SYbIL | Spanish Yearbook of International Law

The Application of Collective Agreements in Cross-border Employment Contracts

Noelia Fernández Avello*

Abstract: Applying collective bargaining agreements in cross-border employment contracts is controversial for two main reasons: first, the employment contract may sometimes fall within the scope of a collective agreement that does not belong to the employment contract law, so alternatives should be assessed to ensure its more favourable working conditions; secondly, the application of a collective agreement which does not belong to the contract law may then impact how the applicable law is determined. Equality plans must be referenced as they raise specific problems in cross-border employment contracts.

Keywords: cross-border employment contracts collective agreements equality plans collective autonomy party autonomy.

(A) APPROACH: DIVERSITY AND UNCERTAIN NATURE OF COLLECTIVE AGREEMENTS

States usually recognise the possibility for workers and company representatives to agree on terms and conditions of employment in collective agreements, developing and specifying the provisions of generally applicable national labour rules. However, the regulation of collective bargaining and conversely the nature of the agreements that result from it vary significantly[1]. In some countries, collective agreements are more or less explicitly regarded as legal rules[2] whereas in other countries they are given a purely contractual force[3]. This issue may be of no practical relevance in employment contracts

* Assistant professor, Private international law, University of Alcalá.

1 See U. Liukkunen, 'The Role of Collective Bargaining in Labour Law Regimes: A Global Approach', U. Liukkunen (ed.), *Collective Bargaining in Labour Law Regimes: A Global Perspective* (Springer, Switzerland, 2019), at. 1-64.

2 Art. 37.1 of the Spanish Constitution and Arts. 3 and 85 of the Worker's Charter do not expressly attribute legal nature to collective agreements, but their binding force (effectiveness beyond the negotiating parties, binding thirds) and their integration into the system of sources of Labour Law. In its jurisprudence, the Constitutional Court has oscillated between the normative thesis and the contractual thesis since it has attributed legal nature to them on several occasions, but it has also used arguments typical of the contractual thesis. Collective agreements are considered as hybrid instruments, between law and contracts. Regulatory effectiveness is attributed to them because their effects are equivalent to those of the law: direct and immediate application to all relationships included in its scope of application; binding on the parties of the employment contract, who cannot agree on conditions less favourable or contrary to those established in the collective agreement; unavailability for the worker; and application of state coercive instruments to enforce what was agreed. Cf. J. Lahera Forteza, *Manual de negociación colectiva* (Tecnos, Madrid, 2022), at. 28-32; A. Martín Valverde, J. García Murcia, *Derecho del trabajo*, 32nd ed. (Tecnos, Madrid, 2023), at. 371, 375, 376.

3 In some states, the predominant model is one in which the private nature of the agreement is assumed to prevail, but even in these cases collective agreements also present qualities inherent to the law. For

with no international elements because the application of the collective agreement in which the contract is included may be assured. However, the nature of the collective agreement must be determined in cross-border employment contracts because this is an issue with obvious consequences: when collective agreements are rules they must be applied by the reference of the labour conflict rule (Article 8 Rome I Regulation) to the legal system to which they belong[4], whereas the application of collective agreements considered only as agreements between the parties would not be determined by the reference of a conflict rule[5].

Each legal system determines which matters may be regulated by collective agreements and to what effect. The content of collective agreements goes beyond the scope of the law that applies by the reference of the labour conflict rule, which only covers the content of the individual employment contract, i.e. employment and working conditions. In addition, national legislators determine the effect that collective agreements may have in relation to generally applicable labour rules, i.e. when they may introduce detrimental or favourable provisions for the employees.

On this basis, this paper will focus on provisions laying down terms and conditions of employment contained in collective agreements with legal effectiveness. First, a distinction will be made between situations when the application of these provisions must be ensured because the collective agreement belongs to the contract governing law and situations when the collective agreement does not belong to the governing law. The latter situations are problematic as the application of the generally more protective conditions contained in the collective agreement is in principle not granted, even though the employment contract falls within the scope of application of the collective agreement. Therefore, we must consider whether there are technically feasible alternatives to justify the application of collective agreements in these situations.

