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Cecilia Pérez Martínez

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WHERE WILL THE CASE BE HEARD? WHICH IS THE
APPLICABLE LAW? APPROACH TO SELECTED PROBLEMS
OF TRANSNATIONAL EMPLOYMENT RELATIONSHIPS

CECILIA PÉREZ MARTÍNEZ¹

Socrates, quidem, cum rogaretur cujatem se esse diceret, “Mundanum,” inquit; totius enim mundi se incolam et civem arbitrabatur. [Socrates, indeed, when he was asked of what country he called himself, said, “Of the world;” for he considered himself an inhabitant and a citizen of the whole world.]
Cicero, *Tusculanarum Disputationum*, Book V. 37. 108.

Non sum uni angulo natus; patria mea totus hic est mundus. [I am not born for one corner; the whole world is my native land.]
Seneca, *Epistles*, 28.

PART I: INTRODUCTION

When do I leave? For how long am I going to stay there? Whose employee am I going to be of? Who will be paying me? Whose country’s social security system will protect me? Whose country’s laws will define my rights as an employee?

These are some of the frequently asked questions by employees when their employer informs them that they will be sent to another country to perform their work there. The employer will typically have drafted an agreement that answers most of them. Unfortunately, in the transnational employment relationship equation, some will remain unknown factors that will be very difficult to clear regardless of the agreement’s clauses. The reason behind this uncertainty is that labor and employment has always been regulated locally and for local employee-employer relationships. Traditionally, domestic regulations have not

¹ Senior Associate at J&A Garrigues, S.L.P., Madrid (Spain). Attorney at law (Labor and Employment Law), admitted to the Bar of Madrid (Spain). LL.M. in Comparative Law, *cum laude*, 2014, California Western School of Law. This article was written while in residence at California Western School of Law, in May 2014 (last update for publication in November 2014).

contemplated transnational employment relationships, and transnational employment is barely regulated by international laws.

Despite these legal issues, in our globalized world, transnational employment relationships are indeed common place now. Defined by some as the most talked about concept in the last millennium and yet the least understood,² globalization has been undeniably altering nations' politics, economies, cultures, and traditions. The concept, though, is not new; in fact, the process started early in the history of civilization. With different purposes and extents in each era, from the ancient Rome Empire to the European colonization, the basic underlying idea has always been transcending local or national boundaries for the creation of a global market. Nowadays, with the evolution of transportation means and the revolution of telecommunications, globalization has resulted in a single world market for goods, services, capital, and labor. This global market has favored both a delocalization of production and an increasing flow of employees from one country to another. In this context, as this paper will contend, the concept of transnational employment refers to the latter phenomenon, where employees are sent across the world by their employers to perform their services, and not to the former, in which companies just use the local workforce of another country.

As it could not have been otherwise, the law has mirrored these changes in the traditional labor and employment scheme. In spite of its eminently local nature, labor and employment law has also “gone global.” Transnational labor and employment law sprang, becoming in the past years an emerging independent field of law. Nonetheless, the evolution of the law and the growth of transnational employment have not followed the same pace. The law still needs to envisage basic transnational employment issues.

On one hand, there has been important progress as to substantive law. The International Labor Organization (ILO) has responded to the “growing number of needs and challenges faced by workers and employers in the global economy”³ by elaborating international labor standards —regarding, among other topics, wages, working time, occupational safety and health and migrating workers. However, its conventions and recommendations only provide minimum requirements that require its implementation by the countries that respectively ratify or follow them.

² WAYNE ELLWOOD, GLOBALIZACIÓN 11 (Xavier Masllorens ed., Bojana Veskovic Kresic trans., 2007).

³ See generally *Subjects covered by International Labour Standards*, INT'L LABOUR ORG., <http://ilo.org/global/standards/subjects-covered-by-international-labour-standards/lang--en/index.htm> (last visited Nov. 30, 2014).

On the other hand, despite the efforts to fill it, there still is a significant legislative gap *vis-à-vis* procedural issues arising out of the transnational employment relationship. Important questions like where to bring suit, whose laws apply, or how to enforce an obtained judgment are not holistically approached. In 1992, the United States (US), through The Hague Conference on Private International Law, initiated a push to conclude a worldwide convention on jurisdiction and judgments. But, because of the legal differences between common law and civil law, negotiations never led to said needed instrument.⁴ Moreover, there is currently a working group elaborating a draft on choice of law in international contracts.⁵ The final outcome it is yet to be seen.

Within the European Union (EU), the legal environment is less uncertain. Its legislation is infused by the concept of a social market economy in which the EU is based, and the corollary principle of free movement of workers set forth in the Treaty on the Functioning of the EU.⁶ In a capsule, EU legislation is not

⁴ KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* 417 (3d ed. 2012).

⁵ *See generally Choice of Law in International Contracts*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=text.display&tid=49 (last visited Nov. 30, 2014) (providing Hague Principles on Choice of Law in International Commercial Contracts drafts).

⁶ Consolidated Version of the Treaty on the Functioning of the European Union article 45, Oct. 26, 2012, 2012 O.J. (C 326) 1, [hereinafter, TFEU], *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:C2012/326/01> (stating freedom of movement for workers shall be secured within the Union. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission. The provisions of this Article shall not apply to employment in the public service.)

comprehensive, but is making progress towards the needed legal predictability in the transnational employment field. On one hand, its directives define minimum labor and employment standards to follow in transnational employment relationships to be implemented by the Member States. On the other hand, its regulations coordinate social security provisions and establish legal tools to solve jurisdiction and choice of law problems.⁷

In sum, multiple legal issues derive from the transnational employment trend to which the answer cannot be found in international instruments. Thorough analysis of both home and host countries is required in order to determine basic questions like (i) whose courts can hear the controversies that arise between the parties, (ii) which is the applicable law, (iii) whose country's social security system protects the employee, or (iv) how will a judgment obtained in one country be enforced in a different one.

This paper will answer questions (i) and (ii) under Spanish and US laws in a hypothetical controversy arisen out of a transnational employment relationship between an employee and a Spanish company that sends him to render services in the US. First, the paper will briefly define the concept of transnational employment law; then, it will explain, in a nutshell, the current applicable laws, both in Spain (EU) and in the US, on jurisdiction and choice of law, to later elaborate on different arguments for and against the US courts' jurisdiction over the Spanish employer defendant; and, finally, it will assess alternative dispute resolution as a means of providing legal predictability to transnational employment relationships.

PART II: TRANSNATIONAL EMPLOYMENT LAW

Transnational labor and employment law has been evolving for the past decades. It is now considered an emerging independent area of concentration. Over the past years, scholars, commentators and employment practitioners throughout the world have devoted to its study generating prolific literature.⁸

⁷ See generally *Employment and Social Affairs*, THE EUROPEAN UNION EXPLAINED, http://europa.eu/pol/socio/index_en.htm (providing information regarding EU employment and social affairs).

⁸ See generally CROSS-BORDER HUMAN RESOURCES, LABOR AND EMPLOYMENT ISSUES: PROCEEDINGS OF NEW YORK UNIVERSITY 54TH ANNUAL CONFERENCE ON LABOR (Andrew P. Morriss & Samuel Estreicher eds., 2005); Donald C. Dowling Jr., *The Practice of International Labor & Employment Law: Escort Your Labor/Employment Clients into the Global Millennium*, 17 THE LABOR LAW 1

According to most commentators, the origin of the notion of transnational law can be found in the work of Professor Philip Jessup on transnational law published in 1956.⁹ What Jessup proposed in his study, in his own words, was “a new approach to international law.”¹⁰ That approach, he said, “would eliminate the stress placed on the state and nation factor by traditional international law in favor of a broader conception based on the multiplicity of rules emanating from both private and public sources which regulate the day to day social, economic, and political relationships of the ‘world community.’”¹¹ He then defined transnational law as “all law which regulates actions and events that transcend national frontiers.”

Jessup’s definition of transnational law —or non-definition, as some commentators have described it¹²— was later shaped by scholars. Soon, law reviews highlighted the importance of distinguishing transnational law from the classic international law as pointed out by Jessup: in the latter, States are its center, while in the former the focus is on the citizenry and their rights and obligations that stem from conventions and treaties, even if those are entered into by the States.¹³ Transnational law has been conceptualized as a “supplementary and challenging category within interdisciplinary research on globalization and law.”¹⁴

On the other hand, the first notions of transnational employment law can be found in the early *Lex Rodhia*, the first compilation of admiralty customs — *consuetudines maris*. This compilation, later adopted by Rome’s legislation, already included rules regarding the relationship between the captain and his crew

(2001); GLOBAL LABOR AND EMPLOYMENT LAW FOR THE PRACTICING LAWYER: PROCEEDINGS OF THE NEW YORK UNIVERSITY 61ST ANNUAL CONFERENCE ON LABOR (Andrew P. Morriss & Samuel Estreicher eds., 2010); Susan Bisom-Rapp, *Exceeding Our Boundaries: Transnational Employment Law Practice and the Export Of American Lawyering Styles to The Global Worksite*, 25 COMP. LAB. L. & POL’Y J. 257 (2004); Marley S. Weiss, *International Labor and Employment Law: From Periphery to Core*, 25 A.B.A. J. LAB. & EMPL. LAW 487 (2010).

⁹ ANTONIO OJEDA AVILÉS, DERECHO TRANSNACIONAL DEL TRABAJO, 21-22 (2013).

¹⁰ David Lehman, *Transnational Law*, by Philipp C. Jessup. Yale University Press. New Haven, 1956. Pp. 113. \$3.00., 18 LA. L. REV. (1957), available at <http://digitalcommons.law.lsu.edu/lalrev/vol18/iss1/46>.

¹¹ *Id.*

¹² OJEDA AVILÉS, *supra* note 9, at 24.

¹³ *Id.*

¹⁴ Peer Zumbansen, *Transnational Law*, COMPARATIVE RESEARCH IN LAW & POLITICAL ECONOMY (2008), available at <http://digitalcommons.osgoode.yorku.ca/clpe/181>.

as well as the salaries and obligations of the seamen sailing from country to country.¹⁵ Nowadays, transnational employment law encompasses not only international private law, but also substantive law. Thus, whilst traditional international private law was limited to solving conflicts regarding jurisdiction and applicable law amongst different countries, transnational employment law is advancing towards the regulation of substantive law concerning rights and obligations derived from private employment relationships.¹⁶ The main sources of this substantive transnational employment law are: international regulations (of which the most relevant are ILO's conventions and recommendations and EU's directives and regulations); international bilateral or multilateral conventions (mainly consisting of international agreements on social security); international collective bargaining agreements (because international negotiations are complex, these kind of agreements are rare and mostly limited to the EU and between the US and Canada); and domestic laws.¹⁷

Notwithstanding, this substantive law is far from comprehensive. As advanced in the introduction, in our globalized world, companies seek to find workforce outside the boundaries of their own countries. The main purpose of doing so is to take advantage of cheaper workforce and lower working conditions. In this context, ILO has played an important role by developing a system of international labor standards. Nonetheless, these standards only apply if the different countries ratify its conventions and implement them into their domestic laws.¹⁸ EU directives have been also important in this regard.¹⁹ But they too require the implementation into domestic laws, although EU directives necessarily have to be implemented by EU Member States in the timeframe specified case by case in each directive. These regulations show important advancements in the transnational employment law. However, it will be difficult, if not barely impossible, to reach a complete transnational employment law. The reason behind this difficulty (if not impossibility) is that labor and employment law is strictly linked to the national economics and politics. Finding the rules that meet the economic needs of all countries, transcending national sovereignties, is, thus, a chimera. Therefore, the current situation of international regulations as minimum

¹⁵ OJEDA AVILÉS, *supra* note 9, at 25-26.

