Jurisdictional Clauses in Platform Work Contracts: A Danish Perspective

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ABSTRACT

Recent technological developments have increased the need for a restatement of some of the prescriptive concepts in labour law, consumer law, completion law, contract law as well as in other areas. Many researchers have increased their scrutiny of these concepts, and for this special issue of the Nordic Journal of Commercial Law, this article tries to deal with what might be an overarching legal issue - the issue of where to solve potential disputes.

This paper is both investigative and exploratory in nature. Using doctrinal research method, and two examples, the author examines the possible legal approaches to disputes arising from work contracts entered into by individuals and platform companies.

The analysis of two different jurisdictional clauses takes into account the character of the subject in the main contract, and finds potential difficulties and consequences in applying the current PIL regime to the sui generis contracts of the platform economy.

Following the conclusions, while based on inductive reasoning, it could be hypothesized that there is a need for a restatement of some concepts in PIL.

This paper argues, based on two examples, that jurisdictional agreements in platform work contracts, and the rules governing them, cause uncertainty and unpredictability. Further studies need to be done to support this.

1. INTRODUCTION

Most contracts of work involve parties located in the same country, wherefore the question of jurisdiction does not need much consideration. However, in contracts with an international aspect these questions can be of great importance, and jurisdictional agreements can create predictability in the legal relationship.

That the standardized patterns of both the social and economic regulation of labour are changing can hardly be contested.[1] The prevalence of standard employment contracts as the means of engaging in remunerated work, is declining around the world.[2] In recent years a new phenomenon, the platform economy, has introduced a new international aspect to the world of work. The digital nature of the platform economy opens up the possibility of cross-border work contracts different from the ones we know.

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[1] Alain Supiot (ed), *Beyond Employment* (OUP 2001) 2.

[2] Katherine V.W. Stone, 'The Decline in the Standard Employment Contract: Evidence from Ten Advanced Industrial Countries' (2012) SSRN <https://ssrn.com/abstract=2181082> accessed May 29th 2018.

1.1. THE PLATFORM ECONOMY AND WORK

The platform economy has been debated, publicly and scientifically, for around a decade. In short, a platform is a digital location, where users of different characteristics can obtain information and interact, socially or economically.[3] The platform economy is a term used to encapsulate the economic transactions and business models that unfold within the framework of the platforms.

The platforms of interest in this article are the ones that provide access to labour, as opposed to the ones that provide access to capital goods.

There is no consensus on what exactly comprises 'platform work'. Neither in the political/media discourse or in the academic debate is the term used systematically.[4] This conceptual confusion blurs the debate, but for the purpose of this article the concept of platform work is seen as a specific manifestation of the broader online platform economy, more precisely one involving the provision of labour.[5] The labour can be of a digital or manual nature but the platform has to be involved in some way other than by presenting static information on a website. The platform can play a role in either the organisation of the work in the production process and/or in the provision of the labour itself.[6] This article focuses only on platforms where labour is the principal service, which clearly distinguishes them from the capital platforms. In this article work platforms are exemplified by the cases of Clickworker[7] and Taxify[8] that are both described below. The two examples have been chosen because they both include jurisdictional clauses in their terms and conditions of use (T&C) and because Clickworker is, and Taxify aims to be, available in Denmark.

For the purpose of this article the term *service providers* covers the individuals performing the labour. The term *platform* is used to describe the company that connects the labourer and the entity that is in need of labour – the latter covered by the terms *user* or *customer*.

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[3] Sacha Garben, 'Protecting Workers in the Online Platform Economy: An overview of regulatory and policy developments in the EU' (European Agency for Safety and Health at Work 2017), 9 (Garben: Protecting Workers) <https://osha.europa.eu/en/tools-and-publications/publications/regulating-occupational-safety-and-health-impact-online-platform> accessed May 29th 2018.

[4] Cristiano Codagnone and Bertin Martens, 'Scoping the Sharing Economy: Origins, Definitions, Impact and Regulatory Issues' (2016) Institute for Prospective Technological Studies Digital Economy Working Paper 2016/01 <https://ssrn.com/abstract=2783662> accessed May 29th 2018.

[5] Garben: Protecting Workers, 11.

[6] Ibid.

[7] Clickworker <www.clickworker.com> accessed May 29th 2018.

[8] Taxify <www.taxify.eu> accessed May 29th 2018.

As far as the Nordic research agenda on platform economy is concerned, the scholarly angles have been vastly different.[9] A common denominator in much of the international research and a critical factor in any labour law debate is the classification issue concerning the 'service providers'. Are they independent contractors, employees or something in-between? As Trebor Schulz writes, '*the question of misclassification might seem overly technical, inessential, or even esoteric … '*,[10] for the uninitiated, but as this article will show, the question can have far-reaching implications for the parties involved – not just in a labour law context.

In most Member States, the lack of an *employment relationship* means that labour law is inapplicable.[11] The platforms have been accused of misclassifying their service providers as *independent contractors* to avoid labour law obligations.[12] The response from the platforms has mainly referred to the contracts that state that the service providers are not employees and that the platforms only provide a technology service.

To rectify a potential classification issue through litigation, the question of jurisdiction must first be answered. When a service provider enters into a contract as an independent contractor, he often accepts terms that potentially reduce his chances of successful litigation, by reducing the number of jurisdictions available to him. The validity of such jurisdictional clauses is therefore interesting.

As this article will show, the question of jurisdiction depends on the outcome of a 'classification debate' as well. As long as there is doubt regarding the classification, there will be doubt as to the validity of the jurisdictional clauses, which will be a source of unpredictability instead of predictability.

This article examines what issues Member State judges, in casu a Danish judge, must consider, what instruments and principles are applicable and how the validity of the clauses will be assessed.

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[9] See for example Marie Jull Sørensen, 'Private Law Perspectives on Platform Services' (2016) Journal of European Consumer and Market Law, Volume 5, Issue 1, 15, Jane Bolander, 'Deleøkonomi og Skat' in Peter Møgelvang-Hansen (ed), *Liber Amicorum* (Ex Tuto 2016), and Marianne Jenum Hotvedt, 'Arbeidsgiveransvar i formidlingsøkonomien? Tilfellet Uber' (2016), *Lov og Rett*, Volume 56, Issue 8, 484.

[10] Trebor Scholz, *Uberworked and Underpaid* (Polity Press 2017) (Scholz 2017), 129.