Then we will analyse the impact of applying a collective agreement which is not part of the legal system that, in principle, governs the contract over the determination of the applicable law. This can be substantiated by two different means: if it is considered as an indicator of the existence of a closer connection with a state other than that where

example, in Italy and Sweden, collective agreements are considered as private contracts and there is a lack of universally applicable collective agreements but, although they are not formally included among the sources of law, they hold primacy in regulating industrial relations and employment. Cf. A. Iossa, *Collective Autonomy in the European Union: Theoretical, Comparative and Cross-border Perspectives on the Legal Regulation of Collective Bargaining*, Doctoral Thesis (monograph), Lund University, 2017, at. 190-208. In Spain, both models coexist. Extra-statutory collective agreements are also allowed, in which the rules on collective bargaining need not necessarily be followed during negotiations and which only bind the signatory parties.

4 See F. Jault-Seseke, 'La détermination des accords collectifs applicables aux relations de travail internationales', *Le droit international privé, esprit et méthodes:* Mélanges Paul Lagarde (Dalloz, Paris, 2005), at. 457-458. Collective agreements belonging to a specific legal system are those negotiated under the collective bargaining rules of that legal system, which gives them binding force and legal effectiveness.

5 If the agreements are not incorporated into the employment contract, the effectiveness of these collective agreements in international employment contracts is controversial. It could be seen as a superposition of contracts: employer and worker are parties to the employment contract and to the 'collective contract'. As contracts, it may be necessary to assess the applicable law to these collective agreements. It is worth considering that their application is mandatory within the margin granted to the material autonomy of the parties to the employment contract.

the employee habitually performs the work or, eventually, other than that where the engaging establishment is located (Article 8.4 Rome I); or if it is considered as an indicator of a tacit choice of law (Articles 3 and 8.1 Rome I).

Finally, problems raised by equality plans in cross-border employment contracts will be mentioned. As will be seen, both gender equality plans and the new LGTBI equality plans raise specific application problems because the existence of employment contracts with international elements has not been considered in their regulation. Therefore, alternatives must be considered to ensure the favourable working conditions contained in these plans are applied to international workers.

(B) CROSS-BORDER APPLICATION OF COLLECTIVE AGREEMENTS

(1) Collective agreements that belong to the employment contract governing law

Application of collective agreements which belong to the employment contract law must be ensured. If there is a choice of law in the contract, both the collective agreements of the objective law and those of the chosen law could be applied, provided that the employment contract meets the scope of application of the respective collective agreements.

If there is a choice of law, there is no one employment contract governing law, but an 'employment contract regime' resulting from a combination of the objective law and the chosen law, which requires a comparison between these laws. It is up to the objective law to set the minimum level of protection with the simply mandatory rules not to be discarded by the parties to the contract of that law. These rules can be found in the collective agreements of the objective law in whose scope the employment contract is included.

The chosen law applies in two areas: in matters governed by simply mandatory rules in the objective law, the chosen law only applies if it is more favourable to the employee; whereas, in the area reserved for material party autonomy in the objective law, the chosen law fully applies. If the contract is included in a collective agreement of the chosen law, the provisions of that agreement may raise the protection of the objective law and may also apply in the area reserved for material autonomy[6].

For example, there may be cases when the minimum protection of the objective law is fixed by the provisions of a sectoral collective agreement of the habitual state of work, which would apply as simply mandatory rules. Application of the company's collective agreement will not be problematic if the law of the state where the employer is established is chosen, provided these provisions raise the minimum protection of the objective law[7].

---

6 The *Report on the Convention on the Law Applicable to Contractual Obligations* (M. Giuliano and P. Lagarde, at. 23) only states that when the law of the state whose legal system governs the contract obliges the employer of this country to respect collective agreements, the worker cannot be deprived of the protection of said collective agreements by choosing the law of another state in the individual employment contract. Accordingly, non-disposable rules of collective agreements belonging to the objective law establish the minimum level of protection that cannot be lowered by the chosen law.