¹⁶ *Id.* at 33.

¹⁷ *Id.* at 37-40.

¹⁸ See generally *List of Instruments by Subject and Status*, INTERNATIONAL LABOR ORGANIZATION, <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12030:0::NO> (listing instruments by subject and status) (last visited Nov. 30, 2014).

¹⁹ See generally *Directory of European Legislation*, EUR-LEX: ACCESS TO EUROPEAN UNION LAW, <http://eur-lex.europa.eu/browse/directories/legislation.html> (listing EU directives) (last visited Nov. 30, 2014).

labor and employment standards is the best that can be achieved for the moment.

Conversely, international regulations have barely addressed issues related to the movement of an employee from one country to another. As stated in the introduction section, globalization not only has led to the outsourcing of companies, but also has favored the movement of performance of work between countries and employee migration —lawful or unlawful.²⁰ This paper will only focus on the former, namely, the scenario in which an employee is asked, or ordered, by his/her employer to render his/her services in a different country. As to substantive law, EU Directive 96/71/EC of the European Parliament and of the Council, of 16 December 1996,²¹ offers some guidance regarding the minimum rights that employees have when temporarily posted from one Member State to another (see section III.B. for further explanation).

Finally, international private law, in this narrow context (i.e. movement of performance of work), relates to three basic topics: international laws on jurisdiction, choice of law, and enforceability of judgments. Regardless of the name of this area of law —*international* private law— it has always been local. In fact, international private law refers to the bulk of domestic laws that solve, nationwide, jurisdiction, choice of law, and enforceability of judgment problems. Within the EU, as it will be explained in sections IV.B. and IV.C. below, these problems have been solved by EU regulations. Outside the EU, solutions could also exist if the abovementioned negotiations within the Hague Convention finally lead to international instruments on those matters. Common law and civil law differences cannot be an excuse to justify the legislative gap. Those differences have already been overcome before, in the arbitration arena, as to the recognition and enforcement of arbitral awards (see section VII). Should this convention finally exist, it will provide legal predictability to the current transnational employment situation.

To sum up, it is obvious that transnational labor and employment law is still a small part of labor and employment law. However, its relevance is increasing in response to the new employment configuration, in which the transnational component is fundamental. Important advancements are needed to solve typical problems that stem from the transnational employment relationship providing the legal predictability that both employees and employers desire.

²⁰ Weiss, *supra* note 8, at 4.

²¹ 1997 O.J. (L 018) 1. Directive 1996/71/EC of the European Parliament and of the Council Concerning the Posting of Workers in the Framework of the Provision of Services.

PART III: THE TRANSNATIONAL EMPLOYMENT RELATIONSHIP UNDER SPANISH LAW

III.A. Transnational employment relationship defined

Transnational employment, or expatriation, as it is frequently called, has not been specifically defined by Spanish labor and employment law.²² Nonetheless, the concept is utilized throughout its legislation and case law in regards to topics such as jurisdiction, applicable law, coordination of social security systems, minimum labor and employment standards, and immigration in a transnational framework.

“Expatriates” have been held by some commentators as “nationals from the MNC [multinational companies] home country, who typically enjoy a rewarding experience with a privileged compensation package and high social status in the host country.”²³ This non-technical definition used to be accurate, but over the last five years in which multinationals have been struggling to survive the economic situation, the latter notion is mostly outdated.

From the abovementioned scattered regulation, transnational employment or expatriation can be understood as the situation in which an employee hired in Spain (home country) *temporarily* renders services abroad (host country) and still maintains the employment relationship with the Spanish employer. Thus, technically, the expatriation concept does not comprise the scenario in which an employee independently migrates, lawfully or unlawfully, to a different country and is hired directly by a foreign employer; it only encompasses the case in which the employer asks or orders the employee to move to a different country to perform his/her services.

As emphasized in the latter definition, the employment relationship will generally be deemed transnational only if it responds to a temporal situation and not a definitive one. However, there is neither legal minimum nor maximum on duration. In practice, the limit is found in the international agreements on social security that Spain has entered into. In those agreements, typically the maximum amount of time in which an expatriate can maintain Spanish social security coverage is five years.²⁴ If the transnational employment relationship exceeds five

²² JESÚS R. MERCADER UGUINA, *LECCIONES DE DERECHO DEL TRABAJO* 410 (6th ed., 2013).

²³ Víctor Oltra et. al., *A New Framework for Understanding Inequalities Between Expatriates and Host Country Nationals*, 115 J. BUS. ETHICS 291, 293 (2013) (internal citations omitted).

²⁴ Five years is generally the maximum time that the Social Security bilateral agreements between Spain and other countries allow an employee to maintain its Spanish social security benefits while the employee is temporarily working abroad.

years, courts tend to consider the employee as a foreign employee and no more an expatriate. Nonetheless, the totality of the circumstances will be assessed to characterize the relationship. In this regard, factors that will be taken into account are: whether the employee is paid by the host company, whether the employee is part of the organizational chart of the host company, whether the employee receives orders from the host company and not from the home company in Spain or whether the employee has to report to someone in Spain. No single fact, however, will be determinative.

III.B. Spanish transnational employment law

In general, when a Spanish company decides to expatriate its employees, the following basic rules will govern the newly created transnational employment relationship:

- a. Workers' Statute article 40,²⁵ on geographic mobility. This article establishes the rules that have to be followed to order an employee to relocate. However, this article was drafted to encompass a domestic situation, not transnational mobility. Typically, the employer will not follow the strict requirements²⁶ that the article imposes because

In transnational employment cases between Spain and the US, the maximum period allowed is five years, which can be extended for an additional year. See article 5 of the Agreement on Social Security between the United States and Spain, in force as of April 1, 1988. For more information on the agreement, see http://www.ssa.gov/international/Agreement_Texts/spanish.html and http://www.segsocial.es/Internet_6/Masinformacion/Internacional/Conveniosbilaterales/EEUU2k9/index.htm.

²⁵ Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores [hereinafter, the Workers' Statute], B.O.E. n.75, March 29, 1995, 9654 (Spain), *available at* <http://www.boe.es/buscar/pdf/1995/BOE-A-1995-7730-consolidado.pdf> (official consolidated version).

²⁶ *Id.* (providing that the employer can only impose relocation to the employee on economic, technological, organizational, and production-based grounds. The employer should inform the employee of his or her relocation thirty days prior to his or her relocations. The workers' representatives should be simultaneously informed of such relocation. The employee can decide to terminate his employment contract instead of relocating, and he will then be entitled to a

both employer and employee will mutually agree on the latter's relocation.

- b. Workers' Statute article 8.5 and Royal Decree 1659/1998, of July 24,²⁷ on the Essential Elements of Employment Contracts. Under these regulations, an employee has to be informed, in writing, of the essential elements to his employment relationship. In transnational employment relationships, the employee must be specifically informed of the duration of the expatriation, the wages he will be paid and the currency in which he will receive them, the out-of-pocket expenses policies, and the repatriation conditions.
- c. Regulation (EU) No 1215/2012 of the European Parliament and of the Council, of 12 December 2012, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (R. 1215/12).²⁸ A more detailed explanation will be provided in section IV.B. below.
- d. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I).²⁹ A more detailed explanation will be provided in section IV.C. below.
- e. International agreements on social security matters between Spain and other countries. These agreements establish which country's social security coverage the employee will have in cases of relocation and temporary or permanent assignments abroad. Within

severance payment amounting to twenty days of salary per year worked, up to a limit of twelve months' salary).

²⁷ B.O.E. n. 192, August 12, 1998, 27512 (Spain).

²⁸ 2012 O.J. (L 351) 1, *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012R1215>. Effective January 10, 2015, this regulation replaces Regulation (EU) No 1215/2012 of the European Parliament and of the Council, of 12 December 2012, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, *available at* <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF>.

²⁹ 2008 O.J. (L 177) 6, *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN>. Regulation 2008/593 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. L 177/6.

the EU, Council Regulations (EC) 883/2004³⁰ and 987/2009³¹ on the Coordination of Social Security Schemes would apply.³²

- f. Law 45/1999, of November 29,³³ Concerning the Posting of Workers in the Framework of the Provision of Services. Under this law, Spanish employers who post employees to an EU Member State, an EEA State (Norway, Iceland and Liechtenstein) or to Switzerland should comply with the corresponding domestic law implementing Directive 96/71/EC of the European Parliament and of the Council, of 16 December 1996.³⁴ The Directive applies to undertakings which, in the framework of the transnational provision of services, post workers to the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting: on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended; to an establishment or to an undertaking owned by the group; as a temporary employment undertaking, to a user

³⁰ 2004 O.J. (L 166) 1, *available at* <http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32004R0883&from=EN>. Regulation 2004/883/EC of the European Parliament and of the Council On the Coordination of Social Security Systems, 2004 O.J. L 166/1.

³¹ 2009 O.J. (L 284) 43, *available at* <http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32009R0988&from=EN>. Regulation 2009/987/EC of the European Parliament and of the Council on Laying Down the Procedure for Implementing Regulation (EC) No. 883/2004 On the Coordination of Social Security Systems, 2009 O.J. L 284/1.

³² *See generally* http://www.segsocial.es/Internet_6/Masinformacion/Internacional/index.htm (Spanish Social Security Department official website on international agreements signed by Spain). Social Security, MINISTERIO DE EMPLEO Y SEGURIDAD SOCIAL, http://www.seg-social.es/Internet_6/Masinformacion/Internacional/index.htm (last visited Nov. 30, 2014).

³³ B.O.E. n. 286, November 30, 1999, 41231 (Spain).

³⁴ 1996 O.J. (L 18) 1, *available at* <http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:31996L0071&rid=1>. Directive 1996/71/EC of the European Parliament and of the Council Concerning the Posting of Workers in the Framework of the Provision of Services, 1996 O.J. L 18/1.

undertaking. Conditions of work and employment to be covered are: maximum work periods and minimum rest periods; minimum paid annual holidays; minimum rates of pay, including overtime rates; the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; health, safety, and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; equality of treatment between men and women; and other provisions on non-discrimination.³⁵

PART IV: TRANSNATIONAL EMPLOYMENT AGREEMENTS UNDER SPANISH LAW

IV.A. Defining the transnational employment relationship

As advanced in section III above, under Spanish law, the transnational employment relationship can potentially be imposed by the employer, following the requirements set forth in Workers' Statute article 40 regarding employees' geographic mobility. However, the latter option is not recommendable, and usually the transnational employment relationship is established by an agreement between the employer and the employee.

