7 PRIVATE INTERNATIONAL LAW AND THE PROTECTION OF THE RIGHTS OF MIGRANT WORKERS – CONCLUSION

7.1. The role of international legal instruments (issued by the International Labour Organization, the United Nations and the World Trade Organization), the regional law (such as the European Union community law) and the national law in protecting of the rights of migrant workers
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7.6. The new legal sources of PIL, particularly in order to protect the rights of migrant workers
7.7. Final Remarks

This final chapter comprises general conclusions to some legal matters that have been explained in more detail earlier. It will answer all the basic questions of this research, in order to accomplish its main objective, i.e. to develop a method to determine the law governing the protection of the rights of migrant workers in the ASEAN region in general; and particularly to develop a more modern Indonesian Labour Law, which does not only consider local factors but also international factors in protecting Indonesian migrant workers in foreign countries or foreign workers in Indonesia. It will answer the legal questions that have been developed in the introduction to this dissertation. These legal questions read as follows:

A. What is the role of international legal instruments (issued by the International Labour Organization, the United Nations and the World Trade Organization), the regional law (such as the European Union community law) and the national law in protecting of the rights of migrant workers?
B. Is it necessary to have a harmonized provision to protect migrant workers in the ASEAN region?
C. How should legal harmonization at the ASEAN level be realized? (Is it possible or necessary to establish regional law in the manner of regional law in the European Union? What would be the proper legal instrument to arrange legal protection for migrant workers?)
D. How should Indonesia as a sending country in ASEAN develop its Private International Law, in order to provide the best legal protection for migrant workers?
E. What is the best PIL principle that might provide suitable legal protection for migrant workers?
F. What should be the new legal sources of Private International Law, particularly in order to protect the rights of migrant workers?

The following sub-chapters will answer these legal questions.

7.1. The Role of International Legal Instruments (Issued by the International Labour Organization, the United Nations and the World Trade Organization), the Regional Law (such as the European Union Community Law) and the National Law in Protecting of the Rights of Migrant Workers

Protection of the rights of migrant workers has been regulated at three levels, i.e. at the international, regional and national levels. These regulations are intended to set up a minimum level of protection for migrant workers. At the international level, the ILO, the UN and the WTO play different roles based on their mandates. Nevertheless, the three international organizations have the same ground for the protection of the rights of migrant workers, i.e. *no less favourable treatment* for migrant workers. That principle is applied by each international organization even though it is used in different contexts by each organization, because every institution needs to adapt that principle to make it pertinent to its own mandate. The UN deliberates the focal points in protecting the human rights of migrant workers and their family members; while the ILO protects both the fundamental rights of workers and the occupational rights of workers established by the terms and conditions of employment contracts. The WTO does not deal directly with the problem of protection of migrant workers, but it assures non-discriminatory treatment to their right to provide services as natural persons in the international trade of services (based on the national treatment and the most favoured nations principles). To realise their objective to protect the rights of migrant workers, the three international organizations have to cooperate and to develop coordination, especially in the process of policy making.

The three international organizations fabricate international conventions, which are open for ratification by the Member States. If a country has ratified a convention, it is obliged to implement that convention; otherwise, an international sanction will be imposed upon it and enforced by each organization. This means that the conventions will provide international standard of protection, which must be applied at the national level by the ratifying country. Persistent application of international minimum standard of protection established by the ILO (and the UN) together with non-discrimination principles in the international trade of services applied by the WTO are very important in maintaining the sustainable economic development with high respect for human rights and human dignity of workers.

These three international organizations regulate their provisions in substantive law. This means they harmonize substantial provisions concerning certain legal matters in the territory of ratifying countries.

Consequently, they do not apply a PIL approach in their conventions. Nevertheless, it can be concluded from the substantive provisions of the ILO *Migration for Employment* Convention (Revised), 1949 (No. 97) and/or the *Migrant Workers* (Supplementary Provisions) Convention, 1975 (No. 143) that they have adopted the *lex loci laboris* principle. This means that the law governing the implementation of the terms and conditions of the employment contract is based on the law of the country in which the work is carried out and the law of the country of immigration (which is usually also the country in which the work is carried out). Amendment of the *lex loci laboris* principle is done by applying the *lex loci originis* principle or the *lex domicilii* principle, but this only occurs if the application of the *lex loci laboris* principle creates adverse effects for the protection of the rights of migrant workers and the members of their family, or if the problem connects closely to the place where the problem arises (for instance the law of the transferring country will be applied to determine the validity of travelling documents of migrant workers and the members of their family). Therefore, it can be concluded that these Conventions apply traditional PIL approach, i.e. using a main connecting factor to find out the applicable law.

7.2. The Necessity to have Harmonized Provision to Protect Migrant Workers in the ASEAN Region

Recently the cooperation in ASEAN has transformed from "coordination and consultation" into "integration". Based on the ASEAN Charter, ASEAN also becomes an inter-governmental organization, which is supposed to present a single legal personality. Transnational labour migration is one of the most intensive and simultaneously troublesome legal relationships in ASEAN. Nevertheless, this activity plays an important role in some ASEAN Member States in obtaining the States' foreign revenue. Therefore, harmonization of the minimum standards of protection of the rights of migrant workers in the ASEAN region (via compulsory ratification of the ILO Core Conventions) will establish a common minimum floor of protection. This will not only increase legal certainty for migrant workers in the ASEAN region, but also potentially alleviate the present social problems and legal disputes arising from labour migration in ASEAN. Additionally, if there is a dispute between parties in a transnational employment relationship, they will not be troubled with the problem of determining the national law that will govern their contract.

Further legal harmonization of substantive law than the harmonization of the minimum standards of protection at the ASEAN level does not yet become a priority. At least it must be reconsidered in several years after year 2015, when the implementation of free-movement principle in the ASEAN region will have shown the result. Whether it is necessary to harmonize the substantive law in ASEAN; how the harmonization should be done and what legal problems should be harmonized at the ASEAN level, etc. must be evaluated at that time, by bringing the real needs and the current situation into considerations. Now, imposing the idea of a total substantive law harmonization in ASEAN is an unrealistic idea.

7.3. The Steps to Realize Legal Harmonization at the ASEAN Level

It is impossible for ASEAN to develop a legal system, with a judicial system/institutions and a supranational legislative body similar to EU, since ASEAN does not have any supranational character in its institutions. It applies intergovernmentalism in the cooperation among the Member States. Nevertheless, ASEAN needs a more solid legal order to support the coming borderless community and territory in 2015. It is necessary for ASEAN as 'a people-oriented intergovernmental organisation' to provide 'a common provision' to regulate the behaviour of legal subjects at the regional level. Nevertheless, it is impossible to force ASEAN to enact those common provisions immediately. Therefore, the author proposes some steps to endeavour the final goal of an ASEAN law.

A. Short Term Target (present-2015): Compulsory Ratification

In this period, the ASEAN Member States are supposed to harmonize their substantive law, in order to endeavour 'a common level playing field' in many legal matters (especially concerning protection of the

rights of migrant workers). The most practical way to achieve such a legal harmonization is by agreeing a package of 'compulsory ratification' to some international conventions by the Member States. The ratification will make these conventions directly binding upon the ratifying countries. This method will establish a level of protection (regarding certain matters regulated in the ratified conventions) in the ASEAN region.

B. Long Term Target (After 2015): Harmonization of Conflict Rules

At this stage, the harmonization of conflict rules will be necessary. Harmonization of conflict rules will be important to simplify the process to determine the applicable law of transnational legal activities (as regards to the topic of this dissertation, especially concerning the applicable law of the rights of migrant workers) at the regional level. The harmonization of conflict rules is used especially to deal with legal matters, which are not yet agreed and enacted by the ASEAN Member States in any ASEAN legal instruments such as Treaty, Convention or Agreement. It is a kind of coordinative law, which is useful to determine the law governing their legal activities, transactions or relationships.

