The Application of Exception Clauses of the Rome Convention and the Rome I Regulation by the Dutch Courts

An Escape from Reality?

Emmely de Haan[*]

Abstract

Both the Rome Convention and its successor the Rome I Regulation contain much discussed provisions on applicable law in the case of absence of a choice of law. Both instruments contain so called 'exception clauses' which refer to a closer connection of the contract with one state to the law of another state resulting from the general presumptions. The Netherlands is the frontrunner with a highly restrictive interpretation of the exception clauses. The applicable law to a transnational dispute might not always be the law of the competent court, although courts tend to prefer their own national law with which they are familiar. This year it has been exactly 20 years since the first revolutionary ruling on the subject by the Dutch Supreme Court, the so called Balenpers case. With the recent transition of the Convention into the Regulation, it is useful to analyse these connecting factors and review them in the context of the new Regulation. The Dutch courts have developed numerous connecting factors over the years. The article analyses Dutch case law on international contracts of carriage and international employment contracts from the implementation of the Rome Convention to date.

Keywords: Rome Convention 1980, Rome I Regulation, choice of law, exception clause, international commercial contracts.

A. Introduction

With the increase of international business contracts worldwide comes the need for judicial cooperation between states in the form of harmonising the conflicts arising from national laws. Predictability of the outcome of litigation in transnational disputes must be encouraged, especially when no choice of forum or law governing the contract has been made. The applicable law might not always be

* The author graduated from Utrecht University in 2012 with an LL.M. degree in Dutch Private Law and is currently an LL.M. candidate at the University of Virginia in the United States, specializing in International Trade Law and Regulation and Dispute Settlement. This article is a shorter version of her master thesis, which was supervised by Professor dr. K.R.S.D. Boele-Woelki.

the law of the competent court, although courts tend to prefer their own national law with which they are familiar, the so called *Heimwärtsstreben.*[1]

Both the Rome Convention[2] (hereinafter: the *Convention*) and its successor the Rome I Regulation[3] (hereinafter: the *Regulation*) contain much discussed provisions on applicable law in the case of absence of a choice of law. The European Court of Justice (hereinafter: the ECJ) has ruled on the interpretation of these provisions of the *Convention*, but has yet to interpret these provisions of the *Regulation*.

Both instruments contain so-called 'exception clauses', which refer to a closer connection of the contract with one state to the law of another state resulting from the general presumptions. National courts might make use of the exception clause in such a way that their own national substantive law can be applied. They are often not familiar with foreign law, which results in a more time-consuming procedure and possibly a wrong application, which would consequently lead to an unjust outcome.[4]

The Dutch courts have developed numerous connecting factors over the years. This year, it has been exactly 20 years since the first revolutionary ruling on the subject by the Dutch Supreme Court, the so-called *Balenpers* case.[5] With the recent transition of the *Convention* into the *Regulation*, it is useful to analyze these connecting factors and review them in the context of the new *Regulation*. The focus of this article will be on the contracts of carriage of goods and employment contracts, because these contracts offer interesting judgments and the relevant provisions of the *Convention* have been subject to the ECJ's interpretation.

Employment contracts show a strong tendency towards domestic law. The Netherlands is the frontrunner with a highly restrictive interpretation of the exception clauses. Whilst the Dutch rigidity on this matter seems to have been met by a more restrictive formulation of the new Article 4 of the *Regulation*, the Dutch attitude towards contracts of employment governed by Article 6 of the *Convention* and Article 8 of the *Regulation* can most probably not be upheld under the *Regulation*, especially not after the ECJ has ruled on the matter.[6]

This research has been confined to case law from the Dutch courts and the ECJ in the interest of the length of this article. Future case law on the *Regulation* would be an incentive for a more elaborate comparative research expanding to other jurisdictions. Case law has been gathered from the NIPR journal and the

1 B. Hess & T. Pfeiffer, *European Parliament Directorate General for International Policies, Study on the interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law PE 453.189*, European Parliament, Brussels, 2011, p. 170, available at <www.europarl.europa.eu/committees/en/juri/studiesdownload.html?languageDocument=EN &file=40891>.

2 Convention no. 80/934/ECC on the law applicable to contractual obligations of 19 June 1980.

3 Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

4 M. Sonnentag, *Der Renvoi Im Internationalen Privatrecht*, Mohr Siebeck, Tübingen, 2001, p. 143.

5 HR 25 September 1992, *NJ* 1992, 750 (*Balenpers*).

6 A-G L. Strikwerda, 'A Preliminary Ruling Regarding the Interpretation of Art. 6 of the Convention on Employment Contracts has been Requested by the Dutch Supreme Court'; HR 3 February 2012, LJN BS8791, *NJB* 2012, p. 405.

website Rechtspraak.nl. A total of 30 cases out of the 1126 cases that the NIPR initially showed have been selected.[7] This research was completed on 19 June 2012. Any case law or literature published on or after this date is not incorporated.

B. Article 4 of the *Convention* and Article 5 of the *Regulation*

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 separable 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 unincorporate, 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. (...)
4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.
5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be dis-

7 All selected cases concern one of the two contracts and were pronounced after the *Balenpers* case. Most importantly, only the cases that explicitly refer to an exception clause are a part of this article. Case law has been gathered from the NIPR journal and the website Rechtspraak.nl. A total of 30 cases out of the 1,126 cases that the NIPR initially showed have been selected. These two main sources of Dutch judgments complement each other. Rechtspraak.nl only publishes about 2% of the cases that are decided by the Dutch Courts annually. Therefore both have been consulted for each case that was published in both. On Rechtspraak.nl, I have searched by selecting the following criteria: "toepasselijk recht" and "conflictenrecht" in "inhoudsindicatie" and "handelsrecht" and "civiel recht overig" as the fields of law. In NIPR, I have gone through every case referring to the *Convention* or the *Regulation*.

regarded if it appears from the circumstances as a whole that the contract is more closely connected with another country

The first paragraph of Article 4 of the *Convention* states that the law of the state with which the contract is most closely connected will apply. The second paragraph gives this seemingly flexible rule a concrete and objective interpretation: The general presumption of the closest connection is the law of the place where the party executing the *characteristic performance* of the contract has its habitual residence.[8] Since the subject of the contract is the transfer of goods to a different jurisdiction and a carriage contract has a rich variety of possible connecting factors, a separate paragraph 4 has been inserted. If the characteristic performance cannot be determined, paragraph 5 offers an exception clause which refers to the law of the country *with which the contract is the most closely connected.*

These controversial clauses have stirred up much discussion in legal literature. For example, they have been criticized for going against the rationale of unifying conflict rules of the *Convention.*[9] Also predictability and legal certainty would suffer from this provision.[10] Kokkini-Iatridou attributes this criticism to the profound fear of the unforeseeable and the lack of confidence in judges in Europe.[11]

The most effective way to illustrate the complexity of Article 4 of the *Convention* is by discussing a revolutionary case in point, the Dutch Supreme Court's *Balenpers* case of 1992.

