

Dutch Articles on Rome I (updated)

The last issue of the Dutch review of private international law (*NIPR Nederlands internationaal privaatrecht*) includes several articles on the Rome I Regulation, including four in English. ✖

Michael Bogdan (Lund University): *The Rome I Regulation on the law applicable to contractual obligations and the choice of law by the parties*

The Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations (in the following 'the Rome Convention') will be replaced on 17 December 2009, in all Member States of the European Union except Denmark, by the EC Regulation No 593/2008 on the Law Applicable to Contractual Obligations (the Rome I Regulation) although only in relation to contracts concluded after that date. The Commission's proposal of 2005 (in the following 'The Commission's proposal'), which led to the adoption of the Rome I Regulation after a number of amendments, stated that it did not set out to establish a new set of conflict rules but rather convert an existing convention into a Community law instrument. Nevertheless, the Regulation brings about several important changes in comparison with the Rome Convention.

Luc Strikwerda (Advocate-General, Dutch Supreme Court): *Toepasselijk recht bij gebreke van rechtskeuze; Artikel 4 Rome I-Verordening*

If contractual parties have not availed themselves of the possibility to choose the law applicable to their contract (Art. 3, Rome I), the applicable law will be determined according to rules laid down in Article 4, Rome I. Similar to the equivalent provision of the 1980 Rome Convention, Article 4, Rome I is based upon the doctrine of the characteristic performance. Nonetheless, a new structure with respect to the concretization of this doctrine has been adopted, ensuring that the characteristic performance no longer functions as a presumption. Instead, Article 4 lays down the law applicable in a number of pre-determined categories (Art. 4(1)(a)-(h), Rome I). For the majority of these categories the law of the habitual residence of the party who performs the characteristic performance will be applied. These pre-determined categories

form the basic structure and content of this contribution. The obvious disadvantage that this new structure leads to issues of characterisation will also be discussed.

Teun Struycken (Utrecht University and Nauta Dutilh, Amsterdam) and Bart Bierman (Nauta Dutilh, Amsterdam): *Rome I on contracts concluded in multilateral systems.*

One of the novelties of the Rome I Regulation is the special provision in Article 4(1)(h) on the law applicable to a contract entered into within a regulated market or a multilateral trading facility in the absence of a choice of a law by the contracting parties.

The authors analyse the practical significance of this provision and the relevant contracts which come into existence within a trading system. In the authors' view, the concept of contract used in Article 4(1)(h) of Rome I, encompasses transactions within a trading system that may not be true agreements under the substantive law of the Netherlands. Furthermore, many of the relevant contractual arrangements, in particular those relating to the clearing and the settlement of securities transactions on a regulated market or multilateral trading facility, fall within the scope of the special PIL provision for designated settlement finality systems pursuant to the Settlement Finality Directive.

According to the authors, legal certainty requires that all transactions on a particular trading system be subject to the same law, regardless of the nature of the parties involved. They take the view that there should be no room for a choice of a law other than the law governing the trading system. The rule in Article 4(1)(h) should in their view become applicable to each contract concluded within a multilateral trading system. The law designated by that provision should prevail over the law chosen by the parties to a transaction: such transactions should always be governed by the law governing the system.

Maarten Claringbould (Leiden University and Van Traa Advocaten, Rotterdam): *Artikel 5 Rome I en vervoerovereenkomsten*

Article 5, paragraph 1, Rome I covers contracts for the carriage of goods and paragraph 2 covers – and this is new – contracts for the carriage of passengers.