[11] Garben: Protecting Workers, 15.

[12] The Labour Court in Paris decided that Uber and their service providers were bound by no employment contract, in the judgement of January 29th 2018 in the case F 16/11460 *Florian Menard v Uber* < www.diritto-lavoro.com/wp-content/uploads/2018/02/sentenza-del-29-gennaio-2018.pdf> accessed May 31st 2018 (English translation); The Employment Appeal Tribunal in London reached a different conclusion, and considered the service providers to be 'workers' in a British context, see *Uber B.V. and Others v Mr Y Aslam and Others* [2017] UKEAT/0056/17/DA.

1.2. THE PLATFORMS

This section presents the two example platforms, which represent two of the archetypes of the platform economy, crowdsourced digital work and transport services.

1.2.1. CLICKWORKER

Clickworker is a German platform that 'utilizes the knowledge of the crowd'.[13] The concept, in short, is based on a database of service providers (Clickworkers), willing to work, and a line of customers with tasks to be solved. Prior to offering any tasks, the platform collects information on the service providers' skills, knowledge and interests.[14] The platform has a full-service solution and a self-service solution, each indicating a different level of engagement from them. Both products involve breaking down large and complex tasks into *microtasks* that can be solved by an individual. Microtasks may vary from translating longer texts to performing one simple search on Google.com and reporting the results. After the service provider has completed the task, the platform ensures the quality by different means, including statistical process control, audits and peer review. If the work performed is 'inadequate and unsatisfactory' no payment is made.[15] The service provider is offered tasks at a piecemeal rate and the platform handles the remuneration.

1.2.2. TAXIFY

Taxify is an Estonian platform with an international transportation network. The concept is based on a smartphone application, an app, which allow people to request personal transportation services.[16] A user in need of the service can enter a request in the app and the platform then searches for an idle service provider. The platform then offers the task to the assigned service provider and if accepted he is dispatched. The service provider picks up the user in his own car and drives to the destination after which the payment is made. The service providers are considered to be independent contractors.[17] The platforms collect information on the service providers' activity level, rate of acceptance

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[13] Clickworker, 'About clickworker' <www.clickworker.com/about-us> accessed May 29th 2018.

[14] Clickworker, 'Our crowd – the Clickworkers' <www.clickworker.com/about-us/clickworker-crowd> accessed May 29th 2018.

[15] Clickworker, 'General Terms and Conditions (Clickworkers)' <https://workplace.clickworker.com/en/agreements/10123> (Clickworker T&C), 3.1.

[16] The business model is very similar to that of Uber, which has become notorious around the world. For a thorough analysis of the business model, that covers everything from philosophy, ethics, economy, business and law, see Henry Schneider, *Uber: Innovation in Society* (Palgrave Macmillan 2017) (Schneider: Uber).

[17] Taxify, 'General Terms for Drivers' <https://taxify.eu/da/legal/terms-for-drivers> (Taxify T&C), para 10.4

and location, which together with the users' ratings are used for suspending underperformers, temporarily or permanently.

2. JURISDICTION, AGREEMENTS AND PLATFORM WORK

The issue of jurisdiction is usually the first one to present itself in a transnational case.[18] The EU Commission estimates that almost 70 % of European cross-border contracts on goods and services involve a jurisdictional agreement.[19] Allowing the parties to choose the jurisdiction creates legal certainty and predictability and party autonomy is therefore of paramount importance in International Private Law. [20] An exclusive agreement can either concern prorogation or derogation, by expressly pointing out that proceedings must or must not be brought in a specific forum. A non-exclusive agreement points out a specific forum, but does not restrict the parties, retaining some flexibility, at the expense of predictability.

If a service provider located in Denmark works via a digital platform with its base in Germany, there is a possible conflict of interest. Both parties might wish to pursue litigation in a specific forum. Most probably, each party will prefer to pursue litigation in his home country, as there are usually several obvious advantages over litigating in a foreign system.

2.1. AGREEING

In the platform economy, the business model is reliant on the streamlined infrastructure of a strong and experienced actor for it to be able to reach its goals of lower transaction costs and thereby profit.[21] Oftentimes, the platform's strongest bargaining chip is the access to the market, in other words, Taxify's passengers are only available through Taxify's platform.[22] If the platforms holds the key to a market with large access costs, this places them on top in the negotiation process. The service providers, on the other hand, regardless of their legal status, are alone. They presumably do not have a team of legal experts advising them, and they might not have the competencies to understand the boilerplate language in a standard contract. As many of the service

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[18] Ketilbjørn Hertz and Joseph Lookofsky, *Transnational Litigation and Commercial Arbitration* (4th edn, DJØF 2017) (Hertz & Lookofsky 2017) 471.

[19] Commission, 'Staff Working Paper, Impact Assessment', SEC (2010) 1547 final, 29.

[20] Peter Arnt Nielsen, 'Exclusive Choice of Court Agreements and Parallel Proceedings' in The Permanent Bureau of the Hague Conference on Private International Law, *A Commitment to Private International Law. Essays in Honour of Hans van Loon* (Intersentia 2013) 409.

[21] Scholz 2017, 43.

[22] Taxify connects two groups of people and thereby creates the market. The first group has idle capacity and would like to exchange it on the market, and the other group has a demand for the capacity and would like to pay for it, cf. Schneider: Uber, 29ff.

providers are oftentimes working through the platforms only to supplement their income,[23] they are possibly inclined to accept terms they otherwise would not, when the contract is offered as one of adhesion, in the sense that it is presented on a "take it or leave it" basis. This could mean that the ones that rely solely on the platform to make a living, are forced to accept the same terms.

2.2. RELEVANCE

Whether or not the parties can rely on the jurisdictional agreement is in itself important as the purpose is to ensure a high degree of legal certainty and predictability. Furthermore, a binding jurisdictional agreement can have the effect that a party is prevented from relying on mandatory rules that would have been applied, if another court had jurisdiction. This is especially relevant in the borderline territory of labour law, where most of the rules cannot be derogated from to the detriment of an employee. If the status of a service provider is unclear, the question arises as to what provisions govern the validity of the jurisdictional agreement, and therefore according to which law the existence of a relationship is going to be assessed. A service provider might be considered an employee in one Member State and an independent contractor in another. As will be shown below, the jurisdictional regime assumes inequality in the employment relationship, wherefore protective measures apply.[24]

2.3. LEGAL INSTRUMENTS

In assessing jurisdictional agreements, the first step is to decide which legal instrument to apply.[25]

Denmark's national rules on territorial jurisdiction are found in part 22 of The Administration of Justice Act.[26] However, following paragraph 247, the act's international jurisdictional rules yield for the Brussels I Regime. Denmark recently ratified the 2005 Hague Convention on

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[23] Anna Ilsøe and Louise W. Madsen, 'FAOS Research Paper 163' (2018) IRSDACE – National Report Denmark, 4.2.1.2. <https://faos.ku.dk/publikationer/forskningsnotater/fnotater-2018/Fnotat_163_-_Industrial_Relations_and_Social_Dialogue_in_the_Age_of_Collaborative_economy__IRSDACE_.pdf> accessed May 29th 2018.

