THE APPLICATION OF THE ROME I AND ROME II REGULATIONS IN THE NETHERLANDS

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1. THE NATIONAL LANDSCAPE

1.1. THE REGULATIONS EMBEDDED IN NATIONAL LAW

Before the Rome I and Rome II Regulations entered into force, Dutch courts determined the law applicable to obligations arising out of contract and tort on the basis of the 1980 Rome Convention and the national Conflict of Laws (Torts) Act,[1] respectively. The Rome Convention remains relevant for contracts concluded before 17 December 2009, while the Conflict of Laws (Torts) Act still applies to harmful events that occurred before 11 January 2009.

Unlike the entry into force of other EU Regulations in the field of private international law, including the Brussels I *bis* Regulation, the entry into force of the Rome Regulations was not accompanied by separate Execution Acts (*Uitvoeringswetgeving*). However, Book 10 of the Dutch Civil Code (*Burgerlijk Wetboek*, DCC), which entered into force on 1 January 2012, contains several provisions relating to the application of Rome I and Rome II.

The Dutch legislator has extended the normal scope of application of the conflict rules of both Rome Regulations. Article 154 of Book 10 DCC states that the provisions of Rome I apply *mutatis mutandis* to obligations to be qualified as contractual but falling outside of the (substantive) scope of the Regulation or any other supranational source. Article 159 of Book 10 DCC contains a similar provision for non-contractual obligations outside of the scope of Rome II. Although it is not stated explicitly, the provisions of Rome I and Rome II do not apply if another European Regulation or a specific provision of national conflicts law regulates the applicable law in relation to the obligation in question. Case law now contains several examples of courts determining the applicable law using the extended application of the Regulations. In this way, courts have applied Rome I's provisions to determine the law applicable to the substantive validity of an arbitration clause,[2] and Rome II's conflict rules to cases of family law,[3] succession,[4] and infringements of personality rights.[5]

Two provisions of Book 10 DCC concern the implementation of Article 7 Rome I: Article 155 extends the free choice of law for insurance contracts covered by Article 7(3) Rome I and in Article 156, the Dutch legislator determines that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.[6] Moreover, Article 158 of Book 10 DCC clarifies that the Hague Traffic Accident Convention and the Hague Product Liability Convention take precedence over Rome II. Remarkably, the DCC contains no similar provision to explicitly establish the hierarchy between the Rome I Regulation and the Hague Agency Convention.[7] However, the priority of the aforementioned conventions already follows from the Regulations themselves.[8]

1.2. CASE LAW ON ROME I AND ROME II

For the purposes of this report, the search engine 'Legal Intelligence' was used. It integrates the content of a large number of existing legal databases.[9] The search results show that as of May 2018, the Dutch courts had

[1] Wet van 11 april 2001, houdende regeling van het conflictenrecht met betrekking tot verbintenissen uit onrechtmatige daad, *Stb.* 2001, 190.
[2] Rb. Amsterdam 11.11.2015, ECLI:NL:RBAMS:2015:8098; Rb. Overijssel 25.06.2014, ECLI:NL:RBOVE:2014:3551. On 01.01.2015 a new provision, Article 166 of Book 10 DCC, entered into force that specifically regulates the applicable law in relation to the substantive validity of an arbitration agreement. As a *lex specialis*, this provision takes precedence over Article 154 of Book 10 DCC.
[3] Hof 's-Hertogenbosch 15.07.2014, ECLI:NL:GHSHE:2014:2181; Rb. Oost-Brabant 03.04.2013, ECLI:NL:RBOBR:2013:BZ7240.
[4] Rb. Amsterdam 27.07.2016, ECLI:NL:RBAMS:2016:4704.
[5] HR 03.06.2016, ECLI:NL:HR:2016:1054 (*Dahabshiil*); Rb. Amsterdam, 09.08.2017, ECLI:NL:RBAMS:2017:5415; Rb. Rotterdam 29.06.2017, ECLI:NL:RBROT:2017:4986; Rb. Amsterdam 21.05.2014, ECLI:NL:RBAMS:2014:3492; Hof 's-Hertogenbosch 17.09.2013, ECLI:NL:GHSHE:2013:4278; Rb. Amsterdam 15.06.2012, ECLI:NL:RBAMS:2012:BW9838.
[6] Compare Article 7(4)(b) Rome I.
[7] However, Article 125 of Book 10 DCC states that the applicable law to agency is regulated by the Hague Agency Convention.
[8] See Article 25(1) Rome I and Article 28(1) Rome II.
[9] Although the vast majority of Dutch lower court decisions are not published, most lower and appellate court decisions by panels of three or more judges are made available on www.rechtspraak.nl, except for decisions that only consist of standard wording. In principle, all decisions

rendered approximately 240 different decisions being published and applying the Rome I Regulation, while in another 50 cases the Regulation was mentioned but found inapplicable *ratione temporis*. In about 200 decisions the courts had applied the Rome II Regulation, whereas the Regulation was mentioned in another around 50 cases falling outside its temporal scope.

The five most-applied Rome I provisions are Article 3 (choice of law), Article 4 (applicable law in the absence of choice), Article 5 (transport contracts), Article 8 (employment contracts), and Article 10 (consent and material validity). The five Rome II provisions that are most often applied are Article 4 (general rule), Article 14 (choice of law), Article 6 (unfair competition and restricting free competition), Article 8 (infringement of intellectual property rights), and Article 10 (unjust enrichment).

In general, the Dutch courts apply the right set of conflict rules. However, there are some exceptions. In two cases, the courts disregarded the universal scope of the Rome I Regulation: they ruled that the Regulation was not applicable because one of the parties was domiciled in Denmark. One court held that the 1980 Rome Convention was applicable instead,[10] whereas the other applied the Rome I Regulation by analogy.[11] In a recent case, the court incorrectly held that the Rome II Regulation was not directly applicable since the case was connected to Serbia and Serbia is not a Member State and thus not a party to the Regulation.[12] In another case, the court assumed that Dutch law was applicable to an international loan agreement, without (explicit) consultation of the European conflict rules (in this case the Rome Convention was temporally applicable).[13]

In other cases, the Dutch courts have erroneously held Rome I/Rome II to be applicable instead of a special convention to which the Netherlands is a contracting state. In a case on agency, the court applied Article 4(1) Rome I, where it should have applied the 1978 Hague Agency Convention.[14] In a product liability case, the Dutch Court applied Article 5 Rome II, instead of the 1973 Hague Product Liability Convention.[15] In another case, which concerned a physical injury caused by a defective tea glass, the court overlooked not only the Hague Product Liability Convention, but also Article 5 Rome II; instead, the court applied the general rule of Article 4 Rome II.[16]

2. THE OPERATION OF ROME I AND ROME II IN PRACTICE

2.1. *LOIS DE POLICE*

In Dutch case law, the role of *lois de police* or overriding mandatory provisions is mainly limited to contracts (Article 9 Rome I). Case law on the Rome II Regulation contains no references to this concept.

One of the most well-known overriding mandatory provisions was Article 6 of the Extraordinary Decree on Labour Relations 1945 (*Buitengewoon Besluit Arbeidsverhoudingen 1945*, BBA). This provision required an employer to request permission from the authorities for a dismissal. Although the legislature remained silent about its application in international cases, in case law the provision has been recognised as an overriding mandatory rule. In the 1980s, the Dutch Supreme Court clarified its scope: employers should ask for permission when the dismissal has an impact on the Dutch labour market. This is especially the case when it is expected that the dismissed employee will seek a new job in the Netherlands or will make use of Dutch social welfare.[17] In 2012, the Dutch Supreme Court changed (or clarified) the scope of Article 6 BBA, by stating that this provision aims to protect employees against unfair dismissal and also applies when the employee's situation cannot be distinguished from that of a Dutch employee who is protected by this provision.[18] The court also confirmed that the application of Article 6 BBA does not depend on the law applicable to the employment contract. In the case in question, the employment contract contained a choice-of-law clause specifying Dutch law, and the employee

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of the Dutch Supreme Court are published. In addition, several legal journals publish case law, sometimes including cases that are not available on www.rechtspraak.nl. Dutch arbitration awards are not systematically published, due to their confidential and private nature. Out of the arbitration awards disclosed and included in the database of 'Legal Intelligence', the vast majority comes from the arbitration board for the building industry (Raad van Arbitrage voor de Bouw). In the rare cases that mention the Rome I Regulation or Rome II Regulation, the Regulation is mostly found inapplicable. For this reason, arbitration awards are further excluded from the present analysis.

[10] Rb. Gelderland 09.12.2015, ECLI:NL:RBGEL:2015:8188

[11] Rb. Noord-Holland 18.04.2018, ECLI:NL:RBNHO:2018:3103.

[12] Rb. Noord-Holland, 28.06.2017, ECLI:NL:RBNNE:2017:2318

[13] Rb. Gelderland 27.07.2016, ECLI:NL:RBGEL:2016:4202.

[14] Rb. Rotterdam 14.10.2015, ECLI:NL:RBROT:2015:7320.

[15] Rb. Noord-Holland 08.12.2015, ECLI:NL:RBNHO:2015:10485.

[16] Rb. Midden-Nederland 01.07.2016, ECLI:NL:RBMNE:2016:3598.

[17] HR 23.10.1987, ECLI:NL:HR:1987:AD0017 (*Sorensen/Aramco*).

