

Constitutionalisation of conflict of laws in employment contracts: insights from the Turkish Constitutional Court's annulment of Article 27(1)

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Abstract

This study examines the background leading to the Constitutional Court's annulment of Article 27(1) of the Turkish PILA, including the grounds for declaring the provision unconstitutional. Following the evaluation of the legislative response, the study examines the applicable law in cases involving recruitment abroad through branches or subsidiaries, group companies, offshore entities, and ships registered under flags of convenience. The study further extends its constitutionalisation analysis beyond Article 27, incorporating the author's commentary on the optimal formulation of conflict of law rules, considering recent developments in cross-border employment and the Constitutional Court's findings in the annulment of Article 27(1). This study highlights that border changes and occupations complicate the determination of state sovereignty over territories and hinder the accurate identification of the applicable national law. Furthermore, the study explores complex extraterritorial environments, such as Antarctica, the high seas, and outer space, which further complicate this determination, and raise important questions about the future of conflict of laws in employment contracts. Within this framework, it analyses whether foreign fighters, illegally recruited workers, migrant children forced to work, and personnel recruited by humanitarian or asylum organizations can be considered employees, and how these issues intersect with the constitutionalisation of choice of law rules in employment relationships. The study concludes that effective protection of employees can only be achieved if employment laws across all countries reach acceptable and consistent standards.

Keywords: Choice of Law; Employment Contracts; Turkish PILA; Rome I Regulation; Mandatory Rules

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1. Introduction.

Apart from bilateral and multilateral treaties, only three statutes have been adopted throughout the history of Turkish Private International Law to regulate conflict of laws and international civil procedure. The first was *Temporary Law on the Rights and Responsibilities of Foreigners Residing in the Ottoman Empire*,¹ commonly known as the “Temporary Law”, was enacted in 1915. Although originally intended as a temporary law, it remained in force until 1982. This law was eventually repealed by the *Private International Law and Procedural Law Act* (1982 PILA) No. 2675, which came into force in 1982.² It was later replaced by the current PILA No. 5718, enacted in 2007.³ Neither the Temporary Law nor the 1982 PILA contained a conflict of laws rule specifically addressing employment contracts. The 2007 PILA was the first to introduce such a provision in Article 27. In the 2007 PILA, Article 24 indicates the applicable law for contractual obligations. Inspired by EU instruments, Articles 25 to 29 specify conflict of laws rules for particular types of contracts that relate to immovable property, consumer transactions, individual employment, intellectual property rights, and the carriage of goods. Article 24 applies unless the contract falls under any of Articles 25 to 29.

In the past decade, Turkish courts have seen a significant rise in cases involving cross-border employment contracts, driven by growing international activities of Turkish companies, especially in the Middle East, Africa and the Commonwealth of Independent States together with increased flows of asylum seekers. They mostly employ Turkish workers abroad and often conclude new employment contracts designating the host country’s law as the applicable law. When the chosen law coincides with that of the habitual workplace and offers weaker protections than Turkish law, employers may circumvent domestic safeguards. The disadvantage experienced by Turkish employees on overseas projects, due to the application of less protective foreign laws, is largely attributed to the conflict of laws rules governing employment contracts, prompting employees to raise their voices in courts against the violations of their fundamental rights. In response, on 5 November 2024, the Turkish Constitutional Court annulled Article 27(1) of the 2007 PILA finding it unconstitutional on the grounds that it failed to adequately protect employees, particularly in cases where the applicable foreign law provided fewer safeguards than Turkish labour law. While the Court did not object to the inclusion of choice of law clauses in employment contracts *per se*, it emphasised the need to prevent the abusive use of such clauses in ways that harm employees. This ruling sparked vigorous academic debate and led to legislative amendments revising Article 27. As noted previously, Turkish companies operating abroad, especially in African or Arab countries or within the Commonwealth of Independent States, often bring employees from Türkiye, and sign contracts through overseas branches or subsidiaries that offer weaker labour protections.⁴ As highlighted by Türkiye’s Constitutional Court, these companies use choice of law clauses as a tool to apply foreign laws, thereby circumventing

¹ Düstur: II. Tertip, Vol. 7, 458-459.

² Official Gazette Dated 22 May 1982 No. 17701.

³ Official Gazette Dated 27 November 2007 No. 26728.

⁴ For a similar case, see Padmanabhan L., *An Analysis of Employment Contract under Private International Law*, in *Indian Journal of Law and Legal Research*, 5, 2, 2023, 3-4.

the safeguards of Turkish labour law. Because the chosen law matches the habitual workplace, employees lose the protections of Türkiye's more employee-friendly legislation.

The ruling sparked vigorous academic debate and ultimately led to the enactment of a revised version of Article 27. Surprisingly, the new version retained the original content of Article 27(1) with only minor wording changes, despite its annulment by the Constitutional Court. It is also noteworthy that Article 27(4) was amended, even though it had neither been annulled nor criticized by the Constitutional Court. The revised Article 27(4) now stipulates that the chosen law, or the law applicable in the absence of a choice, will not apply if another law is more closely connected to the employment contract which in most cases leads to the application of Turkish labour law.

This study first provides an overview of Article 27 of the 2007 PILA and its shortcomings, followed by a discussion of the background and legal grounds for the Constitutional Court's annulment of Article 27(1). It then examines the legislative reforms introduced in response to the annulment and considers whether further action is needed. The study concludes by offering perspectives on the Constitutional Court's decision and the continuing challenges posed by conflict of laws in the context of employment contracts.

2. Analysis of Article 27 of PILA with a comparison to Article 8 of the Rome I Regulation and an evaluation of its shortcomings.

Before analysing the Constitutional Court's ruling dated 5 November 2024, a brief overview of Article 27 is provided to help readers better understand the content and implications of the annulment ruling.

As in the example of Kuwait,⁵ freedom of choice may not be accepted by some countries for international employment contracts. In contrast, Article 27(1) of the PILA, similar to the approach in EU countries, permitted a choice of law in such contracts but limits this choice in favour of the employee.⁶ It provides that such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by compulsory provisions⁷ of the law of the country in which the employee habitually works. If *no choice* is made, Article 27(2) stipulates that the employment contract shall be governed by the law of the country where the employee *habitually performs* his or her work, even if the employee is temporarily working in another country. In situations where the employee works in multiple countries, Article 27(3) provides that the applicable law is that of the country where the *employer's principal place of business* is located. However, if it appears from the circumstances as a whole

⁵ Alrashid H.M.M., *Appraising party autonomy in conflict-of-laws rules in international consumer and employment contracts: a critical analysis of the Kuwaiti legal framework*, in *Journal of Private International Law*, 21, 1, 2025, 177.

⁶ Tekinalp G., *Milletlerarası Özel Hukuk*, Vedat Kitapçılık, İstanbul, 2020, 331; Şanlı C., Esen E., Ataman Figanmeşe İ., *Milletlerarası Özel Hukuk*, Beta Yayınevi, İstanbul, 2024, 365-366; Nomer E., *Devletler Hususi Hukuku*, 24th ed., Beta Yayınevi, İstanbul, 2021, 348-350.

⁷ Compulsory provisions, in the sense of Article 27(1), mean "provisions that cannot be derogated from by agreement". The only limitation on the parties' freedom to choose the applicable law is the presence of compulsory rules. See Ekşi N., *Mahkeme Kararlarıyla Milletlerarası Özel Hukuk El Kitabı*, Beta Yayınevi, İstanbul, 2023, 98.

that the employment contract is *more closely connected* with another country, Article 27(4) states that the law of that country shall apply.⁸

Article 27 of the PILA is largely aligned with Article 6 of EU 1980 Rome Convention⁹ and with Article 6 of the 2005 Proposal for the Rome I Regulation,¹⁰ which was still in draft form when the 2007 Turkish PILA was enacted. Neither Article 8(1) of the Rome I Regulation¹¹ nor Article 27(1) requires the chosen law to have any connection to the employment contract in question.¹² However, there were two differences between Article 27 and the EU instruments. First, both the annulled and the revised Article 27(1) of the Turkish PILA preserve only the compulsory rules of the law of the employee's habitual place of work in cases where a choice of law exists. In contrast, the corresponding EU articles provide that despite such a choice of law, the provisions that cannot be derogated from by agreement of (i) the law of the country where the employee habitually works; (ii) the law of the employer's place of business; or (iii) the law of the country most closely connected to the employment contract take priority. Another difference, which is purely terminological, is that while Article 27(1) refers to the "compulsory provisions" of the habitual workplace, Article 8(1) of the Rome I Regulation uses the phrase "provisions that cannot be derogated from by agreement". Despite the difference in wording, both Article 27(1) and Article 8(1) refer to provisions of the same nature.