I. The Balenpers *Case*

The *Balenpers* case[12] concerned a contract for the sale of a paper bale press between a French buyer and a Dutch seller. All negotiations took place in France through an agent situated in France, the quotation was drafted and concluded in French and the paper bale press was delivered and installed in France.

The Supreme Court rejected the buyer's argument that the sales contract was more closely connected to France than the Netherlands pursuant to Article 4(5) of the *Convention.* It held that the exception clause contained in that paragraph was to be applied restrictively; given the special circumstances of the case, only if the place of habitual residence of the characteristic performer in the Netherlands *de facto* has no actual value as a connecting factor, could French law apply instead. The Advocate General Strikwerda inferred from the Giuliano-Lagarde Report (hereinafter: the *Report*) and the explanatory memorandum that the exception clause serves a better localization of the contract, not the application of a law that

8 Preamble 19 points to the centre of gravity on this point.

9 *Ibid.*, p. 806.

10 Proposal COM (2005) 650 for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), Brussels, 15 December 2005, points 16 and 39.

11 Kokkini-Iatridou, *Les clauses d'exception en matière de conflits de lois et de conflits de jurisdictions, ou le principe de proximité: XIVe Congrès International de droit comparé*, Nijhoff, Dordrecht, 1994, p. 41.

12 HR 25 September 1992, LJN ZC0689, *NJ* 1992, 750 (*Balenpers*, op. A-G L. Strikwerda).

simply offers better results or meets the parties' expectations.[13] He based the exception rule on a prevailing actual geographical connecting factor with another state, adding that it is only to be applied in evident preponderance to prevent the exception from becoming the main rule. Strikwerda considered the presumption of the characteristic performer's habitual residence the most important factor, not comparable to more insignificant factors such as nationality of the parties and language of the contract. Even if only the factor of habitual residence points to a one state and all other connecting factors to another, the first must still prevail.

This judgment was met with resistance. For example, Van Wechem found the Dutch interpretation too restrictive and pointed out that other states have not followed this restrictive interpretation.[14] It has been considered the "most extreme version of the strong presumption theory".[15] Lando found the Supreme Court's approach "inflexible" and questioned whether the Supreme Court would have come to the same conclusion if the situation had been reversed.[16] Tang called it "an extreme approach", which is "too restrictive".[17] Plender, however, did welcome the enhancement of predictability by the Dutch Supreme Court, since this is exactly what the *Convention* strives to achieve.[18] Wilderspin found the interpretation '*correct in principle*' but found the distinction of the main rule in paragraph 1 and the exception in paragraph 5 "quite incorrect" and the results "dramatic".[19] He acknowledges the advantage of certainty and predictability of the Dutch approach, but sees it as somewhat inflexible and leading to artificial results. He states that the exception "cannot be used as a means of discarding presumptions (...), reaching a result which the court simply finds preferable".[20] Magnus and Mankowski find Article 4 of the *Convention* an "almost non-rule" and the exception clause a "*dangerous device*" which weakens the main rule. They detect the home-bound trend of courts to apply the *lex fori*.[21] It must be empha-

13 M. Giuliano & P. Lagarde, 'Report on the Convention on the Law Applicable to Contractual Obligations', 282 *Official Journal C* 1980, p. 31.

14 T.H.M. van Wechem, *Rome I: verscholen ingewikkeldheden, (Preadviezen NVIR 2008, Mededelingen van de NVIR no. 136)*, T.M.C. Asser Press, Den Haag, 2008, pp. 24-25.

15 J. Hill, 'Choice of Law in Contract under the Rome Convention: The Approach of the UK Courts', 53 *ICLQ* 2004, p. 340.

16 O. Lando, 'The Eternal Crisis', *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag* 1998, p. 368.

17 Z. Tang, 'Law applicable in the absence of choice – the new Art. 4 of the Rome I Regulation', *Modern law Review*, Vol. 71, No. 5, 2008, p. 798.

18 R. Plender, 'The Rome Convention – on the Law Applicable to Contractual Obligations', *Angleichung des materiellen und des internationalen Privatrechts in der EU* 2003, p. 42.

19 R. Plender & M. Wilderspin, *The European Private International Law of Obligations*, Sweet & Maxwell, London, 2009, p. 175.

20 M. Wilderspin, 'The Rome Convention: Experiences to Date before the Courts of Contracting States', *Angleichung des materiellen und des internationalen Privatrechts in der EU* 2003, p. 115.

21 U. Magnus & P. Mankowski, 'The Green Paper on a future Rome I Regulation – on the road to a renewed European Private International Law of contracts', *Zeitschrift für vergleichende Rechtswissenschaft: eindschielsslich der ethnologischen Rechts- und der Gesellschaftsforschung*, Vol. 103, No. 2, 2004, p. 158.

sized that the rejection of an exception might just as well indicate this homeward trend.

Sixteen years later, the Dutch Supreme court requested a preliminary ruling of the ECJ on the interpretation of the exception clause of Article 4 of the *Convention*.

II. The ECJ's response to Balenpers: The ICF v. Balkenende *case*[22]

ICF, a Belgian company and Balkenende and MIC, two Dutch companies entered into a charter contract for a train connection for freight traffic between Amsterdam and Frankfurt am Main. ICF sought payment of unpaid invoices. Balkenende claimed that the contract ought to be labelled as a contract of carriage and the invoices were therefore time-barred, according to Dutch law. ICF on the other hand claimed that the applicable law was to be ascertained by paragraph 2 of the *Convention*, which would appoint the law of Belgium, where ICF as characteristic performer had its principal place of business. According to Belgian law, the invoices were not time-barred yet.

The Dutch Supreme Court took this opportunity for a preliminary ruling[23] on *inter alia* the following question:

> "Must the exception in the second clause of Article 4 paragraph 5 of the Convention be interpreted in such a way that the presumptions in Article 4 paragraphs 2 to 4 of the 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 therefrom that there is a stronger connection with some other country?"

