Ruling Dutch Supreme Court on Article 4 Rome Convention

On 17 October 2008, the Dutch Supreme Court delivered a judgment in the case Baros A.G. (Switzerland) v. Embrica Maritim Hotelschiffe GmbH (Germany), concerning the application of Article 4 of the Rome Convention (*Hoge Raad*, 17 October 2008, No C07/084HR; LJN: BE7628). In 1998 Baros and Embrica concluded a "Bareboat-Chartervertrag" (rental agreement) concerning a hotel ship; the ship was located in Bremem (Germany) at that time, but was to be used for housing persons seeking asylum in the Netherlands. After termination of the contract in 2002, Embrica claimed damages in the amount of € 742.416,–, because the ship was not returned in the state it was when it was made available.

The Dutch Court of first instance dismissed the claim, but the Court of Appeal awarded a part of the claim. The applicable law was Dutch law, according to the Court. To this end the Court of Appeal stated that according to Article 4(2) of the Rome Convention the contract is presumed to be most closely connected to Germany, since the characteristic performer (Embrica) has its principal place of business in Germany. In line with the Dutch Supreme Court (*Hoge Raad*, 25 September 1992, No. 14556, *NJ* 1992, No. 750), the Court of Appeal further stated that article 4(2) of the Rome Convention constitutes the general rule, while Article 4(5) is the exception and should only be applied in exceptional circumstances, where the country where the party effecting the characteristic performance is situated has no real connecting value. The Court of Appeal decided that in this case the rental agreement did not have a real significant connection to Germany, since (a) the hotel ship was rented with the intention to use it as housing in a permanent location in the Netherlands, (b) the hotel ship had been connected to the shore with a jetty and a footbridge on a permanent basis, (c) the hotel ship was not intended or suited as a means of transport and cannot be moved without the assistance of a tugboat, (d) this was a continuing performance contract where Embrica had agreed to make the ship available in the Netherlands for rent, (e) Embrica was aware that Baros would not use the hotel ship himself, but would sublet it to a party situated in the Netherlands (National centre for support of persons seeking asylum), (f) the agreement stipulated that the return of the ship was to take place in the Netherlands.

Therefore, the Court of Appeal concluded that Dutch law was applicable as the most closely connected law.

The Supreme Court, however, disagreed. It ruled that none of the grounds set out by the Court of Appeal could lead to the conclusion that Germany, as the principal place of business of the lessor (Embrica), has such an insignificant connection that it justifies departing from the general rule of Article 4(2) Rome Convention.

This ruling reaffirms the strict interpretation of Article 4(5) Rome Convention in the Netherlands. Further, it is in line with Article 4 of its successor, the Rome I Regulation, where the law of the habitual residence of the characteristic performer explicitly is the main rule, and may only be set aside where the contract is manifestly more closely connected to another country.