In short, Article 27 seeks to balance party autonomy in choosing the applicable law with the need to protect employees by ensuring that such a choice does not override provisions that cannot be derogated from by agreement. However, unlike the EU instruments, this goal is not fully achieved due to the wording of Article 27(1), which refers exclusively to the *compulsory provisions of the law of the employee's habitual workplace* and *fails to account for the compulsory rules of the law that would apply under paragraphs (3) and (4)* in the absence of a choice of law.

Assuming a Turkish employee works continuously in *multiple countries* for a Turkish employer and the parties have chosen Tunisian law, the employee files a case before a Turkish labour court due to his dismissal. The court must determine the applicable law under Article 27. In this case, the law chosen by the parties, Tunisian law, would apply as stipulated by Article 27(1). If no choice of law was made, the applicable law would be that of the employer's principal place of business – in this case, Turkish law – pursuant to Article 27(3). However, Article 27(1) reserves only the compulsory provisions of the law of the employee's habitual workplace, and not those of the employer's principal place of business, which would apply in the absence of a choice of law under Article 27(3). Accordingly, the court would apply exclusively the chosen law, disregarding any compulsory provisions of Turkish law,

⁸ Prior to its annulment by the Constitutional Court, the application of the law most closely connected under Article 27(4) was conditional upon the absence of a chosen governing law. Güngör G., *Türk Milletlerarası Özel Hukuku*, Yetkin Yayınevi, Ankara, 2021, 191; Serbest F., *Yüksek Mahkeme Kararlarına Göre Yabancılık Unsuru İçeren Bireysel İş Sözleşmelerine Uygulanacak Hukuk*, in *Çukurova Üniversitesi Hukuk Araştırmaları Dergisi*, 4, 2023, 146.

⁹ Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980, OJ L 266, 9.10.1980, 1-19.

¹⁰ Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), Brussels, COM(2005) 650 final 2005/0261 (COD) 15 December 2005.

¹¹ Krebber S., *Conflict of Laws in Employment in Europe*, in *Comparative Labor Law and Policy Journal*, 21, 3, 2000, 523.

¹² Ayşar M., 2023 Taribli Yargıtay Hukuk Genel Kurulu Kararı Işığında Yurt Dışı Hizmet Akdine Uygulanacak Hukuk, in *İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi*, 9, 2, 2024, 606.

except insofar as public policy and the mandatory rules under Articles 5 and 6 of the 2007 PILA require otherwise.

A similar observation can be made with respect to Article 27(4). For example, a Turkish company engaged in road construction in Tunisia entered into an employment contract with a Turkish employee, designating Tunisian law as the governing law. In the absence of such a choice, however, the overall circumstances indicate that the contract is more closely connected to Turkish law. Since Article 27(1) does not limit the chosen law by reference to closely connected compulsory rules, a Turkish court would apply only the chosen law, except for public policy and mandatory rules pursuant to Articles 5 and 6 of the 2007 PILA.

In a nutshell, Article 27(1) limits the scope of the chosen law to the *compulsory rules of the country where the employee habitually performs his work*, and does not include the compulsory rules of the *employer's principal place of business* or the *law with the closest connection*.¹³

3. Background of the Constitutional Court's annulment.

3.1. Foundations of the annulment request of paragraphs (1) and (2) of Article 27.

The Turkish Constitutional Court primarily serves two main functions under Article 148 of the Constitution.¹⁴ First, it reviews the constitutionality both in terms of form and substance of laws, Presidential decrees, and the Rules of Procedure of the Grand National Assembly of Türkiye.¹⁵ This process is known as an *action for annulment*. Second, the Court reviews *individual applications* submitted by persons who believe their fundamental human rights have been violated. Before bringing a case to the Constitutional Court, applicants are required to exhaust all available administrative and judicial remedies. If these avenues do not result in a resolution, they may then submit their application to the Constitutional Court.

Constitutionalisation of private international law began in 1971 in the European countries.¹⁶ Despite its later emergence in Türkiye, the constitutionalisation of Turkish private international law has been shaped by several notable decisions of the Constitutional Court.¹⁷ These rulings were granted in both *actions for annulment* and *individual applications*.

¹³ Aşar M., nt. (12), 605.

¹⁴ For the official translation published by the Grand National Assembly of Turkey, Department of Laws and Resolutions, May 2019, see https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf (last accessed on 5 February 2026).

¹⁵ On 26 May 2022, the Republic of Türkiye officially changed its name from the Republic of Turkey in a request submitted to the Secretary-General of the United Nations. See <https://www.un.org/en/about-us/member-states/turkiye> (last accessed on 8 February 2026).

¹⁶ Symeonides C.S., *The Private in Private International Law*, Maastricht Law Series 9, Eleven International Publishing, The Hague, 2019, 27.

¹⁷ See, for example, the Second Section of the Constitutional Court, *Yasemin Dinç* (Application No: 2015/14796), decision of 10 October 2018. The Constitutional Court rejected the claim that the enforcement of a French court's divorce and custody ruling violated the right to respect for family life, even though no personal relationship had been established between the mother and the child in Türkiye. Constitutional Court, *Tasimpeks Granit ve Mermer San. ve Tic. Ltd. Şti.* (Application No: 2016/9000), decision of 20 March 2019. This case involved a violation of the right to a fair trial, stemming from the recognition and enforcement of a Swiss court decision that conflicted with Turkish public order.

Among these rulings, the most recent one, granted on 5 November 2024,¹⁸ is of particular significance. It concerns Article 27, paragraphs (1) and (2), of the PILA, which indicates the applicable law for individual employment contracts. This ruling is particularly significant, as it affects a large number of employees working on projects undertaken by Turkish companies abroad, as well as media professionals and workers in maritime, aviation, railway, and road transport sectors who are assigned to work overseas, often in countries where employee protection standards are lower than those in Türkiye.

According to Article 152 of the Constitution “if a court hearing a case finds that the law, or the presidential decree to be applied is unconstitutional, or if convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue”. Three courts hearing the cases – the 27th *Civil Chamber of the Istanbul Regional Court of Justice*, the 10th *Labor Court of Istanbul*, and the 11th *Labor Court of Ankara* – found that paragraphs (1) and (2) Article 27 of PILA was unconstitutional and petitioned the Constitutional Court for their annulment. The Constitutional Court consolidated three applications into a single file.

All three courts argued that, as a result of the application of foreign law indicated by paragraphs (1) and (2) of Article 27, Turkish employees working at the *foreign branches of companies registered in Türkiye* are unable to access the same rights granted to employees working in Türkiye for the same employer. This is because, in most cases, the employment contract contains a choice of law clause referring to the law of the country where the employee performs their work. This is especially common when Turkish employees are sent to Arabic countries and Commonwealth of Independent States countries. Consequently, *the chosen law* and *the law of the habitual place of work* are usually the same.

While Article 27(1) retains the compulsory rules of the law of the habitual workplace but does not extend this protection to the compulsory provisions of the law more closely connected to the contract, which, as previously noted, would be Turkish law. For example, where Russian law is chosen but, absent such choice, Turkish law is deemed more closely connected, the court will apply the chosen law without regard to the compulsory provisions of the more closely connected law. According to the referring courts, this discrepancy was found to violate the constitutional principle of equality.

