

4 ECO

- 4.1 Introduction to ECO
- 4.2 Conditions on the use of ECO
- 4.3 Content of ECO
- 4.4 Combination of EEX and ECO
- 4.5 Law applicable to international torts

European Regulation on Contractual
Obligations 81
Rules of reference 81
Member States of the ECO 81
Universal effect of the ECO 82
General provisions of the ECO 82
Freedom of choice 82
No choice of law is made 83

Characteristic performance 83
Immovable property 84
Consumer contracts 85
Employment contracts 86
Mandatory rules 89
Material validity 90
Formal validity 90
Applicable law to torts 92

International contracts and conflicts: which law holds the solution?

Mr. Laurent, a schoolteacher living in France, closes a contract of sale with Schmitt GmbH, a company established in Germany. Schmitt is to deliver 10 cases of wine to Laurent. The delivery is carried out correctly. However, because Laurent has not yet paid for several shipments, the German seller has retained the ownership of the goods until payment has been received from the French buyer. Laurent pays the last delivery, but still Schmitt refuses to transfer the ownership of the goods because of several other payments by Laurent that have

not been made. Laurent subsequently goes bankrupt. Obviously, there is a conflict between Schmitt and Laurent, the contracting parties who are from different States. What law has the solution to this conflict? Had French law been applicable to this international contract of sale between Laurent and Schmitt, Laurent would have been the owner of the goods, whereas under German law, Schmitt would still have had the legal right to retain ownership of the total of 1,000 cases of wine for a longer period.

4.1 Introduction to ECO

In Chapter 1, the three main issues of international private law were discussed, the second of which was the law applicable to contract or the tort involved. This question becomes relevant when the parties involved are from different countries. This is set out by the EC Regulation on the law applicable to Contractual Obligations (hereinafter referred to as ECO). As natives of any country are inclined to depend on their own national laws to settle legal conflicts, which may arise out of contractual relationships, a choice has to be made. As in the introductory case study, it is necessary to know which national law applies in a certain situation.

European
Regulation on
Contractual
Obligations

The issue (Question 2 of Chapter 1) of which national law applies in a certain situation (i.e. one involving contracts) is dealt with by the ECO. The first issue of international private law, what court of law has jurisdiction in a certain case (Question 1 of Chapter 1), is dealt with by the EEX (Chapter 3). Looking back at Chapter 3, bear in mind that the answer to Question 1 about which court of law has jurisdiction, has no connection to, or effect on the answer to Question 2. It is, for example, quite possible that a French court of law would have to apply German law, as in the introductory case illustrating the conflict between Laurent and Schmitt.

What is very important to remember at this stage is that the ECO does not provide a competent court of law with an immediate solution to a conflict between two contracting parties. The ECO only gives so-called 'rules of reference'. In other words, the rules of the ECO dictate which law should be applied to a disputed contract. It is this law which will resolve the conflict between the two parties. The ECO does therefore not provide answers to questions such as: 'Can I claim damages?' or 'Is it possible to nullify the contract?', but only answers such as 'German law' or 'English law' and it is these national laws which will provide answers to those questions mentioned above.

Rules of
reference

4.2 Conditions on the use of ECO

The ECO applies to contractual obligations in any situation involving a choice between the laws of different countries. The Member States of the ECO are all EC members except for the United Kingdom and Denmark, who chose not to be bound by this Regulation. Both countries will remain bound to the former EC Convention on the law applicable to Contractual Obligations. The Regulation and the Convention basically have the same content when it comes to the topics of this Chapter.

Member States
of the ECO

According to Art. 25 ECO, the ECO should not be used if there is a Convention or Treaty dealing with the same subject in as much detail as the ECO. As a result, should a problem arise e.g. in an international contract of sale that meets the requirements of Art. 1 of the Convention of the International Sale of Goods (CISG), then ECO must not be used to solve the legal conflict. In such a case the court of law would immediately turn to the CISG (Chapter 5). However, in cases where the CISG cannot be used or

= gao-filling

EXAMPLE 4.1

In the introductory case study, Laurent and Schmitt are in conflict over the transfer of the ownership of goods from seller Schmitt to buyer Laurent. Had Laurent been a company, established in France, the parties themselves and their contract would have been subject to Art. 1, 1 CISG (Chapter 5).

As the CISG, however, has no provision as to when a party becomes the owner of goods delivered to him, the ECO must be used to determine the law applicable to their contract of sale. The answer to their legal problems lies in whichever national law the ECO indicates.

According to Art. 1, 2 ECO the ECO does not apply to e.g. contractual obligations relating to wills and succession, or property rights arising from a matrimonial relationship. Furthermore agreements on arbitration and on which court of law should have jurisdiction (Art. 23 EEX) are not governed by the ECO; separate Treaties concern themselves with all these issues.

