A COMPARATIVE ANALYSIS OF THE MANDATORY RULE DOCTRINE AND ITS APPLICATION IN THE SOUTH AFRICAN LABOUR COURT

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Abstract

Inherent in any employment relationship is the imbalance of bargaining power between the parties to the employment contract. On a globalised scale, this imbalance is exacerbated where employees are often reliant on the provisions within their contract to ensure they are adequately protected. Party autonomy enables the parties to choose the legal system that will govern these provisions and the employment relationship as a whole. The doctrine of mandatory rules purports to make applicable those 'laws of a strictly positive, imperative nature' so as to guarantee the protection of employees' interests where party autonomy serves to conceal the power imbalance within the employment relationship. The Labour Court has, however, often misunderstood and neglected to consider the application of private international law rules, which are inclusive of the mandatory rule doctrine. The aim of this article is, therefore, to critically analyse the doctrine and question whether, from a comparative perspective, South African labour law can be considered as fitting within this framework as developed within the European Union and the United States, so as to ensure its protective elements are applied in the appropriate instances.

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1 Introduction

Globalisation and shifts in employment marked by yet another industrial revolution have increased the mobility of labour.[1] Whilst employees such as airline pilots and the crewmembers of ships are frequently working in different jurisdictions, some may find themselves working overseas for differing durations.[2] Multinational companies often send their employees overseas for a fixed period. For instance, someone may be employed for a specified period at the London office of an entity incorporated in South Africa.[3] The International Labour Organisation (ILO), with a focus on the gig-economy, has further highlighted the growth of online platforms that hire employees from anywhere in the world to work remotely on casual jobs that are offered by a platform that may hail from a different jurisdiction entirely.[4] This growth of employment with international features uncovers the various private international law rules necessary for adjudicating a cross-border employment dispute.

Case law in South Africa has highlighted the lack of academic material surrounding private international law, particularly in the realm of labour law.[5] The contention lies in the approach taken by the Labour Court in deducing the territorial scope of the statutes that empower the Court with jurisdiction — leading to misapplication or, oftentimes, complete neglect of the rules of private international law. Met with a dispute containing international features, the Labour Court has resorted to utilising methods of statutory interpretation that requires the Court to investigate whom Parliament is presumed to have been legislating for.[6]

In interpreting the various employment statutes and finding no express territorial provision, the Labour Appeal Court in *Astral Operations v Parry*[7] found that the statute finds application exclusively within South Africa's borders. Adhering to the presumption against extraterritoriality, Parliament was held to have intended to only legislate for employees who work in South Africa.[8] The corollary is that the Labour Court may then only assume jurisdiction if an employee's workplace is within the Republic, thus

1 K Schweb *The fourth industrial revolution* (2016) at 10.
2 L Merrett 'The extra-territorial reach of employment legislation' (2010) 39 *Industrial Law Journal* at 355.
3 *Monare v South African Tourism and Others* (2016) 37 ILJ 394 (LAC) para 7.
4 MA Cherry 'Regulatory options for conflicts of law and jurisdictional issues in the on-demand economy' (2019) *International Labour Organisation Conditions of Work Series and Employment Series* at 1.
5 *Parry v Astral Operations Ltd* [2005] 10 BLLR 989 (LC) (*Parry*) para 30.
6 S Dutson 'The territorial application of statutes' (1996) 22 *Monash University Law Review* at 78.
7 *Astral Operations Ltd v Parry* (2008) 29 ILJ 2668 (LAC) (*Astral Operations*) paras 2-3.
8 *Astral Operations* (n 7) para 21.

leaving many who work outside South Africa at the mercy of employers who, in trying to avoid South Africa's protective employment legislation, may, for instance, simply post their employees outside the country to a subsidiary.[9] By electing to disengage with the rules of private international law, the Labour Court fails to consider the precarious position those employees working abroad may often find themselves in.[10]

The challenges generated by judgments such as *Astral Operations* may arguably be solved through the application of private international law. While the problems raised confront several aspects of private international law, the focus here lies on the doctrine of mandatory rules. Where a provision or statute is considered mandatory it, in effect, has extra-territorial application. Finding South African labour law as mandatory would dispute the conclusion drawn in *Astral Operations* and subsequent case law,[11] thereby better reflecting the instances in which a claimant may fall within the scope of the relevant statute and be adequately protected. Yet, while much has been written on the historical context and nature of mandatory rules, the suitability of South African labour law as mandatory in nature and the question of when the Labour Court may apply this doctrine remains largely unanswered.

The aim is, therefore, to critically analyse the doctrine and question whether, from a comparative perspective, South African labour law can be considered as fitting within this framework as developed within the European Union (EU) and the United States. The European Union and the United States offer avenues in which the doctrine may be applied — in instances where protection of the weaker party is necessitated — as well as offering an established perspective into the doctrine, particularly in the EU where a formal, standardised framework has been developed.

While an analysis of the doctrine of mandatory rules invites a technical argument into its application, the argument extends to considerations of state interventions within the labour market of a particular territory. If corporations are accountable to the employees they engage within a territory, they should be equally responsible for their employees who engage in production elsewhere.[12] Considering

9 K Calitz 'The jurisdiction of the Labour Court in international employment contracts in respect of workplaces outside South Africa' (2011) 32 *Obiter* at 687.

10 For instance, in *Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry & Others* (1995) 16 ILJ 51 (A) the territorial limits placed on the statute granting the Court with jurisdiction left the employees who were working on an oil rig with no remedy as no court had jurisdiction within those waters.

11 *Schenker South Africa (Pty) Ltd v Robineau and Others* (2019) 40 ILJ 213 (LC); *MECS Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (2013) 35 ILJ 747 (LC).

12 G Mundlak 'De-territorializing labor law' (2009) 3 *Law & Ethics of Human Rights* at 211.

that the purpose underlying the application of labour law is to balance out the inequality that is inherent within an employment relationship, dismissing the responsibility of corporations where that relationship extends beyond a state's borders is intrinsically unequal.[13] That said, where a doctrine such as that of mandatory rules is still in a state of infancy, as it is within South Africa, understanding when and how it may be applied is central to having its purposes fulfilled.