7.4. The Ideal Approach of Private International Law in Indonesia as a Sending Country in ASEAN, in order to Provide the Best Legal Protection for Migrant Workers

The author determines the most important goals of the PIL approach to protect the rights of migrant workers are to provide legal certainty and substantial justice for the migrant workers. To achieve these goals, the author proposes the application of the traditional PIL principle to determine the law governing an employment contract, i.e. first, if the parties have a lawful choice of law rule in their employment contract, the chosen law is the *lex causae* of the contract. Secondly, if there is no choice of law clause in the employment contract, the author proposes to apply the *lex loci laboris* principle. The application of this principle may provide legal certainty for the parties, because the law governing the employment contract will refer directly to one national law, i.e. the national law of the country in which the work is carried out. Nevertheless, if there is no single country in which the work is carried out or the work is carried out in more than one country, the *lex loci laboris* principle will not solve the determination of the applicable law; and other methods should be applied to find the law governing the employment contract.

In order to determine the law governing an employment contract that is not performed in one particular country or that is performed in more than one country, some considerations must be deliberated. As a sending country in labour migration, Indonesia has conflict of interests to balance the best protection for the rights of Indonesian migrant workers on the one hand; and to maintain the competitiveness of Indonesian migrant workers in the international labour market on the other hand. Consequently, the future codified Indonesian PIL also has to support these purposes. This means that the Indonesian conflict rules concerning interpretation, performance and the effect of nullity of an employment contract must provide proper protection to the rights of migrant workers, without allocating excessive financial burden as the consequence of such protection.

To answer this problem, the author applies a two layers approach: first, to determine the law governing the employment contract that is not performed in one particular country or that is performed in more than one country, the author applies "substantial justice" as the objective of the protection. The applicable law should be determined based on the rules, which support some basic principles to protect the rights of workers, such as non-discrimination principle; the application of the more favourable rules for workers; the relevant policies of interested countries; and the rules that protect the justified expectation of the parties. Secondly, if there are public policies or mandatory rules of more than one competing country involved in the case (not including the public policies or mandatory rules of the forum), the author will apply "conflict justice". This means that only the public policies or mandatory rules of the country that has the closest connection to the case will be applied as the law governing the case. This is contrary to "substantial justice", which applies all

the public policies or mandatory rules to protect the workers involved. The substantial justice is not applied in this case, because if the Indonesian PIL regulation is overprotective of Indonesian migrant workers by applying public policies or mandatory rules of all the interested countries, it will create an economic burden for the employers. Consequently, this will decrease the competitiveness of Indonesian migrant workers in the international labour market. As a result, this may disadvantageously affect Indonesian foreign revenue, in which the contribution of Indonesian migrant workers plays a very important role.

7.5. The Ideal Private International Law Principle that might Provide Suitable Legal Protection for Migrant Workers

Basically, the *lex loci laboris* principle is still the main principle to determine the law governing an employment contract. It is not only found in the PIL legislations of many countries, but it is also applied in some ILO Conventions, such as in the ILO Convention concerning *Migration for Employment* (No. 97, 1949) and the ILO Convention concerning *Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* (No. 143, 1975). Even though Indonesia does not have any particular provisions to determine the law governing an employment contract, based on article 18 of the General Provisions of Legislation for Indonesia which applies the *locus regit actum* principle to determine the law governing legal acts and transactions, it can be concluded that the country in which the work is carried out is also referred to by this principle as the law governing an employment contract. In other words, the *lex loci laboris* principle has been derived from the *locus regit actum* principle. In this dissertation, the author supports preservation of the *lex loci laboris* principle as the main principle to determine the law governing an employment contract.

A problem arises if there is no single country in which the work is carried out or if the work is carried out in more than one country. To determine the law governing such an employment contract, the author has chosen a rule-selected approach, because this approach offers substantial justice for the protection of the rights of migrant workers. The author constructs a new method (inspired by the most significant relationship theory) to determine the law governing an employment contract in this case; namely "the most significant employment considerations theory". This theory basically determines the applicable law by determining rules of the competing countries, which have more significant connections with the case. Some connecting factors which must be taken into considerations are:

1. the consistency with the protection of the fundamental rights of workers established by the ILO (it applies the non-discrimination principle; it recognizes the right of association and collective bargaining; it prohibits child labour and forced labour);
2. the support and promotion of the more favourable rules for workers;
3. the relevant policies of interested countries and the relative interests of those countries in the determination of the particular issue;
4. the protection of justified expectations of the parties.

These factors must be applied based on priority and urgency. The first consideration has higher priority than the following considerations. Therefore, rules of the country, which provides more protection to the fundamental rights of worker, will be appointed as the *lex causae* of the case. Yet, if the rules of all competing countries protect the fundamental rights of workers equally, then the applicable law is that of the country which is more favourable for the protection of other rights of workers (such as occupational rights, social security rights, etc.). Not all the significant factors need necessarily be examined. Once the applicable law has been determined, the remaining considerations need no longer be taken into account.

7.6. The New Legal Sources of PIL, Particularly in order to Protect the Rights of Migrant Workers

Transnational disputes settlement is done by applying traditional PIL legal sources, which usually refer to national law or the rules of certain countries related to the case. However, there are some important legal sources in International Labour Law, which do not belong to the legislation of a national law of a certain

country, such as a Collective Labour Agreement, Code of Conduct (either corporate Code of Conduct in a multinational enterprise or international Code of Conduct issued by an international organization such as ILO; as an example *the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*), *Fundamental Principles and Rights at Work* established by the ILO or *ILO Multilateral Framework on Labour Migration*; yet they have a very important function in settling legal problems between parties in employment relationships. It is necessary to consider the important value and the benefit of using non-traditional PIL legal sources (i.e. legal instruments which are not national laws or international conventions), in order to find proper protection for the rights of migrant workers because many rights of migrant workers are protected in these legal instruments.

In order to protect the interests of the parties in employment contracts, it is necessary to allow the parties to choose the law governing their contract from customary International Labour Law or general principles of International Labour Law (such as *Fundamental Principles and Rights at Work* or *ILO Multilateral Framework on Labour Migration*) or soft law (such as *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, code of conduct), which is significantly related to the contract. This application will enable the parties to choose the law essential to their relationship, not only provisions concerning employment relationships in general, but also more technical provisions related to the distinctive characteristics of their contract.

The author believes that the application of usages, practices, codes of conduct and other legal instruments similar to the transnational *lex mercatoria* in the law of contract could be very useful and helpful to provide substantial justice for the parties to employment contracts. Consequently, even though the choice of law rule of the parties to an employment contract does not refer to a national law or international conventions, as long as the chosen legal instrument is part of the customary International Labour Law or general principles of International Labour Law, it cannot be objected to solely because they are not part of the traditional PIL legal sources. This means that the judges should consider any relevant fundamental principles, tripartite declaration, company code of conduct and other legal instruments; and if these legal instruments have significant connections with the case, it must be appointed as the *lex causae* of the case.

7.7. Final Remarks

The PIL method to determine the applicable law of an employment relationship and its related aspects plays a very crucial role to improve the protection of the rights of migrant workers, both in ASEAN region and in Indonesia. Unfortunately, understanding this method is quite complicated. This needs basic knowledge of PIL in general, Public International Law, Comparative Law, International Labour Law as well as substantive national laws of the relevant countries. Due to the complexity of the method, all ASEAN Member States must improve the knowledge of their relevant authorities (particularly judges, legislative bodies, executive body related to the labour matter), especially as regards protection of the rights of migrant workers, in order to provide a proper protection for migrant workers in the ASEAN territory. To achieve this goal, it is necessary for ASEAN Member States in general (and especially for Indonesia) to improve the legal education in their territories. Providing those particular courses held in English especially for the relevant authorities and generally for all Law Faculty students will significantly support the effort to accomplish this goal.