Deciding to expatriate an employee to render his services in another country creates a great vacuum feeling to both the employee and the employer. Introducing the transnational element into the employment relationship entails the modification of the workplace and, hence, possibly, the laws by which it is governed. That is why it is crucial to both parties to regulate *ex ante* all the basic

³⁵ On May 28, 2014 it was published in the Official Journal of the European Union a directive seeking to implement, apply, and enforce Directive 96/71/EC. Directive 2014/67/UE of the European Parliament and of the Council of 15 May 2014 on the Enforcement of Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services and Amending Regulation (EU) No 1024/2012 on Administrative Cooperation through the Internal Market Information System. 2014 O.J. (L 159) 11. Article 1 provides: "This Directive establishes a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC, including measures to prevent and sanction any abuse and circumvention of the applicable rules and is without prejudice to the scope of Directive 96/71/EC."

terms that will define their new transnational employment relationship.

Typically, a transnational employment agreement would include the following key terms of the employment relationship:

- a. Term of employment
- b. Workplace
- c. Scope of employment
- d. Compensation, benefit plans, Social Security
- e. Termination of the employment relationship
- f. Repatriation
- g. Forum selection
- h. Choice of law

Among the other key terms, clauses relating to forum selection and choice of law are unquestionably the most controversial from a legal standpoint. Typically, however, employer and employee will only fight over those if a dispute arises during the relationship. In fact, even when those clauses are included in the transnational employment relationship agreement, the outcome cannot necessarily be predicted with absolute certainty. The following sections will be devoted to the analysis of these key terms.

IV.B. Jurisdiction

IV.B.1. General Spanish forum rules

The first issue that has to be solved when a dispute arises between employer and employee is whose country's courts will be able to hear the case. Pursuant to the abovementioned R. 1215/12, Spanish courts will determine its jurisdiction by applying:

- 1) R. 1215/12 forum rules when the defendant is domiciled in one of the Member States or it cannot be proved that it is domiciled outside the EU.^{36/}

³⁶ 2012 O.J. (L 351) 1, 7. R. 1215/12 article 4, establishes that, as a general rule, the forum is determined by the defendant's domicile:

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that

- 2) R. 1215/12 forum rules over individual contracts of employment (Section 5, articles 20 to 23).³⁷
- 3) R. 1215/12 forum rules in exclusive jurisdiction cases (article 24),³⁸ express jurisdiction agreement (article 25),³⁹ implied jurisdiction agreement (article 26),⁴⁰ regardless of where the defendant is domiciled.
- 4) Spanish domestic laws regarding international jurisdiction,⁴¹ when the defendant is not domiciled in the EU, except when an international agreement entered into by Spain or the EU⁴² determines otherwise.⁴³

To the scenario subject to analysis here (Spanish employer that expatriates an employee to the US), Spanish courts will normally apply R. 1215/12 forum rules to determine their jurisdiction. The following section will explain R. 1215/12 forum rules regarding individual employment contracts.

IV.B.2. Jurisdiction over individual employment contracts

Pursuant to R. 1215/12 article 21, “an employer domiciled in a Member

Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.

³⁷ 2012 O.J. (L 351) 1, 10.

³⁸ 2012 O.J. (L 351) 1, 10-11.

³⁹ 2012 O.J. (L 351) 1, 11.

⁴⁰ 2012 O.J. (L 351) 1, 11.

⁴¹ L.O.P.J. article 25. Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, [Law on the Judiciary], B.O.E. n.157, July 2, 1985, 20632 (Spain).

⁴² Lugano Convention applies to persons domiciled in Switzerland, Norway, Island and Liechtenstein, to which the R. 1215/12 does not apply. Brussels Convention applies to persons domiciled in Denmark.

⁴³ 2012 O.J. (L 351) 1, 7. R. 1215/12 article 6.1 provides: “If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.”

State may be sued:”

1. in the courts of the Member State where he is domiciled; or
2. in another Member State:
 - a. in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or
 - b. If the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.⁴⁴

Notwithstanding the above, R. 1215/12 article 23 allows the employee to bring proceedings in courts other than those indicated above by an agreement on jurisdiction entered into *after* the dispute has arisen or “which allows the employee to bring proceedings in courts other than those indicated in [Section 5 of R. 1215/12].”⁴⁵ Likewise, subject to exceptions, the defendant may waive jurisdiction by not contesting it in his/her first appearance.⁴⁶ Hence, as a general rule, employer and employee would not be allowed to include in their expatriation agreement which courts would hear their future disputes. As a practical matter, however, expatriation agreements typically include forum selection clauses to create a psychological bound to them (regardless of their potential nullity and consequent unenforceability).

IV.C. Choice of law

IV.C.1. Spanish choice of law rules

After resolving jurisdictional issues, the next step prior to getting into the underlying controversy is determining the applicable law. Spanish courts will do so by applying the rules set forth in Rome I.^{47, 48} Rome I, in article 3.1, provides

⁴⁴ 2012 O.J. (L 351) 1, 10. R. 1215/12 article 21.

⁴⁵ 2012 O.J. (L 351) 1, 10. R. 1215/12 article 23.

⁴⁶ 2012 O.J. (L 351) 1, 11. R. 1215/12 article 26: “Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.”

⁴⁷ Rome I replaced the original Rome Convention in force in Spain between September 1, 1993 and December 12, 2009. Before September 1, 1993, article 10.6

that, as a general rule, “a contract shall be governed by the law chosen by the parties.”⁴⁹ Further, the article allows for modifications as to the chosen law —“the parties may at any time agree to subject the contract to a law other than that which previously governed it”⁵⁰—. However, Rome I specifies that “any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under [Rome I] article 11 or adversely affect the rights of third parties”.⁵¹ Additionally, Rome I cautions that where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement. Moreover, “where all other elements relevant to the situation at the time of the choice are located in one or more Member States,” Rome I article 3.4 provides that “the parties’ choice of applicable law other than that of a Member State shall not prejudice the application of provisions of EU law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.”⁵²

In addition, Rome I articles 10, 11 and 13 establish the following rules to assess the validity of an agreement:

- a. The existence and validity of an agreement or any of its terms shall be determined by the law which would govern it under [Rome I] if the contract or term were valid. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law [which would govern it under Rome I if the contract or term were valid].⁵³
- b. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it

of the Spanish Civil Code and article 1.4 of the Workers’ Statute determined the applicable law in employment contract related disputes. For the purposes of this paper, only the Rome I will be analyzed.

⁴⁸ 2008 O.J. (L 177) 6, 10. Rome I article 2: “Any law specified by this Regulation shall be applied whether or not is the law of a Member State.”

⁴⁹ 2008 O.J. (L 177) 6, 10. Rome I article 3.1.

⁵⁰ 2008 O.J. (L 177) 6, 10. Rome I article 3.2.

⁵¹ 2008 O.J. (L 177) 6, 10. Rome I article 3.2 *in fine*.

⁵² 2008 O.J. (L 177) 6, 10-11. Rome I article 3.4.

⁵³ 2008 O.J. (L 177) 6, 13. Rome I article 10.

satisfies the formal requirements of the law which governs it in substance under [Rome I] or of the law of the country where it is concluded. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under [Rome I], or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.⁵⁴

- c. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under [Rome I], or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.⁵⁵
- d. In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.⁵⁶

IV.C.2. Choice of law rules applicable to employment contracts

Choice of law clauses are very common in international agreements due to the great divergence in the law of the different countries involved. Rome I article 8 contains the choice of law rules applicable to individual employment contracts. Said article is inspired by the above explained general rules. It provides that “an individual employment contract shall be governed by the law chosen by the parties.”⁵⁷

However, due to the particularity of employment contracts, Rome I establishes that the choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated by agreement under the law that, absence of choice, would have been applicable

⁵⁴ 2008 O.J. (L 177) 6, 13-14. Rome I article 11.1 and 11.2.

⁵⁵ 2008 O.J. (L 177) 6, 13-14. Rome I article 11.3.

⁵⁶ 2008 O.J. (L 177) 6, 14. Rome I article 13.

⁵⁷ 2008 O.J. (L 177) 6, 13. Rome I article 8.1.

and explained in a., b. and c. below. Thus, in order to comply with this proviso, the parties need to assess the relevant substantive laws in the legal systems at play.⁵⁸

Further, in absence of choice, the article provides the rules to determine the applicable law:

- a. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.⁵⁹
- b. Where the law applicable cannot be determined pursuant to [the above], the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.⁶⁰
- c. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in [the previous paragraphs], the law of that other country shall apply.⁶¹

PART V: US RULES ON JURISDICTION AND APPLICABLE LAW

In order to determine if a civil lawsuit can be brought before US courts, the following threshold questions must be cleared: personal jurisdiction, subject-matter jurisdiction, venue, and service of process. This section will primarily focus on the personal jurisdiction requirement; the other topics will be very briefly touched upon.

⁵⁸ Guido Carducci, *The Importance of Legal Context and Other Considerations in Assessing the Suitability of Negotiation, Mediation, Arbitration and Litigation in Resolving Effectively Domestic and International Disputes (Employment Disputes and Beyond)*, 86 ST. JOHN'S L. REV. 511, 534 (2012).

⁵⁹ 2008 O.J. (L 177) 6, 13. Rome I article 8.2.

⁶⁰ 2008 O.J. (L 177) 6, 13. Rome I article 8.3.

⁶¹ 2008 O.J. (L 177) 6, 13. Rome I article 8.4.

V.A. US jurisdiction in international litigation**V.A.1. Personal jurisdiction**

Personal jurisdiction refers to the ability of the court to exercise power over a particular defendant. It responds to the question: “can suit be brought against a particular defendant in a forum of the plaintiff’s choosing?”⁶² The US has no general treaties on international jurisdiction. The US Supreme Court has largely elaborated the US law of territorial jurisdiction by deciding interstate cases but it has decided very few international jurisdiction cases;⁶³ “US courts do not treat transnational cases differently in any significant way.”⁶⁴ Therefore, the general rules equally apply to an international case.⁶⁵ Notwithstanding, there is an obvious, yet important, distinguishing point: “domestic personal jurisdiction is arguably about venue, due process, and allocation of power between the several *states*; [rather, t]ransnational personal jurisdiction is about” venue, due process, and allocation of power between *nations*.⁶⁶

As in domestic cases, jurisdiction in litigation with an international component will be likely determined by the corresponding state’s long-arm statute, not only in state but also in federal court, by virtue of Federal Rule of Civil Procedure 4(k)(1)(A).⁶⁷ Nonetheless, as in domestic litigation, the complete analysis of a court’s jurisdiction over the defendant requires determining its constitutionality under the Due Process Clause⁶⁸ of the United States Constitution. (Fourteenth Amendment or Fifth Amendment, depending on whether the case is heard in state or federal court respectively). A concise explanation of the determination of personal jurisdiction process follows.

a. *Long-arm statutes.* Most states have adopted long-arm statutes

⁶² Donald Earl Childress III, *Rethinking Legal Globalization: the Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1510 (2013).

