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Some Reflections on the Reference for a Preliminary Ruling by Dutch Supreme Court – ECJ C-133/08

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1. Introduction

The EC Convention on the Law Applicable to Contractual Obligations (hereafter referred to as: RCC) entered into force on 1 April 1991. Until 1 August 2004, however, uniform interpretation of this Treaty was not attributed to the Court of Justice. On 17 December 2009 the RCC shall be replaced by EC Regulation 593/2008 on the Law Applicable to Contractual Obligations (hereafter referred to as Rome I Regulation).

On 2 April 2008, about one and a half year before the end of the lifetime of the RCC, the Dutch Hoge Raad (i.e. Supreme Court) on the basis of article 234 of the EC Treaty in conjunction with the Protocols referred to, lodged a preliminary question in respect of article 4 of the RCC. As the underlying complex contractual relationship gave rise to five, closely interrelated questions in respect of article 4 RCC, the entire text of this Treaty provision and some general comments thereto are presented first. Subsequently the main proceedings under Case C-133/08 and the five questions are considered. In the light of the nearby future some remarks are as well devoted to, substantively speaking, the relationship between article 4 RCC and its successors, articles 4 and 5 of the Rome I Regulation.

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1 Ph. EC 1982 L 266/1-19. Entry into force for Member States (Bulgaria and Romania): 15 January 2008 on the basis of EC Council Resolution 2007/856 EC, Ph. EC 2007 L 347/1-2 and 36.

2 Article 18 on ‘uniform interpretation’ merely incites courts to pay homage to the interest of IPR-Gerechtigkeit (i.e. uniform interpretation throughout all contracting Member States) as much as possible: ‘In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.’

3 Uniform interpretation was established by two Protocols of 19 December 1988: the First Protocol on the Interpretation by the Court of Justice of the European Communities of the Convention on the Law Applicable to Contractual Obligations, and the Second Protocol conferring on the Court of Justice of the European Communities certain powers to interpret the Convention of the Law Applicable to Contractual Obligations, Ph. EC 1989 L 48/1 and 1989, 49 – 50. Both Protocols entered into force after ratification by all then EC Member States. J. Fawcett/J.M. Carraër, Cheshire, North and Fawcett Private International Law 2008, p. 673, however stress that in contrast to the Protocol on interpretation of Brussels Convention (SR: today EC Regulation 44/2001) courts ‘may’ in respect of Rome I request a ruling if they consider that a decision is necessary and that as a consequence thereof ‘there are likely to be fewer referrals to the Court under the Rome Convention (...)’.}


5 Dutch SC 28 March 2008, NJ 2008, 191 (ICF – MIC), NIPR 2008, 93, registered C-133/08, Pb. EC C of 21 June 2008, 15. It is worth noticing that on 17 October 2008 another case also concerning a complicated contractual relationship falling under article 4 RCC had to be adjudicated by the Dutch Supreme Court, Case C20/08/HR (Baros – Embricia). According to Advocate-General L. Sterkewits, Observ. 28, there was no need however to lodge a preliminary question, as the outcome of a preliminary ruling by the ECJ would not affect parties’ substantive positions. Half November 2008 the judgment was published on line, www.rechtspraak.nl. Occasionally this case will be referred to below as well.
2. Article 4 Rome Contracts Convention

2.1 Conflict of Laws Methodology – Semi-open Conflict Rule

The prejudicial question as it was lodged by the Dutch Supreme Court presupposes a comprehension with regard to all subsections, including their mutual interrelationship, of article 4 of the Rome Contracts Convention (RCC).

Article 4 – Applicable law in the absence of a choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporated, its central administration. However, if the contract is entered into in the course of that party’s trade or profession, that country shall be the country in which the principal place of business is situated, or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the characteristic performance is formulated (subs. 2). Neither of the subsections 2, 3 or 4 shall apply, however, in case no characteristic performance can be deduced, or if it appears from the circumstances as a whole that the contract has closer ties with another legal order.

2.2 Prevailing characteristics of a conflict of laws rule – The Dutch experience

As preliminary questions were lodged by the highest court of the Netherlands, it makes sense to sketch the ‘domestic’ (i.e. Netherlands) private international law background of ECJ Case C-133/08.6

Article 4 RCC seeks to establish a balance between a closed connecting factor 7 as opposed to a fully discretionary open conflict rule.8 Even though, the concept underlying Article 4 RCC was subject to criticism for several reasons. To a certain extent the long duration between the signature of the Convention (1980) and its entry into force (1992)9 is even explained by considerable reluctance against the concept underlying article 4.10 Several intrinsic flaws of article 4 subs. 2 once made me sigh: ‘it’s clear like German metaphysics…’11

This is not surprising: any search for an objective conflict of law rule which is justifiable because of its ‘genuine connecting

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6 Recently, cf. the Opinion of Advocate-General L. Strijkveld, notably C-133/08 ECJ Case C-133/08: ‘Seminis’, HR Case C-048/07, and opinion of Advocate-General A.V.M. Struijcken, in respect of the article 4 RCC from Dutch perspective: ECJ Case C-133/08.

7 Cf., in respect of a conflict rule based on a hard and fast connecting factor without any escape clause the comments to an earlier draft of the Rome I Regulation, 4.5 below.

8 The search is for the ‘closest connection’, the ‘enest Beziehung des Vertrages’, les liens les plus étroits, ‘de nauwste betrokkenheid’, etc., all potential geographical and personal circumstances being weighed against each other case by case.

9 Not even to mention the two interpretative protocols of 2004.

10 Apart from the methodological approach of rebuttable presumptions (subsections 2 – 4, cf. hereafter), severe criticism was uttered from notably Common Law perspective, cf. the various solutions to the problem, as formulated by Fawcett/Carruthers 2008, p. 666 and 575 (cf. above, fn. 3). For treatment in depth: Rammeloo 1992, Ch. 4.2.2 (methodology underlying objective proper law test) and Ch. 8 (article 4 RCC in particular, cf. fn. 6). Besides, article 7 subs. 1 on foreign mandatory laws appeared to be likely controversial. This provision, however, was neutralized by the reservation of article 22 subs. 1 (a).

value" is like starting a quest to find the philosopher’s stone. As after all most ‘international’ contracts are concluded between parties established in different legal orders, as furthermore any contract presupposes an economic balance between the exchanged performances (cf. payment of money corresponding to the transfer of goods, rendition of services, etc.), there isn’t any intrinsically ‘justifiable’ connecting factor. Although theoretically speaking this flaw could be taken away by simply applying the law of any third legal order showing no ties with either of the parties, this approach would no longer fit in the Savignyan approach of trying to ascertain the system of law most closely connected with the contract.

