would also run the risk that their collective action would be assessed against a legal system with which they were unfamiliar. It would involve huge risks for the organising union, certainly in the case of sympathy action as described earlier. Firstly, the union would no longer be able to rely on a familiar law system with respect to the legality of an action it organised. Secondly, if the ship’s flag were used as the main connecting factor, this would make it impossible in practice to launch any effective action against so-called flags of convenience. After all, this connecting factor would provide shipowners with the freedom to select any flag they liked and, as a result, determine the law applicable not only to the employment contracts with the crew²² but also to any sympathy action for the benefit of this crew. A flag of convenience is selected because of economic advantages offered by the legal system in question. One such “comparative advantage” could be a low level of social protection. From a historical point of view, the repression of industrial action and unfavourable terms of employment go hand in hand. Hence, it is to be expected that flags of convenience are not conducive to the right to strike. In general, sympathy action will not be allowed.

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¹⁸ See consideration 27 of the *Tor Caledonia* ruling and §§ 33–39 of the Advocate-General Jacobs’ Opinion. In the same sense *Henkel* C-167/00, ECR 2002 I-8111.
¹⁹ C- 21/76, ECR 1976, I-1735.
²⁰ See in this context §§ 78–80 of Advocate-General Jacobs’ Opinion.
²¹ See in this context considerations 41–45 of the *Tor Caledonia* ruling.
²² The flag is a dominant connecting factor for the law applying to the contract of employment of seafarers.
Though Denmark is not a typical example of a flag-of-convenience country, the outcome of the Tor Caledonia case followed the scenario described above quite closely. The Danish Arbejdsret accepted jurisdiction. It concluded that the damage had occurred on board the ship and declared Danish law applicable to the action conducted in Goteborg in Sweden. The industrial action was declared illegal according to Danish law.23

C. THE DEBATE DURING THE TRAVAUX PRÉPARATOIRES24

The original proposal submitted by the European Commission25 did not provide a separate rule for the law applicable to (non-contractual obligations arising from) industrial action. It is remarkable that the European Economic and Social Committee did not insist on having a special rule for industrial action either. After all, some of the Committee’s members are workers’ representatives.26 The Committee’s recommendation is dated 2 June 2004. It was submitted almost five months after the Tor Caledonia case ruling.27 It was up to the European Parliament to introduce a separate rule for industrial action. This rule referred solely to the locus actus. The amendment did not provide any details on the identity of the liable parties. The European Commission, however, rejected the EP’s proposal as it felt that the amendment was too rigid.28 The amendment not only deviated from the locus damni in favour of the locus actus, it did not allow any exceptions either, contrary to the general rule, for the country of common residence of the parties or for a more closely connected country.

The Commission’s rejection of the EP amendment did not stop the Council, however, from incorporating a special provision in its Common Position. Like the EP’s proposal, the Common Position uses the locus actus as the main connecting factor. Unlike the EP proposal, the Common Position identifies its scope ratione personae. This clarification can be understood as an extension as well as a restriction of the EP’s proposal. It stipulates that the special rule of Article 9 of Rome II only applies to a person in the capacity of a worker or an employer or the organisations representing their professional interests. However, contrary to the earlier EP amendment, which aimed at safeguarding the right of workers to take industrial action, the Common Position broadens the scope to include industrial action by employers. The 24th preamble explicitly mentions lockout as an example

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24 The preparatory documents can be found through www.europarl.europa.eu/oeil; the filename being COD/2003/0168/.
26 Article 257 EU Treaty.
par excellence of an industrial action. The Common Position leaves room for application of the law of the country of common residence, but does not refer to the country more closely connected.

It must be noted that Latvia and Estonia objected to the Common Position at a very early stage. Both countries stated that the application of the rule must remain restricted ratione materiae to disputes which are a direct result of the exercise of the right of employers and workers to carry out industrial action. In the end, both Member States voted against the Common Position. Their joint statement of 13 September 2006 recalled that Article 9 of Rome II could not in any way restrict the freedom of services as guaranteed by Community law. It is safe to assume that this remark was prompted by the (then) pending cases of Laval and Viking.

The Greek and Cypriot delegations supported the Common Position. They pointed out, however, and rightly so, that Article 9 of Rome II would make some ports very attractive as a location to carry out boycott actions against so-called flags of convenience. One of the notable features of Article 9 of Rome II is that it does not exclude disputes regarding seagoing vessels. Such an exception clause does feature in numerous labour law instruments introduced by the European Community.

The provision which was proposed in the Common Position ended up being included in the final version of the Regulation, which also contains two preambles specifically dedicated to this issue. These preambles are the main guideline for the interpretation of the Article. This guideline, however, gives rise to more questions than answers.

Article 9 of Rome II states the following:

“Without prejudice to Article 4(2) the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.”

30 International Transport Workers Federation, Finnish Seamen’s Union v. Viking Line ABP, OÜ Viking Line Eesti, European Court of Justice 11 December 2007, C-438/05, ECR 2007, I-10779 and Laval un Partneri v. Svenska Byggnadsarbetareförbundet, Svenska Byggendantsarbetareförbundets avdelning 1, Bygettan, Svenska Elektrikerförbundet, European Court of Justice 18 December 2007, C-341/05, ECR 2007, I-11767. For an explanation of these cases, see infra.
31 “The Greek and Cypriot delegations would like to point out that the application of Article 9 of Rome II of the Regulation would probably cause problems for shipping, given that vessels would be exposed to rules which varied according to the laws of the Member States of their ports of call, irrespective of whether those vessels were in full conformity with the laws of the flag State.”
32 See in this context e.g. Article 1(2c) Directive 98/59 (Collective dismissal); Article 1(5) of Directive 94/45 (European work councils); Article 1(3) Directive 2001/23 (transfer of an undertaking) and Article 3 Directive 2002/14 (Framework Directive Information and Consultation).
The relevant preambles are the following:

“(27) The exact concept of industrial action, such as strike action or lockout, varies from one Member State to another and is governed by each Member State’s internal rules. Therefore, this Regulation assumes as a general principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers.

(28) The special rule on industrial action in Article 9 of Rome II is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States.”

D. CROSS-BORDER INDUSTRIAL ACTION IN EMPLOYMENT LAW AND THE PRIVATE INTERNATIONAL LAW PERSPECTIVE

Private international law analyses legal phenomena which feature a “foreign element”. In a period of increasing Europeanisation and globalisation, industrial actions were bound to become a subject of interest to private international law practitioners. However, a collective action, or the legal procedures resulting therefrom, may demonstrate a “foreign” element without the action being per se “cross-border” industrial action in the sense of labour law. With this last term, we refer to actions that touch upon a collectivity of workers or collectivities of workers who are located, physically, in more than one state. Such actions affect workers in more than one Member State as a result of the place(s) where the action is taken and/or the location of the workers whose interests are directly affected.

Logically speaking, we can distinguish four categories of industrial action. Most industrial actions are carried out within the confines of a single state and do not have any foreign elements. The industrial action only affects the professional interests of workers who are active in the country where the industrial action is taken. In the absence of a foreign element, the employment relations of the workers are exclusively governed by the laws of the locus laboris. The employer who is established in the state in which the action takes place, is the only one who suffers any damage. Such industrial action has, from the perspective of labour law, a national dimension only and – being “domestic cases” are in principle irrelevant from the private international law perspective.33

33 Unless the question of its lawfulness is for some reason brought before a foreign court, in which case it may be considered to be a “foreign domestic case” for the purpose of private international law.
Some industrial actions can qualify as “cross-border” from either a private international law perspective or a labour law perspective. Collective action which qualifies as “cross-border” from the conflict of laws perspective but not from the employment law perspective is industrial action which only affects workers who physically work within the boundaries of one State, but where the individual labour contracts and/or the collective action features a foreign element. Action can also be cross-border from a labour law perspective only. In that case, the collective action affects a collectivity or collectivities of workers which are situated in different states. But neither the individual industrial actions as such, nor the employment contracts of the participants feature any foreign element. These cases are analysed for private international law purposes as a juxtaposition of purely domestic industrial actions.

And last but not least, there is the category of cross-border industrial action that can be qualified as “cross-border” from the labour law perspective as well as the private international law perspective.

Examples of the last three categories can be found in a number of high-profile cases which have featured prominently in the news of the past decade. Some of these examples also touched on the jurisdiction of the courts. They went all the way to the European Court of Justice and were recorded as a cause célèbre. This paper aims to focus in particular on that industrial action which can qualify as cross-border from the perspective of private international law.

\[a) \] Cross-border industrial action from a labour law and private international law perspective

The Tor Caledonia case described earlier serves as a classic example of industrial action that can qualify as a cross-border case from the perspective of both employment law and private international law.

Some industrial action provides evidence of solidarity between workers in different countries; for example, when workers in country B take action to improve the wages and working conditions of workers in country A. This makes the action cross-border from a labour law point of view. It is very tempting to describe the phenomenon of a sympathy strike by using the classic twin concepts “primary” and “secondary” action. These twin concepts are based on the description of one type of sympathy action which supports industrial action carried out by workers who work for another company (in another sector or, as in this case, another country).

However, a sympathy strike is not necessarily also a “secondary” action in the literal sense of being an action undertaken after primary action is taken. Sometimes the workers for whom the sympathy is declared are unable to take primary action. Workers who work on a ship that sails under a flag of convenience are sometimes unable to take action. In those cases the privileged position of
dockworkers who help with the loading and unloading of seagoing vessels are a necessary precondition for any industrial action.

