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Regulatory options for conflicts of law and jurisdictional issues in the on-demand economy

Miriam A. Cherry

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***Regulatory options for conflicts of law and
jurisdictional issues in the on-demand economy***

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Introduction

The on-demand economy has truly gone global. Consider the case of online platform TaskRabbit, a U.S.-based site where users could post odd jobs. A high number of TaskRabbit's users were seeking help with the construction of furniture they purchased at IKEA, and skilled workers started using the platform to find customers.¹ Corporate management at Swedish company IKEA noticed the trend, and acquired TaskRabbit in 2017.² As a result, a Swedish company now owns a platform labor service in the United States and Britain, with plans to expand the TaskRabbit platform to twenty-seven more countries where IKEA currently owns brick and mortar stores.³ Throughout its time, TaskRabbit has claimed it only has a handful of employees, and the terms and conditions on its website list its workers as “independent contractors.”⁴

Two other cases effectively illustrate the global nature of on-demand work. Digital platform Upwork, headquartered in Mountain View, California, hosts and parcels out assorted computer programming, graphic design, and data-entry tasks.⁵ Upwork posts tasks from requesters around the world, and likewise, the workers on the platform live around the world, most often working from their homes.⁶ A final example is UK company Chatterbox, which uses its platform to connect remote workers in Syrian refugee camps with users in many other countries who pay to learn Arabic.⁷ In the past, foreign companies have used platforms to engage Kenyan nationals living in refugee camps tasks as diverse as computer programming and customer support calls.⁸

On demand platforms are changing and reshaping our conceptions of both the firm and the work relationship in far-reaching and critical ways, allowing companies to hire workers and to seek customers across national boundaries.⁹ Meanwhile, as on-demand platforms have scaled their operations in the last decade, regulators around the world have struggled to keep pace with the changes these platforms have presented.¹⁰ While some commentators believe existing forms

¹ Thadani, 2017.

² Milne, 2017.

³ Fung, 2017.

⁴ Roberts, 2017.

⁵ Fry, 2017 (noting Fortune 500 companies outsourcing tasks to platforms like Upwork). *See also What Kind of Freelance Talent Can You Hire Through Upwork?* (video), available at: www.upwork.com/hiring/for-clients/kinds-of-freelancers-on-upwork/ [4 Apr. 2019] (listing types of work available on the Upwork platform). International Labour Organization (ILO), 2018a.

⁶ The nations supplying the most labor on Upwork are India, Philippines, United Kingdom, Russia, Pakistan, Bangladesh, U.S., China, Canada, Poland, Belarus, Romania, Vietnam, Indonesia, Argentina, Serbia, Armenia, Germany, and Egypt. The diversity of these supplier countries demonstrates the truly global nature of these platforms. Horton et al., 2017, 17-096, Table 3B.

⁷ World Economic Forum, 2017 (noting language tutoring and computer programming work in Syrian refugee camps, and encouraging the growth of such work).

⁸ Hegarty, S. 2011. “How Silicon Valley Outsources Work to African Refugees”, 18 June. Available at: www.bbc.com/news/world-africa-13784487 [4 Apr. 2019].

⁹ Benkler, Y. 2006. Also note the use of the terms “on demand” or “gig work,” rather than the terminology of the “sharing economy.” The author believes that “sharing” is a misnomer, given that systems of platform work involve remuneration and participation on these platforms is highly commoditized. *See* Cherry, forthcoming 2019.

¹⁰ Cherry, 2016a (listing lawsuits about employment in the gig economy filed in the United States and discussing the digital transformation of work).

of labour and employment regulations can stretch to cover on-demand work,¹¹ others have called for new legal initiatives specifically crafted for online platforms.¹² Confronted with low pay and problematic working conditions,¹³ gig workers around the world have turned to the courts, attempting to invoke the protections of traditional labour and employment law.¹⁴ Court cases were first seen in the United States, where many platforms had their origins.¹⁵ As the platforms have spread to many countries, similar types of litigation have followed in their wake. Currently, cases are being heard around the world on the question of whether gig workers are “employees” or “independent contractors.”¹⁶ These include ongoing litigation in the United Kingdom, Spain, Belgium, and Australia.¹⁷ So far, these decisions have applied different standards, and to date have been reaching seemingly conflicting conclusions.¹⁸

Despite crowdwork being a genuine global system of work, these precedents set the stage for inconsistent rulings and conflicts of law. Transnational ownership and international worker participation on crowdwork platforms present timely and compelling business, technology, and labor law questions. Many digital platforms are truly multinational enterprises, and we can expect to see difficult compliance issues come into play for these businesses. Within the next decade, the spread of online crowdwork will result in even more litigation, creating difficult questions in the labyrinth of rules that comprise private international law, i.e. jurisdiction, choice of law, and conflicts of law.¹⁹ Jurisdiction refers to the ability of a court to decide a dispute.²⁰ Choice of law pertains to the law that a court with jurisdiction will apply. Conflicts of law is the body of law determining, in the absence of a choice of law provision, what law to

¹¹ See e.g., Prassl, J. 2018 (noting similarities between old forms for work and new forms of work, in instances like “open calls” for work by stevedores on the docks). See also Finkin, 2016 (drawing links between piecework and homework in traditional industrialization and computer crowdwork) and Berg, 2018.

¹² Harris and Krueger, 2015 (proposing third intermediate category of “independent worker” located in between employee and independent contractor). See, e.g., Guerrieri, 2016. See also Cherry and Aloisi, 2017 (discussing a comparative and historical approach to the third category).

¹³ Warner, 2015. In a 2016 ILO survey (Berg, 2016), crowdworkers were asked about the upsides and downsides of their work, and there were some common themes. Complaints about low pay were common. The ILO data show that American crowdworkers averaged \$5.55 an hour, below the federal minimum wage of \$7.25 an hour. Fair Labor Standards Act (FLSA) see 29 U.S.C. § 8, et seq. Many crowdworkers in the ILO survey remarked that they had high search costs, i.e. that it took them a long time to find appropriate tasks on the website, so that they spent more time looking for work than they actually spent doing it. Still others noted that their work could be rejected by the requester on a summary basis, without reasons provided. All of these led to dissatisfaction among those surveyed.

¹⁴ For a listing of the ongoing litigation surrounding the on-demand economy in the United States, see Cherry, 2016a. See also Kessler, 2018 p. 111 (noting that “[s]oon it was difficult to find any company that brokered independent workers and didn’t have a lawsuit on its hands.”).

¹⁵ Cherry, *op. cit.*

¹⁶ De Stefano, 2018. “Platform and Labour Protection Flexibility is not Enough”, 23 May. Available at: regulatingforglobalization.com/2018/05/23/platform-work-labour-protection-flexibility-not-enough/ [4 Apr. 2019].

¹⁷ Chapter 1, *infra*. For Australia, see Stewart, A.; Stanford, J. 2017 (noting uncertainty as to the legal status of gig workers).

¹⁸ De Stefano, *op. cit.*; Chapter 2, *infra*.

¹⁹ In Europe, the legal terminology used for these concepts is “private international law.” While both terms are used interchangeably in this paper, I tend to prefer “conflicts of law” as the term seems more expressive.

²⁰ Merrett, 2012. *But see* Berman, 2002, p. 319 (using “jurisdiction” to stand in not only for the concept of being able to hear a dispute, but also to the determination that a certain jurisdiction’s law will apply).

apply when a foreign element is involved.²¹ While at the moment the pending cases about the on-demand economy have largely focused on the issue of employee/independent contractor status, that is only the threshold question. Beyond this gateway lies additional issues, such as the application of substantive rights for workers that vary drastically depending on the law that is applied.²² For example, minimum wage and working time laws vary drastically depending on which jurisdiction's laws are applied.²³ The same is true for collective bargaining, worker's compensation, or unemployment insurance.²⁴ Different country's conflicts of law rules could potentially yield different answers for each phase of doctrinal law and policy.

The conundrum is that work has traditionally been conceived of a localized activity, largely regulated on a national basis, while the incontrovertible fact is that many crowdwork platforms either are or aspire to become genuine multinational enterprises.²⁵ With crowdwork performed wholly on the computer, like Upwork, the company or person who is ordering work could be located in one nation, the platform itself could be located in a second nation, and the workers could be located in many other nations.²⁶ Indeed, the innovative promise of crowdwork lies in its global nature, allowing more workers and companies to participate, and to take advantage of temporal and knowledge differences.

For on demand platforms, this may present difficult legal compliance problems. Currently some platforms have aspirations of becoming "global workspaces," hosting both requesters and workers from dozens of countries. At the moment, there is a void in regulation. However, when countries begin to pass laws with differing and particular regulations requiring compliance, those laws will likely not be uniform. The need to calculate dozens of minimum wages or to comply with various procedural and administrative rules will likely result in time-consuming and potentially costly compliance issues for platforms. While platforms may attempt to engage in self-help through private ordering through the terms and conditions of online contracts, some labor and employment laws are considered mandatory or non-waivable. Such practices might also raise a concern about forum shopping, or the "race to the bottom" in labor standards.²⁷

These are challenging sets of problems. The beginnings of solutions may be found by thinking about other regulatory structures that exist outside of territorial boundaries. Here, specifically I make reference to the recently passed General Data Protection Regulation in the EU,²⁸ which has extraterritorial application to the protection of privacy; to the international rules that govern

²¹ Van Calster, 2016.

²² Basic rights, like the freedom to organize and bargain collectively as part of a union, rest on the outcome of the classification debate, and in many legal systems, only "employees" have these types of rights. *See* Johnston and Land-Kazlauskas, 2018, p. 2. Classification can also have implications for intellectual property rights. California law states that employers own the work of their employees under the work made for hire, but there is no such rule for independent contractors. *See* California Labor Code 3351.5(c), Unemployment Insurance Code Sections 686, 621 (d). Swanlund, 2016 ("California businesses face a critical decision ... They may take advantage of the benefits afforded by the work-made-for-hire doctrine... but be treated under California law as an employer, or they may sacrifice the benefits of the work-made-for-hire doctrine yet maintain the independent contractor status of its creative workers.").

²³ Cherry, 2009; Cherry, 2014a.

²⁴ For example, most crowdwork websites lack a way to verify with certainty that they are free of child labor; they rely almost entirely on self-reporting and self-certification of age.

²⁵ Cherry, 2010.

²⁶ Kittur et al., 2016.

²⁷ For a discussion of arbitration in the on-demand economy, see Garden, 2017.

²⁸ Council Regulation 2016/679, On the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), art. 1, 2016 O.J. (L 119) 32.

employment of transportation workers, specifically those engaged in maritime employment; and to the corporate codes of conduct and social responsibility followed by many multinational companies. In essence, we can profit from thinking about on-demand platforms as another way that labor moves through the global supply chains, except that those supply chains are for services, not products.

The goal of this paper is to provide a global framework for thinking about the on-demand business model and these assorted conflicts of law and jurisdictional issues.²⁹ The next section provides the theoretical background, largely supplied by labor and employment law, and which is based heavily on national regulation. As this section notes, the on-demand model provides a challenge to the received wisdom that employment is inherently local. Section 2 then discusses the specific context of on-demand crowdwork, providing background themes, an explanation of the legal issues, and a survey of the current state of the literature. Section 3 analyzes the jurisdiction and conflict of law issues through the lenses of three jurisdictions that are of paramount importance to crowdwork: California, the European Union, and India. This section also looks at terms of use and forum selection clauses. As the toolkit of private international law provides few definite answers, the final section looks at alternative ways of thinking about regulation, drawing parallels to the GDPR, international maritime law, and multinational codes of conduct and corporate social responsibility. Throughout, the paper emphasizes the need for further coordinated multilateral study, discussion, and regulatory action to assist both crowdworkers and businesses as they navigate the on-demand model of production.

1. Theoretical framework

Previous scholarship provides the context for discussing the jurisdiction, choice of law, and conflict of law issues that arise around transnational employment relationships. For many decades, labor and employment lawyers had tended to neglect jurisdictional issues; and lawyers who were studying conflicts of law tended to ignore labor law issues.³⁰ In 1984, ILO attorney Felice Morgenstern wrote the first English full-length treatment of the intersection of these fields in her book entitled *International Conflicts of Labour Law*.³¹ Morgenstern described complex sets of legal issues that she had encountered at the ILO, all of which dealt with labor and employment issues involving a “foreign element.”³² The book covered many of the issues raised by the employment of itinerant workers, posted workers, offshoring and outsourcing operations, and employment in multinational corporations.³³

Within her book and a preceding article,³⁴ Morgenstern notes the development of rules and concepts surrounding transnational employment. As her book describes, some approaches

²⁹ While this paper formulates an initial framework and adumbrates the issues in three jurisdictions, it is not intended as a comprehensive study of how each jurisdiction would approach these issues. Apart from treaties like the Rome Convention, each national legal system has its own system for determining jurisdiction, choice of law, and conflicts of law issues. It would, however, require a comprehensive study of each of those sets of laws to formulate a comparative conflicts of law handbook and then to attempt to apply those national rules to certain issues in the gig economy. Accordingly such an analysis will have to await further study.

³⁰ See, e.g., Franzen, 2014, p. 245 (“[t]ruly international sources governing conflicts of law in our field [labor and employment law] are not numerous, though of growing importance.”).

³¹ Morgenstern, 1984. This was the first book-length treatment of the subject to appear in the English language, and it cited and quoted cases from around the world. Gross and Birk, 1985 (book review, noting that the “book is, in fact, the first English-language monograph on international conflicts of labor law.”).

³² *Id.* at 1.

³³ *Id.*

³⁴ Morgenstern and Knapp, 1978.

looked at the location of the contract's execution, while others looked at the domicile and nationality of the parties or the location of the company's headquarters, and still others to the location where the work was being carried out.³⁵ Overall, however, Morgenstern noted that the received wisdom seemed to converge on the idea of looking at the physical location of where the work was performed, supplemented by the law of the employing firm's "home base."³⁶ Her approach was doctrinal and practical, looking to statutes and case law, where applicable.