⁶³ GEORGE A. BERMAN, TRANSNATIONAL LITIGATION IN A NUTSHELL 41 (2003).

⁶⁴ Childress, *supra* note 62, at 1498-99.

⁶⁵ CLERMONT, *supra* note 4, at 297-98.

⁶⁶ Childress, *supra* note 62, at 1520.

⁶⁷ FED. R. CIV. P. 4(k)(1)(A) (“(1) *In General.* Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”)

⁶⁸ BERMAN, *supra* note 63, at 35.

which have incorporated the traditional bases for assertion of jurisdiction.⁶⁹ These statutes identify precise circumstances under which a court has personal jurisdiction over non-resident defendants (nationals or foreign). Long-arm statutes can be classified in two types: (i) California type, which authorizes courts to exercise jurisdiction to the constitutional limit, and (ii) the enumerated-act type, which articulates factual circumstances in which courts will be able to exercise its jurisdiction (i.e. tortious acts committed within the state or contracts to be performed within the state).

The federal court system does not have a general federal long-arm statute, so it “borrows” the one of the state in which it sits (by virtue of the already mentioned Federal Rule of Civil Procedure 4(k)(1)(A)). Additionally, Federal Rule of Civil Procedure 4(k)(1)(D) grants personal jurisdiction “when authorized by a statute of the United States”⁷⁰ and Federal Rule of Civil Procedure 4(k)(2) provides that “[f]or a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state’s courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.”

b. *Constitutional basis for personal jurisdiction.* In state court, when the court’s exercise of jurisdiction is proper under the state long-arm statute, and when the long-arm statute is a California type, the constitutional analysis under the Due Process Clause in the Fourteenth Amendment of the United States Constitution must be done. The seminal case in this regard is *International Shoe Co. v. Washington*,⁷¹ which establishes that the constitutional analysis requires determining if there are sufficient minimum contacts so that “the maintenance of the suit [in the forum] does not offend traditional notions of fair play and substantial justice.”⁷² Reaching that conclusion requires three steps:

(1) *Determining the existence of minimum contacts.* A defendant is said to have minimum contacts with the forum state when s/he has purposefully availed herself/himself of the laws of the state such that it is reasonably foreseeable that s/he will be haled into court there. Purposeful availment

⁶⁹ Traditionally, courts had automatic jurisdiction when the defendant resided in the forum state, consented to jurisdiction in the forum state, or was served in the forum state.

⁷⁰ Examples of such statutes are the Foreign Sovereign Immunities Act, the Clayton Antitrust Act, the Securities Act, and the Racketeering-Influenced and Corrupt Organizations Act.

⁷¹ 326 U.S. 310 (1945).

⁷² *Id.* at 316.

occurs when there is some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. When the defendant makes the conscious, voluntary, and avoidable decision to interact with people in a state and assumes the risk that suits that arise from purposeful interaction will be filed in the state where s/he chose to act, it can be concluded that this requirement has been met. Foreseeability exists when the defendant is able to reasonably anticipate being haled into court in the forum state. In cases involving the execution of contracts, elements to be considered are the place of negotiation, execution and performance of the contract, contract solicitation, and choice of law clauses.

(2) *Determining the nature and quality of defendants' contacts with the state.* Having established that minimum contacts exist between the defendant and the forum state, it is necessary to determine the nature and quality of the defendant's contact with such state. Four different scenarios can arise: (i) if the contacts are continuous and systematic and are related to the claim, the court would have jurisdiction over the defendant; (ii) if the contacts are continuous and systematic but unrelated to the claim, the forum court would only have jurisdiction over the defendant if the contacts are such that the defendant is "essentially at home" in the forum (determined by the domicile of a person, for individuals, and the states of incorporation and principal place of business, for corporations). In this case, the court will have general jurisdiction over the defendant; (iii) if the contacts are isolated and sporadic and related to the claim, the court would only have jurisdiction over the defendant if the minimum contact and reasonableness elements are met. In this case, the court will have specific jurisdiction over the defendant; finally (iv) if the contacts are isolated and sporadic and unrelated to the claim, the court would not have jurisdiction over the defendant.

(3) *Determining if it is fair and reasonable for the court to assert jurisdiction over the defendant.* Once the existence of minimum contacts is established, the assertion of jurisdiction over the defendant also has to be fair and reasonable. There are five relevant factors in assessing whether asserting jurisdiction would be fair and reasonable: (i) the burden on the defendant —forum is constitutionally acceptable unless it is so gravely difficult and inconvenient that a party is unfairly put at a severe disadvantage in comparison to his opponent; (ii) the forum state's interest in adjudicating the dispute (for example when it's laws would apply, one

of the parties is a state citizen, or the incident occurred in the forum state); (iii) the plaintiff's interest in obtaining convenient and effective relief (when the forum state is the plaintiff's home, or can seek relief in the forum state); (iv) the interstate judicial system's interest in obtaining the most efficient resolution of controversies (efficiencies associated with litigating in the forum state); (v) the shared interest of several states in furthering fundamental substantive social policies (assessment of which state's substantive policy interests are at stake in the litigation).⁷³

In *federal court*, the due process analysis is done under the Fifth Amendment, the interpretation of which slightly differs from the Fourteenth. Under the Fifth Amendment Due Process Clause, federal courts can exert their jurisdiction over a defendant if s/he has an appropriate relation to the US as a whole⁷⁴ not to a particular state. This concept is particularly significant in transnational litigation, where most likely the defendant will not have a US domicile or residence, and aggregation of contacts in different states may empower federal courts to hear the case.⁷⁵

V.A.2. Subject matter jurisdiction

Courts not only need authority to exert their jurisdiction over the defendant (personal jurisdiction) but also need to have power to hear the particular type of case (subject-matter jurisdiction). In transnational cases, subject-matter jurisdiction tends to be uncontroversial.⁷⁶ State courts exercise general subject-matter jurisdiction and most transnational cases fall under one of the statutory bases in which federal courts may hear the case. Indeed, federal courts will most likely be able to hear the case pursuant to 28 U.S.C. § 1331, which gives federal courts jurisdiction to hear cases "arising under the Constitution, laws, or treaties of the United States," or pursuant to 28 U.S.C. § 1332, which allows federal courts to hear civil actions where the matter in controversy exceeds the sum or value of \$75,000 and, among other scenarios, is between a citizen of a state and citizen or subjects of a foreign state (unless they are lawfully admitted for permanent residence in the US and are domiciled in the same state), or between citizens of different states and in which citizen or subjects of a foreign state are

⁷³ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

⁷⁴ JOSEPH W. GLANNON, *THE GLANNON GUIDE TO CIVIL PROCEDURE* 130 (3d ed. 2013).

⁷⁵ BERMANN, *supra* note 63, at 55-61 (explaining aggregation of national contacts for purposes of assessing personal jurisdiction in transnational cases).

⁷⁶ HAROLD HONGJU KOH, *TRANSNATIONAL LITIGATION IN UNITED STATES COURTS* 132 (2008).

additional parties.⁷⁷ Thus, as a general rule, federal courts do not have jurisdiction over suits between aliens.⁷⁸

V.A.3 Venue

Venue is a matter of geography. The purpose of venue provisions is to identify the most convenient court for hearing a case (once subject-matter jurisdiction and personal jurisdiction issues have been cleared). In transnational cases, where the action is brought in federal court, a non-resident defendant may be sued in any judicial district.⁷⁹

V.A.4. Service of process

Finally, in order for a US court to be able to adjudicate the case, the due process clause requires that the lawsuit is properly notified to the defendant.⁸⁰

V.A.5. Forum selection clauses

Forum selections clauses seek to provide predictability regarding the court that would hear the controversies that may arise from the transnational contract. However, they do not avoid the risk of being sued in different fora. Unlike Spanish courts, US courts now generally admit forum selection clauses in which the parties to a contract agree *in advance* on the court or courts that will adjudicate the potential disputes that may arise with regard to such contract.⁸¹ In the landmark decision *Bremen v. Zapata Off-Shore Co.*,⁸² the Supreme Court

⁷⁷ *Id.*

⁷⁸ DAVID EPSTEIN & CHARLES S. BALDWIN IV, INTERNATIONAL LITIGATION, A GUIDE TO JURISDICTION, PRACTICE AND STRATEGY 104 (4th ed. 2010).

⁷⁹ 28. U.S.C. § 1391(c)(3) (2011) (“[A] defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.”).

⁸⁰ See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“[A]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”).

⁸¹ BERMANN, *supra* note 63, at 19-20.

⁸² *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1976).

concluded that forum selection clauses are generally enforceable. In its own words:

Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were “contrary to public policy,” or that their effect was to “oust the jurisdiction” of the court. Although this view apparently still has considerable acceptance, other courts are tending to adopt a more hospitable attitude toward forum-selection clauses. ... *There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect.* ... Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.⁸³

Bremen constitutes a rule of federal procedural common law that is binding only in federal cases but not in state courts. Notwithstanding, state courts apply *Bremen* as persuasive authority.⁸⁴

This paper will address validity issues in a more practical approach in section VI.A.1. below. Nonetheless, it is worth making here the following two points. First, courts should determine, as a threshold question, which laws apply to determine the validity of the forum selection clause—or choice of law clauses, as it will be explained below in section V.B.2. Second, as a general rule, US courts will not impose formal requirements upon forum selection clauses. However, written evidence of its existence and scope is promoted even if oral forum selection agreements may be valid and enforceable,⁸⁵ as otherwise, the reality of such clause will be difficult to ascertain.

A forum selection clause may (i) give jurisdiction to a court making it available among other courts that have the power to adjudicate the case under the general rules above explained or (ii) designate a court as the only one that can adjudicate the matter. Forum selection clauses that designate an exclusive forum

⁸³ *Id.* at 9-10, 12-13, 15 (emphasis added).

⁸⁴ BERMANN, *supra* note 63, at 32.

⁸⁵ See generally Jason Webb Yackee, Article, *Choice of Law Considerations in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA J. INT'L L. & FOREIGN AFF. 43, 51 (discussing the validity requirements of forum selection clauses).

are known as “derogation clauses.” Clauses that identify a forum as one in which the matter may be heard are known as “prorogation clauses.” Deciding whether the clause is a derogation or prorogation one depends on the intention that transcends from the precise wording of the clause. Generally, however, courts tend to construe the clause as exclusive.⁸⁶ It is worth highlighting in this point that forum selection clauses may only refer to personal jurisdiction and venue, but not to subject-matter jurisdiction. Indeed, parties may not decide whether a matter is adjudicated by federal courts or not.⁸⁷

Finally, albeit legally enforceable, there are specific occasions in which the court might consider that a foreign forum selection is ineffective. This situation may arise when a statute has created an exclusive local jurisdiction or when the court decides that due to public policy reasons the claim must be adjudicated locally.⁸⁸

V.B. US choice of law rules in international litigation

V.B.1. In general

The Supreme Court has stated that “personal jurisdiction and choice of law are separate inquiries.”⁸⁹ Even so, in transnational litigation there is a strong connection between the two. In fact, courts often reach personal jurisdiction questions by examining choice of law through the doctrine of *forum non conveniens*⁹⁰ (*vid* section VI.B.2. *infra*). Moreover, as some scholars have pointed out, personal jurisdiction, as the power of courts over a particular defendant to hear a case, entails the power to choose a certain law to govern that specific controversy.⁹¹

There is no federal legislation regarding choice of law: federal courts follow (i) the choice of law rules of the state in which they sit in diversity cases⁹²

⁸⁶ BERMANN, *supra* note 63, at 15.