[18] HR 24.02.2012, ECLI:NL:HR:2012:BU8512 (*Nuon/Olbrych*).

worked in the Netherlands. The fact that Dutch labour law was applicable pursuant to Article 8 Rome I, however, did not automatically imply the application of Article 6 BBA.

Due to a major revision of Dutch labour law, Article 6 BBA was repealed on 1 July 2015. According to its legislative history, the scope of application of its successor – Article 671a of Book 7 DCC – aligns with Article 8 Rome I,[19] implying that the new provision is not an overriding mandatory provision. This does not mean, though, that the role of *lois de police* within the context of labour relations has been exhausted. Lower and appellate courts are divided on which rules of Dutch labour law are to be considered overriding mandatory rules, however. In 2013, the Court of Appeal of 's-Hertogenbosch held that the provisions of the European Posting of Workers Directive[20] should be regarded as *lois de police*. Moreover, the court held that its scope is extended by the Dutch Employment Conditions Cross-border Employment Act (*Wet Arbeidsvoorwaarden Grensoverschrijdende Arbeid*, WAGA) which transposes the Directive.[21] In a 2016 case, a first instance court qualified the Dutch Act on Compulsory Participation in an Industry-wide Pension Fund 2000 (*Wet verplichte deelneming in een bedrijfstakpensioenfonds 2000*) as an overriding mandatory rule within the meaning of Article 9 Rome I.[22] In 2015, however, a lower court did not find it necessary to clarify whether a provision of national law on the equal treatment of intermediaries should be considered an overriding mandatory rule, since this provision could be applied in any case via Article 8 Rome I.[23]

Outside the context of labour relations, the role of *lois de police* is much more limited. In one case, the court qualified Article 88 of Book 1 DCC as an overriding mandatory rule in the sense of Article 9 Rome I. This provision states that a spouse needs the permission of the other spouse to conclude a contract of guarantee (*borgtochtovereenkomst*). According to the court, the provision applies when the other spouse is domiciled in the Netherlands, irrespective of the law applicable to the contract.[24] However, the prevailing opinion in case law is that the permission of the other spouse falls outside of Rome I's substantive scope. Instead, it should be qualified as an issue of the personal legal relations between the spouses, for which Article 40 of Book 10 contains a specific conflicts rule.[25]

In 2015, the Amsterdam Court of Appeal had to decide whether a provision of Dutch rental law was to be considered an overriding mandatory rule.[26] The court answered the question in the negative. It held that in the case in question, public interests were not sufficiently involved. Yet, it can be inferred from the court's reasoning that another conclusion might have been reached in other circumstances, especially if the tenant was a weaker party protected under Dutch law.

Case law offers few examples of third country overriding mandatory rules. In one case, the court had to determine whether a Turkish rule requiring contracts to be drafted in the Turkish language qualified as an overriding mandatory rule. The court answered in the affirmative: since the rule aims at protecting Turkish citizens with insufficient knowledge of foreign languages, the provision serves a public interest. However, the court held that the case was insufficiently connected with the Turkish legal sphere to apply this provision.[27]

2.2. PARTY AUTONOMY

About 60 per cent of cases examined in which the courts applied the Rome I Regulation concern a choice of law. In the majority of these cases, the parties made an express choice of law, usually included in their contract. However, a choice of law made in the course of the proceedings is also accepted as a means to remedy an invalid choice of law.[28] In several cases, courts have accepted an implied or tacit choice for Dutch law, especially if the parties' pleadings were based on Dutch legislation or case law.[29] However, an agreement to submit disputes to

[19] *Kamerstukken II* 2013/14, 33818, 3, p. 75.
[20] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.
[21] Hof 's-Hertogenbosch 28.05.2013, ECLI:NL:GHSHE:2013:CA1457.
[22] Rb. Noord-Nederland, 15.11.2016, ECLI:NL:RBNNE:2016:4935.
[23] Rb. Midden-Nederland 18.03.2015, ECLI:NL:RBMNE:2015:1752.
[24] Rb. Midden-Nederland 02.08.2013, ECLI:NL:RBMNE:2013:3098.
[25] Rb. Noord-Nederland 01.06.2016, ECLI:NL:RBNNE:2016:2736; Hof 's-Hertogenbosch 11.08.2015, ECLI:NL:GHSHE:2015:3191; Rb. Amsterdam 09.07.2014, ECLI:NL:RBAMS:2014:4641.
[26] Hof Amsterdam 24.02.2015, ECLI:NL:GHAMS:2015:523.
[27] Rb. Amsterdam 24.11.2014, ECLI:NL:RBAMS:2014:8502.
[28] e.g. Rb. Midden-Nederland 12.08.15, ECLI:NL:RBMNE:2015:5882.
[29] Rb. Rotterdam, 21.03.2018, ECLI:NL:2018:3237; Rb. Den Haag 26.10.2016, ECLI:NL:RBDHA:2016:13161; Rb. Rotterdam 23.10.2013, ECLI:NL:RBROT:2013:8186; Rb. Zutphen 15.08.2012, ECLI:NL:RBZUT:2012:BX4722.

arbitration or court litigation in the Netherlands was regarded insufficient to accept a tacit choice for Dutch law.[30]

The validity of a choice of law can be an issue, especially when the choice of law is included in a party's general terms and conditions. In those cases the court will, pursuant to Article 10 Rome I, determine the validity on the basis of the chosen law.[31] Yet, in one case in which parties both referred to the choice-of-law clauses in their own general terms and conditions ('battle of the forms'), the court held that the question as to which party's terms and conditions were applicable had to be determined on the basis of the law applicable to the contract in the absence of choice.[32]

In comparison to Rome I, the role of choice of law is more limited under the Rome II Regulation. Case law shows, however, that courts are often willing to accept both express and implied choices of law in relation to cross-border torts. In practice this usually comes down to the application of Dutch law.[33] If parties make a choice of law, they usually do this in the course of proceedings.[34] This way, the choice of law is in keeping with Article 14(1)(a) Rome II, which states that parties may agree on the applicable law by an agreement entered into after the event giving rise to the damage occurred.

The courts' eagerness to respect party autonomy sometimes leads to dubious outcomes. Within the context of Rome I, courts have sometimes accepted a choice of law in disputes concerning a consumer or labour contract, disregarding the restrictions on party autonomy included in Article 6(2)[35] and Article 8(1) Rome I.[36] Under Rome II, courts have accepted a choice for Dutch law for copyright infringements that had taken place outside the Netherlands,[37] thereby violating Article 8(3) Rome II. Moreover, an implied choice in favour of Dutch law was accepted in a case on unlawful comparative advertising, without making reference to Article 6(4) Rome II, which rules out choice of law for unfair competition.[38]

2.3. ABSENCE OF CHOICE OF LAW

2.3.1. Article 4 Rome I

Article 4(1) Rome I, which contains custom-made conflict rules for specific contracts, is new in comparison to the Rome Convention. Apparently, the change from Convention to Regulation has not given rise to many problems. In general, courts seem to be experiencing little difficulty in putting a contract into one of the categories of Article 4(1).

A large part of the Dutch case law on international contracts concerns the sale of movable goods. The Netherlands is party to the UN Convention on the International Sale of Goods (CISG). It contains uniform substantive rules that – as a general rule – take precedence over conflict-of-laws rules. However, the Rome I Regulation, in particular Article 4(1)(a), providing a conflict rule for sale of movable goods, remains relevant. Its role is twofold. Firstly, courts use the Rome I Regulation to determine the 'complementary' applicable national law[39] that governs issues not regulated by CISG.

Secondly, courts use the Regulation to establish whether CISG is applicable in geographical terms. Unless parties have opted out of CISG, the Convention is geographically applicable if the seller and the buyer have their places of business in a CISG contracting state (Article 1(1)(a) CISG). However, even if this is not the case, CISG is still applicable if – according to the conflict rules of the court seised – the law applicable to the contract is the law of a contracting state (Article 1(1)(b) CISG). This is where Rome I comes into view. In the absence of a choice of law, the court will determine the applicable law pursuant to Article 4 Rome I. Generally, the law of the

[30] Rb. Den Haag 28.05.2014, ECLI:NL:RBDHA:2014:7406; Hof Amsterdam 28.11.2017, ECLI:NL:GHAMS:2017:4959.
[31] See e.g. Rb. Rotterdam 21.10.2015, ECLI:NL:RBROT:2015:8714; Rb. Oost-Brabant 16.04.2014, ECLI:NL:RBOBR:2014:1912; Rb. Rotterdam 29.08.2012, ECLI:NL:RBROT:2012:8663.
[32] Rb. Gelderland 02.03.2016, ECLI:NL:RBGEL:2016:1328.
[33] See e.g. Hof Amsterdam 25.10.2016, ECLI:NL:GHAMS:2016:4212; Rb. Amsterdam 21.09.2016, ECLI:NL:RBAMS:2016:5983; Rb. Rotterdam 30.03.2016, ECLI:NL:RBROT:2016:3638; Rb. Noord-Nederland 18.02.2015, ECLI:NL:RBNNE:2015:698.
[34] Rb. Rotterdam 30.03.2016, ECLI:NL:RBROT:2016:3638; Rb. Amsterdam 18.12.2013, ECLI:NL:RBAMS:2013:9630; Rb. Oost-Brabant 02.12.2013, ECLI:NL:RBOBR:2013:6750.
[35] Hof Arnhem 17.03.2015, ECLI:NL:GHARL:2015:1920.
[36] See Rb. Limburg 25.08.2016, ECLI:NL:RBLIM:2016:7412; Rb. Zwolle 20.01.2010, ECLI:NL:RBZLY:2010:BO9945.
[37] Rb. Amsterdam 21.09.2016, ECLI:NL:RBAMS:2016:5983; Rb. Zutphen 11.11.2009, ECLI:NL:RBZUT:2009:BN4069.
[38] Rb. Oost-Brabant 17.10.2014, ECLI:NL:RBOBR:2014:6281.
[39] e.g. Rb. Gelderland 02.03.2016, ECLI:NL:RBGEL:2016:3134; Rb. Gelderland 14.10.2015, ECLI:NL:RBGEL:2015:7269; Hof Arnhem-Leeuwarden 15.09.2015, ECLI:NL:GHARL:2015:6805; Rb. Overijssel 07.01.2015, ECLI:NL:RBOVE:2015:380; Rb. Den Haag 12.03.2014, ECLI:NL:RBDHA:2014:3082.