What is said here a fortiori applies to the ICF – MIC case lodged with the ECJ, as the functional scope of subsections 2 and 4 of article 4 RCC must be considered to be the heart of the matter. In spite of what it pretends to be the ‘characteristic performance test’ underlying article 4 subs. 2 appears to be an empty shell, nothing more, nothing less: the contract is submitted to the law of the place where the party resides who is responsible for the performance of the obligation distinguishing the fore lying contract from other contract types. In respect of many (though not all) contract types the characteristic performance test thus provides for legal certainty in advance. It further enhances the idea of ‘Law and Economics’ as it reduces legal transaction costs for business undertakings concluding contracts on a large scale with contractors in various legal orders.

The final text of the rebuttable presumption for the contract concerning carriage of goods as laid down in art 4 subs. 4 RCC equally reflects the struggle of compromising. Some even felt that the highly complicated contract concerning carriage of goods as it is now being covered by article 4 subs. 4 was to be excluded from the material scope of the RCC. Complications are likely to rise when the contract is either not ‘predominantly’ related to the carriage of goods, or the contract happens to be of a complex nature (i.e. featuring versatile contract types), or, finally, when neither combination of connecting factors required by article 4 subs. 4 has been met.

The foregoing observations serve the goal of a better comprehension of Case C-133/08 (ICF – MIC) as it was lodged on 28 March 2008 by the Dutch Hoge Raad (Supreme Court). Preliminary questions concerning subsections 4 (‘contract concerning carriage of goods’) and 2 (‘characteristic performance’), as well as the exception clause laid down in subs. 5 of article 4 RCC (‘characteristic performance cannot be determined’, or ‘contract more closely connected with another country’) have been submitted for an interpretative ruling by the ECJ.

3. Dutch Supreme Court (Hoge Raad) ICF – MIC

3.1 Facts underlying the main court proceedings

ICF, a company duly established under Belgian law with residence in Belgium, concluded a contract with MIC, a company duly established in the Netherlands with residence in the Netherlands. The contractual relationship inter alia envisaged the following:

MIC assigned ICF to provide for railway wagons. ICF arranged transportation equipment and (i.e. by hiring locomotives from Netherlands Railway NS and Deutsche Bundesbahn) and infrastructure, further taking care of railway transport. MIC hired out railway capacity to others and took care of the whole operational carriage.

Evidence of the contract in writing was missing. Although a draft contract was sent to MIC by ICF, it was signed by neither of both parties. Still, the contracting parties fulfilled their obligations for a certain period of time. By the end of 1998 invoices were dispatched to MIC by ICF. On September 7, 2001 ICF summoned MIC to pay invoices dating back to the year 1998. MIC replied thereto that according to Netherlands law (limitation statute: article 8:711 Civil Code) these invoices could no longer be claimed.

Mayer/Heuze 2007, p. 546 (cf. fn. 16) contest the advantageous position the ‘professional’ party is in, notably when this party is established in a ‘liberal’ legal order.


21 The summarized facts rendered were deducted from Advocate-General L. Strikwerda’s Opinion and from the judgment of the Appeal Court Amsterdam of 20 July 2006, NIPR 2007, nr. 26. Cf. also the reference in [2008] EuLII, II-41 et seq.

22 Another element of court proceedings, yet not being dealt with here, involved the question whether parties made a tacit choice in favour of Belgian law. If the answer would be affirmative no limitation statute would oppose to claims reached in by ICF.
3.2 Judgments Court of First Instance and Court of Appeal

Although in view of the Rechtbank (i.e. court of first instance) the legal relationship is deemed to be a contract for the carriage of goods under article 4 subs. 4 RCC, this provision cannot be applied here. First, it must be taken into account that the carrier (ICF) had his principal place of business in Belgium at the time the contract was concluded. Second, as transport took place between Amsterdam (Netherlands) and Frankfurt (Germany), the country where the carrier is established is neither also [italics SR] the country in which the place of lading or the place of discharge, nor the country where the principal place of business of the consignor is situated, as MIC is established in the Netherlands. Ultimately, the Court reaches the conclusion that on the basis of the open-ended formula of article 4 subs. 1 RCC (‘closest connected law’) Netherlands law governs the contractual relationship between ICF and MIC.

On the ground of article 4 RCC the Appeal Court of Amsterdam also holds that Netherlands law is applicable. In the first place, the ‘main purpose’ of the contract is the carriage of goods (article 4 subs. 4 in fine). Although indeed ICF did not itself perform carriage duties, it had to guarantee the organization of rail transportation. As, however, the required combination of connecting factors is missing, Netherlands law is most closely connected to the contract (article 4 subs. 1). In the second place the contract is deemed to have closer ties with the Netherlands than with Belgium anyway. In consequence of which article 4 subs. 2 RCC (presumed applicability of the law of the country where the characteristic performer – ICF – is established) cannot apply.

The case being lodged at the Dutch Supreme Court, ICF contests that the ‘main purpose’ of the contract is the carriage of goods. Further contested is the judgment observation that article 4 subs. 2 RCC is set aside, Netherlands law being deemed ‘more closely connected’ to the contract.

3.3 Preliminary question Dutch Supreme Court

In conformity with the Advocate-General’s Opinion the Dutch Supreme Court submits the following preliminary questions to the ECJ:

(a) Must Article 4(4) of the 1980 Convention on the law applicable to contractual obligations be construed as meaning that it relates only to voyage charter parties and that other forms of charter party fall outside the scope of that provision?