ANNEX I
INDONESIA:
STATUS OF RATIFICATION OF INTERNATIONAL CONVENTIONS
RELATED TO THE PROTECTION OF THE RIGHTS OF MIGRANT WORKERS
(As of 15 September 2008)

ILO Conventions	
Equality of Treatment (Accident Compensation) Convention, 1925 (No.19)	12 June 1950
Marking of Weight (Packages Transported by Vessels) Convention, 1929 (No.27)	12 June 1950
Forced Labour Convention, 1930 (No. 29)	12 June 1950
Underground Work (Women) Convention, 1935 (No.45)	12 June 1950
Certification of Ships' Cooks Convention, 1946 (No.69)	30 March 1992
Labour Inspection Convention, 1947 (No.81)	29 January 2004
Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87)	9 June 1998
Employment Service Convention, 1948 (No.88)	8 August 2002
Right to Organise and Collective Bargaining Convention, 1949 (No.98)	15 July 1957
Equal Remuneration Convention, 1951 (No.100)	11 August 1958
Abolition of Forced Labour Convention, 1957 (No.105)	7 June 1999
Weekly Rest (Commerce and Offices) Convention, 1957 (No.106)	23 August 1972
Discrimination (Employment and Occupation) Convention, 1958 (No.111)	7 June 1999
Hygiene (Commerce and Offices) Convention, 1964 (No.120)	13 June 1969
Minimum Age Convention, 1973 (No.138)	7 June 1999
Tripartite Consultation (International Labour Standards) Convention, 1976 (No.144)	17 October 1990
Worst Forms of Child Labour Convention, 1999 (No.182)	28 March 2000
Seafarers' Identity Documents Convention (Revised), 2003 (No. 185)	16 July 2008
UN Conventions and Covenants	
Convention on Elimination of All Forms of Discrimination against Women	13 September 1984
Convention on the Rights of Child Indonesia	5 Sep 1990
Convention on the Elimination of Racial Discrimination	25 June 1999
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	28 February 2000
The International Covenant on Economic, Social and Cultural Rights (ICESCR)	23 February 2006
International Covenant on Civil and Politic Rights	23 February 2006
WTO	
The Final Act of the World Trade Organization (WTO) Establishment	2 December 1994

ANNEX II
LIST OF RATIFICATION OF THE ILO CORE CONVENTIONS
BY THE ASEAN MEMBER STATES[1056]
(As of 15 September 2008)

Conventions	Freedom of association and collective bargaining		Elimination of forced and compulsory labour		Elimination of discrimination in respect of employment and occupation		Abolition of child labour	
	Conv. 87	Conv. 98	Conv. 29	Conv. 105	Conv. 100	Conv. 111	Conv. 138	Conv. 182
Brunei Darussalam	-	-	-	-	-	-	-	09 June 2008
Cambodia	23 August 1999	23 August 1999	24 February 1969	23 August 1999	23 August 1999	23 August 1999	23 August 1999	14 March 2006
Indonesia	09 June 1998	15 July 1957	12 June 1950	07 June 1999	11 August 1958	07 June 1999	07 June 1999	28 March 2000
Lao People's Democratic Republic	-	-	23 Jan 1964	-	13 June 2008	13 June 2008	13 June 2005	13 June 2005
Malaysia	-	05 June 1961	11 Nov 1957	13 Oct 1958 denounced: 10 Jan 1990	09 Sept 1997	-	09 Sept 1997	10 Nov 2000
Myanmar	04 March 1955	-	04 March 1955	-	-	-	-	-
Philippines	29 Dec 1953	29 Dec 1953	15 July 2005	17 Nov 1960	29 Dec 1953	17 Nov 1960	04 June 1998	28 Nov 2000
Singapore	-	25 Oct 1965	25 Oct 1965	25 Oct 1965 denounced 19 April 1979	30 May 2002	-	07 Nov 2005	14 June 2001
Thailand	-	-	26 Feb 1969	02 Dec 1969	08 Feb 1999	-	11 May 2004	16 Feb 2001
Viet Nam	-	-	05 March 2007	-	07 Oct 1997	07 Oct 1997	24 June 2003	19 Dec 2000

[1056] Source: ILOLEX <http://www.ilo.org/ilolex/english/docs/declworld.htm>, accessed 10 September 2008.

ANNEX III
LIST OF RATIFICATION OF THE ILO CORE CONVENTIONS
BY SAUDI ARABIA, AS A MAJOR RECEIVING COUNTRY OF INDONESIAN MIGRANT WORKER
(As of 15 September 2008)

Freedom of association and collective bargaining		Elimination of forced and compulsory labour		Elimination of discrimination in respect of employment and occupation		Abolition of child labour	
Conv. 87	Conv. 98	Conv. 29	Conv. 105	Conv. 100	Conv. 111	Conv. 138	Conv. 182
-	-	15 June 1978	15 June 1978	15 June 1978	15 June 1978	-	8 October 2001

SUMMARY

Introduction

Labour migration is one of the most intensive transnational activities in the ASEAN region. It creates more opportunities for many workers to find work and contributes significantly to the foreign revenue of many countries in the region. This dissertation concentrates on the question of "how to cope with problems concerning the protection of the rights of transnational migrant workers", especially on finding the right method to determine which law governs the protection of the rights of migrant workers. The interfaces between the national standards of protection and the international or regional standards of protection are discussed and an analysis is made of the prospect of ASEAN coordinating a common level of protection in the ASEAN region as well as of the need for Indonesia to unify the PIL method to determine the law (the *lex causae*) governing the protection of the rights of migrant workers.

The Role of International Organizations in the Protection of the Rights of Migrant Workers

The ILO, the UN and the WTO are the international organizations that have introduced provisions regarding the protection of the rights of migrant workers, although they cope with the problems from a different perspective, based on their own function as stipulated in their mandates. The UN deliberates upon the focal points for the protection of the human rights of migrant workers and their family members; while the ILO goes one-step further and regulates many issues related to employment relationships and the impact of this relationship on migrant workers. The WTO does not deal directly with the problem of protecting migrant workers; but it assures the right of migrant workers to be treated equally *vis-á-vis* nationals of the immigration country (as it is promised by the immigration country in its Schedule of Specific Commitments) as well as nationals of other countries, in trading their services as natural persons. Since the main objective of the ILO is to promote social justice and it establishes internationally recognized labour rights around the world, it is reasonable that the ILO becomes the main organization to manage the improvement of the protection of the rights of migrant workers, and that it works actively with the UN and other relevant specialized agencies to develop policies and programmes that support the creation of decent work and decent protection for the rights of migrant workers. Furthermore, the ILO and the WTO may cooperate to achieve their goals to protect migrant workers on the one hand and to accelerate the implementation of free trade in services on the other hand. The ILO and the WTO must deal with these two extreme positions in order to accelerate the production process without hampering the welfare of the workers. To achieve this target, global cooperation and a common political will are required from these international organizations. Persistent application of international minimum standards of protection established by the ILO together with non-discrimination principles in international trade of services will be very useful to maintain the sustainable economic development with high respect for human rights and human dignity.

To avoid the worst conditions at work and to ensure that globalization offers a fair chance of prosperity for everyone, the ILO has established a system of international labour standards drawn up by representatives of governments, employers and workers from around the world covering the most basic rights related to work, namely the core international labour standards. This comprises:

- Freedom of association and the effective recognition of the right to collective bargaining;
- The elimination of all forms of forced compulsory labour;
- The effective abolition of child labour;
- The elimination of discrimination in respect of employment and occupation.

These forms of protection are legally binding and the ILO Members are obliged to protect the rights of workers related to those matters as a result of their ILO membership, and not as a result of ratification to those Conventions; because these levels of protection are established by the *Declaration of Fundamental Rights and Principles at Work*. This is an ILO legal instrument with which the ILO State Members are bound

to comply and with which they must implement simply because of the fact that they are Members of the ILO. Therefore, in cases where it has been determined that a specific national law applies to a migrant worker, if the national standards of protection provided for under this national law do not comply with the level of protection laid down by the ILO, the migrant worker is still entitled to this level of protection as a result of the fact that the countries involved are ILO members. The level of protection stipulated by the ILO represents the minimum protection that must be provided not only for migrant workers but also for all workers throughout the world.

Recent Cooperation Regarding the Protection of the Rights of Transnational Temporary Migrant Workers in the ASEAN Region

Legal cooperation in ASEAN has often been compared with the European Union legal system. Certainly, it ends up with a very complementary result. ASEAN was established by a two pages founding document, i.e. the Bangkok Declaration 1967; while the EU is developed from the EEC and Euratom, which were established by a very comprehensive Treaty of Rome 1957. By examining the content of the founding legal document of each international organization, it is obvious that the two international organizations have different targets and intensity of cooperation. ASEAN has an open or loose cooperation, while the EU has a more settled institutional cooperation. In fact, ASEAN is a voluntary association of sovereign states that do not yield their sovereignty to a central authority. The different principles and values in the ASEAN Member States' legal systems (as an example: some Member States are democratic countries, while others are communist countries or Islamic law influenced countries) make the idea of ASEAN community law would appear to be somewhat unrealistic. Under the current legal cooperation, if ASEAN Member States want to have a binding legal cooperation regarding a certain problem, this must be established via bilateral or multilateral cooperation.