Since that time, the intersection of labor and private international law as a doctrinal category has received only sporadic interest from academics. Within the U.S., there is some attention to the issue when the employment laws of one state conflict with another state's laws. Most notably, the fact that California bans non-competition agreements, (while other states recognize them), has prompted legal scholars into discussion.³⁷ In the EU, scholars have tended to focus on the impact and application of the rules around the Rome Regulation. These accounts and ones like it tend to be more practical and applied, rather than theoretical.³⁸ There has also been a robust discussion about the longstanding issues with posted workers throughout the EU, as well as workers who live on one side of a border yet work in another. In all of this scholarship, which is focused on the practical outcomes for certain groups of workers or multinational companies, employment law is generally conceived of as largely a local issue.³⁹

During the span of time between when Morgenstern wrote and today, the globalization of work and the pace of technological change rapidly accelerated. In the words of Professor Marie-Ange Moreau, the "relationship between time, place, and space of action has... changed in profound ways" due to technology and globalization.⁴⁰ Legal doctrine, Professor Moreau argues, has yet to "come to terms with this transnationalization."⁴¹ In the late 1990s and early 2000s, legal theorists such as Katherine Van Wezel Stone began to grapple with transnational labour law as well as problems of labour standards in the global supply chain and in multinational companies.⁴²

In his 2001 article *Labour Law Beyond Borders*, Professor Patrick Macklem noted that flexible forms of production and economic globalization were creating profound challenges for systems of labor and employment law traditionally based on national regulation.⁴³ As a counterweight Macklem pointed to international minimum standard setting by the ILO; the insertion of human rights norms and labour standards in trade liberalization treaties; and multinational firms' corporate codes of conduct and social responsibility. In 2009, Professor Guy Mundlak picked

³⁵ Morgenstern, 1984 at 61-64. For more on the triangular nature of the relationship with the platform, see Prassl, 2018, *op.cit.*

³⁶ *Id.* at 121 ("Many of the conflicts and uncertainties inherent in the subject would seem to be due to the difficulty of establishing a clear dividing line between the legitimate scope of the law of the place of work and that of the home base [.]").

³⁷ Moffat, 2012; Lester and Ryan, 2010; Glynn, 2008.

³⁸ See Merret, 2012; Grusic, 2012

³⁹ See, e.g., McCallum, 2002, p. 6 ("Throughout history, the performance of paid work has been a local affair. This is because workers are flesh and blood human beings who live in family groups, and who undertake employment to support themselves and their families by earning money to provide food, shelter, clothing, recreation and the education of their children."); See also Martinez, 2015, pp. 5-6 ("labor and employment law has always been regulated locally and for local employee-employer relationships. Traditionally, domestic regulations have not contemplated transnational employment relationships[.]").

⁴⁰ Moreau, 2013, p. 697.

⁴¹ *Id.*

⁴² See, e.g. Stone, 1995; Stone, 1999.

⁴³ Macklem, 2002.

up on Macklem’s proposals, emphasizing the need to de-territorialize labor law. In his article, Mundlak argues that with the process of globalization, the territorial solutions previously created within labor law are no longer adequate.⁴⁴ Interestingly, he suggests identifying the location of the ultimate beneficiaries of products and services as the appropriate place to look for regulation.⁴⁵ As Mundlak puts it, regulation “of the labor market should be associated with the de-facto employment relationship, as viewed in terms of social and economic reliance.”⁴⁶

Professor Harry Arthurs has also discussed transnational labour law extensively. In his article *Extraterritoriality by Other Means*, Arthurs notes that labour law has a tendency to “sneak” or to be smuggled across borders.⁴⁷ Sometimes one state’s laws present a strategy or template for the law in another country, as Arthurs notes is true of the United States and Canada.⁴⁸ Other times, multinational companies import their own standards and norms into the countries where they employ workers. This can be a positive experience for workers, raising local standards; or multinationals can receive exemptions even from low standards, because some governments are desperate for foreign investment.⁴⁹

Computer crowdwork on a global technological platform presents a unique and almost existential challenge for traditional territorial labour law. In essence, crowdwork turns the dependence on national systems on its head. The received wisdom in private international law doctrine, which is based on territoriality, physical presence, and habitual place of work fundamentally do not comport with crowdwork. While theorists such as Arthurs, Stone, Macklem, and Mundlak have all noted this disconnect as it pertained to earlier forms of globalized work and global supply chains, computer crowdwork serves to shine a spotlight on these issues. These theoretical accounts must serve to inform the analysis of the major private international law issues in the on-demand economy.

2. The global reach of platform businesses

2.1 *Background on platform development*

Overviews of how on-demand platforms operate are by now well-covered in the popular press⁵⁰ and the academic literature.⁵¹ In 2016, a survey by *Time Magazine* found that over fourteen million people in the United States were working in the “gig,” “on demand,” or “sharing” economy.⁵² Since the time of that study, the popularity of online platforms has continued to

⁴⁴ Mundlak, 2009.

⁴⁵ *Id.* at 212.

⁴⁶ *Id.*

⁴⁷ Arthurs, 2010, pp. 527, 529 (“labor laws in fact ‘sneak across borders’ relatively unconstrained by the extraterritoriality doctrine[.]”).

⁴⁸ *Id.* at 534-535. *See also* Arthurs, 2001.

⁴⁹ *Id.* at 544. *See also* Bisom-Rapp, 2009.

⁵⁰ Marvit, 2014.

⁵¹As such, this section has been adapted from the author’s earlier work that described the particular features, structures, economics, and legal issues of the gig economy. *See* Cherry, 2016a. *See also* Aloisi, 2016; De Stefano, 2016; Means and Seiner, 2016; Rodgers, 2015; Lobel, 2016; Acevedo, 2016.

⁵² Steinmetz, 2016. According to a 2016 report from the Congressional Research Service, if temporary work, on-call work, part-time work, and “self-employment” in the United States are included in this trend, the issues around alternative work arrangements have an impact on nearly one-third of the labor force; Donovan et al., 2016.

grow around the world, making gig work a truly global phenomenon.⁵³ As the vanguard of these trends toward more flexible and contingent work, labor in the on-demand economy has received both its share of positive and negative attention in the media and in the courts. Positive news stories focus on the opportunities generated for people who need and want more flexible days and more flexible hours than a typical forty-hour a week job would provide. Sharing websites and mobile apps also may provide a quick and easy way for customers to seek out assistance.

Negative stories, on the other hand, focus on the terms and conditions of the work, including a lack of benefits and opportunity for advancement.⁵⁴ These stories detail the uncertainty of on-demand platforms for workers, the low rates of pay provided on some platforms, and the amount of unpaid search time that goes into finding the next gig.⁵⁵ Ever since Uber became a popular app, most people have at least a passing familiarity with how on-demand platforms operate.⁵⁶ Accordingly, the background provided herein will be streamlined.

The on demand business model offered important innovations; instead of buying or selling a good, users of certain platforms could rent access to what they needed.⁵⁷ A driver with a car could transform an ordinary morning commute into a profit-generating enterprise by picking up a passenger on Uber or Lyft. Other websites, like Amazon's Mechanical Turk, crowdsourced computer tasks to a global market of workers, using only very small slices of time. Websites that were part of "prosumer" movements involved customers in design or marketing decisions, only to then sell them products.⁵⁸ These business models in and of themselves were different than the standard models of sales that firms had typically employed.

The specifics and mechanics may differ, but crowdworking platforms share common characteristics. Through a market-making function they create an "open call" that then matches discrete tasks to the on-demand workers.⁵⁹ One category of on-demand work involves tasks that take place in the real world, and that are powered by a website or app. Well-known examples include websites and apps that range from Uber (ridesharing),⁶⁰ GrubHub (food delivery),⁶¹ and Handy (home repair). The other category, exemplified by Upwork or by Amazon's Mechanical Turk (AMT), involve completion of computer tasks online. On these computer sites, the requests, the hosting, and the work itself are all performed online.⁶²

On-demand services seemed to thrive in an environment that was increasingly globalized, anonymous, and with lowered transaction costs, more efficient. A convergence of critical thought and attention is beginning to crystalize around the gig economy, contained in the popular press, in computer science accounts, sociological studies, economic studies, in business schools, in law reviews, and in the courts. Various accounts have emerged that document and

⁵³ International Labour Organization (ILO), 2018b.

⁵⁴ Marvit, 2014; Kittur et al, 2016.

⁵⁵ See, e.g. Kessler, 2018 (noting call center platforms that advertised paying minimum wage, as if that were something to brag about).

⁵⁶ Madeintyo, *Uber Everywhere*. Available at: <https://www.youtube.com/watch?v=BcyFJLrBVhA> (not-safe-for-work rap about taking Uber everywhere because of its ubiquity). Cf. De Los Santos, 2017.

⁵⁷ Kessler, 2018.

⁵⁸ Howe, 2008 (describing the "Threadless" website).

⁵⁹ Steinmetz, 2016.

⁶⁰ www.uber.com.

⁶¹ www.grubhub.com.

⁶² De Stefano, 2016 makes the distinction between work performed entirely in cyberspace and work that originates on an app or internet platform, and then is performed in the "real world"; Donovan et al., 2016.

analyze key characteristics of on demand platforms: 1) reliance upon, and placement within, the information society;⁶³ 2) the globalization of both the platforms and the workforces involved;⁶⁴ 3) dependence on trust and reputation proxies;⁶⁵ 4) use of big data and surveillance;⁶⁶ 5) use of just-in-time scheduling of labour relations;⁶⁷ and 6) the management of workers by algorithm.⁶⁸

While the traditional employment relationship involved a steady forty-hour work week, hierarchical structure and advancement, along with accompanying benefits, the on demand model instead stresses limited commitment and extreme flexibility.⁶⁹ Rather than having an individual assigned employee to take on tasks as work arises, work is broken down into smaller pieces and placed out via Internet or cellular phone app on an “open call.”⁷⁰ Workers sign in and complete tasks at their own pace and on their own time. There are no obligations of the worker or the platform to each other past the conclusion of one particular gig or task.⁷¹ Yet systems of surveillance sit atop the workflow, and algorithmic management controls and directs work activities.

2.2 *Conflicting law in the gig economy*

A recurring legal issue that is critical in considering work in the on-demand economy stems from confusion over the proper employment classification of platform workers. From the beginning, many platforms labelled workers who used the platforms as “independent contractors” through terms of service listed on a website or on a mobile app.⁷² The matter of employment classification, however, is not decided by a company’s label or terms of service. Rather, courts determine classification based on a number of factors, primarily the amount of control exerted over the worker or how the work is performed, and whether the workers look like an independent business, based on their indicia of entrepreneurial activity.⁷³ Classification as an employee is a “gateway” to determine who deserves the protections of labor and employment laws, including the right to organize, minimum wage, and unemployment compensation, to name just a few of the benefits that are part and parcel of employee status.⁷⁴ As such, classification as an employee is actually “an important instrument for the delivery of workers’ rights.”⁷⁵

⁶³ Cherry and Poster, 2016.

⁶⁴ Cherry, 2016a.

⁶⁵ Rosenblat and Stark, 2016.

⁶⁶ Bodie et al., 2017.

⁶⁷ De Stefano, 2016.

⁶⁸ Rosenblat and Stark, 2016.

⁶⁹ Cherry, 2016a.

⁷⁰ Howe, 2008.

⁷¹ Cherry, 2016a; *See also* Garden, 2017.

⁷² Cherry, 2018.

⁷³ Cherry, 2016a.

⁷⁴ Finkin, 2016, p. 603.

⁷⁵ Davidov, 2002.

Under U.S. law, whether a worker is an employee or independent contractor is determined through various multifaceted tests dependent on the facts of the relationship.⁷⁶ The “control” test derives from the caselaw and decisions on agency law, and focuses on a principal’s right to control the worker. In brief, the factors for finding employee status are whether the employer may direct the way in which the work is performed, determine the hours involved, and provide the employee with direction.⁷⁷ On the other hand, elements that lean toward independent contractor classification include high-skilled work, workers providing their own equipment, workers setting their own schedules, and getting paid per project, not per hour.⁷⁸ In an alternate test, courts examine the economic realities of the relationship to determine whether the worker is exhibiting entrepreneurial activity, or whether the worker is financially dependent upon the employer.⁷⁹ The label affixed to the relationship is a factor in the outcome, but it is certainly not dispositive. In any event, the tests are notoriously malleable, difficult, and fact-dependent, even when dealing with what should be a fairly straightforward analysis.⁸⁰

Many commentators had hoped these disputes over worker classification would be concluded, or at least be shaped, by the wage and hour lawsuits within platform companies that have been pending in the Northern District of California.⁸¹ In the largest of these suits, *O’Connor v. Uber*,⁸² over 400,000 drivers for the popular ridesharing service were certified as a class to seek employee status and redress under the FLSA for minimum wages and overtime pay. Throughout the litigation, the judges in the Northern District of California struggled to characterize these working relationships within the “on/off” toggle of employee status.⁸³ The case has been in settlement negotiations for some time.

⁷⁶ See Stone, 2006, pp. 257-258 (listing factors from the cases). Oft-cited cases on this subject include *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947); *Ira S. Bushey & Sons, Inc. v. U.S.*, 398 F.2d 167 (2d Cir. 1968); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

⁷⁷ See, e.g. *Herman v. Express Sixty-Minutes Delivery Service, Inc.*, 161 F.3d 299 (5th Cir. 1998).

⁷⁸ See, e.g. Carlson, 1996, p. 663 (“Most labor and employment laws assume a paradigmatic relationship between an “employer” and “employee.” The employer in this model contracts directly with an individual employee to perform an indefinite series or duration of tasks, subject to the employer’s actual or potential supervision over the employee’s method, manner, time and place of performance. This model describes most workers well enough, but there has always been a large pool of workers in alternative relationships with recipients of services. Some workers are “independent contractors” who contract to perform specific tasks or achieve particular results, but who retain independence and self-management over their performance.”).

⁷⁹ Stone, 2006 at 257-58.

⁸⁰ Carlson, 2001, p. 298 (“Indeed, in the case of employee status, the law encourages ambiguity. On the one hand, employers often crave the control they enjoy in a normal employment relationship. On the other, the advantages (to employers) of employing workers who are plausibly not employees motivate a good deal of arbitrary and questionable “non-employee” classification. It is not uncommon to find employees and putative contractors sitting side by side, performing the same work without any immediately visible distinguishing characteristics.¹³ And the trend of the working world is toward greater complexity and variation, driven partly by the temptation to capitalize on the fog that obscures the essence of many working relationships.”)

⁸¹ See *Cherry*, 2016a at 584-85.

⁸² *O’Connor v. Uber*, 3:13-cv-03826-EMC (N.D. Cal.).

⁸³ Again, this has been a longstanding problem. See, e.g. Hyde, 1998, p. 101 (“The new ways of working, that I believe challenge normal legal analyses, include such new relations of employment as temporary employment placed by an agency and part-time employment rendered by people who have no other employer but are treated as contingent workers without benefits or implicit promises. They also include ways of working that are not, technically, “employment” relations under any statute:

2.2.1. Litigation in the United States

More recent cases in the United States have planted the seeds for inconsistent holdings about the status of gig economy workers. For example, two federal trial courts reached opposing conclusions about employment status despite the cases involving the same company, the same platform business model, and the same way of structuring the work relationship. In *Search v. Uber Technologies*, the United States District Court for the District of Columbia allowed a case involving *respondeat superior* liability of Uber to move forward.⁸⁴ In that case, the plaintiff alleged that he had been stabbed by an Uber driver who had been behaving erratically.⁸⁵ In responding to Uber's motion to dismiss the case, the court noted its skepticism about Uber's claim that its workers were all independent contractors, thus absolving it of liability for wrongs that were committed in the furtherance of Uber's business. In about the same time period, the United States District Court for the Eastern District of Pennsylvania decided *Razek v. Uber*, a decision under the Fair Labor Standards Act ("FLSA") the minimum wage and hour law.⁸⁶ Looking primarily at control test, the court decided that because the Uber drivers could work as much or as little as they wanted, they looked more like independent contractors. The court also discussed entrepreneurial activities and that Uber drivers shouldered the risk of profit or loss, which also made them look more like employees.