(b) If Question (a) is answered in the affirmative, must Article 4(4) of the 1980 Convention then be construed as meaning that, in so far as other forms of charter party also relate to the carriage of goods, the contract in question comes, so far as that carriage is concerned, within the scope of that provision and the applicable law is for the rest determined by Article 4(2) of the 1980 Convention?

(c) If Question (b) is answered in the affirmative, which of the two legal bases indicated should be used as the basis for examining a contention that the legal claims based on the contract are time-barred?

(d) If the predominant aspect of the contract relates to the carriage of goods, should the division referred to in Question (b) not be taken into account and must then the law applicable to all constituent parts of the contract be determined pursuant to Article 4(4) of the 1980 Convention?

With regard to the ground set out in 3.6.(ii) above:

(e) Must the exception in the second clause of Article 4(5) of the 1980 Convention be interpreted in such a way that the presumptions in Article 4(2), (3) and (4) of the 1982 Convention do not apply only if it is evident from the circumstances in their totality that the connecting criteria indicated therein do not have any genuine connecting value, or indeed if it is clear there from that there is a stronger connection with some other country?

4. Preliminary questions – Critical observations

4.1 Freedom of contract versus the appearance of legal certainty according to a ‘Kollisionsleiter’ (alternative conflict rule)

Sooner or later a dispute as arisen between ICF and MIC had to be expected. Unlike e.g. property law, contract law does not adhere to the numeros clausus concept (i.e. a legally binding restricted number of contract types). But any broad discretion granted to contract parties to shape a contractual relationship according to their specific needs has ramifications for conflict of laws. This is notably when a ‘Kollisionsleiter’ (i.e. a conflict of law rule consisting of subsections to be applied one after another) consists of presumable conflict rules for some specific contract types. Any such approach may fail for two reasons: either may a contractual relationship show an overlap between two (or even more) contract types, or the combination of connecting factors may appear not to be fulfilled. Both elements, as follows from the fore lying case ICF – MIC, ask for comment.

4.2 Preliminary question – questions (a) and (b): restrictive interpretation of article 4 subs. 4; applicability of article 4 subs. 2?

The scope of article 4 subs. 4 RCC appears to be the heart of the matter, as question parts (a) and (d) require clarity as to the restrictive or extensive material scope of this Treaty provi-
The first question is whether the ‘main purpose’ of the contractual relationship between ICF and MIC is ‘carriage of goods’ in the sense of article 4 subs. 4 in fine RCC. In that respect the Explanatory Report states the following:

‘In addition, the third sentence of paragraph 4 provides that in applying that paragraph single-voyage charter parties and other contracts whose main purpose is the carriage of goods shall be treated as contracts for the carriage of goods. The wording of paragraph 4 is intended to make it clear that charter parties may be considered to be contracts for the carriage of goods in so far as that is their substance.’ (italics, SR)\(^\text{32}\)

This leads to the assumption, as Advocate-General Strikwerda puts it,

‘(…) that inasmuch other kinds of carriage of goods are not enshrined by article 4 subs. 4, unless such contracts also involve carriage of goods, in which case contract parts relevant to the carriage of goods are covered by the material scope of article 4 subs. 4.’\(^\text{33}\)

Article 4 subs. 4 thus requires that at least part of the contractual relationship is covered by this Treaty provision and that a certain combination of connecting factors is fulfilled.

It has been argued that those contractual elements that would fall outside the scope of article 4 subs. 4 should be captured by subs. 2.\(^\text{34}\) An argument for this view is that in quite some situations the combination of connecting factors as required by subs. 4 between the place of loading or discharge commonly accepted in the law on the carriage of goods on one hand and the connecting factor resulting from article 4 subs. 2 on the other hand more or less run parallel.\(^\text{35}\) Nevertheless, this may be doubted for more than just one reason.

In the first place the draftsmen obviously decided to formulate distinguishing connecting factors for article 4 subsections 4 and 2. They must have felt that, for whatever reason, subs. 2 was less ‘suited’ (cf. the aforementioned ‘genuine connecting factor’ criterion) to be applied to contracts concerning the carriage of goods. In my view not even the observation that certain parts of a contract of which the ‘main purpose’ nevertheless is the carriage of goods fall outside the material scope of subs. 4 would be sufficient to conclude categorically that subs. 2 must apply.\(^\text{36}\) Neither does it seem appropriate to stick to any ‘parallel’ between subsections 4 and 2 of article 4 in case of non-fulfilment of the required combination of connecting factors under the former conflict of law provision.\(^\text{37}\) It is not likely after all, that in many cases the combination of connecting factors as prescribed by article 4 subs. 4 – (a) habitual residence characteristic performing contract party; (b) place of loading; (c) place of discharge; (d) principal place of business of consignor – would lead to the same result as the application of article 4 subs. 2.\(^\text{38}\)

A third objection against an application of article 4 subs. 2 is demonstrated by the facts underlying the ICF – MIC proceedings: no characteristic performance can be deduced when both (or perhaps even more) contracting parties commit themselves all to obligations of a non-payment nature.\(^\text{39}\)

Last but not least, preparative works preceding the RCC reveal that the draftsmen showed themselves not in favor of applying the law of the country where the carrier resides, i.e. of any outcome that would simply run parallel to that following from applying subs. 2.\(^\text{40}\) It is likely that ‘peculiarities of this type of contract’ (i.e. the contract concerning carriage of goods) explain the difference in approach.\(^\text{41}\)

4.3 Preliminary question – question (c): limitation statute. Splitting the proper law?

It follows from the main proceedings that according to Netherlands law ICF would no longer be entitled to claim payment by MIC of invoices dating from the year 1998, whereas on the contrary such a claim would still be legitimate under Belgian law. It is therefore relevant to ask which law governs limitation statutes.