From the perspective of private international law, a conflict or relationship is cross-border when it touches upon several legal orders. Collective action may contain several foreign elements. The employment relations of the workers who take action and those of the workers whose interests are at issue may be subjected to different legal systems. The location of the sympathy action and the place where the damage occurred may be in two different countries. Moreover, an international federation of unions, such as the ITF, may be involved in the organisation of the action.

Another example of an industrial action that can qualify as a cross-border case from the private international law as well as from the labour law perspective is the Viking case. The Viking case was about summary proceedings aimed at obtaining a court order banning a strike called by a Finnish union that resisted the intended reflagging of a ship sailing under the Finnish flag to a flag of convenience for its journeys to Estonia. The summary proceedings also addressed the well-observed ITF circular, which had called upon its non-Finnish members not to sign a collective labour agreement to which the crew of the ship to be reflagged were subjected. As a result, the freedom of establishment of the Finnish shipowner in the direction of Estonia was affected. This was the reason why the threat of a classic strike called by the Finnish union FSU and a particular type of boycott initiated by the ITF were tested for compatibility with the freedom of establishment laid down in Community law. The boycott concerned a call to third parties to exercise their negative freedom of contract in an organised way. As it happened, the ITF had its place of residence in London and so the ITF, as well as the FSU, were summoned to appear before an English court.

It goes without saying that the international sympathy boycott that resulted from the call to strike by the Finnish union against a Finnish shipowner only marginally touched upon English law. The case is an example of the possibilities provided by the Brussels I Regulation for shipowners to engage in forum shopping. In this case, the place where the Finnish action took place as well as the place where the damage occurred pointed at the jurisdiction of the Finnish courts. Considering the generous approach of the law on strikes by Finnish courts, the “courteous” choice of the shipowner for the forum of the defendant ITF (an English court) revealed to be a more interesting option.

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b) Cross-border industrial action from an exclusive private international law perspective

Some industrial action, which does not fit the qualification of a cross-border case from the labour law perspective, may have a foreign element as a result of the nature of the employment relations involved. In such a hypothesis, the industrial action touches upon an international “cross-border” employment relationship. The industrial action actually takes place within the borders of a single state or it only touches upon the operation of the national labour market.

An employment relation may feature a foreign element if a worker who usually works in country A is posted abroad or seconded to country B. Generally speaking, an employment relationship will have a “foreign element” when the locus laboris and the law applicable to the employment relation are not the same. If workers in such international employment relations participate in industrial action, the question arises which law is applicable. Theoretically speaking, the choice should be between the law of the country where the industrial action is taken and the law applicable to the employment relationships. The law applicable to the posted workers may not be the same law that governs the employment relations of the local workers. If the seconded as well as the local workers are involved in the industrial action, the connecting factor of the locus (non) laboris has the advantage that the entire collectivity of workers are subjected to the same law system. The connection with the law applicable to the employment relation may lead in this case to the fragmentation of the collectivity of workers. The connection with the common locus (non) laboris provides evidence of an institutional approach of the “community of labour”, which goes beyond its contractual construction.

A recent example of such an action is the Laval case. This case concerned industrial action carried out by Swedish unions in the building industry who wanted to put pressure on a Latvian builder who was building a school for the Swedish municipality of Vaxholm with the aid of seconded workers. The employer refused to apply the terms of employment which are commonly used in the Swedish

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36 Moreover, the place of residence of an employer may also give rise to conflict of laws issues such as the procedure applicable to the strike in country A which is brought before the court in country B. We will not discuss this possibility here. The concept of an “international employment contract” is discussed in more depth and with more nuance by Van Hock, 2000, 365–370.
37 In that case, the opposite may apply in the case of collective action against an internationally active employer. Applying the law applicable to the employment contract instead of the lex loci laboris will lead to a uniform treatment, if one and the same legal person employs workers in different Member States whose labour contracts are subject to the law of the country of origin of the employer. An example of this is the employment of workers by an airline company with a choice of law for the law of the company. A similar situation may exist with respect to international secondment in the building industry and in international transport by road.
38 European Court of Justice 18 December 2007, C-341/05, Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet et al. ECR 2007, I-11767.
l Labour market. He was pressurised into entering a Swedish collective labour agreement. The boycott called by the Swedish unions was aimed at a blockade of all Laval construction sites in Sweden. The workers who supplied the site by no means refused to enter into an agreement with Laval. They had an employment contract with a different employer. They did refuse, however, to perform their contract of employment insofar as that benefited their employer’s client. That client was a blacklisted employer. The Laval case addressed the issue whether this industrial action was compatible with the freedom to provide services.

The industrial action took place within the Swedish borders for the benefit of workers who actually worked there. In that sense, it is not a cross-border industrial action. The outcome of this analysis would only be different if one were to support the proposition that the seconded workers are active on the Latvian labour market 39 and that the industrial action was a sympathy action for the improvement of the terms of employment of some of the workers on the Latvian labour market. Such an analysis is at odds with the rationale behind the industrial action. From the perspective of the Swedish unions, the industrial action was not an expression of international solidarity. The solidarity with the workers who worked on the same territory was at issue. If the qualification were to be based on a more labour market-oriented approach, the industrial action could be considered to have cross-border aspects. The Swedish unions, however, contested the artificial allocation, from their point of view, of the seconded workers on the Latvian labour market. 40 After all, the aim of the industrial action was to ensure that Latvian workers were treated as if they formed an integral part of the Swedish labour market. The criterion was that their physical presence and activities on Swedish territory would have a negative effect on the social protection commonly applied in the Swedish labour market.

c) Cross-border from an exclusively employment law perspective

Particular industrial action can be said to be cross-border from an employment law perspective only. Industrial action instigated by the ETUC, for example often consists of action carried out (more or less) simultaneously in different Member States. The private international law practitioner will consider such action as a cluster of national actions, each of which is devoid of any foreign element. The cross-border nature of the industrial action may be the exclusive result of workers taking industrial action in more than one state for an identical claim. Such a claim may touch upon an interest held in common or primarily concern the interests of some members of the collectivity of workers. The pan-European strike waves

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39 This position is expressed by the ECJ, inter alia in the case Rush Portuguesa, European Court of Justice 27 Maart 1990, C-113/89, ECR I-1417.

40 This localisation of seconded workers in the labour market of the Member State of origin largely goes back to the ruling in Rush Portuguesa, European Court of Justice 27 Maart 1990, C-113/89, ECR I-1417, consideration 15. See on this Houwerzijl, 2005, 72 et seq.
which were triggered by the intended liberalisation of the port services can serve as an example of the first sub-category. Another example would be industrial action taken in support of European social dialogue.

Lyon-Caen remarked that the submission of the legality of cross-border industrial action to the *lex loci laboris* has an atomising effect. The action taken by the “international” collectivity of workers is connected to distinct legal orders. The same criterion that was qualified earlier as having a unifying effect may make a truly cross-border industrial action of the type described here very difficult and even impossible. After all, it is unlikely that the legal systems of all legal systems of the Member States involved will allow participation in such industrial action. In practice, the national unions involved in such cross-border action specifically determine the type of action and procedure in conformity with the legal systems of their own countries.

II. THE DIFFICULT ISSUE OF CLASSIFICATION: THE SCOPE OF ARTICLE 9 OF ROME II

A. THE CONCEPT “INDUSTRIAL ACTION”

Article 9 states that “Without prejudice to Article 4 of Rome II the law applicable to a non-contractual obligation is in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken”. The Regulation does not provide any more detailed description of the concept “industrial action”. Before we address the issue of whether this concept should be interpreted autonomously or *lege fori*, we would like to discuss the question whether “industrial action” must be taken to refer to a social phenomenon or to the exercise of a (fundamental) right. The difference between these two approaches is considerable. In the first interpretation the category will cover a sociological concept (or rather a social reality). In the second interpretation Article 9 is restricted to a legal category. According to the latter interpretation, industrial action is the exercise of freedom recognised and protected by the internal rules of a country, which is enjoyed by workers and employers in order to defend specific interests with the help of well-defined means of pressure. If the actors choose other objectives or other means of action, their action cannot be brought under the legal category of “industrial action”.

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42 See Warneck, 2007, 75–84.
43 The distinction between the sociological and legal approach is a relative one. Labour law has a long tradition of basing certain concepts on social reality. Such neologisms are only waiting to be given a legal meaning, which may then deviate from the sociological one.
The EP’s original amendment refers in its justification to the industrial action as the object of a fundamental right. The reference to the industrial action as a fundamental right did not recur in the statements of the Council accompanying the Common Position.\textsuperscript{44} It only states that the legislator’s intervention was prompted by a desire to find a balance between the interests of all parties concerned. It is doubtful that this would be enough to conclude that the concept of industrial action refers to a sociological category.\textsuperscript{45} It is more likely that the category of industrial action refers to a legal concept. Subsequently, the question can be raised which legal order should provide the definition of this concept.