Meanwhile, the Supreme Court of California handed down the *Dynamex* decision.⁸⁷ While not an on-demand economy case, the California decision fundamentally changed the test for determining employee status throughout the state.⁸⁸ In *Dynamex*, the court established the so-called ABC test, which states that a business wanting to classify workers as independent contractors must satisfy three elements: (A) that the worker is free from control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.⁸⁹ While all of these seem difficult for Uber to meet, probably the most difficult and fatal element for Uber – and companies like it – will be prong B. To date, Uber has had little luck convincing courts that it is a software company. Courts have recognized that Uber is in the business of providing transportation, and that drivers are an integral part of shuttling passengers from one location to another. While the matter may be indeterminate at the moment, under the new expansive A,B,C test in California, the most likely outcome will be that Uber drivers are considered employees.

2.2.2. Litigation within the EU

The rush towards the gig economy model started somewhat later in the EU, as did the litigations about employee status. But EU jurisdictions are now grappling with the same set of difficult problems that the U.S. courts have been struggling with for several years. A 2018 blog post by Valerio De Stefano discusses the gig economy litigations across Europe, and the reasoning of

independent contractors, free-lancers, consultants, and people out of the labor market after downsizing or other elimination of former career jobs.”).

⁸⁴ *Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222, 234, 238 (D.D.C. 2015).

⁸⁵ *Id.*

⁸⁶ *Razak v. Uber Techs., Inc.*, No. CV 16-573, 2018 WL 1744467, slip op. at *1 (E.D. Pa. Apr. 11, 2018).

⁸⁷ *Dynamex Operations W. v. Superior Court*, 416 P.3d 1, 1 (Cal. 2018).

⁸⁸ Scheiber, 2018.

⁸⁹ *Dynamex, op. cit.*

the courts deciding the cases, which are being decided inconsistently.⁹⁰ While each depends on the individual facts of the case, and the specifics of the national regimes of employment law that are being applied, we can see that the initial round of litigation has resulted in uncertainty and confusion, with some tribunals finding gig workers to be employees and others finding them to be independent contractors. Making matters more complicated is that some jurisdictions in the EU have a third category of “dependent contractor” or “self-employed worker,” which can make classification lawsuits even more complicated.⁹¹

One of the first cases in Europe that received a great deal of attention was *Aslam & Farrar v. Uber*, in which the London Employment Tribunal ruled that the Uber drivers bringing the case were “workers,” an intermediate status between employee and independent contractor.⁹² The Tribunal noted that Uber had imposed a great number of conditions on the drivers, managed and instructed the drivers through the cellphone app, and overall, controlled the driver’s working conditions.⁹³ The decision was upheld on appeal by the U.K.’s Employment Appeals Tribunal. Courts in other European nations have also held on-demand workers to be employees. And so in Belgium, the Administrative Commission for the Governance of the Employment Relationship decided that Deliveroo riders were employees under Belgian law.⁹⁴ In its decision, the Commission noted that Deliveroo riders do not control their working time, since they must reserve their work slots more than one week in advance.⁹⁵ In Spain, the Labor Inspectorates of Valencia and Madrid determined that Deliveroo and Glovo drivers were employees, because they work in conditions of subordination to the platform.⁹⁶

Contrast these outcomes with the recent decision of the Labour Tribunal of Turin, Italy, which rejected a claim from Foodora delivery workers who were seeking to be classified as employees.⁹⁷ The Tribunal relied heavily on the fact that workers had control over their schedules and could decide when they wanted to work. As such, the Tribunal found these riders could not be considered employees.⁹⁸ A similar type of argument convinced the Paris Court of Appeal, which found that a Deliveroo rider could not be considered an employee,

⁹⁰ De Stefano, 2016. *See also* Beltran de Heredia Ruiz, 2018 (listing court cases across various jurisdictions).

⁹¹ Cherry & Aloisi, 2017 (comparing systems of worker classification in Canada, Italy, Spain, and the United States).

⁹² Judgment of 28 Oct. 2010, *Aslam v. Uber*, London Emp. Trib.: 2202550/2015, para. 97.

⁹³ *Id.* para. 92.

⁹⁴ “Commission Administrative de règlement de la relation de travail [CRT]”, in *Administrative Commission for the Settlement of Work Relationship*, 23 Feb. 2018, No. 116-FR-20180209. Available at: <http://commissiearbeidsrelaties.belgium.be/docs/dossier-116-fr.pdf> (Belg.). *See also* “Deliveroo Couriers are False Independent Contractors”, 27 Mar. 2018. Available at: <http://trends.levif.be/economie/entreprises/les-coursiers-deliveroo-sont-de-faux-independant-selon-la-crt/article-normal-817847.html>

⁹⁵ “Commission Administrative de règlement de la relation de travail [CRT]”, in *Administrative Commission for the Settlement of Work Relationship*, 23 Feb. 2018, No. 116-FR-20180209. Available at: <http://commissiearbeidsrelaties.belgium.be/docs/dossier-116-fr.pdf> (Belg.), at 7.

⁹⁶ S. Juz. Soc., June 1, 2018 (<https://adriantodoli.com/wp-content/uploads/2018/06/documento-2.pdf>), No. 244/2018) (Spain). *See also* Semprun, A.; Romera, J. 2018. “False Autonomous Work at Deliveroo and Glovo”, 2 Apr. Available at: <http://www.eleconomista.es/empresas-finanzas/noticias/8914943/02/18/Trabajo-acorralla-a-Deliveroo-y-Glovo-por-los-falsos-autonomos.html>.

⁹⁷ Trib., 11 Aprile 2018, Foro it, 2017, Turin RG n. 4764/2017 (It.). *See also* AGI Italian Attorneys. 2018. “On the Foodora Case”, 7 May. available at <https://www.linkedin.com/pulse/motivazioni-caso-foodora-la-sintesi-agi/> [19 Apr. 2019].

⁹⁸ AGI Italian Attorneys, 2018.

because the riders could choose their shifts and decide when to work.⁹⁹ The reasoning about work flexibility and selection of shifts also convinced the Paris Conseil des prud'hommes, a lower judicial body in France, which held that an Uber driver was not an employee.¹⁰⁰ In short, these precedents illustrate the differing views of the legal precedent and the gig economy. And as these cases wend their way through employment tribunals and national courts, the differing outcomes and confusing conclusions will only multiply.

3. Private international law and the platform economy: An analysis of three jurisdictions

“It only takes two facing mirrors to build a labyrinth.”

--Jorge Luis Borges¹⁰¹

To date, the cases that have been brought around employment in the gig economy have not delved into the issues surrounding jurisdiction, choice of law, and conflict of law in any depth.¹⁰² In part, that is because there has not yet been enough law developed to enable the parties to make strategic decisions about where to bring suit, or to ask courts to apply a particular jurisdiction's law. Without knowing how any particular jurisdiction will rule, the parties can only guess about which legal system might result in a favorable ruling. Some jurisdictions generally have more favorable labour and employment laws, or have precedents that strongly favor employee rather than independent contractor status, which might influence a decision about where a plaintiff might want to bring suit.¹⁰³ In addition, apart from the *Otey v. Crowdfunder* case, most of the litigation to date has concerned platforms that facilitate work in the real world, i.e. transportation, home repair, cleaning, or odd jobs. As such, the workers have tended to bring suit based on where they live and perform these jobs.¹⁰⁴

This is not the case with the three examples that were set out in the paper's Introduction. Upwork could be sued in many of the jurisdictions in which it has recruited requesters and workers. Calculating the permutations of the different countries involved in this interaction is

⁹⁹ *YZ v. Deliveroo France*, Cour d'appel de Paris, Pole 6, Chambre 2, 9 Nov. 2017, no. 16/12875 (Fr.). Available at: <https://www.doctrine.fr/d/CA/Paris/2017/C125532D4DDC78DA11AE2>. See also “Court Dismisses Deliveroo Driver's Bid to Be an Employee”, 11 Nov. 2017. Available at: https://lentreprise.lexpress.fr/rh-management/droit-travail/la-justice-deboute-un-livreur-de-deliveroo-qui-voulait-etre-reconnu-salarie_1961503.html.

¹⁰⁰ *Menard v. SAS Uber France*, Conseil de Prud'hommes de Paris, no. RG:F 16/11460, 29.01.18. See also Bohic, C. 2018. “These Uber Drivers aren't Employees for the Prud'hommes”, 9 Feb. 9. Available at: <https://www.itespresso.fr/chauffeurs-uber-salaries-non-prud-hommes-183124.html> [19 Apr. 2019].

¹⁰¹ Borges, J.L. 1984, pp. 29 (“I remember seeing, in the house of Dora de Alvear in the Belgrano district, a circular room whose walls and doors were mirrored, so that whoever entered the room found himself at the center of a truly infinite labyrinth.”)

¹⁰² The litigations so far have treated the employee status question as one of national or state law. See *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 WL 5138097, at *1 (N.D. Cal. Sept. 1, 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1060-61 (N.D. Cal. 2014); also Noguchi, 2018.

¹⁰³ See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1061 (N.D. Cal. 2014) (noting that the plaintiffs contended that California's laws are more worker-protective than those of other states). Kokalitcheva, 2015 (stating that the judge informed prominent plaintiffs' attorney Shannon Liss-Riordan that she wasn't eligible for admission pro hac vice in California because she “regularly engaged in substantial legal activities in California.”).

¹⁰⁴ *Razak*, No. CV 16-573, at *1 (stating that the plaintiffs are Pennsylvania drivers who filed the lawsuit in Pennsylvania).

a matter for factorial combinatorics.¹⁰⁵ TaskRabbit platform workers in the UK, who work for a platform based in the U.S. but owned by a Swedish company might have a very difficult time figuring out what their minimum wage would be, especially so because Sweden has no minimum wage.¹⁰⁶ Workers in refugee camps performing piecework computer tasks for a multinational company with a platform based in yet another country and end users in many nations present even more difficult problems.

These difficult conflicts issues will soon become important in future litigation and policy discussions. Conflicts of law is a “sleeper,”¹⁰⁷ a dormant and unexpected legal issue for the gig economy now, that will later have considerable significance in the future. In the three to five year period following the publication of this paper, there will be indicators or rough outlines of different national approaches to the labour and employment law problems the gig economy has provoked. In some instances, the response will be the work of courts, either stretching current laws to cover the gig economy, or declining to do so on the grounds that it is beyond the bounds of existing regulation. In the ensuing years, the issues will make their way up to the appellate courts. In other instances, legislatures will be key actors, either passing laws to provide courts with clear guidance as to appropriate approaches or to correct approaches where legislatures disagree with the courts. Legislatures may enact “fixes” to bring gig workers within the ambit of existing laws, repeal the effect of judicial decisions they do not like, or to pass legislation specifically to regulate the gig economy.

Based on the preliminary rulings we currently see, a high degree of divergence is likely in various national final rulings. Because the decision about classification is like “fitting a square peg in a round hole,” some jurisdictions will decide that gig workers are employees, and some will decide that they are independent contractors. Where a legal system recognizes an intermediate category, that third category may also be recognized as the correct gig worker classification.¹⁰⁸ It is at that point that the conflicts of law problems will emerge. In selecting a place to bring suit, workers will try to choose the jurisdiction with the highest or most favorable labour standards. Likewise, platforms could also attempt to choose a favorable forum, either by writing choice of law clauses into their online terms or by arguing for removal. Choosing regulation by either searching for the jurisdiction that provides a “race to the bottom” or “race to the top” seems more like a jurisdictional shell game than a coherent regulatory approach.

While so far this paper has been somewhat abstract in its discussion of the conflict of law and choice of law rules, the following discussion is designed to cover three jurisdictions that have important connections with crowdwork: California, the European Union, and India. While the application to crowdwork platforms has not occurred yet, the analysis below is intended as a starting point.

3.1 *United States: California’s governmental interest approach*

An analysis of California law is included because many of the well-known on-demand platforms originated in Silicon Valley and many platforms continue to operate there.¹⁰⁹ Further, many platforms were tested in the San Francisco Bay area, and so California is home to many requesters and on-demand workers as well.¹¹⁰ The focus here is on California and not the entire

¹⁰⁵ DeHaan, 2012; Berry, 2017.

¹⁰⁶ Skedinger, P. 2008, p. 1.

¹⁰⁷ “Sleeper.” Available at: <https://www.merriam-webster.com/dictionary/sleeper> [19 Apr. 2019].

¹⁰⁸ Cherry and Aloisi, 2017.

¹⁰⁹ Lien, 2016.

¹¹⁰ *Id.*

United States because conflict of law rules vary between the states and are somewhat unsettled.¹¹¹ The Restatement (Second) of Conflicts of Laws has only been adopted by twenty states; some states continue to follow the Restatement (First), while others take a common law approach.¹¹² This problem with lack of uniformity can be sidestepped by focusing on the conflicts laws of California.

The focus on California also makes sense as many gig economy cases have been brought in California, although most of those cases have either settled or are in the process of settling.¹¹³ Currently, there is no consensus in California law about whether platform workers are employees or independent contractors.¹¹⁴ As noted in an earlier section, the Supreme Court of California's decision in *Dynamex* sets out the "ABC" test, which contains a strong presumption in favor of employment status.¹¹⁵ With this change in the controlling precedent, it is safe to assume that under California law, a substantial fraction of on-demand workers will be found to be employees. From a worker's perspective, California is also a jurisdiction within the United States that has some of the more worker-friendly sets of labour and employment laws. For example, non-competition clauses are unenforceable in California, unlike their status in most other U.S. states.¹¹⁶ As another example, California's Unruh Act extends anti-discrimination protection to LGBT workers, whereas the federal law has not yet done so.¹¹⁷ As a third example, California is also phasing in a state minimum wage that is higher than the amount under the FLSA, with the ultimate goal of a \$15 hourly wage by 2020.¹¹⁸

3.1.1. Conflict of laws: Governmental interest approach

California courts apply the governmental interest approach and comparative impairment analysis when resolving conflict of laws issues.¹¹⁹ The governmental interest approach involves three steps. First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different.¹²⁰ Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a "true conflict" exists.¹²¹ Third, if the court finds that there is a true conflict, it carefully evaluates and

¹¹¹ Hay et al. (eds), 2010, p. 72.

¹¹² *Id.*

¹¹³ See Cherry, 2016b.