Universal effect of the ECO

Art. 2 ECO deals with the so-called 'universal effect' of the ECO. While the ECO only determines the applicable law, Art. 2 ECO says that that law must be applied. It is irrelevant at this point that this law may not be the law of a Member State.

EXAMPLE 4.2

A company established in Switzerland delivers goods to Moleman, a buyer living in Holland. As agreed on by the parties, the place of delivery of the goods is Amsterdam (Holland). On delivery, the buyer checks the goods and finds them not to be in order.

The buyer starts litigation against the seller. A Dutch court of law has jurisdiction (Art. 2 and 5, 1 EEX) and has the option of applying Swiss law (Art. 4 ECO) to the international sales contract, even though Switzerland is not a Member State (Art. 2 ECO).

4.3 Content of ECO

This paragraph explains the following Articles of the ECO:

- The choice of law made by contracting parties in Art. 3 and 4 ECO (paragraph 4.3.1).
- Law applicable to consumer contracts in Art. 6 ECO (paragraph 4.3.2).
- Law applicable to individual employment contracts in Art. 8 ECO (paragraph 4.3.3).
- Law applicable under certain circumstances in Art. 9 ECO (paragraph 4.3.4).
- Formal validity of a contract in Art. 11 ECO (paragraph 4.3.5).

4.3.1 The choice of law made by contracting parties (Art. 3, 4 ECO)**General provisions of the ECO**

The general provisions of the ECO are mentioned in Art. 3 and 4 ECO. Under Art. 3 ECO contracting parties have the opportunity to choose the law that will govern their contract; there is freedom of choice. This

EXAMPLE 4.3

Becker, from Germany, sells his yacht, which is currently moored in the harbour at Monaco, to Lacoste, who lives in Monaco. The sale of the yacht is concluded in Monaco. Delivery and payment of the yacht are made at Lacoste's apartment. This is an international contract (Art. 1 and 3 ECO).

EXAMPLE 4.4

Johnson, an Englishman living in Amsterdam (Holland), sells a batch of 1,000 Korean lamps to LeBrun, a Frenchman living in Utrecht (Holland). Delivery and payment are made in Holland. This is not an interna-

tional contract as both parties are domiciled in Holland. Their nationality is not relevant. Dutch law applies to their contract; they cannot change this by opting for the law of a different country (Art. 1 and 3 ECO).

A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. While it is therefore not mandatory to put this choice of law in writing, it is preferable, when drawing up the contract, that it should be. The choice of law is in most cases put in writing either in the contract itself or in the terms of sale and delivery. Keep in mind that the ECO at this point provides parties with all kinds of opportunities to choose the governing law. They can make a different choice at different parts of the contract (Art. 3, 1 ECO). They can also change the choice of law after concluding the agreement (Art. 3, 2 ECO). Art. 3 ECO applies to international contracts and, as explained earlier, parties cannot by their choice of law make their contract an international contract.

If no choice of law is made by the parties or the choice made by the parties cannot be demonstrated with reasonable certainty, Art. 4 ECO takes effect. Art. 4, 1 ECO says that if no choice of law has been made, the law applicable to the contract can be derived from one of the situations displayed in 4, 1 ECO (a) tot (h) inclusive. Art. 4, 1 ECO mentions the law applicable to several contracts e.g.:

- contract for the sale of goods: the applicable law to this contract is the law of the country where the seller has his habitual residence,
- contract for the provision of services: the applicable law to this contract is the law of the country where the service provider has his habitual residence,
- franchise contract: the applicable law to this contract is the law of the country where the franchisee has his habitual residence,
- contract of distribution: the applicable law to this contract is the law of the country where the distributor has his habitual residence.

Where the contract is not covered by Art. 4, 1 ECO, the contract shall be governed by the law of the country where the party who is to effect the

No choice of law is made by the parties

significant action of this particular contract. A significant action can never be paying an amount of money as this happens with nearly all contracts.

Examples of characteristic performances under Art. 4, 2 ECO:

- contract for rent: the characteristic performance is effected by the landlord,
- employment contract: the characteristic performance is effected by the employee,
- contract for an agent: the characteristic performance is effected by the agent.

Note that the payment of money between contracting parties occurs in all the contracts mentioned above. For that reason payment can never be seen as a characteristic performance of any contract.

EXAMPLE 4.5

Murphy Ltd., a seller established in the UK, delivers goods to Jansen, a buyer living in Holland. At the moment of delivery in Amsterdam, the buyer checks the goods and finds them not to be in order. The buyer starts litigation against the seller. What law should be applied to this contract? Parties have not already made a choice of law (Art.

3 ECO) and therefore we need to establish the law applicable to the contract by means of Art. 4 ECO. Art. 4, 1, (a) ECO says that a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence. As the seller is from the UK, British law must be applied to this sales contract.