There is no doubt that this question is relevant. The law on industrial action is by no means harmonised. The European Community has no regulatory powers whatsoever to lay down rules on this subject.\textsuperscript{46} Comparative law research shows that the differences between Member States with respect to the permitted means of action are considerable.\textsuperscript{47} The most common species of the right to take industrial action is the strike. Other action, however, can also be legitimate. In the past, the Dutch Supreme Court has recognised go-slow strikes and work-to-rule as legitimate forms of industrial action.\textsuperscript{48} Under Swedish law, a boycott and a blockade are considered a legitimate means of collective action.\textsuperscript{49} Thus, there are substantial differences between the Member States’ internal rules with respect to the type of action they allow. A similar divergence can be discerned with regard to \textit{inter alia} the objectives of the action and the procedural requirements.\textsuperscript{50}

These differences are not only a matter of substance. They are also based on differences with regard to the source of law underlying the qualification. A number of countries, including France, Spain and Italy, have laid down the right to strike in their Constitution.\textsuperscript{51} Such a constitutional right often only applies to specific forms of industrial action. Action falling outside the constitutional recognition will not be considered as legitimate collective action. As a rule, constitutional recognition is restricted to the classic walkout. In these jurisdictions there is no such thing as a general category of “industrial action” which could be either legitimate or illegitimate. Forms of action not covered by these constitutions are subject to the rules on breach of contract, tort law and sometimes even criminal law. The legality of industrial action depends on their qualification as an industrial action protected by the Constitution.

\textsuperscript{44} See \textit{OJ} C no. 289, 28 November 2006.
\textsuperscript{45} This interpretation may be assumed to be very bold. It could lead to the collective employment relations being used as a cover-up for all kinds of illegal practices in order to subsume them under a rule which deviates from the main regime.
\textsuperscript{46} See Article 137 \textit{in fine} EU Treaty. Novitz contests the possibility of adopting a directive regarding the right to strike and the right of a lockout by virtue of other articles of the Treaty. (Novitz, 2003, 162).
\textsuperscript{49} See Bruun, 2007, 208.
\textsuperscript{50} See Dorssemont, 2007, 245–273.
\textsuperscript{51} See Dorssemont, 2007, 245–249.
Preamble 27 to Rome II states: “The exact concept of industrial action, such as strike action or lockout, varies from one Member State to another and is governed by each Member State’s internal rules. Therefore, this Regulation assumes as a general principle that the law of the country where the industrial action was carried out applies with the aim of protecting the rights and obligations of workers and employers”. The preamble appears to refer to the Member States’ internal rules, not only with respect to the right to take industrial action but also for the definition of this category itself. This fits in with the situation described earlier where the admissibility and qualification are one and the same. The phrase is, however, somewhat confusing from a private international law perspective.

According to the national conflict of laws, the issue of the qualification is usually subject to the lex fori: the court applies its own private international law to see which conflict of laws rule is applicable. The input of national private law concepts is indispensable for this. That does not mean, however, that the private international law categories are identical to the ones used in domestic law. The private international law qualification must take into account the differences between the legal systems involved. For example, in the Netherlands the legal relationship between a company and its director appointed in accordance with the articles of association is considered to be an employment relationship. This does not automatically mean that the conflict of laws rule for employment contracts must be applied, or that a conflict between a foreign company and its director is covered by the rules on jurisdiction in employment contract cases. After all, the private international law classification is applied in a different context and serves different purposes than the classification under domestic law.52

An even more important reason not to base the classification on the national restrictions of the concept “industrial action” is the EU origin of the conflict of laws rule. As a rule, concepts used in European laws must be interpreted autonomously.53 The reason for this is that only an autonomous, European interpretation will ensure the identical application of the European rule in different Member States. If the definition of a concept is left to the Member States’ internal rules, the Regulation usually says so expressis verbis.54 In private international law cases, autonomous interpretation has been used by the ECJ in the context of the Brussels Convention and Regulation. The Rome II Regulation, too, is based on the principle of autonomous interpretation. This can be deduced from preamble 11, which explicitly refers to the autonomous interpretation of the concept of a “non-contractual obligation”. We consider it unlikely that preamble 27 was meant

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52 See on this Van Lent, 2000, 120–121 and Van Hoek, undated II, Artikel 18 aant. 1.
53 See e.g. with respect to the concept of an obligation arising from a contract in the Brussel I Regulation and the Jurisdiction and Judgement Regulations: European Court of Justice 20 January 2005, C-27/02, ECR I-481,Engler v. Versand consideration 33.
54 See e.g. the description of the notion of ”worker” in the Secondment Directive (RI 96/71/EU OJ EU 1997 L 18, Article 2 paragraph 2) and the notion of ”place of residence” in the Brussel I Regulation (Vo 44/2001 OJ EU 2000 L 12, Article 59).
to create an exception to this rule: the wording is much too ambiguous to draw such a conclusion. As one can tell from the second sentence of the preamble, the difference in the scope of the right to take industrial action in the Member States’ internal rules is quoted rather as a justification of the special provision of Article 9 of Rome II. Therefore, it seems safe to assume that the concept of “industrial action” in Article 9 of Rome II must be interpreted autonomously.

To shed some light on the issue of interpretation, it may be interesting to see whether a comparison of some of the different language versions can shed any light on this. Unfortunately, this question must be answered in the negative. The translation of the relevant private international law category seems to rely heavily on terminology which is derived from the national context.55

International law may provide some indications to clarify the enigma. The right to take industrial action is a fundamental right recognised in several international instruments. We would like to mention in this respect ILO Treaty no. 87, the International Covenant on Economic, Social and Cultural Rights,56 the (revised) European Social Charter57 and (Article 11) of the European Convention on Human Rights (ECHR). The European Court of Human Rights opted for a broad interpretation of Article 11 of the ECHR in its Dilek ruling, formerly known as the Satilmis ruling.58 The ECHR’s interpretation can be considered “progressive” in two ways. Notwithstanding that it is the freedom of assembly and association of unions which is promoted by Article 11 of the ECHR, the Court concluded that the right to strike is such an important instrument for the defence of workers’ interests that every restriction of this right must also be tested for compatibility with Article 11 § 2.59 Furthermore, the objections submitted

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55 The Dutch language version does not refer to ‘strike’ but to the mere generic term of “collectieve actie” (literally “collective action”). This fits into the broad recognition of the right of industrial action by the Dutch Supreme Court. The German language version is also based on the broad category of “Arbeitskampfmaßnahmen”. The French language version however reduces the category of industrial action to the two best-known varieties: the workers have the “grève” and the employers the lock out. The English language version refers to the concept of “industrial action”. This concept is more narrow than the Dutch collectieve actie, because the use of the adjective ‘industrial’ reduces the concept to the professional context. The use of this term limits the collective labour dispute to the relationship between employers and workers without regard to sympathy action and action against the government. Finally, the Italian language version used the phrase “danni causati da un’attività sindacale”. The use of the term “sindacale” seems to reflect an organic view of industrial action. According to this view, a collective action is primarily an action which originates from an organisation. Such an interpretation seems to exclude wild cat strikes and is also unfortunate as the lock out is rarely organized by an employers’ organisation.

58 ECHR 17 July 2007, nos. 74611/01, 26876/06 and 27628/02.
59 In ECHR 21 April 2009, no. 68959/01 Enerji Yapı-Yol Sen v. Turkey (application no. 68959/01), the Court seems to have adopted at least implicitly that the right to strike is an essential and
by the Turkish government that the strike, in this case the refusal of some civil servants to report to work as toll-booth cashiers, could not qualify as a strike was not accepted by the Court either. It held that Article 11 ECHR safeguards a more comprehensive right to take industrial action.

These treaties are useful for finding the essence of the right to take industrial action, but their usefulness only goes so far in defining the concept for private international law purposes. After all, all they do is provide for the internationally recognised minimum standard. This does not necessarily mean that they present a good view of the different variations of the concept in European Member States. For the conflict of laws rule to be useful in the cases for which it was created (such as the Tor Caledonia, Viking and Laval), the concept of “industrial action” must be more comprehensive. Also that industrial action which is eventually declared inadmissible according to the applicable law, for example because the action cannot be subsumed under the right to strike laid down in the Constitution, will have to be covered by the conflict of laws rule of Article 9 of Rome II.

In the cases put before it, the European Court of Justice seems to be in favour of a more inclusive approach to the concept “industrial action”. The Viking and Laval cases addressed very different and varying means of action. Earlier we explained that, in addition to the threat to take classic industrial action, the Viking case was an organised effort to exercise negative freedom of contract at a collective level. The Laval case showed a different type of boycott. All these are treated as expressions of the right to collective action. The European Court of Justice even takes it one step further by considering that a blockade is also covered by the general principle of European law on the right to take industrial action.60 The European Court of Justice’s recognition must be regarded as more comprehensive in other respects too. The central issue in the Viking and Laval cases was a sympathy action: an action purporting to improve the fate of workers who are attached to a different employer or a different branch of economic activity. In the Viking case non-Finnish unions supported the boycott called by the Finnish union (the primary action). In the Laval case, different Swedish unions supported the strike by the construction workers’ union, which themselves called the collective action in order to better the working conditions of the seconded Latvian workers.61 The Tor Caledonia case also dealt with a sympathy strike.

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not just an important means to defend workers’ interests. Hence, it is inherent in the freedom of association.

60 See consideration no. 107 in the Laval ruling. In the outcome of the cases, this qualification seems to have little significance, though. The relevant questions were 1) does the action in question pose an obstacle to one of the economic freedoms? and 2) can the action be justified for reason of protection of workers?