Usually, this subject-matter does not create insurmountable problems, as article 10 subs 1 under (d) RCC explicitly submits ‘the various ways of extinguishing obligations, and prescriptions and limitations of actions’ to ‘the law applicable to a contract by virtue of articles 3 to 6 and 12 of this Convention (…)’.\(^\text{42}\) The foregoing however sufficiently demonstrates that this ‘Treaty provision cannot, logically speaking, be applied in case more than one single proper law of the contract governs the legal relationship. Any restrictive interpretation of

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\(^{33}\) Opinion Advocate-General, Observ. 30, with reference to Bouwk 1998, p. 181 (cf. fn. 25), Haak 1982, p. 897 (cf. fn. 20), Schultsz 1982, p. 185 (cf. fn. 17), Steffen/Vonkoten, comment 6.3.2 (cf. fn. 6).

\(^{34}\) This view was defended by Bouwk 1998, p. 191, Haak 1982, p. 920, and Bertrams/Krausnova 2007, p. 46 (cf. fn. 6), Schultsz, p. 663 (cf. fn. 19), referring to German case law and Münchener Kommentar, 2006 fn. 6), p. 1736, and, notably in respect of charter trade contracts, p. 1738.

\(^{35}\) Cf. Bouwk, p. 920.

\(^{36}\) In that respect it would be more plausible instead to apply article 4 subs. 2 to any contract type which is not of a mixed nature, cf. in this sense Schultsz 2004, p. 663 (cf. fn. 19).

\(^{37}\) Strikwerda 2004, p. 106 (cf. fn. 6), observes that though serving as a basis for the conflict rule of article 4 subs. 2, the characteristic performance test must nevertheless still prove to be worth applying.

\(^{38}\) In a comparable sense Boonk 1998, p. 188: the principal place of business of the carrier as characteristic performing party may be an important, though not in itself decisive connecting factor, as this is being presumed for other contract types (article 4 subs. 2). Steffen/Vonkoten, comment 6.3.3, while referring to case law, reject the application of subs 2, instead propose the ‘closest connection’ principle underlying subs. 5 of article 4.

\(^{39}\) In particular with a view to contracts concerning carriage of goods, cf. Schultsz 1982, p. 198.

\(^{40}\) Expl. Report, p. 19. Cf. as well Kropholler, 2006, p. 470 and 471, in particular with a view to article 28 of the German EGBGB and referring to BegrRegE BT-Drucks. 10304, p. 79: subs. 2 of article 28 (i.e. article 4 subs. 2 RCC) is not to be applied to ‘Güterbeterordnungsverträge’ (i.e. carriage of good contracts). Likewise Fauvert/Carruthers, 2008, p. 717: in case the requirements of subs. 4 are not met, subs. 1, not 2 of article 4 should be applied.

\(^{41}\) Schultsz 1987, p. 197. It is worth mentioning here that under EC Regulation 593/2008 on the Law Applicable to Contractual Obligations (‘Rome I’), which shall replace the RCC on 19 December 2009 carriage of good contracts are even extracted from the scope of article 4 and, instead, taken up in a new provision, article 5 subs. 1.

\(^{42}\) The same approach is endorsed by article 12 subs. 1 d of EC Rome I Regulation. Strikwerda 2004, p. 116, underlines that explicit reference by art. 10 was yet required, as some legal orders would submit this subject-matter to the lex fori as it may as well be qualified as a matter of civil procedural law, rather than to the lex contractus. In a comparable sense Mayer/Heuze 2007 (cf. foott. 16), p. 558, with reference to ‘les pays anglo-saxons’. 
article 4 subs. 4 RCC might result in ‘severability’, \textit{id est} (at least) two proper laws governing one contractual relationship.\textsuperscript{41} Consequently, the question arises which of the proper laws of the contract should govern the limitation statute.

The first observation must be here that ICF and MIC did not themselves opt for splitting the proper law by making an explicit choice on the applicable law(s). Neither would it make sense on the basis of an objective proper law test to distinguish between the validity of the contract on the one hand, and the performance of it on the other hand (the limitation statute consequently being submitted to the law of the proper law governing the latter subject-matter), as the dispute between ICF and MIC is exclusively about performance duties arising from the entire legal relationship.

Basically three options seem to be worth contemplating: where the application of more than one conflict rule (e.g. article 4 subsection 4 for the carriage of good and article 4 subsections 2, 1 or 5 for the remaining parts)\textsuperscript{42} would indeed lead to more than one single proper law of the contract, either of these laws or the \textit{lex fori} could be applied. Furthermore, the limitation statute could be left to the \textit{lex debitoris} (i.e. the law of the country where the debtor resides). Apart from their methodological flaws there isn’t any authority under the RCC to sustain either of these solutions.

Instead, the text of article 4, notably the final sentence of subsection 1 may serve as a guideline:

‘Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that country.’ (italics, SR)

In line with this provision the Explanatory Report clearly states that splitting the proper law is to be seen as a last resort in situations where splitting the proper law seems to be inevitable and any such ‘severability’ would have to concern an independent and separable part of the contract, in terms of the contract and not of the dispute. The court ‘must’ have recourse to severance as seldom as possible.\textsuperscript{43} No answer seems to be ready at hand. Inasmuch, however, recourse would be had to article 4 subs. 5 RCC any undesired consequence of severability would be avoidable.

Quite remarkable, to conclude with, is the utterance that taking up the possibility of ‘severability’ was nevertheless deemed necessary, as ‘mere reference in the report would be insufficient by itself, because in some Member States of the Community it is not usual to take account of the Explanatory Report.’\textsuperscript{44}

4.4 Preliminary question – question (d): extensive interpretation of article 4 subs. 4

It remains doubtful whether it is feasible to delimitate ‘the’ contract for the carriage of goods in a concise manner, as various modalities fall within the scope of article 4 subs. 4 RCC. Carriage of goods either by road as well as by rail, and maritime transport are all covered by this Treaty provision.\textsuperscript{45}

It is relevant to ask here where the scope of article 4 may be widened in a sense that other contract parts, regardless whether the ‘main purpose’ thereof is the carriage of goods or not, may be brought under it as well. The answer to this question appears to be negative.\textsuperscript{46} As the contractual relationship between ICF and MIC envisaged the fulfilment of a series of transports and the places of loading and discharge were determined during this contractual relationship application of the combined connecting factors as prescribed by article 4 subs. 4 would be hardly feasible.\textsuperscript{47}

Without debating all ins and outs of the contract for the carriage of goods, it seems reasonable to assume that an all-embracing interpretation of article 4 subs. 4 is not appropriate. As a consequence thereof the possibility of ‘severability’ (i.e. splitting the proper law) must at least be taken into account in any situation where according to article 4 subs. 4 final sentence the carriage of good is ‘the main purpose’ of the contract.