⁸⁷ *See* United States v. Cotton, 535 U.S. 625, 630 (2002) (“[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.”).

⁸⁸ BERMANN, *supra* note 63, at 26-27.

⁸⁹ Childress, *supra* note 62, at 1526.

⁹⁰ *Id.*

⁹¹ *Id.* at 1527.

⁹² *See* Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487 (1941); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

and (ii) federal common law of choice of law in federal question cases.⁹³ Every state has its own choice of law rules and they may differ significantly from one state to another.⁹⁴ For the purpose of this paper, those specific rules are not worth analyzing in depth.⁹⁵ But is worth alluding to the skepticism with which scholars write about choice of law rules in the US. Some have described them as a “mess” and have concluded that: “(1) choice-of-law doctrine does not significantly influence judges’ choice-of-law decisions; instead, (2) these decisions are biased in favor of domestic over foreign law, (3) they are biased in favor of domestic over foreign parties, and (4) they are biased in favor of plaintiffs over defendants; and (5) these decisions are highly unpredictable.”⁹⁶

The analysis of choice of law depends on the issue at stake. The search should not be for the state whose law will be applicable to govern all issues in a case; rather, it is for the rule of law that can most appropriately be applied to govern the particular issue. As a result, there are situations where the court must decide whether it should apply the rules of different states to determine different issues in a single case.⁹⁷ For the purposes of this paper, it will only be noted here that traditional choice of law state doctrines in contracts cases looked to the contract law of the place where the contract was formed.⁹⁸

V.B.2. Choice of law clauses

US courts generally enforce valid choice of law clauses. In order to enforce them, the court has to interpret them and determine their validity.⁹⁹ Three main issues arise in interpreting such validity.

First, the court must determine whether the choice of law clause refers to the “whole” of that law, including conflict of law rules, or just the substantive or “internal” law. Generally, courts assume that the parties have intended to choose only internal law.

Second, the court must determine the scope of application of the clause.

⁹³ BERMANN, *supra* note 63, at 224.

⁹⁴ See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW 1 Intro. Note (1987); RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 5 (1971). See generally Symeon C. Symeonides, *Choice of Law in the American Courts in 2005: Nineteenth Annual Survey*, 53 AM. J. COMP. L. 559 (2005).

⁹⁵ See generally Christopher A. Whytock, *Myth or Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 724 (2009).

⁹⁶ *Id.* at 730.

⁹⁷ EPSTEIN & BALDWIN, *supra* note 78, at 325.

⁹⁸ GLANNON, *supra* note 74, at 217.

⁹⁹ BERMANN, *supra* note 63, at 216.

On one hand, it is necessary to decide whether it applies both to substantial and procedural matters (typically, procedural issues are not considered within the scope of the clause), and on the other hand, it is necessary to conclude to which concrete substantial matters it applies (depending on the wording, the selected law may apply only to a part of the contract or to all of it and the disputes that arise out of it).¹⁰⁰

Third, as explained in section V.A.5. above relating to forum selection clauses, the court must determine whose laws would be applicable to assess the validity of the choice of law clause. US courts generally apply the forum law, as the law to which they are more familiar to (instead of applying the selected law in doubt as to its applicability at that prior stage or the law that would have applied in absence of a choice of law clause).¹⁰¹ Notwithstanding, this issue has not been typically address by courts. US courts rarely explicitly explain the conflict of laws analysis when determining if the forum selection clause or choice of law clause is valid and enforceable.¹⁰²

In brief, choice of law provisions will be enforced when they are not unreasonable¹⁰³ or when they are not the product of fraud, duress, or unconscionability.¹⁰⁴ Nonetheless, as explained in the forum selection clause (section V.A.5. above), an otherwise valid choice of law clause may finally not be enforced by the courts if it is offensive to public policy of the forum or of a third state.¹⁰⁵

PART VI: EXPATRIATIONS FROM SPAIN TO THE US: SELECTED PROBLEMS AND STRATEGIES

As previously stated in this paper, expatriation is a worldwide increasing trend. Spanish companies have not remained aloof to this phenomenon. Over the past decade, Spanish companies have created departments entirely devoted to dealing with the expatriation of their employees. Law firms, as well, have had to train their labor and employment lawyers to assist clients in the emerging transnational employment law. What companies most demand from their

¹⁰⁰ BERMANN, *supra* note 63, at 218.

¹⁰¹ *Id.* at 219.

¹⁰² Yackee, *supra* note 85, at 63, 67-72.

¹⁰³ EPSTEIN & BALDWIN, *supra* note 78, at 322.

¹⁰⁴ BERMANN, *supra* note 63, at 221.

¹⁰⁵ *Id.* at 222.

lawyers, obviously, is legal certainty in the transnational employment relationships with their employees. In order to best achieve this purpose, an agreement between employer and employee is common. But, even when the parties enter into an agreement, absolute certainty will not exist.

Thus far, this paper has explained, in a nutshell, the basic applicable rules to the two most controversial topics within the transnational employment relationship: jurisdiction and choice of law, under both Spain (EU) and US laws. The purpose of this section is (i) identifying and briefly analyzing selected theories for and against US jurisdiction, and (ii) stretching strategic moves as to a potential simultaneous lawsuit in Spain.

The analysis in this section will be based on a hypothetical claim brought, in federal court, by a Spanish expatriate against the Spanish subsidiary and the US parent company. In this hypothetical, the parties have signed a transnational employment agreement according to which the employee would be expatriated from Spain to the US for a maximum of five years. During that time, he would still be receiving his Spanish ordinary salary from the Spanish subsidiary, and the expatriation prime would be paid by the US parent company. The agreement envisaged an exclusive forum selection clause and choice of law clause pointing Spanish courts and Spanish law as the one applicable for all disputes arising out of the agreement. Finally, the expatriate has also brought suit against both companies in Spain.

It is worth noting, however, that arguments and strategies will vary from case to case, and it is not possible to contemplate, in abstract, all imaginable combinations and scenarios. This paper does not intend to encompass all possible options arising from a transnational employment relationship dispute.

VI.A. Avoiding Spanish courts: plaintiff-expatriate's arguments

A priori, a Spanish expatriate would normally want to have his disputes adjudicated in Spain. On one hand, Spanish laws will usually be more protective of the employee; on the other hand, Spanish expatriates will commonly be more familiar with their rights under Spanish laws. Nonetheless, an expatriate might bring suit where he currently lives, regardless of the wording of the forum selection and choice of law clauses contained in the agreement that s/he had entered into. The employee might strategically decide to act that way to try to avoid costs of traveling to Spain. Furthermore, doing so will normally put pressure on the Spanish company to settle the case to avoid travelling to the US to fight the case there—in fact it tried to avoid litigating in the US in the first place

by including a forum selection clause. Finally, an employee could also bring suit in the US if its law are more favorable to his claim —forum shopping.

The following are selected theories upon which the expatriate could try to support jurisdiction of the US court – obviously, however, it will depend on the specific case at hand.

VI.A.1. Inapplicability of the forum selection clause

The employee would have to challenge the forum selection clause under which jurisdiction would correspond to Spanish courts.

First, the employee could impugn it as a matter of contract law.¹⁰⁶ The employee would have to (i) show the existence of fraud, overreaching, duress, unconscionability, or bad faith; (ii) demonstrate that the Spanish forum is not available;¹⁰⁷ (iii) bring up the inadequacy of the remedy for his or her claim;¹⁰⁸ or argue that the forum selection clause is unreasonable or unjust.¹⁰⁹ The employee would have to demonstrate that the Spanish forum is so inconvenient that he “will for all practical purposes be deprived of his day in court.”¹¹⁰ The employee would carry, however, a heavy burden of showing that the forum selection clause is not enforceable. In fact, as explained above in section V.A.5., forum selection clauses will be considered by a US court as *prima facie* valid. In this regard, in

¹⁰⁶ *Id.* at 20.

¹⁰⁷ *Id.* at 24.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See generally* Fitzgibbons v. Hill-Rom Co., 2012 U.S. Dist. LEXIS 91289, at *8 (D.S.D. CIV. LR June 28, 2012) (“Cf. McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F. 2d 341, 345-46 (8th Cir. 1985) (excusing enforcement of a forum-selection clause where it required the parties to litigate in post-revolutionary Iran, during the ongoing war between Iran and Iraq). In fact, the Supreme Court has held that enforcement of a forum-selection clause is unreasonable where ‘the party seeking to escape his contract . . . show[s] that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.’ *Bremen*, 407 U.S. at 17-18. Fitzgibbons has failed to elevate his financial inconvenience to this level and, as a result, has failed to show that enforcement of the clause would be unfair, unjust, or unreasonable.”)

the recent case of *Montoya v. Financial Federal Credit, Inc.*,¹¹¹ the United States District Court for the District of New Mexico explained:

“A motion to dismiss based on a forum selection clause frequently is analyzed as a motion to dismiss for improper venue under FED. R. CIV. P. 12(b)(3).” *K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft (“BMW”)*, 314 F.3d 494 (10th Cir. 2002)(“*K & V Scientific Co., Inc. v. BMW*”). The Tenth Circuit has observed that “[f]orum selection provisions are ‘prima facie valid’ and a party resisting enforcement carries a heavy burden of showing that the provision itself is invalid due to fraud or overreaching or that enforcement would be unreasonable and unjust under the circumstances.” *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 957 (10th Cir. 1992) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)). Only a showing of inconvenience “so serious as to foreclose a remedy, perhaps coupled with a showing of bad faith, overreaching or lack of notice would be sufficient to defeat a contractual forum selection clause.” *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d at 958. Even if minor inconvenience would result, that would not justify non-enforcement of the forum-selection clause. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596-97, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991).

Second, the expatriate could argue that, under Spanish law, the agreement is *per se* invalid. As explained in section V.A.5., under Spanish law, forum selection clauses are not valid unless entered into *after* the dispute has arisen. This argument would only be available if the court decides to apply Spanish law to assess the validity of the agreement. However, as noted in section V.A.1. above, many courts apply the forum law for that purpose. In support of the employee’s theory, and against the applicability of the forum’s law, the United States Court of Appeals for the Second Circuit has recently concluded as

¹¹¹ *Montoya v. Fin. Fed. Credit, Inc.*, 872 F. Supp. 2d 1251, 1261 (D.N.M. 2012) (emphasis added).

follows:¹¹²

[W]e normally apply the body of law selected in an otherwise valid choice-of-law clause. *See AVC Nederland*, 740 F.2d at 155; *Phillips*, 494 F.3d at 386 (noting in dicta that “we cannot understand why the interpretation of a forum selection clause should be singled out for application of any law other than that chosen to govern the interpretation of the contract as a whole”). Hence, if we are called upon to determine whether a particular forum selection clause is mandatory or permissive, *see AVC Nederland*, 740 F.2d at 155-56, or whether its scope encompasses the claims or parties involved in a certain suit, we apply the law contractually selected by the parties.