country where the seller has his habitual residence will apply pursuant to Article 4(1)(a) Rome I, unless the contract is manifestly more closely connected with another country, in which case the law of that country applies (Article 4(3) Rome I). Consequently, if the provisions of Rome I refer to the law of a contracting state, the court will deem CISG applicable pursuant to Article 1(1)(b) CISG and apply the Convention's uniform rules. If, on the other hand, Rome I refers to the law of a non-contracting state, CISG is not applicable and the court will apply this state's national sales law.

Some cases, however, take the following approach: the court first determines, on the basis of Rome I, which country's law is applicable to the contract and then checks whether this country is party to CISG.[40] In view of Article 1(1)(a) CISG, this approach should be considered incorrect: if both seller and buyer have their place of business in a (different) CISG contracting state, CISG is applicable even when the law applicable to the contract would be that of a non-contracting state.[41]

In a substantial part of the case law examined, the type of contract in question is not listed in Article 4(1) Rome I, and courts resort to Article 4(2) Rome I, which refers to the law of the country where the party required to effect the characteristic performance has his habitual residence. This provision has been applied to a wide variety of types of contracts.[42] In general, courts seem to face little difficulty in establishing which party has to effectuate the characteristic performance. For contracts of guarantee, this is the person who gives a guarantee for repayment.[43] For loan agreements, the person lending the money has been identified as the characteristic performer.[44] In a case concerning a sponsorship contract – in which a Uruguayan company sponsored the acquisition of a football player by Football Club Utrecht, the club was considered the characteristic performer as it had an obligation to let the football player play in the Dutch football league.[45] The company from Uruguay, on the other hand, only had to transfer the sponsorship fee.[46]

Only in rare instances have courts not been able to determine the applicable law pursuant to Article 4(1) and (2). In one case, concerning an agreement to cooperate, the court of The Hague could not identify the characteristic performer. Therefore, it applied Article 4(4) Rome I, which refers to the law of the country the contract was most closely connected with. It held that the contract was most closely connected with the Netherlands, since at the time of signing the agreement, the parties involved were habitually resident in the Netherlands and one other party had Dutch nationality.[47] In another case, the Amsterdam Court of First Instance applied Article 4(4) to determine the law applicable to a settlement agreement.[48]

2.3.2. Article 4 Rome II

Dutch courts have applied Article 4(1) Rome II, which refers to the law of the country where the damage was sustained (*lex loci damni*), in highly diverse cases. They include conspiracy,[49] endangerment,[50] and violation of ownership rights.[51] A relatively high proportion of cases, though, concern the collision of vessels, wrongful arrest/attachment, and director's liability.

The cases regarding the collision of vessels concern inland navigation.[52] The rules in this field of law – at least when the collision is *between* vessels – have been harmonised to a certain degree by the 1960 Geneva Convention,[53] to which the Netherlands is a contracting state. However, even when the Convention applies, the

[40] Rb. Arnhem 10.10.2012, ECLI:NL:RBARN:2012:BY2169; Rb. Rotterdam 08.07.2010, ECLI:NL:RBROT:2010:BN3275.
[41] This could be the case if the law of a non-contracting state would be manifestly more closely connected within the meaning of Article 4(3) Rome II.
[42] e.g. for a contract to reserve ambulances (see Rb. Overijssel 02.03.2016, ECLI:NL:RBOVE:2016:655), a consultancy agreement (see Rb. Leeuwarden 19.10.2012, ECLI:NL:RBLEE:2012:BY0812), combined sale of goods and provision services (see Rb. Rotterdam 29.06.2016, ECLI:NL:RBROT:2016:4913), and a sub-licence agreement (see Hof Arnhem-Leeuwarden 17.02.2015, ECLI:NL:GHARL:2015:1152).
[43] Rb. Den Haag 18.09.2013, ECLI:NL:RBDHA:2013:13451.
[44] Rb. Rotterdam 24.06.2015, ECLI:NL:RBROT:2015:4512; Rb. Den Haag 23.04.2014, ECLI:NL:RBDHA:2014:6909.
[45] Rb. Midden-Nederland 30.12.2015, ECLI:NL:RBMNE:2015:8754.
[46] Rb. Overijssel 02.03.2016, ECLI:NL:RBOVE:2016:655.
[47] Rb. Den Haag 28.05.2014, ECLI:NL:RBDHA:2014:7406. In Rb. Overijssel 22.10.2014, ECLI:NL:RBOVE:2014:5834, the court referred to Article 4(4), whereas it actually meant to apply Article 4(3) Rome I.
[48] Rb. Amsterdam 31.05.2017, ECLI:NL:RBAMS:2017:3650.
[49] Rb. Rotterdam 21.09.2016, ECLI:NL:RBROT:2016:7258.
[50] E.g. Hof 's-Hertogenbosch 09.12.2014, ECLI:NL:GHSHE:2014:5184; Rb. Rotterdam 12.02.2014, ECLI:NL:RBROT:2014:1605.
[51] E.g. Rb. Zeeland-West-Brabant 08.06.2016, ECLI:NL:RBZWB:2016:3515; Rb. Midden-Nederland 19.02.2014, ECLI:NL:RBMNE:2014:550; Rb. Limburg 15.07.2013, ECLI:NL:RBLIM:2013:4521.
[52] E.g. Rb. Rotterdam 25.11.2015, ECLI:NL:RBROT:2015:8534; Rb. Rotterdam 03.07.2013, ECLI:NL:RBROT:2013:6173; Rb. Zwolle 02.05.2012, ECLI:NL:RBZLY:2012:1765.
[53] Convention relating to the unification of certain rules concerning collisions in inland navigation, Geneva, 15.03.1960.

courts still need to determine the 'complementary' applicable law pursuant to Article 4 – which usually will refer to the law of the country where the collision took place.[54]

In cases concerning (alleged) wrongful arrest/attachment, courts generally locate the damage at the place where the arrest was made.[55] Yet, in 2011, in a case concerning the arrest of a ship, the court held that even though at the time of the arrest the ship was situated in Belgium, the damage was sustained in the Netherlands, where the victim resided and where the arrest was registered.[56]

In cases concerning director's liability, the preliminary question arises whether this subject falls within the substantive scope of the Rome II Regulation. After all, Article 1(1)(d) Rome II determines that the Regulation is not applicable to non-contractual obligations arising out of the law of companies regarding matters such as the personal liability of officers. Although the Dutch legislator has 'extended' the substantive scope of the Regulation (see above, section 1.1), the extension will in principle not apply in this case, as Book 10 DCC contains specific conflict rules for issues of company law.[57] Moreover, courts have regularly held that the exception of Article 1(1)(d) Rome II and the specific rules of Book 10 DCC only apply in situations where the director's liability is based on company law, for example when the claims concern personal liability of the director for the company's debts.[58] If the claim against the director is based on general tort law (in the Netherlands: Article 162 of Book 6 DCC), the courts usually consider the claim as falling within the scope of the Rome II Regulation, and apply Article 4 Rome II to determine the applicable law.[59]

In general, the application of Article 4 Rome II does not appear to cause the courts many problems. In cases such as collision of vessels or endangerment, the place of damage is usually easy to establish.