As regards the protection of the rights of migrant workers, the different legal systems as well as different levels of prosperity and economic development in the practice of labour migration might create problems. Some Member States apply corporal punishment (particularly judicial caning) in their Criminal Law. A question concerning whether this corporal punishment might be applicable as well to foreign workers from a country that considers such punishment to be a violation against human rights must be answered. Furthermore, since the ASEAN Member States have different levels of prosperity and economic development, the levels of human rights, occupational rights and occupational and/or social security protection for migrant workers are different from one country to another. Coordinative provisions regarding a method to determine the law governing the rights and protection of migrant workers in ASEAN are required. Against the historical and political backgrounds that have produced the system of loose cooperation in ASEAN as well as in the absence of substantive law for the protection of the rights of migrant workers at the regional level, the necessity of PIL rules on the protection of the rights of migrant workers is increasing.

The most fundamental change of attitude as regards regional cooperation in ASEAN has been expressed in the ASEAN Charter, which was issued in November 2007. This transforms ASEAN from being a "State-centric" organization into a more "people-oriented" inter-governmental institution. This means that ASEAN has to fundamentally change its conventional loose cooperation approach in order to develop a down-to-earth intergovernmental cooperation by expanding its concern to fabricate ASEAN legal instruments, which directly coordinate the interaction of the people in the ASEAN region.

The National Substantive Law of Indonesia Regarding the Protection of the Rights of Migrant Workers

Indonesia has enacted much legislation covering many aspects of labour law. It has also ratified many international conventions and covenants relating to the human rights and fundamental protection of workers. Nevertheless, Indonesia has not ratified any convention passed by either the UN or the ILO directly

regarding the protection of migrant workers. This means that Indonesia has protected the most basic rights of workers, but does not want to be bound by any obligations pursuant to international conventions concerning the protection of the rights of migrant workers, because such obligations will be economically detrimental for Indonesia as the sending country in international labour migration flows.

Indonesia has sufficient national legislation to protect the rights of workers. Yet in practice, there are large numbers of labour problems in Indonesia. Actually, the main hindrance creating such labour problems is not in the legislation, but in the lack of implementation and enforcement of this legislation. The work of labour inspectors is still ineffective. Corruptive behaviour plays the most important role in this ineffectiveness. Furthermore, the Indonesian judicial system hardly contributes to enforce the legislation. Additionally, most Indonesian trade unions are powerless to protect their members. Therefore, workers in Indonesia still occupy a vulnerable position, especially when faced with the power of Indonesian employers.

Even though Indonesia has much legislation to protect workers, all this legislation is drafted in substantive law. This means that Indonesian Labour Law is not yet designed as a transnational legal instrument for solving transnational labour disputes by determining the jurisdiction of the national laws involved and deciding the law governing such disputes. In view of this, an analysis of the PIL approach to the legal protection of temporary migrant workers in Indonesian law must be based on an examination of the available substantive law. In fact, it is barely possible to find a PIL approach in Indonesian labour law.

Many provisions regarding the rights of transnational temporary migrant workers and their family members (such as the right to trade union participation, the right to collective bargaining, the right to strike, occupational safety and health, social security, termination of contract and collective dismissal, working and resting time) are considered to be mandatory rules. In these matters, when a legal dispute is filed by the parties to an Indonesian court, Indonesian law has jurisdiction to be applied to settle the dispute.

The National Conflict of Laws Rules of Indonesia regarding the Protection of the Rights of Transnational Temporary Migrant Workers

Indonesian law includes a tiny part of PIL. It has no unified PIL legislation; and conflict rules on specific legal relationships are scattered throughout various Acts and Regulations. Basically, Indonesian labour legislation forms part of national law, which is meant to be locally applicable. Nevertheless, from these scattered items of legislation, it can be concluded that the main and basic provisions of Indonesian Private International Law still refer to the old principles *locus regit actum*, *lex patriae* and *lex situs* established by the Dutch government in its colonial period in the Dutch Indies (former Indonesia). These principles are still applicable and have become the main source to settle Private International Law cases in Indonesia.

As regards the protection of the rights of transnational temporary migrant workers, Indonesian law does not have any explicit conflict rules. Thus, it must be concluded from many Acts, Regulations and Ministerial or Presidential Decrees. In these items of legislation, the basic applicable principles are the *locus regit actum* and the *lex loci actus* principles, which have been elaborated further into *lex loci laboris*, *lex loci contractus* and *lex loci solutionis* principles. Since many aspects in an employment relationship are part of mandatory rules and they are severable parts from the whole contract, it is explicable that these parts apply their own principle to determine the applicable law.

In the procedure of recruitment of Indonesian migrant workers for employment in foreign countries and in the authorization of recruitment licence, the government is entitled to control the content, terms and conditions of employment contracts. The licence will not be issued if the content of the contract does not pass the minimum content obliged by Indonesian legislation. Therefore, even if the law of the country of destination is the *lex causae* of the employment contract, the legal protection for Indonesian migrant

workers in foreign countries cannot go below the minimum protection established by Indonesian labour law, otherwise the recruitment will not be approved by the government.

Some parts of Indonesian law implicitly contain the method of determining the *lex causae* of the legal protection of the rights of temporary transnational migrant workers and their family members, even though it is regulated in substantive laws instead of in conflict rules. Furthermore, the whole procedure of formal placing of Indonesian workers in foreign countries provides many filters to ensure that Indonesian law is applicable as the minimum standard of protection. Nevertheless, the practice of labour migration indicates that there are a lot of problems still result from the employment of Indonesian workers in foreign countries. The author believes that it is a problem of implementation and enforcement of the law rather than a problem of legislation, because Indonesia has ratified all ILO fundamental conventions and has a substantial amount of national legislation on labour law.

In order to maintain the consistency of PIL principles, Indonesia must now consider a unified legislation of conflict rules, not only regarding PIL aspects of transnational labour migration and the protection of Indonesian migrant workers in foreign countries or foreign workers in Indonesia; but also regarding PIL aspects of other legal matters. Intensive thought must be given to the question of whether Indonesia will preserve the application of the traditional approach of Private International Law or will discover a more modern approach in unified legislation before the legislator drafts the content of such legislation.

Legal Harmonization of Conflict Rules regarding the Protection of the Rights of Migrant Workers: Proposition for ASEAN and Indonesia

a. The Future Legal Cooperation in ASEAN and the Protection of the Rights of Migrant Workers

ASEAN has agreed the ASEAN Charter that functions as "the ASEAN Constitution", even though until recently this Charter has not entered into force yet. The Charter has reaffirmed the position of ASEAN as an inter-governmental organization, which is supposed to present a single legal personality. It transforms its cooperation from being "state-centric" to being more "people-oriented". This development demands an ASEAN law, which expands its concern to fabricate unified ASEAN legal instruments and to directly coordinate the interaction of the people in the ASEAN region.

In the protection of the rights of migrant workers in particular and Labour Law in general, harmonization of substantive law via hard legal instruments can also be achieved by way of utilizing international legal instruments such as the ILO Convention. If the leaders of the ASEAN Member States agree to establish a minimum level of protection regarding a particular issue in the ASEAN territory, they may introduce compulsory ratification of some ILO Conventions. The involvement of the ILO supervisory mechanism to monitor the implementation of these Conventions in the territory of the ratifying countries will be effective to assure ASEAN reaches the established minimum level of protection.

Furthermore, as regards the protection of the rights of migrant workers in particular and on Labour Law in general, the use of Codes of Conduct by a multinational enterprise plays a very important role in designing and promoting effective application of labour standards in the manufacturing operations of the enterprise. Sharing of the best practices is another harmonization mechanism. This mechanism will help each Member State learn from the experience of other Member States in managing industrial relationships in their territory. It may also potentially lead ASEAN to formulate a common policy in industrial relations. Even though it will fabricate soft law as a result, it is a very promising process by which to discover the living law in the ASEAN community.