¹¹⁴ DePillis, 2018.

¹¹⁵ *Dynamex Operations W.*, 416 P.3d at 29, 30, 35.

¹¹⁶ Moffat, 2012, pp. 941-43; Lester and Ryan, 2010; Glynn, 2008.

¹¹⁷ See Department of Fair Employment and Housing, 2017. "Unruh Civil Rights Act." Available at: https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH_UnruhFactSheet.pdf [19 Apr. 2019].

¹¹⁸ State of California Department of Industrial Relations. "Minimum Wage." Available at: https://www.dir.ca.gov/dlse/faq_minimumwage.htm [19 Apr. 2019].

¹¹⁹ *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 922 (Cal. 2006) (citing *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967)). For an excellent summary of choice of law and conflict of law rules in California, see Hoffheimer, 2015.

¹²⁰ *Kearney*, at 922 (Cal. 2006). The California government interest approach owes a heavy debt to the judicial opinions of California Supreme Court Justice Roger Traynor. See Currie, 1963, pp. 629-89; Kay, 1984.

¹²¹ *Id.* See also Lindsley, W. *California Jurisprudence* § 30 (3d ed. 2018) ("Although the two potentially concerned states have different laws, when only one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none, the law of the

compares the nature and strength of the interest of each jurisdiction in the application of its own law “to determine which state’s interest would be more impaired if its policy were subordinated to the policy of the other state” and then ultimately applies “the law of the state whose interest would be more impaired if its law were not applied.”¹²² This last step is known as comparative impairment analysis.

Two recent cases concerning conflicts of employment law are illustrative of the approach and provide some guidance for application of the tests to crowdwork. In *Kearney v. Salomon Smith Barney, Inc.* the Court held that the privacy laws of California and Georgia differed, conflicted, and the failure to apply California’s privacy law would have impaired California’s interest more severely than the application of California law would have impaired Georgia’s interests.¹²³ In *Kearney*, the Atlanta-based branch of Salomon Smith Barney (“SSB”) recorded the telephone conversations between SSB’s employees and California clients without the California clients’ knowledge or consent.¹²⁴ Under California’s invasion of privacy statute, *all* parties must have knowledge and consent to the recording of telephone conversation.¹²⁵ However, under Georgia’s privacy statute, only *one* party in the conversation needs to give prior consent to the recording of the telephone conversation.¹²⁶ The Court reasoned that both California and Georgia had a legitimate interest in the application of its law.¹²⁷ California had an interest in protecting the privacy of its citizens. Georgia’s privacy statute can be reasonably interpreted to establish the ground rules under which persons in Georgia may act in regard to recording private conversations and, therefore seeks to protect the liability of persons or businesses who acted in reasonable reliance on Georgia law.¹²⁸

Accordingly, the court concluded that the case presented a true conflict.¹²⁹ After a true conflict is identified by the court, the comparative impairment approach seeks to determine which state’s interest would be more impaired if its policy were subordinated to the policy of the other state.¹³⁰ However, the comparative impairment approach is not a weighing test because a “balancing” of conflicting state policies creates federalism concerns.¹³¹ Instead the comparative impairment process attempts to accommodate conflicting state policies and achieve the “maximum attainment” of underlying governmental purpose.¹³² The *Kearney* court looked to the legislative history of the invasion of privacy statute’s enactment to determine the statute’s

interested state should be applied. A true conflict of laws arises only if the laws of two jurisdictions differ and each state has a legitimate interest in having its law applied.”); Horowitz, 1973-1974.

¹²² *Bernhard v. Harrah’s Club*, 546 P.2d 719 (Cal. 1976).

¹²³ *Id.* at 917.

¹²⁴ *Id.* at 918.

¹²⁵ *Id.* at 929.

¹²⁶ *Id.* at 932.

¹²⁷ *Id.* at 933.

¹²⁸ *Id.*

¹²⁹ *Id.* See also DiMugno and Glad, 2018 (True conflicts differ from “false conflicts.” Brainerd Currie termed a “false conflict” as a situation in which only one state had an actual interest in having its law applied.).

¹³⁰ *Id.* (citing *Bernhard*, 546 P.2d 719 (Cal. 1976)).

¹³¹ *Id.* at 934 (citing *Bernhard*, 546 P.2d 719 (Cal. 1976)).

¹³² *Id.* (citing *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721 (Cal. 1978)). See also *Harvard Law Review*, 1982 (“The spirit of our Constitution and the values underlying our federal system sanction and encourage the separate development of policy and law in each state in accordance with its own environment. If this uniquely federalist value—maximum attainment of policy objectives by each state—is itself a systemic policy whose promotion is important to each state, the comparative impairment principle follows quite naturally.”).

principle purpose.¹³³ Since 1967, the California legislature has continually modified and added to the invasion of privacy statutory scheme.¹³⁴ Additionally, the California courts repeatedly have invoked and vigorously enforced the invasion of privacy provisions.¹³⁵ Accounting for the many national and international firms that have headquarters, offices, or telephone operators in California, the *Kearney* court reasoned that the failure to enforce California's invasion of privacy provision would substantially undermine the protection afforded by the statute.¹³⁶ By contrast, applying California law to a Georgia business' recording of telephone calls between its employees and California customers will not severely impair Georgia's interests because California law does not totally prohibit a party to a telephone call from recording the call, but rather prohibits only the *undisclosed* recording of telephone conversations.¹³⁷ Accordingly, the Court held that California law should apply in determining whether the alleged secret recording of telephone conversations at issue in this case constitutes an unlawful invasion of privacy because California's interests would be severely impaired if its law were not applied and Georgia's interest would not be significantly impaired if California law rather than Georgia law were applied.¹³⁸

In *Sullivan v. Oracle Corporation*, the Court held that the California Labor Code applied to overtime work performed in California for a California-based employer by out-of-state plaintiffs.¹³⁹ In *Sullivan*, former non-California resident employees sued Oracle alleging misclassification as "exempt" from overtime and sought unpaid overtime compensation.¹⁴⁰ The employees contended California's overtime law governed their work in the state of California, whereas Oracle contended the laws of the plaintiffs' home states, Colorado and Arizona, governed.¹⁴¹ The relevant laws differed between the three states because California law had an additional overtime compensation provision increasing the rate of pay to twice the regular rate for work in excess of eight hours on the seventh workday.¹⁴² Unlike California law, neither Colorado law nor Arizona law required double pay.¹⁴³

The California Supreme Court reasoned that neither Colorado nor Arizona expressed any interest in disabling their residents from receiving the full protection of California overtime law when working in California, or in requiring their residents to work side-by-side with California residents in California for lower pay.¹⁴⁴ Consequently, neither Colorado nor Arizona had a legitimate interest in shielding Oracle from the requirements of California wage law for work performed in California because Oracle is a multi-state operation. A company that conducts business in numerous states ordinarily is required to make itself aware of and comply with the law of a state in which it chooses to do business. Even if a genuine "true conflict" existed, permitting nonresidents to work in California without the protection of California's overtime law would have sacrificed the state's important public policy goals of protecting health, safety

¹³³ *Id.*

¹³⁴ *Id.* at 935.

¹³⁵ *Id.* at 934.

¹³⁶ *Id.* at 936.

¹³⁷ *Id.*

¹³⁸ *Id.* at 937.

¹³⁹ *Sullivan v. Oracle Corporation*, 254 P.3d 237, 247 (Cal. 2011).

¹⁴⁰ *Id.* at 239.

¹⁴¹ *Id.* at 244.

¹⁴² *Id.* at 245.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 246.

and preventing the evils associated with overwork.¹⁴⁵ Colorado overtime law expressly did not apply outside the state's boundaries and Arizona had no overtime law. In this situation, the California Supreme Court held that the California Labor Code applied to overtime work performed in California for a California-based employer by out-of-state plaintiffs.¹⁴⁶

One last point about why *Sullivan v. Oracle* is an important case. In the last part of its opinion, the Court declined to extend California overtime pay provisions to work that was performed by the plaintiffs for Oracle in states other than California. The discussion is limited to the last section of the opinion, and it is fact-specific, noting that the plaintiffs were trying to reinstate time-barred FLSA claims as restitution claims under California's unfair competition law.¹⁴⁷ Nonetheless, the court noted the presumption against extraterritorial application of laws, and noted no intent to overcome that presumption in the UCL by the California legislature.¹⁴⁸ This was enough to prompt one commentator to note that this decision and ones like it marked a return of California to territorial application of rules, with a tendency to apply the "law of the place where the events occurred" rather than apply the governmental interest approach.¹⁴⁹

3.1.2. Choice of law

In addition to the default rules of the governmental interest approach and the comparative impairment test set out above, California follows the rules set out in the Restatement (Second) of Conflicts of Laws. When the parties intend the law of a certain state to govern a dispute, that intention is usually respected.¹⁵⁰ In the absence of countervailing public policy considerations, agreements of the parties as to the applicable law are enforced.¹⁵¹ But this statement is qualified by an escape clause. The Restatement (Second) of Conflict of Laws § 187 states "the law of the state chosen by the parties to govern their contractual rights and duties will be applied... unless... application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination."¹⁵² To determine which state has a materially greater interest in resolution of an issue, a court may consider (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, (5) the domicile, residence, nationality, place of incorporation and place of business of the parties, (6) the impact of the transaction on the state or its citizens, and (7) the extent to which the state has sought to regulate the issue.¹⁵³

Three cases are particularly relevant for the crowdwork discussion. In *Hammerl v. Acer Europe, S.A.*, the plaintiff's employment contract contained a choice of law clause.¹⁵⁴ The plaintiff sought to bring his claim under the California Labor Code whereas the defendant, Acer Europe, sought to enforce the contractual choice of law provision and have Swiss law govern the dispute.¹⁵⁵ Under the Restatement (Second) of Conflicts approach, application of the law of the chosen state would be contrary to a fundamental policy of a state that has a "materially

¹⁴⁵ *Id.* at 247.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 248.

¹⁴⁸ *Id.*

¹⁴⁹ Hoffheimer, 2015 at 241-242.

¹⁵⁰ *Connolly Data Systems, Inc., v. Victor Technologies, Inc.*, 114 F.R.D. 89, 92 (S.D. Cal. 1987).

¹⁵¹ *Id.*

¹⁵² Restatement (Second) of Conflict of Law § 187 (Am. Law Inst. 1971).

¹⁵³ Restatement (Second) of Conflict of Law § 187 (Am. Law Inst. 1971).

¹⁵⁴ *Hammerl v. Acer Europe, S.A.*, No. C08-4757, 2009 WL 30130 at *2 (N.D. Cal. 2009).

¹⁵⁵ *Id.*

greater interest” than the chosen state in determining the particular issue.¹⁵⁶ The court stated that the defendant’s American subsidiary corporation, Acer America, exercised a degree of control over the plaintiff’s employment duties, compensation, and benefits to the extent that it would be reasonable to consider the plaintiff an employee of Acer America and, therefore, eligible to state a claim for violations of the California Labor Code.¹⁵⁷

In *Application Group v. Hunter Group*, the court declined to enforce the parties’ contractual choice-of-law provision because the interests of the forum state, California, were “materially greater” than those of the chosen state, Maryland.¹⁵⁸ California’s interests would have been more seriously impaired by the enforcement of the parties’ contractual choice-of-law provision.¹⁵⁹ In this case, a Maryland corporation was seeking to enforce a covenant not to compete within a consultant’s contract after the consultant was recruited and hired by a California corporation.¹⁶⁰ The court was convinced that California had a materially greater interest than Maryland in the application of its law to the parties’ dispute, and California’s interests would be more seriously impaired if its policy were subordinated to the policy of Maryland because California has consistently expressed a public policy ensuring that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.¹⁶¹ A similar result was obtained in the case of *In re Gault South Bay Litigation*, which involved an Indiana corporation attempting to enforce a non-competition clause.¹⁶² The conflicts of law rules required the court to apply California law to the agreement, holding the non-compete provision of the agreement to be void.¹⁶³

Finally, *Pinela v. Neiman Marcus Group* involved a contractual mandatory arbitration provision within an employment agreement.¹⁶⁴ The plaintiffs alleged various wage and hour violations under the California Labor Code.¹⁶⁵ The employer, a Texas-based corporation, sought to enforce the mandatory arbitration provision under Texas law whereas the plaintiffs sought to argue unconscionability using California public policy.¹⁶⁶ The court held that California law should be enforced because the enforcement of Texas law would be contrary to the “fundamental policy” of California’s interest to protect California-based workers.¹⁶⁷ These cases seem to indicate that rather than accepting a choice of law clause written by an employer at face value, California courts are willing to undertake a more searching review, looking at the governmental interests involved.

3.2 *European Union*

The European Union is included in this study because of its large number of requesters and workers performing gig work, as well as a substantial number of platforms that are either hosted or EU-owned.¹⁶⁸ In addition, European countries have had a long history of dealing with cross-

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at *7.

¹⁵⁸ *Application Group v. Hunter Group*, 61 Cal. App. 4th 881, 898-99 (Cal. Ct. App. 1998).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 886-87.

¹⁶¹ *Id.* at 900.

¹⁶² *In re Gault South Bay Litigation*, No. C 07-04659 JW, 2008 WL 4065843 at *1 (N.D. Cal. 2008).

¹⁶³ *Id.*

¹⁶⁴ *Pinela v. Neiman Marcus Group, Inc.*, 238 Cal. App. 4th 227, 233 (Cal. Ct. App. 2015).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 257.

¹⁶⁸ ILO, 2108a.

border workers and posted workers.¹⁶⁹ As background to this discussion, it is important to note that a number of issues, such as worker safety, maximum hours, or employment discrimination are in many nations in the EU considered “public law,” with enforcement of these laws to be taken by a national governmental authority. Each such authority is responsible for either taking action (or not) to enforce the rules within its territorial boundaries.¹⁷⁰

Some components of the employment relationship, however, are considered a subset of contractual matters, and these are classified as private law.¹⁷¹ As such these matters are generally left up to the individual employee to claim his or her rights through grievance procedures or the courts. The rules jurisdiction over such claims are set out in the Brussels I regulation. Section 5 of the Brussels I Regulation allows employees who act as claimants to commence proceedings in a number of places: in the courts of the employer’s domicile; in the courts of the habitual place of work; in the courts of the engaging place of business.¹⁷² As such, Brussels I is quite permissive in where an employee can bring a claim, with the ultimate intent of furthering employee protection.¹⁷³

Private international law problems are set out in the Rome I Regulation,¹⁷⁴ in which the EU adopted an extremely comprehensive and sophisticated system for dealing with private international law problems and labour and employment.¹⁷⁵ Based on the Rome Convention of 1980,¹⁷⁶ the Rome I Regulation has as its goal a uniform approach that will yield predictable outcomes throughout the member states. There is also a special section, Article 8, specifically dealing with employment contracts. Rome I attempts to respect the parties’ choice of the applicable law in their contracts, reinforce predictability and stability, and also to allow for some discretion to default rules so as to favor the nation with the closest connection to the contract to supply the rules.¹⁷⁷

¹⁶⁹ Directive 96/71/EC of the European Parliament [1997] deals with posted workers.