However, sometimes the application of Article 4 Rome II may raise difficulties, for example in cases concerning medical liability or purely financial loss. In general, in medical cases the direct damage will occur at the place of treatment.[60] Sometimes the place of damage is more difficult establish, though. For the purpose of establishing jurisdiction, the Court of Appeal of The Hague had to establish where the damage resulting from a doctor incorrectly implanting birth control had occurred – at the place of the treatment, of the undesired conception, where the pregnancy was discovered, or where the child was born. The court held that the place of damage – which included costs for raising the child and loss of income – was the place where the baby was conceived.[61] In cases of purely economic loss – often considered a potential pitfall[62] – courts have not been hesitant to locate the damage at the place where the victim has his bank account if he also resides there.[63]

Finally, the place of damage can be difficult to determine if the damage occurs in more than one country. The court can decide to apply the 'mosaic approach', which means that the damage occurring in country A will be governed by the law of country A, the damage occurring in country B by the law of country B, etc.[64] However, in the case of defamation and libel, the courts have adopted a different approach. As mentioned above, libel and defamation are excluded from Rome II's substantive scope, but pursuant to Article 159 of Book 10 DCC, the Dutch courts apply the Regulation's conflict rules to these types of cases.[65] In a recent case before the Dutch Supreme Court, the question arose as to where the damage should be located if defamatory statements are

[54] Rb. Rotterdam 17.07.2013, ECLI:NL:RBROT:2013:6174; Rb. Rotterdam 03.07.2013, ECLI:NL:RBROT:2013:6173.
[55] E.g. Rb. Rotterdam 04.05.2016, ECLI:NL:RBROT:2016:3786; Rb. Amsterdam 06.04.2016, ECLI:NL:RBAMS:2016:1938; Rb. Zeeland-West-Brabant 12.03.2014, ECLI:NL:RBZWB:2014:1974; Rb. Arnhem 30.08.2012, ECLI:NL:RBARN:2012:BX8019.
[56] Rb. Dordrecht 28.04.2011, ECLI:NL:RBDOR:2011:BQ4329. The Netherlands is also a contracting state to the 1952 Brussels Convention which contains uniform rules relating to the arrest of sea-going ships. In addition to uniform substantive law this Convention also contains a conflict of laws rule to determine the law applicable to a damages claim: Article 6 refers to the law of the contracting state in whose jurisdiction the arrest was made. In Rb. Rotterdam 27.05.2015, ECLI:NL:RBROT:2015:3919, the court held that the application of Article 6 of the 1952 Brussels Convention led to the same result as Article 4(1) Rome II.
[57] See Article 117 ff. of Book 10 DCC.
[58] See also the Conclusion of Advocate-General Vlas 18.03.2016, ECLI:NL:PHR:2016:139.
[59] See e.g. Rb. Noord-Holland 17.05.2017, ECLI:NL:RBNHO:2017:4029; Rb. Amsterdam 10.02.2016, ECLI:NL:RBAMS:2016:356; Hof 's-Hertogenbosch 16.09.2014, ECLI:NL:GHSHE:2014:3665; Rb. Noord-Nederland 27.03.2013, ECLI:NL:RBNNE:2013:BZ6207; Rb. Utrecht 04.04.2012, ECLI:NL:RBUTR:2012:BW1752. In Rb. Overijssel 27.08.2014, ECLI:NL:RBOVE:2014:4875, the court held that the director's personal liability falls outside the scope of Rome II. However, the court still determined the applicable law pursuant to Article 4 Rome II, while referring to the extension of the substantive scope of Rome II in Article 159 of Book 10 DCC.
[60] X.E. KRAMER and H.L.E. VERHAGEN, *Mr. C. Assers handleiding tot de beoefening van het Nederlands burgerlijk recht. 10. Internationaal Privaatrecht. Deel III. Internationaal Vermogensrecht*, Kluwer, Deventer 2015, no. 1002.
[61] Hof Den Haag 14.10.2004, ECLI:NL:GHSGR:2004:AR5850.
[62] See, inter alia, L.M. VAN BOCHOVE, 'Purely economic loss in conflict of laws: the case of tortious interference with contract' [2016] *Nederlands Internationaal Privaatrecht* 456–465; X.E. KRAMER and H.L.E. VERHAGEN, above n. 60, no. 998.
[63] Rb. Amsterdam 29.07.2015, ECLI:NL:RBAMS:2015:4871; Rb. 19.08.2015, ECLI:NL:RBROT:2015:6045.
[64] See Hof 's-Hertogenbosch 04.08.2015, ECLI:NL:GHSHE:2015:2992.
[65] See e.g. Hof 's-Hertogenbosch 17.09.2013, ECLI:NL:GHSHE:2013:4278; Rb. Amsterdam 15.06.2012, ECLI:NL:RBAMS:2012:BW9838.

published on the Internet.[66] Based on the principle of coherent interpretation between EU private international law instruments, the Supreme Court deemed the CJEU case law on (now) Article 7(2) of the Brussels I *bis* Regulation to be guiding, in particular the *eDate Advertising and Martinez* case.[67] As a consequence, the Supreme Court held that the *locus damni* was situated at the place of the centre of the victim's interests.[68]

2.4. ESCAPE CLAUSES

2.4.1. Article 4(3) Rome I

In general, Dutch courts restrictively apply the escape clause of Article 4(3) Rome I in favour of the manifestly more closely connected law. However, in some cases, this provision has been used to avoid the application of Article 4(1) and (2) Rome I. In a case concerning a loan agreement and a deposit agreement, the court found it unnecessary to identify the characteristic performer since both agreements were clearly most closely connected to the Netherlands.[69]

Courts also restrictively interpret the other escape clauses of the Rome I Regulation, such as Article 8(4) for employment contracts.[70]

2.4.2. Article 4(3) Rome II

In general, the escape clause of Article 4(3) Rome II is not overused. Still, there are considerable differences in the way courts apply this provision. Sometimes the court only briefly states that the escape clause is not applicable.[71] In other instances, the court uses this provision as a 'safety net', by arguing that a certain law – for example Dutch law – applies pursuant to *either* Article 4(1) *or* (3) Rome II.[72] In addition to this, courts occasionally determine the applicable law solely on the basis of Article 4(3) Rome II.[73]

In some cases, courts adopt a more balanced approach to the escape clause. In general, courts draw specific attention to the fact that there is an agreement between the parties.[74] In a case concerning the non-payment of the earnings of a vessel sale, the court held that pursuant to Article 4(3) Rome II Dutch law was applicable. It took into account the parties' country of residence, the fact that there were pre-existing relationships between the parties governed by Dutch law, and that, at the time of the sale, the vessel was situated in the Netherlands.[75] In a case on the medical liability of a physician, pursuant to Article 4(3) Rome II the court applied Belgian law, which also governed the treatment agreement between the victim and the hospital. And this was despite the fact that both patient and physician were habitually resident in the Netherlands, which according to Article 4(2) Rome II would have led to the application of Dutch law. However, in a case concerning conspiracy, the court held that although the case was associated with loan agreements, the escape clause of Article 4(3) Rome II was not applicable since the agreements were not concluded between the two litigating parties.[76] However, even a pre-existing relationship *between the parties* is in itself not necessarily sufficient to assume a manifestly closer connection; the court still has to take into account all the other circumstances of the case.[77]

2.5. SPECIFIC RULES

2.5.1. Specific Rules in Rome I

[66] HR 03.06.2016, ECLI:NL:HR:2016:1054 (*Dahabshiil*).
[67] Joined Cases C-509/09 and C-161/10, *eDate Advertising and Martinez* [2011] ECR I-10269.
[68] HR 03.06.2016, ECLI:NL:HR:2016:1054 (*Dahabshiil*), para. 4.11.2. See in similar fashion Hof 's-Hertogenbosch 06.10.2015, ECLI:NL:GHSHE:2015:3904. See also L.M. VAN BOCHOVE, 'Onlogisch analogisch. De overeenkomstige toepassing van Europese conflictregels in grensoverschrijdende smaadzaken ex artikel 10:159 BW', in F.Q. VAN DER POL et al. (eds.), *Vijftig weeffouten in het BW*, Ars Aequi Libri, Nijmegen 2017, pp. 377-383.
[69] Rb. Amsterdam 12.11.2014, ECLI:NL:RBAMS:2014:7138.
[70] e.g. Hof Amsterdam 28.11.2017, ECLI:NL:GHAMS:2017:4959; Rb. Midden-Nederland 22.07.2015, ECLI:NL:RBMNE:2015:5393.
[71] Rb. Rotterdam 30.09.2015, ECLI:NL:RBROT:2015:6864; Rb. Rotterdam 19.08.2015, ECLI:NL:RBROT:2015:6045; Hof 's-Hertogenbosch 04.08.2015, ECLI:NL:GHSHE:2015:2992.
[72] Rb. Rotterdam 09.12.2015, ECLI:NL:RBROT:2015:9110; Rb. Zeeland-West-Brabant 12.03.2014, ECLI:NL:RBZWB:2014:1974; Rb. Arnhem 30.08.2012, ECLI:NL:RBARN:2012:BX8019.
[73] Rb. Gelderland 23.07.2014, ECLI:NL:RBGEL:2014:5618; Rb. Oost-Brabant 19.02.2014, ECLI:NL:RBOBR:2014:1584; Rb. Den Haag 23.04.2014, ECLI:NL:RBDHA:2014:6909.
[74] e.g. Rb. Dordrecht 04.07.2012, ECLI:NL:RBDOR:2012:BX1353.
[75] Rb. Noord-Nederland 13.03.2013, ECLI:NL:RBNNE:2013:BZ7200. The court, however, did not answer the question of which law would have been applicable pursuant to Article 4(1) Rome II, i.e. whether or not the escape clause was needed to apply Dutch law.
[76] Rb. Rotterdam 21.09.2016, ECLI:NL:RBROT:2016:7258.
[77] Hof 's-Hertogenbosch 15.07.2014, ECLI:NL:GHSHE:2014:2181.