As regards the development of the future legal cooperation in ASEAN, the author proposes the following step:

- Short Term Target (present-2015): Compulsory Ratification

In this period, the ASEAN Member States are expected to harmonize their substantive law, with a view to creating 'a common level playing field' in many legal matters (especially concerning the protection of the rights of migrant workers). The most practical way to achieve such a legal harmonization is by agreeing a package of 'compulsory ratification' to some international conventions by the Member States. The ratification will cause these conventions to be legally binding to the ratifying countries. This method will establish a level of protection (regarding certain matters regulated in the ratified conventions) in the ASEAN region.

- Long Term Target (after 2015): Harmonization of Conflict Rules

At this stage the harmonization of conflict rules will be necessary. It will be important to simplify the process to determine the law governing transnational legal activities (as regards the topic of this book, especially concerning the law governing the rights of migrant workers) at the regional level. This is a kind of coordinating law, which makes it easier for people to predict which law governs their legal activities, transactions or relationships.

b. The Unification of Indonesian Private International Law

A unified system of PIL legislation will be very useful for the correct settlement of transnational legal cases. In the absence of a unified system of PIL legislation, the courts tend to settle all transnational cases brought before them on the basis of Indonesian law, treating these cases in the same way they would treat a domestic case. With regard to some aspects, this may create detrimental effects for Indonesia in its international relationships.

The majority of rights of migrant workers are regulated in mandatory rules in Indonesian Labour Law. The application of some principles in International Labour Law (such as the 'more favourable rule for workers', the non-discrimination principle, etc.) will be challenged by the application of Indonesian mandatory rules. The role of any unified PIL legislation in Indonesia in this matter would be to provide the method for determining the legal system under which the rights of migrant workers should be protected by indicating the *lex causae* of a transnational industrial relationship. It is also useful in determining the applicable minimum level of protection for migrant workers, especially if the mandatory rules of more than one country are involved and applicable.

Legal harmonization of the conflict rules to protect the rights of migrant workers is one of the top priorities, because on the one hand problems related to labour migration and transnational employment relationships represent some of the biggest problems faced by ASEAN today, and on the other hand, the harmonization of substantive labour law to protect migrant workers will be a long processes many parts of these provisions and a lot of sensitive matters such as the application of the right to strike, minimum wage, etc. form part of the mandatory rules of each country.

c. The Proposed Private International Law to Protect the Rights of Transnational Migrant Workers

Even though an employment contract essentially has a public law character, still it falls within the scope of the contract law. Consequently, the parties have a right to choose the law governing their employment contract. Therefore, as long as the parties have agreed a valid choice of law, this law will be the law governing their employment contract.

Problems arise in cases in which no law has been chosen. There are many options available for determining the law governing an employment contract. The author chooses the law of the country in which the work is carried out (*lex loci laboris*) as the law governing an employment contract subject to which the work is habitually carried out in one country. Not only has this principle been applied in Indonesia for a long period of time, but it is also the most universally applied principle for determining the law governing an employment contract subject to which the work is habitually carried out in one country.

If an employment contract does not state a country in which the work is carried out or if the work is carried out in more than one country, the *lex loci laboris* principle is not a suitable one. To determine the law governing such an employment contract, the author has chosen a rule-selected approach instead of the proximity approach, because this approach offers substantial justice rather than conflict justice and thus provides greater protection to the rights of migrant workers. Furthermore, the author constructs a new method to determine the law governing an employment contract that does not state the country in which the work is carried out or subject to which the work is carried out in more than one country, which is inspired by the most significant relationship theory. The author calls this new method "the most significant employment considerations theory". This theory basically determines the applicable law by determining rules of the competing countries, which have more significant connections with the case. Some connecting factors that must be taken into consideration are:

1. the consistency with the protection of fundamental rights of workers established by the ILO (it applies the non-discrimination principle; it recognizes the right of association and collective bargaining; it prohibits child labour and forced labour);
2. the support and promotion of the more favourable rules for workers;
3. the relevant policies of interested countries and the relative interests of these countries in the determination of the particular issue;
4. the protection of justified expectations of the parties.

Contrary to the most significant relationships theory, which utilizes the relevant considerations without priority, the author considers that the application of these factors in this theory should be based on priority and urgency. The first consideration has higher priority than the following considerations.

Many terms and conditions in an employment contract have been regulated as mandatory rules in Indonesian Labour Law, such as: unilateral termination by the employer; collective dismissal; trade union participation; the right to collective bargaining; legal justification and procedure to strike and lock out; minimum wage; over time allowance; maximum working time; minimum resting time; safety and health. Determination of the applicable mandatory rules is a very important issue in an employment contract, because many terms and conditions of employment contracts are regulated by mandatory rules. It is already universally accepted that if the public policies or mandatory rules of the forum are relevant to the case, it justifiable to avoid the application of foreign law to settle the case.

Actually, in the process to determine the law governing an employment contract, the examination of these four essential factors in the most significant employment consideration theory simultaneously looks at the relevance of the competing mandatory rules or public policies. Therefore, if more than one country regulates the problem in its mandatory rules or public policies, the mandatory rules or public policies of the country which has the most significant connection to the case will be appointed as the applicable mandatory rules or public policies (as the *lex causae* of the case). In this case, the author does not propose that all related mandatory rules be applied because if the Indonesian PIL regulation is overprotective to Indonesian migrant workers in this way it will create an economic burden for the employers and consequently decrease the competitiveness of Indonesian migrant workers in the international labour market.

SAMENVATTING

Inleiding

Arbeidsmigratie is een van de meest intensieve grensoverschrijdende activiteiten in de ASEAN-regio. Het biedt vele werknemers een grotere kans een baan te vinden en het draagt substantieel bij aan de buitenlandse inkomsten van veel van de landen uit de regio. Dit proefschrift richt zich op de vraag "hoe om te gaan met problemen rondom de bescherming van de rechten van grensoverschrijdende arbeidsmigranten", meer in het bijzonder op het vinden van de juiste methode om te bepalen welk recht de bescherming van de rechten van arbeidsmigranten beheerst. De raakvlakken tussen de nationale beschermingsnormen en de internationale of regionale normen worden besproken en het vooruitzicht van een door ASEAN gecoördineerd gemeenschappelijk beschermingsniveau in de ASEAN-regio alsmede de noodzaak voor Indonesië om tot één internationaal privaatrechtelijke methode te komen ter bepaling van het recht (de *lex causae*) dat de bescherming van de rechten van arbeidsmigranten beheerst, wordt geanalyseerd.

De rol van internationale organisaties in de bescherming van de rechten van arbeidsmigranten

De ILO, de VN en de WHO zijn internationale organisaties die regelingen hebben opgesteld met betrekking tot de bescherming van de rechten van arbeidsmigranten, al doen zij dat elk vanuit hun eigen perspectief, gebaseerd op de taak die is omschreven in hun mandaat. De VN beraadslaagt over de kernpunten voor de bescherming van de mensenrechten van de arbeidsmigranten en hun familieleden, terwijl de ILO een stap verder gaat en diverse aspecten van arbeidsrelaties en de invloed van deze relaties op arbeidsmigranten regelt. De WHO houdt zich niet direct bezig met het probleem van de bescherming van arbeidsmigranten; zij waarborgt echter het recht van arbeidsmigranten op een gelijke behandeling ten opzichte van onderdanen van het immigratieland (zoals toegezegd door het immigratieland in zijn *Schedule of Specific Commitments*) alsmede onderdanen van andere landen, in hun dienstverlening als natuurlijke personen. Aangezien de ILO tot hoofddoel heeft sociale rechtvaardigheid te bevorderen en zij internationaal erkende rechten voor werknemers over de hele wereld tot stand brengt, is het verstandig dat de ILO de belangrijkste organisatie wordt om de verbetering van de bescherming van de rechten van arbeidsmigranten te leiden en dat zij actief samenwerkt met de VN en andere relevante gespecialiseerde organisaties om beleid en programma's te ontwikkelen die het ontstaan van aanvaardbaar werk en een aanvaardbare bescherming van de rechten van arbeidsmigranten ondersteunen. Bovendien zouden de ILO en de WHO kunnen samenwerken om hun doelen, bescherming van arbeidsmigranten enerzijds en versnelde invoering van vrije dienstverlening anderijds, te bereiken. De ILO en de WHO moeten deze twee uiterste standpunten zien samen te brengen om het productieproces te bespoedigen zonder de welvaart van de werknemers te belemmeren. Om dit doel te bereiken wordt wereldwijde samenwerking en een gemeenschappelijke politieke wil van deze organisaties gevraagd. Consequente toepassing van door de ILO ontwikkelde internationale minimum-beschermingsnormen en het non-discriminatie beginsel in de internationale dienstverlening zullen zeer bruikbaar zijn om een duurzame economische ontwikkeling met groot respect voor mensenrechten en menselijke waardigheid in stand te houden.