The referring courts further observed that the legal systems of habitual workplaces located abroad may lack adequate development with respect to employee protection. These laws provide significant advantages for employers, and employment contracts often contain clauses specifying their application. Accordingly, applying such chosen laws is incompatible with the state’s constitutional obligation to improve the living standards of workers. The referring courts contended that making entitlements – such as paid weekly rest, public holidays, and annual leave – subject to the law of the habitual workplace or the law chosen by the parties, rather than to the law more closely connected to the employment relationship, prevents these rights from being effectively realized. It was emphasized that the protective provisions of the law most closely connected to the contract should not be overridden by a

¹⁸ Constitutional Court of the Republic of Türkiye, File No. 2023/158, Decision No. 2024/187, 5 November 2024 (Official Gazette of 10 March 2025, No. 32837).

choice of law. The referring courts also underlined that employers must inform employees about the content of law applicable to their employment contracts. However, the current rules include no provisions imposing such an obligation. On these grounds, the applicant courts to Constitutional Court argued that the paragraphs (1) and (2) of Article 27 violate not only the right to property and the right to a fair trial, but also the state's duty to protect workers, and are therefore unconstitutional.

3.2. Grounds for the annulment of Article 27(1) of PILA.

The Constitutional Court annulled Article 27(1) but concluded that Article 27(2) did not violate the Constitution. The Constitutional Court does not oppose the principle of party autonomy in selecting the applicable law for employment contracts. However, it underlines that the employee, as the weaker party in the contractual relationship, typically has limited bargaining power to negotiate such a choice with the employer.¹⁹ According to the Constitutional Court, Article 27(1), on the one hand, permits the application of the chosen law; on the other hand, it gives priority exclusively to the compulsory provisions of the law of the employee's habitual workplace and does not mention the compulsory provisions of the law most closely connected to the employment contract. When the parties chose the applicable law, such a choice may enable the employer to circumvent imposed obligations and thereby deprive the employee of the protections afforded by the provisions of the law most closely connected to the employment relationship, which would otherwise apply.²⁰ The Constitutional Court noted that, in cases involving Turkish employees engaged in overseas projects for companies affiliated with Turkish-based entities or their foreign branches, Turkish law is deemed to be the most closely connected to the employment contract. However, if foreign law is chosen, which in most cases is the law of the employee's habitual workplace, it may override the compulsory provisions of Turkish law, since Article 27(1) refers only the compulsory provisions of the employee's habitual workplace. Consequently, the Constitutional Court ruled that Article 27(1) is inconsistent with Article 49 of the Constitution, which guarantees the right to work. The Constitutional Court also highlights the burden placed on courts by the need to compare the law chosen by the parties with the compulsory provisions of the employee's habitual workplace.

It should be emphasized that the Constitutional Court also referred to the EU Rome I Regulation in its reasoning.²¹ The Court noted that Article 27(1) creates a gap in legal protection when compared to instruments such as the Rome I Regulation, which safeguard the non-derogable provisions of the law applicable in the absence of a choice of law by the parties. The Constitutional Court cited Article 8(1) of the Rome I Regulation which provides

¹⁹ Constitutional Court of the Republic of Türkiye, File No. 2023/158, Decision No. 2024/187, 5 November 2024, § 36.

²⁰ Constitutional Court of the Republic of Türkiye, File No. 2023/158, Decision No. 2024/187, 5 November 2024, §§ 38-39.

²¹ 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), OJ L 177, 4 July 2008, 6-16.

that even where the parties have made a choice of law, such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that would have applied under paragraphs (2), (3), and (4)".²²

The Turkish Constitutional Court's decision, dated 5 November 2024, was made by majority vote. The Court deemed it appropriate for the annulment ruling to take effect six months after its publication in the Official Gazette. This interim period aims to prevent a legal vacuum until the legislator revises Article 27(1). Given that the decision will take effect in six months, the question arises as to what will happen to pending cases. In my experience, trial courts typically suspend proceedings in such situations, rather than applying the current version of Article 27(1), while awaiting the legislator's revision in compliance with the Constitutional Court's ruling. But a remarkable decision is granted by the Istanbul Regional Court of Appeals 27th Civil Chamber on 14 April 2025.²³ A Turkish employee worked on a construction site for a Turkish construction company in the Russian Federation. After the termination of his employment contract, he was sent back to Türkiye. He subsequently filed a lawsuit before the employment court, claiming severance pay, notice pay, and unpaid wages. The defendant argued that the employment contract included a choice of law clause selecting Russian law and that the habitual place of work was Russia. Therefore, under Article 27 PILA, Russian law should apply. The defendant also claimed that, under Russian law, the claim was subject to a one-year statute of limitations, which had expired, and thus the case should be dismissed. The labour court accepted the defendant's argument and dismissed the case based on the statute of limitations. However, the employee appealed the decision. The 27th Civil Chamber of the Istanbul Regional Court of Appeals reversed the ruling. It emphasized that although the Constitutional Court had given the legislature six months to amend Article 27(1), it would be contrary to the principles of constitutional supremacy and the rule of law to resolve pending cases based on provisions already found unconstitutional. Accordingly, the Court disregarded Article 27(1) and instead evaluated whether paragraphs (2), (3), or (4) of Article 27 should apply to determine the applicable law. It found that the plaintiff is a Turkish citizen whose place of residence and centre of social life is Türkiye. Therefore, Turkish law is more closely connected to the employment contract. Under Article 27(4), the applicable law must be determined based on law and equity, taking into account the state's positive obligations to protect employees as outlined in Article 49 of the Constitution. If the law more closely related to the contract offers greater protection to the employee than the law of the habitual workplace, the court may apply that more protective law. In this case, Turkish law was found to offer a higher standard of protection to the employee than Russian law. The appellate court concluded that it was erroneous to apply Russian law instead of Turkish law, which provided better protection for the worker.

²² Constitutional Court of the Republic of Türkiye, File No. 2023/158, Decision No. 2024/187, 5 November 2024, § 34.

²³ 27th Civil Chamber of the Istanbul Regional Court of Appeals, File No. 2024/1078, Decision No. 2025/814, 14 April 2025.

3.3. Academic debate triggered by the Constitutional Court's annulment of Article 27(1).

Following the publication of the Constitutional Court's ruling in the Official Gazette, academics began to interpret the decision and offered suggestions, mostly presented orally during online meetings, on how Article 27(1) should be amended. Rather than offering creative proposals, they frequently refer to Article 8(1) of the EU Rome I Regulation.

3.4. Legislative reform following the Constitutional Court's annulment of Article 27(1): is further action needed?

The annulment ruling was published in the Official Gazette on 10 March 2025, and the legislation swiftly responded to the annulment. Law No. 7750, dated 4 June 2025, introduced amendments to various laws, including changes to paragraphs (1) and (4) of Article 27 of the 2007 PILA. Interestingly, however, the Constitutional Court had annulled only paragraph (1), raising questions about the basis for amending paragraph (4) as well. With the new amendments, Article 27 of the 2007 PILA is as follows:

Article 27(1) – An employment contract shall be governed by the law chosen by the parties. However, such choice shall not deprive the employee of the minimum protection provided by the compulsory provisions of the law of the country where the employee habitually performs their work.

(2) In the absence of a choice of law by the parties, the employment contract shall be governed by the law of the country in which the employee habitually performs his or her work. If the employee temporarily performs his or her work in another country, that workplace shall not be considered the habitual workplace.

(3) If the employee does not habitually perform his or her work in any one country but instead works continuously in more than one country, the employment contract shall be governed by the law of the country where the employer's principal place of business is located.

(4) Without prejudice to the application of the provisions of the law of the place where the work is performed at the time it is carried out, and taking into account all the circumstances of the case, the law that is more closely connected to the employment contract may be applied in place of the law determined under paragraphs (1), (2), or (3).