In most bills of lading, sea waybills and charter parties a choice of law clause has been inserted into the documents, although only a clause paramount in a bill of lading might not be sufficient: the Hague (Visby) Rules that are incorporated into the contract only deal with the liability of the carrier and not with such items as payment for freight or the interpretation of the contract etc. and for such bills of lading Article 5(1) will determine the applicable national law. In CMR and CIM consignment notes, bills of lading for inland navigation as well as in air waybills a clear choice of national law clause is often lacking and then Article 5(1) also determines the applicable national law, sometimes with an unexpected outcome ... But first of all we have to categorise the contracts that fall under the legal term 'a contract for the carriage of goods' as mentioned in Article 5(1). We know that recital 22 considers 'single charter parties and other contracts the main purpose of which is the carriage of goods' to be a contract for the carriage of goods. The Court of Justice in its recent judgment of 6 October 2009, ICF v. Balkenende (Case C-133/08), has interpreted this term. It concerned a contract for a shuttle train service between Amsterdam and Frankfurt for the carriage of containers. Under this contract ICF would make wagons available and it would also arrange for traction (locomotives). In my opinion this is a clear framework contract for the carriage of goods by rail as such a contract has been described in Article 8:1552 Dutch Civil Code since 2006. However, the Court of Justice (inspired by the Dutch Advocate-General Strikwerda as well as the questions formulated by the Dutch Supreme Court) started out on the wrong footing by stating in sub 2 that the contract at issue here was a charter party contract. A charter party contract means that the charterer has chartered a specifically named vessel or other means of transport (such as a truck or a complete train) including the crew. It is obvious that this was not the case for this train shuttle service: wagons were made available from time to time and ICF would arrange for traction (not mentioning specific locomotives with drivers). That is not a charter party with regard to a train; it is just a plain framework contract for the carriage of containers by rail. For that reason, the first answer by the Court of Justice should be read as merely referring to a 'contract of carriage' instead of a 'charter party'. Then the answer makes sense: 'The second sentence of Article 4(4) of the Rome Convention applies to a contract of carriage [emphasis added], other than a single voyage charter-party, only when the main purpose of the contract is not merely to make available a means of transport, but the actual carriage of goods.'

I am of the opinion that time charter parties, although under Dutch law they are considered to be contracts of carriage and now – strictly speaking – fall under the first answer by the Court of Justice as contracts of carriage, are still excluded by recital 22 from the term ‘contract for the carriage of goods’ as mentioned in Article 5(1). If it were otherwise, the law which is applicable to such time charters might vary from port to port, such port being ‘the place of delivery agreed by the parties’, Article 5(1) last sentence. That would certainly be contrary to recital 16 (‘the conflict-of-law rules should be highly foreseeable’). The fact that in its first answer the Court of Justice uses – in my opinion by mistake – the term ‘charter party’ does not alter this.

In my opinion (and unlike Boonk and Mankowski) the contractual side of bills of lading falls under Rome I and more specifically – if a choice of law clause is lacking – under Article 5(1). That concerns cargo claims, payment for freight and other obligations under the contract of carriage which is incorporated in the bill of lading. But the questions of who may claim under the bill of lading or who is the carrier under the bill of lading fall outside the scope of Rome I and Rome II and for that reason Article 5 of the Dutch Code on Private International Law with regard to the carriage of goods has to be retained.

Article 19(2) makes the place where the agency or branch of the carrier (the carrier always being a company) is located the habitual residence of the company. In practice, contracts of carriage are often concluded by agents of branch offices of the carrier and in such cases the place of the receipt of the goods will coincide with the ‘habitual residence of the carrier’ making – maybe quite unexpectedly – the law of the country where the goods are received for shipment the applicable law.

For that reason I advise air carriers carrying passengers, who seldom include a choice of national law in their tickets or general conditions, to choose as the applicable law the place where the carrier has its central administration (Art. 5(2c)) and not the place where the carrier has its ‘habitual residence’ which will often be the place where its agent who concluded the contract is located. I finish this article by expressing the hope and the expectation that the next time the Court of Justice has to interpret Article 5(1) Rome I, it will first properly categorise the contract of carriage at issue by starting from the correct body of facts.

Jonathan Hill (Bristol University): *Article 6 of the Rome I Regulation: Much Ado about nothing*

Consumer contracts are typically standard-form contracts, the terms of which are drafted by (or on behalf of) suppliers. As the consumer has no influence over the substance of the contract, one of the perceived dangers is that a supplier may include in the contract a choice-of-law clause which selects a law which favours the interest of the supplier over those of the consumer. This danger suggests that, in order to ensure that consumers are not deprived of the level of legal protection which they may legitimately expect, the choice-of-law rules applicable to consumer contracts should differ from those which apply to contracts in general (and which are founded on the principle of party autonomy).

Christian Heinze (Max Planck Institute, Hamburg): *Insurance contracts under the Rome I Regulation.*

All government, indeed every human benefit and enjoyment, every viryue, and every prudent act, is founded on compromise and barter'. these words written by Edmund Burke more then 200 years ago still seem to be a fair description of the legislative process in the democracies today. They hold particularly true at the European level where compromise is notoriously difficult, in particular if the national backgrounds are as disparate as they are in insurance law. Article 7 of the European Regulation NOo 593/2008 on the law applicable to contractual obligations (hereafter abbreviated as 'Rome I'), the rule titled 'insurance contracts', is exactly that, a compromise.

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