2 Party autonomy and choice of law

A fundamental hindrance to the application of private international law is that the Labour Court, with its jurisdiction firmly held within the Labour Relations Act,[14] cannot proclaim on foreign law.[15] The result of this is that, where the choice of law in an international employment contract is unequivocally a foreign law, the Labour Court will not be able to give an effective judgment and will, thus, have to forfeit its jurisdiction. The prerequisite that South African law must be applicable to the dispute for the Labour Court to be competent in its adjudication gives reason as to why the Court often relies on interpreting statutes on the basis that foreign elements have no bearing on their applicability. The problem, however, lies in the conclusion that these statutes are only applicable to employees who work within the geographical boundaries of the South African Republic.

Where it might be appreciated that the Labour Court has avoided unnecessary litigation by ensuring that no claimant may evoke South African statutory employment rights without working within the Republic, such appreciation must be understood as placing employees in an even more precarious position. A common feature of almost every employment relationship is the imbalance of information.[16] An employer, especially one that engages employees in multiple jurisdictions, will be more familiar with the various legal systems it potentially engages.[17] In having this knowledge, an employer may employ employees to work abroad and sign employment contracts with a South African choice of law clause without consequence.[18] An employee, on the other hand, likely without the knowledge of territoriality and its implications, will see a South African choice of

13 As above.
14 Labour Relations Act 66 of 1995 (LRA).
15 *Parry* (n 5) para 55.
16 U Grusic 'The territorial scope of employment legislation and choice of law' (2012) 75 *Modern Law Review* at 749.
17 As above.
18 While not an express choice, the employer in *Astral Operations*, (n 8), at para 2 made a commitment to follow a retrenchment procedure if South African law was applicable and argued that it was not applicable when enforcing the payment of severance pay following possible retrenchment.

law clause and assume they will be protected by that law.[19] This is not only an injustice to the employee but further an unconscionable limitation on party autonomy in the instances that the parties did reach a genuine consensus on the issue of choice of law. This runs counter to the developments of international commercial practice and, while it remains beyond the scope of this article, it must be mentioned that this further generates legal uncertainty and unpredictability in the scope of cross-border employment.

That said, one of the cornerstones of private international law is party autonomy. In short, party autonomy enables parties to agree on the proper law or *lex causae*.[20] It is recognised in legal systems all over the world and its universal acceptance can be seen in various international instruments.[21] Its recognition is typically due to the certainty it brings to the choice of law enquiry. Having made a choice, parties relieve a court of the often unpredictable task of localising the contract to a particular legal system.[22] Essentially, contracting parties are free to choose the legal system that will apply to all or even just parts of the contract.[23]

It would be erroneous, however, to consider party autonomy as unfettered and, in the same token, to believe that both contracting parties always contract with the same level of bargaining power and freely choose the terms incorporated within. The mere existence of standardised contracts makes this position dubious. More so, employment remains one of those concerns where the bargaining power is known to be unequal. As Davies and Freedland hold, 'labour law is chiefly concerned with [the] elementary phenomenon of social power. And — this is important — it is concerned with social power irrespective of the share which the law itself has in establishing it'.[24] It thus remains imperative to ensure regulation of these facets of inequality to minimise their impact. Under the guise of private international law, limiting party autonomy is one such form of regulation ensured by the forum state.[25]

19 Grusic (n 16) 749.
20 The law that is to govern the contract. See C Kandiyero 'Party autonomy in Brazilian and South African private international law of contract' LLM Dissertation, 2015, University of Johannesburg at 1.
21 Kandiyero (n 20) 1. See also both the Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (Rome Convention); and 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) which recognise the principle of party autonomy.
22 CF Forsyth *Private international law* (2012) at 320.
23 When different legal systems apply to different parts of the contract, this is known as the scission principle. See Forsyth (n 22) 392 for a discussion on the scission principle in the case of immovables.
24 P Davies & M Freedland *Kahn-Freund's labour and the law* (1984) at 14.
25 P Nygh *Autonomy in international contracts* (1999) at 46.

The most prominent dictum on party autonomy is found in the case of *Vita Food Products Inc v Unus Shipping*.[26] Here, Lord Wright held that while a choice of law clause should be honoured, it should be done so only to the extent that it is *bona fide*, legal, and not against public policy.[27] Hence, party autonomy is not absolute. It may be limited in various ways and numerous practices have been accepted by legal systems worldwide. The doctrine of mandatory rules is a common and widely accepted practice in overriding the choice of law. A focus on statutory interpretation, however, devoid of any considerations of private international law prompts the Labour Court to overlook the possibility of applying the doctrine of mandatory rules to disputes where the subjective or objective proper law is foreign law.[28] This results in the Labour Court forfeiting jurisdiction in instances where it is not necessary to do so. More critically, it further strips an employee of protection in instances where the mandatory nature of the forum's statutory provisions, and the subsequent connections that dispute has to the forum, necessitates their protection.

It is appreciated, however, that where misunderstanding of private international law principles and rules persist, statutory interpretation may continue to be a method that the Labour Court relies on in determining whether an employee falls within the scope of a statutory employment right or provision. The rest of this paper is thus dedicated to canvassing the doctrine of mandatory rules, what the doctrine entails, and how and when it should be applied so as to ensure adequate protection of employees as weaker contracting parties.

3 The nature and extent of mandatory rules

3.1 Historical context

The nature of mandatory rules may be traced back to the writings of Friedrich Karl von Savigny who argued that the effects of multilateralism needed to be limited so as to give respect to the laws that he characterised as 'laws of a strictly positive, imperative nature'.[29] The exception to party autonomy has been debated for centuries, yet problems as to the proper application of this exception persist. While the application of conflict rules is common practice today, states have routinely sought to regulate private relationships,

26 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] UKPC 7 para 7.
27 *Vita Food Products Inc v Unus Shipping Co Ltd* (n 26) para 6.
28 A subjective choice of law is one chosen by the parties whereas an objective choice is made when considering all the factors surrounding the contract — it may be said to be connected to a particular legal system which is to apply.
29 Nygh (n 25) 199.

leading to the intervention of economic and political domains that form part of a community with distinct public interests.[30] Mandatory rules have thus been elevated as imperative for not only ensuring the interests of private individuals, but also furthering the economic, political, and social interests of the state.[31]