In the field of transport law, there are ample international instruments containing harmonised substantive law. Case law shows that Dutch courts usually first check whether or not such an instrument is applicable. However, the special conflict rules of Article 5 Rome I for transport contracts remain relevant for two reasons: (1) to establish the law applicable to transport contracts which fall outside the scope of the international instruments, such as multimodal carriage,[78] and (2) to determine the supplementary applicable law, i.e. the law applicable to specific issues not regulated by the relevant international instrument.[79]

The conflict rule for consumer contracts in Article 6 Rome I has been applied in only a limited number of cases. One case, which was decided by the Amsterdam Court of Appeal, provides a good illustration of the courts' approach to a choice-of-law clause in contracts involving a consumer. First, the court checked whether or not the contract in question was a consumer contract within the meaning of Article 6(1) Rome II. After concluding that the requirements of Article 6(1) were fulfilled, the court held that the choice of law for Maltese law could not deprive the consumer of the protection he received on the basis of mandatory law of the country of his habitual residence, the Netherlands. The court did not make a comparison between Dutch and Maltese law to determine which law offers a higher degree of protection; instead it simply held the protective mandatory provisions of Dutch law to be applicable.[80] Not all courts, however, do things by the book. In one case, the Court of Appeal of Arnhem merely held that Article 6 does not stand in the way of a choice of law and applied the chosen (Dutch) law. The court did not consider it relevant to check whether or not the contract – concluded between a Dutch bank and a consumer habitually resident in Germany – fulfilled the requirements of Article 6(1).[81] The question of whether or not a person is acting in the exercise of his trade or profession within the meaning of Article 6(1) Rome I was raised in a case concerning the renting of property. According to the court, the fact that the defendants rented out the property, in which they had previously lived themselves, at a profit, was not enough to consider them professional landlords.[82]

In all cases found regarding insurance contracts, parties made a choice of law.[83] As said in the introduction, the Dutch legislature has extended the freedom to choose the applicable law to an insurance contract falling under the scope of Article 7(3) Rome I.

When determining the law applicable to an employment contract, the place where the employee habitually carries out his work is the primary connecting factor pursuant to Article 8 Rome I. Case law shows that locating the habitual place of work may raise difficulties, especially in relation to truck drivers.[84] In one decision, in order to establish this place, the Court of Appeal took into account the place from where the employee carried out his transport orders, received instructions and organised his work, in addition to the place where the trucks were located, the places where the transport was mainly carried out, where the goods were delivered and the place where the driver returned to after completing his orders.[85]

How should the habitual place of work of an employee who carries out a great deal of his work from home be determined? According to a (questionable) decision, remote work using an electronic connection with the employer's office in another country should be equated with working in that office.[86]

Article 8(2) Rome I states: 'The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.' In a case concerning Portuguese and Polish temporary workers, employed by an Portuguese and an English temporary work agency, the court had to determine whether the work carried out by the employees on a Dutch road and tunnel, for which they had concluded a special agreement with their agency, was to be considered temporary in the sense of Article 8(2) Rome I. The court held that the fact that the workers had been employed by the agencies before in other countries was not relevant; the habitual place of work had to be determined solely for the employment contracts in question. It argued that a fixed-term contract does not necessarily imply temporary work. This decision has been criticised,[87] especially since Recital 36 Rome I states that the conclusion of a new employment contract with the employer 'should not preclude the employee from being regarded as carrying out his work in another country temporarily'.

[78] e.g. Rb. Rotterdam 29.06.2016, ECLI:NL:RBROT:2016:4923; Rb. Noord-Holland 03.04.2013, ECLI:NL:RBNHO:2013:CA0271.
[79] Hof 's-Hertogenbosch 21.06.2016, ECLI:NL:GHSHE:2016:2474; Rb. Rotterdam 24.12.2014, ECLI:NL:RBROT:2014:10513.
[80] Hof Amsterdam 25.10.2016, ECLI:NL:GHAMS:2016:4212.
[81] Hof Arnhem-Leeuwarden 17.03.2015, ECLI:NL:GHARL:2015:1920.
[82] Hof Amsterdam 24.02.2015, ECLI:NL:GHAMS:2015:523.
[83] Rb. Oost-Brabant 20.01.2016, ECLI:NL:RBOBR:2016:232; Rb. Rotterdam 23.12.2015, ECLI:NL:RBROT:2015:9586; Rb. Rotterdam 15.10.2014, ECLI:NL:RBROT:2014:8785.
[84] e.g. Rb. Den Haag 09.06.2011, ECLI:NL:RBSGR:2011:BR1683; Rb. Maastricht 08.02.2011, ECLI:NL:RBMAA:2011:BP5801.
[85] Hof Arnhem-Leeuwarden 17.05.2016, ECLI:NL:GHARL:2016:3792.
[86] Rb. Den Haag 10.05.2016, ECLI:NL:RBDHA:2016:5102.
[87] See E.J.A. FRANSSEN's case note on ECLI:NL:RBDHA:2016:5102 in *Jurisprudentie Arbeidsrecht* 2015/203.

The implications of Article 8(1) Rome I, which aims to protect the employee from a choice of law imposed on him by the employer, are sometimes overlooked. In several cases, courts have accepted a choice of law in the employment contract pursuant to Article 3 Rome I without further ado.[88] In another case, the court (wrongly) paraphrased Article 8(1) by stating that this provision merely makes explicit the fact that parties can choose the law applicable to their employment contract pursuant to Article 3 Rome I. Thus, the court ignored the second sentence of Article 8(1), which states that the choice of law may not deprive the employee of the protection offered by mandatory provisions of the objectively applicable law.[89]

2.5.2. Specific Rules in Rome II

Of the conflict rules for specific torts and delicts in Rome II, Dutch courts have almost exclusively applied Article 6 (unfair competition and restricting competition) and Article 8 (infringement of intellectual property rights). In only one case, which concerned the pollution of surface water as a result of a vessel collision, did the court hold that pursuant to Article 7 juncto 4(1) Rome II Dutch law was applicable as the *lex loci damni*.[90] Article 9 (industrial action) was applied in one case.[91] In addition, Article 5 Rome II was applied once, even though the court actually should have applied the 1973 Hague Product Liability Convention.[92]

Article 6 Rome II has been applied mostly in cases of unfair competition. In only one case, which concerned cartel damage, did the court make reference to the market rule of Article 6(3) Rome II, even though the Regulation was not temporally applicable to that case.[93] In all other cases, the courts have applied Article 6(1) and (2) Rome II. Two cases concern the taking advantage of a breach of contract, in which the courts (correctly) concluded that the act exclusively affects the interests of one specific competitor and applied Article 6(2) in conjunction with Article 4 Rome II.[94]

Misleading and unlawful comparative advertising is generally considered to affect more than just the interests of only one competitor and thus to fall within the scope of Article 6(1) Rome II.[95] However, in one case, the court failed to apply Article 6 to a claim based on unfair comparative advertising.[96] Instead, it found an implied choice for Dutch law on the basis of Article 14 Rome II. In a case concerning slavish product imitation, the court applied Article 4 instead of Article 6 Rome II.[97]

Article 8 Rome II is most frequently used in relation to copyright infringements.[98] Since intellectual property law is a field with a high degree of harmonisation of law at the international level, the question of concurrence of sources of law arises. An important question in this respect is whether or not the Berne Convention and Paris Convention contain a choice-of-law rule.[99] Both the Dutch Supreme Court and the Court of Appeal of The Hague have answered this question in the affirmative in respect to the Berne Convention.[100] In two cases, the Rotterdam Court of First Instance ruled accordingly, by giving preference to the Berne Convention on the basis of Article 28 Rome II.[101] Other courts have evaded the discussion by assuming that the conflict rule of the Convention and Article 8(1) Rome II both lead to the application of the *lex loci protectionis*.[102] Finally,

[88] Rb. Limburg 25.08.2016, ECLI:NL:RBLIM:2016:7412; Rb. Zwolle 20.01.2010, ECLI:NL:RBZLY:2010:BO9945.
[89] Rb. Limburg 29.09.2016, ECLI:NL:RBLIM:2016:8473.
[90] Rb. Rotterdam 20.07.2016, ECLI:NL:RBROT:2016:6041. In Rb. Rotterdam 25.11.2015, ECLI:NL:RBROT:2015:8534 and Rb. 30.09.2015, ECLI:NL:RBROT:2015:6864 the court did not refer to Article 7 Rome II even though the cases concerned environmental damage.
[91] Rb. Rotterdam 22.04.2015, ECLI:NL:RBROT:2015:3783.
[92] Rb. Noord-Holland 08.12.2015, ECLI:NL:RBNHO:2015:10485. See above, section 1.2.
[93] Rb. Gelderland 24.09.2014, ECLI:NL:RBGEL:2014:6118.
[94] Rb. Midden-Nederland 15.07.2015, ECLI:NL:RBMNE:2015:5500; Rb. Almelo 07.03.2012, ECLI:NL:RBALM:2012:BV8702.
[95] Rb. Rotterdam 10.06.2013, ECLI:NL:RBROT:2013:CA2928; Hof Den Haag 29.01.2013, ECLI:NL:GHDHA:2013:BZ0458.
[96] Rb. Oost-Brabant 17.10.2014, ECLI:NL:RBOBR:2014:6281.
[97] Rb. Arnhem 14.09.2012, ECLI:NL:RBARN:2012:BX9527.
[98] e.g. Rb. Oost-Brabant 27.02.2015, ECLI:NL:RBOBR:2015:1328; Rb. Amsterdam 24.12.2014, ECLI:NL:RBAMS:2014:9087; Rb. Haarlem 07.12.2011, ECLI:NL:RBHAA:2011:BV6111; Hof Den Haag 12.07.2011, ECLI:NL:GHSGR:2011:BR1364.
[99] See also S.J. SCHAAFSMA, 'Rome II: intellectuele eigendom en oneerlijke concurrentie' [2008] *Weekblad voor Privaatrecht, Notariaat en Registratie* 998–1003.
[100] HR 13.12.2013, ECLI:NL:HR:2013:1881; Hof Den Haag 22.09.2015, ECLI:NL:GHDHA:2015:2592.
[101] Rb. Rotterdam 16.03.2016, ECLI:NL:RBROT:2016:2045; Rb. Rotterdam 20.01.2016, ECLI:NL:RBROT:2016:550.
[102] e.g. Hof Den Haag 02.02.2016, ECLI:NL:GHDHA:2016:217; Hof Den Haag 12.07.11, ECLI:NL:GHSGR:2011:BR1364. Compare also Rb. Den Haag 22.03.2011, ECLI:NL:RBSGR:2011:BS8763, in which the court argued that the national treatment principle of Article 2 of the Paris Convention for the Protection of Industrial Property can also be regarded as a conflict of laws rule for unfair competition. Yet the court held that Article 2 Paris Convention and Article 6(1) Rome II will lead to the same result: application of the law of the country where competitive relations are affected.