61 The industrial action in the Laval case could be related to the protection of workers’ interests in more than one way, according to the European Court of Justice: the action was aimed at a pay rise for seconded workers and was concerned with workers’ interests in that respect. On the other hand, the Court also recognises the workers’ interest in being protected against competition regarding terms of employment. It means that Swedish unions also defended the interests of Swedish workers). See consideration 103 and compare considerations 74 and 76.
2. THE NON-CONTRACTUAL OBLIGATION

Even if we accept a more comprehensive interpretation of the concept of industrial action, it does not mean that we have solved the qualification problems with respect to Article 9 of Rome II. Article 9 of Rome II (exclusively) refers to “a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages”. The restriction to non-contractual obligations presents special obstacles with respect to industrial action. After all, the two major parties involved in industrial action, the workers and their employer, are bound by the contract they concluded with each other. The classic form of industrial action, the strike, presents a temporary suspension of the obligation of the worker to execute the work which the parties have agreed upon. In this respect, every strike implies a temporary breach of contract. Accompanying actions, however, such as sit-ins and gate protests, are not intrinsically linked to the performance of the contract. They can be tortious and even illegal.

The situation is even more complicated for the unions. Strikes and other forms of industrial action are important levers in the collective bargaining process. The European Court of Justice emphasised this aspect in its rulings in the *Viking* and *Laval* cases. A successful strike will therefore, in general, lead to the signing of a collective labour agreement between the employer or employers’ organisation and the union or unions involved in the industrial action. In this respect, the strike is part of the pre-contractual relationship between these parties.

Once the collective labour agreement is concluded, the parties to that agreement are in a contractual relationship. A number of countries lay down an implicit peace obligation for the duration of the collective agreement. The collective agreement itself may also provide for a no-strike clause. In those cases industrial action which is taken during the collective labour agreement’s term can be regarded as a violation of a contractual obligation by the organising union (assuming it is a party to the collective labour agreement). Thus, the liability for damages caused by industrial action in breach of a peace agreement may arise in contract, rather than tort.

Sympathy action presents a special case. Such action, which occurred in the *Tor Caledonia*, *Viking* and *Laval* cases, sees one collectivity of workers taking action in favour of another collectivity of workers. The best known action of this type is the action in which dockworkers refuse to unload a ship in order to enforce better terms of employment for the crew of the ship against which the action is directed. In that case there is no contractual relationship whatsoever between the

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workers taking the action and the employer against whom the action is directed. That relationship is purely non-contractual. There are several examples in the case law of national courts in which such transnational sympathy action has actually given rise to claims based on tort against the organising unions. 63

The words of Article 9 of Rome II do not provide a *prima facie* clarification of the type of claims it covers. The stipulation mentions the liability of persons *in their capacity as employer and worker*. This suggests that the provision is also intended to govern the relationship between the employer and worker. Therefore, the existence of an employment contract between the parties would not by and of itself have to preclude the application of Article 9 of Rome II.

This interpretation of the scope of Article 9 of Rome II is supported by Article 4 paragraph 3 of Rome II. Paragraph 3 contains a general exception with respect to the conflict of laws rule of Article 4 paragraphs 1 and 2. The provision provides: “Where it is clear from all the circumstances of the case that the tort or delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.” Traditionally, this type of “accessory allocation” is thought to apply to claims for compensation from passengers against a transport company arising from accidents. These two parties are bound by a transport contract, but compensation for injury can also be claimed by virtue of the rules on tort (if fault can be attributed). Causing bodily harm is, in general and save disculpatory circumstances, unlawful irrespective of the existence of a contractual relationship.

Industrial action, too, can result in divergent claims based on either contract or tort (or both). The tortious character of blockades and sit-ins may not be difficult to construe. It is doubtful, however, that the stoppage of work during a strike can also be considered unlawful without having recourse to the (existence of an) employment contract. Moreover, the usefulness of Article 4 paragraph 3 of Rome II as an explanatory tool for the scope of Article 9 of Rome II is limited, as Article 4 paragraph 3 of Rome II does not apply to claims related to industrial action. This means that the exact scope of Article 9 of Rome II still remains unclear.

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C. THE SCOPE RATIONE PERSONAE

Article 9 of Rome II restricts the scope ratione personae to a person in their capacity as a worker or employer and the organisations that represent their professional interests. The European Commission made an interesting remark on the Common Position of the Council when it said that it regretted that the words of Article 9 of Rome II failed to state that its application was restricted to liability claims between the actors mentioned there.\(^6\) We take this to mean that the European Commission held the view that the EP’s amendment was not intended to apply to disputes arising from industrial action between the actors mentioned in the Article as the liable parties and third parties. The Common Position reflects the idea that the aim of the amendment is to safeguard the balance of power between employers and workers. This also suggests that the Article’s scope should be restricted to disputes between the persons it mentions.

Such an analysis deserves some comment. Firstly, employers may be considered “third parties” in certain cases of industrial action. This is the case when the employer whose workers are taking collective action, is not the actual target of the action and may be in no position to answer the claims made by the workers and their organisation. Examples of this would be the sympathy action targeted against a blacklisted employer. Another example is industrial action carried out for the promotion of workers’ interests against a government policy which can harm these interests. This would often be a policy of the State, but these days it could also be an EU policy – the protests against the plans for liberalisation of port activities (the port package) being a point at hand. Secondly, Article 9 of Rome II only defines its scope in relation to the subject of the dispute and the identity of the defending party. This implies that there is no reason whatsoever why Article 9 of Rome II should be restricted to disputes between the persons it mentions. Any different conclusion would enable employers or their organisations to “break” an industrial action by involving a third party who also suffers damage as a result of the industrial action. This may be travellers in dispute in public transport and other consumers of the goods or users of the services (the supply of which is disrupted by the action) but also suppliers and sub-contractors who have a contractual relationship with the employer whose company is the object of the strike. Though we would not like to deny these parties a claim, if they have one under domestic law, the law applying to the right to collective action should not be made dependent on the party who is challenging this right.

D. MAIN ISSUES AND PRELIMINARY ISSUES

The last complication to be addressed with respect to the application of Article 9 of Rome II is caused by the problems regarding the preliminary question. These problems are related to the issue of how, by whom and under which circumstances the lawfulness of a strike can actually be brought before a court (or any other adjudicating body). The comparative law study we conducted in 2006 shows substantial differences between the domestic laws of the Member States.65 These national differences are the result of differences not only in the definition of the right to take industrial action in the domestic law, but also as regards the available remedies or the lack thereof.

Proceedings relating to the right to strike in the Netherlands are conducted, almost without exception, between employers and unions as claimants and defendants respectively. They are taken in summary proceedings and aim at retrieving a court order against the unions ordering them to refrain from taking action or to stop an ongoing action. These remedies are based on tort.

The opposite situation can be found in Belgium, where proceedings, if they are brought at all, are always conducted against individuals. As a rule, these proceedings do not concern the question whether the right to strike itself is exercised in an unlawful way, but rather concern the “incidental and collateral activities” such as a sit-in or a blockade.66 At most, the court discusses whether a particular action can be regarded as the exercise of the right to strike. Belgian unions do not have full legal capacity and cannot be held liable for non-contractual faults.67 They are deprived of the legal capacity to act as a party in a procedure based on tort. The Regulation does not affect this internal rule in any way. The 25th preamble says explicitly that the special rule of Article 9 of Rome II is without prejudice to the legal status of unions.

Yet another system is used in the Scandinavian countries. Denmark has a special procedure to try cases on the legality of industrial action, to which only unions and employers can be a party. This was the procedure which led to the preliminary ruling in the Tor Caledonia case. Sweden, too, has a declaratory remedy enabling the court to assess the lawfulness of an industrial action.68

The lawfulness issue can be the main issue in Denmark, Sweden and the Netherlands in a procedure involving collectivities. Subsequently, the answer to the lawfulness issue will affect the legal status of the individual participants in the action. If the call for the industrial action by the unions satisfies all legal requirements, the workers will be protected against any reprisals taken by the employer. A number of countries seem to support a reversed logic: the union’s

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68 See Malmberg, 2007, 418.
liability for the call to strike or for the support of an action carried out by workers is made dependent on the question whether the workers involved are exercising their right to strike in conformity with the relevant statute or constitutional provisions. The primary issue of lawfulness of the strike as such is placed at the level of individuals. In these countries strikes are regarded primarily as an individual problem regarding the suspension of the obligation to work and, as a result, they are qualified as a contractual issue. These differences also affect national private international law qualifications.69

In the Tor Caledonia case the question was raised whether a procedure between the unions and the employer on the legality of the strike under the Danish system could be subsumed under Article 5 paragraph 3 of the Brussels Convention. This provision deals specifically with non-contractual liability. The (positive) answer of the ECJ is however in our view not decisive for the qualification of the legality issue for choice of law purposes. In the Tor Caledonia case, the ECJ restricted itself to the relationship between the parties to the dispute, being the organising union and the injured employer. This relationship was purely non-contractual as the case concerned a boycott against a blacklisted employer by workers employed elsewhere. If the lawfulness of the action had been addressed in a procedure on unfair dismissal (addressing whether participation in a specific industrial action can be regarded as a valid reason for dismissal) the European Court of Justice would undoubtedly have qualified the claim as contractual. Indeed, the qualification regarding jurisdiction depends on the basis of the claim, which is largely dependent on the parties to the specific procedure. We contest that this should also hold true when we address the issue of applicable law. If the applicable choice of law rules were made dependent on the proceedings in which the legality of the action was (first?) put before the court, this would result in legal uncertainty for the parties who (want to) participate in such an action and lead to a restriction of their right to take industrial action in a cross-border context.