Having an overriding nature, mandatory rules must accordingly be separated from multilateral choice of law rules. While a statute may determine its territorial reach and, at that, its international application, it does not determine that a statute is mandatory in the sense as described above. Its application may still be affected by the choice of law process, where parties have made an express choice, thereby excluding a foreign statute or a statute of the forum.[32] The corollary is that unilateralism will usually suggest the mandatory nature of a statute. Not all statutes, however, will be considered mandatory in an international sense.[33]

3.2 Domestic and international mandatory rules

Notwithstanding the position where a statute clearly and with utmost certainty demands applicability irrespective of choice of law,[34] there are a number of statutes that are considered mandatory but only insofar as they are applicable as the *lex causae*.[35] These may be termed domestic mandatory rules.[36] This refers to statutes that become directly applicable if and when the choice of law is the law of the forum. A *locus classicus* example is section 1 of the Intestate Succession Act that grants certain rights to a surviving spouse.[37] These rights, while peremptory, may be excluded by simply making the *lex causae* a law other than the law of the forum.[38] Therefore, the rules have no international mandatory application and will only find applicability over domestic contracts or international contracts that have determined such law to be applicable. They have no overriding effect.

30 As above.
31 KAS Schafer *Application of mandatory rules in the private international law of contracts* (2010) at 4.
32 Nygh (n 25) 202.
33 Schafer (n 31) 11.
34 Forsyth, (n 22), calls these 'directly applicable statutes' which have the effect of overriding the choice of law process. An example is section 47 of the Electronic Communications and Transactions Act 25 of 2002 which states that 'the protection provided to consumers … applies irrespective of the legal system applicable to the agreement in question'.
35 Forsyth (n 22) 13. *Lex causae* may be synonymously understood as choice of law.
36 Nygh, (n 25), coins these as domestic mandatory rules, but they have further been termed 'localising rules' or 'dispositions imperative' as found in Article 3 of the French Civil Code.
37 Intestate Succession Act 81 of 1987 sec 1. These refer to the rights that a surviving spouse has to the intestate estate of the deceased. For instance, the right to claim a child's share of the intestate estate under certain conditions.
38 Nygh (n 25) 200.

An international mandatory rule may be explained through the definition as found in the Rome I Regulation.[39] Article 9(1) holds that overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social, or economic organisation, to such an extent that they apply to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.[40]

Without questioning the significance of what might constitute a mandatory rule as per this definition, it is evident that a difference exists between international and domestic mandatory rules. Here it specifies that mandatory rules are rules that must apply irrespective of the chosen legal system. This differs from domestic mandatory rules which, while peremptory, only apply when they form part of the *lex causae*.

This distinction, while nuanced, bears importance. A statute being peremptory is a necessary condition for it to have an international mandatory effect — that is, having an overriding effect on the choice of law process.[41] However, that on its own is not a sufficient criterion for it to be declared an international mandatory rule.[42] The statute must go further and be of a specific nature, underpinned by a particular purpose, for it to justifiably override the choice of law process.[43]

3.3 Purpose of mandatory rules and their relationship to public policy

As already alluded to, the rationale behind mandatory rules is firmly rooted in public interest, that being both the interests of the state as well as the private interests that the state wishes to protect.[44] These have been described as laws that regulate markets and the economy, protection of the interests relating to land, and the protection of monies and securities, the environment, and labour.[45] Protection of private interests is inclusive of protecting those parties economically weaker to a contract. This encompasses consumers, insured parties, and employees.[46]

39 Rome I (n 21).
40 Rome I (n 21) Art 9(1).
41 J Mitchell 'To override, and when? A comparative evaluation of the doctrine of mandatory rules in South African private international law to override and when' (2013) 130 *The South African Law Journal* at 768.
42 As above.
43 A Chong 'The public policy and mandatory rules of third countries in international contracts' (2006) 2 *Journal of Private International Law* at 6.
44 Nygh (n 25) 203.
45 As above.
46 Nygh (n 25) 204.

Beyond this rather ambiguous understanding of what mandatory rules purport to do, there is no regulating framework within South Africa with which to work with. Essentially, any rule may be mandatory where the legislation deems it so.[47] The general difficulty, thus, lies in identifying a mandatory rule as the intention of the legislation and this matter is not always directly expressed.[48] However, public interest is often expressed in a state's public policy. Mandatory rules, therefore, maintain a close relationship to public policy and, as such, have been considered an expression thereof.[49] Public policy demands that a court reject the application of a chosen law when such law offends the 'fundamental values of the forum'.[50] As Mayer puts it, mandatory rules of law are a matter of public policy and reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws.[51]

While the view that mandatory rules are a reflection of public policy might assist in determining whether a rule is mandatory in nature, the proximity at which these two notions exist should not designate them to be one in the same thing. Public policy has an inherent negative effect on the choice of law process, rejecting outright the application of the chosen law.[52] The primary and, arguably, the only aim of public policy is to protect the fundamental values of the forum and does so by refusing the application of a law that offends this.[53] Mandatory rules, on the other hand, are not considered law-rejecting but rather law-selecting.[54] Once a mandatory rule has been identified and selected, the rule must apply. There is no outright rejection of the choice of law, instead, another law is given priority due to its imperative nature.[55] This is usually, and as is the emphasis here, the law of the forum.[56] As Nygh argues, rejection of the chosen law on the grounds of public policy will usually direct the forum to apply another rule from that same legal system and only when this is not available does the law of the forum become applicable.[57]

47 M Wojewoda 'Mandatory rules in private international law: With special reference to the mandatory system under the Rome Convention on the Law Applicable to Contractual Obligations' (2000) 7 *Maastricht Journal of European and Comparative Law* at 189.
48 Wojewoda (n 47) 206.
49 Nygh (n 25) 206.
50 Wojewoda (n 47) 192.
51 P Mayer 'Mandatory rules of law in international arbitration' (1986) 2 *International Arbitration* at 274.
52 Nygh (n 25) 206.
53 Wojewoda (n 47) 193.
54 As above.
55 Nygh (n 25) 193.
56 As above.
57 Nygh (n 25) 193.

Other differences that exist further exemplify the purpose behind mandatory rules. For instance, public policy is considered a discretionary ground whereby a court is usually in the position to determine whether or not a foreign law is offensive to the values of the forum state.[58] Mandatory rules are, however, so pertinent that they demand applicability and denote a compulsory, rather than permissible, nature.[59] The chosen law might, for instance, be acceptable but is overridden for the simple fact that the law of the forum purports to offer more protection to the vulnerable party than does the *lex causae*. Thus, public policy as a limitation on party autonomy will not find application under these circumstances.