¹⁷⁰ Franzen, 2014 at 246-247 (“As a rule – this is universally accepted – the application of these protective norms is contingent on the fact that the work is executed within national boundaries. The Conflict of Law norm is unilateral. For example, the German factory inspectorate ... is only responsible and German safety regulations only apply if the work is done in Germany.”). Collective norms pertaining to industrial relations do not easily fit into the public law / private law dichotomy. *Id.* at 246.

¹⁷¹ *Id.*

¹⁷² Brussels I Regulation, Section 5, [2001] OJ L12/1. The regulation also allows for a dispute arising out of an employer’s branch or agency to take place in the courts in those places, and on a counter-claim, the court in which the original claim is pending.

¹⁷³ See Grusic, 2012, (noting that even though Brussels I jurisdictional rules were enacted to protect workers, recent decisions had not been employee friendly).

¹⁷⁴ Rome I Regulation 593/2008, [2008] OJ L177/6. For more on the history of the enactment of Rome I, see Franzen, 2014 at 247.

¹⁷⁵ See, e.g. Kribber, 2000, p. 503; Kullman, 2015, p. 4 (discussing enforcement issues that arise around posted workers in Germany, the Netherlands, and Sweden).

¹⁷⁶ 1980 Rome Convention on the law applicable to contractual obligations is the predecessor law. Before the Rome Convention, traditional approaches to continental European private international law of contracts had as their object finding the “seat” of the dispute. See generally von Savigny, 1869. For tort law, private international law is set out in the Rome II Regulation. Rome II Regulation, [2007] OJ L199/40.

¹⁷⁷ van Calster, 2016 at 203.

3.2.1. Problems with characterization

In his book chapter, Professor Wolfgang Kozak sets out some thoughts as to how to the private international law issues created by crowdwork might be treated in the EU.¹⁷⁸ Most of Kozak's discussion, however, is focused on the preliminary question of how to characterize the relationship between the worker and the platform.¹⁷⁹ So, if there is an employment contract, then you would use Article 8 to analyze the problem. If, on the other hand, the contract between the worker and the platform is not considered enough to be an employment contract, then it would receive the analysis specified for general contracts in Article 4. The problem that gives Kozak a great deal of trouble is that if EU national systems are using different standards to decide if gig workers have employment contracts, there is no way to determine which Article of the Rome Regulation to apply.¹⁸⁰ The problem that Kozak ran into was, in effect, a type of difficult question of characterization.¹⁸¹ The Rome Regulation requires a determination about whether there is an employment contract, but such a determination of characterization¹⁸² is the very issue that is the conflict between the different legal systems.¹⁸³ In essence, Kozak spends his chapter describing this very difficult problem of characterization, and notes the questions it raises.

The analysis need not stop there, however. Kozak was correct to raise the issue of characterization, but that does not present an insurmountable bar to the analysis. Other parts of the Rome Regulation itself describe what to do in these types of infinite regress problems. For example, Article 10 attempts to correct the characterization problem that comes up with contractual validity, noting that courts should decide the validity of a contract based on the law that would govern it if were found to be valid.¹⁸⁴ Rather than get bogged down in this difficult characterization problem, the answer lies in setting out the alternatives and following them to their conclusions. What law would a worker suing a platform receive if they attempted to bring the case under Article 8, and alternately, what would the result be if they attempted to bring the case under Article 4? The next portions explore these two paths.

3.2.2. Two paths of the Rome Convention

Let us assume that the correct determination is to treat platform work as a contract of employment, and further let us assume that no choice of law has been set forth in the contract. In that instance, Rome I Article 8 states that “the contract shall be governed by the law of the country in which, or failing that, from which the employee habitually carries out his work in

¹⁷⁸ Kozak, 2017.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ van Calster, 2016 at 6-7. Perhaps it is not an exact match but the issue could also be thought of as analogous to the limited doctrine of *vorfrage* (a German doctrine that roughly translates into English as “preliminary question.”). The entire scenario provides a very difficult thought problem. *Cf.* Borges, 1962 (“Before unearthing this letter, I had questioned myself about the ways in which a book can be infinite. I could think of nothing other than a cyclic volume, a circular one. A book whose last page was identical with the first, a book which had the possibility of continuing indefinitely.”).

¹⁸² Professor Louise Merrett describes the question of whether there is an employment contract as one of characterization. *See* Merrett, 2012 at 49.

¹⁸³ As discussed by Professor Geert van Calster, a *vorfrage* concern may arise when EU law may have “determined which applicable law is connected to a given legal category, however before one may apply it, one needs to decide on the actual existence of the category in the facts at issue.”

¹⁸⁴ Rome I Regulation, Article 10(1).

performance of the contract.”¹⁸⁵ Thus a geographical location, that is, the habitual place of work, has considerable importance and gravity in making the determination of applicable law.¹⁸⁶ Article 8 goes on to state that when the habitual place of work cannot be determined, “the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.”¹⁸⁷ An escape clause is also included, and if it appears from the totality of the circumstances that the contract is more related with another country than those enumerated in the preceding sections, then the law of the other country will apply.¹⁸⁸

If on the other hand, we say that the user and the platform have not entered a contract for employment, and we instead have a general contract, then the correct place to look is Rome I Article 4(1). Under this section, “a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence[.]”¹⁸⁹ In case this is not a proper classification, then Article 4(2) states that the contract shall be governed by “the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.”¹⁹⁰ Escape clauses also apply here, with Rome I Article 4(3) and 4(4) noting that if it seems that the contract is more closely connected with another country than that country’s laws will apply.¹⁹¹

While it is true that habitual place of work might be different than the worker’s place of residence, since most platform workers choose to work from their homes, this might be a distinction without a difference. In any event, it should not lead to an infinite regress problem as both Article 4 and Article 6 contain sufficient escape clauses that lead back to the idea of applying the country’s law that has the most connection to contract or the contract of employment, whichever we determine it to be. A larger impact might be felt because of specialized rules for employment contracts and choice of law, the rules for which are set out in the next subpart.

3.2.3. *Choice of law*

Just as in the United States, many employment contracts in the EU contain a choice of law clause, so as to minimize transaction costs.¹⁹² These clauses can provide certainty, especially when a transaction has an international aspect.¹⁹³ Pursuant to Rome I, Article 3, parties are free to specify in their contract the law that they would elect to apply to a dispute arising from the contract.¹⁹⁴ The freedom of choice embraced by Article 3 is expansive, even including the ability to choose the law of a country that is not part of the EU. However, there is a countervailing concern, which is that the employer will forum-shop and through a choice of law clause, seek to dictate the choice of law unilaterally.¹⁹⁵ Employees are recognized to have

¹⁸⁵ *Id.*, Article 8.

¹⁸⁶ van Calster, 2016 at 216. The habitual place of employment would not be changed by temporary employment. Rome Regulation, Article 8.

¹⁸⁷ Rome I Regulation, Article 8.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*, Article 4(1).

¹⁹⁰ *Id.*, Article 4(2).

¹⁹¹ *Id.*, Articles 4(3) & 4(4).

¹⁹² Posner, 2013.

¹⁹³ *Id.*

¹⁹⁴ Rome I Regulation, Art. 3, 593/2008, [2008] OJ L177/6.

¹⁹⁵ Jan Voogsgeerd *Navimer SA* [2011] ECR I-13275. *See also* Hepple, 2005, p. 156 (noting the “reason for the application of mandatory employment rules in the need to secure protection for the

less bargaining power, and the concern is that choice of law provisions might work to their disadvantage.¹⁹⁶ And so the Rome Regulation instead seeks to set a “minimum standard of employment protection that cannot be undermined by the chosen law.”¹⁹⁷

The Rome Regulation does this first by allowing the parties a choice of law in their contract under Article 3.¹⁹⁸ Then, in Article 8, we are told that “[s]uch a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable[.]”¹⁹⁹ In short, the choice of law rules allow some flexibility, but not at the expense of worker rights. As noted by Franzen, the “idea of the principle of the most favourable law has achieved a breakthrough. Its purpose is to prevent abuse of the party autonomy as well as to allay misgivings about submitting the employment contract to an unfamiliar or underdeveloped local law. This theory involves the joint application of both legal systems. The employee is entitled to claim the norm most favourable to him.”²⁰⁰

3.3 *India and private international law*

This paper includes a summary of the Indian system for private international law because of the large numbers of Indian workers who perform platform work.²⁰¹ For decades now, many companies have outsourced their backroom operations and call centres to India and other parts of the global south. India is an attractive location for many businesses because there is a group of highly educated university graduates to perform skilled work at lower cost.²⁰² India is also an attractive site to offshore because of its temporal advantage. While workers in other parts of the world are asleep, call centres in India can provide staffing to run round-the-clock technical support and customer service hotlines.²⁰³ While in some ways the virtual work engaged in by platforms like Amazon Mechanical Turk seem new, in some ways they are just another step along a system of global offshoring that has been a trend over the past decades.²⁰⁴ While the labor and employment laws on the books in India provide protections for workers, enforcement of those laws on the ground continues to be a problem.²⁰⁵

3.3.1. *The approach of “proper law”*

Until 1952, Indian courts followed the common law British rules for private international law.²⁰⁶ After this date, courts in India were free to establish an alternate set of rules for conflict

party who from the socio-economic point of view is regarded as the weaker in the contractual relationship.”) (internal quotation omitted).

¹⁹⁶ Franzen, 2014 at 254 (noting that “the main idea is to protect the worker against an abuse of power by the employer. This fear of abuse with regard to the freedom of contract is enhanced with a growing distrust of large multinational enterprises[.]”).

¹⁹⁷ Krebber, 2000 at 527.

¹⁹⁸ Rome I Regulation, Article 3.

¹⁹⁹ *Id.*, Article 8.

²⁰⁰ Franzen, 2014 at 249.

²⁰¹ ILO, 2018a at 29.

²⁰² Penfold, 2009, p. 92 (noting India has the advantage of a “large, well-educated, English-speaking work force”). Nathan et al., 2016, pp. 13-15 (noting increasing automation and degree requirements among engineering staff).

²⁰³ Poster, 2007, p. 274.

²⁰⁴ *See generally* Messenger and Ghosheh, 2010.

²⁰⁵ Penfold, 2009 at 95.

²⁰⁶ *Indian & General Investment Trust Ltd. V. Raja of Kholikhote*, AIR 1952 Cal 508.

of law problems, but as a practical matter, the paucity of case law meant a continued reliance on the law of the United Kingdom, and to a lesser extent the law of the United States, Canada, and Australia.²⁰⁷ As a common law system, few codifications of the private international law rules exist, and instead the bulk of principles have set out in various judicial decisions, largely drawing on U.K. precedents.²⁰⁸ There are efforts in India in support of uniformity and unification, in the areas of insolvency, e-commerce, international banking and secured credit, and international secured interests.²⁰⁹ To date, there are no specific scholarly works looking just at employment contracts and private international law. As such, one must look at the general rules for contracts, and then extrapolate the principles to employment and labour, which are a subset of contracts.

Jurisdiction in the Indian courts is far-reaching, and encompasses situations where a company “actually and voluntarily ... carries on business, or personally works for gain.”²¹⁰ The term “employee” is used in several pieces of legislation in India, but is defined in different ways. For example, the 1948 Minimum Wages Act contains a circular definition, holding that an employee is “in a scheduled employment in respect of which minimum rates of wages have been fixed.”²¹¹ On the other hand, the Payment of Gratuity Act of 1972 means “any person, other than an apprentice, who is employed on wages in any establishment[.]”²¹²

3.3.2. *India and conflicts in employment and labour law*

For conflicts of law involving contracts, India applies the “proper law” approach, a concept historically developed under U.K. law.²¹³ The “proper law” approach means that a court will use the law which the parties have expressly or implied chosen to govern their dispute.²¹⁴ If no source of law has been chosen by the parties, or can be implied to the parties, then Indian courts will impute the law that has the “closest and most intimate connection with the contract.”²¹⁵ The judge then approaches the question of the “proper law” from the perspective of the “reasonable man,” asking how a just and reasonable person would view the problem. Elements

²⁰⁷ Noronha, 2010, pp. 7-10 (analyzing opinions of the Indian Supreme Court and listing the foreign precedents compiled and used therein, which are overwhelming).

²⁰⁸ Y. Narasimha Rao v. Y. Venkata Lakshmi, (1991) 3 SCC 451. *See also* Agrawal and Singh, 2010, p. 19 (“Presently, in Indian private international law, in some areas there is an absolute dearth of rules ... Indian courts have largely relied on English precedents unfortunately even many years after Indian independence.”).

²⁰⁹ Noronha, 2010 at 40-42; *See also* Satish Chandra, 2011 (reproducing texts of conventions and international treaties to which India is a party).

²¹⁰ Agrawal and Singh, 2010 at 228-229 (citing to Section 20 of the Code of Civil Procedure, 1908). *Accord* Noronha, *op. cit.* at 54-55 (citing U.S. precedents on minimum contacts for jurisdiction).

²¹¹ Johri, 2012, p. 62.

²¹² *Id.*

²¹³ It seems that India has continued to follow the “proper law approach,” despite the UK – as part of the EU – following the rules for conflicts under the Rome Regulation. Will this change again with Brexit, and what approach would India take in the face of Brexit? This speculation is beyond the scope of this paper, and as such the paper will analyze the jurisdiction according to the common law proper law approach.

²¹⁴ *See* Diwan, 1993, pp. 506-508. *Accord* Chavan, 1982, p. 175 (“It means that parties of the contract are free to stipulate their terms of contract and also free to lay down the law by which their contract would be governed. The law by which the contract is intended by the parties to be governed is called ‘the proper law of contract.’”).

²¹⁵ Noronha, 2010 at 72 (“the expression refers to the substantive principles of the domestic law of the chosen system and not to its conflict of [law] rules.”). *National Thermal Power Corporation (NTPC) v. Singer Company* (1992), 3 SCC 51; *Delhi Cloth & General Mills Co. Ltd. V. Harnam Singh*, AIR 1955 SC 590.

that an Indian court might consider would include the “place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties, reference to the courts having jurisdiction, and such other links. . . . to determine the system of law with which the transaction has its closest and most real connection.”²¹⁶ Even though the parties’ choice of law will generally be respected by Indian courts, parties may not choose a foreign law to avoid the application of Indian law. For example, Indian prohibition of speculation in groundnut oil could not be circumvented through a choice-of-law clause invoking foreign law.²¹⁷

With reference to employment contracts, the starting point would be to ascertain the intent of the parties as to their choice of law. If that is not possible, or no intent can be ascribed, an Indian court would then look at the law of the place with which the employment contract is most closely connected.²¹⁸ In the case of an employment contract, commentators have noted that a choice of law clause shall not have the result of depriving the employee of the protection afforded by the mandatory rules of the law of the state that would be applicable in the absence of a choice of law clause.²¹⁹ In Indian labour and employment law, employment status is determined based on the employer’s ability to dismiss the employee.²²⁰ Realizing that there are few “truly” Indian sources that the U.K. law itself may be in a state of flux due to Brexit, the following is a limited discussion of some of the issues that might arise in litigation around Indian crowdwork.