[24] Hertz & Lookofsky 2017, 110.

[25] Alameda C., Alfonso et al., 'Choice-of-court agreements under Brussels I Recast Regulation', Escuela Judicial (Spain), 3. <www.ejtn.eu/Documents/Themis%20Luxembourg/Written_paper_Spain1.pdf> accessed May 29th 2018.

[26] LBKG nr. 1101 af den 22. september 2017, Retsplejeloven [The Administration of Justice Act].

Choice of Court Agreements.[27] Jurisdictional agreements relating to contracts of employment are expressly excluded from the scope of the Convention.[28] The Convention does not, however, change the state of the law relating to intra-EU cases, wherefore it will not be discussed further in this article.

The Brussels I Regulation governs issues of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[29] Denmark is opting out from the Community cooperation in a number of areas, including the field of justice, wherefore the Regulation as such does not apply. However, due to a bilateral agreement between EU and Denmark, the rules of the Regulation apply regardless. This distinction will not be examined further, and the Regulation will be applied in a Danish context as is.

The general principle of Brussels I is that jurisdiction is dependent on the domicile of the defendant.[30] Article 4 states that a defendant, whatever his nationality, can be sued in the courts of the Member State in which he has his domicile. The objective of the domicile jurisdiction, and of the Regulation, is inter alia, to: " … *ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen.*"[31] If the dispute regards certain matters, including insurance, consumers or employment, it is for the plaintiff to choose either the general or a special jurisdiction.[32]

Article 25 governs jurisdictional agreements and has two purposes: giving the parties freedom to choose and limiting that power, reasonably.[33] To make sure that the jurisdictional agreements strike the right balance, certain conditions of validity are put in place,[34] and it is a prerequisite for the validity of a jurisdictional agreement that it satisfies all formal and material conditions in article 25.[35]

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[27] LOV nr. 670 af den 8. juni 2017, Lov om ændring af retsplejeloven, lov om Bruxelles I-forordningen m.v. og forskellige andre love [Act amending the Administration of Justice Act and various other laws].

[28] Hague Conference on Private International Law, Hague Convention on Choice of Court Agreements, June 30th 2005, art 2(1)(b).

[29] Council Regulation (EC) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 (Brussels I).

[30] Brussels I, art 4.

[31] Brussels I, recital 16.

[32] Peter Mankowski, 'Article 7' in Ulrich Magnus and Peter Mankowski (eds), *Brussels Ibis Regulation: Volume I* (Verlag Dr. Otto Schmidt 2016) (M&M: Brussels Ibis), note 1.

[33] Ulrich Magnus, 'Article 25' in *M&M: Brussels Ibis*, note 1.

[34] Case 25/76 *Galeries Segoura SPRL v. Société Rahim Bonakdarian* (1976) ECR 1851, para 6.

[35] Magnus (n 34), note 75.

2.4. APPLICATION

This section presupposes a dispute between a service provider located in Denmark and the two platforms, Clickworker[36] and Taxify.[37] The service provider is presumed to institute proceedings in Denmark.

2.4.1. CLICKWORKER

Clickworker uses the following clause in its standard terms:

> "Insofar as this is legally permissible, Essen shall be the exclusive venue for any legal disputes arising out of the business relationship between Clickworkers and clickworker"[38]

From the wording of the clause, it is safe to presume that the intention is to confer exclusive jurisdiction to the courts of Essen, Germany.

For the Danish court to assess the jurisdictional clause, it first has to decide whether the dispute falls within the scope of the Brussels I Regulation. Article 1(1) of the Regulation states that it applies in *civil and commercial matters*. The definition of such matters is not given in the Regulation itself, but it is generally accepted in both the literature and case law of the European Court of Justice (ECJ), that all litigation between private parties fall within the scope of the Regulation, except when the case is excluded by subject matter.[39] Employment law is specifically included as there are special provisions on the matter in section 5.

Next, the court has to assess whether the courts of a Member State have exclusive jurisdiction following article 24 of the Regulation. Exclusive jurisdiction bypasses all other general and special rules of jurisdiction and cannot be derogated from by agreement.[40] The case at hand is not subject to exclusive jurisdiction.

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[36] Not only is Clickworker accessible from Denmark, they have actively sought out workers here as well by placing job ads online, cf. Jobindex, 'Internet Research/Dataindsamling' <www.jobindexarkiv.dk/cgi/showarchive.cgi?tid=h683856> and Jobindex, 'Tekstforfattere og korrekturlæsere' <www.jobindex.dk/vis-job/h669070> both accessed May 30th 2018.

[37] Taxify is not currently active on the Danish market but they are present in several European countries, e.g. Austria, Czech Republic, Hungary, Poland and the Baltic countries. Taxify has stated that they are looking to enter the Danish market following Uber's goodbye, cf. The Copenhagen Post, 'Taxify eyeing Denmark following Uber's demise' (March 31st 2017) <http://cphpost.dk/news/business/taxify-eyeing-denmark-following-ubers-demise.html> accessed May 30th 2018.

[38] Clickworker T&C, para 8.3.

[39] Pippa Rogerson, 'Article 1' in *M&M: Brussels Ibis*, note 16.

[40] Luís de Lima Pinheiro, 'Article 24' in *M&M: Brussels Ibis*, note 3, cf. Brussels I, art 25(4).

The next matter at hand is to examine whether the claimant falls within one of the protected categories in Brussels I. These protected categories are comprised of what is seen as weaker parties in the need of protection from standard clauses in contracts.[41] The protection consists of provisions placing the 'weaker party' in an intermediate position between the exclusive nature of article 24 and the 'total' freedom of article 25.[42]

In relation to platform work and international contracts on the provision of labour the relevant 'weaker party protection regime' to consider is the one found in section 5 of the Brussels I Regulation, namely the one concerning individual contracts of employment. That the contract classifies the relationship as a 'business relationship'[43] carries in itself no decisive meaning.