7 Rules that establish the priority of application of certain collective agreements in the event of concurrence should not be applied when it comes to collective agreements belonging to different legal systems. Art.

If the worker is posted to provide services temporarily in a member state, the working conditions of the host state included in the "hard core" of Directive 96/71/EC[8] may apply provided they are favourable for the worker in comparison with those of the law of the contract. These conditions may be those laid down in generally applicable collective agreements of the host state (Article 3.8)[9]. Directive 96/71/EC does not require collective agreements to be of a legal nature, rather collective agreements of general application, which is not exactly the same[10]. However, application of collective agreements with no legal effectiveness would be consistent with the mechanics of the Directive. Application of host member state terms and conditions of employment does not result from a conflict rule reference. On the contrary, the employment contract law is not altered during the temporary posting, and only certain provisions of the host state law apply. The application of certain conditions of the host state contained in collective agreements without legal effectiveness is therefore not problematic from the point of view of the conflict of laws technique[11].

(2) Collective agreements not belonging to the employment contract governing law

Problematic situations are when the contract falls within the scope of application of a collective agreement which does not belong to the objective or to the chosen law. In principle, the collective agreement is not applicable as it does not belong to the 'law of the contract' so application of the generally more favourable employment and working conditions of that collective agreement is not granted.

84(2) of the Spanish Workers' Statute establishes the priority of company collective agreements but this rule would not serve for the company's collective agreement of the chosen law to be applied with priority over a sector collective agreement of the objective law because Art. 8 Rome I establishes the conditions under which the rules of each legal system apply: as any other rule of the chosen law, its collective agreements can only apply when they increase protection.

8 Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (*OJ* L 18, 21 January 1997), amended by Directive 2018/957 (*OJ* L 173, 9 July 2018).

9 Problems of application of host state collective agreements have been highlighted in successive cases before the Court of Justice of the EU, even before Directive 96/71/EC came into force. The CJEU ruled on the territorial application of host state collective agreements to workers temporarily posted to its territory, establishing that only generally applicable collective agreements could be applied, i.e. those which must be respected by all undertakings belonging to a given sector or profession falling within their territorial scope of application. Problems arose because in some cases there was no universally applicable collective agreement system in host member states and the collective agreements that were intended to apply only applied to one or more undertakings.

10 Art. 3(8) Directive 96/71/EC was modified by Directive (EU) 2018/957 to allow host member states to require the application of the working conditions set out in collective agreements, regardless of whether those member states have a universally applicable collective agreement system or not. Currently, both general applicable collective agreements in a strict sense and other collective agreements of a more limited scope of application are included. They should be collective agreements that apply to all similar companies in the geographical area, profession or sector in question or that have been concluded by the most representative social partners and are applied throughout national territory. In any case, application of company collective agreements of the host state is only granted by the Directive when the employer is a temporary work agency.

11 However, this presents a problematic fit with the generally held position on the qualification of the "hard core" conditions as internationally mandatory rules of the host state. A provision contained in a collective agreement without legal effectiveness obviously cannot be applied as an internationally mandatory rule because this provision is not a rule.

This can happen in different situations: for example, if the work is habitually performed in one state and the employer is established in another state, the provisions of the company's collective agreement do not apply; similarly, even though the work has been habitually performed in one state, if the law governing the contract is that of another state which is closer (Article 8.4 Rome I), the collective agreements of the habitual State of work do not apply. In these situations, application of the collective agreement could depend on the employer's will.

In contrast to this orthodox perspective, some authors have argued the appropriateness of applying collective agreements in which the employment contract is included, even if they are not part of the employment contract law[12]. Parties to collective bargaining autonomy of the will would be recognised as having the function of raising the minimum protection of the contract law. Application of the collective agreement would be justified because it would be necessary to guarantee respect for what has been agreed by the parties to collective bargaining, as well as the protection due to workers.