The ECJ held that paragraph 5 of Article 4 counter-balances the presumptions of paragraphs 2 to 4 and expresses the necessity for a certain degree of flexibility from the courts. It concluded that

> "...article 4(5) of the Convention must be construed as meaning that, where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that determined on the basis of one of the criteria set out in Article 4(2) to (4) of the Convention, it is for the court to disregard those criteria and apply the law of the country with which the contract is most closely connected."

With this answer, the ECJ has given a different interpretation to the exception clause of Article 4 of the *Convention* from the Netherlands. Although the ECJ

22 ECJ 6 October 2009, no. C-133/08 (*ICF v. Balkenende*).

23 This preliminary ruling was the first of only four on the *Convention* to date. Three of them, the *ICF v. Balkenende* case included, will be discussed in this research. The fourth concerned a choice of law in an insolvency matter (ECJ 19 April 2012, no. C-213/10 (*F-Tex SIA v. Lietuvos-Anglijos UAB*)).

acknowledges the need for legal certainty and foreseeability, the principle of the closest connection must prevail.

The next paragraphs will analyze how this new approach has affected the Dutch interpretation of the exception clause in case law on contracts of carriage and how the new Articles 4 and 5 of the *Regulation* have been formulated in accordance with this interpretation.

III. Dutch Case Law on International Contracts of Carriage: Article 4(4) of the Convention *and Article 5(1) and (3) of the* Regulation

In 1993, a Dutch court of appeal passed over paragraphs 2 or 4 and assigned Dutch law as the law of the country that the contract had the closest connection with, pursuant to paragraph 5.[24] The consignor was a Dutch company and the goods to be transported from the Netherlands to Yugoslavia had to be picked up in the Netherlands. Furthermore, the fact that the consignor had summoned the transport company before the Dutch court indicated a desire for Dutch law to govern the proceedings. The special presumption of the closest connection of a contract for carriage to the country of operation of the carrier, who provides the service, was only applicable if the place of loading or unloading was also in this country or if the main place of business of the consignor of the goods was located there. A contract for carriage often had no connection to the principal place of business of the carrier, so applying the general presumption would often lead to an unjust result.[25] If the contract was labelled a contract of carriage, none of the requirements set out in Article 4(4) would have been met and the court of appeal was right to apply the exception clause. However, had the contract been labelled a forwarding contract, German law would be applicable as the law of the principal place of business of the carrier pursuant to Article 4(2) of the *Convention*. Ultimately, the court of appeal failed to systematically apply Article 4 in a transparent way; counting the choice of forum as a connecting factor would go against the rationale behind the *Convention* of forum-shopping prevention.

Article 4(4) does not provide for a presumption of connection in the case the requirements of that same paragraph are not met. The applicable law must then be determined according to paragraph 1 only, because contracts for carriage of goods have been excluded from application of paragraph 2. Consequently, no presumptions will apply and the issue rises whether to turn to paragraph 1 or 5. It has been argued that the proper law must be determined in accordance with paragraph 5.[26] However, the application of paragraph 1 should suffice, for this paragraph points to the country to which the contract has "the *closest* connection", whilst paragraph 5 mentions the weaker formulated "*closer* connection". Since paragraph 1 is the main rule as opposed to paragraph 5 as the exception, paragraph 1 should apply.

Article 5(1) of the new *Regulation* does provide for a secondary connecting factor when the requirements of paragraph 4 are not met. It states that then, the

24 Hof 's-Hertogenbosch 17 February 1993, *NIPR* 1993, p. 273 (*Kramer q.q. v. Frigosped GmbH*).

25 Giuliano & Lagarde, 1980, commentary on Art. 4 point 6.

26 *Ibid.*, commentary on Art. 4 point 7.

law of the place of delivery as agreed by the parties shall apply. This new structure will significantly reduce the use of the exception clause by the courts.

Lastly, the word "manifestly" has also been added to the exception of paragraph 3. The change of outcome in these cases however must be attributed to the addition of the secondary presumption, which makes it impossible to predict how the Dutch courts will interpret the exception clause of the new provision for contracts of carriage. No case law on the matter has been published to date. The more strict formulation of the new exception might make it harder to disregard this subsidiary presumption. If so, the extra presumption might still result in an artificial outcome, as the following cases will demonstrate.

In another case a German company entered into a contract for carriage of goods from Germany, the Netherlands and Belgium to the Ukraine with a Dutch shipping company.[27] Regarding the goods loaded in the Netherlands, the court of first instance held Dutch law to be applicable to the contract as the law of the principal place of business of the carrier and the law of the place of loading, pursuant to Article 4(4) of the *Convention*. With regard to the tank containers loaded in Germany, the court held German law to be applicable as the law of the principal place of business of the sender and of the place of loading. It presumably came to this conclusion by applying Article 4(1) and/or (5), because the contracts for carriage of goods are explicitly excluded from the general presumption of Article 4(2). Unfortunately, the court does not elaborate on this point.

A case in which the court of first instance could have used the exception clause but refrained from doing so was about the sinking of a pontoon addressed to Dutch company by a German shipping company.[28] According to Article 4(4) of the *Convention*, German law was applicable as the law of the principal place of business of the carrier, where the loading also took place. The facts that the pontoon had sunk in the Netherlands, that the post of destination was situated in the Netherlands and that the recipient was Dutch, were apparently of no significance to rebut the special presumption of paragraph 4. Another case in which the court of first instance briefly mentioned the exception clause concerned a Texan consignor who contracted a Dutch carrier for the multimodal transportation from the Netherlands to the United Kingdom, Ireland, Italy and Turkey.[29] It found no closer connection to another country than the Netherlands, where the principal place of business of the carrier was situated and the goods were loaded.

Paragraph 4 could not be applied in a case between a German carrier and a Dutch consignor, because the goods were transferred from Turkey to the Netherlands.[30] The court held that, since two of the four connecting factors named in paragraph 4 connected the contract to the Netherlands, Dutch law applied. It would have been obvious to grant more value to the principal place of business of the carrier in Germany, because this is the common connecting factor in the two

27 Rb. Rotterdam, 30 September 1999, *NIPR* 2000, p. 28 (*Confreight Nederland BV. v. Tejonca Shipping GmbH*).

28 Rb. Rotterdam, 7 April 2004, *NIPR* 2005, p. 40 (*Bosma Beheer v. Ullrich*).

29 Rb. Rotterdam, 3 May 2006, LJN AX9359, *S&S* 2007, p. 114 (*Advanced Micro Services Inc. V. TNT Nederland*).

30 Rb. Rotterdam, 1 September 2010, LJN BO1536 (*Quorum AG v. Sun Trade B.V.*).

possible situations as laid down in paragraph 4. The court found no factors connecting the contract closer to any other country. As mentioned *supra*, it is not clear from the structure of Article 4(4) if one must resort to the law of the country that the contract has the *closest* connection to pursuant to paragraph 1, or the law of the country that it is *more closely* connected to according to paragraph 5. Either way the outcome would have been the same in this particular case.