Section 5 governs jurisdiction in matters relating to individual contracts of employment according to article 20(1) of the Brussels I. As with the general scope, the Regulation does not include a definition of the concept of an 'individual contract of employment'. As such a concept has different meaning in different Member States, the ECJ has intervened and developed an autonomous interpretation of the concept.[44] The concept has been developed in both case law and in the Jenard/Möller report[45] accompanying one of the Brussels I predecessors, the Lugano Convention.[46] According to the ECJ in the case of *Shenavai v Kreischer*, a contract of employment is characterized by a durable relation between individual and company, a lasting bond, which brings the worker, to some extent, within the organizational framework of the business.[47] The contract also has to be linked to the place of performance, which determines what mandatory rules and collective agreements are to be applied.[48] It has however been suggested that the precedent value of the ruling, in a Brussels I context, is suboptimal due to the fact that employment contracts were not separately regulated at the time.[49]

Furthermore, the Jenard/Möller Report introduced the concept of *subordination* to the equation, following which an employment contract

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41 Geert Van Calster, *European Private International Law* (2nd edn Hart Publishing 2016) (Van Calster: EPIL), 89.

42 Van Calster: EPIL, 106.

43 Clickworker T&C, para 3.4.

44 Van Calster: EPIL, 109.

45 Paul Jenard and Gustav Möller, 'Report accompanying the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988' (Jenard/Möller Report), OJ [1990] C189/57.

46 Convention 88/592/EEC on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ L 319.

47 Case 266/85 *Hassan Shenavai v Klaus Kreischer* [1987] ECR 239, para 16.

48 Ibid.

49 Van Calster: EPIL, 110.

presupposes a relationship of subordination of the employee to the employer.[50] In the case of *Holterman v Spies*[51], AG Cruz Villalòn specified that the purpose of the assessment is to distinguish the employment contracts from other contracts involving the provision of services.[52] To do this, the ECJ looks towards the concept of a *worker* in the context of article 45 TFEU and other legislative acts, since it has been developed more and continues to be.[53] In such a context, the essential feature of *an employment relationship* is that a person, for a certain period of time, performs services for and under the direction of another, in return for which remuneration is paid.[54]

The test that the Court applies is used both to establish the concept of a worker and to distinguish workers from independent contractors. In the case of *Ruhrlandklinik,* the Court asserted that restricting the concept of a worker to those that have a tangible employment contract was liable to undermine the effectiveness of the underlying directive in an inordinate and unjustified way.[55] The term worker must be given a broad interpretation, and any exceptions to and derogations from, on the other hand, must be interpreted strictly.[56]

When distinguishing workers from independent contractors, the ECJ does not shy away from reclassifying the relationship, if the *independence* is merely notional.[57] But where do they draw the line? The ECJ delimits negatively by stating that:

> "Since the essential characteristic of an employment relationship . . . is the fact that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration, any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity . . . "[58]

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[50] Jenard/Möller Report, point 41.

[51] Case C-47/14 *Holterman Ferho Exploitatie BV and Others v F.L.F. Spies von Büllesheim* [2015].

[52] Ibid, Opinion of AG Cruz Villalòn, para 27.

[53] Case C-47/14 *Holterman Ferho Exploitatie BV and Others v F.L.F. Spies von Büllesheim* [2015], para 41.

[54] Case 66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121, paras 16 and 17; for the context of the Council Directive (EC) 92/85, see the judgment in Case C-232/09 *Dita Danosa v LKB Līzings SIA [2010]*, para 39.

[55] Case C-216/15 *Betriebsrat der Ruhrlandklinik gGmbH v. Ruhrlandklinik gGmbH* [2016], para 36.

[56] Case 139/85 *R. H. Kempf v. Staatssecretaris van Justitie* (1986), ECR 1741, para 13.

[57] Case C-256/01 *Debra Allonby v Accrington & Rossendale College* [2004] ECR 873, para 71.

[58] Case C-268/99 *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie* [2001] ECR 8615, para 34.

Even though the ECJ has developed the concept, it is for the national courts, in casu the Danish court, to apply the criteria in practice.[59]

As to the durability criteria, the relationship between the service provider and the platform, in the case of Clickworker, can hardly be characterized as a lasting bond per se. The service providers are entitled to delete their accounts at any time on their own initiative,[60] and some might do so after performing a limited amount of work. Some might however depend on the income from the platform as an important or necessary component of their budget, as suggested by a qualitative survey.[61] It can be helpful to draw upon the case law of the ECJ in the context of the free movements, as it treats a similar issue, namely when a work activity can be viewed as so marginal and ancillary that it excludes the performer from the concept of worker and thus from the protection of the Treaty. In the case of *Fenoll* did the fact that the worker was paid substantially less than a guaranteed national average not mean that he was excluded from worker classification and the accompanying protection.[62] Some do not pursue activities on the Clickworker-platform as anything else than a distraction, but the 41% that depend on the platform assumedly maintain a stronger bond with the platform, which could be considered as bringing them within the scope of the employment relationship in a Brussels I context.

That the platform denotes the service providers as 'our Clickworkers' could be seen as an indication that they are, to some extent, brought within the organizational framework of the platform. The users are considered the customers of the platform and not of the service providers.

As to the link to a place of performance criteria, the T&C stipulates that the platform itself, in concreto its websites, are to be considered 'the workplace'. [63] This author argues that the notion of 'place' in relation to the 'workplace' and the 'place of performance' is becoming increasingly

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[59] Van Calster: EPIL, 110, cf. Case C-337/97 *C.P.M. Meeusen v. Hoofddirectie van de Informatie Beheer Groep* [1999], ECR 3289, para 16.

[60] Clickworker T&C, para 2.7.

[61] The survey, which suggests that 41 % of Clickworker's service providers are dependent on the income, was made by the German organisation Fair Crowd Work, that collects information about platform work from the perspective of workers and unions, cf. Fair Crowd Work, 'Clickworker' <http://faircrowd.work/platform/clickworker> accessed May 30th 2018.

[62] Case C-316/13 *Gérard Fenoll v. Centre d'aide par le travail* [2015], para 33.