Immovable property

Art. 4, 1, (c) ECO states that a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated. Notwithstanding Art. 4, 1, (c) ECO, Art. 4, 1, (d) ECO states that a tenancy of immovable property concluded for temporary private use for a period of no more than 6 consecutive months shall be governed by the law of the country where the landlord has his habitual residence. That is, if the tenant is a natural person and has his habitual residence in the same country as the landlord. If that is not the case, one must opt for Art. 4, 2 ECO.

EXAMPLE 4.6

Jansen, living in Amsterdam (Holland), and De Bruijn, living in Rotterdam (Holland), close a contract of sale concerning a villa. This villa is situated near Montpellier (France). Jansen and De Bruijn draw up a preliminary contract, in which buyer De Bruijn retains the right to nullify the contract if financing the purchase should prove to be impossible. Jansen and De Bruijn make an appointment with a notary, established in France, to sign

the 'compromis de vente', a legal document required by French law for the sale of immovable property. However, De Bruijn refuses to sign this document, relying on the provision mentioned in the preliminary contract. Seller Jansen nullifies the preliminary contract. According to Art. 4 ECO French law governs this contract, as the villa is situated in France.

Art. 5 ECO determines the law applicable to a contract for the carriage of goods. This contract shall be governed by the law of country in which, at the moment the contract is concluded, the carrier has its principle place of business. But this is only the case when:

- the place of loading of the goods, or
- the delivery address for the goods, or
- the place where the consigner is situated,

is the same country as the one where the carrier is established.

The correct interpretation of Art. 5 ECO has given rise to controversy e.g. in situations where all the places mentioned in Art. 5 ECO are in different countries.

EXAMPLE 4.7

Huisman Fruit & Vegetables B.V., a company in Holland, come to an agreement with Giscard Import & Export Trading S.a.r.l., a company established in France. The agreement is about a weekly delivery of fresh fruit and vegetables from Huisman to Giscard for a period of 6 months. Giscard has arranged for Klein Transporte GmbH, a company established in Holland, to take

care of the transport of the goods. Klein will collect the goods from a warehouse belonging to Huisman. As Giscard and Klein made no decision about applicable law, Dutch law will govern the contract for the carriage of goods under Art. 5 ECO. Both the place where the carrier is situated, as well as the place of loading of the goods, is situated in Holland.

Also note that with some contracts it is almost impossible to determine the characteristic performance: in case of contracts of joint venture, in contracts dealing with the cooperation between two parties, contracts for the exchange of goods a characteristic performance is not easily determined (Art. 4, 4 ECO). In such cases (international) courts of law have tended to decide for themselves the characteristic performance.

4.3.2 Law applicable to consumer contracts in Art. 6 ECO

In Art. 6 special provisions are given concerning certain consumer contracts. Art. 6 ECO takes effect only when no choice of law has been made by the parties to the consumer contract.

Consumer contracts

Under Art. 6, 1 ECO, a *consumer* is someone acting outside his trade or profession. If the consumer closes a contract with a person acting in the exercise of his trade or profession, the *professional*, this contract shall be governed by the law of the country of the consumer, provided that the professional:

- pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
- by any means, directs such activities to that country or to several countries including the country where the consumer has his habitual residence.

The law of the country of the consumer must be applied to the consumer

EXAMPLE 4.8

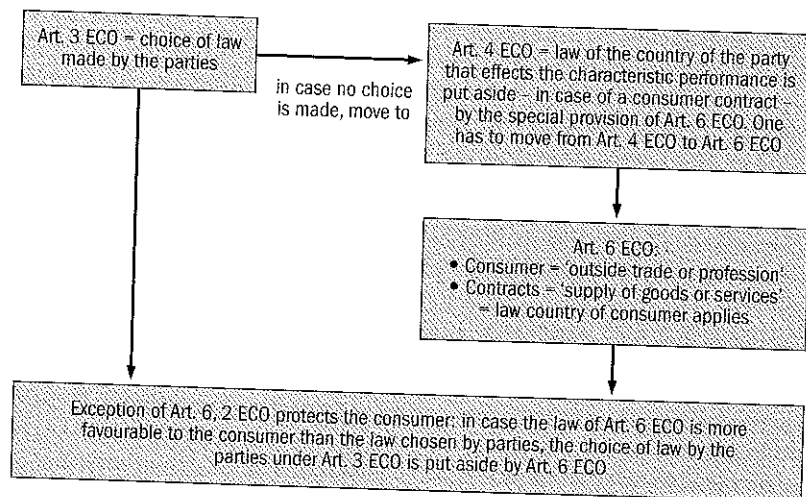
In the market square at Enschede (Holland), Rekers, from Almelo (Holland), buys a tree for his garden from Bäumer GmbH, a company established in Germany. The German seller had put an advertisement in the local newspaper for the Enschede region, inviting all citizens to come to the Enschede market square on that particular

Saturday to buy a tree from Bäumer. According to Art. 6, 1 ECO, Rekers is also a consumer and the sales contract is also a consumer contract. So Dutch law is applicable to this contract, because the contract was concluded in the State where the consumer lives, i.e. The Netherlands, and was preceded by an advertisement.