The District Court of Rotterdam ruled likewise and held Dutch law to be applicable to a contract.[31] It came to this conclusion by counting the following four connecting factors: the place of loading and the principal place of business of the consignor in the Netherlands, the principal place of business of the carrier in Poland and the place of discharge in Germany. Paragraph 4 could not be applied, as its requirements could not be met. Apparently, it valued all four factors equally. Although this supports the objective of the *Convention* for a predictable outcome, there is a reason that some connecting factors carry more weight than others and sometimes are even codified in a separate paragraph. Obviously the place of the habitual residence of the carrier as a connection carries the most weight in Article 4(4), but should this factor lose its special value as soon as the requirements of paragraph 4 are not met? After all, had the contract not been a contract of carriage, this connecting factor would have been the one to rebut according to paragraphs 2 and 5. The most recent case concerning a contract of carriage was between two Dutch companies.[32] Both parties were of the Dutch nationality and the goods were delivered in the Netherlands, so the general rule applied. No factors, such as the goods being loaded in Germany, were of enough value to disregard the general rule.

These last two cases came before the court after the ECJ's ruling on the matter. The courts could have relied on the *ICF v. Balkenende* case, but did not. Therefore, any change in Dutch case law since the leading rulings from the ECJ is yet to be detected.[33]

Regarding contracts of carriage, the fixed pair of requirements of Article 4(4) of the *Convention* naturally leads to a more frequent application of other connecting factors because of the exclusion of contracts of carriage from the general presumption of Article 4(2). Hence in four out of the seven cases on contracts of carriage, the courts applied Article 4(1) and/or (5), depending on how the courts look at it.

The outcome to some of these cases would have been radically different had the *Regulation* applied to them. In the first case, Yugoslavian law would have been

31 Rb. Rotterdam, 6 July 2011, LJN BR2205 (*Karex v. KDS Logistics*).

32 Rb. Rotterdam, 14 September 2011, LJN BT1776 (*Axa Schade N.V. & Nedeximpo v. X*).

33 Although falling outside the scope of this article, the only case to date in which a Dutch court granted an application of the exception clause to overrule the general presumption of Art. 4(2) of the *Convention* concerned a franchise contract. *See*: Hof Arnhem 4 March 2003, *NIPR* 2003, p. 278. According to paragraph 2, German law was applicable as the law of the county of the characteristic performance, the exploitation of a travel agency. The main office however was situated in the Netherlands, as were both parties. The franchise agreement was signed in the Netherlands, in Dutch and in accordance with Dutch legislation. Finally, payment was converted to the Dutch currency.

applicable. In the second case, the application of the extra presumption would have resulted in Ukrainian law. In the penultimate case, German law would have been applicable. The parties probably had no desire to have these laws govern their contract, making the eventual law applicable rather artificial.

C. Article 4 of the *Regulation*

The exception clause of the *Convention* was originally not designed to be interpreted as restrictively as the *Report* states and for example how the Dutch courts did. The new provision can be considered a codification of case law on the *Convention*, which statement is supported by preambles 6 and 16 of the *Regulation*.[34] More importantly, preamble 6 states that the applicable law should be determined irrespective of the forum.[35] Thus, this connecting factor which Dutch courts have used often in the examined cases will probably not be raised anymore in the future.

The wording of the exception clause of Article 4 of the *Regulation* is in line with the formulation of the exception clause on tort/delict of Article 4 of the Rome II Regulation, which implicates a deliberate correspondence of the two provisions. This is also expressed in preamble 7 of the *Regulation*.[36] The explanatory documents to the Rome II Regulation express the need for foreseeability of the applicable law at the expense of a more flexible exception clause and refer to the *Convention* in explaining the binding rules of the Rome II Regulation as opposed to mere presumptions.[37] It noted that a more restrictive exception was needed to prevent abuse.[38]

D. Employment Contracts: Article 6 of the *Convention* and Article 8 of the *Regulation*

Article 6 of the *Convention*, which deals with employment obligations, is a so-called *weaker party* clause and a *lex specialis* to the *leges generales* of Articles 3 and 4.[39] Its objective is to protect employees in the eventuality of a dispute arising out of an individual employment contract with international aspects.[40] Para-

34 Preamble 16 also encourages the foreseeability of conflict-of law rules, but does acknowledge a certain degree of discretion to be retained by the national courts.

35 "The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought."

36 Preamble 7: "The substantive scope and the provisions of this Regulation should be consistent with (...) Brussels I and (...) Rome II."

37 Proposal COM(2003) 427 for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II), Brussels, 22 July 2003, p. 13.

38 A. Bonomi, 'The Rome I Regulation on the Law Applicable to Contractual Obligations', 10 *Yearbook of Private International Law* 2008, p. 176.

39 Giuliano & Lagarde, 1980, commentary on Article 6 point 1.

40 *Ibid.*, commentary on Article 6 point 2.

graph 2 concerns the applicable law in the case of absence of a choice or if the choice made would deprive the employee of protection by the mandatory provisions of the law that would have been applicable according to paragraph 2. Subparagraph 2a states that the law of the country "in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country" is applicable. If this country cannot be determined, the law of the country in which the place of business through which he was engaged is situated, is applicable. Only if these two presumptions cannot be confirmed, the exception clause "unless it appears from the circumstances as a whole that the contract is more closely connected with another country" may be applied.[41] Van Hoek states that the exception is meant to be applied to employment contracts concerning expatriates and postings abroad which are unexpectedly extended.[42]

I. Interpretation by the ECJ

The presumptions of Article 6 of the *Convention* have been subject to interpretation by the ECJ on two occasions. In the *Mulox* case, the ECJ held that the habitual place where a travelling employee carries out his work must be defined as the place "where or from which the employee principally discharges his obligations."[43] In the *Rutten* case, the ECJ ruled the place where the employee habitually carries out his work in performance of the contract to be the office "from which he organized his activities and to which he returned after each business trip abroad".[44]

The first ECJ case about the interpretation of Article 6 of the *Convention* concerned a German truck driver, an employee of a subsidiary of a Danish company.[45] The Luxembourg Court of Appeal posed the following preliminary question to the ECJ:

> "Is the rule of conflict in Article 6(2)(a) of the Rome Convention ... , which states that an employment contract is governed by the law of the country in which the employee habitually carries out his work in performance of the contract, to be interpreted as meaning that, in the situation where the employee works in more than one country, but returns systematically to one of them, that country must be regarded as that in which the employee habitually carries out his work?"