The wording of paragraph (1) of Article 27 remains identical both before and after its annulment by the Constitutional Court. Paragraphs (2) and (3) of the Article were left untouched by the legislature. The main revision, however, was made to paragraph (4), which will be explained below.

Although Article 27(3) remains unchanged it still poses some problems²⁴ in particular for group companies and seafarers working in the ships registered flags of convenience. As is underlined by the Turkish Constitutional Court, companies having their headquarters in Türkiye may establish branches or subsidiaries in foreign countries whose law provide less protection than Türkiye's employment law. When an employee files a claim against the headquarters in Turkish courts, the employer often contends that branches or subsidiaries located abroad are separate legal entities and therefore do not have standing in the case. Filing a lawsuit before a Turkish court is generally easier for employees than initiating proceedings in the country where the foreign branch or subsidiary is located. In such cases, the key question is whether the employer's principal place of business is the headquarters in Türkiye or the branches or subsidiaries in foreign countries. While employees often insist on piercing the corporate veil, arguing that the foreign subsidiaries or branches are effectively controlled by the Turkish headquarters, employers typically maintain that these entities are legally independent and should not be held liable for obligations arising from employment contracts signed by the branches or subsidiaries.

Article 27(3) may also create difficulties for seafarers working on ships whose shipowner companies are registered under a flag of convenience. In such cases, neither the ship, the shipowner, nor the seafarers may have any genuine connection to the flag state.²⁵ Both Article 8(3) of the Rome I Regulation and Article 27(3) of PILA indicate the law of the country where the employer's place of business is located but do not require any link other than the location of the employer's place of business. As a result, these provisions may appear applicable even when the employer is merely a paper company registered in an offshore jurisdiction, with no substantive connection to that country beyond formal registration. Shipowners or charterers registered in offshore jurisdictions may recruit or hire seafarers through agencies based in low-wage countries.²⁶ As a result, both the employer and the seafarer may be based in low-wage jurisdictions.²⁷ As *Mankowski* rightly articulated, the application of the law of the country in which the place of business is situated may result unfavourably for the employee.²⁸ *Mankowski's* concern is also valid with respect to Article 27(3). In proceedings initiated by seafarers against Turkish maritime companies registered under flags of convenience, Turkish courts may determine the applicable law under Article 27(3) to be that of the employer's principal place of business, which is often an offshore jurisdiction. In such cases, only the mandatory rules or public policy of the forum state serve to mitigate any unfavourable outcomes.

²⁴ Grušić U., *The European Private International Law of Employment*, Cambridge University Press, Cambridge, 2015, 178, argues that the law of the employer's place of business under Article 8(3) "leads to excessive legal uncertainty and unpredictability, undermining the objective of employee protection, and therefore this rule should be abolished".

²⁵ Morgenstern F., *The importance, in practice, of conflicts of labour law*, in *International Labour Review*, 124, 2, 1985, 122.

²⁶ Mankowski P., *Employment Contracts under Article 8 of the Rome I Regulation*, in Ferrari F., Leible S. (eds), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, De Gruyter European Law Pub, Berlin, New York, 2009, 200.

²⁷ Mankowski P., nt. (26), 200.

²⁸ Mankowski P., nt. (26), 200.

Further, it is my contention that the new version of Article 27(4) effectively addresses these concerns. The revised paragraph (4) not only overrides the choice of law made by the parties but also supersedes the laws designated under paragraphs (2) and (3). It grants judges the discretion to apply Turkish law as the law most closely connected to the employment relationship, particularly where Turkish companies engage in new contracts with Turkish employees through subsidiaries or branches established abroad. Article 27(4) allows courts to consider that offshore companies operating from Türkiye, lacking any substantive connection to the offshore jurisdiction, establish a close link between the employment contract and Turkish law. Consequently, Turkish law may be applied regardless of the parties' choice of law under Article 27(1) or, in the absence of such choice, the law of the employer's principal place of business under Article 27(3).

Article 27(4) stipulates that the application of a more closely connected law does not preclude the application of the provisions of the law of the place where the work is performed, which must be applied at the time the work is carried out. Certain examples of such provisions include weekly rest days, public holidays, and religious holidays, and work performed on these days, all of which are subject to the legislation of the country where the work is performed.²⁹ Similarly, road drivers engaged in international transport must comply with local laws regarding working and driving hours.³⁰ Work-related injuries or death involve three different dimensions: criminal law, social security law, and civil liability. The criminal and social security dimensions do not fall within the scope of conflict of laws.³¹ However, as *Morgenstern* rightly stated, civil liability for work-related injuries has generally favoured the applicability of the law governing the employment relationship as a whole.³²

²⁹ There are specific regulations that address conflict of laws concerning individual employment contracts of Romanian citizens residing in Romania and working in countries outside the EU. See Lungu L.R., *Employment Contract with Foreign Element*, in *Conferința Internațională de Drept, Studii Europene și Relații Internaționale*, 2015, 314-315. Depending on the country, different conflict-of-law rules apply and, in some countries, a conflict of law rule not only determines which country's law is applicable, but also specifies the matters in which that law will not be applied. For example, in countries such as Lebanon, Morocco, Syria, Tunisia, Venezuela, and Brazil, the applicable law is generally that of the place where the employment contract was concluded, but this is subject to certain conditions imposed by the law of the state where the work is performed (the place of execution), specifically those relating to working hours, rest periods, and occupational health and safety. In contrast, in common law jurisdictions, such as England, the United States (except Louisiana), New Zealand, Australia, Israel, and Canada (excluding Quebec), the applicable law is, in principle, that of the place where the employment contract is to be executed (Lungu, 314-315).

³⁰ Morgenstern F., nt. (25), 122.

³¹ Morgenstern F., nt. (25), 122.

³² Morgenstern F., nt. (25), 124-125.

4. Commentaries on the Constitutional Court's annulment of Article 27(1), the subsequent academic debate, and the enacted legislative reform.

As *Morgenstern* pointed out, conflict of law rules for employment contracts should not be regarded as a 'panacea'.³³ Accordingly, he proposes that a model akin to the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts³⁴ and the Principles of European Contract Law³⁵ might be worth considering in the context of international employment contracts.³⁶ The Turkish Employment Agency (İŞKUR) has prepared model employment contracts and, in some cases, tailors them by taking into account key destination countries for Turkish workers, such as Qatar and Libya.³⁷ For example, the model contract for Turkish employees working in Qatar includes a choice of Qatari law. Model contracts drafted by the Turkish Employment Agency are commonly used, and Article 27(1) does not preclude the use of pre-formulated contracts prepared by the employer, the Agency, or any other relevant body.³⁸ A detailed examination of these contracts reveals a noticeable influence of employers. This raises concern that the Turkish Employment Agency may be neglecting its role in protecting employees and instead advancing the interests of employers. Accordingly, *Morgenstern's* proposal might be more effectively elaborated by the International Labour Organisation (ILO),³⁹ rather than by individual national agencies, potentially leading to greater harmonization in practice.

The proposal made by some Turkish academics to integrate Article 8(1) of the Rome I Regulation as a new Article 27(1) can be criticized on two grounds. First, it does not fully address the findings of the Constitutional Court. Second, it overlooks the fact that Article 8

³³ Morgenstern F., nt. (25), 127-128.

³⁴ International Institute for the Unification of Private Law (UNIDROIT), *UNIDROIT Principles of International Commercial Contracts*, Rome, 2016.

³⁵ Lando O., Beale H. (eds), *The Principles of European Contract Law Part I and II*, Kluwer Law International, Alphen aan den Rijn, 2000.

³⁶ Morgenstern F., nt. (25), 129.