3.4 *Application of choice of law*

A common issue to California, the EU, and India (and, likely, many additional jurisdictions) is the use of choice of law clauses in contracts to specify which country’s labour and employment law will govern the relationship. But in all three systems, California, the EU, and India, these choice of law clauses, which as a practical matter almost entirely are dictated by employers, will not be considered absolute. California’s application of the governmental interest test and precedent in the context of non-competition agreements in fact seem to take a dim view of clauses selecting another state’s law when the result is less rights for workers than the California Labor Code provides.²²¹ The EU’s Rome Regulation allows choice of law clauses, but not if it causes workers to lose the rights they would have enjoyed in the absence of such a clause.²²² And India’s approach is similarly in accord, holding that a choice of law clause would not be valid if it caused workers to lose rights they would have had under the default choice of law provisions.²²³

These are important points to keep in mind, because crowdwork environments are largely intermediated by and through standardized form contracts, the “terms and conditions” or “terms of service” put forth in order for a user to register an account. These terms and conditions are

²¹⁶ Noronha, *op. cit.* at 74. *The Assunzione*, (1954) P. 150; (1954) 1 All ER 278 (CA); *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd*, (1938) AC 224; (1937) 4 All ER 206.

²¹⁷ *SE Oil v. M/s Gorakharam Gokalchand* (1962) 64 Bom LR 113.

²¹⁸ Agrawal and Singh, 2010 at 105. *See also* *Nicholas Schivas v. Nemazie*, AIR 1952 Cal. 85 (case of a seafarer, in which court noted its willingness to first look at the law selected by the parties; and if there was no selection made, then to look at the place where the contract was made or was to be performed, and if uncertain, to look at the *lex fori*).

²¹⁹ Agrawal and Singh, 2010 at 105.

²²⁰ *Id.* at 108.

²²¹ Section 3.1.1, *supra*.

²²² Section 3.2, *supra*.

²²³ Section 3.3, *supra*.

displayed in an online format, sometimes with scrollable texts. Some are presented in a format that requires the user to click “I agree” before continuing to use the site or platform. Courts in the United States have been reaching a consensus that the “click” signifies an objective assent or agreement to the form terms.²²⁴ Other sets of terms may be presented in a scattered way throughout the website or platform. Known as “browsewrap,” these kind of contracts require no manifestation of assent and U.S. courts have been reluctant to enforce them.²²⁵

In fact, the terms of service raise many of the same kinds of issues for online workers that terms of use and end user licensing agreements (EULAs) have long raised for software users.²²⁶ The 2018 ILO study *Digital Labor Platforms and the Future of Work* notes that many platforms come along with terms and conditions that are largely unfriendly to workers.²²⁷ Many contain statements purporting to govern employment status, and others may contain arbitration or choice of law clauses. Online workers may not even have seen the terms, or they may be presented in a piecemeal fashion, or during inopportune times.²²⁸ Even if the workers are able to access the terms and conditions, that may not help them. The terms and conditions are often long and dense, with some running to over 10,000 words of legalese.²²⁹ Needless to say, just like busy consumers, most gig workers are trying to piece together a living and do not have the time to read all the terms. And even if they did, a feature of online adhesion contracts is their “take it or leave it” nature.²³⁰ Even if a worker did read the terms and conditions fully any attempt to bargain would likely be futile.²³¹

The terms of service for many on-demand platforms contain a statement that the work is done on an “independent contractor” basis and that no employee benefits are designated or even desired. That is sidestepping the fact that in most jurisdictions, such labels are not dispositive and that the true question of employee status is a matter to be decided by a legislature or court.²³² Further questionable clauses in platform terms of service agreements may seek to impose mandatory binding arbitration.²³³ Others seek to limit class actions or impose choice of law provisions.

²²⁴ *Fteja v. Facebook, Inc.*, 841 F.Supp.2d 829 (S.D.N.Y. 2012).

²²⁵ *Specht v. Netscape*, 306 F.2d 17 (2nd Cir. 2002).

²²⁶ Cherry, 2014b.

²²⁷ ILO, 2018b.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *See, e.g.* Radin, 2013 (describing problems of adhesion contracts).

²³¹ Rakoff, 1983 (noting that dickering of terms is not likely to be successful in an adhesion contract situation); Kim, 2013.

²³² *See* section 2.2, *supra*.

²³³ For recent accounts of the use of EULAs and pre-dispute mandatory arbitration as a way of managing workplace liability for employers in the United States, *see* Sternlight, 2015, p. 1310 (“Today employers, with substantial assistance from the Supreme Court, are using mandatory arbitration clauses to “disarm” employees, effectively preventing them from bringing most individual or class claims and thereby obtaining access to justice. It has been estimated that roughly 20% of the non-unionized American workforce is covered by mandatory arbitration provisions, and this number may well increase.”) For more on arbitration as a method of containing costs toward consumers, *see* Eisenberg et al., 2008 (“We provide the first study of varying use of arbitration clauses across contracts within the same firms. Using a sample of 26 consumer contracts and 164 nonconsumer contracts from large public corporations, we compared the use of arbitration clauses in firms’ consumer and nonconsumer contracts. Over three-quarters of the consumer agreements provided for mandatory arbitration but less than 10% of the firms’ material nonconsumer, nonemployment contracts included arbitration clauses. The absence of arbitration provisions in the vast majority of material contracts suggests that, *ex ante*,

In a recent case from the U.K.'s Employment Tribunal about Uber, the tribunal analyzed the web of contracts between Uber and its drivers as well as Uber and its passengers in some depth.²³⁴ Regarding the former relationship, the Tribunal was extremely critical, noting that:

“the terms on which Uber rely do not correspond with the reality of the relationship between the organization and the drivers. Accordingly, the Tribunal is free to disregard them. As is often the case, the problem stems at least in part from the unequal bargaining positions of the contracting parties... Many Uber drivers (a substantial proportion of whom, we understand, do not speak English as their first language) will not be accustomed to reading and interpreting dense legal documents couched in impenetrable prose. This is... an excellent illustration .. of “armies of lawyers” contriving documents in their clients’ interests which simply misrepresent the true rights and obligations on both sides.”²³⁵

Instead, the tribunal relied on a discussion of thirteen points of analysis to show that Uber was not working for the drivers; that instead, the drivers were working for Uber.²³⁶ These points included key issues of recruitment, control over information regarding the passengers, Uber’s setting of default routes, pricing structures, conditions on drivers, instructions for drivers, the establishment of disciplinary and rating systems, and that Uber handles complaints from passengers.²³⁷

Choice of law and forum selection clauses are certainly useful for reducing wasteful litigation about where a dispute should be heard and what rules should apply.²³⁸ It is also understandable that platforms would desire to manage risk. The concern is that if multinational platform operators can choose the law that they impose through an adhesive contract, they might decide to pick jurisdictions in which there either is no law; ones in which there seems to be a favorable precedent or the likelihood of one; or jurisdictions where labour standards are quite low. In other words, the race to the bottom in labour standards.

The material that I have set out, above, on choice of law in labour and employment law cases show that this approach will not work, at least not in California, India, and the EU. And it might not work in other jurisdictions, if it is determined that platforms are skirting at the edge of regulation or engaged in strategic forum shopping. In some countries, that might take the form of national governments telling platforms that they must classify platform workers as employees, or else they need to do business elsewhere.²³⁹

Private ordering cannot and will not provide a complete solution to these problems. Because of the power imbalances embodied in many of the online terms of service used by platforms, they are not the product of equal bargaining power. Traditional choice of law doctrines have recognized this, with the Rome Regulation presenting workers with probably the most favorable

many firms value, even prefer, litigation over arbitration to resolve disputes with peers. Our data suggest that the frequent use of arbitration clauses in the same firms' consumer contracts may be an effort to preclude aggregate consumer action rather than, as often claimed, an effort to promote fair and efficient dispute resolution.”). *But see* Drahozal and Ware, 2010.

²³⁴ Aslam & Farrar, *op. cit.* (note 92) at 27.

²³⁵ Aslam & Farrar, *op. cit.* at 31.

²³⁶ Aslam & Farrar, *op. cit.* at 30. The analysis proceeded under the 1996 Act, Section 230(b), referred to in the decision as a “limb b” type case.

²³⁷ Aslam & Farrar, *op. cit.* at 29.

²³⁸ Posner, 2013, at 261-62.

²³⁹ *See e.g.*, Dockterman, 2016. *Cf.* Bhuiyan, 2016; Horwitz, 2017.

structure for enforcing their rights of the three examined. All of the systems recognize that any choice of law rules must work in tandem with the background private international rules.

3.5 *Conflicts of law in the gig economy (without choice of law clauses)*

As of the date of this paper's publication, no caselaw, statutes, directives, or other precedent are on point for dealing with the issues of jurisdiction, conflict of law, or choice of law and crowdwork platforms in California, the EU, or India. Yet with that said, we can use some of the existing private international law concepts and precedents discussed above to make some general predictions about how a court in each of these jurisdictions might consider the issues if seized with a question that involves multiple jurisdictions and gig work, without the application of a choice of law clause. As there is no live case or controversy at the moment where arguments are being asserted, the discussion herein is of necessity rather abstract.

Beginning with California, a company's decision to set up its headquarters or even to host its server in the state of California would establish the necessary minimum contacts for jurisdiction. Beyond initial jurisdiction, with California's territorial turn along with the governmental interest approach, the location of the other parties involved would be important.²⁴⁰ Because the questions around employment of platform workers generally involve a claim that the platform is the employer and not generally the requester, the requester seems to fall out of the equation.²⁴¹ Even though the relationship is triangular, it is difficult to go back as against the requester.²⁴² There might be an exception through the application of the joint employer doctrine, in the case of a company that was perhaps posting an enormous number of tasks to a crowdsourcing platform, creating the equivalent of a virtual workforce on these platforms. The jurisdictional issues with minimum contacts would also be true in both the EU and India.

In all three jurisdictions, focus would largely remain on the place where the work was to be habitually carried out, that is similar to the received wisdom about where the worker is physically located.²⁴³ This approach will cause major problems for platforms with the need to comply with many sets of jurisdictional rules and regulations, once statutes and judicial rulings begin to regulate. So, if there is truly a globalized platform, and it is ethical and wants to comply with the law, and has workers from fifty different countries, the platform will need compliance with all fifty of the regulatory regimes and will also be subject to suit under all of them. Right now, the process "works" because there is no regulation, and thus the platforms do what they want. But that will not be case five or ten years from now, when there is regulation.

Thinking about India, specifically, consider Indian private international law rules.²⁴⁴ Assume that a group of Indian crowdworkers wanted to bring a claim for wage theft or failure to pay minimum wage against a platform based in the United States or the EU. Note that such situations are commonplace on crowdwork platforms, where requesters have a great deal of power to reject work, in some instances not paying the workers who completed the tasks, but retaining the benefit of the work.²⁴⁵ If crowdworkers in India were to bring a lawsuit in an

²⁴⁰ Section 3.1, *supra*.

²⁴¹ Prassl, 2018.

²⁴² *Id.*

²⁴³ Morgenstern, 1984, pp. 61-64.

²⁴⁴ All of these instances are hypothetical but entirely possible.

²⁴⁵ See Cherry and Poster, 2016; Berg, 2016 (survey of crowdworkers). In the survey, some workers noted that their work could be rejected by the requester on a summary basis, without reasons provided. All of these led to dissatisfaction among those surveyed.

Indian court, for example,²⁴⁶ the court would have jurisdiction to hear the case, regardless of the location of the platform, thanks to the jurisdictional element.

Although this section has employed a methodical approach, setting out the law around private international law in three jurisdictions, and then applying the doctrines, at the moment with no concrete cases, the issues are still nascent. Further, even applying the best knowledge we have through the toolkit of private international law, many of these questions do not have cut-and-dried answers. Returning to the examples provided in the beginning of the paper, what rights would refugees in a camp have, if they are Syrian nationals temporarily located in Jordan, the platform they use is hosted in the United Kingdom, and the customers for the website who are trying to learn a language are located in eighty different countries around the world? If private ordering will only result in a race to the bottom, and the toolkit of private international law is unwieldy in its application and yields uncertain results, we need to look elsewhere for appropriate solutions. The next section discusses regulatory options and helpful constructs for dealing with these emergent problems.

4. Regulatory options and solutions

“The best way to predict the future is to invent it.” – Alan Kay²⁴⁷

As crowdwork is a genuinely global enterprise, it runs counter to the received wisdom that labor and employment law is a matter only for national authorities and local regulation. At the moment, the stage is set for disagreement and conflicting regulations between nations about how to characterize or even approach the labour problems associated with gig work.²⁴⁸ Moreover, as with any type of labour regulation, there is a worry about capital flight and races to the bottom in labour standards.²⁴⁹ In some ways, these problems are just a heightened form of some of the enduring and difficult conundrums of global labour law and the global supply chain.²⁵⁰

This solutions section sets out several strategies for thinking about transnational regulation of crowdwork, and the harmonization that is necessary for a successful system of international regulation. The first possibility is to look at regulations, like the European Union’s General Data Protection Regulation (GDPR), that of necessity have an extraterritorial reach. Second, one idea that may prove fruitful would be to examine other employment sectors where the physical location of workers has been subtracted from the law’s calculus. The third option might seek to link crowdwork to the discussion over ethical sourcing throughout the global supply chain. Corporate social responsibility and corporate codes of conduct can set best practices and standards for computer crowdwork; these forms of “soft law” cross borders and can be influential. The section ends by thinking backwards about preferences for decent

²⁴⁶ See Batchelor, 2017 (reporting that domestic workers on zero hours contracts would be covered by the Indian minimum wage laws).

²⁴⁷ *Financial Times*, Nov. 1, 1982.

²⁴⁸ See De Stefano, 2016.

²⁴⁹ Indeed, as platforms have few physical assets tying them to any geographic location, the race to the bottom may present an even more important concern.

²⁵⁰ Arthurs, 2001.

crowdwork, and then calling upon national governments, unions, employers, and policymakers²⁵¹ to begin thinking about what looks like “good” outcomes on this issue.