According to Art. 6, 2 ECO any choice of law made by the parties under Art. 3 ECO cannot ultimately deprive the consumer of the protection of the law of his own country, which would be the applicable law under Art. 6 ECO. So under this provision a consumer, engaged in a lawsuit against a contracting party, may use whichever law is more favourable to him, even if the consumer and his counterpart have already chosen to apply a different law to their contract.

Schedule 4.1 illustrates the relationship between Art. 3 ECO (choice of law made by the parties), Art. 4 ECO (applicable law when no choice was made) and Art. 6 ECO (special provisions for law applying to certain consumer contracts).

SCHEDULE 4.1 Relationship Art. 3, 4 and 6 ECO



4.3.3 Law applicable to individual employment contracts (Art. 8 ECO)

Art. 8 ECO is another special provision, which applies to individual employment contracts. These employment contracts should also be international contracts (Art. 1 and 3 ECO) in order for the ECO to apply.

There are two options concerning the law applicable to an individual employment contract:

- parties – employer and employee – choose the applicable law themselves according to Art. 3 ECO, or
- if they have not chosen the applicable law, they must turn to the law given under Art. 8 ECO.

Art. 8, 2 ECO says that if an employer and employee have not chosen the law which will apply to the employment contract, then the law of the country where the employee usually works is the law which will apply.

EXAMPLE 4.9

Vink, living in Deventer (Holland), is employed by Hausmacher Immobilien GmbH, a company established in Bielefeld (Germany). As no choice of law was made by employer and employee in the individual employment contract (Art. 3 ECO does not

apply), Art. 8, 2 ECO determines that German law will govern this contract. Germany is the country where Vink usually works. This would also seem fair enough to the German colleagues of this Dutch employee.

If the employee is working in several different countries at the same time, the law of the country of the employer should be used instead, according to Art. 8, 3 ECO.

EXAMPLE 4.10

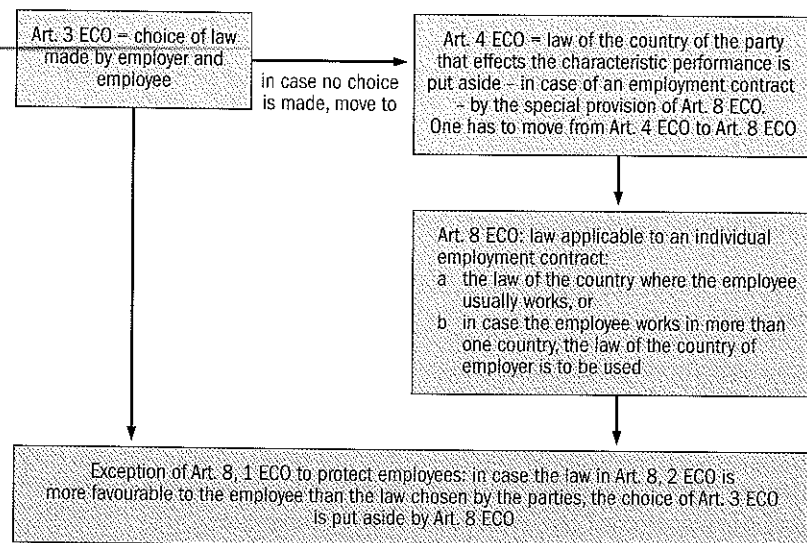
Jansen, a student living in Amsterdam (Holland), applies for a post with Mueller GmbH, a shipping company established in Hamburg (Germany). She is hired by Mueller's Rotterdam (Holland) office to assist on Rhine cruises organised by the company. The ship travels from Holland, through Germany to Switzerland, and back.

Two months later, Jansen has not been paid anything approaching the salary they had agreed on. If no provisions were made regarding this matter, then Dutch law is applicable under Art. 8, 3 ECO. Jansen was hired by the Rotterdam (Holland) Mueller branch office, therefore Dutch law applies to this employment contract.

According to Art. 8, paragraph 1 ECO, any choice of law made by the parties (employer and employee) under Art. 3 ECO cannot ultimately deprive the employee of the protection of the law of the country where he usually works, which would be the applicable law under Art. 8, 2 ECO. Art. 8, 1 ECO states that an employee, engaged in a lawsuit against his employer, may use whichever law is more favourable to him, even though employer and employee have already chosen to apply a different law to the employment contract.

Schedule 4.2 illustrates the relationship between Art. 3 ECO (choice of law

SCHEDULE 4.2 Relationship Art. 3, 4 and 8 ECO



The following case from the Dutch Supreme Court demonstrates how Dutch courts apply Art. 8, 1 ECO.