4.5 Preliminary question – question (c): interrelationship between escape clause (article 4 subs. 5) and rebuttable presumptions (article 4 subs. 2-4)

4.5.1 Article 4 subsections 1 and 5: delimitation of scope

It was often suggested that it wouldn’t make any difference whether subsection 5 or subsection 1 of article 4 would be applied, as both Treaty provisions center round the Savignyan principle of the ‘most/more closely connected law.’\textsuperscript{48} For more than just one reason though this way of reasoning seems to be inappropriate.

The material scope, to start with, of subsections 1 and 5 differ

\textsuperscript{41} Cf. the Expl. Report, p. 19. Commonly used as well are the following expressions: \textit{Spaltung des Vertrages}, \textit{dépeçage/morcellement/suivi du contrat}, splitting the proper law.

\textsuperscript{42} Provided that the applicability of more than one conflict rule (cf. article 4 subsections 4, 2, 1 and/or 5 RCC) for various contract parts would indeed lead to the applicability of different proper laws of the country.

\textsuperscript{43} Ultimately this matter depends on further elaborations (cf. 4.4 and 4.5 below). While formulating an Opinion preceding the judgment of the Dutch Supreme Court of 17 October 2008, Case C27/084HR (Baros – Embra), cf. fn. 5, Advocate-General L. Strikwerda, Observ. 32, clearly underlines that in case of complicated contractual relationships courts should not unreason this relationship by submitting each individual obligation to the characteristic performance test of article 4 subs. 2, as this approach would result in an irreconcilable judgment (piling up and applying several laws to one single legal relationship).

\textsuperscript{44} In the view of Fawcett/Carruthers, 2008, p. 710, the word ‘may’ makes it unclear whether courts are obliged to split the proper law or whether courts are free to refuse any such severance, even though part of the contract is severable and independent.


\textsuperscript{46} Expl. Report, p. 19.

\textsuperscript{47} Haak 1980, p. 920. Cf. further in respect of article 28 subs. IV EGBG (i.e. transposition of art. 4 subs. 4 RCC)P. Markowski, Kollisionsrechtanwendung bei Güterbeförderungsverträgen, TranspR 1993, p. 213. Note that any affirmative answer would absorb the problem of splitting the proper law of the contract as described under 4.3 above.

\textsuperscript{48} Boonk 1998, p. 191. For more than just one reason though this way of reasoning seems to be inappropriate.

4.5.2 Article 4 subs. 5 – Thinking beyond national Private International Law concepts

If indeed subs. 5 of article 4 calls for application the question arises how the formula ‘more closely connected with another country’ has to be filled in. In that respect the preliminary question (c) reads:

‘Must the exception in the second clause of Article 4(5) of the 1980 Convention be interpreted in such a way that the presumptions in Article 4(2), (3) and (4) of the 1980 Convention do not apply only if it is evident from the circumstances in their totality that the connecting criteria indicated therein do not have any genuine connecting value, or indeed if it is clear that there is a stronger connection with some other country?’ (italics, SR)

While referring to the Dutch Supreme Court’s Balenpers Judgment ICF complains before the Supreme Court that the Appeal Court while deciding that the contractual relationship is most closely connected with the Netherlands allegedly does not comply with earlier case law of the Supreme Court. According to the Balenpers judgment which was adjudicated in the year 1992, article 4 subs. 5 RCC in particular

‘(...') is to be interpreted in a restrictive manner, as the main conflict rule may only be set aside when, on case-by-case reasoning, the principal place of business of the contracting party

who is to effect the characteristic performance lacks ‘reële aanknopingswaarde’ (i.e. genuine connecting factors). (Iitalsics, SR)’

As until August 2004 no interpretative powers had been attributed to the ECJ, ICF exclusively relied on interpretations biased by national (more in particular) Netherlands conflict of law premises, without reference to precedents from other RCC Contracting States. As, however, the Balenpers judgment dates back to 1992, it is necessary to underscore that at that time it did not solely aim at uniform interpretation of the RCC. Rather must this decision be seen against the background of contractual conflict rules as in those days these rules tended to be applied by lower courts, notably in the Netherlands.

The question therefore must be how article 4 deserves to be interpreted at European law level. In respect of ‘the law more closely connected with another country’ sub question (c) seems to assume that article 4 subs. 5 must be interpreted on the same footing as subsections 2, 3 and 4. This is not self-evident though. Unlike subsection 3 subsection 2, though perhaps defensible from the point of view of legal certainty for businessmen thus introducing legal certainty in advance and reducing transaction costs, does not provide for a ‘genuine connecting factor’. Apart from this fundamental flaw, it

51 Dutch Supreme Court, Observ. 3.8. This restrictive approach was reiterated by the Dutch Supreme Court recently, HR 17 October 2008 (cf. fn. 5, above), Case C07/084HR (Baros – Embrica). In respect of an earlier judgment, HR 13 September 1996, NIPR 1996, 395, RevDi 1996, 173, Bertrams/Krausenga 2007, p. 43, already noticed the scarce number of cases indeed resulting in application of the escape clause of article 4 subs. 5. (cf. District Court Amsterdam 16 September 1992, NIPR 1993, 123 and District Court Arnhem 27 May 1993, NIPR 1994, 262), in their view for no other reason than to apply the lex fori (Dutch law). In comparable sense Strikwerda 2004, p. 102, referring to the Appeal Court of The Hague of 27 January 1998, NIPR 1998, 222 and Appeal Court Arnhem 4 September 2001, NIPR 2002, 107.