It could be argued that foreign collective agreements can always be taken into account, provided that the law governing the contract allows it, as a matter of substantive law. The rules of the employment contract law which state the obligation to apply the collective agreements in which the contract is included can be invoked in this sense, even though there will be no express reference to cross-border employment contracts or to the application of collective agreements which do not belong to that law[13]. In any case, the collective agreement would only apply within the margin available for collective bargaining in the employment contract governing law. If the collective agreement contains provisions on matters not available for collective bargaining, these could not apply.

It must therefore be determined whether a collective agreement that does not belong to the contract governing law can be applied to the employee's detriment. This would be possible because in the employment contract law collective agreements may be allowed to introduce lower conditions than those provided in the general regulations in some matters. A parallel could be drawn with the party autonomy in Article 8 Rome I. Thus, the applicable legal system under the connecting points of Article 8 Rome I would set the minimum level of protection against the conflictual and material autonomy of the parties to the contract, and also against the autonomy of the parties to the collective bargaining.

Another alternative would be application of the collective agreement provisions as internationally mandatory rules (Article 9 Rome I)[14]. It could be argued that only

---

12 Cf. Á. Espiniella, *La relación laboral internacional* (Tirant lo Blanch, Valencia, 2022), at. 88. The solution could depend on the type of collective agreement and the type of collective agreement provision in question: F. Jault-Seseke, *supra* n. 4, at. 468-473.

13 If there is a choice of law, once the contractual regime resulting from the combination of the objective law and the chosen law has been determined, the possibility of applying a collective agreement belonging to a third legal system must be considered. It can be argued that, in matters governed by the objective law, the collective agreement may be applied if the objective system allows collective agreements to regulate those matters. The same would happen with the chosen law.

14 See: A.L Calvo Caravaca, J. Carrascosa González, 'Contrato internacional de trabajo', in A.L Calvo Caravaca, J. Carrascosa Gonzalez (dirs.), *Tratado de Derecho internacional privado* (tomo III), 2ª ed. (Tirant lo Blanch, Valencia, 2022), at. 3578; L. Carballo Piñeiro, *International Maritime Labour Law* (Springer, United

certain provisions of a collective agreement of the state of the forum or the state of work performance could be applied in this way, provided that these provisions can be considered essential for safeguarding the public interests of that state. However, as these are matters made available to collective bargaining by the national legislator, the concurrence of public policy interests would be excluded.

(C) IMPACT ON DETERMINING THE APPLICABLE LAW

(1) Indication of greater proximity of the exception clause

If some of the terms and conditions of employment have been determined by applying a collective agreement which does not belong to the contract governing law, then this circumstance may impact how applicable law is determined. Application of the collective agreement may contribute to the fact that the contract governing law is corrected and that the 'new' applicable law is that of the state to which the collective agreement belongs.

In the *Schlecker* case[15], the Court of Justice of the European Union (CJEU) set out the circumstances to be considered when assessing the existence of a closer connection with a state other than where the habitual place of work or the engaging establishment is located (Article 8.4 Rome I). In addition to the state of affiliation to Social Security and the state of payment of taxes on income from the worker's activity, 'all the circumstances of the case, such as the parameters relating to salary determination and other working conditions' must be considered[16]. Thus, the fixation of wages and other working conditions by the rules of a particular legal system including its collective agreements is one of the circumstances that must be assessed as an indication of proximity to determine the existence of a closer connection with another state, overriding the presumptions of the habitual state of work or the engaging establishment.

(2) Indication of a tacit choice of law

Following the CJEU, application of a collective agreement which is not part of the contract governing law must in principle be considered as an indication of the proximity of the exception clause. However, such a solution may be too simple and potentially detrimental to workers.