[63] Clickworker T&C, para 1.1.

obsolete.[64] In the *Holterman v Spies* ruling, the ECJ abstained from emphasizing exactly this part of the *Shenavai v Kreischer* test.[65]

The subordination criteria must be assessed on the basis of all of the factors and circumstances characterising the relationship between the parties.[66] In the Clickworker T&C, 'projects' are presented as invitations to submit an offer, an 'invitatio ad offerendum'.[67] Technically, this means that the platforms' posting of a job to the list does not constitute a binding offer. However, in practice are service providers only 'offered' jobs that correspond to their 'qualification profile' and the work itself can begin immediately after clicking on it.[68]

After the customer has made a request to Clickworker, the platform creates tasks that can be performed by individual service providers. The conditions of a specific project are set by the customer and/or the platform, and the remuneration is non-negotiable. The prerequisite qualifications for service providers to accept a specific task and the criteria for subsequent acceptance of the performance are also set by the platform. If either a temporal or material condition is not met, the service provider will receive no compensation. When the service providers' performance is 'inadequate or unsatisfactory', he will, if the customers' deadline allows it, have three days to revise or rectify the defective work product. The platform expressly states that the service provider is prohibited from 'subcontracting or outsourcing' projects.[69] If the service provider violates either the T&C or any other obligation arising from the contractual relationship, the platform reserves the rights to delete the user account.[70] The data needed to make such a decision are collected seamlessly whenever the service provider accesses any part of the Clickworker website.[71] In this way, the platform can both supervise the performance of work and subsequently discipline poor performance.

As the ECJ in the *Holterman v Spies* ruling, for the first time, directly considered the meaning of 'individual contract of employment', in the context of Brussels I, it is worth noting that AG Cruz Villalón sees '*the power of management and instructions*' as the defining factor of a subordinate

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[64] Miriam A. Cherry, 'A Taxonomy of Virtual Work' *Georgia Law Review* (2011) 951–1013, II, D.

[65] Case C-47/14 *Holterman Ferho Exploitatie BV and Others v F.L.F. Spies von Büllesheim* [2015], para 45.

[66] Ibid, para 46.

[67] Clickworker T&C, para 3.1.

[68] This author created a profile on Clickworker, accepted a task and performed the service, without further offer/acceptance formalities.

[69] Clickworker T&C, para 3.3.

[70] Clickworker T&C, para 2.7.

[71] Clickworker, 'Terms of Data Privacy', paras 1 and 3, <https://workplace.clickworker.com/en/agreements/10124> accessed May 30th 2018.

relationship.[72] This, and the fact that the ECJ referenced the case law regarding article 45 TFEU, suggests that a wide definition of employment should be applied.[73]

There is an imbalance between the platform and the service provider. The platform has the power of management, e.g. when they assign a task to a specific service provider and subsequently monitor the performance, under the threat that non-compliance can lead to exclusion. Even though the overall description of the project comes from the customer, it is the platform who divides it into smaller tasks and instructs the service providers in the performance of them. These factors point towards an employment relationship. That the service provider can choose when to work and what tasks to do does however point in the opposite direction. On the other hand, the notion of flexibility does not negate an employment relationship per se, since all factors and circumstances in each case has to be assessed. As shown above, numerous conditions are imposed on the service providers and control is exerted both during and after the performance.

Section 5 in Brussels I is essentially a protection of the weaker party, the employee. To assess the relationship, one must first accede to the wide definitions of the ECJ and take into account that the Danish courts traditionally take a dynamic and teleological approach to the defining concepts of labour law.[74]

For all of the above mentioned reasons, provided that the specific dispute involves a service provider that depends on the income from the platform and moreover that the facts of the relationship perfectly align, it is not completely unwarranted to expect a Danish court to consider the service provider and the platform to be in an employment relationship, and therefore section 5 of the Regulation to be applicable. The service provider, for a certain period of time, performs a service for and under the direction of the platform in return for remuneration.

The question of whether the jurisdictional agreement is valid in this specific example therefore has to be answered in the context of section 5, including article 23, which states that the protective provisions may only be departed from by agreement if said agreement is concluded after the dispute has arisen, or if the agreement gives the employee access to

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[72] Case C-47/14 *Holterman Ferho Exploitatie BV and Others v F.L.F. Spies von Büllesheim* [2015], Opinion of AG Cruz Villalòn, para 28.

[73] Louise Merrett, 'The Contract of Employment in its International and European Law Setting' in Mark Freedland (ed) *The Contract of Employment* (OUP 2016), 632ff.

[74] Ole Hasselbalch, *Den Danske Arbejdsret I-III* (Schultz Arbejdsretsportal, online), Section III, 1.1, cf the ruling of June 24th 1986 Sø- og Handelsretten [the Maritime and Commercial Court of Copenhagen] in the case F-79/85, where a finishing artist at an ad agency, hired on a piecemeal basis, was considered to be an employee in the context of the legislation on sickness benefit but not in the context of the legislation on sick pay.

other jurisdictions than those indicated in the section itself.[75] As the agreement obviously was entered into before the dispute arose, it is necessary to examine what jurisdiction(s) section 5 appoints.

The Brussels I Regulation distinguishes between disputes where the employee is the plaintiff and those where the employer is the plaintiff. As the case at hand, and the majority of labour law suits,[76] is initiated by the 'employee', the relevant provision is article 21.

The general rule of jurisdiction in the defendant's domicile is found in article 21(1)(a) as well. Employers may however also be sued in the courts for the place where or from where the employee habitually carries out his work, according to article 21(1)(b)(i). This is the main factor of the protective design of section 5, as it allows the weaker party, the employee, to commence, or defend himself against, court proceedings in the place 'where it is least expensive'.[77]

The *habitual workplace* is, according to the ECJ, to be understood as the place that is the effective centre of the working activities and where the essential parts of the duties vis-à-vis the employer are performed.[78] There are no provisions in the contract between the platform and the service provider as to where, geographically, the work has to be performed, but only that it has to be performed in the area they call the 'Workplace'.[79] For the purpose of this analysis, the assumption is that the work is performed in Denmark, wherefore the habitual workplace leads to Danish jurisdiction, according to article 21(1)(b)(i) of the Brussels I Regulation.

The words of the jurisdictional agreement 'Essen shall be the exclusive venue' implies the prorogated exclusive jurisdiction of the court, which means that the effect of the clause would be that the service provider is barred from suing in Denmark. The jurisdictional agreement conflicts with article 23(2) of the Brussels I Regulation, in this specific example, thus voiding it, according to article 25(4).