52 Any such investigation would however not result in a vast number of cases decided over by highest courts. In respect of notably article 4, cf. OGH Austria 25 October 2005, Bbl. 2006, p. 178; Gatschitz (Lux, 2005) at p. 158. In this sense see also the Advocate-General preceding the judgment of the Dutch Supreme Court recently, HR 17 October 2008 (cf. fn. 5, above), Case C07/084HR (Baros – Embrica). Even way before the RCC entered into force lower courts anticipated thereto, hardly departing from the rebuttable presumption of article 4 subs. 2 RCC. This attitude was criticized bydoctrine, cf. De Ly, 1996, p. 127 (cf. fn. 6), Steffens/Vonken, comment 7.1 (cf. fn. 6), with reference to case law. De Boer 1993, p. 214 (cf. fn. 6), assumes that, rather than interpreting article 4, the Dutch Supreme Court affirmed lower courts’ case law. Idem, ‘The EEC Contracts Convention and the Dutch Courts. A Methodological Perspective’, RabelZ 1990, p. 91 (state of art Netherlands case law lower courts before the Balenpers decision was adjudicated).

53 According to De Ly (foregoing fn.), the Dutch Supreme Court nevertheless restricted itself to article 4, using three arguments: the text of the Treaty provision, the structure of the conflict rule as a whole, and the interest of uniform interpretation. This view is sustained by Steffens/Vonken, comment 7.2.


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makes quite a difference whether this rebuttable presumption is applied to a 'single oriented' contractual relationship underlying the Balenpers judgment (sale of goods versus payment of money; nearly all geographical contacts pointing at one legal order in particular), or whether (as appears to be the case in ICF – MIC) on the contrary the contractual relationship is highly complicated, both from the point of view of versatile obligations arising and contacts balancing between various legal orders. It is therefore almost unavoidable that each of subsections 2, 3 and 4 show their own 'impact' on the escape clause of subsection 5.62 Even more, the so called *la mise en échec des présomptions*,63 in an early stage already gave rise to fear of an 'upwards pressure' of the escape clause laid down in subs. 5 anyway.64

Bearing in mind this *échec* the formulation of the escape clause of subs. 5 is a hazardous exercise. It may be difficult enough already for the ECJ to formulate some guidelines.

Which guidelines are recommendable? First and foremost the 'Dutch' attitude as described above may not serve as a point of departure for further reasoning: the Explanatory Report, while 'a margin of discretion' to courts, does not require anywhere that only a restricted use is made of subs. 5.65 Neither should, however, any French,66 Danish, Spanish, Italian, Portuguese, or whatever national law biased 'conflict of laws tradition' prevail.67

4.5.3 Article 4 subs. 5 – Transitional European Private International Law. Thinking beyond the RCC era

A second matter preceding a substantive interpretation of article 4 is that of transitional European Private International law. The Dutch Supreme Court in its *Balenpers* judgment still held an eye on both the past tradition of national conflict of laws concepts as applied by lower Dutch courts and the then relatively new provision of article 4 RCC.

The position of the ECJ is another one, not only because of its decisive institutional role in EC law. Though being requested to give interpretative rulings exclusively on article 4 RCC, the Court may keep in the back of its mind that this conflict of law provision is to be replaced by another in December 2009 (article 4 of Reg. 593/2008, 'Rome I'), the latter as a matter of fact equally paying homage to the characteristic performance criterion.68 As at least partially the dispute between ICF and MIC is related to the carriage of goods, it is relevant to make mention here of the fact that both article 4 subs. 5 and the corresponding 'Rome I' provision of article 5 subs. 3 both contain an escape clause ('more closely connected law') which should both possibly be treated on the same footing.69

Taking into account the dispute between ICF and MIC is does make sense indeed that in advance a glance is taken as well to the Preamble of Rome I in a sense that 'account shall be taken (…) of whether the contract in question has a very close relationship with another contract or contracts' (italics SR).70 Far less understandable is the statement that the law of

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62 This is clearly acknowledged by the Expl. Report, p. 18 (subsection 3 set aside in case of rent of immovable good situated at the isle of Elba between two contract parties residing in Belgium).


64 Rammeloo 1992, p. 334.


66 Mayer/Heuze 2007, p. 555 (cf. fn. 16): ‘Le recours à la notion de présomption (étrangible) est lui-même défectueux. Une présomption n’a de sens que pour palier une difficulté de preuve: or tous les faits qui localisent le contrat sont faciles à prouver; la présomption ne sert donc à rien.’

67 *Audit* 2006, p. 664 (cf. fn. 44), referring to Southern European legal orders where, ‘au motif du caractère patrionnial de la relation à regir’ the common nationality of the contracting parties is given relatively more weight.

68 Fawcett/Carruthers, 2008, p. 718, speak of ‘worrying differences’ between the approach adopted by the English courts and that adopted by the Dutch and Scots courts (…) ‘Quite remarkably though, recent English case law ‘shifted as to give more weight to the presumption’, p. 719. Article 4 subs. 2 should (…) only be disregarded in circumstances which clearly demonstrate the existence of connecting factors justifying (this),’ p. 719, with reference to a number of cases adjudicated by English courts.

69 It is worth noticing, cf. Pfeiffer, 2008 (fn. 4), p. 622, that neither EC Regulation is to be ‘implemented’ in the national legal orders of EC Member States. Nor are any provisions contained in them ‘amended’ by Member States’ legislatures. Cf. for the ‘implementation’ history of the RCC involving several textual amendments thereto in the German legal order (EGBGB) Rammeloo 1992, p. 75. The German legislator is well aware of this, cf. ‘Anpassung der Vorschriften des Internationalen Privatrechts’, referring to proper ‘treatment’ of EC Rome II (conflict of law with regard to torts) and ‘Rome I’, cf. the noticeletter from 21 May 2008, www.bmj.bund.de/enid/newsletter/. The RCC was ‘implemented’ as well in the United Kingdom, cf. the *Contracts Applicable Law Act 1990*, cf. Fawcett/Carruthers, 2008, p. 617 (cf. above, fn. 3).