according to some courts, only Article 8(1) Rome II was relevant. Their approach implicitly rejects the view the Conventions contain a choice-of-law rule.[103]

The scope of Article 8 Rome II can give rise to difficulties, as is shown in a decision of 2009. In this case, the court wrongly qualified the law of database protection as *sui generis*, holding a choice by the parties for Dutch law valid pursuant to Article 14 Rome II.[104] In doing so, the court neglected Recital 26 Rome II, which states that the term 'intellectual property rights' of Article 8 Rome II also includes the right for the protection of databases. This means that the court should have determined the applicable law on the basis of this provision, which does not allow for a choice of law.

2.6. RULES APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS OTHER THAN TORTS

The application of the conflict rules for non-contractual obligations other than torts does not appear to be problematic for the courts. In several cases, the courts have relied on the law applicable to the relationship (tort or contract) between the parties closely connected with the unjust enrichment (Article 10(1))[105] or *negotiorum gestio* (Article 11(1)).[106] In some instances, though, the courts have applied the law of the country where parties both have their habitual residence, on the basis of Article 10(2) Rome II.[107]

Only in a few cases has Article 12 Rome II on *culpa in contrahendo* been applied. In these cases, the courts connected the applicable law governing pre-contractual relations to the law which would have been applicable to the contract had it been entered into.[108] Nevertheless, a different approach was adopted in a case in which the plaintiff argued that the defendant's behaviour during negotiations was contrary to the principles of reasonableness and fairness.[109] There can be little doubt that the claim concerned 'a non-contractual obligation arising out of dealings prior to the conclusion of a contract' within the meaning of Article 12 Rome II. The court, however, determined the applicable law on the basis of Article 4(1) Rome II, as the claim was based on tort/delict, thereby arguably overlooking the autonomous characterisation of *culpa in contrahendo* for the purposes of the Rome II Regulation.[110]

2.7. RULES OF SAFETY AND CONDUCT

Article 17 Rome II on rules of safety and conduct, was mentioned in two cases. One case concerned an observation balloon, to be used for surveillance at large events. The balloon, for which the British Civil Aviation Authority had issued an administrative permit, was released in England. The cable attached to the balloon broke, which caused the balloon to float away, all the way to the Netherlands. When it landed, the balloon damaged a high-tension cable. Although the court was concise in its reasoning, it appeared to accept that, pursuant to Article 17 Rome II, the British safety rules applied to the balloon's release.[111]

Another case concerned a person, domiciled in the Netherlands, who got injured in Turkey at a waterslide in a swimming pool. Although the incident took place in Turkey, the court held that the dispute was governed by Dutch law, since parties agreed on the application of Dutch law, including the Dutch rules of safety and conduct. The court explicitly stated that, along with the parties, it assumed the applicability in Turkey of the European safety standard for waterslides.[112] At first sight, it seems peculiar that the court did not determine whether or not Turkey was bound by this European safety standard. Yet, assuming the European safety standard is at least as high as the Turkish standards, it is difficult to argue that the court should have rejected the choice for this standard made by the parties.

2.8. *RENVOI*

[103] e.g. Rb. Midden-Nederland 25.03.2015, ECLI:NL:RBMNE:2015:1096; Rb. Haarlem 07.12.2011, ECLI:NL:RBHAA:2011:BV6111.
[104] Rb. Amsterdam 01.10.2009, ECLI:NL:RBAMS:2009:BJ9179.
[105] Rb. Zeeland-West-Brabant 08.06.2016, ECLI:NL:RBZWB:2016:3515; Rb. Rotterdam 23.05.2014, ECLI:NL:RBROT:2014:4707; Rb. Zwolle 17.09.2012, ECLI:NL:RBZLY:2012:BY1774.
[106] Rb. Rotterdam 29.06.2016, ECLI:NL:RBROT:2016:4960; Rb. Rotterdam 07.08.2015, ECLI:NL:RBROT:2015:5907.
[107] Rb. Noord-Holland 09.12.2015, ECLI:NL:RBNHO:2015:10691; Rb. Den Haag 22.02.2012, ECLI:NL:RBSGR:2012:BV7139.
[108] Rb. Midden-Nederland 30.12.2013, ECLI:NL:RBMNE:2013:7419; Hof 's-Hertogenbosch 14.12.10, ECLI:NL:GHSHE:2010:BO8197; Rb. Rotterdam 21.10.2009, ECLI:NL:RBROT:2009:BK3279.
[109] Rb. Gelderland 14.10.2015, ECLI:NL:RBGEL:2015:6306.
[110] See Recital 30 of Rome II's preamble.
[111] Rb. Rotterdam 19.06.2015, ECLI:NL:RBROT:2015:4199.
[112] Rb. Oost-Brabant 02.12.2013, ECLI:NL:RBOBR:2013:6750.

The exclusion of *renvoi* in the Rome I (Article 20) and Rome II Regulation (Article 24) is in line with Dutch national conflicts law (Article 5 of Book 10 DCC). This exclusion also corresponds with the Dutch courts' generally hostile attitude towards *renvoi*.[113] Only in exceptional cases – outside the scope of Rome I and Rome II and their predecessors – has *renvoi* been accepted to correct the result of the conflict rules.[114]

2.9. FOREIGN LAW

As a rule, a Dutch court has to apply the conflict rules as well as the substantive law applicable pursuant to these conflict rules *ex officio*. The application of foreign law on the court's own motion has been the prevailing opinion in case law for many years and has been confirmed in Article 2 of Book 10 DCC. There are, however, some restrictions to this rule. In the first place, the court of appeal is in principle bound by the decision of the lower court in relation to the applicable law, except when one of the parties files a complaint against this decision. The same is true for the court of final appeal: the Dutch Supreme Court cannot determine the applicable law *ex officio*. In addition to this, Article 79 of the Judicial Organisations Act (*Wet op de Rechterlijke Organisatie*) explicitly excludes violation of foreign law from the grounds of cassation. Furthermore, in interim proceedings, the courts may apply Dutch law, when (the contents of) the applicable law cannot be established with reasonable certainty, given the constraints of time.[115] Finally, in a judgment rendered in 2015, the Dutch Supreme Court seems to 'soften' the duty for courts to apply foreign law on their own motion.[116] One could infer from this case that it is up to the parties to inform the court on the contents of foreign law and – possibly – even substantiate this by submitting foreign legislation, case law or literature.

In order to establish the contents of foreign law, courts make use of several sources. They use legislation, case law and handbooks, available in specialised libraries such as the Peace Palace Library in the Hague, and/or Internet sources, including the information made available on the European e-Justice Portal. In addition to this, courts turn to one of the institutes specialising in the application of foreign law, such as the International Legal Institute (*Internationaal Juridisch Instituut*, IJI).[117] The more formal route provided for by the European Convention on Information on Foreign Law of the Council of Europe is rarely used, even though the Netherlands is one of the contracting parties,.

The court has to determine the contents of foreign law on its own motion, but in practice parties and their lawyers have an important role in this regard. Parties often provide information on the contents of foreign law on their own initiative. The court also invite the parties to deliver this information, although this should not be seen as a court order to provide evidence. The parties' involvement in establishing the contents of foreign law has increased over the past few years. This may be explained by the fact that as of 2010 the Council for the Judiciary no longer bears the responsibility for the costs connected to the IJI providing advice on foreign law. Instead, the courts themselves have to finance 50 per cent of the hourly rate the IJI charges for its advisory service.

In general, Dutch courts do not compromise the universal scope of Rome I and Rome II. On the basis of these Regulations, Dutch courts have applied, inter alia, Malaysian law,[118] Costa Rican law,[119] New York law,[120] Ukrainian law,[121] and the law of Greenland.[122] Still, as mentioned in section 2., courts regularly invite parties to make an explicit choice for Dutch law in the course of the proceedings, or derive an implied choice for the law of the Netherlands from the parties' behaviour.