Om de slechtste arbeidsomstandigheden tegen te gaan en ervoor te zorgen dat globalisatie een eerlijke kans op voorspoed biedt voor iedereen, heeft de ILO een systeem ontwikkeld van internationale arbeidsnormen, opgesteld door vertegenwoordigers van regeringen, werkgevers en werknemers van over de hele wereld, die de meest basale rechten in relatie tot arbeid beslaan, de zogenaamde kern-internationale arbeidsnormen. Deze bestaan uit:

- De vrijheid van vereniging en de daadwerkelijke erkenning van het recht op collectieve onderhandelingen;
- Het uitbannen van iedere vorm van onvrijwillige dwangarbeid;
- De daadwerkelijke afschaffing van kinderarbeid;

- Het uitbannen van discriminatie op grond van werk of beroep.

Deze vormen van bescherming zijn juridisch bindend en de ILO-leden zijn verplicht de rechten van werknemers op deze terreinen te beschermen op grond van hun ILO-lidmaatschap, en niet op grond van ratificatie van de verdragen, aangezien deze bescherming is neergelegd in de *Declaration of Fundamental Rights and Principles at Work*. Dit is een juridisch instrument van de ILO dat de lidstaten van de ILO dienen na te leven en dat zij moeten implementeren als gevolg van het enkele feit dat zijn lid zijn van de ILO. Wanneer derhalve is vastgesteld dat een bepaald nationaal rechtsstelsel van toepassing is op een arbeidsmigrant en de nationale beschermingsnormen van het nationale rechtsstelsel niet in overeenstemming zijn met het beschermingsniveau van de ILO, dan heeft de arbeidsmigrant als gevolg van het feit dat de betrokken landen ILO-leden zijn desalniettemin recht op het ILO-beschermingsniveau. Het beschermingsniveau van de ILO geeft de minimumbescherming weer, die niet alleen aan arbeidsmigranten moet worden geboden, maar aan alle werknemers over de hele wereld.

Huidige samenwerking met betrekking tot de bescherming van de rechten van grensoverschrijdende uitzendkrachten in de ASEAN-regio

Juridische samenwerking binnen ASEAN is vaak vergeleken met het rechtssysteem van de Europese Unie. Deze vergelijking leidt uiteindelijk echter tot de conclusie dat beide zeer van elkaar verschillen. ASEAN werd opgericht door middel van een twee pagina's tellend oprichtingsdocument, te weten de *Bangkok Declaration 1967*, terwijl de EU is ontstaan uit de EEG en Euratom, die werden opgericht door middel van het zeer uitvoerige Verdrag van Rome 1957. Onderzoek van de inhoud van de juridische oprichtingsdocumenten van beide organisaties laat duidelijk zien dat beide organisaties andere doelen en een andere intensiteit van samenwerking hebben. ASEAN kent een open en ongedwongen samenwerking, terwijl de EU een meer vastomlijnde institutionele samenwerking kent. In feite is ASEAN een vrijwillige vereniging van soevereine staten die hun soevereiniteit niet aan een centrale autoriteit hebben overgedragen. De verschillende beginselen en waarden in de rechtsstelsels van de ASEAN-lidstaten (bijvoorbeeld: sommige lidstaten zijn democratische landen, terwijl andere communistische landen zijn of landen onder invloed van Islamitisch recht) maken het idee dat een ASEAN-gemeenschapsrecht zou kunnen ontstaan enigszins onrealistisch. In de huidige omstandigheden moeten ASEAN-lidstaten die een juridisch bindende samenwerking op een bepaald terrein willen aangaan, dit via bilaterale of multilaterale samenwerking doen.

Met betrekking tot de bescherming van de rechten van arbeidsmigranten zouden door de verschillen in rechtsstelsels alsmede de verschillen in niveaus van voorspoed en economische ontwikkeling in de praktijk van de arbeidsmigratie problemen kunnen ontstaan. Zo passen sommige lidstaten lijfstraffen (bijvoorbeeld gerechtelijke afranseling) toe in hun strafrecht. De vraag dient te worden beantwoord of deze lijfstraffen ook ten aanzien van buitenlandse werknemers, afkomstig uit een land dat dergelijke straffen als een schending van de mensenrechten beschouwd, kunnen worden toegepast. Bovendien is als gevolg van de verschillen in niveaus van voorspoed en economische ontwikkeling in de ASEAN-lidstaten ook het niveau van de bescherming van mensenrechten, arbeidsrechten en sociale zekerheid voor arbeidsmigranten van land tot land verschillend. Op elkaar afgestemde bepalingen over een methode om het recht te bepalen dat de rechten en de bescherming van arbeidsmigranten binnen ASEAN beheerst zijn nodig. Tegen de historische en politieke achtergrond waarin het systeem van ongedwongen samenwerking binnen ASEAN is ontstaan alsmede uit het ontbreken van materiële rechtsregels ter bescherming van de rechten van arbeidsmigranten op regionaal niveau, groeit de behoefte aan regels van internationaal privaatrecht met betrekking tot de bescherming van de rechten van arbeidsmigranten.

De meest fundamentele verandering in de houding ten opzichte van de regionale samenwerking binnen ASEAN is tot uiting gekomen in het *ASEAN Charter*, dat in november 2007 is verschenen. Het vormt ASEAN om van een organisatie waarin staten centraal staan, tot een meer op mensen gericht intergouvernementeel instituut. Dit betekent dat ASEAN haar traditionele benadering van ongedwongen samenwerking fundamenteel dient te veranderen, teneinde een praktische intergouvernementele

samenwerking tot stand te brengen, door haar aandeel in de ontwikkeling van juridische ASEAN-instrumenten, die de onderlinge relaties tussen de bevolkingen in de ASEAN-regio rechtstreeks coördineren, te vergroten.

Het nationale materiële recht van Indonesië met betrekking tot de bescherming van de rechten van arbeidsmigranten

Indonesië heeft een grote hoeveelheid wetgeving uitgevaardigd, die diverse aspecten van het arbeidsrecht beslaan. Ook heeft het diverse internationale verdragen en overeenkomsten geratificeerd met betrekking tot mensenrechten en fundamentele bescherming van werknemers. Desalniettemin heeft Indonesië geen van de verdragen van de VN of de ILO geratificeerd, die rechtstreeks zien op de bescherming van arbeidsmigranten. Dit houdt in dat Indonesië de meest basale rechten van werknemers heeft beschermd, maar niet gebonden wenst te zijn aan enige verplichting uit internationale verdragen over de bescherming van de rechten van arbeidsmigranten, aangezien dergelijke verplichtingen economisch nadelig zullen zijn voor Indonesië als land van waaruit internationale arbeidsmigratie plaatsvindt.

Indonesië heeft voldoende nationale wetgeving om de rechten van werknemers te beschermen. In de praktijk bestaan echter talloze arbeidsrechtelijke problemen in Indonesië. De grootste oorzaak voor het ontstaan van deze problemen is niet de wetgeving zelf, maar het gebrek aan tenuitvoerlegging en handhaving van deze wetgeving. Het werk van arbeidsinspecteurs is nog altijd inefficiënt. Corruptie is hiervoor de voornaamste reden. Daarnaast draagt het Indonesische rechtssysteem nauwelijks bij aan de handhaving van wetgeving. Bovendien zijn de meeste vakbonden niet bij machte hun leden te beschermen. Werknemers nemen in Indonesië derhalve nog altijd een kwetsbare positie in, zeker ten opzichte van de machtige Indonesische werkgevers.

Indonesië kent weliswaar veel wetgeving om werknemers te beschermen, maar al deze wetgeving maakt deel uit van het materiële recht. Dit houdt in dat het Indonesische arbeidsrecht niet is ontworpen als een instrument voor het oplossen van grensoverschrijdende arbeidsgeschillen, door de reikwijdte van de betrokken nationale rechtsstelsels te bepalen en het recht aan te wijzen dat dergelijke geschillen beheerst. In dit licht dient een analyse van de IPR-methode met betrekking tot de juridische bescherming van uitzendkrachten in het Indonesische recht te worden gebaseerd op onderzoek van het beschikbare materiële recht. In feite is het nauwelijks mogelijk een IPR-methode in het Indonesische arbeidsrecht te ontwaren.