This uncertainty is exacerbated by the difficulties as regards preliminary and main questions. The following examples may illustrate this. In the first scenario the employer responds to a strike by dismissing the workers involved in the action. The employer then relies on the illegality of the strike to justify his actions. In the ensuing procedure the issue of the legality of the action can be regarded as a preliminary question. The legality of the dismissal is the main issue. In another scenario the legality of a sympathy action, which is put before a court as the main issue, is made dependent on the question whether the primary action (with which the sympathy was expressed) is justified, which is the preliminary question. Hence, we are continually facing the question whether the law applicable to the main question should also be applied to the preliminary question. As European

69 The comparative survey quoted earlier, which was reported in 2007 in Cross-border Industrial Actions in Europe: a Legal Challenge, clearly shows how these differences in perspective affect in the private international law qualification.
private international law lacks a section providing for the general principles underlying this field of law, the question of how to deal with the preliminary question is left to the Member States. The study quoted earlier shows that a number of countries do not subject the question of the legality of the industrial action discussed earlier to a separate law system, but to the law that governs the main issue. This system of dependent allocation of preliminary questions, again, results in the splitting up of a single industrial action into a number of sub-issues and sub-results, each governed by their own system of law. The consequence of this could be that an industrial action is declared illegal in a procedure on the dismissal of the workers who participated in the action, whereas the same action is permitted when it is considered in the light of the relationship between the employer and the organising union. It is our view that such a splitting up seriously undermines the possibilities of taking industrial action in cross-border cases. The organisation of industrial action would then only be safe if all the legal orders that are directly or indirectly involved would permit it.

E. THE RIGHT TO STRIKE AS A “CIVIL AND COMMERCIAL MATTER”

It must be anathema to employment law lawyers with some sense of history to consider the right to take industrial action as a “civil or commercial matter”. Therefore, we do not want to make any principled statements as to the nature of the right to strike as such, but only address it as part of our discussion on the scope of the Rome II Regulation (including Article 9). A specific paragraph on this issue is required due to the special character of the right to take industrial action. On the one hand, we are dealing with an internationally recognised fundamental right; while on the other hand, the right to take industrial action is strongly related to public order. The way actions such as picketing, sit-ins and blockades are conducted places them under the same heading as demonstrations and as such they can directly affect public order and safety. The same applies to strikes in essential services such as garbage collection, the fire brigade, health care and the police. Both aspects make the right to strike a matter of public policy. Hence, the question may be raised whether the right to take collective action can and should be subjected to a multilateral conflict of laws rule, or rather be excluded from the scope of application of the Rome II Regulation. The answer of the European legislation seems to be the former, as Article 9 demonstrates, unless some action can be considered to fall outside the scope of application of the Regulation as such.

The concept of “civil and commercial matters” was used earlier to define the scope of application of the Brussels Convention. In this context it has been

interpreted by the ECJ on several occasions. This case law shows that also cases with a public policy or public law aspect may be covered by the category “civil and commercial matters.” The only relationships the European Court of Justice has excluded from its scope concern the relationship between the government institutions, officials and/or civil servants and private citizens. And even those are only excluded when the former use their special prerogatives. This implies that, at most, the right of civil servants to strike may be excluded from the scope of Rome II. Collective action against private employers would be covered. This also holds true, in our view, when, such as is the case in Italy and Belgium, there are special legal provisions regarding industrial action taken in essential services. After all, the distinctive criterion for the application of the Regulation is not whether the services are part of the public law domain, but whether the employer relies on special public law powers.

The special nature of the right to take industrial action, including the special position of some services, will therefore not be expressed by (restricting) the scope of Article 9 of Rome II, but rather in the conflict of laws rule itself. In this respect, overriding mandatory provisions and the exception of public policy will have to be taken into account. Furthermore, Article 17 which enables the consideration of the rules on safety and conduct that prevail at the place and time, might come into play as well.

III. THE CONFLICT OF LAWS RULES

A. THE CONFLICT OF LAWS RULE, LOCUS ACTUS AND ALTERNATIVES

The special provision for industrial action refers to the place where the action will be carried out or has been carried out as the main connecting factor. This rule, which refers to the locus actus, deviates from Article 4 of the Rome II Regulation,

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71 See European Court of Justice 15 February 2007, C-292/05, Lechouritou ECR 2007, I-1519 and the case law quoted. In most of the cases brought before the European Court of Justice the plaintiff is a Member State, only in some cases have Member States acted as defendants. Henkel v. VKI was a dispute between two civil parties. This was already enough to subject the case to the Civil Jurisdiction and Judgement Regulation: European Court of Justice 1 October 2002, C-167/00, Verein für Konsumenteninformation v Karl Heinz Henkel, ECR 2002, I-8111.

72 The explanation regarding the proposal by the Commission (COM(2003)427 p. 8) expressly refers to case law on the Civil Jurisdiction and Enforcement Regulations and the Brussels I Regulation with respect to the substantive scope of the Regulation.


75 There are no ECJ cases on the Brussels Convention or the Brussels I Regulation in which a private organisation relies on special prerogatives. Any organisation having special government prerogatives would probably have to be considered as part of the government according to EU law. See European Court of Justice 12 July 1990 C-188/89, ECR I-3313, Foster v. British Gas and see Chalmers, 2006, 380.
which refers to the locus damni. So in cases of a double locus the rule for collective action makes the opposite choice from the general rule. This “opposition” against the locus damni was triggered by the SEKO case and has been the major driving force behind the creation of a special conflict of laws rule for industrial action. But Article 9 deviates from the main rule in other aspects as well. In the EP’s proposal which introduced the special rule for collective action, the locus actus was the only relevant connecting factor. In contrast, the draft regulation as proposed by the Commission provided for several alternatives to the locus damni. In the Commission proposal the locus damni would only be relevant in the absence of a common habitual residence for both the tortfeasor and the injured party. Moreover, both connecting factors (locus damni and common domicile) may be ignored when the tort/delict is manifestly more closely connected to another country. This closer connection might (in particular) be based on a pre-existing relationship between the parties, such as a contract, which is closely connected with the tort/delict in question.76 Both alternatives made it to the final version of the Regulation and can be found in the general rule of Article 4. Moreover, in accordance with Article 10 of the Commission’s proposal, Article 14 of the Rome II Regulation provides that the parties themselves may designate the law applying to the non-contractual obligation. Non-commercial parties can only make such a choice after the event giving rise to the damage occurred.77 None of these alternatives figured in the EP’s proposal.

As we stated earlier, the European Commission considered the EP’s proposal to be too rigid. Though the main aspect of the amendment, the choice for the locus actus, was maintained, the provision as adopted integrates several aspects of the general rule. Article 9 of the Regulation refers to Article 4 paragraph 2, and in that way integrates the reference to the common place of residence. Moreover, Article 14 regarding the choice of law can be applied to industrial action. However, the escape clause of Article 4, referring to a more closely connected country, is not applicable to industrial action. This means, amongst other things, that the law which governs the pre-existing relationship between the parties cannot be relied upon. The conflict of laws rule only operates with specified connecting factors, making it a “closed” conflicts rule. The generally recognised advantage of the use of closed conflicts rules is that the determination of the applicable law becomes more predictable and is not open to manipulation.78 This curbs the risk of so-called forum bias: the tendency of judges to prefer the application of their own laws. The closed nature of the rule and the absence of a sub-rule referring to the pre-existing relationships, however, also make it impossible for the court to embed the industrial action organically into the system of collective employment.

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77 The Commission’s proposal was more restricted because in commercial conflicts the choice of law could only be made afterwards.
78 See e.g. S. Bouzoumita, 2007, 280 on how the general exception clause in Belgian private international law can be manipulated.
relations in which the action is taken. Therefore, the semi-closed character of the rule has both advantages and disadvantages.

We do not think that there is such a thing as the perfect conflict of laws rule for industrial action. The major differences in the conceptualisation as well as in the specific legal construction of and constraints to the phenomenon in the several legal systems make it difficult if not impossible to formulate a conflict of laws rule that does justice to all systems involved. After all, conflict of laws presupposes a minimum of comparability of substantive laws, which is difficult to find with regard to industrial action. However, in our opinion the Tor Caledonia case had made it politically unavoidable that a conflict of laws rule for industrial action would become a major point of negotiations. For the time being, we will not try to outwit the legislator by formulating an alternative rule. Neither will we give a final judgment on the quality of the conflict of laws rule which found its way into Article 9. We would like to address, however, a number of complications with respect to the current provision. We will do so by using the cases described in Section I.