2.10. *ORDRE PUBLIC*

In the cases examined, the public policy exception was rarely invoked. However, in one case involving a claim in tort the court held on the basis of national conflicts law – as Rome II was not applicable due to its temporal scope – that awarding punitive damages on the basis of Israeli law would be contrary to Dutch public policy. The court did not, however, apply the *lex fori*. Instead, it dismissed the claim.[123]

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[113] A.P.M.J. VONKEN, *Mr. C. Assers handleiding tot de beoefening van het Nederlands burgerlijk recht. 10. Internationaal Privaatrecht. Deel I. Algemeen deel IPR*, Kluwer, Deventer 2013, no. 437.
[114] See the Conclusion of Advocate-General Strikwerda 01.10.2004, ECLI:NL:PHR:2004:AP2680, within the context of family law.
[115] Rb. Noord-Nederland 01.06.2016, ECLI:NL:RBNNE:2016:2736.
[116] HR 16.10.2015, ECLI:NL:HR:2015:3092.
[117] See e.g. Rb. Gelderland 05.02.2014, ECLI:NL:RBGEL:2014:586, in which the court referred to the Internationaal Juridisch Instituut's questions on the application/interpretation of Swedish contract law.
[118] Rb. Rotterdam 21.09.2016, ECLI:NL:RBROT:2016:7258.
[119] Hof Arnhem-Leeuwarden 18.02.2014, ECLI:NL:GHARL:2014:1208.
[120] Rb. Limburg 28.05.2014, ECLI:NL:RBLIM:2014:4725, confirmed in Hof 's-Hertogenbosch 06.06.2017, ECLI:NL:GHSHE:2017:2512.
[121] Rb. Amsterdam 14.12.2016, ECLI:NL:RBAMS:2016:8264.
[122] Rb. Amsterdam 09.06.2011, ECLI:NL:RBAMS:2011:BQ7690.
[123] Rb. Utrecht 24.10.2012, ECLI:NL:RBUTR:2012: BY2102.

2.11. COMPENSATION

For a long time, the level of compensation for pecuniary and non-pecuniary damage in the Netherlands was on or even below the average of the other European countries.[124] However, based on more recent case law, an upward trend can be identified, in any event in the compensation of immaterial damage.[125] No conclusions on the sufficiency of compensation for victims in cross-border cases can be drawn from the available information.

2.12. RELATIONS WITH INTERNATIONAL CONVENTIONS

Being the host country of the Hague Conference on Private International Law, the Netherlands is party to many Hague Conventions. In view of the aim of this report, attention will be paid to the problem of concurrence between Rome I and the 1978 Hague Agency Convention, and between Rome II on the one hand and the 1971 Hague Traffic Accidents Convention and the 1973 Hague Product Liability Convention on the other hand.

The problem of concurrence between the Hague Agency Convention and Rome I does not arise in relation to the question whether an agent is able to bind a principal in relation to a third party, as this issue is excluded from Rome I's substantive scope (Article 1(2)(g) Rome I).[126] By contrast, both the relationship between the agent and the principal and the relationship between the agent and the third party fall within the scope of Rome I. Yet in these cases, the Hague Agency Convention should be given precedence pursuant to Article 28 Rome I.[127] The practical implications of this are limited, however. Both Article 6 Hague Agency Convention and Article 4 Rome I will generally refer to the law of the country of the agent's habitual residence. Moreover, both instruments accept party autonomy.

Both the Hague Traffic Accident Convention and the Hague Product Liability Convention take precedence over Rome II. This follows from Article 25 Rome II, and is confirmed in Article 158 of Book 10 DCC.

In the vast majority of cases,[128] the Hague Traffic Accident Convention and Rome II will refer to the law of the same country, namely the country where the traffic accident took place.[129] Usually, the place of the accident (*locus delicti*, the connecting factor of Article 3 Hague Convention) will also be the place of damage (*locus damni*, the connecting factor of Article 4(1) Rome II).[130] However, divergence between the results is more likely to occur when Article 4 of the Hague Traffic Accident Convention applies, which refers to the internal law of the country where the vehicle is registered.[131] This connecting factor is absent in Rome II. Conversely, the Hague Convention contains no equivalent of Article 4(2) Rome II, referring to the law of the country where both parties have their habitual residence. The question of which party would benefit from the application of Rome II instead of the Convention is not easy to answer. Case law offers two examples in which the conflict rules of the Hague Convention referred to foreign law, whereas, if Article 4(2) Rome II had been applied, Dutch law would have governed the claim.[132] However, in order to establish whether Dutch law actually offers the victim better protection than foreign legal systems, thorough comparative research would be required.

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[124] See in relation to non-pecuniary loss, inter alia, S.D. LINDENBERGH, 'Smartengeld: ontwikkeling en stilstand', *Smartengeld*, ANWB, The Hague 2006, p. 6, 11; L.T. VISSCHER, 'QALY in de vaststelling van smartengeld bij letsel' [2013] *Tijdschrift voor Vergoeding Personenschade* 94.

[125] S.D. LINDENBERGH, 'Smartengeld anno 2017' <https://www.smartengeld.nl/pagina/smartengeld-anno-2017> accessed 01.05.2018. See also the Bill on Affectionate Damage (*Wetsvoorstel Affectieschade*), *Kamerstukken II* 2014/15, 34257, no. 2, which aims to introduce a legal basis for the compensation for bereavement.

[126] Dutch courts determine the applicable law on the basis of Article 11 ff. of the Hague Agency Convention, See e.g. HR 16.09.2016, ECLI:NL:HR:2016:2118; Hof Amsterdam 02.02.2016, ECLI:NL:GHAMS:2016:362; Rb. Overijssel 17.06.2015, ECLI:NL:RBOVE:2015:3123.

[127] e.g. Hof Den Haag 23.06.2015, ECLI:NL:GHDHA:2015:3304; Rb. Amsterdam 16.04.2013, ECLI:NL:RBAMS:2013:BZ9386; Rb. Utrecht 25.04.2012, ECLI:NL:RBUTR:2012:BW5342.

[128] A search, conducted on 01.05.2018, on the Hague Traffic Accident Convention in 'Legal Intelligence' resulted in 30 cases in which the Convention was applied. In the vast majority of these cases, the application of Rome II would (most probably) have led to the same outcome.

[129] e.g. Rb. Midden-Nederland 14.09.2016, ECLI:NL:RBMNE:2016:5346; Rb. Gelderland 23.03.2016, ECLI:NL:RBGEL:2016:1907; Rb. Amsterdam 26.07.2012, ECLI:NL:RBAMS:2012:BX4272.

[130] However, in exceptional cases these places can be situated in different countries. In Rb. Zeeland-West-Brabant 17.12.2014, ECLI:NL:RBZWB:2014:8827, a car driver chased a horse and cart. He forced them into the kerb, thereby frightening the horse, which escaped and eventually ran through a glass shop window. Due to this, the horse was severely injured. Although both the accident and the damage occurred in the same country – the Netherlands – this could have been different, especially in view of the fact that the series of events took place in the town of Baarle-Nassau, which is closely linked to the Belgian exclaves of Baarle-Hertog.

[131] In Hof Arnhem-Leeuwarden 19.08.2014, ECLI:NL:GHARL:2014:6502, concerning an accident in Scotland between motorbikes, the court held that Dutch law was applicable as the internal law of the country of registration (Article 4(a) and (b) Hague Traffic Accident Convention). However, as both parties where domiciled in the Netherlands, the application of Rome II, more specifically Article 4(2), would probably have led to the same result.

[132] See Hof 's-Hertogenbosch 15.04.2003, ECLI:NL:GHSHE:2003:AF7941 and Hof Arnhem 18.05.2004, ECLI:NL:GHARN:2004:AP0037. The first case concerned a traffic accident in Indonesia with a rented car (registered in Indonesia). Pursuant to the Hague Traffic Accident

Case law in which the Hague Product Liability Convention has been applied is scarce. Hence, it is difficult to draw general conclusions as to whether the solutions are truly different from the possible results of applying Rome II.[133] One case, however, shows that the fact that the connecting factors of Articles 4 and 5 of the Hague Convention, on the one hand, and Article 5 Rome II, on the other hand, diverge raises questions as to the scope of the latter provision.[134] The case concerned an employee (domiciled in the Netherlands) of a Dutch company who was posted to work for a Belgian company. One day, the employee was injured after the heavy door of the cabin in which the employee carried out his work fell down and hit his foot. The Dutch employer filed a damages claim against the Belgian company, submitting that the Belgian company produced and installed the cabin, and therefore was liable on the basis of product liability. On appeal, the court held that, pursuant to Article 4(b) of the Hague Product Liability Convention, Belgian law was applicable since the accident occurred in Belgium, which was also the principal place of business of the company claimed to be liable. However, the court made a reservation by adding that this was true 'insofar as the claim falls within the Convention's substantive scope'.[135] Judging by the wording of the Hague Convention, it is not unlikely that the claim indeed falls within the Convention's scope. Conversely, it is highly doubtful that the claim also falls within the substantive scope of Article 5 Rome II. After all, this provision attaches importance to the question of where the product was marketed, and the product in question (the cabin) was not marketed in any country. Presuming Article 5 Rome II would not apply, the applicable law has to be determined on the basis of Article 4 Rome I, which in this case would probably refer to Belgian law since the (initial) damage occurred in Belgium. Hence, the application of Rome II in this case would probably have led to the same outcome as the application of the Hague Product Liability Convention.