Case of Sanchez

Facts

Dutch Supreme Court (Hoge Raad) 8-1-1991, NJ 1991, 296

Juan Sanchez Martinez, of Spanish nationality, had been an employee of the Spanish airline Iberia since 1951. He worked for Iberia in Spain until 1961, in Switzerland until 1972, in Germany until 1975, and finally in Holland.

There he had the position of general manager ('Director de la Compania en Holanda') with the Dutch branch of Iberia. Sanchez lived in Amsterdam in an apartment paid for by Iberia. He received his salary plus expenses in NLG; he also received an amount of money in Spanish pesetas from Iberia, which he used to pay for his pension plan in Spain, among other things. Sanchez reported to his Spanish superiors, who gave him their instructions directly from Spain.

The contract by which Sanchez was appointed general manager in Holland was finalised in Madrid. The contract had the following paragraph, which was signed by both parties: 'Taking into account that my working contract has been finalised in Spain, any question related to the practice or suspension of the position as manager shall be subject to Spanish law and Spanish courts.'

On April 13th 1983 Sanchez was fired for taking bribes.

Sanchez sued his employer before a Spanish court of law and demanded that his discharge be reversed. All Spanish courts of law denied his claim. Then he turned to the Dutch Magistrate's Court in Amsterdam and requested the reversal of his discharge (...).

Art. 3 ECO applies: valid choice made in writing for Spanish law
Art. 23 EEX: the choice as regards the court with jurisdiction was made in writing

Verdict: effect of Art. 8, 1 ECO for Sanchez

Iberia claims that Spanish law should be applied here, because both parties agreed to this in writing. Sanchez claims that Dutch law, which would be more favourable to him, should be applied instead.

The Dutch Supreme Court decides that Dutch law should be applied here according to art. 8, 1 ECO. Even though both parties made a choice of law under art. 3 ECO, this choice cannot deprive Sanchez of whatever protection is available to him under Dutch law, (according to art. 8, 2 ECO), Holland being the country where Sanchez usually works.

4.3.4 Law applicable under certain circumstances (Art. 9 ECO)

An exception to the rules mentioned in Art. 3 – 6 ECO inclusive, is given in Art. 9 ECO. This article was put into the ECO as a result of a verdict given by the Dutch Supreme Court. The fundamental point of this exception is that a court of law can decide to ignore the rules of Art. 3 – 8 ECO inclusive and instead apply the mandatory rules of another law to the contract in question if there are special circumstances which would allow this. The verdict of the Dutch Supreme Court does not indicate what circumstances are 'special' enough in order to do this. Furthermore, in the case itself the exception was mentioned but not used.

Mandatory rules

The content of Art. 9 ECO is derived from the Alnati case.

Case of Alnati

Facts

Dutch Supreme Court (Hoge Raad) 13-5-1966, NJ 1967, 3

A Dutch potato trader buys a quantity of potatoes in France and then sells them to a client in Brazil. Van Nievelt, a ship owner established in Holland, transports the potatoes from Antwerp (Belgium) to Rio de Janeiro. A Dutch insurance company insures the consignment on board the ship 'Alnati'. When the potatoes are delivered in Brazil, there is some damage to the cargo, caused by seawater.

In the documents concerning this freight, the applicable law chosen is Dutch. As Dutch law has fewer options to claim damages from the Dutch insurance company than Belgian law, parties quarrel over what law should be applicable in this case. Dutch law, according to the choice made by both parties, or Belgian law, because it contains several mandatory rules about transport and the liability of the transport company.

Verdict

Because both parties chose to apply Dutch law, the fact that mandatory Belgian (international private) laws exist presents no obstacle to any Dutch court of law wishing to apply Dutch law, even though Dutch law differs from mandatory Belgian law.

However, when conflicts like this arise, it is possible for a Dutch court of law to take into consideration the interests of a foreign state in the execution of some of its laws outside its territory and therefore a Dutch court of law has the authority to give preference to this law over the law of another country chosen by the contracting parties. But in this case there are no circumstances that oblige the Dutch court of law to use Belgian law instead of the Dutch law chosen by the parties.

4.3.5 Material and formal validity of a contract (Art. 10, 11 ECO)

Material validity Art. 10 concerns the material validity of a contract. This Article provides rules to establish whether the content of a contract is valid or not. The decision is based on the law which is applicable to the contract under the ECO.

EXAMPLE 4.11

Blits Images B.V., a photo agency established in Amsterdam (Holland), makes an agreement with Bild Zeitung (Germany) about the sale and supply of 5 photos of a former German tennis celebrity and his new

girlfriend in Amsterdam. The contract states that Dutch law is applicable (Art. 3 ECO). Whether or not it is legal to distribute these photos i.e. the material validity of this contract depends on Dutch law.