VI.A.2. Alternatives for obtaining jurisdiction over a non-resident

Should the expatriate prevail in his latter theory—inapplicability of the forum selection clause—the US court would only assert its jurisdiction over the Spanish company defendant if the requirements explained in section V.A.1. are met—long-arm statute and minimum contacts requirements. In the hypothetical case of study, it could be difficult for a Spanish company to have the minimum contact required for the US court to be able to assert jurisdiction over it—its only contact with the US could perfectly be having an employee performing his services there. Should that be the case, the employee would have to rely upon the following two theories to be able to hale the Spanish company into a US court.

a. “Alter ego” theory. When the foreign parent company does not have on its own minimum contacts with the US, those could be found on the basis of the *alter ego* theory. A local company, closely tied to the foreign parent, may be regarded as the latter’s *alter ego* so its own contacts with the forum can ultimately bring the parent company within the court’s personal jurisdiction. The reverse scenario, namely, bringing the foreign subsidiary to the US courts because of the parent’s contacts with the forum, is also possible under this theory. For it to apply, courts have taken into account whether the parent completely dominates its subsidiary, whether corporate formalities are disrespected, whether there is

¹¹² *Martinez v. Bloomberg LP*, 740 F.3d 211, 218 (2d Cir. 2014).

constant supervision and intervention, and whether overall parent and subsidiary are an integrated whole or the subsidiary forms an integral part of a business operation strategy put in place by the parent.¹¹³ Following this theory, in *AGS International Services, S.A. v. Newmont USA Ltd.*,¹¹⁴ the United States District Court for the District of Columbia granted five non-resident corporations their motions to dismiss based on lack of personal jurisdiction. The District summarizes the *alter ego* doctrine as follows:

“Ordinarily, a corporation’s contacts with a forum may not be attributed to affiliated corporations.” *Material Supply*, 62 F. Supp. 2d at 19. “An exception exists, however, when the party which contests jurisdiction is an ‘alter ego’ of an affiliated party over which the court has uncontested jurisdiction;” *Id.* The determination of whether a subsidiary is the alter ego of a parent corporation turns on whether the parent corporation “so dominated the [subsidiary] corporation as to negate its separate personality.” *Id.* at 20 (quoting *Hart v. Dep’t of Agric.*, 324 U.S. App. D.C. 262, 112 F.3d 1228, 1231 (D.C. Cir. 1997)); see also *Capital Bank Int’l v. Citigroup, Inc.*, 276 F. Supp. 2d 72, 76 (“[A] parent-subsidiary relationship is insufficient to support jurisdiction unless ‘parent and subsidiary are not really separate entities.’”) (citation omitted). The alter ego determination is a “question of law to be decided by the court.” *Material Supply*, 62 F. Supp. 2d at 19-20. In assessing the Courts authority to exercise personal jurisdiction over a party pursuant to the alter ego status doctrine, it must evaluate “(1) whether there is ‘such unity of interest and ownership that the separate personalities of the [subsidiary] and [parent] no longer exist’; and (2) whether an inequitable result will follow if the court treats the [subsidiary's] allegedly wrongful acts as those of [the subsidiary] alone.” *Id.* at 20 (quoting *Smith v. Washington Sheraton Corp.*, 328 U.S. App.D.C. 367, 135 F.3d 779, 786 (D.C. Cir. 1998); *Camacho v.*

¹¹³ BERMANN, *supra* note 63, at 61.

¹¹⁴ *AGS Int’l Servs. S.A. v. Newmont USA Ltd.*, 346 F. Supp. 2d 64 (D.D.C. 2004).

1440 Rhode Island Ave. Corp., 620 A.2d 242, 248-49 (D.C. 1993) (citation omitted); [90] see *Diamond Chem.*, 268 F. Supp. 2d at 7; see also *Vuitch v. Furr*, 482 A.2d 811, 815 (D.C. 1984)) (finding alter ego status when “adherence to the fiction of the separate existence of the corporation would sanction a fraud or promote injustice.”).

Unity of interest is measured by “the nature of the corporate ownership and control; failure to maintain corporate minutes or records; failure to maintain corporate formalities; commingling of funds and assets; diversion of one corporation's funds to the other's uses; and use of the same office or business location.” *Material Supply*, 62 F. Supp. 2d at 20 (citing *Labadie Coal Co. v. Black*, 217 U.S. App. D.C. 239, 672 F.2d 92, 97-99 (D.C. Cir. 1982)). For example, the Supreme Court refused to find a parent corporation subject to personal jurisdiction in North Carolina under the theory that its subsidiary, with jurisdictional contacts there, was its alter ego. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 69 L. Ed. 634, 45 S. Ct. 250 (1925). Despite evidence that “the defendant dominated the [subsidiary], immediately and completely, and exerted its control both commercially and financially in substantially the same way,” the *Cannon Mfg. Co.* Court decided that the two companies were “wholly independent corporations” because they maintained separate financial and transactional records. *Id.* at 335. In some cases, a subsidiary has been determined not to be the alter ego of its parent corporation even though both entities had common directors and engaged in joint marketing endeavors. *Diamond Chem.*, 268 F. Supp. 2d at 9. Specifically, the *Diamond Chemical* court held that the plaintiff's evidence that the parent corporation and one of its subsidiaries shared executives, made “joint use of trademarks, and a common marketing image,” and that the parent jointly promoted itself and the subsidiary and

benefitted from the activities of other subsidiaries in the District of Columbia, was insufficient to establish that the subsidiary was the alter ego of the parent corporation. *Id.* at 8.¹¹⁵

b. *Agency theory.* Even if two entities do not constitute corporate *alter ego*, they may stand in a principal/agent relationship to one another. An agency does not arise for jurisdictional purposes unless the alleged agent acted for the account and benefit of the alleged principal, with the latter's knowledge and consent and subject to the latter's control.¹¹⁶ In *SGI Air Holdings II LLC v. Novartis International AG*,¹¹⁷ the United States District Court for the District of Colorado concluded that it had personal jurisdiction over a Swiss company based on its contacts with its subsidiary, a Colorado pharmaceutical corporation operating a production facility within the state. The District Court noted that:

For purposes of personal jurisdiction, agency and alter ego, while different legal concepts, often depend on the same facts when parent and subsidiary corporations are involved. Particularly, facts concerning the amount of control exercised by the corporate parent over its subsidiary are relevant for both theories. Such control could be evidence that the subsidiary is the parent's alter ego because the subsidiary has no real separate corporate existence. Similarly, such control could be evidence that the subsidiary is the parent's agent because the subsidiary is conducting the "real" business of the parent, which is formally only a holding company. The objective of either theory is to establish that the parent company has the minimum contacts with the forum necessary to support a finding of general jurisdiction.¹¹⁸

¹¹⁵ *Id.* at 89-90.

¹¹⁶ BERMANN, *supra* note 63, at 61.

¹¹⁷ *SGI Air Holdings II L.L.C. v. Novartis Int'l AG*, 239 F. Supp. 2d 1161 (D. Colo. 2003).

¹¹⁸ *Id.* at 1166

VI.B. Avoiding US courts: defendant-Spanish company's arguments

VI.B.1. Relying on the forum selection clause

In the hypothetical at study, the Spanish company would have to support the validity of the forum selection clause. The former course of action, however, entails applying US law and not Spanish law (because, as said, under Spanish law a forum selection clause of the like would be invalid). In this regard, the defendant- Spanish company will potentially have two main options:

(i) Depending on the choice of law rules applicable in the specific case, the Spanish company could try to rely on the theory that the assessment of the validity of the forum selection clause will be done under the law of the forum, regardless of the parties' choice of law. Otherwise, the company could run the risk of invalidating, by its own acts, the choice of law provision, making US law applicable to both the determination of the validity of the forum selection clause and to the underlying claim, should the motion to dismiss on lack of personal jurisdiction be finally denied and the case be heard in a US court.

(ii) If the US law is more favorable to the Spanish company in the particular case, the Spanish company could try to defend the applicability of US law not only for the assessment of the validity of the forum selection clause, but also for the underlying claim. Should the motion to dismiss on lack of personal jurisdiction be denied, one of the factors leading to that result could probably be that ultimately US law was going to be applied to the underlying case. In fact, courts would rather dismiss the case in favor of Spanish jurisdiction if that is the law to be applied to the underlying claim.

VI.B.2. Contesting personal jurisdiction

Alternatively, the Spanish company could contest the US court's personal jurisdiction over it. Selected theories on which to rely follow:

a. International *forum non conveniens*. The Spanish employer could allege international *forum non conveniens*. As applied to the transnational context, the *forum non conveniens* doctrine does not have an express statutory basis, unlike domestic *forum non conveniens*.^{119, 120} As a general rule, courts apply

¹¹⁹ BERMANN, *supra* note 63, at 91.

the doctrine of international *forum non conveniens* unless the legislature expressly forbids it or public policy bars its applicability.¹²¹

The doctrine was first established in the domestic case *Gulf Oil Corporation. v. Gilbert*.¹²² There, applying the doctrine of *forum non conveniens*, the district court dismissed a tort action in New York arising out of events occurring in Virginia. The Supreme Court concluded that, under the *forum non conveniens* doctrine, a federal district court could dismiss a case in favor of another court even when jurisdiction and venue were established. The applicability of the doctrine requires that private and public interest weigh in favor of another adequate forum.¹²³ In the Court's words:

An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum

¹²⁰ For domestic cases, 28 U.S.C. § 1404(a) provides as follows: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

¹²¹ BERMANN, *supra* note 63, at 91-92 (explaining that Congress has not expressly forbid international *forum non conveniens* but courts have found in some occasions—for instance, regarding federal antitrust laws—that public policy barred the applicability of such doctrine).

¹²² *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

¹²³ Childress, *supra* note 62, at 1529.

should rarely be disturbed.

Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.¹²⁴

The Court later addressed the *forum non conveniens* doctrine in a transnational case. In *Piper Aircraft Company v. Reyno*,¹²⁵ the Court clarified that, in evaluating the applicability of the doctrine in the transnational context, when a plaintiff chooses her home forum “it is reasonable to assume that this choice is convenient.”¹²⁶ But “[w]hen the plaintiff is foreign, . . . this assumption is much less reasonable.”^{127, 128} The Court explained that nationality is more important than the fact that the parties had selected the US as the competent forum. Additionally, the Court concluded that the need to apply foreign law is a factor tending to favor dismissal even if it is not the decisive factor.¹²⁹

Thus, in a transnational employment scenario, for the case to be dismissed on these *forum non conveniens* grounds, the employer would have to demonstrate: (i) there is an available alternative forum in Spain¹³⁰ which would be able to

¹²⁴ *Gulf Oil Corp.*, 330 U.S. at 508-09.