4.1 *Extraterritorial reach of statutes: The example of the GDPR*

The European Union’s 2018 enactment of the General Data Protection Regulation (GDPR) is of interest worldwide, applying to any company that collects data from or employs citizens of the European Union.²⁵² Its expansive jurisdictional reach and liberal interpretation of “personal data” has created interest and concern among multinational firms, engendering discussion and the need for legal insight.²⁵³ At a glance, the GDPR pertains to the processing of personal data “wholly or partly by automated means” or where personal data forms part of a filing system.²⁵⁴ A list of the basic principles of data are set forth in article 5,²⁵⁵ and article 6 sets forth legal limits for processing the data.²⁵⁶

Perhaps most interestingly for purposes of this paper, in article 3 the GDPR sets out the jurisdiction of the GDPR, which applies “to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union,” even if the processing does not take place within a Member State.²⁵⁷ A controller not established in the Union has it apply to them “by virtue of public international law.”²⁵⁸ Article 83, among other recitals, states that the penalties for noncompliance with certain provisions of the GDPR can range from ten million²⁵⁹ to twenty million Euro yearly.²⁶⁰

The threshold for determining whether someone is offering goods or services for sale in the EU is a key point for determining applicability of the GDPR.²⁶¹ Recitals in the GDPR mention that among other things, offering multiple languages, offering payment in Euro, using domain names of Member States, or offering local testimonials will trigger GDPR compliance issues.²⁶² Privacy specialists have also noted that tracking and monitoring of data has a “wide net,” and

²⁵¹ As an international standard setting body of importance, it is crucial that the ILO continue to study the problem closely, whether through the mechanism of a committee of experts or through solicitations for guidelines that might help in the process of harmonization.

²⁵² Council Regulation 2016/679, On the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), art. 1, 2016 O.J. (L 119) 32 (“This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.”). For more on the theoretical background of data protection as a fundamental right in the European Union, *see generally* Tzanou, 2017.

²⁵³ Dunne, 2018. In addition, consent must be able to be as easily withdrawn as given, which would open scenarios of consent being withdrawn and that data requiring expungement.

²⁵⁴ Council Regulation, *op. cit.* at art. 2(2) 2016 O.J. (L 119) 32.

²⁵⁵ *Id.* at art 5(1)(a)-(f), 2016 O.J. (L 119) 35-6. Among these principles are transparency with the data subject, limitation on collecting purpose, limitation of collecting, and accuracy.

²⁵⁶ *Id.* at art 6(1)(a)-(f) 2016 O.J. (L 119) 37.

²⁵⁷ *Id.* at art 3(1) 2016 O.J. (L 119) 33.

²⁵⁸ *Id.* at art 3(3).

²⁵⁹ *Id.* at art. 4, 2016 O.J. (L 119) 82.

²⁶⁰ *Id.* at art. 5

²⁶¹ Kish, 2018. *See also* Jones, 2016, pp. 168-171 (discussing extraterritorial reach of GDPR and noting controversies).

²⁶² Kish, *op. cit.*

they generally urge companies to engage in compliance measures to see if they fall under the regulations.²⁶³ Thus, locating servers in the United States²⁶⁴ does not exempt a company from following the strictures of the GDPR.²⁶⁵ Traditionally the United States and European Union have been cooperative regarding reciprocal enforcement of respective laws.²⁶⁶

While the GDPR's applicability to crowdwork, big data,²⁶⁷ and people analytics²⁶⁸ shall have to be addressed in other articles, the main reason for discussing it here is to examine how the regulations of the EU on privacy could have an impact on privacy practices around the world. A similar approach, involving a statute regulating crowdwork with a far-reaching extraterritorial jurisdiction is one possibility for overcoming the private international law issues that crowdwork poses. Although we typically think of employment and labour regulation as creatures solely of national law, the example of the GDPR should make regulators take notice. Rather than decline to regulate at all because of problems with jurisdiction, it might make more sense to learn from implementation of the GDPR.

4.2 The possibility of sectoral regulation

Another option for thinking about crowdwork is to compare it to other forms of work that are divorced from physical location. Traditionally there are some occupations, such as traveling sales, transportation workers, or seafarers, which have fallen outside and apart from the territorial jurisdiction of national regulation.²⁶⁹ In thinking about solutions to the regulatory and jurisdictional problems posed by crowdwork, one possible answer is a specific sectoral approach. Here is a description of some of the issues that maritime employment law practitioners would face:

It is not unusual for a seafarer to work on a vessel registered in a foreign country, sailing on the high seas and calling at ports in countries other than that of her flag, owned by citizens of yet other countries, insured in other countries, perhaps chartered by interests in other countries, managed by a company in another country, and carrying cargo owned by citizens of other countries. More than a half-dozen different countries may be directly connected to a vessel's operations. When problems arise, which country has jurisdiction? Which country's or countries' laws apply--and what laws within that country affect seafarers?²⁷⁰

These issues sound incredibly similar to the transnational and jurisdictional issues pertaining to modern-day crowdwork. While crowdworkers are not physically traveling in the same way that ships' crews are, the work that they produce certainly is in motion, given that it often arrives

²⁶³ *Id.* A few examples of monitoring as analyzed by IAPP include online advertising based on behavior, fitness tracking, location tracking via apps, and tracking of public transportation.

²⁶⁴ Winston, 2017. US companies with a physical presence within the EU will have the Regulation "enforced directly" upon them just as it would be for a totally EU-based company. *Cf.* Jones, *op. cit.* at 168 (noting that enforcement may encounter problems around the world).

²⁶⁵ *Cf.* Wimmer, 2018, p. 548.

²⁶⁶ *Id.*

²⁶⁷ Zarsky, 2018.

²⁶⁸ *See* Bodie et al., 2017.

²⁶⁹ Morgenstern, 1984 (61-64).

²⁷⁰ Stevenson, 2005, p. 567.

from a foreign nation, and is sent back to another, while meantime any other parts of the work are being amalgamated from workers in other nations.

Effective international regulation of maritime workers took over a century of effort to achieve. In the nineteenth century, a seafarer's life was a difficult one, with few, if any safeguards against wage theft, safety hazards, or poor working conditions.²⁷¹ At that time, the dominant international law regulating the seas was the centuries-old concept of freedom of the seas. Apart from this paradigm of *mare liberum*, antagonistic powers created rigid codes that constituted a "harmful corollary" of regulation.²⁷² As the amount of goods shipped at sea increased, so too did concern over potentially exploitative or poor working conditions for seafarers.²⁷³ Positions on ships were often temporary. Workers faced isolation, enduring separations from friends and families for months at a time.²⁷⁴ In extreme situations, workers could find themselves abandoned at foreign ports with no money and no passage to return home.²⁷⁵

Beginning in 1897, the International Maritime Committee (IMC) began advocating for greater unification of maritime law, and adopted regulations and protocols to further harmonization.²⁷⁶ In the ensuing years, the IMC began to fashion the standards and organization necessary to provide cooperation between seafaring states.²⁷⁷ In 1948, the United Nations established a department, the International Maritime Organization (IMO), which has as its goal regulating the resources of the ocean and the people who work on it. The many international treaties overseen by the IMO include the United Nations Convention on the Law of the Sea (UNCLOS)²⁷⁸ and the International Convention for the Safety of Life at Sea (SOLAS), both promulgated and adopted in the 1970s and 1980s.²⁷⁹ These sets of regulations established that ship owners would register their ships with a nation and subject themselves to the jurisdiction of the country whose flag they flew. The duties of a flag state included maintaining a register, assuming jurisdiction of laws, legal liability, and proper regulations including compliance with labor conditions.²⁸⁰ However, problems remained because ships could register with so-called flags of convenience, states with low standards or lax enforcement, that in fact encouraged a race to the bottom.²⁸¹

In 2006, under the auspices of the UN-ILO, the International Labour Conference took up the project of consolidating and modernizing the sixty-plus instruments that concerned various

²⁷¹ Mangone, 1997, p. 117 ("From antiquity to modern times the life of the ordinary seaman has been woeful: exposed to the frightful perils of the world ocean for months or years; . . . deprived of family or normal human society for long periods; and, until recently, subjected to the arbitrary command of a master at sea."). See also *Life Aboard*. Available at: <https://www.whalingmuseum.org/learn/research-topics/overview-of-north-american-whaling/life-aboard> [19 Apr. 2019].

²⁷² Lilar and Van Den Bosch, 1972, pp. 4-6.

²⁷³ Mangone, *op. cit.* at 117 (noting that the flogging of seamen was not outlawed in the United States until 1850 and that brutal discipline continued throughout the century, and that the system of "crimping," i.e. pressing alcoholics or penniless people onto ships continued until the late 1800s).

²⁷⁴ Link, 2015, p. 174.

²⁷⁵ *Id.*

²⁷⁶ Wiswall Jr, 2018, *A Brief History*, Available at: <http://comitemaritime.org>. [19 Apr. 2019].

²⁷⁷ Frawley, 2011 (over time, IMO would adopt most of CMI's protocols.)

²⁷⁸ United Nations Convention on the Law of the Sea, Preamble, Dec. 10, 1982, 1833 U.N.T.S. 397.

²⁷⁹ International Convention for the Safety of Life at Sea, Chapter II-1, Nov. 11, 1974, 1184 U.N.T.S. 1980. See generally Becker, 2007.

²⁸⁰ *Id.*

²⁸¹ See Shaughnessy and Tobin, 2006-2007. See also Link, 2015 at 178-179 (noting race to the bottom).

aspects of maritime employment in the Maritime Labour Convention (MLC).²⁸² Every seafarer under the MLC has a right to a safe workspace that complies with international standards, fair terms of employment, medical care, and decent living conditions, and these rights are set out in five titles.²⁸³ Title I sets forth minimum and basic requirements, such as age requirements, adequate training, and employment notification standards.²⁸⁴ Title II covers the conditions of employment, including notice of termination periods, regular wage payment and calculation, hours, leave, repatriation, and compensation.²⁸⁵ Title III concerns decency of accommodation and recreation, including quality of food served aboard.²⁸⁶ Title IV ensures adequate healthcare provisions, places liability for workers' health on the owner of the ship, requires safety standards to be followed, and provides for social insurance for seafarers.²⁸⁷

Finally, Title V discusses the enforcement of the other titles. Each signatory must agree to implementation, through authorization of compliance inspections and maintaining Maritime Labor Certificates certifying compliance once those inspections are complete.²⁸⁸ This section also concerns inspections in port states, complaint procedures on shore, and maintenance of the labor supply.²⁸⁹ The goal of the MLC is to ensure parity of maritime laborers with those performing the same types of tasks on land, and, to date, it seems to be performing its function.

Since its promulgation in 2006 and its effectuation in 2013, the MLC can by all accounts be considered a success. As of the date of this writing, 82 states have ratified the convention.²⁹⁰ While that may only sound like half of the states needed, it covers over 90 percent of the tonnage shipped.²⁹¹ Because ships can be stopped and checked for violations from its flag state, the port of departure, and the port of entry, regulators in many different countries have uniform measures to ensure that wages have been paid and that working conditions onboard are safe for seafarers.²⁹²

Some issues present in maritime employment stand out as directly applicable to the situation and status of online crowdworkers. Both the “jobs” on many online work sites and the crewing of a ship are considered temporary or transitory, lasting only as long as the job. There is potential for social isolation in both types of work. The specter of wage theft is a shared threat as well. But the most striking parallel is, of course, the international aspect of both types of work with work being transitory and mobile. In the case of the maritime worker, that is because the job of necessity involves transport and moving from place to place. In the case of online crowdworkers, work is being generated, sent, processed, and stored in many different locations and fellow workers are located around the world.

²⁸² Maritime Labour Convention, Preamble, Feb. 23, 2006, 2952 U.N.T.S. 5. *See also* Chirstodoulo-Varotsi, 2012, p. 468.

²⁸³ Maritime Labour Convention, at Art. IV.

²⁸⁴ *Id.* at Title I, Regulations 1.1-1.4.

²⁸⁵ *Id.* at Title II, Regulations 2.1-2.3.

²⁸⁶ *Id.* at Regulation 3.2.

²⁸⁷ *Id.* at Title IV, Regulations 4.1-4.3.

²⁸⁸ *Id.* at Title V, Regulations 5.1.1-5.1.4

²⁸⁹ *Id.* at Title V, Regulations 5.2-5.3.

²⁹⁰ ILO: *MLC, 2006: What it is and what it does*, Available at: <https://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/lang--en/index.htm> [19 Apr. 2019].

²⁹¹ *Id.*

²⁹² Link, 2015 (advocating that United States ratify the Maritime Labour Convention).

As such, crowdwork might benefit from the type of sectoral regulation that exists in maritime employment. That would mean regulations specifically crafted and tailored to fit the requirements, special issues, and needs of online crowdworkers. Like the ports that can check for compliance with the MLC, various host or entry points could be checked for compliance in the network that comprises crowdwork. Because the workers behind the platform are largely invisible, such regulatory checks would necessarily involve the turnover of data.

The idea of sectoral regulation is somewhat controversial. I have no doubt there are some academics in my circle who would object to the idea that crowdwork is in any way different than offline work or deserving of special status or treatment. This group might complain that crowdwork is not a *sui generis* type of employment that deserves its own set of rules. The reasoning would be that if crowdworkers are treated as a special category, that they will somehow not be seen as deserving of the same kinds of labour rights that other workers have. One response would be to refer to the other types of workers that receive sectoral regulation and to point to the benefits that have accrued to them. All of this is abstract for now, but might become of more importance if the ILO or other agencies decide to act and begin formulating guidelines or other regulations for crowdwork. Where might some of those rules and guidelines be drawn from? One source might be to look at forms of “soft regulation” for online platforms, and look to the best practices of the industry, including socially responsible platforms. The next section looks at these practices.

4.3 Corporate social responsibility, global supply chains, and best practices for crowdwork

The issue of fair standards for online work has connections to existing issues that have already been discussed in the context of global supply chains for products. Global supply chains may obscure poor labour practices by dispersing businesses geographically and breaking down the operations, functions, and participants in work into many segments. Through global labor arbitrage, multinational companies may move jobs to countries where hiring workers is less expensive, where they can save money on rent and physical infrastructure, and where they may receive exemptions from legal regulations in return for foreign investment.²⁹³ The phenomenon is now standard for business practice: 80% of Fortune 500 companies in the United States now outsource some of their functions abroad, and a large percentage of that outsourcing is to the global south.²⁹⁴ Unfortunately, there is little transparency in these global supply chains for products, and because the workers are largely invisible to the parent company and consumers, poor working conditions can prevail. For example, the fires and building collapse in Bangladesh killed over 1,100 workers who were sewing clothes for labels including Walmart, Target, and The Gap.²⁹⁵ Due to the growth of crowdwork and many of the trends that accompany the trend toward increasingly temporary and precarious work arrangements, it is important to think about how these new forms of work fit into the existing legal regulation of work, including the need to trace labour in global supply chains. If regulation along a global supply chain is a problem, then corporate social responsibility and corporate codes of conduct may help to provide an answer.