2.4.2. TAXIFY

Taxify's standard terms contain the following dispute settlement clause:

> "Any dispute that may arise in connection with this Agreement, whether with respect to its existence, validity, interpretation, performance, breach, termination or otherwise, shall be settled by way of negotiations. If the respective dispute resulting from this Agreement could not be settled by the negotiations, then the dispute will be finally solved in

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[75] Brussels I, arts 23(1) and (2).

[76] Carlos Esplugues Mota, 'Article 21' in *M&M: Brussels Ibis*, note 1.

[77] Case C-125/92 *Mulox IBC Ltd v Hendrick Geels* [1993], ECR I-4075, para 19, cf. Mota (n 768), note 13.

[78] Case C-383/95 *Petrus Wilhelmus Rutten v Cross Medical Ltd* [1997], ECR I-57, para 23.

[79] Clickworker T&C, para 1.1.

> Harju County Court Kentmanni court house in Tallinn, Republic of Estonia."[80]

As can be seen from the quote, the Taxify T&C require initial 'negotiation' as a dispute settlement mechanism. However, for the purpose of this article, this negotiation-clause is treated as legally non-binding on the basis of uncertainty.[81] The Danish courts have not determined specific criteria regarding the enforceability of such clauses, but seem to allow the parties to initiate litigation regardless of even well-defined mediation clauses.[82] The Taxify T&C negotiation-clause is however not well-defined. Even though mandatory language as the word 'shall' is used, the clause contains neither deadlines nor specification of the negotiation participants, which is essential for the enforcement of multi-tier resolution clauses.[83]

For the remaining part of this article, it is presumed that the intention of the clause is to confer exclusive jurisdiction to the Harju County Court in Talinn, Estonia. This court is located in the same county as the registered offices of the platform, Taxify.

The article takes the view that the dispute falls within the scope of Brussels I, according to article 1, and that no court has exclusive jurisdiction, according to article 24.

Next is the matter of whether the claim relates to an individual employment contract. The fact that the parties have expressly agreed that the relationship is not an employment relationship,[84] carries in itself no decisive meaning.

The same criteria as used for the analysis of the Clickworker-relationship has to be applied, in order to determine the nature of the relationship in the context of Brussels I.

Whether or not the relation between the platform and the service provider is durable and brings the worker within the organizational framework of the business may vary greatly. The Taxify T&C allow both individuals and 'fleet companies' to register. Individuals may only perform transportation services themselves, whereas fleet companies may simply use the platform's software as a dispatching system.[85] For the purpose of this article only the individual agreements are considered.

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[80] Taxify T&C, para 15.2.

[81] Neil Andrews, *Arbitration and Contract Law* (Springer 2016), 36.

[82] See for example the ruling of January 20th 2015 Sø- og Handelsretten [the Maritime and Commercial Court of Copenhagen] in the case H-41-10.

[83] Dan Terkildsen, "Denmark" in *Multi-Tiered Dispute Resolution Clauses* (International BarAssociation 2015), 60 <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Litigation/multitiereddisputeresolution.aspx> last accessed July 25th 2018.

[84] Taxify T&C, para 10.4.

[85] Taxify T&C, paras 2.5 and 2.6.

The agreement allows the service provider to receive requests from users interested in transportation services, which the service provider may '*accept or ignore at* [his or her] *choosing*'.[86] The service provider is free to, at any point, delete the account.[87] While providing transportation services, the service provider is obliged to have all the necessary licenses, certifications and registrations, and the platform has a right to control these. The service provider is also obliged to perform the services in 'a professional manner' in accordance with the business ethics 'applicable to providing such services', including, but not limited to, taking the route least costly for the user and not having other passengers in the car.[88] The compliance with these ethics is enforced through a rating system, which allows the users to rate and give feedback upon completion of services. The ratings are published and linked to the service provider's account, just as an 'activity score', based on the habits of the service provider, is calculated. Both parameters have to exceed a minimum level, set by the platform.[89] If a service provider, after being notified by Taxify, does not increase the parameter levels within a prescribed period of time, his or her account will be deactivated automatically, temporarily or permanently, at the discretion of the platform.[90] The platform is generally entitled to terminate the agreement, at its own discretion.[91]

The characteristics of the individuals that use the Taxify platform may vary as much as in the case of Clickworker. The characteristics of the services performed on the Clickworker platform vary greatly within a certain genre, whereas the Taxify services are specifically limited to transportation. In this case, where the service provider is not affiliated with a taxi company or other dispatchers, the threshold for being brought within the framework of the platform's organisation is juxtapose to the threshold for more traditional taxi drivers. As the service provider is legally bound to the ethics and standards of the platform and furthermore given labels and tags to affix to the car, a court may very well consider that a service provider performing services for Taxify is brought within the organizational framework of the platform. However, this criteria, as well as the 'place of performance' criteria, are not sufficient to point to an employment relationship, also due to their 'built-in obsolescence'.[92]

Assessing the subordination criteria involves examining whether the service provider performs his services under the direction of another, in return for remuneration. When a user sends a request for transportation services to the platform, the platform presents the service

[86] Taxify T&C, para 4.5.
[87] Taxify T&C, para 11.2.
[88] Taxify T&C, para 4.4.
[89] Taxify T&C, paras 8.1 and 8.2.
[90] Taxyfi T&C, para 8.3.
[91] Taxify T&C, para 13.4.
[92] Text to n 66.

provider with the possibility to accept or decline. Technically, the choice is the service provider's, though declining is equal with a lowered activity score, which is equal to the risk of being deactivated.[93] The service provider is entitled to charge a fare for each service provided, and a fare is automatically calculated and suggested after the trip.[94] The service provider may lower the fare, but in reality this seems unlikely, as the 'Taxify Fee' that the service provider has to pay, is based on the suggested price. The service provider may only charge a higher fee, if he is a licensed taxi driver and in that capacity legally obliged to use a physical taximeter. The platform can 'adjust' the fare after the trip, for example if the user believes the service provider took a longer route than necessary.[95] To assess a claim from a user, the platform may use any of the personal data it has collected, including the location based information that is transmitted constantly via the smartphone application while active.[96] To sum up: Taxify controls key information, the contact details and location of the user, it determines the 'right' route and the 'right' price and it reserves the power to unilaterally change the T&C and/or terminate the relationship. Taxify solicits feedback, sets the relevant performance levels, and makes decisions based on the users' feedback – just as employers do.[97]