The ECJ held that the law resulting from Article 6(2)(a) should prevail over the seat of the employer, for the social and economic functions of work are primarily subject to the political and business environment of that country. Therefore, it is of essence to safeguard this principle of *favor laboratoris*. As a consequence, an

41 A.J. Bělohlávek, *Commentary on the Rome I Regulation*, Juris, Huntington, 2010, p. 1373.

42 A.A.H. van Hoek, *Uitleg bij: Verordening (EG) nr. 593/2008 inzake het recht dat van toepassing is op verbintenissen uit overeenkomst ('Rome I'), Artikel 8*, Kluwer, Deventer, 2011, note 12.

43 ECJ 13 July 1993, no. C-125/92 (*Mulox IBC Ltd. V. Hendrik Geels*).

44 ECJ 9 January 1997, no. C-383/95 (*Rutten v. Cross Medical Ltd.*).

45 ECJ 15 March 2011, no. C-29/10 (*Heiko Koelzsch v. Luxemburg*).

extensive approach of Article 6(2)(a) is appropriate, prior to the application of Article 6(2)(b).

The ECJ ruled that the country in which the employee habitually carries out his work in performance of the contract is the place where he, taking into consideration all the factors that characterize his activities, carries out the greater part of his obligations towards his employer, the so called "centre of gravity". Moreover, the ECJ referred to preamble 23 in ruling that Article 6 should be interpreted on the basis of the principle of *favor laboratoris*; the weaker party must be protected by conflict of laws rules that are more favourable. This statement is rather confusing. The employee must be protected, but not favoured.[46] In applying the law most favourable to the employee, how is the employee not favoured by this? The ECJ offers some explanation in stating that it is the law of the country where or from which the employee habitually carries out his work

> "of which the business and political environment affects employment activities. Therefore, compliance with the employment protection rules provided for by the law of that country must, so far as is possible, be guaranteed."[47]

In the second preliminary ruling, instigated by the Belgian Court of Appeal, the ECJ ruled on the following questions relevant to this article:[48]

"1. Must the country in which the place of business is situated through which an employee was engaged, within the meaning of Article 6(2)(b) of the [Rome Convention], be taken to mean the country in which the place of business of the employer is situated through which, according to the contract of employment, the employee was engaged, or the country in which the place of business of the employer is situated with which the employee is connected for his actual employment, even though that employee does not habitually carry out his work in any one country?
2. Must the place to which an employee who does not habitually carry out his work in any one country is obliged to report and where he receives administrative briefings, as well as instructions for the performance of his work, be deemed to be the place of actual employment within the meaning of the first question?
4. Can the place of business of another company, with which the corporate employer is connected, serve as the place of business within the meaning of the third question, even though the authority of the employer has not been transferred to that other company?"

46 S.F.G. Rammeloo, *'Grensoverschrijdende arbeid. Favor laboratoris, Statutenwechsel en eenvormige interpretatie van Europees IPR', Strikwerda's conclusies – Opstellen aangeboden aan Mr. L. Strikwerda ter gelegenheid van zijn afscheid als advocaat-generaal bij de Hoge Raad der Nederlanden*, Kluwer, Deventer, 2011, p. 395.

47 Point 42.

48 ECJ 15 December 2011, no. C-384/10 *(Voogsgeerd v. Navimer SA)*.

Regarding the first two questions, the ECJ acknowledged the fact that paragraph 2 seems to establish a hierarchy between the different criteria and in doing so, refers to the *Heiko Koelzsch* case discussed *supra*. It held that the word "engaged" in subparagraph 2b clearly only refers to the actual entering into the contract, regardless of the actual employment. Besides, one only comes to subparagraph 2b when it is impossible to rule out one single country of employment in accordance with subparagraph 2a.

Since the criterion of the principal place of business of the employing company has no connection to the circumstances in which the work is actually being carried out, it is of no relevance in determining the principal place of business. Only if it is clear from the facts that the employing company is acting on behalf of the actual employer, then subparagraph 2b can refer to the principal place of business of the actual employer. In principle, subparagraph 2b must be interpreted restrictively and refers only to the place of business "which engaged the employee and not to that with which the employee is connected by his actual employment."[49] This interpretation safeguards legal certainty. By answering the way it did, the ECJ did not come to the second question.

The restrictive approach to subparagraph 2b can be stretched, for example, when it is obvious that the company deliberately engages an employer in a country which offers little protection.[50] However, this is an extreme example in which a more extensive interpretation of subparagraph 2b is only permitted in case the employee is effectively employed in that country and it is not just a matter of the country where the contract was signed.

In answering the fourth question, the ECJ held that

> "the place of business of an undertaking other than that which is formally referred to as the employer, with which that undertaking has connections, may be classified as a "place of business" if there are objective factors enabling an actual situation to be established which differs from that which appears from the terms of the contract, and even though the authority of the employer has not been formally transferred to that other undertaking."

II. Article 8 of the Regulation *and Dutch Case Law on Employment Contracts*

The exception clause has been given a separate paragraph in the new provision. It is interesting that this clause has not been formulated more restrictively, as has been done with the exception clauses of Articles 4 and 5. This might imply the broader scope of this particular exception clause as opposed to the others with the aim of protecting the employee. However, it is even more striking that the Dutch translation of this provision does include the word *kennelijk*, which means "manifestly". After taking a close look at all 21 other translations of the English version of the *Regulation*, it appears that none of them have adopted this restrictive formulation. They have all stayed true to the English version, except for the Netherlands. Most of the publications regarding employment contracts on which

49 ECJ 15 December 2011, no. C-384/10 (*Voogsgeerd v. Navimer SA*), ECJ opinion § 67.

50 *Ibid.*, ECJ opinion §71.

this article is based on do not acknowledge this difference. Van Hoek calls it a "mistake".[51] The Supreme Court referred to the exception clause of Article 8(4) of the *Regulation* in its judgment on the most recent case on employment contracts, discussed *infra*, but did apply it correctly, *i.e.*, without the word *kennelijk* in it. Apparently it based its statement on the English version of the *Regulation*. Thus the difference so far truly seems to be a mistake. It is unfortunate though that this mistake occurred in the translation of the Netherlands, the member state with the most restrictive approach to the exception clauses. Future case law on the matter will show whether this difference was intentional or not.

Case law with regards to employment contracts are much less straightforward and allow for more discretion of the courts in determining the relevant connecting factors.