³⁷ See *Yurtdışı İstihdam (Foreign Employment)*, <https://www.iskur.gov.tr/isveren/yurtdisi-istihdam/> (last accessed on 3 February 2026). For workers sent abroad for employment, it is also necessary that the employment contracts prepared by İŞKUR are signed by both the worker and the employer, and that the contracts are approved by İŞKUR. See Avşar M., nt. (12), 601; Aygül M., Erdoğan C., *Türkiye İş Kurumu Tarafından Hazırlanan Yurt Dışı Hizmet Akitlerinde Hukuk Seçimine Dair Kayıtların Geçerliliği*, in *Yıldırım Beyazıt Hukuk Dergisi Prof. Dr. M. Fatih Uşan'a Dekanlıkta 10. Yıl Anısına Teşekkür Armağanı*, 2, 2022, 755-756; Akdeniz A.L., *Yurt Dışına Götüürülen İşçilerin İş Sözleşmelerine Uygulanacak Hukuk Konusuna İnterdisipliner Bir Yaklaşım*, in *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, 73, 2, 2024, 927.

³⁸ Article 8(1) of the Rome I Regulation permits the use of standard clauses pre-formulated by the employer in employment contracts. See Grušić U., *Private International Law Regulation of Individual Employment Relationships within the European Union*, in *European Labour Law Journal*, 15, 1, 2024, 97; Nita M.C., *Designation of the Law Applicable to the Individual Employment Contract According to Regulation (EC) No. 593/2008 on the Law Applicable to Contractual Obligations (Rome I)*, in *Conferința Internațională de Drept, Studii Europene și Relații internaționale*, 2023, 275.

³⁹ Among ILO conventions, the *Maritime Labour Convention (MLC)*, which was opened for signature in 2006 and entered into force in 2013, should be cited here. The MLC sets out minimum working requirements for seafarers, including employment conditions, living standards, health and welfare protections, and compliance measures. To date, 110 ILO Member States have ratified the Convention. The text of the MLC Convention (2006) is available at <https://www.ilo.org/international-labour-standards/maritime-labour-convention-2006-0/text-and-preparatory-reports-maritime-labour-convention-2006> (last accessed on 6 February 2026).

of the Rome I Regulation itself has been subject to criticism on several points, which will be discussed below.

There are three main reasons why the suggestion made by academics do not fully meet the requirements set out in the Constitutional Court's ruling. First, the Court emphasized that the new conflict of laws rule must require the employer to inform the employee about the content of the applicable law; however, this issue has largely been ignored in academic discussions. Second, in practice, Turkish employees are often sent to the branches of Turkish companies in the Commonwealth of Independent States, African countries or the Middle East. These parent and subsidiary company relationships can be used by employers to prevent employees from claiming certain rights. A new employment contract is signed between the foreign branch and the employees, and the employer typically includes a choice of law clause that applies the laws of the host country. Therefore, the chosen law coincides with the law of the country where the employee habitually performs their work. However, some of these countries' labour laws do not offer the same safeguards as those provided by Turkish labour law. As a result, Turkish employees working at foreign branches of companies registered in Türkiye are often unable to access the same rights granted to employees working in Türkiye for the same employer. The Constitutional Court emphasized that a solution should be sought to ensure that the new conflict of laws rules address this issue and should be designed to prevent employers from engaging in such manoeuvres. Third, according to Article 27(1), even if a choice of law is made, such a choice must not deprive the employee of the protection provided by compulsory provisions under the law of the country where the employee habitually carries out their work. Turkish courts examine both the provisions of the law chosen by the parties and the law of the country where the employee habitually works. However, interpreting and applying the laws of different countries and identifying which provisions are compulsory is a complex and challenging task in each case. The Constitutional Court has urged lawmakers to address this issue when drafting a new paragraph (1) of Article 27.

As mentioned, Article 27 is inspired by the 1980 Rome Convention and its proposal to convert it into a regulation, which later replaced the Convention. However, it is important to note that the Rome Convention was adopted in 1980, the proposal to convert it into a regulation⁴⁰ was made in 2005, and since then, the nature and format of international labour mobility have evolved significantly. In addition to traditional forms of employment abroad, new and more complex arrangements have emerged. While both Article 8 and Article 27 address how to determine the applicable law for employment contracts, some shortcomings still persist in relation to certain issues arising in cross-border employment⁴¹. For example,

⁴⁰ Initially, EU legal instruments for the harmonization of private international law took the form of conventions. Later, regulations became the primary legal instruments, and the former conventions were converted into regulations. See Ekşi N., *Sözleşmeden Doğan Borçlara Uygulanacak Hukuk Hakkında Roma Konvansiyonu*, Beta Yayınevi, İstanbul, 2004, 10-34.

⁴¹ For a comprehensive and outstanding critical analysis of Article 6 of the Rome Convention, see Mankowski P., nt. (26), 171-216.

the applicable law in cases of *temporary posting*⁴² or *temporarily transferred*⁴³ employees is specified in Article 27(2). To illustrate the application of Article 27(2), consider a hypothetical case in which, a Turkish company may send its employees to Germany for a limited period, such as for the installation of a factory or to provide after-sales services for machinery; however, this does not make Germany their habitual place of work. This provision is also applicable in cases involving temporary work agencies operating across borders,⁴⁴ as well as journalists and transport workers engaged in maritime, aviation, or road transport. According to Article 8(2) of the Rome I Regulation⁴⁵ and Article 27(2) of the 2007 PILA, the habitual place of work is not considered to have changed merely because the employee is temporarily employed in another country. Having said that, if an employee stays in Germany for an extended period to install a factory and provides a long-term training to the factory owner's personnel, the question arises whether the habitual place of work has shifted from Türkiye to Germany. The answer depends on the assessment of several factors, including from whom the employees receive their salary, the duration and stability of the work arrangement, the nature of the duties performed, and where their social security is registered.⁴⁶

Article 27(3) of the PILA addresses cases of dual employment, where an employee does not habitually perform his or her work in a single country but instead works continuously across multiple countries. In such situations, it provides that the applicable law is that of the employer's principal place of business. This provision may also be relevant in the case of cross-border IT workers, as determining the place of business can be challenging for certain employees who may work from home, in an office, at a client site, or under a hybrid arrangement involving multiple locations, including their residence.

On the other hand, in certain complex cases, Article 27 fails to adequately address the applicable law and whether the employee would receive sufficient protection, as emphasized by the Constitutional Court. In practice, some companies in Türkiye transfer their employees to countries whose employment laws offer weaker protections than those provided under Turkish law, and they designate the law of those countries as the applicable law in the employment contract. However, it can be argued that Article 27(1) offers a safeguard and provides that even when the parties choose the applicable law, the *non-derogable provisions of the*

⁴² Directive 96/71/EC, which was consolidated in 2020, regulates the posting of workers within the framework of service provision across EU member states. For its text, see Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the Posting of Workers in the Framework of the Provision of Services; Directive 2014/67/EU 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 ('the IMI Regulation') Text with EEA relevance, 11-31.

⁴³ For the different types of posting, as well as brief information about the preliminary rulings of the European Court of Justice (CJEU) concerning the determination of the habitual place of work in the context of posting, see Grušić U., nt. (38), 90-92; Piñeiro C.L., *Labour Migration and Private International Law*, in Ruiz Abou-Nigm V., Noodt Taquela M.B. (eds), *Diversity and Integration in Private International Law*, Edinburgh University Press, Edinburgh, 2019, 215-222.

⁴⁴ Morgenstern F., nt. (25), 120.

⁴⁵ The ECJ has interpreted habitual workplace very broadly, see Wilderspin M., *The Contribution of the CJEU to the Notion of Habitual Workplace in the Field of International Transport*, in *European Labour Law Journal*, 15, 1, 2024, 137-143.

⁴⁶ Sabirau-Pérez M.-A., *Changes of the law applicable to an international contract of employment*, in *International Labour Review*, 139, 3, 2000, 345-347.

law of the employee's habitual workplace continue to apply, to the extent that they offer stronger protection, and these provisions take precedence over the chosen law. However, these companies often establish branches or subsidiaries in foreign countries, and employment contracts are concluded through these foreign branches or subsidiaries. As a result, the chosen law and the law of the employee's new habitual workplace effectively become identical, both being the law of the host country. This could give the employer an opportunity to act opportunistically. In such cases, Turkish workers transferred abroad to work under contracts issued by foreign branches of companies based in Türkiye may lose access to certain rights and protections provided under Turkish employment law.