Does that mean it is an employment relationship? The threat of termination in case of misbehaviour does not in itself help distinguish the relationship from other commercial transactions.[98] What self-employed carpenter or gardener is impervious to ratings on Google, Facebook or Trustpilot? The service providers do have a relatively high degree of freedom, as they for example decide when, where and if at all to work. They might be sanctioned if they are active on the platform and do not accept tasks, but they are not sanctioned if they do not activate the platform to begin with. The service provider accepts the risk of losses. If the user does not pay, or the transaction is cancelled due to the service providers' non-compliance with the T&C, the losses fall on the service provider, not the platform. The platform does not receive payment either, but nor did it invest capital or labour in the specific transaction, at least to a significant degree. The service provider is obliged to, at his own expense, provide and maintain all equipment and the means necessary to perform the services.[99] The question is, how

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93 Taxify T&C, para 13.6.
94 Taxify T&C, para 4.7.
95 Taxify T&C, para 4.8.
96 Taxify T&C, 11.1.
97 Benjamin Sachs, 'Uber and Lyft: Customer Reviews and the Right-to-Control' (Onlabor, May 20th 2015) <https://onlabor.org/uber-and-lyft-customer-reviews-and-the-right-to-control> accessed May 30th 2018.
98 Guy Davidov, 'The Status of Uber Drivers: A Purposive Approach', *Spanish Labour Law and Employment Relations Journal*, 1-2, Vol. 6, November 2017, 12.
99 Taxify TOC, para 4.6.

these freedoms and responsibilities measure against the factors that point towards a subordinate relationship.

Employment relationships are characterized as suffering from a 'democratic deficit'.[100] This imbalance is what labour law regulation, in this case the weaker party protection provisions in Brussels I, seek to even out. One thing that particularly distinguishes the Taxify-platform from the Clickworker-platform is that to provide services through Taxify one must acquire operational capital of significant value, i.e. a car compared to a personal computer. Comparing the size of the parties' investment in the agreement might put some perspective on the imbalance and help decide whether the dispute at hand arises from an employment relationship. Considering the size of the investment, which on the platforms' side is the same no matter what, the service provider, who uses a bought and paid for family car to supplement her income, will not necessarily fall into the same category as the young entrepreneurial spirit, who takes out a loan to buy a car, and if applicable a permit, with the intention of performing transportation services as his main profession. The latter might, at some point, want to buy additional cars, hire drivers herself and use Taxify as a dispatcher, or maybe she maximises her profits by working via different transportation platforms simultaneously and thereby advertises her services on several different markets.

As the service providers may vary greatly, and the formalities of the contract alone will take us only so far, it is hard to reach a conclusive analysis without limiting it to an actual case with actual facts.[101] To explore the differences in the legal regimes applicable to jurisdictional agreements concerning platform workers, regardless of their employment status, this article hereinafter considers the possibility that the plaintiff is an independent contractor, in the context of the Brussels I Regulation, thus not encompassed by section 5.

The jurisdictional agreements validity therefore has to be assessed under article 25 of the Regulation, including the requirements on form, certainty and fairness.[102] Article 25 regulates international jurisdiction

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[100] Davidov (n 101), 14.

[101] The ECJ has yet to rule in a dispute concerning the employment status of 'a platform worker', but in the recent ruling in Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain SL* [2017], paras 37-40, the Court notes that the platform, in casu Uber, is more than an intermediation service, namely a part of a transportation service, over which they exercise decisive influence. The Court gives no answers, but their assessment of the factors, such as Uber setting the price, handling the payment and controlling aspects of the quality regarding both the vehicle and the conduct of the service provider, resembles the assessment one would have to do in the context of an employment relationship.

[102] Mukarrum Ahmed, *The Nature and Enforcement of Choice of Court Agreements* (Hart Publishing 2017), 4, III, A.

agreements conclusively, within the scope of the Regulation.[103] However, as it has already been established that the agreement does not contradict articles 23 and 24 this issue will not be further examined. The material, territorial, temporal and personal scope of article 25 will not be discussed either.

The certainty requirement, following the wording '*disputes which have arisen or may arise in connection with a particular legal relationship*', serves to avoid doubts and disputes over the competent court and to prevent a party from forcing a weaker party to litigate in foreign jurisdictions.[104] As such, this rules out *catch all-clauses* which cover all present and future disputes between two parties.[105] The agreement between the platform and the service provider pertain to 'the respective dispute resulting from this Agreement', whereas it clearly limits itself to one legal relationship. Article 25 furthermore requires that the specific dispute is connected to the relationship for which the jurisdictional agreement is concluded. This requirement is met already due to the fact that the dispute arises from the same contract which contains the jurisdictional agreement.[106] Lastly, the certainty requirement demands that the prorogated court is designated with sufficient certainty. In the case at hand, the agreement clearly designates Harju County Court in Tallinn, whereby the requirement is met.

Another central criteria when applying article 25 is that the parties *have agreed* that their disputes are to be litigated in a certain place.[107] The ECJ has affirmed the importance of this criteria several times, e.g. in the case of *Galeries Segoura SPRL v. Société Rahim Bonakdarian* (25/76).[108]

The *agreement* in this context is an autonomous concept in EU-law and it must be appraised only in relation to the requirements in the article itself.[109] If the agreement lacks true consensus, the jurisdictional agreement is invalid and has no effect.[110] The criteria are: (a) the agreement must be in writing or evidenced in writing or (b) the form of the agreement must comply with either the practices of the parties or in international relationships with a usage which the parties are or ought to have been aware of.[111]

In assessing the '*in writing*'-criteria[112] the salient point is whether both parties have expressed their consent in written form.[113] The criteria

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103 Magnus (n 33), note 15.
104 Ibid, note 65.
105 Ibid, note 66.
106 Ibid, note 69.
107 Ibid, note 75.
108 (1976) ECR 1851, para 6.
109 Case C-116/02 *Erich Gasser GbmH v. MISAT Srl* (2003) ECR I-14693, para 51.
110 Magnus (n 33), note 77.
111 Brussels I, art. 25 (1).
112 Brussels I, art. 25 (1) (a), 1st alt.
113 Magnus (n 33), note 95.

can be met by means of electronic communication, as stated in (2) of the article. That the Taxify jurisdictional agreement is contained in the general terms and conditions is therefore, in itself, without significance for the validity of the clause. When a potential service provider creates an account, he accepts the platforms' Terms of Service and Privacy Policy, and is provided with a link to both.[114] The ECJ has established a set of conditions validating jurisdictional clauses in standard contract terms, for the purpose that a jurisdictional clause should not '*slip a reasonable party's attention*'.[115] What the conditions, in general terms, prevent are hidden clauses that are printed on the back of the contract or on separate papers.[116] Where a party specifically signed that he had '*read and accepted*' the T&C, the formal requirements of the criteria were held to have been complied with.[117] This leads to the conclusion that the Taxify jurisdictional agreement, prima facie, complies with the requirements of article 25.