Formal validity Art. 11 is about formal validity. Formal validity means whether or not a contract can be deemed valid after having examined the legal formalities involved in that contract. Formalities are whether a contract must be put in writing, or whether a notary's document is required. Art. 11, 1 ECO: as long as the contract meets the formal requirements of the law chosen by the parties (Art. 3 ECO, choice of law) or the law of the country where the contract was concluded (that is, in the event this is different from the law chosen by the parties) the contract is formally valid. Thus, according to Art. 11, 1 ECO there are two circumstances in which a contract can be deemed to be formally valid. It is enough for a contract to be formally valid if only one applies.

EXAMPLE 4.12

Rubens, from Brussels (Belgium), concludes a verbal contract with Schneider, from Emden (Germany), at an auction in Frankfurt (Germany). The contract concerns the sale and delivery of a painting by Rubens to Schneider. Both parties decide that Belgian law should be applicable to their contract.

According to German law, the contract is valid only if it is in writing. Under Belgian law, it can be made verbally. According to Art. 11, 1 ECO the contract is formally valid, because Belgian law is applicable to this contract under the ECO.

4.4 Combination of EEX and ECO

ECO Treaty

Chapter 3 of the EEX Regulation deals with which court of law has jurisdiction. This chapter explains the ECO Treaty on the law applicable to international contracts. As will be seen, the combination of both the EEX and the ECO in the following case gives rise to confusion in the Dutch Supreme Court. In cases such as this, one has to make a clear distinction between EEX and ECO, and between *court of law* and *law*.

Case of BOA

Dutch Supreme Court (Hoge Raad) 25-09-1994, NJ 1994, 750

Facts

What court of law has jurisdiction: a French court of law or a Dutch court of law?

Link between Dutch law as the applicable law and a Dutch court of law having jurisdiction?

Verdict

Art. 2 and 5 EEX: alternative jurisdiction for courts of law, plaintiff BOA chooses Art. 5, 1 EEX

Art. 4 ECO: applicable law if no choice was made by BOA and SNPAA

Art. 3 ECO: applicable law chosen by BOA and SNPAA

(Note that the Art. 3 and 4 ECO exclude each other, so both articles cannot be used together in the way the Hoge Raad does!)

In 1986 the French enterprise SNPAA reaches an agreement with BOA Ltd. in Enschede over the delivery and installation of a so-called paper presser (in Dutch: 'baalpers'). BOA has delivered the presser to France, assembled it on behalf of SNPAA, and put the presser into operation. But payment by the French contracting party fails to arrive.

At the Rechtbank (the County Court) in Almelo BOA demands payment of NLG 75,000.-, the price the parties had agreed upon. The defendant, SNPAA, resists this and claims that in this case a French court of law instead of a Dutch court of law should have jurisdiction, either on the basis of art. 2 EEX, or on the basis of art. 5, 1 EEX. According to BOA the Dutch court of law has jurisdiction, based on the fact that payment should have been made in the Netherlands (art. 5, 1 EEX).

The Rechtbank finds that the contract is governed by French law and declares itself not competent. During the appeal, the Gerechtshof (the Court of Appeal) states that Dutch law is applicable, based on art. 4, 1 ECO, and that therefore a Dutch court of law has jurisdiction in this case. Eventually the case is brought before the Hoge Raad (the Dutch Supreme Court).

The first issue to be resolved here is whether art. 5, 1 EEX gives jurisdiction to the Rechtbank. Because BOA claims payment, it is therefore necessary to determine first what law governs the agreement that contains this obligation and, according to this law, where the place of payment should be. In this case, payment should have been made at the BOA company in Enschede, and the Rechtbank of Almelo therefore had jurisdiction in this case, based on art. 5, 1 EEX.

The first question is answered by using art. 4 of the European Communities Convention on Contractual Obligations (ECO); it is irrelevant that this convention has not yet come into effect in The Netherlands.

The 'characteristic performance' according to art. 4, 2 ECO is carried out by BOA in this specific contract, so that it is likely that the contract is most closely connected with the Netherlands and that Dutch law governs the contract. There are no grounds to believe that the fifth paragraph of art. 4 should not be put into operation nor that the agreement is more closely connected with France.

After reaching the conclusion that Dutch law governs the contract, because no choice of law was made, the Gerechtshof (...) subsequently examined whether the parties concerning their contract made a choice of law. The Gerechtshof answered this question in the affirmative, finding that the Smecoma terms of sale are to be applied to this contract and that these terms say that Dutch law governs a contract that is closed according to these terms.

4.5 Law applicable to international torts

The ECO deals with the law applicable to international *contracts*, and becomes relevant when such contracts are breached by one of the contracting parties. As a result, the ECO does not apply to *torts*, which are civil wrongs between parties that do not have a contract. The verdict in the following case, heard in the Dutch Supreme Court, gives the criterion on what law to apply to an international tort.