4 The mandatory nature of labour law

The history, nature, and purpose of mandatory rules have been the focus of many academic writings and as such, it is not difficult to pinpoint a commonality amongst them. Some opinions may differ slightly and there is no singular concrete definition of mandatory rules that exists on a global scale. However, mandatory rules may, nonetheless, be understood as rules that are so important to a given state, so fundamental to the precepts and functioning of such legal system, and imperative to the economic and political structure thereof, that they must be applied in circumstances that find themselves under the authority of such rules.[60]

As mentioned, the difficulty thus lies in determining which laws fall under this classification. While mandatory rules have been considered in the Labour Court before,[61] their development and acceptance has been slow and taken to in a piecemeal fashion. One reason for this is the enduring application of the presumption against extra-territoriality. With a strong opinion in the Labour Court that South Africa's employment statutes do not possess extra-territorial application, the processes under private international law that are inclusive of the mandatory rule doctrine are frustrated and ultimately overlooked. However, in finding that South African employment statutes are mandatory, it is argued that the Labour Court must abandon its sovereign stance on the application of its employment statutes and 'replace' it with the search for the underlying substantive social, economic, and political relations.[62]

In doing so, the Labour Court may anticipate applying the doctrine over instances where the employment relationship reflects a power

58 Wojewoda (n 47) 193.
59 As above.
60 Nygh (n 25) 199.
61 *Parry* (n 5) para 46.
62 Mundlak (n 12) 205.

imbalance that necessitates extending protection to the weaker contracting party.[63] This further generates a truer reflection of the employment relationship in cross-border disputes since the elements of the relationship, the place of performance (payment and dismissal to name a few), and their localisation may vary from case to case.[64] To reject this approach in favour of upholding employment as having an intrinsic territorial component is, moreover, incongruent to the developments of international commercial dealings where regulatory mechanisms that govern cross-border employment relationships are rooted in private international law rules, methods, and principles.[65] This must, nevertheless, account for the public law component inherent within labour law.

4.1 The public and private dichotomy

Labour law is a hybrid of private and public law.[66] It is a component of private law because a private relationship between an employee and their employer is established by contract and the parties are free to (with exceptions) exercise autonomy over such contracts.[67] These exceptions allude to the public law component as the autonomous and private nature of an employment relationship limited by the regulatory instruments of the state.[68] These instruments place restrictions on the employment relationship in so far as they create mechanisms that act as a countervailing force to the unequal bargaining power that is inherent therein.[69] This duality is expressed both on a domestic and international level. International norms have been enacted primarily through the standards set by the International Labour Organisation that emphasise both collective bargaining and cooperation between employees and their employers as well as calling for individual nation-states to enact protective legislation in line with its standards.[70]

In terms of mandatory rules, a distinction is sometimes made between international mandatory rules of a public and private law nature.[71] Public law norms are considered imperative but the choice

63 See Cherry, (n 4) at 24, where it was argued that choice of law clauses are almost entirely dictated by employers.
64 Y Nishitani 'Protection of weaker parties and mandatory rules' (2007) 50 *Japanese Annual of International Law* at 52.
65 These include, but are not limited to, Rome I (n 22); the Inter-American Convention on the Law Applicable to International Contracts (CIDIP-V) (1994) (Mexico City Convention); the Act on General Rules for Applicable Laws Act No. 78 of 2006; and the Australian Fair Work Act No. 28, 2009 that allow for extra-territorial application of employment law under certain circumstances.
66 *Parry* (n 5) para 48.
67 As above.
68 *Parry* (n 5) para 49.
69 Davies & Freedland (n 24) 18.
70 *Parry* (n 5) para 50.
71 Schafer (n 31) 13.

of law process, a facet of private international law, is, as the name suggests, an application of private law provisions.[72] This is in harmony with the principle of sovereignty, which highlights that states cannot enforce their public laws abroad.[73] The territorial implications assigned to South Africa's employment statutes might then find justification. An encroachment of one state's labour norms onto another could be unwarranted especially when considering public law as an extension of a state's socio-political position.[74] There are, however, differing opinions on the matter.[75] The private and public dichotomy is not so clear cut. Labour law existing within both areas exemplifies this.

International employment contracts blur the distinction further. Working outside their places of residence, employees are reliant almost exclusively on the protective provisions incorporated within their employment contracts. The regulatory mechanisms offered by states is largely dependent on an express choice of law clause being made and in the absence of such, the conflict rules of the state with jurisdiction may vary and in any case be manipulated so as to avoid a certain legal system.[76] International regulatory mechanisms are entirely voluntary and as such may not be of assistance to a given employee. At the same time, collective bargaining, a component of the private nature of labour law, is frustrated at an international level with employers being less likely to be willing to participate and oversight of this being insufficient.[77] Accordingly, when discussing mandatory rules as a doctrine that may offer an avenue of protection over possible injustice, the public and private contradiction should be overlooked at least in the ambit of labour law. As the Swiss Code on Private International Law holds, 'any reference to foreign law encompasses all provisions applicable to the case according to that law and the sole fact that some of them may be characterized as public law cannot make them inapplicable'.[78]

5 Approaches to mandatory rules

Having a public law component does mean, however, that labour law possesses an intrinsic mandatory nature.[79] This, however, must be qualified, as the importance here lies in South Africa's employment

72 Wojewoda (n 47) 194.
73 As above.
74 Wojewoda (n 47) 194.
75 As above.
76 Calitz (n 9) 684.
77 Directorate-General for Internal Policies: Employment and Social Affairs (2011) European Commission: Brussels at 12.
78 Switzerland's Federal Code on Private International Law 1987 (CPIL) Art 13.
79 *Parry* (n 5).

statutes bearing an *international* mandatory nature so that they may justifiably limit a party's choice of law by overriding it.

That being said, it remains necessary to delve into an analysis of the elements of labour law that emphasise an international mandatory characteristic and the approaches that justify their application. This is because even where the conclusion results in South Africa's employment statutes possessing an international mandatory nature, there is still the question of when the courts should seek to limit a party's choice. It cannot be at every instance of an international employment contract where a foreign choice of law clause exists that the Labour Court override such a choice in favour of the law of the forum. Accordingly, approaches to the application of international mandatory rules must be considered.