3. GENERAL EVALUATION AND CONCLUSION

It appears from the Dutch case law that the transition from the Rome Convention to the Rome I Regulation has caused few problems. Courts generally understand the functioning of the new Article 4 Rome I, including the list of the eight specific contracts in Article 4(1). The substitution of the Dutch Conflict of Laws (Torts) Act with Rome II was not problematic either. This can be attributed to the fact that the provisions of the Act are very similar to the Rome II provisions.[136]

In the majority of cases, Dutch courts do not encounter major difficulties when applying the Rome I and Rome II Regulations. Often, the courts accept a choice of law by the parties – made either in advance or during the proceedings, and either explicit or implicit. Although in most cases examined the courts ultimately applied Dutch law, the courts generally respect both their duty to apply the conflict rules of the Regulations *ex officio* and the universal scope of the Regulation. When the conflict rules of Rome I or Rome II refer to a foreign legal system, the court will apply this law on its own motion, although in practice parties often take the initiative to inform the court of the content of foreign law. Moreover, the exact scope of this duty has been called into question following a recent decision of the Dutch Supreme Court.[137]

The case law examined shows that courts sometimes make mistakes, however. In some instances, courts have ignored the precedence of a specific convention over the Rome II Regulation. A more common mistake is applying a general provision instead of the conflict rule that specifically regulates the law applicable to the contract, delict or quasi-delict in question. This can have significant implications, for example where the court accepts a choice of law in cases where the European legislator actually ruled out or limited party autonomy.

The above-mentioned errors do not seem to point to structural problems in the application of the Regulations. They do, however, show that judges are occasionally not fully aware of the basics of European conflicts law. A possible explanation is that, in recent decades, most Dutch law schools have decreased the role of private

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Convention, Indonesian law, being the law of the country of the accident, applied. The result under Rome II would (probably) have been different, as both the person claimed to be liable and the victim were domiciled in the Netherlands. Pursuant to Article 4(2) Rome II, Dutch law would have been applicable, assuming that the court would not find Indonesia manifestly more closely connected with the tort (Article 4(3) Rome II). The second case concerned an accident in Turkey that involved a car registered in the Netherlands and a motorbike registered in Turkey. Pursuant to Article 3 Hague Traffic Accident Convention, Turkish law was applicable. Again, the result would have been different under Rome II as both the person whose liability was claimed (the insurance company) and the victim were habitually resident in the Netherlands.

[133] In Rb. Noord-Holland 08.12.2015, ECLI:NL:RBNHO:2015:10485, the court erroneously applied Article 5 Rome II, instead of Article 5 of the Hague Product Liability Convention. The application of the Hague Convention would nonetheless have led to the same result.

[134] Hof 's-Hertogenbosch 02.12.2014, ECLI:NL:GHSHE:2014:5073.

[135] *Ibid*., para. 3.7.

[136] See also J.A. VAN DER WEIDE, 'Het verwijzingsrecht voor niet-contractuele verbintenissen Europees geregeld. Een analyse van de Verordening Rome II' [2008] *Nederlands Tijdschrift voor Europees Recht* 214, 225.

[137] See above, section 2.9.

international law in their educational programmes, despite the expansion of national, European and international legislation in this area of law. Continuing training of the judiciary, as well as the reinstatement of the position of private international law in the university curriculums, is therefore recommended.

Questions of a more fundamental nature relate to the application of Article 4(1) Rome II, which refers to the law of the country where the damage occurred. The first issue concerns the way in which courts apply this provision in purely economic loss cases. Case law shows the courts' current readiness to locate the place of damage at the place where the victim holds a bank account and is domiciled. However, the European case law casts certain doubts with regard to the correctness of this approach, since the CJEU – within the context of (now) Article 7(2) Brussels I *bis* Regulation – has held that purely financial damage which occurs directly in the applicant's bank account is not, in itself, a 'relevant connecting factor' for establishing jurisdiction, even when the victim is domiciled in the country where the bank account is held.[138]

The second issue concerns the application of Article 4(1) Rome II in defamation cases. In order to establish the place of damage within the meaning of this provision, in 2016 the Dutch Supreme Court imported the 'centre-of-the-victim's-interests' criterion from CJEU case law. The 2016 caseraises the question whether this criterion, developed within the context of the EU jurisdiction rules, is also appropriate for determining the applicable law in a defamation case, especially in view of the universal scope of the Rome II Regulation. There is a risk that a Dutch court will have to apply strict foreign defamation laws to claims against journalists, bloggers, etc., domiciled in the Netherlands.[139] This could result in a decision by a Dutch court stating that a publication is wrongful, whereas pursuant to Dutch law the publication is permitted. Evidently, the issue touches on fundamental principles underlying the Dutch legal order, in particular the freedom of expression. The public policy exception could possibly be used to correct an undesirable result, but given the narrow scope of this exception it is doubtful whether it is sufficient to avert the danger.

It should be noted that, at first glance, the European legislature is not to blame in this matter. After all, by excluding defamation from Rome II's the substantive scope it has made clear the Regulation's provisions do not apply to this field of law. The aforementioned risk is first and foremost a consequence of the fact that the Dutch legislature has extended the scope of Rome II, in combination with the way in which the Dutch Supreme Court interpreted the 'place of damage' within the context of Article 4(1) Rome II. Still, the problem would presumably not have occurred if either the Rome II Regulation had been applicable in defamation cases, particularly if it had contained a specific conflict rule on defamation. This is something to consider in preparation for the reform of Rome II. Alternatively, a provision explicitly dealing with the question of the law applicable in defamation cases could be introduced at the national level.

Finally, attention should be paid to two new challenges for the European and/or national legislature, namely the rise of collective actions and the increasing importance attached to the concept of international corporate social responsibility.

Dutch law contains several provisions that provide for a remedy in mass damages cases. Article 305a–c of Book 3 DCC contain a legal basis for representative collective action. However, at present this provision explicitly rules out the possibility to request pecuniary damages. In addition, the Dutch Collective Settlements Act (*Wet Collectieve Afwikkelingen Massaschade*, WCAM), which entered into force on 27 July 2005, arranges for collective redress in mass damages on the basis of a settlement agreement binding all persons covered by its terms, except for those who choose to opt out. Over the past years, the private international law aspects of the Dutch provisions on collective redress have received considerable attention in scholarship.[140] The research focuses, however, mainly on international jurisdiction and recognition and enforcement. The role of the question of the applicable law is considered a matter of much less importance. This is especially true for WCAM settlements, which usually contain a choice-of-law clause.[141] However, in view of the legislative draft to extend the scope of Article 305a–c of Book 3 DCC to pecuniary damages claims,[142] it is likely that in future the courts

[138] Case C-12/15, *Universal Music*, ECLI:EU:C:2016:449, para. 38. See also Case C-168/02, *Kronhofer* [2004] ECR I-06009, para. 21.
[139] See M. TEEKENS's case note on ECLI:NL:HR:2016:1054 in *Jurisprudentie in Nederland* 2016/155.
[140] See, inter alia, T. ARONS and W.H. VAN BOOM, 'Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from the Netherlands' [2010] *European Business Law Review* 857–883; H. VAN LITH, *The Dutch Collective Settlements Act and Private International Law*, Maklu, Apeldoorn 2011; A. HALFMEIER, 'Recognition of a WCAM settlement in Germany' [2012] *Nederlands Internationaal Privaatrecht* 176–184; N. PETERS and M.H. TEN WOLDE, 'De Wet collectieve afwikkeling massaschade: wat is zij waard in het buitenland?' [2013] *Nederlands Tijdschrift voor Burgerlijk Recht* 3–14; M.W.F. BOSTERS, *Collective redress and private international law in the European Union. Issues regarding jurisdiction and the recognition and enforcement of judgments in cross-border mass disputes relating to financial services*, T.M.C. Asser Press/Springer, The Hague 2016.
[141] See VAN LITH, above n. 141, pp. 137–139.
[142] *Kamerstukken II* 2016/17, 34608, 2.

will encounter problems in relation to the applicable law in mass damages cases. Consequently, it is recommended that this issue be addressed during the preparations for the reform of Rome II.

A second issue that deserves further consideration is that of the legal duties in relation to human rights of EU-based companies who pursue business activities in developing countries (international corporate social responsibility). Under certain conditions, the general provisions of Dutch tort law provide for a legal basis to hold companies responsible for human rights violations committed in the course of their business activities or those of their subsidiaries or supply chain partners. However, it raises the question of the extent to which Dutch courts can apply Dutch legislation, especially in view of the fact that in the vast majority of cases the *locus damni* will be situated in the developing country, which may not provide possibilities for legal redress.[143] Therefore, it is recommended that the European legislature examines the possibilities of introducing a provision that specifically deals with the applicable law question in relation to non-contractual liability arising out of extra-territorial human rights violations committed within the context of business activities.[144]

[143] In three much-debated judgments of 18.01.2015, The Hague Court of Appeal accepted jurisdiction in cases brought by Nigerian residents and a Dutch environmental association against Shell for environmental damage caused in Nigeria by Shell's subsidiaries, see ECLI:NL:GHDHA:2015:3586, ECLI:NL:GHDHA:2015:3587, and ECLI:NL:GHDHA:2015:3588. The court held that pursuant to the Dutch Conflict of Laws (Torts) Act (Rome II was inapplicable *ratione temporis*) Nigerian law applied to the claims. Yet it should not be ruled out that the claims would succeed under Nigerian common law; see C. DE GROOT, 'The "Shell Nigeria Issue": Judgments by the Court of Appeal of The Hague, The Netherlands' [2016] *European Company Law* 98–104.

[144] See also L. ENNEKING et al., 'Zorgplichten van Nederlandse ondernemingen inzake internationaal maatschappelijk verantwoord ondernemen. Een rechtsvergelijkend en empirisch onderzoek naar de stand van het Nederlandse recht in het licht van de UN Guiding Principles' <https://www.wodc.nl/binaries/2531-volledige-rapport_tcm28-73868.pdf> accessed 01.05.2018, p. 453.