In the first case concerning an international employment contract under the *Convention*, the court of first instance held German law to be applicable to a contract between a Dutch company and a Dutch employee residing in the Netherlands but carrying out his work in Germany.[52] The court of first instance correctly applied Article 6(2)(a) and designated German law to be applicable, because it was the law of the habitual workplace of the employee and the salary was paid in Dutch currency. Apparently the fact that both parties resided in the Netherlands could not rebut the general presumption. In disregarding the factors of Dutch nationality of the parties, the court of first instance immediately sent a clear message that the general presumption of Article 6(2)(a) carries strong value. It remains unclear whether or not the factor that payment of the salary occurred in the German currency was needed to strengthen the general rule, an ambiguity which often occurs in Dutch judgments in point.

That same month, the court of first instance held Danish law applicable to a contract between a Dutch employee and a Danish company.[53] For the first nine years, the employee had worked at the Dutch branch, after which followed five years of employment at the American branch. Another three years at the Dutch branch followed before the employee was appointed a director at the Danish branch. The employee argued that he travelled around. Therefore no habitual workplace could be determined and the law of the principal place of business of the employer who engaged the employee in Denmark was applicable. The court explicitly stated that the fact that the employee used to work in the Netherlands and still resided there, did not constitute a closer connection to this country. This is quite surprising: All together, the employee had worked in the Netherlands for twelve years, as opposed to less than two years at the Danish branch, where he did not even carry out his usual activities.

Four years later, a District Court applied the general presumption of Article 6(2)(a) correctly in holding Dutch law applicable to a contract between a Dutch employee and a Belgian employer, according to which the employee habitu-

51 Van Hoek, 2011, note 8.

52 Rb. Zutphen, 3 December 1992, *NIPR* 1993, p. 143 (*Maurix Management BV. v. Beunk*).

53 Rb. Utrecht (ktg.) 24 December 1992, *JAR* 1993, p. 25 (*Van Barneveld v. Brüel & Kjaer*).

ally carried out his work in the Netherlands.[54] In a case between a Dutch employer and a Dutch employee conducting his work in Germany in accordance with a contract signed in the Netherlands but written in German, the Dutch court of first instance interpreted Article 6(2)(a) as a specification of the criterion of the closest connection from Article 4 of the *Convention*.[55] It subsequently held that the exception clause of Article 6 should also be interpreted restrictively and defined this as an evidently factual and geographical preponderance to the Netherlands.

Another interesting case came before the cantonal judge in 1999.[56] A Dutch employee was working for a Dutch company for years, the last few years posted being in Poland, before being fired. His original contract and its modification when he was posted to Poland were both governed by Dutch law and salary administration and payment occurred from the Dutch office, thus the employee argued in favour of Dutch law to be held applicable. Nevertheless, the court found the modification of the original contract to be a new contract governed by Polish law. Additionally, the employee had lived and worked in Poland during the term of his contract. The court held that the formal registry of the employee as a Dutch resident was not relevant to Article 6, which is remarkable. If an employer can be tied by his seat or statutory business place, why not to apply the same standard to the employee? Indeed, the question arises whether or not this factor carries enough weight to overrule the presumption of Article 6(2)(a), but it is in my view most definitely a connecting factor to be taken into account. The court found Polish law to be applicable. This judgment contradicts the *Heimwärtsstreben* as demonstrated by the two cases from the courts of appeal, which makes it even harder to detect consistency in Dutch case law on international employment contracts.

The following year, a Dutch employee held his Belgian employer liable according to Dutch law for an accident that occurred in the Netherlands during work.[57] The employer argued that all circumstances of the case, such as the habitual residence of the employee in Belgium, the salary being paid in Belgian currency and the fact that the employee would be working in Belgium instead of the Netherlands in the future, led to the applicability of Belgian law. The court of first instance found the last argument of little relevance: "a habit is developed by the past, not the future." These factors would prevail only if they would lead to a *manifestly* better localization of the contract, which is a rather restrictive approach. Above all the court sought a connection between the contract and the tort claim which was governed by Dutch law, making the applicability of Dutch law to the contract even more obvious and convenient. This reasoning seems to be a counter reflection of the provision on applicable law on tort claims of the current Rome II Regulation, which refers to a "pre-existing relationship between the parties, such

54 Rb. Middelburg, 18 September 1996, *NIPR* 1997, p. 217 (*Van Tongeren v. Burmex Computers BV. BA*).

55 Rb. Maastricht, 14 January 1999, *JAR* 2000, p. 203 (*Wolf Europa BV. v. Hermelink*).

56 Rb. 's-Hertogenbosch (ktg.) 9 September 1999, *NIPR* 2000, p. 36 (*Van der Sijde v. Helioform Quality Shoes BV*).

57 Rb. Middelburg 30 August 2000, LJN AA7948 (*ASK NV. v. Van Stiphout*).

as a contract, that is closely connected with the tort in question" as a possible connecting factor.[58]

A similar situation was brought before the District Court of Amsterdam in the same year, but since the employee, a resident in Portugal, carried out his work in more than one country and no closer connection to another country could be found, Dutch law was held applicable as the law of the place of principal place of business of the employer who engaged the employee, pursuant to Article 6(2)(b) of the *Convention*.[59] The accident occurred in Spain, but this seems to carry no value as it was only a coincidental place of performance.

The District Court of Utrecht provided a rather confusing ruling when it held Dutch law applicable to a contract between a Dutch employee and a Dutch company, which had positioned the employee at a sister company in France.[60] The Dutch employer had continued to act as his employer and was stated as the official employer in the secondment contract which was conducted in Dutch. Also the employee received his salary from the Netherlands, paid contribution to the Dutch social security system and the contract referred to the Dutch collective labour agreement. Surprisingly, the court stated that there was no closer connection to France, even though the employee carried out his work there. Although the eventual outcome is just, this reasoning is not in line with Article 6(2) of the *Convention*. It is the accumulation of the aforementioned connecting factors that should rebut the general presumption of habitually carrying out his work in France in Article 6(2)(a), not the other way around. The courts argumentation would make more sense if it had relied on paragraph 6(2)(b), which would indeed lead to the applicability of Dutch law. However it did not do so expressly and in any case if it relied on subparagraph b, it could then not rebut this subsidiary presumption with the main presumption, which would create a never ending cycle! In her commentary on this case the annotator agreed with the ultimate outcome, but finds the closer connection test to be an apparently very convenient factor for the Dutch courts.[61] Once again this is a peculiar conclusion, because the court did not rely on the exception clause at all.