5.1 The European Union

The approach taken by the EU has been mentioned briefly above and may accordingly be found within the Regulation on the Law Applicable to Contractual Obligations, otherwise known as Rome I. Article 9(1) of this Regulation holds that where a provision is crucial for the safeguarding of the political, economic, and social forums, and there exists a significant public interest in the application of such provision, it may justifiably override the choice of law and be applied.[80]

Accordingly, the approach taken by the EU stresses state interest and close connection.[81] Emphasis should, thus, be put on the word 'crucial' as it appears in Article 9(1).[82] May labour provisions must be considered crucial and if so, what is it about labour law that bears prominence in the mandatory rules enquiry within the EU? The first enquiry should question the purpose of labour law. It has already been noted that labour law seeks to balance out the unequal bargaining power between an employee and his employer.[83] This is simple enough, however, it should bear weight especially in consideration of party autonomy and the limitation thereof. Party autonomy extends a veneer of equivalence that serves to conceal the unequal power balance between the contracting parties.[84] The Regulation recognises this by not only promoting the application of mandatory rules, but further expressing protection to employees in Article 8 that not only holds that provisions offering more protection may not be derogated

80 Rome I (n 21) Art 9(1).
81 Mitchell (n 41) 770.
82 Mitchell (n 41) 762.
83 Davies & Freedland (n 24) 18.
84 As above.

from, but further includes specific objective conflict rules that favour the weaker party.[85]

In terms of overriding mandatory provisions, Grusic opines that labour provisions should be considered internationally mandatory only in so far as they impact the labour market of the forum.[86] This is because there is a personal scope that the state is seeking to regulate.[87] Thus, where provisions are aiming at the misuse of managerial power, they should not have an overriding effect.[88] Provisions that have a personal scope to them are, according to Grusic, those that regulate labour standards such as working hours, anti-discrimination, and minimum wage, to name but a few.[89]

Grusic supports his claim through an analysis of the Posted Workers Directive (PWD) of the EU.[90] Article 3(1) of the Directive holds that Member States (of the EU) must apply the standards therein regardless of what the choice of law might be, where workers have been posted to their territory.[91] The overriding effect of these provisions has been considered by the European Court of Justice (ECJ) as so fundamental that even domestic legislation of a Member State, that claims to be internationally mandatory, cannot override or exclude a provision found within Article 3(1).[92] The ECJ further found Article 3(1) of the Directive to be an implementation of the mandatory rule doctrine in Article 9(1) of Rome I.[93] What this means is that any provision of a forum statute pertaining to any of the matters listed under Article 3(1) will be considered as overridingly mandatory.[94] Where they fall outside these matters, the provision must satisfy the test in Article 9(1) that the provisions are crucial for the safeguarding of the forum's political, economic, and social organisation and that there is a significant public interest in the application of those provisions to justify their application.[95]

85 LM van Bochove 'Overriding mandatory rules as a vehicle for weaker party protection in European private international law' (2014) 7 *Erasmus Law Review* at 147.
86 Grusic (n 16) 746.
87 As above.
88 Grusic (n 16) 746.
89 As above.
90 European Parliament, Council of the European Union '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' (PWD).
91 Grusic (n 16) 743.
92 *Commission v Luxembourg* Case C-319/06 [2008] ECR 1-4232.
93 Grusic (n 16) 744.
94 PWD (n 90). The listed matters include: maximum work periods and minimum rest periods, minimum paid annual leave, minimum rates of pay and overtime, the conditions of hiring workers from temporary employment agencies, health safety and hygiene at work, protective measures for pregnant women and women who have children, and equality of treatment among men and women.
95 As above.

The conclusion drawn by Grusic bears weight, however other approaches that emphasise the protection of the weaker party are notable too. These do not rely on the provision's relationship with the labour market but rather promote a preference for the legal system that offers more protection.[96] In *Unamar v Navigation Maritime Bulgare*, the Court of Justice of the European Communities (EUECJ) implied the overriding mandatory nature of provisions that offer more protection.[97] This case involved the application of a Belgian statute that was held to be an implementation of the EU Directive on self-employed commercial agents.[98] A choice of law clause held Bulgarian law to be applicable, however, the Commercial Tribunal in Belgium held the Belgian statute on Commercial Agency Agreements to be applicable as an overriding mandatory rule.[99]

Eventually, the case was heard in the EUECJ that professed it was up to the forum court to decide whether its law was of an international mandatory nature, implying that statutes that purport to not only implement EU Directives but also go beyond the scope of protection offered, might be considered as such.[100] What this judgment does is reflect the favourability principle in Article 8(1) of Rome I that grants an employee those protective provisions that would have been applicable in the absence of choice.[101] The stark difference, however, is that the EUECJ in *Unamar v National Maritime Bulgare* did not provide definitive answers and left open considerable freedom for courts to use their discretion. Article 8(1), on the other hand, maintains the principle of close connection.[102]

5.2 The United States of America

Since statutes do not often specify their mandatory nature, courts apply their discretion to discern this.[103] Due to this, their approach is often supplemented by American doctrines of governmental interest analysis.[104] This approach emphasises the policies underlying statutes and the interest that each legal system concerned has in applying them.[105] This is outlined in section 187(2)(b) of the American Restatement (Second) Conflicts of Laws where it holds that the forum

96 van Bochove (n 85) 152.
97 *United Antwerp Maritime Agencies NV v Navigation Maritime Bulgare* (Case C-184/12) [2013] EUECJ (*Unamar*) para 20.
98 As above.
99 van Bochove (n 85) 149.
100 *Unamar* (n 97) para 50.
101 M Czerwinski 'The law applicable to employment contracts under the Rome I-Regulation' (2015) 5 *Adam Mickiewicz University Law Review* at 152.
102 van Bochove (n 85) 156.
103 Nygh (n 25) 208.
104 As above.
105 Mitchell (n 41) 771; TG Guedj 'The theory of the Lois de Police, a functional trend in continental private international law — a comparative analysis with modern American theories' (1991) 39 *American Journal of Comparative Law* at 661.

may override a choice of law when application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.[106]