B. **TOR CALEDONIA, VIKING AND THE LOCALISATION OF A BOYCOTT**

The facts of the Tor Caledonia and Viking cases are typical for industrial action in maritime transport. The unions stood up for the crew’s interests by organising boycotts and blacklisting port work. In addition to a strike carried out by the sailors themselves, often an unlikely event due to the poor negotiating position of these workers, the unions involved will organise different types of boycotts. Firstly, there will be refusal to engage in a contract (individually or collectively) with a blacklisted shipowner. Secondly, workers hired by other employers active in port services will refuse to perform activities for the benefit of the blacklisted employer. Earlier, we discussed the need to retain the *locus actus* as primary connecting factor for collective action instead of the otherwise dominant *locus damni*. According to the *locus actus* rule, the law applicable to the relationship between the shipowner suffering from the secondary boycott and the dock workers’ unions and dock workers themselves will primarily be determined by the place where the dock services are withheld. In other words: the law of the port will determine the lawfulness of the dock strike, the ship’s flag is irrelevant. Greece and Cyprus rightly pointed out that this may lead to port shopping: the situation in which unions will take action in a place the law of which is supportive of collective action. It is not entirely coincidental that the cases mentioned earlier

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80 By ‘port services’ we refer to all services supplied in a port for the benefit of visiting ships, such as loading and unloading, stevedore and piloting services.
81 See above.
occurred in Scandinavia. Scandinavian countries have a long tradition regarding industrial action, in which solidarity plays an important role.\textsuperscript{82}

The possibility to refer to the common place of residence, which is integrated in Article 9 by reference, will not change this. After all, the types of action described above are mainly used as a weapon against employers who sail under a flag of convenience. A flag of convenience is called ‘convenient’ because its law places little legal restraint on the shipowner and/or provides advantages with regard to taxes and social security premiums. Typically, flags of convenience are also selected because of the poor protection the legal regime concerned provides to sailors. Such legal systems also tend to restrict the freedom of collective action. As a result, action is taken elsewhere in countries which are more permissive of industrial action. And such action will most often consist of or include sympathy action.\textsuperscript{83} Therefore, the dock workers and the employer typically will lack a common residence.

Sympathy action in the Scandinavian system is usually constructed as secondary action to support the primary action of the workers in that particular industry. As we mentioned previously, dock strikes for sailors who sail under a flag of convenience do not always support an actual strike taking place on the ship itself. The primary action often serves symbolic purposes only: the seamen’s union in the country where the action is taken imposes a boycott of the shipowner, which means that its members seafarers are called upon not to engage in an employment contract with the disqualified shipowner. Hence, the primary action consists of a preliminary refusal to enter into a contract. This boycott is not directed against specific job offers or ongoing contract negotiations: the refusal is purely theoretical. In the \textit{Viking} case, the alleged tort consisted of exactly this type of primary action. Since the \textit{locus actus} will (in future) determine the applicable law to the boycott action, the question is: where can such a general and \textit{a priori} refusal to enter into a contract be situated?\textsuperscript{84}

Omissions are more difficult to localise than actions. In 2001 the Dutch Supreme Court dealt with a case of tortious liability of a bank which had refused to give permission for the handover of monies and goods held at a subsidiary to an interested party. According the Court, this tort could be located at the place where the handover should have taken place, had permission been forthcoming.\textsuperscript{85} A tortious omission must be localised, according to this ruling, at the place where the action should have taken place. This rule seems to hold true when there is an obligation to act on the side of the (alleged) tortfeasor. In this case, however, there is no obligation to act – no one can be obliged to enter into an employment contract. In other respects, too, the case which prompted the Dutch Supreme

\textsuperscript{82} This is also evidenced in the \textit{Laval} case.

\textsuperscript{83} The country where the dock is located must provide for sympathy action, as is the case in Scandinavia.

\textsuperscript{84} See with respect to this subject also Pontier 2002, 274-282.

\textsuperscript{85} Dutch Supreme Court 12 October 2001 C00/307HR Nederlandse Jurisprudentie 2002, no. 255.
Court's ruling must be distinguished from a general refusal to contract due to a boycott action. Such action shows more similarity to the facts of the case regarding Besix/Wabag. In its ruling on this case the European Court of Justice addressed the localisation of an exclusivity clause, which prohibited parties to enter into agreements with other parties. Which was the place of performance of this obligation in the context of Article 5 paragraph 1 of the Brussels Convention and Brussels I Regulation? In the Besix case the obligation to refrain from action was, just like the refusal to contract in the case of a boycott, not restricted to a specific geographical area. The Court ruled that such an obligation does not allow for the determination of a specific place of execution. The Court declared Article 5 paragraph 1 of the Civil Jurisdiction and Judgment Regulations to be not applicable to the case at hand.

Article 12 of the Rome II Regulation, which is concerned with pre-contractual liability, does not provide any solution either. This stipulation provides only for non-contractual liability which arises from negotiations prior to the conclusion of a contract. There are no such negotiations in the cases under discussion here. Even if applied by analogy, the rule provided by Article 12 of Rome II has limited use. Article 12 primarily opts for a connection to the law that would have governed the contract if it had been concluded. However, the application of the potential lex contractus does not do justice to the conflict at hand. The law applicable to employment contracts of seamen is often determined by using the flag as an important connecting factor. It is exactly this conflicts rule which has triggered the use of flags of convenience. The industrial action discussed here is directed against the use of cheap flags. This implies that there is emphatically no agreement between the prospective (or rather fictitious) parties to the contract on the law applicable to the contract. The use of the flag as a connecting factor for the law determining the legality of such a boycott seems to us to be incompatible with the objective and logic of Article 12 of the Rome II Regulation as well as with the purpose of this type of action.

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86 ECJ 19 February 2002, C-256/00, ECR I-1699.
87 In the Laval case, the boycott seems to concern the Swedish activities of Laval only. This would allow the location of the boycott within a specific legal system.
88 Consideration 49: "By its very nature, an obligation not to do something, which, like that in question in the main proceedings, consists in an undertaking to act exclusively with a contracting partner and a prohibition restraining those parties from committing themselves to another partner for the purpose of submitting a joint tender for a public contract and which, according to the parties’ intention, is applicable without any geographical limit and must therefore be honoured throughout the world - and, in particular, in each of the Contracting States -, is not capable of being identified with a specific place or linked to a court which would be particularly suited to hear and determine the dispute relating to that obligation. …”.
89 Compare the facts in Viking, where the Finnish shipowner was planning to substitute the Finnish flag by an Estonian flag in order to profit from the difference in labour condition between the two countries. For that reason, the Estonian flag is considered to be a flag of convenience.
If a connection to the intended contract is out of the question, Article 12 of the Rome II Regulation refers back to the main rule in Article 4, Rome II. And, there again, we find the place where the damage has occurred as a connecting factor. But the application of this connection factor is problematic in this case, too. Because, after all, what exactly is the damage caused by the boycott? The actual leverage of the union in the case of *Viking* as well as *Tor Caledonia* is its power to prevent the ship from leaving the port. Thus the actual harm caused to the shipowner was the result of a *secondary* action. The only relation of the *primary* action to the harm suffered is that it *legitimises* the secondary action. Therefore, it may be argued that the damage caused as a result of the primary action described earlier can be localised at the place where the secondary action occurred. The added bonus of this is that both primary and secondary action will be subject to one and the same system of law.

Alternatively, the location of the union’s call for action – whether it concerns a strike action or a boycott - may be located at the premises of the union. The location being identified as the place from which the call originated. This line of argument would, when applied to the *Viking* case, submit the call for the secondary boycott action of the ITF to English law and the call for the primary boycott by the Finnish Seamen’s Union to Finnish law. A consecutive action by dock workers would be governed by the place where this action took place and might refer to yet another system of law. In other words: this line of reasoning separates the action of the unions (call for and support of a collective action) from the collective action taken by the workers. As we stated before, we do not think such a separation for choice of law purposes is conducive to the actual enjoyment of the right to collective action.

Needless to say, the argument presented earlier only refers to primary action which lacks a clear *locus actus*. If the primary action is a strike by the crew on the ship of a blacklisted shipowner, it is very possible to localise the action separately. In that case, the *locus actus* of the primary action determines, barring the exceptions of Article 4 paragraph 2 and Article 14 of Rome II, the law applicable to the primary action.

C. *Laval*, the secondment of workers and the connection to the common place of residence

The free movement of services gives rise to a new type of labour conflict of which *Laval* is a textbook example. The Latvian company *Laval un Partneri* was responsible for construction work in Sweden and brought its own Latvian workers to Sweden, which is allowed according to the principle of the free movement of services. The individual employment contracts of the workers were subject to Latvian law. At some point, a collective labour agreement was concluded between the employer and the Latvian union, which was subject to Latvian law. The pay received by
the Latvian workers was based on Latvian social and economic conditions and was substantially lower than the average pay of comparable Swedish construction workers. In other respects, too, the protection which Latvian law provided to the posted workers, was poor compared to the Swedish collective labour agreement for the construction sector. Through industrial action the Swedish unions tried to persuade the Latvian employer to sign the Swedish collective labour agreement and to agree on a wage level which would be in conformity with local standards. This would have not only led to enhancing the protection of the Latvian workers, but would also have prevented the Latvian employer taking advantage of labour costs that were lower than those paid by its Swedish competitors. In other words: it would have prevented wage competition based on pay in the Swedish labour market.

Technically speaking this was, again, a sympathy action which involved workers of suppliers, sub-contractors and other services vital for the accomplishment of the building project by Laval. The project was effectively boycotted, which made it impossible for Laval to continue the building project. This sympathy action was localised in Sweden. By virtue of Article 9 of Rome II, the employer’s claim regarding the non-contractual liability of the Swedish unions for the damage suffered by Laval was subject to Swedish law. The locus actus would be the decisive factor as the party causing the damage and the injured party do not have a common place of residence.