¹²⁵ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

¹²⁶ *Id.* at 255-56.

¹²⁷ *Id.* at 256.

¹²⁸ Childress, *supra* note 62, at 1531.

¹²⁹ *Piper Aircraft Co.*, 454 U.S. at 260; *see also* BERMANN, *supra* note 63, at 101.

¹³⁰ Note that in this regard, as explained in a nutshell, “the Second Circuit found that delays of ‘up to a quarter of a century’ rendered the foreign forum (India)

provide the employee a fair and adequate opportunity to make out its claim; (ii) the Spanish forum is more convenient than the US one.¹³¹

There is an empirical study that “concludes that ‘foreign plaintiffs are twice as likely to have their suits dismissed’ compared to domestic plaintiffs.”¹³² In our case, Spanish nationality and the likely applicability of Spanish laws will weigh in favor of dismissal in the US —unless the company relies on US law to enforce the forum selection clause, as explained above.

Finally, it is worth mentioning that courts frequently attach some strings to dismissal on *forum non conveniens* grounds. For example, the court may require the employer to consent to service of process and to personal jurisdiction and will be asked to waive any technical defense ordinarily available in Spain.¹³³

b. *Doctrine of comity and reasonableness.* When two or more nations have jurisdiction over a case, it is necessary to balance the jurisdictional power of each nation. Traditionally, courts have relied upon the doctrine of comity to perform such a balancing test.¹³⁴

International comity has been defined as “the deference voluntarily displayed by one sovereign state towards another independent and sovereign nation.”¹³⁵ The doctrine provides a court with a rationale for not exercising the jurisdiction that it possesses.¹³⁶ The United States District Court for the District of Columbia recently reminded:¹³⁷

International comity is a “doctrine of deference based on respect for the judicial decisions of foreign sovereigns.”
United States v. Kashamu, 656 F.3d 679, 683 (7th Cir.

inadequate for these purposes.” *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220 (3d Cir. 1995).

¹³¹ BERMANN, *supra* note 63, at 98 (explaining that, in assessing should the case stay in the US or be dismissed, courts will weigh private and public interests, such as access to sources of documents and witnesses, availability of discovery, jury trial, etc. on the private interest part and the burden on congested courts, possible difficulty of establishing foreign law, the advantage of having local disputes being decided at home, etc. on the public interest part).

¹³² Childress, *supra* note 62, at 1532-33.

¹³³ BERMANN, *supra* note 63, at 102.

¹³⁴ EPSTEIN & BALDWIN, *supra* note 78, at 121.

¹³⁵ *Id.*

¹³⁶ *Id.* at 122.

¹³⁷ *LG Display Co. v. Obayashi Seikou Co.*, 919 F. Supp. 2d 17, 28 (D.D.C. 2013).

2011) (Posner, J.). It provides that a U.S. court should give full effect to a foreign judgment entered with impartiality and due process. *Hilton v. Guyot*, 159 U.S. 113, 158-159, 168, 16 S. Ct. 139, 40 L. Ed. 95 (1895); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 64, 397 U.S. App. D.C. 371 (D.C. Cir. 2011) (citing *Hilton*, 159 U.S. at 202-03). Comity fosters international cooperation and encourages reciprocal recognition of our judgments elsewhere. See *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304, 38 S. Ct. 309, 62 L. Ed. 726 (1918) (“To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.”). Thus, the doctrine is accurately characterized as a “golden rule among nations—that each must give the respect to the laws, policies, and interests of others that it would have others give to its own in the same or similar circumstances.” *Mich. Cmty. Servs., Inc. v. NLRB*, 309 F.3d 348, 356 (6th Cir. 2002) (quoting Black’s Law Dictionary).

Similarly, US courts can defer their jurisdiction under the more recent rule of reason. This rule is designed to permit the exercise of jurisdiction when reasonable.¹³⁸ Under this rule, courts balance if “a particular exercise of jurisdiction is reasonable.”¹³⁹ Section 403 of the Restatement (Third) of Foreign Relations Law provides, in this regard that “[e]ven when one of the bases for jurisdiction . . . a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.” Further, it enumerates factors that would make jurisdiction unreasonable, including, for instance, the link of the activity to the territory of the regulating state; or the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect.

¹³⁸ EPSTEIN & BALDWIN, *supra* note 78, at 127.

¹³⁹ *Id.*

VI.B.3. Lis pendens

The company may move to dismiss the claim on international *lis pendens* grounds. Under the *lis pendens* doctrine, “the pendency of an action in the courts of one jurisdiction is reason for the court of another jurisdiction to decline to entertain the same, and possibly even a related, legal action.”¹⁴⁰ However, *lis pendens* is generally considered a discretionary instrument of the courts, and courts will likely entertain the action unless out of deference they decide to decline if the foreign claim was filed first.¹⁴¹

VI.B.4. Fallback: litigating the case in the US and avoiding duplicities in Spain

Should the motion to dismiss on lack of personal jurisdiction be denied, the next issue to be determined is the enforceability of the choice of law clause. As explained in section V.B.2., the analysis of the validity of such clause will vary depending on the state where the court sits and the specific facts at hand. The company, however, would have to decide, as advanced in section VI.B.1., if it wants to challenge the choice of law clause, depending on what law is more beneficial to its underlying claim.

The Spanish company then should decide how to proceed in regard to the proceedings in Spain. Two selected options follow.

a. *Anti-suit injunctions in the US.* The employer could seek an anti-suit injunction. “Anti-suit injunctions are orders addressed by court to parties enjoining them from introducing, maintaining or prosecuting a given action in another court.”¹⁴² Under this theory, the employer would seek from the US court an anti-suit injunction enjoining the employee from maintaining the mirror-image action in Spain. The Second Circuit has given five factors to consider granting said anti-suit injunction: (i) whether a policy of the enjoining forum is being frustrated; (ii) whether the maintenance of the action is vexatious; (iii) whether the court’s jurisdiction is threatened; (iv) whether there are other equitable considerations; and (v) the delay, inconvenience, expense, and race to judgment that would result if the injunction is not granted.¹⁴³ However, it is unlikely that this strategic move would prevail because US courts hesitate to issue anti-suit

¹⁴⁰ BERMANN, *supra* note 63, at 107.

¹⁴¹ *Id.*

¹⁴² *Id.* at 111.

¹⁴³ EPSTEIN & BALDWIN, *supra* note 78, at 133.

injunctions that interfere in another country's sovereignty¹⁴⁴ and it is uncertain that a Spanish court would succumb to such an order issued from a US court.

b. *Lis pendens in Spain.* International *lis pendens* is not expressly contemplated in Spanish domestic procedural laws. The Spanish Supreme Court, however, does not exclude its application.¹⁴⁵ Against its application, scholars have pointed out that, when it is not certain that the foreign judgment will be enforced in Spain, *lis pendens* will equate to denying the constitutional right to having ones claim adjudicated.¹⁴⁶ On the other hand, scholars have noted that courts should base their analysis as to the applicability of the *lis pendens* doctrine relying on the rules established in R. 1215/12¹⁴⁷ for EU transnational cases. Under such position, Spanish courts would have to stay their proceedings when they can determine that the judgment entered in the foreign courts, solving an identical dispute between identical parties, will be susceptible of recognition and enforcement in Spain.¹⁴⁸

PART VII: INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

VII.A. Alternative dispute resolution at a glance

In international legal controversies, arbitration and mediation have become an attractive alternative to litigation. In US-EU transactions, the use of these alternatives has increased especially because of the differences between common

¹⁴⁴ *Id.*

¹⁴⁵ *S.T.S.*, June 18, 1990.

¹⁴⁶ JOSÉ LUIS IGLESIAS BUIGUES, *DERECHO INTERNACIONAL PRIVADO* 120-21 (7th ed. 2013).

¹⁴⁷ 2012 O.J. (L 351) 1, 12 article 29 (“1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. 2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32. 3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.”)

¹⁴⁸ IGLESIAS BUIGUES, *supra* note 146, at 121.

law and civil law.¹⁴⁹ These forms have been jointly called “alternative dispute resolution” (ADR) and have been defined “as the use of any form of mediation or arbitration as a substitute for the public judicial or administrative process available to resolve a dispute.”¹⁵⁰ Generally, mediation and arbitration are private processes in which the parties select a third-party neutral to resolve their dispute.¹⁵¹ Mostly all commentators agree that ADR processes are more flexible because parties have more control than they would have over a judicial proceeding.¹⁵² This is even more evident in the international context. There, arbitration is usually more flexible than domestic arbitration regimes, to better accommodate the legal diversity between the parties.¹⁵³

Arbitration can be defined as “a process in which the neutral hears evidence and renders a decision on the merits in a manner similar to court adjudication.”¹⁵⁴ It has become the “preferred means of [international] dispute resolution”¹⁵⁵ mainly because the institutionalization of international arbitration is much more developed than the judicial process.¹⁵⁶ In fact, because over one hundred countries, including Spain and the US,¹⁵⁷ are signatories of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention), it is easier to enforce an arbitral award than a foreign judicial judgment.^{158, 159} Furthermore, aside from the ease of enforcement of the

¹⁴⁹ EPSTEIN & BALDWIN, *supra* note 78, at 397.

¹⁵⁰ David B. Lipsky et. al., *An Uncertain Destination: On the Development of Conflict Management Systems In U.S. Corporations*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA, PROCEEDINGS OF NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 109 (Samuel Estreicher & David Sherwyn eds., 2004).

¹⁵¹ *Id.*

¹⁵² *See, e.g., id.* at 112.

¹⁵³ *See, e.g.,* Carducci, *supra* note 58, at 524.

¹⁵⁴ MARK V.B. PARTRIDGE, ALTERNATIVE DISPUTE RESOLUTION 38 (2009).

¹⁵⁵ EPSTEIN & BALDWIN, *supra* note 78, at 39.

¹⁵⁶ *Id.* at 40-41.

¹⁵⁷ *See generally* UNCITRAL, <http://www.uncitral.org/uncitral/en/index.html> (last visited Nov. 30, 2014) (providing an updated status of the New York Convention).

¹⁵⁸ *E.g.,* EPSTEIN & BALDWIN, *supra* note 78, at 40.

awards, commentators have recognized that, with international arbitration, the common problems that arise out of transnational litigation, and explained thus far, can be minimized. For example, by choosing international arbitration as an alternative to dispute resolution, parties can benefit from the advantages of being able to

(i) select the forum – in international arbitration as opposed to international litigation, setting the place of arbitration can avoid nearly all problems of jurisdiction; (ii) select the adjudicators; (iii) choose the governing law – arbitrators always apply the law selected by the parties; and (iv) resolve the dispute in a confidential time and cost effective¹⁶⁰ process.¹⁶¹

On the other hand, international mediation can be defined as “an informal, yet structured negotiation, conducted by a specially trained expert called a mediator . . . who is not the ultimate decision maker in the case.”¹⁶² Some commentators have described these forms of dispute resolution as the ones in which the parties to a conflict assume their own responsibility of achieving an agreement, instead of leaving such difficult task to a third-party neutral and becoming frustrated by the final outcome.¹⁶³ One of the main advantages of mediation is that it can provide a creative settlement process, not limited by judicial constraints of the conventional litigation process. In addition, parties usually benefit from a more relaxed environment, because the mediator is not the ultimate decision maker, and s/he usually dedicates more time learning about the case and aiming to settle the case. The biggest disadvantage, however, is that mediation does not necessarily have to end in settlement.¹⁶⁴ For this reason, some commentators have even distinguished mediation from a real “alternative” to litigation, noting that technically it does not substitute litigation if an agreement is not finally achieved.¹⁶⁵

¹⁵⁹ Carducci, *supra* note 58, at 528 (stating that in the labor and employment arena, the award would be generally enforceable unless there it is contrary to the public policy of the country requested to enforce it).