In its decision dated 5 November 2024, the Constitutional Court highlighted the inadequacies of Article 27(1) and noted that this paragraph does not provide a solution to the practical problems encountered. As previously mentioned, in evaluating this decision, the private international law academic community has favoured a simpler approach, advocating for the inclusion of Article 8(1) of the Rome I Regulation in the new legal framework, rather than addressing the concerns raised by the Constitutional Court. As noted above, the legislature adopted a different approach and, rather than revising Article 27(1), chose to substantially amend Article 27(4).

As mentioned, the legislature responded quickly to the annulment ruling of the Constitutional Court but did not fully comply with the requirements of that ruling. If the legislature had fully complied with the Constitutional Court's ruling, I believe the revised text of Article 27 might read as follows:

Individual employment contracts

Article 27 - (1) Employment contracts are governed by the law chosen by the parties, provided that the employer supplies the employee with a document setting out the employment law provisions concerning minimum wage, maximum working hours, annual paid leave, weekly and public holidays, holiday pay, pregnancy and maternity leave, work accident procedures, and social insurance premium payments. Furthermore, such a choice of law must not deprive the employee of the protection afforded by provisions that cannot be derogated from by agreement under the law which, in the absence of such a choice, would have applied pursuant to paragraphs (2), (3), and (4) of this Article.

(2) In the absence of a choice of law by the parties, the employment contract shall be governed by the law of the country in which the employee habitually performs his or her work, even if the employee is temporarily employed in another country. Where the employer's headquarters is located in a different country from its branches or subsidiaries, the law of the country that affords the employee more favourable protection shall apply.

(3) If the employee does not habitually perform his or her work in any one country but instead works continuously in more than one country, the employment contract shall be governed by the law of the country where the employer's principal place of business is located.

(4) Without prejudice to the application of the provisions of the law of the place where the work is performed at the time it is carried out, and taking into account all the

circumstances of the case, the law that is more closely connected to the employment contract may be applied in place of the law determined under paragraphs (1), (2), or (3).

The author should emphasize that the above conflict of law rule is designed in accordance with the Constitutional Court's annulment ruling and does not reflect the author's entire opinion. It remains to be seen whether a new annulment action will be initiated before the Constitutional Court with respect to the new Article 27 of PILA.

5. Critical perspectives on the current structure and future reform of Article 27 PILA and Article 8 of the Rome I Regulation.

Instead of carefully examining and revising the entire Article 27, the legislature only amended paragraphs (1) and (4) of Article 27. I believe the legislature should consider the following points in the course of any future amendments to Article 27 and Article 8.

Foreign elements may appear in employment contracts in various ways. The traditional criteria usually involve either the employee or the employer being a foreign national, or the place of performance being a foreign country. In recent years, different types of employment relationships have developed in addition to the traditional employer and subcontractor roles. One example is the temporary transfer of an employee to another employer abroad, which involves *hiring employees* for a specific period or for the duration of a particular project. The employees involved remain employed with their original employers.⁴⁷ Hiring employees by a different employer in abroad requires the execution of two separate contracts.⁴⁸ The first is the contract between the employee and the employer who is transferring them temporarily. The second is the hiring contract between the transferring employer and the borrowing employer.⁴⁹ The hiring contract is not an employment contract⁵⁰ and therefore does not fall into the scope of Article 27. New paragraph 1 of Article 27, as it will be drafted by the lawmakers, should also address the question of the location where the work is habitually performed in such cases. At this point, Article 8(1) of Rome I Regulation also requires further clarification.

Wars and domestic conflicts have led to changes in state borders or disputes over territorial boundaries. The question of a country's territorial boundaries is further complicated by invasions from other nations. In such situations, should the law of the invaded or controlled state apply, or the law of the invading state? For example, if an employee works in territory occupied or annexed by the Russian Federation, is that territory considered part of Ukraine or the Russian Federation? The same applies to territories such as Gaza or parts of Syria occupied by Israel. Neither Article 27 of the Turkish PILA nor Article 8 of the Rome I Regulation addresses this issue.

⁴⁷ Mankowski P., nt. (26), 198.

⁴⁸ Mankowski P., *ibid.*

⁴⁹ Mankowski P., *ibid.*

⁵⁰ Mankowski P., *ibid.*

In my view, the new legislation concerning Article 27(1) should have been drafted in a detailed and comprehensive manner. First and foremost, it must prevent employers from engaging in manipulative practices aimed at wage suppression or depriving employees of their rightful entitlements – such as annual paid leave, maternity leave, severance pay, the right not to work on public holidays, and the employer’s obligation to pay social security contributions. Although there are various comments regarding the applicable law,⁵¹ in order to eliminate differing interpretations by courts, the legislation should additionally address the specific needs of diverse categories of workers, including IT professionals, employees working for group companies, workers employed in the international transport sector, workers in territories contested between states, those on oil platforms and rigs in the high seas, space workers, and employees posted abroad for long-term humanitarian assignments. For the new legislation the preliminary ruling of the European Court of Justice for the interpretation of Article 6 of the Rome Convention⁵² as well as Article 8 of the Rome I Regulation should also be taken into consideration.

When drafting conflict of laws rules, discussions often focus on contracts involving economically weaker parties, particularly employment contracts, consumer contracts, and insurance contracts. It should be noted that, no matter how carefully the legislator seeks to establish criteria to ensure a fair determination of the applicable law and to protect the weaker party, conflict of laws rules do not always succeed in achieving this objective. This is because genuine protection of the economically weaker party is primarily achieved through substantive law, rather than through conflict of laws rules.⁵³ Furthermore, the fact that a significant portion of the rules aimed at protecting employees are connected to public policy, along with the intervention of the directly applicable rules of the *lex fori*, serves to prevent the potential risks that the principle of freedom of contract may pose for the employee.⁵⁴ This issue was also emphasized in the dissenting opinion to the Constitutional Court’s decision dated 5 November 2024. According to the dissent, the majority’s decision on annulment was largely driven by concerns that Turkish citizens working abroad – particularly in countries with weaker legal protections – might be deprived of the safeguards offered by Turkish law due to the application of foreign law. However, pursuant to Article 5 of the

⁵¹ Nita M.C., nt. (38), 278-279, states that the employer’s place of business, under Article 8(3) of the Rome I Regulation, serves as a key connecting factor, especially in cases involving international transport, employment contracts with itinerant professionals such as sales agents, and work carried out on offshore platforms or in territories not belonging to any state. Nomer E., nt. (6), 353, is of the opinion that for space workers and those employed on oil platforms or rigs in the high seas or non-state territories, where no habitual workplace exists, the law of the employer’s place of business should apply. Çelikel A., Erdem B.B., *Milletlerarası Özel Hukuk*, 18th ed., Beta Yayınevi, İstanbul, 2024, 436, share Nomer’s view.

⁵² The *Koelzsch* (CJEU, Case C-29/10, *Heiko Koelzsch v État du Grand Duché de Luxembourg*, 15 March 2011) and *Voogsgeerd* (CJEU, Case C-384/10, *Jan Voogsgeerd v Navimer S.A.*, 15 December 2011) cases illustrate the difficulty of determining applicable law in cross-border employment under Article 6 of the Rome Convention, especially in the international transport sector. Both workers challenged their dismissals, seeking the protection of labor laws in the countries where they primarily worked, despite contractual choices of foreign law. For the comments about these two cases see Gulotta C., *The First Two Decisions of the European Court of Justice on the Law Applicable to Employment Contracts*, in *Cuadernos de Derecho Transnacional*, 5, 2, 2013, 584-591. In accordance with Article 29 of Rome I Regulation, Rome Convention are still applicable to all contracts concluded prior to 17 December 2009.