The situation could have been different if Latvian workers and/or the Latvian unions were also involved in the action. Indeed, if the habitual place of residence of the employer and the workers was in Latvia (and the union had its place of residence in Latvia, too), those parties would have a common habitual place of residence in the sense of Article 4 paragraph 2 of Rome II. This provision says that “where the person claimed to be liable and the person sustaining damage both have their habitual place of residence in the same country at the time when the damage occurs, the law of that country shall apply”.

With respect to the Latvian workers who worked in Sweden, it may be argued in some cases that their habitual place of residence at the moment when the damage occurred was Sweden. When the employer is still considered to reside in Latvia, this would mean that there would no longer be such a thing as a common place of residence in the relationship between the employer and the individual workers. The involvement of the Latvian union, however, may again trigger the application of the special rule of Article 4 paragraph 2 of Rome II. As both the employer and the union are ‘resident’ in Latvia, Article 4 paragraph 2 would refer to Latvian law with regard to the relationship between the Latvian union and the Latvian employer. The outcome of such an assessment would only be different if it were to be decided that the employer’s habitual place of residence was in Sweden, too. Or at least, was so at the time of the event causing the damage. Article 23 of Rome II provides some arguments which support this. The Article deals with the concept of habitual place of residence. The habitual residence of a company or
other body, corporate or incorporate, would normally be their place of central administration. Where the event giving rise to the damage occurs, or the damage arises, in the course of operations by a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located will be treated as the place of habitual residence. There is no doubt in the Laval case that the damage affected business operations in Sweden. There was no such thing as an establishment in the sense of the EU Treaty, however, as Laval relied on the free movement of services. It is true that a Swedish subsidiary company was declared bankrupt in the aftermath of the industrial action, but this subsidiary was not a direct party to the dispute. It is therefore unlikely that the European Court of Justice would interpret the Rome II Regulation in such a way that Laval’s habitual place of residence at the time of the collective action would be considered to be Sweden.

Neither the provision itself, nor the travaux préparatoires\(^90\) give any clues as to the application of Article 4 paragraph 2 of Rome II in the case of multiple parties causing the damage and/or more than one victim with a place of residence in several countries. A similar provision in Dutch law\(^91\) is interpreted in such a way, however, that every offender-victim combination must be considered separately for the application of the special sub-rule on common residence.\(^92\) According to the Dutch interpretation, the conflict between Laval and the Swedish unions would be subject to the main rule (the locus actus), making Swedish law applicable to their relationship. If a Latvian union had also been involved, however, the dispute between the employer and the Latvian union would have been governed by the law of the country of their common place of residence, being Latvian law. The application of the rule of common residence in the relationship between the employer and individual workers would depend on the residence of each of the workers concerned.

We consider such an interpretation to be highly undesirable in industrial action. Industrial action in cross-border cases not only requires a high level of foreseeability with regard to the applicable law, but also requires that all parties involved on the part of the employees are able to coordinate their action. In order to do so, they must be able to rely on one and the same legal system for determining the legality of the action as such. We already stated before that, in our opinion, the splitting up of an industrial action into a number of sub-questions - each subject

\(^90\) The Commission’s proposal (COM(2003)427 p.13) only says that “This is the solution adopted by virtually all the Member States, either by means of a special rule or by the rule concerning connecting factors applied in the courts. It reflects the legitimate expectations of the two parties.” See for the limited value of the travaux préparatoires of European legislation: Freudenthal and Van der Velden 2003, 117-126.

\(^91\) Article 3 paragraph 3 Dutch Act on Conflict Rules with respect to Tort, Staatsblad 2001, 190.

\(^92\) That means: if only one of the possible tort feasors is involved in legal proceedings by at least one of the victims, it is decided for this combination whether the special arrangement for the consequences applies: Dutch Supreme Court 23 November 2001 Nederlandse Jurisprudentie 2002, no. 281 with a note by Th. M. de Boer. Also see Vonken 2002, 390-393.
to a different legal system - will lead to a system where industrial action will only be possible if all relevant legal systems declare it lawful. Such an accumulation of requirements is bound to dampen any enthusiasm for cross-border industrial action. It would also imply that a cross-border industrial action would be subject to more restrictions than each of the legal systems involved would impose when taken separately.

It may be argued, though, that in secondment cases, a distinction should be made between industrial action directed at the integration of seconded workers in the social fabric of the country in which they temporarily work on the one hand, and industrial action directed at the terms of employment of the seconding company as such on the other. The law of the country where seconded workers temporarily work is the most closely connected in the first case, and it may be argued in the second case that the industrial action is governed by the law of the common place of origin of the workers and the employer. Such a result can be achieved under the Regulation if the exception of Article 4 paragraph 2 of Rome II is interpreted restrictively. It should only be applied to cases where all relevant parties (workers, unions and employer) share a common country or origin. Such interpretation will lead to a situation in which the common residence rule will only be applied when there is no involvement of unions and/or collectivities of workers from the country where the work is temporarily performed.93

D. PARTY AUTONOMY

If the (rather sparse) Dutch case law is any indication, parties sometimes actually make a choice of law in disputes concerning industrial action. One of the recorded cases was a choice for the lex fori, which was made during the trial.94 But choices of law are also made beforehand, and as such have been recognized in Dutch legal practice. In the Saudi Indepence case,95 the Dutch Supreme Court considered the choice of law for an individual employment contract of theseafarers to be relevant for the assessment of the lawfulness of strike action taken by these seamen. The latter ruling seems outdated, as it does not sit well with either Article 9 of the Rome II Regulation96 or the protection provided by Article 6 paragraph 1 of the

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93 An interesting example of this would be the 2009 case of Polish truck drivers who went on strike in the Netherlands in support of collective action taking place in Poland. The action was allegedly aimed at the reinstatement of some co-workers of the workers taking the action, who had been fired by the Polish employer. See on this incident inter alia BN/DeStem 2 april 2009 “Verdachten van incident bij bedrijf Schavemaker weer vrij”.
94 See e.g. President of the District Court of Amsterdam 30 November 1978, Schip & Schade 1979, 75 (Tropwind).
95 Dutch Supreme Court 16 December 1983, Nederlandse Jurisprudentie 1985, no. 311.
96 The law which applies to the individual employment contract does not seem to play a role under the Rome II Regulation for the determination of the law applicable to a non-contractual obligation arising from industrial action.
Rome Convention on the Law applicable to Contractual Obligations. The first scenario however, in which the employer and the union make a joint choice of law during the trial, is certainly one of the options allowed under the Rome II Regulation.

Under Article 14 of Rome II, parties can agree on a choice of law for non-contractual obligations. If all the parties are pursuing a commercial activity, they can make such a choice before the event giving rise to the damage occurs. A choice of law in all other cases will only be possible after the event giving rise to the damage has occurred. As neither the unions nor the workers pursue any commercial activities, a choice of law regarding the law applicable to a collective action can only be made afterwards.

Again according to Article 14, a choice of law by the parties shall not prejudice the rights of third parties. It is not entirely clear in this context who is meant by “third parties”. We assume here that the term refers to anyone who is not a party to the choice of law agreement. Such an interpretation would prevent the union which is a party in a law suit from making a choice of law which affects the legal position of the workers involved and/or other unions which took part in the industrial action. If the Viking case is taken as an example, it should not be possible for a choice of law agreed upon by the Swedish union to affect (the law applying to) the relationship between the employer and the ITF. The position of the workers involved in the industrial action should not be negatively affected by this choice of law either. In theory Article 14 seems to offer a sufficient safeguard against this.

It is very doubtful, however, whether this ‘immunisation’ against choice of law by the other participants will also work in practice. If a court, applying the law chosen by the parties to the dispute, decides to grant a court order to ban the industrial action, this ban will undoubtedly also affect the other participants. The fact that the court order may be given in summary proceedings and/or by way of a provisional measure does not necessarily change this. And neither does to inter partes effect of civil judgements. Indeed, some legal systems prohibit the participation in an industrial action once this action has been banned by the court. In that case all workers and unions involved in the labour conflict are affected by the court order, even if they’re not a party to the procedure and hence, not a party to the choice of law.

If the ‘immunisation’ indeed works, this causes yet another problem. In that case the choice of law option may lead to the further fragmentation of the interdependent set of relationships arising from industrial action. After all, the
law may be different for each plaintiff-defendant combination, depending on the agreement reached.

In spite of these objections, a choice after the fact may fulfil practical purposes. Moreover, the European legislator did not opt for an exception to the application of Article 14 – as they did with regard to inter alia unfair competition.99 We can only hope that the restrictions incorporated into the provision will be interpreted in such a way that the negative side-effects are smoothed out as much as possible. This might be achieved by accepting the (direct or indirect) effect of the choice of law on all parties to the collective action, but only in as far as it does not negatively affect (‘prejudice’) their right of collective action. The fact that in most cases the employer will be party to the agreement (and hence, in contrast to the workers and other co-organizing unions, not a third party), helps to interpret the provision in a way which is conducive to collective action.