In 2007 the Court of Appeal of Den Bosch designated Dutch law applicable to an employment contract between residents of Turkey and a Dutch transport company.[62] They received their assignments from the Belgian office of the company and usually drove all through the way Europe, to and from Turkey. No specific country could be appointed, which led to the law of the principal place of business of the employer, pursuant to subparagraph 2(b). The court of appeal found no closer connection to Turkey, even though they always drove to or from Turkey in carrying out their assignments.

58 Art. 4(2) of the Rome II Regulation.

59 Rb. Amsterdam 6 December 2000, LJN AO7194, *S&S* 2004, 5 (*Gomes Moreira v. Scheepvaartonderneming Koningsgracht*).

60 Rb. Utrecht 29 December 2004, *JAR* 2005, 44 (*van Driel v. CCL Label BV*).

61 *Ibid.*, commentary M.S.A. Vegter.

62 Hof 's-Hertogenbosch 10 April 2007, LJN BB2826 (*St. Vervroegde Uittreding v/h beroepsgoederenvervoer o/d weg & de verhuur van mobiele kranen v. X*).

A striking case from August 2007 which also caught the attention abroad[63] concerned a German employee who had carried out her work for a German company in the Netherlands for the last ten years.[64] Consequently the Cantonal Judge of the District Court of Arnhem held Dutch law applicable, even though all other factors pointed to Germany. These factors were: the common German nationality of both parties and Germany as their place of residence, the contract was conducted in the German language and signed in Germany, the employee contributed to the German tax system, received her salary in the German currency and her travel expenses to the Netherlands were reimbursed. Two years later, a case concerning a Dutch employee residing in Germany and all factors pointing to Germany led to the applicability of Dutch law as well.[65] More or less the same connecting factors were raised as in the first case and pointed towards German law. In spite of this, both courts rejected the appeal to the exception clause and again held Dutch law to be applicable.

Another court of appeal held Dutch law applicable to the contract between a Dutch and Moroccan employee and his Moroccan employer.[66] The employee had worked in Morocco for eleven years before being stationed in the Netherlands, where he eventually took up residence with his family -also after becoming unfit to work- and received 70% of his salary. The fact that the other 30% of his salary was received from Morocco, he had previously worked in Morocco, had a residence and relatives there and only spoke French and Arabic and possessed Moroccan nationality were not of enough weight to overrule the general presumption. After all these were mainly subjective factors which would distract from the objective connection test that the *Convention* is designed to promote.

In the case of a Dutch employee residing in Germany versus the Dutch Ministry of Foreign Affairs in Germany, the Court of Appeal of The Hague held Dutch law applicable.[67] It resorted to the exception clause, stating that there was a closer connection to the Netherlands, because the employment contract with the Dutch State referred to Dutch legislation. Also, modification of the contract was only permitted after consultation with a Dutch institute. Furthermore the Netherlands was chosen as the forum. With this last criterion, the Dutch court of appeal seems to express a preference to its own domestic law.

A case that offers detailed insight to the different connecting factors that were considered is one of June 2011.[68] A Dutch pension fund brought a Dutch transport company before the Cantonal Judge of the District Court of The Hague for not paying pension contributions for its 46 English employees. The pension fund supplied the court with the following connecting factors leading to Dutch law: the principal place of business of the transport company, the seat of the

63 R. Plender & M. Wilderspin, *The European Private International Law of Obligations*, Sweet & Maxwell, London, 2009, p. 320.

64 Rb. Arnhem (ktg.) 15 August 2007, LJN BB2067.

65 Hof Arnhem 15 December 2009, LJN BL9006 (*Firma A.S. v. B*).

66 Hof Amsterdam 7 August 2008, LJN BG5130, *RAR* 2009, 31 (*Crédit Du Maroc SA v. X*).

67 Hof 's-Gravenhage 3 November 2009, LJN BK7091 (*A v. The Netherlands*).

68 Rb. 's-Gravenhage (ktg. Delft) 9 June 2011, LJN BR1683, *JAR* 2011, 176 (*Stichting Bedrijfstakpensioenfonds voor het Beroepsvervoer over de Weg v. Post-Kogeko Logistics*).

board of directors, the salary recordings, payment of salary in Dutch currency, the organization of the work, the Dutch license plates, the Dutch transportation licenses and an applicable collective labour agreement. The factors leading to English law according to the pension fund were the residence, workplace and nationality of the employees and the contribution to the social security system and taxes. It argued that the connecting factors leading to Dutch law mainly involved the organization of the work, whilst the factors pointing to English law were of less relevance.

The Dutch transport company rebutted with the following enumeration of factors leading to English law: the residence and nationality of the employees, the place of their social life, the contract being conducted in English, a part of the salary recordings, the contribution to the social security system, pension and taxes, the relapse onto the labour market after termination of the contract and on retirement pension, the payment in English currency to the employees' English bank accounts. The factors leading to Dutch law were their principal place of business, the seat of the board of directors, partial salary recording, the organization of the work, the Dutch license plates, the Dutch transportation licenses and an applicable collective labour agreement.

The court held that both the quantitative and qualitative factors led to the applicability of English law. The court probably came to this conclusion in accordance with Article 6(2)(a), although this is not expressly stated. It appears as if though the court placed all connecting factors on the scale and simply picked the heaviest side. It mentioned that generally, the contracts had a closer connection to the United Kingdom than to the Netherlands and concluded by stating that subsequently, there was no reason to deviate from the general rule. The factor that the contracts were concluded in English was also considered. Bělohlávek states that language can be a factor, but it is not decisive.[69] This is especially so when the language is English it is of little relevance, because this is such a universal language and many international contracts are drafted in English.

The most recent case on employment contracts is a perfect example of the Dutch rigidity when it comes to the exception, more specifically when it threatens to cut off the possibility of applying domestic law.[70] A German employee carried out her work for a German company for over eleven years when a dispute regarding relocation of her activities to Germany arose. The employee argued that Dutch law was applicable to the employment contract, because the Netherlands was the country where she habitually carried out her activities pursuant to Article 6(2)(a) of the *Convention*. However, the employer argued that all other relevant connecting factors pointed towards Germany. He stated that a rejection of the application of the exception clause would basically render it useless.