When applying the exception clause, consideration should be given only to elements of sufficient value to reveal the existence of greater conflictual proximity to another legal system and circumstances determined exclusively by the employer's will should be excluded. Otherwise, this would facilitate an indirect determination of the applicable law by the employer. Indeed, application of the collective agreement reveals a link

Kingdom, 2015), at. 254; O. Deinert, *International Labour Law under the Rome Conventions* (Beck/Hart/Nomos, Germany, 2017), at. 195-197; F. Jault-Seseke, *supra* n.4, at. 472; U. Liukkunen, *The Role of Mandatory Rules in International Labour Law: A Comparative Study in the Conflict of Laws* (Talentum, Helsinki, 2004), at. 121, 132.

15 Judgment of the Court, 12 September 2013, C-64/12, ECLI:EU:C:2013:551.

16 As stated in the Advocate General's Conclusions, the judge can examine by which collective agreement or what national scale the salary and other working conditions were determined.

between the contract and the legal system to which it belongs, but if it cannot be regarded as binding for the employer since there are no conflict law rules which lay down an express obligation to apply the collective agreement, the most appropriate approach would be for it to be taken as an indication of a tacit choice of the legal system to which the collective agreement belongs. Its consideration as an indication of a tacit choice is protective for employees because the choice can only favour them and the minimum level of protection of the objectively applicable law is granted. In addition, it must be borne in mind that application of the collective agreement may have created an expectation for the worker that the legal system to which the collective agreement belongs is the one that governs the contract.

When the employment contract contains an express mention of the collective agreement requires specific analysis. How it is introduced into the contract must be examined to determine the relevance of that mention: while in some cases the mention may be considered as an indication of a tacit choice of law, in other cases it may be an incorporation by reference, which excludes the parties' intention to choose the law to which the collective agreement belongs. It can be argued that whenever a mention of a collective agreement with legal effectiveness exists, it must be considered to reveal a tacit choice of the legal system to which the collective agreement belongs. However, the contract can mention the application of a collective agreement that does not belong to the legal system governing the contract, the parties could be aware of this, and the mention could only intend to clarify that the agreement will apply. In this case, the reference can be considered as an incorporation by reference of the collective agreement which would avoid having to resort to doubtful criteria to justify its application[17].

(D) CROSS-BORDER APPLICATION OF EQUALITY PLANS

Specific problems in applying equality plans for women and the new LGTBI equality plans arise from how the obligation to negotiate them has been established. LO 3/2007[18] and Law 4/2023[19] only establish that all companies with more than fifty employees, whether Spanish or foreign companies, should negotiate them[20], and the obligation to negotiate the plan is not coordinated with the possibilities for the negotiated plan to be applied.

---

17 If a specific provision of the collective agreement is reproduced in the employment contract, it can be considered a clause resulting from the material autonomy of the parties incorporated by reference and the mention would not be considered an indication of a tacit choice. *Cf.* A.L Calvo Caravaca, J. Carrascosa González, *supra* n. 14, at. 3579.

18 Organic Law 3/2007 for the effective equality of women and men (*BOE* no. 71, 23 March 2007). According to Art. 45.2, companies with more than fifty workers must negotiate and apply an equality plan containing measures aimed at avoiding any type of employment discrimination between women and men. However, the plan can also be negotiated and applied in other cases. Equality plans between women and men have been developed by Royal Decree 901/2020 (*BOE* no. 272, 14 October 2020).

19 Law 4/2023 for the real and effective equality of trans people and the guarantee of the rights of LGTBI people (*BOE* no. 51, 1 March 2023). According to Art. 15.1, companies with more than fifty workers must have a set of measures and resources planned to achieve real and effective equality for LGTBI workers, including an action protocol to address harassment or violence against LGTBI people. The content and scope of these measures have been developed by Royal Decree 1026/2024 (*BOE* no. 244, 9 October 2024).