E. CORRECTIONS TO THE RESULT OF THE MULTILATERAL CONFLICTS RULE: PUBLIC POLICY

The Regulation contains several provisions which may be read as corrections to the multilateral system of conflict of laws rules. Article 16 also provides for the application of overriding mandatory provisions found in the forum law. Article 17 deals with rules of safety and conduct applicable at the place and time of the tortious event. Finally, Article 26 deals with public policy. We will not go into all these provisions here. One point we would like to address, though, is the use of public policy as a means to safeguard the protection of fundamental rights.100

The right to take industrial action is now recognised both in Europe and internationally. Case law on recognition of judgments under the Brussels Convention and Brussels I Regulation shows that such fundamental rights are part of public policy taken as a ground to refuse recognition of a foreign judgment.101 Likewise, in the conflict of laws, human rights may be part of public policy as a ground for refusing the application of foreign law. According to Article 26 of Rome II, courts may only rely on public policy if the application of foreign law is manifestly incompatible with the public policy of the forum. This means that there are two further conditions. Firstly, it is not the foreign rule of law as such, but the result of the application of that rule to a specific case which must be incompatible with the public policy of the forum. Secondly, the gap between the result of the application and the standards internal rules of the forum must be wide and deep for an application of Article 26 of Rome II to be successful.

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99 Article 6 paragraph 4. See also Article 8 on the infringement of intellectual property rights.
100 On the content of public policy in private international law and the internal market, see also Van Hoek 2009, 55–90.
This may lead to the type of problems illustrated by the Dutch *Saudi Indepence* case.\(^\text{102}\) In that case, the lawfulness of a strike in the Rotterdam port was considered to be subject to the law of the Philippines. At the time, this legal system subjected the right of industrial action to far-reaching restrictions, including formal requirements.\(^\text{103}\) According to Advocate-General Franx in his conclusion preceding this ruling, these restrictions on the exercise of the fundamental right were not incompatible with (Dutch) public policy.\(^\text{104}\) Indeed, unconditional fundamental rights are a rarity and, in this case, the relevant international instruments allow for a certain regulation of exercise of the right of industrial action. As a result, incompatibility with public policy becomes a matter of the degree to which the right is subjected to restrictions. Moreover, not every difference between the applicable law and the law of the *forum* as regards the restrictions on the freedom to take industrial action presents an incompatibility with public policy. It depends on the extent of the discrepancy between the legal systems as well as on the closeness of the connection between the legal issue and the *forum*.

In the *Saudi Indepence* case, the Dutch Supreme Court considered the application of Philippine law to be compatible with Dutch public policy. This conclusion was reached in spite of the rather far-reaching restrictions imposed on the right of collective action under Philippine law. A major argument for this was that the connection of the industrial action to the Netherlands was very weak. Neither the shipowner, nor the seamen had any relevant connection to the Netherlands. The action was taken in a Dutch port in a typical example of “port shopping”, which involves calling for an industrial action in a port with favourable organisational and legal conditions. In those cases, the country in which the port is situated does not have any direct socio-economic interest in supporting the action, while it may have an economic interest in stopping it. After all: no port wants to become a preferential location for industrial action by seafarers. In other words, the application of the restrictive Philippine laws did not harm the interest of the country of the *forum*.

Very probably the *Saudi Indepence* case would be decided differently if it were to be put before the Supreme Court today. First of all, under the Rome II Regulation, the law applying to non-contractual obligations arising out of industrial action is primarily determined by the *locus actus*. As a result, the involvement of the Dutch section of the ITF in the seamen’s strike in Rotterdam as well as any action on land will be governed by Dutch law. In this respect, Rome II supports this form of “port shopping” described earlier. Secondly, since the *Saudi Independence* judgment, the right of industrial action has received wider


\(^{103}\) We have no information on the current state of the law in the Philippines.

\(^{104}\) Conclusion of Advocate-General Franx, *Nederlandse Jurisprudentie* 1985, no. 311 p. 1094-1095.
recognition as a fundamental right. An example of the recognition of industrial action as a fundamental principle in European law can be found in the *Laval* and *Viking* cases. Foreign laws which affect the essence of this right will probably be considered incompatible with public policy, even if the connection with the European legal order is relatively weak.\(^{105}\)

**IV. SOME CONCLUDING REMARKS**

Rome II is innovative owing to its introduction of industrial action as a special (sub-)category in conflict of laws. With this, the Regulation seems to recognize the special status of industrial relations within the system of private international law. This contrasts with the European Court of Justice’s approach in *Tor Caledonia* in which collective action subsumed under the general civil law category of “non-contractual obligations” for jurisdiction purposes. This approach taken by the ECJ comes as no surprise. After all, the existing instruments on jurisdiction and applicable law (Brussels and Rome) are based on civil law categories. The rules of Brussels I do not include a separate category for “industrial action”. Nonetheless, the European Court of Justice has in the past created a special jurisdiction rule for individual employment contracts in order to accommodate the special characteristics of this type of contracts (as opposed to commercial contracts). This rule was created by a rather free interpretation of the rule for contracts in general. The special rule was subsequently incorporated the Convention and elaborated upon in the Brussels I Regulation. This demonstrates that the absence of special rules in the text of a European instrument does not necessarily stop the European Court of Justice from interpreting general rules in such a way that it effectively introduces new sub-rules for special sub-categories. Apparently, the ECJ did not find it necessary to do so in the *Tor Caledonia* case. In as sense it is ironic that it was precisely this ruling which led to a special provision for industrial action in the Rome II Regulation.

Upon closer scrutiny, Rome II does not provide for an autonomous connection to the *lex locus damni* for (the legality of) industrial action as such. The special provision only applies to the non-contractual obligations which may arise as a result of an intended or actual industrial action. The industrial action operates as a sub-category within the main category of tort. The assessment of the lawfulness of an industrial action in the context of a contractual dispute might still be subjected to the *lex contractus*. As a result, the actions of the unions who (intend to) organise an industrial action may be governed by a different legal system than the actions of individual workers who (intend to) participate in the industrial action. This lack of consistency may harm, in our view, the effective exercise of the right to take industrial action in cross-border cases.

So the scope of application of the provisions of Rome II poses problems with regard to legal certainty and consistency. But the rules present problems in other respects, too, when tested against legal certainty as described earlier. After all, the rule incorporated in Article 4 paragraph 2 of Rome II regarding the common place of residence may lead to the fragmentation of the collective event in a number of individual legal relationships. When different actors on the side of the workers have different domiciles, the law applied to judge their respective contributions to the collective action may differ. The same applies to Article 14 of Rome II regarding choice of law by the parties: some parties may join the choice of law, while others may not. All these examples show that private international law is indeed a branch of ‘private’ law and is not well adjusted to problems arising from employment law which are more collective-orientated.

The most important deviation from the main rule that was introduced by Article 9 of Rome II is that the \textit{locus actus} has priority over the \textit{locus damni}. This reversal particularly affects the legality of (sympathy) action in international maritime transport. The outcome of the \textit{Tor Caledonia} case in Denmark, in which the legality of sympathy action taken in Sweden was tested against Danish law as the \textit{lex loci damni}, shows the need for this new rule. Article 9 of Rome II enables the crew themselves to engage in “port-shopping”. Moreover, the provision enhances the position of the unions when they want to organise sympathy strikes. So the interference of the European Parliament (which introduced the special provision) seems to have resulted in a victory for the unions. But what was won in private international law was - to some extent - lost in substantive law, at least for situations which come within the purview of the (European) internal market. According to the ECJ, cross border sympathy action may hamper the freedom of establishment and/or the free provision of services. In those situations, the exercise of this fundamental right is open to strict European scrutiny.

Article 9 of Rome II provides evidence of the willingness of the European legislator to respect the right of industrial action as recognised in the Member States. This fundamental right, which falls outside the regulatory scope of competence of the EU, should be safeguarded from restrictions imposed by instruments of secondary EU law. In that respect this Regulation does not stand on its own. The preambles and Article 2 of the so-called Monti Regulation\textsuperscript{106} also stressed the neutral character of that particular instrument with respect to the level of protection granted to the right or the freedom of industrial action in the Member States. This provision was preceded by the 22\textsuperscript{nd} preamble in the Posting of Workers Directive 96/71, which expressed the heartfelt wish that the directive was to be without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions. And finally, also

the Services directive pays homage to the autonomy of the Member States with regard to collective labour actions.\(^\text{107}\)

By their nature, such provisions in secondary EU law cannot safeguard the right of industrial action against the impact of the fundamental freedoms as they are laid down in the EC Treaty. The recognition of the right to industrial action as a general principle of EU law may mitigate the unimpaired application of fundamental freedoms to the detriment of workers’ rights, but even this cannot neutralise the (treaty-based) economic freedoms. The Court rulings in the Laval and Viking cases are clear examples of this. In these cases, the European Court of Justice encouraged the referring court to balance the exercise of the right to industrial action as recognised in national law against the fundamental freedoms recognized in the EC Treaty. Both cases contain evidence that at times the European Court of Justice is quite willing to perform this review itself. We will not go into the merit of the test performed by the ECJ in the Viking and Laval cases. What this case law demonstrates, however, is that the protection provided by conflict of laws for the right of industrial action does not suffice, whereas the willingness to respect national autonomy in secondary legislation does not provide any guarantee either.\(^\text{108}\)

BIBLIOGRAPHY


\(^{107}\) Directive 2006/123 dedicates several provisions of the preamble to the right to collective action: see in particular no. 14 and 15.

\(^{108}\) The limited importance of the preamble to the Posting of Workers Directive is strikingly illustrated by the fact that neither the Court nor the Advocate-General referred to it in the Laval case, notwithstanding the major importance of this Directive for the test for compliance with the freedom of services.


3. Collective Action in Labour Conflicts Under the Rome II Regulation