⁵³ Ekşi N., *Yabancılık Unsuru Taşıyan İş Sözleşmelerine Uygulanacak Hukuk*, in Prof. Dr. Kenan Tunçomag’a Armağan, *İstanbul Üniversitesi Hukuk Fakültesi Eğitim Öğretim ve Yardımlaşma Vakfı*, İstanbul, 1997, 147.

⁵⁴ Ekşi N., *ibid*, 147-148.

PILA, Turkish law may still be applied in cases where the chosen law violates Turkish public policy. For these reasons, the dissenting opinion rejects the majority's decision to annul Article 27(1) of the PILA, arguing that it does not violate Article 49 of the Constitution.

6. Conclusion.

The decisions of courts, especially their interpretations and applications of the conflict of laws, carry undeniable significance for both theory and practice. In addition, the guiding judgements of the courts on matters that are not clearly regulated in the law clarify ambiguous or uncertain issues. Sometimes, wrong judgements inspire the doctrine and lead to the emergence of new ideas or different interpretations. In short, whether right or wrong, the decisions rendered by the courts play a vital role in shaping the interpretation and development of conflict of laws.

The Constitutional Court, which holds the power to annul legislative provisions, has a more direct influence on private international law compared to other supreme courts. Consequently, its annulment of Article 27(1) and the decision to grant the legislature a six-month period to enact a new conflict of laws rule highlight the Court's dominant and proactive role in shaping legal frameworks. While academics were still debating the ruling and the possible form of a new conflict of laws rule regarding employment contracts, the legislature moved swiftly to amend paragraphs (1) and (4) of Article 27.

The amended paragraph (1) is nearly identical to the original, with only slight wording changes and no meaningful content differences. Moreover, although the Constitutional Court did not annul Article 27(4), the legislature nonetheless proceeded to significantly amend this provision in order to preclude employers from exploiting conflict of law rules to designate a less protective applicable law. Article 27(4) now permits not only disregarding the chosen law but also the law that would apply in the absence of a choice, if the employment contract is more closely connected to the law of another country. The new amendment to paragraph (4) may provide a legal foundation that encourages judges inclined to apply Turkish law.

It is common practice for companies in high-income countries to establish subsidiaries or branches in lower-income countries. Employment contracts with local employees typically specify that the law of the host country will apply. By choosing the law of the place where the work is performed, these companies effectively avoid the heavier regulatory burdens imposed by the employment laws of their home countries. Similarly, Turkish companies undertaking projects abroad often prefer employees from Türkiye, who, though not necessarily more qualified than local personnel, meet eligibility requirements and consistently comply with employment regulations and workplace standards. They establish overseas companies or branches, and employment contracts are signed by these entities, which operate under significantly weaker labour protections. Therefore, as emphasized by Türkiye's Constitutional Court, these companies circumvent the protective provisions of Turkish employment law by inserting clauses in employment contracts that designate the laws of their overseas companies or branches. Since the chosen law coincides with the habitual workplace

law, employees are deprived of the protections provided by the more employee-friendly provisions of Turkish law. To prevent such manoeuvres by employers, the legislature went beyond the annulment ruling of the Constitutional Court. The legislator designed Article 27(4) as a safety valve. It identifies the law most closely connected to the contract and prevents the application of the chosen law, the law of the habitual workplace, or the law of the employer's main place of business under paragraphs (1), (2), and (3), while still preserving the compulsory rules of the place where the work is performed.

The conflict of law rules in employment contracts also require further development in response to cross border conflicts and migration. Due to increased cross-border mobility, the merger of multiple foreign companies operating in the same country, and the effects of migration and asylum, current cross-border employment contracts, along with their parties and places of performance, often differ significantly from traditional models. Consequently, the current conflict of law rules related to employment contracts are insufficient to address the full range of issues arising in cross-border employment relationships. There are several issues that have not yet been thoroughly addressed in the private international law literature. Below is a brief overview of these issues.

The first concerns the extent to which illegal recruitment may be considered or classified as employment under applicable legal frameworks. This question has gained significance due to enhanced migrant mobility and the growing presence of illegal organizations, both of which have complicated the qualification and classification of employment contracts involving foreign elements. Whether the lack of a work permit prevents an individual from being treated as an employee and claiming salary or employment benefits remains a key issue.⁵⁵

The second issue involves a similar legal question in the different context of individuals working for international humanitarian or asylum organizations such as the United Nations High Commissioner for Refugees (UNHCR) or International Organization for Migration (IOM). Although enjoying a certain level of immunity and being subject to the regulations and rules of the relevant organization,⁵⁶ individuals may still file claims to recover unpaid salaries or other employment-related benefits.

The third issue is illegal recruitment or regular or irregular migrants. Many migrants, primarily from Syria and Afghanistan, work in Türkiye without work permits, rendering them illegal workers; whether such recruitment relationships qualify as employment contracts and

⁵⁵ Not only in complex situations, but also more generally, the classification of who constitutes a 'worker' in terms of the free movement of workers in the EU remains an ongoing issue. For a critical analysis of the concept of 'worker' in European labour law, primarily shaped by the Court of Justice of the European Union through its jurisprudence on the free movement of workers, see Kountouris N., *The Concept of Worker in European Labour Law: Fragmentation, Autonomy and Scope*, in *Industrial Law Journal*, 47, 2, 2018, 192-225. For the autonomous and broad interpretation of the concept of an employment contract under EU law, see Cavalier G., Upex R., *The Concept of Employment Contract in European Union Private Law*, in *International & Comparative Law Quarterly*, 55, 3, 2006, 587-608.

⁵⁶ Morgenstern F., *The Law Applicable to International Officials*, in *International & Comparative Law Quarterly*, 18, 3, 1969, 739.

which law applies should be evaluated under conflict of laws rules, with particular reference to public policy considerations and mandatory rules.⁵⁷

The fourth issue concerns cases where regular or irregular migrant children are informally employed in agriculture, with wages transferred to their families – circumstances that may amount to human trafficking under criminal law. Determining the rightful employer in such cases is complex, and responses to these classification challenges vary depending on the country in which the case is filed.

The fifth and more complex issue concerns foreign terrorist fighters recruited by state or non-state actors, including terrorist organizations, and the extent to which they should be classified as employees. Given that these individuals never obtain work permits, it remains uncertain whether they can nonetheless be regarded as employees. Another extreme example, beyond the scope of traditional international employment contracts, involves challenges in U.S. courts concerning the applicable law and procedural issues in cases related to slave and forced labour during World War II.⁵⁸

If aforementioned recruitments are deemed null and void, a question arises as to whether they fall within the scope of unjust enrichment,⁵⁹ an issue that must also be examined from conflict of laws perspective.

Fundamental labour protections are recognised in the constitutions of numerous states and are reinforced by international human rights law. Together, constitutional guarantees and the European Convention on Human Rights (ECHR) establish a minimum framework of protection aimed at preserving workers' dignity, autonomy, and collective rights. These values have also shaped the development of the conflict of laws governing employment relationships. Accordingly, the choice of law regime applicable to employment contracts is founded upon the principle of protecting the employee as the weaker party to the contractual relationship. In this way, Article 8 of the Rome I Regulation and Article 27 of the Turkish PILA are not merely a technical choice of laws rules but a normative mechanism designed to give effect to constitutional and human rights values by ensuring that cross-border employment relationships do not undermine the effective protection of fundamental labour rights. The protection of humanitarian considerations in conflicts of laws in employment contracts becomes particularly delicate in relation to the aforementioned vulnerable individuals.

⁵⁷ In *Hounga v Allen & Anor* [2012] EWCA Civ 609, the Court of Appeal overturned earlier rulings by holding that Ms Hounga, Nigerian citizen, could not bring a dismissal discrimination claim under the Race Relations Act 1976 because she was working illegally, emphasizing public policy concerns and effectively shielding employers from liability for discrimination against illegal workers. For a commentary on the case, see Monaghan C., *Illegal Contracts and Discrimination: Why an Illegal Immigrant cannot Bring a Claim for Race Discrimination*, in *International Journal of Discrimination and the Law*, 12, 2, 2012, 109-116.