Case of COVA

Facts

Dutch Supreme Court 19-11-1994, AA 1995, 3

COVA, an organisation concerned with oil, is the employer of a person named H. On August 7th 1984, H. requests the NMB Bank to transfer NLG 10 million to COVA's account, thus bringing into operation a credit agreement to the value of NLG 250 million. COVA had made with the NMB Bank. The next day the NMB Bank receives a telex requesting them to transfer nearly all the money to an account with the Banque Generale du Luxembourg (BGL) in Zurich. The telex contained a code the parties had agreed upon in advance and it mentioned the names of two directors of COVA. The following day, in Zurich, a certain A. withdrew in cash the money that had been transferred and together with H. vanished into thin air.

Tort

COVA claims damages from both the NMB Bank and BGL in a Dutch court of law. How the lawsuit against the NMB Bank ended is of no importance to us. BGL is accused of committing a tort: they never should have paid the money to A. without checking with COVA first.

What law is applicable to the tort: Swiss law or Dutch law?

BGL makes a stand and claims that Swiss law should be applied here. According to Swiss law, a claim based on tort can no longer be submitted if one year has passed from the day the victim knew that damage had been done and by whom. According to Dutch law, however, a claim based on tort is statute-barred (i.e. it is no longer possible to submit a claim, because of the time that has passed) after five years. In view of the fact that BGL was summonsed almost two years after the damage had occurred and had become known, the claim could be submitted under Dutch law, but no longer under Swiss law. The obvious question is: what law is to be applied here?

Hoge Raad Criterion

According to Dutch international private law a claim based on tort is governed by the law of the country where the tort was committed, unless the parties have agreed otherwise. The Gerechtshof found the actions of BGL in Zurich wrongful with regard to COVA. As neither party at the trial took the opportunity to choose an alternative legal system the Gerechtshof rightly found that Swiss law should be applied.

Applicable law to torts

Regulation 864/2007 of the European Parliament and the Council of Ministers on the law applicable to non-contractual obligations (also referred to as 'Rome II Convention') came into effect in 2009. This Regulation determines the applicable law to torts in general and the applicable law in cases concerning, for example, product liability, unfair competition, violations of privacy and rights relating to personality, violation of the environment and infringement of copyright.

EXAMPLE 4.13

Mannesmann, living in Münster (Germany), buys a hand drill at MegaDrill, a hardware store in Almelo (Holland). Due to faulty wiring in the drill, Mannesmann suffers

burns on both hands. According to the new Regulation, German law would be applicable in this case, as Mannesmann lives in Germany.

EXAMPLE 4.14

Coca Cola is a registered trademark all over the world, including in Holland. Jansen, living in Enschede (Holland), alters this trademark and prints Cocaine (in the same typeface and colours as the protected Coca

Cola trademark) on t-shirts. He sells these t-shirts in a store in Bruges (Belgium). Because the trademark is protected under Dutch law, Dutch law will govern this tort.

Summary

- ▶ When a contract involves two parties living in different countries, it is clear that a choice has to be made as to which law governs the contract. The ECO convention provides rules on these matters (Art. 1, 2 ECO).
- ▶ If the contracting parties choose the applicable law themselves in accordance with Art. 3 ECO, this choice should be made in writing.
- ▶ If no choice of law is made by the contracting parties, the contract is governed by the law indicated by Art. 4 ECO. This states that the law applicable to the contract is the law of the country to which the contract is most closely connected. This in most cases is the country of the party who is to effect the characteristic performance under the contract. However, if the contract concerns either the carriage of goods or immovable property, then different criteria apply.
- ▶ A choice of law made by contracting parties under Art. 3 ECO is sometimes set aside by special provisions for consumer contracts (Art. 6 ECO).
- ▶ A choice of law made by contracting parties under Art. 3 ECO is also sometimes set aside by special provisions for individual employment contracts (Art. 8 ECO).
- ▶ A choice of law by contracting parties under Art. 3 ECO can even be set aside – on very rare occasions – by the mandatory rules of another country's law (Art. 9 ECO).
- ▶ Art. 10 ECO provides rules on the material validity of the contract. Art. 11 ECO provides rules on the formal validity of a contract.
- ▶ As the ECO applies to contractual obligations only, it does not apply to (international) torts. The EC Regulation on the law applicable to non-contractual obligations came into effect in 2009.

Glossary

Characteristic performance

If no choice of law has been made by the parties to a contract, or their choice is not clear, then according to Art. 4 ECO one has to determine what the characteristic performance of the contract is. Paying money to another party is a common feature of many contracts and for that reason is not in any way 'characteristic'. So, the party receiving payment is therefore the one effecting a characteristic performance of the contract. If the country of the party carrying out the characteristic performance is known, one has to apply the law of that country to the contract.

Consumer contract

Contract made by a person acting outside a trade or profession at the time of concluding the contract. Art. 6 ECO describes the necessary conditions for a contract to be a consumer contract under the ECO Treaty. Both parties to this contract must be from different states.