Corporate social responsibility takes a wider view of a corporation’s purpose than a single-minded focus on shareholder primacy and profit.²⁹⁶ Generally, corporate social responsibility means managing a business with equal regard for the triple bottom line,²⁹⁷ that is financial

²⁹³ Doorey, 2010 (exhaustive treatment of issues with global supply chains in Canada).

²⁹⁴ Deloitte, 2014.

²⁹⁵ Greenhouse and Harris, 2014 (describing garment factory collapse).

²⁹⁶ See, e.g., Smith, 1998, pp. 290-91. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919). Macey, 2008.

²⁹⁷ See generally Elkington, 1988.

performance, environmental consequences and labour standards, and social impact.²⁹⁸ In addition to “the traditional bottom line of financial performance (most often expressed in terms of profits, return on investment, or shareholder value)” a firm should also mind its “impact on the broader economy, the environment, and on the society in which [it] operate[s].”²⁹⁹ In fact, this triple focus often improves firms’ financial bottom lines as much as it helps the environment and society. To take one example, efforts to reduce waste and pollution often result in greater efficiency and the discovery of innovative techniques and materials.³⁰⁰

Compliance with labour standards is often discussed as a form of corporate social responsibility. But following the law, surely, is a basic obligation of corporations, as well as citizens. How then is basic compliance considered socially responsible? It helps to think of corporate social responsibility as a type of continuum, with firms integrating these concepts in their operations to varying degrees. At one end of the spectrum, a firm may have no ambition to be socially responsible and in fact be out of compliance with applicable labor and environmental laws and regulations.³⁰¹ At this stage, the focus is on profits to the exclusion of all other considerations and the firm may even deliberately violate laws in order to maximize corporate profits.

Slightly more socially responsible is the firm that complies with applicable laws and perhaps engages in generic corporate philanthropy, but does little beyond that.³⁰² These firms see “no business case” for going beyond compliance or serving stakeholders’ interests.³⁰³ To these firms, “the business of business is business” and by bare compliance (and paying taxes) they see themselves as fulfilling their societal obligations.³⁰⁴ A third type of firm moves beyond bare compliance but only does to where it would be profitable.³⁰⁵ These firms may view corporate social responsibility primarily as a public relations matter, for particularly in consumer-focused industries social responsibility attracts customers and social irresponsibility repels.³⁰⁶ These companies may also pursue a socially responsible agenda to save resources,

²⁹⁸ See Jensen, 2001 (positing that a firm best maximizes its long-term value by tending to all of its stakeholder groups). Orlitzky et al., 2003 (“[P]ortraying managers’ choices with respect to [sustainability and profitability] as an either/or trade-off is not justified in light of 30 years of empirical data.”).

²⁹⁹ See Savitz and Weber, 2006, p. xii. Elkington notes that, by considering society and the environment, the triple bottom line internalizes costs that firms would otherwise externalize. See Elkington, 1988 at 92-94, 307 (discussing the “full cost accounting” method of “assessing the total cost of making, using, and disposing of products”).

³⁰⁰ See Elkington, *op. cit.* at 314 (discussing DuPont’s successful 99% reduction in toxic emissions at a Texas plant – “achieved through the use of closed-loop recycling, off-site reclamation, selling former wastes as products, and substituting raw materials” – which saved “\$2.5 million of capital and more than \$3 million in annual operating costs”); see also Savitz and Weber, 2006, at *passim* (containing numerous such anecdotes).

³⁰¹ See van Marrewijk and Werre, 2003 (terming this level “pre corporate sustainability”). Kerr, 2008, p. 857 (arranging corporate social responsibility levels along a spectrum). Interestingly, van Marrewijk and Werre derive their levels of corporate social responsibility from Clare Graves’s psychology research on value systems and levels of existence. See van Marrewijk and Werre at 107.

³⁰² See SustainAbility, 2004, pp. 34-37 (terming this category “compliance”); van Marrewijk and Werre, *op. cit.* at 110 (terming this category “compliance-driven” corporate sustainability); Kerr, 2008 at 857 (terming this category “mere or reactive compliance”).

³⁰³ See SustainAbility, *op. cit.* at 35.

³⁰⁴ See *id.* (paraphrasing Milton Friedman).

³⁰⁵ See SustainAbility, *op. cit.* at 35 (labeling this type of firm a corporate social responsibility “volunteer”); van Marrewijk and Werre, 2008 at 110 (describing this level as “profit-driven” corporate sustainability).

³⁰⁶ See Fisman et al., 2007 (noting that corporate social responsibility is more positively related to profitability in advertising-intensive, consumer-oriented industries); Kerr, 2007, pp. 664-65 (citing

reduce waste, achieve production efficiencies, and anticipate changing conditions, regulations, and consumer preferences.³⁰⁷ These firms may incorporate environmental, ethical, and social considerations at all levels of their operations and decisionmaking, but only act upon them when it would benefit their financial bottom lines.³⁰⁸

At fourth type of firm routinely balances economic, social and environmental considerations and does so not in order to comply with applicable laws or to make a profit.³⁰⁹ Rather, these firms are motivated by altruism to “do good”—for their various constituencies and for the planet—while still producing handsome returns for their shareholders.³¹⁰ These firms also tend to be more pro-active, partnering with government, “suppliers, customers, and others in their industry” to together innovate sustainable solutions to environmental and other problems.³¹¹ At the next level of corporate social responsibility, firms integrate social responsibility principles into their strategy and business processes (starting with product or service development) such that the way of doing business is “built in, not bolted on.”³¹² For example, companies at this stage may rethink their design and production processes to reduce waste, utilize improved, sustainable, and even reusable materials, and in some cases eliminate the use of harmful materials altogether. These firms aim to serve all their stakeholders, creating value for shareholders, by matching “corporate objectives [with] wider societal challenges.”³¹³ At the sixth and highest level, corporate social responsibility “is fully integrated and embedded in every aspect of the organization, which is committed to contributing to the quality and continuation of life of every being and entity, now and into the future.”³¹⁴ Here, companies also redesign or “reengineer” their business models, financial institutions, and markets to identify and root out any underlying causes inconsistent with social responsibility. Aside from a few outliers,³¹⁵ however, corporate social responsibility rarely moves beyond the third, profit-

studies measuring “a strong positive relationship between CSR behaviors and consumers’ reactions to a company’s products and services”). This may be the case in business-to-business transactions, as well. See Elkington, 1988, at 110, 119 (relating anecdotes).

³⁰⁷ See Barnard, 2007 (noting that “sophisticated corporate managers” are “take into account the possibility of increased governmental regulation; the increasing risk of a costly response to changing environmental conditions . . . ; and growing consumer preference for products sold by companies that are good corporate citizens”).

³⁰⁸ See van Marrewijk and Werre, 2008 at 110.

³⁰⁹ See SustainAbility, 2004 at 35 (labeling this the “partner” level); van Marrewijk and Werre, *op. cit.* (describing this level as “caring” corporate sustainability); Kerr, 2008, at 857-58 (labeling these firms “pro-active” in corporate social responsibility).

³¹⁰ See van Marrewijk and Werre, *op. cit.* at 110.

³¹¹ See SustainAbility, 2004 at 36; van Marrewijk and Werre, *op. cit.* at 110.

³¹² See SustainAbility, *op. cit.* at 36 (labeling this level “integrate”); van Marrewijk and Werre, *op. cit.* (describing this level as “synergistic” corporate sustainability). McEwen and Schmidt, 2007 (“What you have to do is build responsibility into every aspect of the way you do business, so it’s built in, not bolted on.” [quoting a pharmaceutical manufacturer’s vice president of corporate responsibility]).

³¹³ See SustainAbility, *op. cit.* at 36.

³¹⁴ See SustainAbility, *op. cit.* at 36 (calling this level “re-engineer”); Kerr, 2008 at 858 (calling this “creative capitalism”); van Marrewijk and Werre, 2008 at 110 (terming this level “holistic” corporate sustainability).

³¹⁵ See, e.g., Carpenter, 2010 (profiling Green Mountain Coffee Roasters). Dean, 2007 (profiling Ray Anderson of Interface Carpets). Foster, 2009. Lyall, 2007. Martin, 2009 (interviewing Stonyfield Farms CE-Yo Gary Hirshberg). Moore, 2009. Sacks, 2010. *Seth Goldman: Brewing Organic Tea with a Mission-Based Business Model*, Knowledge@Wharton, Dec. 23, 2008. Available at: <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2124> (interviewing Honest Tea co-founder and TeaEO Seth Goldman).

driven level described above. This encompasses a great deal of socially responsible behavior and business practices, to be sure.

Specifically for global labour standards, many approaches have tended to focus on the level of the articulation of corporate codes of conduct and compliance with those codes.³¹⁶ Several studies report that socially responsible business practices tend to be profitable,³¹⁷ and the popular business press is replete with anecdotal evidence in further support of this hypothesis.³¹⁸ While corporate codes of conduct are typically voluntary,³¹⁹ and thus an exercise in “soft law,” they can be extremely important sources of self-regulation and also a way for industries to develop “best practices.” Those best practices of an industry often form the basis for the starting point of regulation. After all, industry leaders who have participated in and helped to craft the codes of conduct and who are already meeting those standards are most likely to endorse compliance. In fact, such codes provide a type of “buy in” for those industry leaders, who would rather compete on a level playing field, free from competitors who ignore or flout minimum labour standards.

In the crowdwork sector, such efforts have already begun. As noted in my book, *Invisible Labor*, technology “may hide workers from a Web site’s ultimate users or consumers, who ... may not even know that a human is working at all.”³²⁰ Various crowdworker and labor activists have attempted to change this dynamic over the years, through protests specifically designed to make workers more visible. In 2015, Stanford researchers and crowdworkers organized the Dynamo campaign, which was described as “... a community platform designed to gather ideas, energy, and support directed towards collective action.”³²¹ A primary focus of Dynamo was overcoming the twin issues that seemed to be stopping collective action in the sector, which they described as “stalling” and “friction.”³²² Two of Dynamo’s initiatives secured significant media attention: the articulation of guidelines for academic researchers and a letter-writing campaign targeted at Amazon CEO Jeff Bezos.³²³

The guidelines were aimed at academic researchers, who commonly post surveys, psychological tests, and other similar tasks online. Many of the tasks came under fire because of the low rates of pay offered. Amazon now officially suggests that requesters use Dynamo’s Guidelines for Academic Requesters as a basis “to help Requesters get started successfully with

³¹⁶ Westfield, 2002.

³¹⁷ See Margolis et al., 2007, p. 21. The percentages do not total one hundred because thirteen percent of the studies did not use statistically significant sample sizes. An earlier meta-study reached similar results. See Orlitzky et al., 2003 (“[P]ortraying managers’ choices with respect to [sustainability and profitability] as an either/or trade-off is not justified in light of 30 years of empirical data.”). A more recent, individual study concludes that voluntary overcompliance beyond applicable environmental regulations does sacrifice shareholder profits, albeit only very slightly. See Fisher-Vanden and Thorburn, 2008, p. 2 (reporting that overcompliance depressed firms’ stock prices by about 1%).

³¹⁸ See, e.g., *supra* note 300; Linn, 2007.

³¹⁹ Professor Afra Afsharipour has analyzed the fact that certain Indian provinces have made corporate codes of conduct mandatory and enforced through a tax regime, with a percentage of profits to be turned over to social causes. See, e.g. Afsharipour, 2011; Afsharipour and Rana, 2014.

³²⁰ Cherry, 2016c, p. 73.

³²¹ Salehi et al., 2015, p. 1622.

³²² *Id.*

³²³ *Id.* at 1626.

MTurk.”³²⁴ The guidelines include standards of identification, timeliness, and fair pay.³²⁵ As such, this part of the Dynamo effort seems to have had a lasting impact.

Codes of conduct prompt a discussion of what “socially responsible” or “sustainable” online or app platforms might look like. To begin, some of the platforms might actually be run and owned by crowdworkers. Professors Trebor Scholz and Nathan Schneider have written extensively about platform cooperatives.³²⁶ The business model of such platform cooperatives “flip the script” on most traditional working relationships. Rather than work for a wage, workers who are also cooperative owners are able to keep most of the money earned from their platform. Only a percentage of their earnings go back to the platform in order to invest in upkeep and functionality, rather than pay dividends out to shareholders.

Even in businesses not owned by workers, we could imagine socially responsible on demand platforms. First, we should assume that such a business wanting to establish such norms would likely adhere to a corporate code of conduct and corporate social responsibility norms.³²⁷ These would encompass the idea of fair remuneration and compliance with minimum wage laws. Disclosure and transparency are also important, so that workers understand the big picture of what they are working for and can make informed choices.³²⁸ Finally, there would be procedural safeguards for workers on platforms. If there are rating systems that are being built up over time, then workers should be able to have access to that data.³²⁹ It is also important to ensure for procedural protections so that wage theft does not occur if the work is performed, but the task is “rejected.” As these soft law standards develop, we can hope for a code of conduct for crowdwork that applies regardless of jurisdiction, and that balances the needs of gig workers along with those of the platforms.

5. Conclusion

Online crowdwork presents endlessly fascinating conflicts of law, jurisdiction, and choice of law problems that will only become more salient as platforms become more established, more legal systems began to enforce existing regulations or pass new ones, and the legal issues around the gig economy reach an increasing number of legislatures and courts. This paper has sought, on a practical level, to work through the labyrinth of doctrinal issues, using the available toolkit of private international law and its intersection with nationally-based labour and employment laws. The analysis, however, only serves to point out the shortcomings of the existing laws and approaches.

Working through the maze of corporate compliance concerns and labor standards issues that global crowdwork has created exposes far deeper fault lines in the territorial-based approach to labour and employment law. As long as the focus for regulation remains on “workplaces,” and physical locations where work is performed, effective regulation of crowdwork will remain elusive. There will be no easy answers for what law to apply to TaskRabbit, Upwork, or Chatterbox. Rather than focus on geographical approaches, this paper has tried to marshal a number of suggestions, looking at extraterritorial applications of law, sectoral regulation, and the soft law of corporate codes of conduct, to provide the possibility for ways forward. Socially

³²⁴ “How to Be a Great MTurk Requester”, 17 Sep. 2017. Available at: <https://blog.mturk.com/how-to-be-a-great-mturk-requester-3a714d7d7436> [8 Apr. 2019].

³²⁵ *Id.*

³²⁶ Scholz and Schneider (eds), 2017; *See also* Anzilotti, 2018; Scholz, 2014.

³²⁷ For more on this point, see Cherry and Poster, 2016.

³²⁸ *Id.*

³²⁹ *Id.*

responsible crowdwork is possible, but it will require creative thinking and the cooperation of platforms, workers, and regulatory organizations.

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