Strikwerda, the same Advocate General for the Supreme Court who instigated the Court's judgment in the *Balenpers* case, emphasizes that the rationale behind the protection of employees is not to apply the law which offers the most favourable outcome, but the law which safeguards the principles and standards of the

69 A.J. Bělohlávek, *Commentary on the Rome I Regulation*, Juris, Huntington, 2010, p. 794.
70 HR 3 February 2012, LJN BS8791, *NJB* 2012, p. 405 (*Schlecker v. Boedeker*).

economic and social environment of the employees' workplace. Considering the employees' work was of a lasting and permanent nature, the exception clause would detract from the effects of subparagraph 2a and according to Strikwerda should not be applied. The question arises if Strikwerda's opinion would be less rigid if it were the other way around, meaning the employee had habitually carried out her work in Germany but all other factors led to the Netherlands.

The Supreme Court posed the ECJ *inter alia* the following preliminary question:[71]

> "Should Article 6(2) of the Convention on the law applicable to contractual obligations be interpreted in such a way that, if an employee carries out the work in performance of the contract not only habitually but also for a lengthy period and without interruption in the same country, the law of that country should be applied in all cases, even if all other circumstances point to a close connection between the employment contract and another country."

Again this opinion and the ECJ's slightly ambiguous ruling on this matter in the *Heiko v. Koelzsch* case raises the question what exactly the so called "protection" of the employee entails, if it is not to ensure the best possible outcome for the weaker party. Van den Eeckhout calls it "conflict-of-law rules protection", which should ensure the applicability of the law that the employee is the most familiar with.[72] Van Hoek, Zilinsky and Plender and Wilderspin are of the opinion the protection entails the applicability of the law "most favourable to the weaker party", which must be determined in each individual case.[73] Strikwerda seems to imply that the protection entails legal certainty and foreseeability, but not necessarily the application of the most favourable law with the most favourable outcome for the employee. The word "protection" then seems rather artificial, for it does not actually offer actual direct protection to the weaker party, aside from the safeguarding of economic and social principles and standards of the employee's workplace. However it is disputable whether this can be considered as protection, especially if the outcome after applying this law is detrimental to the employee. In the Green Paper, the Commission stated that the exception clause serves to avoid "the harmful consequences of rigid connection of the contract to the law of the place of performance", which in my view supports the idea that "protection"

71 The application to the ECJ has been lodged on 8 February 2012 and has been registered under the case no. C-64/12. It will take at least another year for the ECJ to rule on this question.

72 V. van den Eeckhout, 'Navigeren door artikel 6 EVO-Verdrag c.q. artikel 8 Rome I-Verordening: mogelijkheden tot sturing van toepasslijk arbeidsrecht', 11 *Arbeidsrechtelijke Annotaties* 2010, p. 55.

73 Van Hoek, 2011, note 3c; M. Zilinsky, 'Rome I en arbeidsovereenkomst', *WPNR* 2009-6824, pp. 1031-1032; R. Plender & M. Wilderspin, *The European Private International Law of Obligations*, Sweet & Maxwell, London, 2009, p. 312.

in this context indeed means a substantially more favourable law to the employee.[74]

The last case included, ten out of the fifteen cases resulted in the application of Dutch law. Of the nine cases in which the employee expressed a desire for Dutch law to be applicable, six cases were decided in favour of the employee. On one occasion the Dutch court of appeal had to resort to the exception clause to achieve this outcome. These numbers alone indicate the principle of weaker party protection underlying Article 6 of the *Convention*.

In the majority of the cases, Article 6 was incorrectly applied – although the outcome was just – or the judgment lacked proper motivation and often raised more questions than it answered. Thus the Dutch courts seem to struggle most with the ambiguity of the scope of the general rule of subparagraph 2(a).

The ECJ's preliminary ruling on the most recent case on employment contracts will hopefully be the start of a new Dutch interpretation of the exception clause of Article 8 of the *Regulation*. Although the preliminary questions have been asked with regards to the *Convention*, the answers will also be applicable to the interpretation of the *Regulation*, for the article did not change much, neither in wording, nor in substance. Unfortunately, virtually no case law has been made on Article 8 of the *Regulation* by the Dutch courts, let alone the ECJ. The fact that Article 8 of the *Regulation* does *not* differ much from Article 6 of the *Convention*, might indicate that the Dutch courts must interpret the exception clause in a slightly broader sense.

E. Conclusion

Europe has not yet reached consensus on a uniform interpretation of the exception clauses. The Netherlands is still the frontrunner with its restrictive interpretation. In a way, the *Regulation* has met the strong attitude that the Netherlands has shown towards the exceptions in the wording of the new Article 4. Consequently the case law and interpretation as developed under the *Convention* will continue to apply to the *Regulation*.

With regard to contracts of carriage, in three of the four cases that would have another outcome under the *Regulation*, law undesired by the parties would apply. Taking into account the fact that the new exception clause is formulated much more strictly, it might be more difficult to overrule this subsidiary presumption. No pattern of *Heimwärtsstreben* was detectable in the contracts of carriage cases. The inconsistency in reasoning can mainly be attributed to the unfortunate formulation of the article, which does not exactly encourage a uniform interpretation.

With international employment contracts, a much greater variety of connecting factors can be considered. This complexity is reflected by the judgments of the Dutch courts. Of the fifteen examined cases about employment contracts, only a

74 Greenpaper COM (2002) 654 on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization, Commission of the European Communities, Brussels, 14 January 2003, p. 35.

handful of cases were based on sound reasoning. *Heimwärtsstreben* as a core problem throughout this whole research is without a doubt the most evident in this type of contract. In three cases, the desire of the Dutch courts to apply their own law could not be more evident. In two of them, the employee was Dutch. It could be attributed to the principle of weaker party protection, but when a staggering amount of convincing connecting factors are unable to overrule one single connecting factor, that cover seems highly unlikely. It is disputable whether this should be attributed to the desire of the Dutch courts to apply the *lex fori*, or simply to the principle of weaker party protection underlying in Article 6 of the *Convention*. I expect the ECJ's interpretation to be significantly less rigid and will hopefully evoke a change in the Netherlands.

Dutch courts often rely on a general presumption, but then continue to name more connecting factors pointing to that same law. They seem to consider the general presumption alone of insufficient value and want to strengthen their judgment with more connecting factors. Yet the structure of the articles clearly places the general rule on one side and the possible counter-factors on the other.

If there is anything that would improve a consistent interpretation of the *Regulation* in the future, it would be more transparency in judgments. A systematic approach to the articles, without skipping any steps would hugely contribute to consensus that the community instruments strive to achieve; not only on a national, but also on a European level.

Formulating a rule more restrictively might reduce deviation from the general rule, but will eventually not prevent courts from finding another good enough reason to apply a certain law, if they are determined enough. The ECJ can provide a nudge in the right direction, but it ultimately depends on the national courts and their willingness to adapt to a European consensus.