⁵⁸ For a detailed information, see Anderson K., *Issues of Private International Law and Civil Procedure Arising Out of the U.S. Civil Suits for Forced Labor During World War II*, in *Yearbook of Private International Law*, 3, 2001, 137-183. For a decision, see U.S. District Court for the Northern District of California, *In Re: World War II Era Japanese Forced Labor*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001), 17 September 2001.

⁵⁹ Employers might exploit contract invalidity opportunistically, potentially causing unjust enrichment to the innocent party. See Xiong B., Durovic M., *The Enforcement of Mandatory Rules against Illegal Contracts*, in *Asia Pacific Law Review*, 29, 2, 2021, 322.

Mass migration and displacement among countries have consistently increased the number of employment contracts containing foreign elements, leading courts in various jurisdictions to face disputes arising from such contracts. Despite efforts to protect employees through the application of the most appropriate conflict of law rules, public policy exceptions, and directly applicable rules of the forum, as explained above, this objective has not been fully realised. *Morgenstern* rightly argued that conflict of law rules should not be considered a panacea for employment contract issues.⁶⁰ Genuine and effective protection of employees in cross-border contexts will remain unattainable unless employment laws across all jurisdictions are harmonized to meet acceptable and enforceable international standards.

Bibliography

- Akdeniz A.L., *Yurt Dışına Götüürülen İşçilerin İş Sözleşmelerine Uygulanacak Hukuk Konusuna İnterdisipliner Bir Yaklaşım*, in *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, 73, 2, 2024;
- Alrashid H.M.M., *Appraising party autonomy in conflict-of-laws rules in international consumer and employment contracts: a critical analysis of the Kuwaiti legal framework*, in *Journal of Private International Law*, 21, 1, 2025;
- Anderson K., *Issues of Private International Law and Civil Procedure Arising Out of the U.S. Civil Suits for Forced Labor During World War II*, in *Yearbook of Private International Law*, 3, 2001;
- Avşar M., *2023 Tarıblı Yargıtay Hukuk Genel Kurulu Kararı Işığında Yurt Dışı Hizmet Akedine Uygulanacak Hukuk*, in *İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi*, 9, 2, 2024;
- Aygül M., Erdoğan C., *Türkiye İş Kurumu Tarafından Hazırlanan Yurt Dışı Hizmet Akitlerindeki Hukuk Seçimine Dair Kayıtların Geçerliliği*, in *Yıldırım Beyazıt Hukuk Dergisi Prof. Dr. M. Fatih Uşan'a Dekanlıkta 10. Yıl Anısına Teşekkür Armağarı*, 2, 2022;
- Cavalier G., Upex R., *The Concept of Employment Contract in European Union Private Law*, in *International & Comparative Law Quarterly*, 55, 3, 2006;
- Çelikel A., Erdem B.B., *Milletlerarası Özel Hukuk*, 18th ed., Beta Yayınevi, İstanbul, 2024;
- Ekşi N., *Mabkeme Kararlarıyla Milletlerarası Özel Hukuk El Kitabı*, 2nd edition, Beta Yayınevi, İstanbul, 2023;
- Ekşi N., *Sözleşmeden Doğan Borçlara Uygulanacak Hukuk Hakkında Roma Konvansiyonu*, Beta Yayınevi, İstanbul, 2004;
- Ekşi N., *Yabancılık Unsuru Taşıyan İş Sözleşmelerine Uygulanacak Hukuk*, in *Prof. Dr. Kenan Tunçomağ'a Armağarı*, İstanbul Üniversitesi Hukuk Fakültesi Eğitim Öğretim ve Yardımlaşma Vakfı, İstanbul, 1997;
- Grušić U., *Private International Law Regulation of Individual Employment Relationships within the European Union*, in *European Labour Law Journal*, 15, 1, 2024;

⁶⁰ Morgenstern F., nt. (25), 127-128.

- Grušić U., *The European Private International Law of Employment*, Cambridge University Press, Cambridge, 2015;
- Gulotta C., *The First Two Decisions of the European Court of Justice on the Law Applicable to Employment Contracts*, in *Cuadernos de Derecho Transnacional*, 5, 2, 2013;
- Güngör G., *Türk Milletlerarası Özel Hukuku*, Yetkin Yayınevi, Ankara, 2021;
- International Institute for the Unification of Private Law (UNIDROIT), *UNIDROIT Principles of International Commercial Contracts*, Rome, 2016;
- Kountouris N., *The Concept of Worker in European Labour Law: Fragmentation, Autonomy and Scope*, in *Industrial Law Journal*, 47, 2, 2018;
- Krebbler S., *Conflict of Laws in Employment in Europe*, in *Comparative Labor Law and Policy Journal*, 21, 3, 2000;
- Lando O., Beale H. (eds), *The Principles of European Contract Law Part I and II*, Kluwer Law International, Alphen aan den Rijn, 2000;
- Lungu L.R., *Employment Contract with Foreign Element*, in *Conferința Internațională de Drept, Studii Europene și Relații Internaționale*, 2015;
- Mankowski P., *Employment Contracts under Article 8 of the Rome I Regulation*, in Ferrari F., Leible S. (eds), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, De Gruyter european law pub, Berlin, New York, 2009;
- Monaghan C., *Illegal Contracts and Discrimination: Why an Illegal Immigrant cannot Bring a Claim for Race Discrimination*, in *International Journal of Discrimination and the Law*, 12, 2, 2012;
- Morgenstern F., *The Importance, in Practice, of Conflicts of Labour Law*, in *International Labour Review*, 124, 2, 1985;
- Morgenstern F., *The Law Applicable to International Officials*, in *International & Comparative Law Quarterly*, 18, 3, 1969;
- Nita M.C., *Designation of the Law Applicable to the Individual Employment Contract According to Regulation (EC) No. 593/2008 on the Law Applicable to Contractual Obligations (Rome I)*, in *Conferința Internațională de Drept, Studii Europene și Relații internaționale*, 2023;
- Nomer E., *Devletler Hususi Hukuku*, 24th ed., Beta Yayınevi, Istanbul, 2021;
- Padmanabhan L., *An Analysis of Employment Contract under Private International Law*, in *Indian Journal of Law and Legal Research*, 5, 2, 2023;
- Piñeiro L.C., *Labour Migration and Private International Law*, in Ruiz Abou-Nigm V., Noodt Taquela M.B. (eds.), *Diversity and Integration in Private International Law*, Edinburgh University Press, Edinburgh, 2019;
- Sabirau-Pérez M.-A., *Changes of the law applicable to an international contract of employment*, in *International Labour Review*, 139, 3, 2000;
- Şanlı C., Esen E., Ataman Fıganmeşe İ., *Milletlerarası Özel Hukuk*, Beta Yayınevi, Istanbul, 2024;
- Serbest F., *Yüksek Mahkeme Kararlarına Göre Yabancılık Unsuru İçeren Bireysel İş Sözleşmelerine Uygulanacak Hukuk*, in *Çukurova Üniversitesi Hukuk Araştırmaları Dergisi*, 4, 2023;
- Symeonides C.S., *The "Private" in Private International Law*, Maastricht Law Series 9, Eleven International Publishing, The Hague, 2019;
- Tekinalp G., *Milletlerarası Özel Hukuk*, Vedat Kitapçılık, Istanbul, 2020;

Wilderspin M., *The Contribution of the CJEU to the Notion of Habitual Workplace in the Field of International Transport*, in *European Labour Law Journal*, 15, 1, 2024;
Xiong B., Durovic M., *The Enforcement of Mandatory Rules against Illegal Contracts*, in *Asia Pacific Law Review*, 29, 2, 2021.

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