Even though the agreement is an autonomous concept in this context, there are situations where national law must be considered, even in the case of an otherwise valid agreement. [118] These situations, including the issues that may rise as a result of Estonian contract law, choice of law provisions and possible reverse lis pendens effects, fall outside the scope of this article.

3. CONCLUSION

The Clickworker T&C contain, at least for this purpose, an invalid jurisdictional agreement. If Danish courts, contrary to the agreement, categorize the contract as an employment relationship, the jurisdictional agreement is void and unenforceable, according to article 25(4) of the Brussels I Regulation in that it is contrary to article 23. The Danish courts may therefore continue proceedings.

The Taxify T&C contain, at least for this purpose, a valid jurisdictional agreement. A Danish court must therefore, of its own motion, reject the proceedings as inadmissible, according to article 25(1) of the Brussels I Regulation.

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[114] This method is called *click-wrapping*. Websites often refer to terms and conditions that are located behind 'a click' on a link to a subpage. In effect, this means that there is no guarantee that the signee has in fact seen the T&C he agrees to. However, the ECJ accepts this practice in commercial relationships, as long as the method allows for the T&C's to be saved and/or printed before the conclusion of the contract, see Case C-322/14 *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH* (2015), para 40.

[115] Ibid, note 97.

[116] Case 24/76 *Estasis Salotti di Colzani Aimo and Gianmario Colzani v. RÜWA Polstereimaschinen GmbH* (1976) ECR 1831, para. 9.

[117] Magnus (n 33), note 99.

[118] Ibid, note 79a.

4. EPILOGUE

This last section is part impact analysis and part perspectival reflections.

The individuals' motivation for entering into contracts online, crossing virtual borders, have traditionally been found within the consumers' sphere. The possibility of concluding contracts of work on an online platform gives both companies and individuals new possibilities. When contracts are entered into, the parties' bargaining powers are hardly ever equal. However, through negotiations compromises are made, and different terms and conditions benefit different parties. An unfavourable jurisdictional clause can be mitigated by a favourable price, or maybe even a favourable choice of law. Contractual freedom is the reason that Brussels I focuses on the agreement or consensus and only limits it reasonably, as mentioned above (section 2.3). The validity criteria for jurisdictional agreements emphasize an informed consent. These criteria are put in place to distinguish voluntary and coerced agreements.

The weaker party protection rules are also put in place to assure reasonableness, as there are categories of people whom we assume to be weak and thus in need of protection. Companies actively target service providers in other countries, as mentioned above, by posting job ads on Danish websites or announcing their arrival in mass media outlets. The risks of not protecting the weaker party is, that they are being taken advantage of by stronger parties, whom after having 'coerced' a jurisdictional agreement into the contract can rest surely knowing that the weaker party de facto has no access to justice. Milana Karayanidi describes it as letting "[*t*]*he will of one part . . . entirely dominate the transaction to the point that it crushes the autonomy of the other party*."[119]

Are these service providers necessarily the weaker party? The service providers' themselves have sought out an international business partner, when they could have picked a local. They actively chose to sign up with a multinational enterprise, maybe because they have more clients, customers or users, thus increasing the potential amount of work for the service providers. The prospect of forcing platform companies to litigate in forums all over the world might however make them seem weak. Some have even predicted their 'death by litigation', without them having to worry about jurisdiction.[120] Take Clickworker, who has over 1 million service providers. According to themselves, 35% of them are from the United States, 15% from Germany, 25% from the rest of the

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[119] Milana Karayanidi, 'Reassessing the Approach to Jurisdiction in Civil and Commercial matters: Party Autonomy, Categorical Equality and Sovereignty' (Dphil thesis, Trinity College Dublin 2018) 121.

[120] Sarah Kessler, 'The Gig Economy Won't Last Because It's Being Sued To Death' (Fast Company February 17th 2015) <www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death> accessed 31st May 2018.

EU, and the rest are from all over the world, including Canada, Australia and South America.[121] Litigating in exotic jurisdictions will likely entail expenses, which will be passed on to the users and remaining service providers, and legal obstacles can ultimately push the platforms out of the market and force them to leave the country.

Who benefits from the end of the platforms? The 41% that depend on the income,[122] and probably the most likely to dispute their employment status, would lose an important source of income. In a platform economy context, the European regime governing jurisdictional agreements seem to provide not legal certainty and predictability but uncertainty and unpredictability.

This author therefore subscribes to the view that the European private international law is characterized by a lack of coherence and conceptual vision,[123] for my part at least in the field of work contracts in the platform economy. Applying the autonomous concepts of the ECJ can sometimes feel like being handed a square peg and being asked to choose between two round holes, as famously expressed by District Judge Vince Chhabria in the *Cotter v Lyft* case.[124] The judge continued, stating that the 20th century tests for classifying workers were not helpful in addressing a 21st century problem. Even though derived from a case from California, this point might prove valid in the EU as well. Just as across the Atlantic, the 20th century tests will have to suffice in the absence of legislative action or judicial pronouncement.

This article does not provide alternative regulatory approaches, nor does it intend to suggest that the balance has shifted in favour of anyone in particular. This article does however intend to emphasize that the current balance of power in work contracts is not alone determined by the market, but also an outcome of political decisions.

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121 Clickworker, 'Our crowd – the Clickworkers' <www.clickworker.com/about-us/clickworker-crowd> accessed May 31st 2018.

122 See n 62.

123 Giesela Rühl, 'The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy' (2014), *Journal of Private International Law*, Volume 10, No 3, 358.

124 *Cotter v Lyft, Inc.*, United States District Court, N.D. California. Jan 1, 201560 F. Supp. 3d 1067 (N.D. Cal. 2015), 19, 8-9.