

SUMMARY

2011/63: American 'employer' cannot be sued in Italy (IT)

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Facts

The plaintiff in this case was an Italian man who lived in Monaco. The defendant was an American company without any legal presence in Europe. The plaintiff worked for the defendant on the basis of a contract that was governed by Massachusetts law. It was not clear from the contract whether the parties' relationship was one of employment, as the plaintiff claimed, or one of self-employment, as alleged by the defendant.

The plaintiff's duty was to promote sales in various countries including Italy, North Africa, Syria and Jordan. He spent most of his working time travelling. However, he did have an office in Nice in France, the address of which was mentioned on his invoices and correspondence. He usually departed on his business trips from Nice and returned there afterwards. The plaintiff also worked for an Italian company which, although completely independent of the defendant, did distribute its products.

In 2008, after a collaboration of over 20 years, the defendant dismissed the plaintiff. The latter

brought an action against the defendant before an Italian court.

Judgment

The court, applying the Brussels Convention of 27 September 1968 and the ECJ's case-law on that Convention, in particular the Mulox case (C-125/92), along with the Italian law implementing both the Brussels Convention and Regulation 44/2001, declared that it lacked jurisdiction to rule on the case. It found that the dispute was in no way connected to Italy. In particular, the place of performance of the contract ('the place where or from which the employee principally discharges his obligations towards his employer') was not in Italy but in France.

Commentary

Strangely, the plaintiff invoked the Brussels Convention, which had been replaced by Regulation 44/2001 in 2002. Initially, the Brussels Convention had no special provisions relating to employment. The Convention, as amended on the occasion of the accession of Spain and Portugal (which was after the Mulox judgment), provided that a person domiciled in a contracting state may be sued either in his own state or: *"in matters relating to a contract, in the courts of the place of performance of the obligation in question; in matters relating to individual contracts of employment, this is where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts of the place where the business which engaged the employee was or is now situated"*.

The Brussels Convention is different from Regulation 44/2001 in many respects. One difference is that the Regulation has a specific provision dealing with employers who are located outside the EU. Article 18(2) provides that: *"Where an employee enters into an individual contract of employment with an employer that is not domiciled in a Member State, but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operation of the branch, agency or establishment, be deemed to be domiciled in that Member State"*.

In this case, the plaintiff failed to establish facts evidencing that the defendant had a branch, agency or establishment in Italy. Given its finding that it lacked jurisdiction, the court could not rule on whether the plaintiff was an employee or on whether his contract was subject to Italian law.

This judgment illustrates rather nicely that an employer located outside the EU can be sued in an EU Member State, but only by an employee whose work is somehow connected to that Member State, which was not the case in this dispute.

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