¹⁶⁰ *But see* DANIEL M. KOLKEY ET. AL., PRACTITIONER’S HANDBOOK ON INTERNATIONAL ARBITRATION AND MEDIATION 398 (3d ed. 2012) (emphasizing that arbitration can be more expensive than litigation since the expenses, including arbitrators’ fees, are borne by the parties); *but cf.* PARTRIDGE, *supra* note 154, at 16-17 (mentioning that views on the cost savings of arbitration are mixed).

¹⁶¹ KOLKEY, *supra* note 160, at 3-4.

¹⁶² *Id.* at 479.

¹⁶³ SILVIA BARAONA VILLAR, MEDIACIÓN EN ASUNTOS CIVILES Y MERCANTILES EN ESPAÑA 20 (2013).

¹⁶⁴ KOLKEY, *supra* note 160, at 483.

¹⁶⁵ BARAONA VILLAR, *supra* note 163, at 107-09.

In the US, ADR has experienced great growth for several decades. Indeed, even the Supreme Court has favored enforcement of arbitration provisions.¹⁶⁶ In the employment arena, “commentators increasingly advocate employment arbitration as a substitute for litigation of wrongful discharge, civil rights, and discrimination claims” and binding arbitration clauses are common in US employment contracts.¹⁶⁷ Some scholars claim that “labor arbitration is one of the most enduring and successful social institutions of our time,” demonstrated by the fact that over ninety-five percent of the collective bargaining agreements contracts in force as of April 2014 provide for arbitration of grievances.¹⁶⁸

In Spain, ADR has also been in vogue over the past years.¹⁶⁹ Both arbitration and mediation have been statutorily regulated: arbitration is regulated by Law 60/2003, of December 23, on arbitration;¹⁷⁰ mediation is regulated by Law 5/2012, of July 6, on mediation in civil and commercial matters¹⁷¹ — incorporating EU Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008 on certain aspects of mediation in civil and commercial matters.¹⁷² However, labor and employment is expressly excluded from the scope of both laws. They do so under the “principle of specificity,” which provides that specific regulations preempt general ones, because labor and employment regulations include arbitration and mediation as dispute resolution alternatives in certain cases. In fact, arbitration and mediation in the labor and employment

¹⁶⁶ EPSTEIN & BALDWIN, *supra* note 78, at 40.

¹⁶⁷ Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA, PROCEEDINGS OF NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 305–06 (Samuel Estreicher & David Sherwyn eds., 2004).

¹⁶⁸ 1-1 TIM BORNSTEIN ET AL., LABOR AND EMPLOYMENT ARBITRATION, § I.01 (2014).

¹⁶⁹ See generally Yasmine Tarasewicz & Niki Borofsky, *International Labor and Employment Arbitration: A French and European Perspective*, 28 A.B.A. J. LAB. & EMP. L. 349 (2013) (explaining the EU approach to arbitration).

¹⁷⁰ B.O.E. n. 309, Dec. 26, 2003, 46097 (Spain). Article 1.1 establishes the applicability of the law to both domestic and international arbitrations whenever they take place in Spain.

¹⁷¹ B.O.E. n. 162, July 7, 2012, 49224 (Spain).

¹⁷² 2008 O.J. (L 136) 3, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>.

arena have been contemplated long before the current ADR “revolution;” indeed, labor and employment legislation has always been inspired by the idea that the parties are the ones that should solve their own conflicts. In 1926, the *Organización Corporativa Nacional* (an organization of local, provincial, and national joint committees that represented both employers and employees) was created with the purpose of solving collective labor and employment disputes (fundamentally, strikes) through compulsory arbitration processes.¹⁷³ Nevertheless, Spanish labor and employment legislation still contemplates arbitration only for collective disputes¹⁷⁴ and establishes as a threshold requirement a compulsory conciliation or mediation for barely all labor and employment disputes to be able to initiate judicial proceedings.¹⁷⁵ In practice, however, these conciliation or mediation processes are executed as the only way to get to trial —where again, there has to be another conciliation, this time, in court, prior to the trial phase. Usually, if the parties do not show intent to reach an agreement, there is no real effort on the neutral’s part in settling the case.

VI.B. Is ADR the solution to Spanish-US transnational employment disputes?

¹⁷³ MERCADER UGUINA, *supra* note 22, at 43.

¹⁷⁴ Arbitration is also referred to in other instances in labor and employment legislation. *See* Royal Decree 17/1977, March 4, article 10, B.O.E. n. 58, Mar. 9, 1977, 5464 (Spain) *available at* <http://www.boe.es/buscar/act.php?id=BOE-A-1977-6061> (official consolidated version) (regarding labor relations, establishing even a compulsory arbitration as an extraordinary way of putting an end to long widespread strikes in which employer and employees are far away from reaching an agreement in prejudice of the economy); *see also* Workers’ Statute, *supra* note 25, at articles 40–41 (regarding collective modifications on employment conditions and collective geographical mobility of employees respectively); *id.* at article 51 (regarding collective dismissals); *id.* at article 82 (dealing with collective bargaining agreements.)

¹⁷⁵ It is a unique conciliation that is held by administrative organisms. *See* Law 36/2011, of October 10, articles 63–68, B.O.E. n. 245, Oct. 11, 2012, 15936 (Spain), *available at* <http://www.boe.es/buscar/pdf/2011/BOE-A-2011-15936-consolidado.pdf> (official consolidated version) (regulating labor and employment judicial procedure); and Royal Decree 2756/1979, of November 23, B.O.E. n. 291, Dec. 5, 1979, 28015 (Spain), *available at* <http://www.boe.es/boe/dias/1979/12/05/pdfs/A28015-28016.pdf> (official original version) (regulating the Institute of Mediation, Arbitration and Conciliation).

The question will most likely be answered in the negative. Generally speaking, as said above, ADR is seen as a very effective form of solving international disputes. Nevertheless, in the domestic context, these forms of dispute resolution are not generally available in Spain in the employment arena as a real alternative to the judicial proceedings. For an individual dispute arising out of an employment contract, arbitration will not be an available form of solving the dispute, and both conciliation and mediation are just compulsory threshold requirements to litigate. While Spanish labor and employment law has been largely inspired by arbitration and mediation principles, it has always been contemplated as a form of primarily solving collective disputes and also as a way of trying to avoid litigation, but not as a substitute of such. The reasons being that article 24.1 of the Spanish Constitution¹⁷⁶ grants the right to an effective judicial protection, access to labor and employment courts is free or non-expensive, and proceedings are designed to be fast —although lately courts are incapable of complying with the statutory deadlines due to the overwhelming increase of labor and employment disputes.¹⁷⁷

In the international context, as anticipated in section III.A., Spanish labor and employment legislation is scarce. ADR has not been one of the topics addressed by such legislation. And the current ADR legislation in the employment arena is designed with the domestic dispute in mind. Put in another way, the legislator has not contemplated these forms as a solution to the many issues that arise in transnational employment disputes and for which it would indeed be an appropriate solution for the reasons stated above.

Therefore, if the parties choose Spanish law as the governing law of the transnational employment relationship, ADR would not be an option. However, if the parties were to choose US law as the governing law, ADR might be available if such arbitration or mediation does not take place in Spain, and the specific issue is arbitrable under US law. This second scenario, however, will usually be unlikely because Spanish companies, and the expatriated employee, will generally not be willing to add such an uncertainty to the relationship. The employer and, especially, the employee, would normally seek to minimally alter the relationship they had maintained prior to the expatriation, except, obviously, for the inherent international elements that will be necessarily introduced. Thus, substituting entirely the legislation that shall regulate their relationship for one unknown to both parties, and most likely less protective to the employee, will usually not occur. Furthermore, it could present a problem of enforceability in Spain. Article V of the New York Convention establishes that recognition and enforcement of an award may be refused by the country where recognition and enforcement is sought if either the subject matter of the dispute is not capable of settlement by

¹⁷⁶ B.O.E. n. 311, Dec. 29, 1978, 29313 (Spain).

¹⁷⁷ MERCADER UGUINA, *supra* note 22, at 815 (discussing why ADR has not had such an important growth in Spain in the labor and employment arena).

arbitration under its laws or if it would be contrary to its public policy. Thus, provided that under Spanish law the matter would not have been arbitrable for the reasons explained, the award will most likely be unenforceable in Spain.

In sum, while ADR can definitely be an effective solution to the selected problems analyzed in this paper derived from a transnational employment relationship, in Spain-US expatriations these alternatives to litigation will likely be unavailable.

PART VIII: CONCLUSION

In our globalized world, transnational employment is an unstoppable reality. The law cannot fall behind—it has to naturally evolve to provide legal answers to the every day problems arising out of transnational employment relationships. As to the substantive law, natural limitations—nation's sovereignties, local politics and economic needs, and local cultures—impede a comprehensive regulation. But there has been significant progress towards the worldwide standardization of minimum labor and employment requirements. Conversely, an important legislative gap exists in regard to procedural aspects of the transnational employment relationship—whose courts will hear the case? Whose laws will apply? Will the judgment be enforceable in other countries?

To fill in the legislative gap, employers and employees self-regulate their transnational employment relationships *via* individual agreements. Nonetheless, thorough analysis of both home and host countries' domestic and transnational laws will always be imperative. Even then, due to variety of approaches to transnational issues, different outcomes are possible.

This paper has focused on jurisdiction and choice of law as two major problems in transnational employment cases. Within Spain (EU)-US expatriations, some conclusions can be drawn: (i) under Spanish legislation *ex ante* forum selection clauses are not allowed; however, parties can generally choose the governing law; (ii) under US law, both forum selection and choice of law clauses are generally enforceable; (iii) forum selection and choice of law clauses will not prevent the parties from bringing suit in different *fora* or applying different laws; and (iv) ADR seems to be an effective solution to jurisdictional and choice of law problems, but it will generally be unavailable in Spain for individual transnational employment relationships.

In sum, there is no such thing as absolute certainty, and even less from the law standpoint. However, legal predictability to some extent is needed. For the moment, we will have to stay tuned for upcoming changes in the evolving transnational employment law. Regarding choice of law, an international

instrument within The Hague Conference appears to be a possibility in the near future. It is yet to be seen if similar efforts are taken as to jurisdiction.