Veel van de bepalingen die betrekking hebben op de rechten van grensoverschrijdende uitzendkrachten en hun familieleden (zoals het recht lid te zijn van een vakbond, het recht op collectieve onderhandelingen, het recht om te staken, beroepsveiligheid en -gezondheid, sociale zekerheid, contractsbeëindiging en collectief ontslag, werk- en rusttijden) worden beschouwd als regels van dwingend recht. In deze kwesties wordt, wanneer partijen een juridisch geschil aan de Indonesische rechter voorleggen, Indonesisch recht toegepast op de beslechting van het geschil.

De nationale conflictregels van Indonesië met betrekking tot de bescherming van de rechten van grensoverschrijdende uitzendkrachten

Het Indonesische recht omvat mede een uiterst klein deel internationaal privaatrecht. Het kent geen geharmoniseerde IPR-wetgeving en conflictregels met betrekking tot specifieke juridische verhoudingen zijn verspreid over diverse wetten en regelingen. In wezen maakt de Indonesische arbeidsrechtelijke wetgeving deel uit van het nationale recht, dat bedoeld is ter plaatse van toepassing te zijn. Desalniettemin kan uit deze verspreide wet- en regelgeving worden afgeleid dat de belangrijkste bepalingen van het Indonesische internationaal privaatrecht nog altijd zijn gebaseerd op de oude beginselen *locus regit actum*, *lex patriae* en *lex situs*, ingesteld door de Nederlandse regering in haar koloniale periode in Nederlands Indië (thans

Indonesië). Deze beginselen zijn nog steeds van toepassing en zijn de belangrijkste bron geworden om voor de beslechting van IPR-kwesties in Indonesië uit te putten.

Met betrekking tot de bescherming van de rechten van grensoverschrijdende uitzendkrachten bevat het Indonesische recht geen specifieke conflictregels. Zij moeten derhalve worden afgeleid uit diverse wetten, regelingen en ministeriële of presidentiële verordeningen. In deze wet- en regelgeving zijn de toepasselijke hoofdbeginselen het *locus regit actum*- en het *lex loci actus*-beginsel, welke verder zijn uitgewerkt in het *lex loci laboris*-, het *lex loci contractus*- en het *lex loci solutionis*-beginsel. Aangezien diverse onderdelen van een arbeidsrelatie deel uitmaken van dwingend recht en deze onderdelen van de rest van het contract zijn af te splitsen, is het verklaarbaar dat deze onderdelen onderworpen worden aan hun eigen beginselen om het toepasselijke recht te bepalen.

In de wervingsprocedure van Indonesische arbeidsmigranten voor het verrichten van arbeid in het buitenland en bij het verlenen van wervingsvergunningen is de regering gerechtigd de inhoud, bepalingen en voorwaarden van arbeidscontracten te controleren. De vergunning zal niet worden afgegeven als de inhoud van het contract niet voldoet aan de minimumvoorwaarden uit de Indonesische wetgeving. Zelfs als het recht van het land waar de arbeid wordt verricht van toepassing is op het arbeidscontract, kan de juridische bescherming van Indonesische arbeidsmigranten derhalve niet beneden de minimale bescherming die het Indonesische arbeidsrecht biedt zakken, aangezien de werving anders door de regering niet zal worden goedgekeurd.

Sommige onderdelen van het Indonesische recht bevatten impliciet de methode om het toepasselijke recht op de bescherming van de rechten van grensoverschrijdende uitzendkrachten en hun familieleden te bepalen, ook al is één en ander geregeld in het materiële recht en niet in het conflictenrecht. Voorts bevat de formele procedure van het plaatsen van Indonesische werknemers in het buitenland diverse mechanismen om zeker te stellen dat het Indonesische recht van toepassing is als minimumnorm van bescherming. Niettemin blijkt in de praktijk dat de arbeidsmigratie van Indonesische werknemers naar het buitenland nog altijd tot diverse problemen leidt. De auteur is van mening dat één en ander meer een probleem van implementatie en tenuitvoerlegging van de wet is dan een probleem van wetgeving, aangezien Indonesië alle fundamentele ILO-verdragen heeft geratificeerd en een aanzienlijke hoeveelheid arbeidsrecht in de eigen wetgeving aanwezig is.

Ten einde de IPR-principes consistent te houden zou Indonesië nu moeten overwegen om één wet betreffende het conflictenrecht tot stand te brengen, niet alleen betreffende de IPR-aspecten van grensoverschrijdende arbeidsmigratie en de bescherming van Indonesische arbeidsmigranten in het buitenland of van buitenlandse werknemers in Indonesië, maar ook betreffende de IPR-aspecten van andere juridische kwesties. Met name zou moeten worden nagedacht over de vraag of Indonesië de traditionele benadering van het internationaal privaatrecht wil behouden dan wel een modernere benadering van ipr-wetgeving zou moeten volgen, voordat de wetgever met een voorstel voor dergelijke wetgeving komt.

Harmonisatie van conflictregels met betrekking tot de bescherming van de rechten van arbeidsmigranten: voorstel voor ASEAN en Indonesië

a. De toekomst van de juridische samenwerking binnen ASEAN en de bescherming van de rechten van arbeidsmigranten

ASEAN heeft een regeling aangenomen (*ASEAN Charter*) die functioneert als de grondwet van ASEAN, ook al is deze grondwet tot dusver nog niet in werking getreden. Het *ASEAN Charter* heeft de positie van ASEAN als een intergouvernementele organisatie, die beoogt één juridische entiteit te zijn, bevestigd. Het vormt de samenwerking binnen ASEAN om van een staatgeoriënteerde samenwerking naar een meer op mensen gerichte samenwerking. Deze ontwikkeling vraagt om ASEAN-recht, bestaande uit geünificeerde

juridische ASEAN-instrumenten die de onderlinge relaties tussen de bevolkingen in de ASEAN-regio rechtstreeks coördineren.

Waar het gaat om de bescherming van de rechten van arbeidsmigranten in het bijzonder en het arbeidsrecht in het algemeen kan harmonisatie van het materiële recht door middel van "*Hard Law*" ook worden bereikt door gebruik te maken van internationale juridische instrumenten zoals de ILO-verdragen. Wanneer de leiders van de lidstaten van ASEAN overeenstemming bereiken over het tot stand brengen van een minimum beschermingsniveau betreffende een bepaald onderwerp in de ASEAN-regio, dan zouden zij verplichte ratificatie van sommige ILO-verdragen kunnen introduceren. De betrokkenheid van het ILO-toezichtsmechanisme bij de implementatie van deze verdragen in de betrokken landen zal dermate effectief zijn dat ASEAN het beoogde minimum beschermingsniveau zal bereiken.

Bovendien speelt met betrekking tot de bescherming van de rechten van arbeidsmigranten in het bijzonder en het arbeidsrecht in het algemeen, ook het gebruik van de gedragsregels (*Codes of Conduct*) door multinationals een belangrijke rol bij het ontwerpen en promoten van effectieve toepassing van arbeidsnormen in de uitvoering van ondernemingsactiviteiten. Het delen van "*best practices*" is een ander instrument van harmonisatie. Dit instrument zal iedere lidstaat helpen te leren van de ervaring van andere lidstaten met het beheersen van bedrijfsverhoudingen op hun grondgebied. Eén en ander zou tevens kunnen leiden tot het formuleren van een gemeenschappelijk ASEAN-beleid met betrekking tot bedrijfsverhoudingen. Ook al leidt dit tot "*Soft Law*", niettemin is het een veelbelovend proces om te ontdekken wat het levende recht is in de ASEAN-gemeenschap.