70 Article 4 of this Rome I Regulation is build up as follows: not referring to the principle of the ‘closest connection’ any longer (cf. article 4 subs. 1 RCC) subsection 1 directly submits eight contract types to the law of the country where the seller, the party rendering services (etc.), or the distributor resides, respectively where an immovable is situated, or where an auction is being held. In their result most of these connecting factors commensurate with the outcome under the characteristic performance test already. For contracts not covered by subsection 1, subsection 2 states that (accordingly) the law applies of the country where the party rendering the characteristic performance resides. Pursuant to subsections 3 and 4 the law of another country may apply if it follows from the circumstances that another law is more closely connected with the contract than would follow under subsections 1 and 2, or in case the applicable law cannot be determined on the basis of subsections 1 and 2.

71 This observation is not as self-evident as it may seem, as the 2005 version of ‘Rome I’ still excluded this escape clause. For a number reasons the hard and fast conflict rule remaining was severely criticized (unworkable for both courts in national court proceedings and, in preliminary stays, the ECJ), cf. P. Mankowski, ‘Der Vorschlag für die Rom-Verordnung’, IPKax 2006, p. 101, and S.F.G. Rammeloo, ‘Via Romana. Van EVO naar Rome I – Nieuw Europees IPR dat van toepassing is op verbintenissen uit overeenkomst’, NIPR 2006, p. 239. Mankowski even spoke of a ‘ungeahnte Radikalität’. Likewise, the *Report of the Financial Law Markets Committee, Legal_Docs: 101510v1, ‘Issue 121’, containing a ‘Legal assessment of the conversion of the Rome Convention to a Community instrument and the provisions of the proposed Rome I Regulations’, www.fmlc.org/papers/ April06issue121.pdf, p. 12, rejected the ‘oversimplification of various situations’. For a historical perspective on ‘hard and fast’ contractual conflict rules (i.e. without any escape possibility) as promulgated by e.g. Institut de Droit International projects, as well as the American ‘Restatement First on the conflict of laws’, cf. Rammeloo 1992, p. 75, and S.F.G. Rammeloo, ‘Via Romana. Van EVO naar Rome I – Nieuw Europees IPR dat van toepassing is op verbintenissen uit overeenkomst’, NIPR 2006, p. 239.

72 Van Weeber, 2008 (fn. 4), however, follows another line of reasoning: in his view a restricted use of the escape clause of article 4 subs. 3 Rome I is required, as Cons. 7 of the Preamble to Rome I clearly demands that this Regulation ‘should be applied only to extraordinary circumstances’ of 11 July 2007 on the law applicable to non-contractual obligations (‘Rome II’). As the latter Regulation only allows for strict use of escape clauses the same principle would also govern the Rome I Reg. as well. Lamee/Lehmann, 2008, p. 536 distinguishes the abuse of the escape clause of article 4 subs. 3 Rome I. The authors adhere to the Max Planck Institute’s proposal that this provision should have been admitted in exceptional circumstances only. Cf. Pfeiffer, 2008, p. 626, the criterion ‘offensichtlich engere Verbindung’ requires that ‘em Festhalten an der Regelanknüpfung nicht mehr vertretbar wäre.’

73 Cons. 20 of the Preamble preceding ‘Rome I’. 
the party who is to effect the characteristic performance should also govern contractual relationships ‘where the contract cannot be categorized as being one of the specified types or where its elements fall within more than one of the specified types. In case of a contract consisting of a bundle of rights and obligations capable of being categorized as falling within one of the specified types of contract, the characteristic performance should be determined having regard to its center of gravity.’

4.5.4 Filling in the blank of article 4 subs. 5 RCC – Substantive guidelines

While turning back to article 4 subs. 5 of the RCC, one must establish that the Explanatory Report does not offer a clear and workable guideline. It is entirely left to the ECJ to fill in the blank of article 4 subs. 5. The least that can be said on the basis of a contrary reasoning can be said is that the structure of article 4 as a whole does not tolerate a full discretionary search for a ‘proper law of the contract’, ‘die engste Beziehung des Vertrages’, ‘les liens les plus étroits’, ‘de nauwste betrokkenheid’, etc.

Is, from point of view of autonomous interpretation of the Treaty, any more positively formulated guideline imaginable? If one takes into account that for most international contracts a ‘genuine’, intrinsically justifiable connecting factor simply does not exist, a workable approach could be the following. The presumptions of subsections 2 to 4 of article 5, rebuttable as they are, undisputedly engender justified party expectations. These presumptions may therefore be set aside only when, geographically speaking, all connecting factors manifestly outweigh the relevant rebuttable presumption, nothing more nothing less. ‘Thus, a ‘European’ approach would avoid national law concepts that are too rigid (Dutch Supreme Court Balenpers approach: subs. 5 to be applied in exceptional circumstances only), or too permissive (cf. ‘proper law’ approach).’

Hard and fast rules cannot be formulated though. Whereas it seems reasonable to assume that the rebuttable presumptions of subsections 2 and 3 are to be set aside in favor of subsection 5 when there are manifestly closer ties with another legal order, it is hardly feasible to formulate guidelines in advance for complex legal relationships as captured by subsection 4 of article 4 (carriage of goods cum annexis).

4.6 ECJ Case C-133/08 – Potential conflict of laws approaches

How should, taking into account the foregoing observations, the preliminary question be approached? Any interpretation of article 4 RCC should meet the needs of everyday practice. Notably of importance is:

(i) Delimitation of the scope of each subsection of article 4, as well as their mutual interrelationship (sub questions a, b, d and e);

(ii) Avoidance of conflict of laws outcome of ‘severability’, (i.e. ‘depeçage’, splitting the proper law: sub question c).

Although admittedly the preliminary question does not relate to future EC law, one could recall once more the interest of transitional European Private International Law:

(iii) Searching a synthesis between RCC and Rome I

If one takes as a point of departure that article 4 subs. 4 does not cover complex multifold contractual relationships as in ICF – MIC entirely, and if furthermore it is assumed that article 4 subs. 2 would not be suited to govern the contract part falling outside the material scope of article 4 subs. 4, a foreseeable proper law of the contract not entailing ‘severability’ could be achieved along the following ways of reasoning:

- Inasmuch carriage of goods remains the ‘main purpose’ of the contract as a whole, other obligations arising from the contractual relationship could be submitted to the same lex

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74 Idem, Cons. 19, italics SR.