Interest analysis was heavily influenced by American academic, Brainerd Currie. Currie offered the interest analysis framework as an alternative to conflict rules that he argued, created false conflicts between presumed state interests.[107] According to Currie's theory, the first step involves deducing the potentially applicable rules and the policies that underline them.[108] To deduce underlying policy one only has to look at the purpose behind the enactment of a particular rule and the problems it seeks to address.[109] The second step requires determining if a state has an interest in the application of its rule. A state has an interest if its policy is furthered by the implementation of that rule and not necessarily because it has an interest in the subject matter at hand or because the rule is potentially applicable.[110]

The policy concerned must likewise be of a fundamental nature. Guidance as to what a fundamental policy is may be found in the commentary to the Restatement that exemplified policies that are 'designed to protect a person against the oppressive use of superior bargaining power'[111] as fundamental. Arguably then, according to the US approach, are provisions that aim at protecting the weaker party overridingly mandatory as they reflect fundamental policies of the state. These fundamental policies must, nevertheless, be policies that would have been applicable in the absence of choice.

The US approach must be qualified. While section 187(2)(b) may be classified as an application of the mandatory rule doctrine, the interest analysis framework, of which the Restatement embodies, is more closely reflective of the principles underlying public policy.[112] The approach outlined in the Restatement has been classified as an indeterminate approach to the choice of law process that non-arbitrarily and predictably chooses the applicable legal system while preserving protection for consumers and employees by recognizing

106 Restatement (Second) of Conflict of Laws (1971) (Restatement) sec 187(2)(b).
107 JR Ratner 'Using Currie's Interest Analysis to Resolve Conflicts between State Regulation and the Sherman Act' (1989) 30 *William and Mary Law Review* at 729.
108 Guedj (n 105) 686.
109 Ratner (n 107) 729.
110 As above.
111 RJ Weintraub *Commentary on the Conflict of Laws* (2010) at 517.
112 PJ Borcher 'Categorical exemptions to party autonomy in private international law' (2007) 82 *Tulane Law Review* at 16.

overriding public policies of an interested state when those policies are fundamental in an international sense.[113]

Bar this distinction, the two approaches analysed seek to limit party autonomy in relatively the same way. 'Fundamental' may be understood to have the same exceptional application as those 'crucial' policies applied in the EU. Accordingly, both Rome I and the Restatement look towards the application of overriding provisions as exceptional to the choice of law process. When it comes to the protection of weaker contracting parties, the US approach is certainly clearer in its regard for the policies possessing an international mandatory nature than is the approach in the EU. However, both would arguably maintain that these provisions cannot supplement a chosen legal system that aims at serving the same purpose as the forum's rule.[114]

6 Mandatory rules in South African labour law

The first point of departure when considering the mandatory nature of South Africa's labour legislation must be the Constitution. Having elevated labour rights as constitutionally imperative, they form part of the country's public policy.[115] The statutes themselves reinforce this position. To this end, reference is only made to the Labour Relations Act (LRA),[116] Basic Conditions of Employment Act (BCEA),[117] and Employment Equity Act (EEA)[118] as they are significant in providing the rights and duties that the constitutional provision relating to fair labour practices envision.[119] The purposes of these statutes further illustrate their constitutional importance. Both the LRA and BCEA aim at fulfilling section 23 of the Constitution as well as the Republic's commitments to the obligations set out by the ILO.[120] The EEA goes even further and specifies its aim as promoting the constitutional right to equality by eliminating discrimination in the workplace.[121] Accordingly, if the chosen legal system acts against these purposes it may be rejected on the grounds of public policy.[122]

113 Ratner (n 107) 708.
114 H Buxbaum 'Mandatory rules in civil litigation: status of the doctrine post-globalisation' (2008) 18 *Article by Maurer Faculty* at 36.
115 K Calitz 'Globalisation, the Development of Constitutionalism and the Individual Employee' (2007) 10 *Potchefstroom Electronic Law Journal* at 7.
116 LRA (n 14).
117 Basic Conditions of Employment Act 77 of 1997 (BCEA).
118 Employee Equity Act 55 of 1998 (EEA).
119 Constitution of the Republic of South Africa, 1996 (Constitution) sec 23.
120 LRA (n 116) sec 1; BCEA (n 117) sec 1.
121 The aim of the EEA, (n 118), specifies that it, in recognition of the injustices faced during apartheid, aims to, *inter alia*, promote equality and anti-discrimination in the workplace.
122 Calitz (n 115) 7.

Mandatory rules have been discussed above as an expression of a state's public policy, albeit it with the former being so imperative as to demand its application. One may comfortably conclude then that South Africa's labour law is of a mandatory nature. This is in further consideration of the fact that the nature of labour law, as being closely linked to a state's socio-economic position, commands it to be mandatory. However, the impact here must not only be that it possesses a mandatory characteristic, but that such characteristic demands it to override the choice of law process. It must go beyond mere public policy and not reject the chosen law, but displace it in favour of the law of the forum. That said, the international mandatory nature of labour law in South Africa has been considered before, deriving influence from the Rome I Regulation.

In *Parry v Astral Operations*, the Labour Court made mention of the constitutionalism of labour rights in South Africa, holding that it strengthens the protective elements of this ambit of the law.[123] Party autonomy must, thus, exist within the limits of the Constitution. These limits are regulated by the employment statutes and so, there may be room to argue that the application of the LRA, for instance, may be justified as overriding a foreign choice of law. In *Parry*, the Court further justified the limitation of party autonomy by referring to the Rome Convention (the predecessor to Rome I). Emphasis was made on the protection the Convention offers to employees by not allowing parties to deprive them of the mandatory rules that would be applicable in the absence of choice.[124] Further holding that the Republic is not bound by the Convention, the Court rightly maintained that it was time to consider it as it would be in accordance with section 39(1)(b) of the Constitution, that which directs a court to consider international law.[125] The approach taken by this court is unequivocally one that favours protection to the weaker contracting party, arguing that a choice of foreign law cannot avoid the protection of South Africa's labour law.[126]

A similar approach was seen in *August Läpple (South Africa) v Jarret* where the Labour Court held that external companies cannot avoid South Africa's labour laws by contractually claiming that persons posted to their subsidiaries are not employees when the LRA clearly defines them as such, arguing further that it would seriously disadvantage the South African citizens who work for these companies.[127] The protection offered to employees was thus justified as treating labour law in South Africa as overridingly mandatory. The