Wat betreft de ontwikkeling van de toekomstige juridische samenwerking binnen ASEAN stelt de auteur de volgende stap voor:

- Korte termijn-doel (heden-2015): verplichte ratificatie
In deze periode wordt van de lidstaten van ASEAN verwacht dat zij hun materiële recht harmoniseren met het oog op het creëren van een "*common level playing field*" op diverse juridische gebieden (met name betreffende de bescherming van rechten van arbeidsmigranten). De meeste praktische manier om een dergelijke juridische harmonisatie te bereiken is door overeenstemming te bereiken over een pakket van verplichte ratificatie van een aantal internationale verdragen door de lidstaten. De ratificatie zal ervoor zorgen dat deze verdragen juridisch bindend zijn voor de landen die geratificeerd hebben. Deze methode zal ervoor zorgen dat een bepaald niveau van bescherming (betreffende in deze verdragen geregelde onderwerpen) in de ASEAN-regio wordt bereikt.

- Lange termijn-doel (na 2015): harmonisatie van conflictregels
In deze fase is harmonisatie van het conflictenrecht noodzakelijk. Het is bijzonder belangrijk om het proces van het bepalen van het toepasselijke recht op grensoverschrijdende juridische activiteiten (in het licht van het onderwerp van dit boek, in het bijzonder betreffende het recht dat van toepassing is op de rechten van arbeidsmigranten) op regionaal niveau. Deze wet heeft een coördinerende taak, die het voor mensen makkelijker maakt om te bepalen welk recht van toepassing is op hun juridische activiteiten, transacties of verhoudingen.

b. Het codificeren van het Indonesische internationaal privaatrecht

Een gecodificeerd systeem van IPR-regels zou bijzonder bruikbaar zijn voor het op juiste wijze beslechten van grensoverschrijdende juridische geschillen. Bij afwezigheid van dergelijke regels zijn rechtbanken thans geneigd alle internationale zaken te beoordelen naar Indonesisch recht, zodat zij deze zaken op dezelfde wijze behandelen als een nationale zaak. Met betrekking tot sommige aspecten kan dit nadelige gevolgen hebben voor de internationale relaties van Indonesië.

Het grootste deel van de rechten van arbeidsmigranten worden geregeld door middel van dwingende regels in het Indonesische arbeidsrecht. Het toepassen van bepaalde beginselen uit het internationale arbeidsrecht (zoals het toepassen van het gunstigere recht voor werknemers, het non-discriminatiebeginsel, enz.) wordt bemoeilijkt door de toepassing van het Indonesische dwingende recht. De rol van een IPR-codificatie in Indonesië zou moeten zijn dat zij een methode opstelt om het rechtsstelsel te bepalen dat de bescherming van de rechten van arbeidsmigranten beheerst door het toepasselijke recht op een grensoverschrijdende arbeidsrelatie aan te wijzen. In dat kader zou ook moeten worden aangegeven wat het minimum beschermingsniveau zou moeten zijn voor arbeidsmigranten, met name indien dwingende regels van meer dan één land betrokken en van toepassing zijn.

Harmonisatie van de conflictregels betreffende de bescherming van arbeidsmigranten is een topprioriteit, aangezien de problemen met betrekking tot arbeidsmigratie en grensoverschrijdende arbeidsrelaties enerzijds een van de grootste problemen vormen waarmee men in ASEAN te maken heeft en anderzijds duidelijk is dat de harmonisatie van het materiële arbeidsrecht teneinde arbeidsmigranten te beschermen een lang proces zal zijn, waarbij diverse onderdelen van deze regelingen en gevoelige onderwerpen als het stakingsrecht, het minimumloon, enz. tot het dwingende recht van ieder land behoren.

c. Het voorgestelde internationaal privaatrecht betreffende de bescherming van grensoverschrijdende arbeidsmigranten

Arbeidscontracten vallen binnen het bereik van het contractenrecht, ook al hebben ze in essentie een publiekrechtelijk karakter. Dit betekent dat partijen het recht hebben om het toepasselijke recht op hun arbeidsverhouding aan te wijzen. Wanneer partijen een geldige rechtskeuze hebben uitgebracht, dan zal het gekozen recht hun arbeidsovereenkomst beheersen.

Problemen ontstaan in het geval er geen recht is gekozen. In dat geval zijn er diverse mogelijkheden om het toepasselijke recht op het arbeidscontract te bepalen. De auteur kiest het recht van het land waar het werk wordt uitgevoerd (*lex loci laboris*) als het recht dat een arbeidscontract beheerst op basis waarvan gewoonlijk in één land arbeid wordt verricht. Dit beginsel wordt niet alleen al lange tijd gehanteerd in Indonesië, maar is ook wereldwijd het meest gehanteerde beginsel om het toepasselijke recht op een arbeidscontract te bepalen.

In het geval dat in het arbeidscontract niet is bepaald in welk land het werk moet worden uitgevoerd of wanneer het werk in meer dan één land wordt verricht, biedt het *lex loci laboris*-beginsel geen oplossing. Voor die situatie heeft de auteur gekozen voor een '*rule-selected approach*' in plaats van voor het beginsel van de nauwste verbondenheid, aangezien eerstgenoemde benadering leidt tot materieelrechtelijke rechtvaardigheid in plaats van conflictenrechtelijke rechtvaardigheid en daarmee meer bescherming biedt aan de arbeidsmigranten. Voorts verdedigt de auteur een nieuwe methode om het toepasselijke recht te bepalen op een arbeidscontract wanneer het land waar de arbeid moet worden verricht niet wordt vermeld of de arbeid in meer dan één land wordt verricht, welke methode is geïnspireerd op de "*most significant relationship theory*". De auteur noemt deze nieuwe methode "*the most significant employment considerations theory*". Volgens deze theorie dient het toepasselijke recht te worden bepaald door vast te stellen met welke regels uit de betrokken landen de zaak het meest significant is verbonden. Enkele van de aanknopingsfactoren die daarbij in aanmerking moeten worden genomen zijn:

1. de mate van overeenstemming van de betreffende regels met de bescherming van de fundamentele rechten van werknemers zoals neergelegd in de ILO-regels (het non-discriminatiebeginsel wordt toegepast; het recht op vereniging en collectieve onderhandeling wordt aanvaard; kinderarbeid en dwangarbeid zijn verboden);
2. het ondersteunen en promoten van gunstiger regels voor werknemers;
3. de relevante beleidslijnen en belangen van de betrokken landen bij de bepaling van het voorliggende geval;

4. de bescherming van gerechtvaardigde verwachtingen van partijen.

Anders dan het geval is bij de "*most significant relationships theory*", die de relevante overwegingen zonder prioriteit hanteert, is de auteur van mening dat de toepassing van genoemde aanknopingsfactoren dient te geschieden op volgorde van prioriteit en urgentie. De eerste overweging heeft hierbij hogere prioriteit dan de daarop volgende.

Diverse bepalingen en voorwaarden in een arbeidscontract kunnen regels van dwingend Indonesisch arbeidsrecht betreffen. Het gaat hierbij om: het eenzijdig beëindigen van het arbeidscontract door de werkgever; collectief ontslag; vakbondslidmaatschap; het recht op collectieve onderhandelingen; het recht om te staken; minimumloon; overwerkvergoeding; maximumwerktijden; minimumrusttijden; veiligheid en gezondheid. Het bepalen van de toepasselijke dwingende regels is bijzonder belangrijk in een arbeidscontract, aangezien veel van de bepalingen en voorwaarden van arbeidscontracten gereguleerd worden door dwingend recht. Het is algemeen geaccepteerd dat wanneer de openbare orde of dwingende regels van het forum betrokken zijn bij het geval, het gerechtvaardigd is om onder omstandigheden buitenlands recht buiten toepassing te laten.

In het kader van het bepalen van het toepasselijke recht op een arbeidscontract wordt bij het toepassen van de vier hierboven genoemde factoren meteen ook de relevantie van het dwingende recht en de openbare orde van de betrokken jurisdicties meegenomen. Eén en ander betekent dat indien meer dan één land het betrokken probleem regelt door middel van regels van dwingend recht, de regels van het land waarmee "*the most significant connection*" bestaat als toepasselijk zullen worden aangewezen. In dat geval verdedigt de auteur overigens niet dat alle dwingende regels van toepassing zullen zijn, aangezien, indien het Indonesische internationaal privaatrecht een overdosis aan bescherming aan Indonesische arbeidsmigranten biedt, dit een economische last voor de werkgevers zou betekenen, waardoor de concurrentiepositie van Indonesische arbeidsmigranten op de internationale arbeidsmarkt zou verslechteren.

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