ECO

European Convention on the law applicable to Contractual Obligations. The convention provides rules as to which law determines the obligations of contracting parties who are situated in different states.

Formal validity

The validity of a contract depends on whether the required legal formalities for that type of contract are fulfilled.

Freedom of choice

Contracting parties are free to choose the law which will apply to their contract. The decision should preferably be in writing, but under Art. 3 ECO this is not mandatory.

Immovable property

Property, houses and land and their accompanying legal rights and obligations.

Individual Employment Contract

A contract of employment, where employer and employee are from different states. The employee works under the direction of the employer for a period of time and in return for which he receives payment.

Mandatory rules

Rules which, either by the authority of their content or of the organisation that issued them, must be followed.

Material validity	The validity of a contract is based on its content e.g. are the rights and obligations described in the contract legal?
Rules of reference	ECO does not provide immediate solutions to legal problems, but rather indicates which laws should be applied to the problems.
Tort	An act or omission committed by a person or legal entity resulting in damage to another person or legal entity, without any justification for this act or omission.
Universal effect	Whichever law is specified by the ECO will apply, regardless of the fact that this might mean applying the law of a state that has not signed the ECO.

Exercises

- Independent contractor
- freelancer/consultant

Exercise 4.1

Ancelotti, domiciled in Firenze, Italy, has agreed to act as Weller's financial adviser. A contract to that effect has been drawn up and signed in London UK where Weller lives. Ancelotti has been requested by Weller to advise him on an investment he is planning to make in Ahold N.V., a multinational company, established in Amsterdam, Holland.

Ancelotti, who is not sure whether Ahold will prove to be such a good investment, asks the advice of Westerhagen, a friend of his who is a financial consultant in Cologne, Germany. Westerhagen gives Ancelotti his approval to the proposed investment. Ancelotti advises Weller to proceed with the investment, informing him that this advice was checked twice, by him and by Westerhagen. Due to economic developments in South America and Ahold's accounting problems, the value of Ahold shares drops and Weller loses a great deal of money. Weller is not a happy man and blames both advisers for the bad advice they gave him. Weller decides to sue both Ancelotti and Westerhagen for compensation for his loss. Ancelotti is not a happy man either as Weller refuses to pay the fee agreed on in their contract.

- 1 What law governs the financial consultancy agreement between Weller and Ancelotti?
- 2 Suppose that Italian law governs the contract between Ancelotti and Weller and they have both agreed to this. According to Italian law, their contract should have been made in writing, which it was not. However, with regard to the ECO, is it nevertheless possible that the contract might indeed be formally valid?

Exercise 4.2

Van Bemmel B.V. is a company established in Holland that both manufactures shoes and acts as a wholesaler for several brands of shoes. Van Bemmel buys a batch of men's shoes from Hereford Ltd., a company established in the UK, at a price of €20,000. Both parties agree in a telephone conversation, that in the event of any legal problems arising a UK court of law would have jurisdiction and also that the shoes would be collected by Van Bemmel at a Hereford-owned warehouse in Bruges (Belgium). Van Bemmel hires Danzas, a transport company established in France, to collect the goods in Belgium and deliver them to Holland. Payment by Van Bemmel will be made in cash as soon as the goods are collected in Belgium.

- 1 What law applies to the contract of sale between Hereford and Van Bommel?
- 2 What law applies to the transport contract between Van Bommel and Danzas?
- 3 Van Bommel has a contract with a German agent, Mr. Müller. No choice of law has been made by Van Bommel and Müller. What law will apply to their contract?
- 4 Van Bommel has made a distribution contract with Christkindl Schuhe GmbH, a company established in Zug (Switzerland). This Swiss company will handle both the Swiss and the Austrian markets. It is agreed verbally between the two parties that Swiss law will apply to the contract. What law actually does apply to the distribution contract between Van Bommel and Christkindl Schuhe GmbH?
- 5 For many years Van Bommel has been hiring three Italian craftsmen who manufacture all shoes by hand in their workshop in Rome (Italy) and deliver to Van Bommel impeccable work of the highest quality. If Dutch law were chosen as the law applicable to their contracts of employment, would it nevertheless still be possible for the craftsmen to apply *Italian* law to their employment contracts, should the employees wish to do so?

5

CISG

- 5.1 Introduction to the CISG
- 5.2 Application of the CISG
- 5.3 Content of the CISG
- 5.4 Answers to CISG Exercises
- 5.5 Art. 5, 1 EEX, determining place of performance of obligation in question

Convention on the International Sale of Goods 101
 Contracting States of the CISG 101
 Application of the CISG 101
 Formation of the contract of sale 103
 Breach of contract 105

Require performance of the contract 105
 Require performance within an additional period 105
 Nullifying the contract of sale 105
 Reduction of price 105
 Damages 105