123 *Parry* (n 5) para 53.
124 *Parry* (n 5) para 70.
125 Constitution (n 119) sec 39.
126 *Parry* (n 5) para 72.
127 *August Läpple (South Africa) v Jarret & others* (2003) 12 BLLR 1194 (LC) (*August Läpple*) para 46.

same is seen in *Kleinhans v Parmalat SA* where jurisdiction (and accordingly choice of law) was assumed in favour of the Republic because failure to do so would put the applicant at risk of losing his constitutional right of access to courts.[128] Here the dispute concerned, *inter alia*, the identity of the true employer as Kleinhans was seconded to Parmalat Mozambique (PM). PM was not a party to the dispute brought in by the South African Labour Court.[129] Two contracts were drafted, a three-year contract concluded in South Africa and a one year contract concluded in Mozambique. The Court argued that by declining jurisdiction, the applicant could face proceedings in Mozambique against Parmalat Mozambique over the one-year contract. Kleinhans would, accordingly, be without any right of recourse over the three-year contract if the Court were to decline jurisdiction and he were to be unsuccessful in Mozambique.[130]

The justification here was undoubtedly the significance of the Constitution and the necessity it carries in having its provisions (as well as its underlying values) fulfilled. The right of access to courts is not inherently a labour right, however, it is clearly evident that the Labour Court is willing and arguably obligated to protect the constitutional rights of employees as weaker contractual parties.[131]

It may, thus, be fair to conclude that labour rights that are embodied within the various employment statutes in the Republic are overrridingly mandatory insofar as they purport to protect employees from the inherently unequal bargaining power they hold against their employers. The approach is embodied both in the EU and the US where recognition is given to the need to protect weaker contracting parties and should be welcomed in the South African Labour Courts. As Mundlak notes, the erosion of state power to control the market and society has challenged the democratic legitimacy of labour law, but in alternative norm-making venues, such as at the sector level or in multinational companies, no alternative democratic fora have been established.[132]

Accordingly, there is a real risk of creating and sustaining a gap in the protection that an employee, who works on a globalised scale, is entitled to when labour laws are considered strictly territorial. However, while the approaches in the EU and US are qualified in some way, the use of mandatory rules in the South African Labour Court is somewhat arbitrary in that it manifests as an unquestioned imposition of constitutional values over the choice of law process — as seen in the brief discussion of the abovementioned cases. This may be attributed to the conflicting jurisprudence arising out of cross-border

128 *Kleinhans v Parmalat SA (Pty) Ltd* (2002) 23 ILJ 1418 (LC) (*Kleinhans*) para 47.
129 As above.
130 *Kleinhans* (n 128) 47.
131 Calitz (n 115) 11.
132 Mundlak (n 12) 192.

employment disputes in the Labour Court that have obscured the application of private international law rules and principles at the detriment of employees.[133]

7 When should the South African Labour Court apply the doctrine of mandatory rules?

The implication here is not that constitutional rights and statutes enacted in accordance with them are not internationally mandatory or are not justified in overriding the choice of law process. The importance here is that while they may possess an international mandatory characteristic, there must be an approach that expressly warrants their application. Seeing as labour rights are constitutionally imperative, it would seemingly imply that at every instance where they are called into question, the Labour Court will apply South African law regardless of choice. As seen in the approaches both in the EU and the US, this cannot be the case. As Rome I maintains, the application of overriding mandatory rules must be exceptional and justified by a close connection with the forum. Similarly, in the US, overriding a choice of law is rationalised by the law of the forum being the law applicable in the absence of choice.

Evidently, the few times the Labour Court has approached the application of mandatory rules has been at the instance of offering protection to the employee. Protective rules, however, should only be classified as internationally mandatory when they pursue a public interest amidst the protection of the private interests concerned.[134] While the US approaches protective rules as a justifiable reason to override a chosen law (as seen in the Commentary to the Restatement), the EU is far more restrictive. In South Africa, the protection of fundamental rights is a public interest. Accordingly, where the statutes aim at protecting these rights, there should be no doubt that the rule is internationally mandatory.[135] There is, furthermore, no question that the South African forum has an interest in the application of these rights — there is an underlying value of constitutionalism within the jurisprudence of South African law.[136] Being the supreme law, it may be interpreted in a similar light to the

133 See for instance, U Grusic 'Recognition and enforcement of judgments in employment matters in EU private international law' (2016) 12 *Journal of Private International Law* at 531 where it is argued that while employers are equally deserving of statutory protection, they rarely ever sue employees because they have a number of other avenues at their disposal; for instance, salary deductions, internal disciplinary procedures, and dismissal to name but a few.

134 Schafer (n 31) 311.

135 *Parry* (n 5) para 35.

136 C Fombad & E Kibet 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* at 348.

Directives found within the EU. Looking towards the US, where a chosen law would be contrary to these fundamental constitutional values, there is justification in overriding it. It would be a mistake to overlook the overriding nature of the EEA, for instance, which opposes discrimination, considering the socio-political importance the South African Republic bears in upholding equality.[137]

What of something like unfair dismissal, a provision which is not innately associated with a constitutional right? When considering the mandatory nature of a rule, it has been noted that the underlying policies behind such a rule must be considered.[138] These policies will reflect the state's political and economic interest in having the rule apply. Unfair dismissal in the EU has been noted as not having an international mandatory characteristic as it does not directly affect the labour market and reflects private, rather than public, interests. In South Africa, the inclusivity of this provision arose out of the Republic's dedication to the ILO.[139] This is illustrated by the wording within Chapter VIII of the LRA[140] as it draws significantly from the ILO Convention 158.[141] The policies underlying the rule might very well then justify the state's interest in having it applied as the state is undoubtedly interested in ensuring its international obligations are fulfilled, such as the purpose of making a commitment to them. The Labour Court should, when faced with the possible application of mandatory rules, question whether there is a fundamental public interest in having the rule apply. If constitutionally associated, the interest is a given. If not, the investigation must go further and question the purposes behind the enactment of the provision in the first place.