20 LO 3/2007 applies to all companies located or acting in Spanish territory (Art. 2) while Law 4/2023 applies to all those that reside, are located or act in Spanish territory (Art. 2), in both cases regardless of their

Thus, all Spanish companies with more than fifty employees would have to negotiate both equality plans and, in principle, it does not matter that some of the employees and even the whole workforce may work in other countries. In this case, although there would be an obligation to negotiate the plans, they would probably not belong to the employment contract law so application of the plan's employment and working conditions would not be granted[21]. The same arguments raised for collective agreements not part of the law governing the contract to be applied could be invoked to justify the application of the plans[22].

As for foreign companies, *a priori* the obligation to negotiate the plans would reach all those 'acting' or located in Spain, so those with employees working in Spain and with branches (workplaces) in Spain would be included. It seems clear that the number of workers should be adapted so that not all company workers are taken into account, but only contracts with enough links to Spain[23].

It would be more reasonable for the obligation to negotiate the plan to exist whenever the Spanish or foreign company has at least fifty employees working in Spain[24], in which case Spanish law would foreseeably be applicable and the negotiated plan could be applied[25]. In any case, adaptation of the calculation is not compatible with the literal wording of the rules and an adaptation based on the criterion of work performance in Spain does not exclude application problems either. Identification of the habitual state of work of each worker would be required when negotiating the plan, as when determining international jurisdiction and applicable law. If Spain is the habitual state of work of at least fifty employees, there would be an obligation to negotiate the plan. Employees who do not habitually work in any state would not count. Changes in the habitual state of work would be problematic because, if the number of employees working in Spain were to fall below fifty at any time, the obligation to negotiate the plan would disappear and it could be sustained that the obligation to apply a plan already negotiated would also disappear. In addition, although work is habitually performed in Spain, the law of another state may be applicable as the exception clause applies. These contracts would in principle count for the obligation to negotiate the plan, but the negotiated plan would not apply to them, so it might be more appropriate for them to be excluded from the calculation.

---

nationality, domicile or residence.

21 Some equality plan measures must be applied by reference to the Spanish legal system by Art. 8 Rome I but the application of some measures, for example, those that aim to prevent discrimination in hiring, will not be the result of the reference in Art. 8 RIR as these are matters unrelated to employment contract law.

22 This can be sustained only if equality plans share the legal effectiveness of collective agreements, which can be deduced but is not expressly established.

23 However, according to Art. 3 RD 201/2020 and Art. 3 RD 1026/2024, to calculate the number of workers that gives rise to the obligation to negotiate an equality plan, the company's total workforce should be considered, regardless of the number of its work centres or the form of labour contracts.

24 See A. Selma Penalva, 'El plan de igualdad en la empresa internacional', *Revista Justicia & Trabajo* (2022), no. 1, at. 35-42.

25 Although for foreign companies it would be reasonable for the obligation to negotiate the plan to exist if the company has a branch in Spain, the calculation should, in any case, exclude workers providing services in other States because otherwise, the law governing these contracts would most likely not be Spanish law. Cf. Á. Espiniella, *supra* n. 12., at. 216.

(E) CONCLUSIONS

The first difficulty in applying collective agreements derives from the diversity that characterises them from a comparative law perspective: the nature of the collective agreements in which the contract is included must be examined to determine whether they are rules or equivalent to rules in the legal system that has ruled their negotiation.

If it is a legally effective collective agreement, it will be applied by the conflict rule reference to the legal system to which the collective agreement belongs. Application of collective agreements of the objective law and the chosen law must be granted as long as their scope of application is met.

It is worth considering that a collective agreement not belonging to the employment contract law could be applied within the margin granted to the parties to the collective bargaining autonomy of the will in this law. In any case, application of the foreign collective agreement must be admissible in this legal system.

The regulation of equality plans highlights the persistent problematic lack of attention to cross-border collective labour relations and specifically to the international dimension of collective bargaining. So far, the specificity of labour law sources in cross-border employment contracts has not been considered in labour law and conflict of laws rules. This is a traditional and well-known problem which, as can be seen, remains unaddressed in recent regulations.