75 On the occasion, the outcome of the process of finding the proper law of the contract may appear to be intrinsically justifiable, notably in situations where the party who is deemed to effectuate the characteristic performance indeed carries out duties with a strong couleur locale. One might think of e.g. a skiing course offered to Dutch tourist by Swiss instructor, cf. Rammeloo (1994), p. 246 and 247. In such a situation the concepts of the characteristic performance and the ‘berufstypische Leistung’ indeed match. It remains doubtful however, whether any such ‘better law’ inspired approach would be compliant with the Convention. The Expl. Report remains silent on this matter. In his opinion preceding the Balenpers judgment referred to, NJ 1992 750, p. 3262, the Advocate-General rejects this concept.

76 In spite of the fact that notably the rebuttable presumptions of subsections 2 and 4 (cf. comments in respect to subs. 3 above) lack a genuine, intrinsic justification they still serve other goals: legal certainty in advance, calculability (cf. reduced transaction costs ex ante for firms, lawyers, etc., emanating from uniform legal treatment).

77 Steffen/Vonken, comment 7.2 and De Ly 1996, p. 128, the latter referring to B. Aubin, who provides for further tools for the application of subs. 5: In his view this escape clause should be considered as ‘Vermutungsausweichklausel’ to be applied earlier than the so called ‘Ausnahmewechselklausel’ which can only be applied in exceptional cases. The latter criterion, reminding of the Balenpers criterion, should in the context of article 4 subs. 5 RCC be rejected for being too rigid.


79 ‘Manifestly’ closer ties may be concluded from e.g. the following constellation of facts:

- nearly all geographical connecting factors point at one legal order (cf. the facts underlying the Balenpers criterion);

- common nationality and/or common residence of contracting parties result in other proper law of the contract than e.g. article 4 subs. 2 RCC would provide for, cf. Kropholler, 2006, p. 475;


- ‘residence’ of the party effectuating the characteristic performance appears to be fortuitous, cf. Steffen/Vonken, comment 7.3;

- idem, in the situation of e.g. an exclusive sales contract, the characteristic performer exclusively operates beyond the borders of legal order of the place where he resides, cf. Dutch Supreme Court, 24 May 1991, NIPR 1991, 454, NJ 1991, 676 (Häcker).

80 Cf. what has been said about the ‘peculiarities’ of the contract concerning carriage of goods above.

81 Cf. Leibe/Lehmann, 2008 (fn. 4), ‘Listenbildung’ (i.e. making use of a catalogue of various contract types) carries the risk of qualification and delimitation problems that did not or at least not that manifestly arise under the RCC.
contractus, provided that there is sufficient coherence between all obligations undertaken by all contracting parties' arising from the contractual 'package deal';

- Inasmuch carriage of goods appears not to be the ‘main purpose’ of the contract as a whole, recourse must be had to article 4 subs. 1. In situations like this (complicated contracts packages) it is only logical for courts to have full discretionary freedom (freies Ermessen) while ascertaining the proper law of the contract;

- Inasmuch article 4 subs. 5 is applicable (i.e. when subsections 2, 3 and 4 cannot be applied) any ‘closer relationship’ is to be established by the court, again having full discretionary freedom. It is this amount of freedom which enables the court to avoid the ‘misfit’ of having to split the proper law whenever desirable.

5. Conclusions

As the end of the lifetime of the EC Convention on the Law Applicable to Contractual Obligations is approaching, it is yet for the ECJ to formulate guidelines on the interpretation of the half-open conflict rule of article 4 RCC.

This contribution pretends nothing but to unfold some potential interpretation modes. A synthesis is being sought between the interest of IPR-Gerechtigkeit (i.e. paying homage to the aims underlying the structure of each subsection of article 4, as well as article 4 RCC as a whole, whilst avoiding the undesired consequences of severability) and the practice oriented interest of finding convenient solutions for contractual relationships that, as is shown by ECJ Case C-133/08 (ICF – MIC) appear to be of a complex nature. This contribution further makes an attempt to formulate, inasmuch possible, a bridge between the Rome Contracts Convention and the Rome I Regulation.

The potential interpretations aim at finding a solution between various national law biased approaches that might be criticized for being either too rigid (such as e.g. the Dutch Batenpers criterion) or, perhaps, for being too lenient (such as e.g. under the Common Law ‘proper law’ concept, while setting aside the rebuttable presumptions too easily). It is for the ECJ to bring clarity.

West Tankers: the Advocate General’s opinion

Marta Requejo

I. Introduction

On 2 April 2007, the House of Lords referred a prejudicial question to the ECJ concerning the compatibility with Regulation (EC) No. 44/01, of the decision made by a Member State, preventing judicial proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement. The Advocate General (AG) Kokott issued an opinion on this case, C-185/07, West Tankers, on 4 September 2008.

In the United Kingdom, the granting of anti-suit injunctions to protect the efficacy of arbitration clauses against parties appealing to a foreign jurisdiction goes back to 1911. To date, English jurisprudence has varied in its propensity to use the anti-suit technique, irrespective of the nationality of the State jurisdiction in question. There are two paradigmatic cases: in The Golden Anne, proof of a reluctant attitude, the measure was denied; the English judge understood that the question of whether the proceeding opened in the US should continue depended on the American court; a preventive action by its English counterpart (by means of an anti-suit order) would mean usurping that function. On the other hand, in The Angelic Grace, the Court of Appeals decided that comity considerations were irrelevant: in view of the case’s circumstances, the court would need a good reason in order not to grant the injunction.

The indecision of English jurisprudence affects both cases involving non-Community and EU member courts. As a mat-

Note that apart from plurality of obligations a contract may as well be characterized by a plurality of contract parties.

It is likely that in most cases the answer shall be affirmative. If any such coherence is lacking (cf. a situation where the contractual ‘package’ can easily be disentangled), splitting the proper law should no longer be an insurmountable problem. Cf. what has been said above, 4.3, notably the example of the financial investment part to be taken out of the ‘contract package’ as a whole and being submitted to another proper law of the contract.