However, when speaking of international mandatory rules, the effect is the extension of the rules' scope of application.[142] While it may be easy enough to substantiate the Republic's interest in having a labour provision applied by canvassing the protection that it is constitutionally mandated to uphold, there still remains the question of when this protection should be extended. While the approaches in the EU and the US differ slightly, there exists in both a connection to the forum rule that further reinforces the state's interest in having the rule apply.

A close connection may manifest within the choice of law enquiry in the consideration of conflict rules that allocate a connection

137 E Mureinik 'Bridge to where? Introduction to the Interim Bill of Rights' (1994) 10 *African Journal on Human Rights* at 32.
138 Schafer (n 31) 18.
139 A van Niekerk et al *Law@work* (2018) at 237.
140 Chapter VIII of the LRA, (n 116), deals specifically with unfair dismissals.
141 International Labour Organisation Termination of Employment Convention, 1982 (No. 158).
142 Schafer (n 31) 311.

between the contract and a particular legal system in the absence of choice. The doctrine of mandatory rules remains a component of the choice of law enquiry. Accordingly, a close connection must be maintained and must also go further by considering conflict rules that reflect both the public interests of the forum and the interest of the contracting parties in the application or non-application of a rule.[143] In Rome I, the important connecting factors are the habitual place of work or where that is inapplicable, the place where the business that engaged the employee is situated.[144] Another connecting factor that is not inclusive in Rome I, but is submitted here for consideration, is the domicile or residence of the employee. If public interests are contemplated and the impact of the labour market is included in such contemplation, as it is in the EU, then a connection that arises from the South African domicile or residence of one of the parties should be noted as a sufficient connection.

Domicile and residence are personal connecting factors that create relationships between a person and a territory, tying them to a territorial legal system.[145] Where an employee is domiciled in South Africa, they will inevitably fall back on the Republic in the case of unemployment, thus affecting both the economy and the labour market.[146] It is reasonable to conclude then, that the forum will have an interest where the employee is domiciled or resident in the South African Republic and that a sufficient connection exists to justify an intrusion of the forum's law over the choice of law process. In the instance that the employee is not domiciled or resident in South Africa, but the company that employed them is, the connection may still be relevant. It should, however, be qualified that in such an instance, the necessity in applying the forum's mandatory rules arises in an attempt to restrain South African companies from evading the protective legislation of the forum by posting employees to their subsidiaries.[147]

With the approach in the Labour Court emphasising the protection of the weaker party as the basis for the application of overriding mandatory rules, it means that at the very instant that the chosen foreign law offers such protection and inadvertently fulfils any constitutional objective, the forum should not apply its own laws.[148] Even where the law of the forum offers more protection than the chosen law, it is not enough to justify an intrusion. While the EUECJ in *Unamar* implied a preferential approach in applying the legal system that offers the most protection, it should be submitted that

143 Schafer (n 31) 306.
144 Rome I (n 21) Art 8(2)-(3).
145 M Uddin 'Domicile as a personal connecting factor: An assessment of judicial decision' (2018) 1 *International Journal of Global Community* at 294.
146 Uddin (n 145) 293.
147 *August Läpple* (n 127) para 46.
148 Nygh (n 25) 205.

where the chosen law offers enough protection and does not frustrate the socio-political and economic standards of the forum, there is no reason to override it.

On this note, however, a final remark should be made on the BCEA. It has been mentioned that international mandatory rules are a direct application of unilateralism. Some statutes, however, expressly or implicitly render themselves directly applicable.[149] Accordingly, in direct contrast to the position held in the Labour Court,[150] it is held here that the BCEA is one such statute. The implication of section 5 that holds that the 'Act takes precedence over *any* agreement'[151] may be interpreted to include international contracts. If that is an overstatement, there is still room to argue that a local employer would not be able to avoid the BCEA by choosing a foreign law to govern the contract and employing individuals to work abroad in their subsidiaries.[152]

8 Conclusion

The scope of mandatory rules is vast, however, the development of this doctrine in South Africa has been rather slow. The attempt has been to canvas how the Labour Court may apply the doctrine when approached with an international employment contract. The conclusion drawn is that the three employment statutes discussed, that seek to regulate the employment relationship, possess a mandatory characteristic with the exception of the BCEA being implicitly unilateral. They are mandatory in an international sense due to their intrinsic link with the fundamental values and rights embedded within the Constitution. This may be furthered by arguing that the Constitution itself accentuates the application of these statutes as mandatory under section 39(2) which highlights the necessity of interpreting statutes in line with the Bill of Rights.[153] Not only that, but the same section stresses the development of the common law consistently with the Bill of Rights.[154] Accordingly, the use of mandatory rules to ensure the protection of fundamental rights, predominantly rights that protect employees, is constitutionally sound.[155]

The concern is, therefore, not so much whether the statutes and their provisions mentioned herein may be considered as international

149 Forsyth (n 22) 15.
150 In *Astral Operations*, (n 8), the Court specifically rejected the extra-territorial reach of the BCEA.
151 BCEA (n 117) sec 5 [own emphasis].
152 Forsyth (n 22) 15.
153 Constitution (n 119) sec 39(2).
154 As above.
155 Calitz (n 115) 9.

mandatory rules, but rather when it would be appropriate to limit party autonomy through the use of this doctrine. Ultimately, any rule may be mandatory if the legislature deems it to be and courts, being inclined to use their discretion to discern whether a rule is mandatory, may very well be inclined to apply their own laws when there is a connection to the contract that might justify them doing so.[156] As articulated, a connection is but one precondition to having the doctrine apply and the connection itself must be one that encompasses the interests of the forum state and the parties concerned. The contract having been concluded in the forum with jurisdiction, for instance, is not enough.

The mandatory rule enquiry, therefore, requires judges to play an active role in establishing the preconditions that justify limiting party autonomy. In the Labour Court, it also requires them to reject territoriality as a foregone conclusion to international employment contracts. Having established the mandatory nature of the Republic's employment statutes, there should be significant doubt placed on the ruling that the statutes have no extraterritorial reach. Under certain prerequisites that have been outlined, these statutes certainly find application in disputes with foreign elements. Accordingly, private international law principles should find application in the Labour Court when adjudicating over an international employment contract. Even where foreign law is seemingly present within a dispute, the Labour Court has the opportunity to nonetheless impute the law of the forum and maintain its jurisdiction when it is necessary for the protection of its own interests and the interests of the parties.

156 van Bochove (n 85) 156.