International non-contractual liability from a Dutch perspective

31 January 2011

By: Karel Frielink

1. Introduction

Financial law is not an exclusively national affair. Cross-border transactions and service provisions have been common place for a very long time. Harmonisation of rules has been worked towards in a European context for decades.[1] Leaving aside special subject matters such as liability for products and road accidents, the (partial) harmonisation of the rules in respect of the cross-border tort (wrongful act) has only relatively recently been realised.

Rome II, which concerns the law applicable in respect of non-contractual obligations, has been in force in the Netherlands since 11 January 2009.[2] It applies to non-contractual obligations which have arisen after that date. The regulation has universal application and therefore applies irrespective of whether or not it is the law of a member state (article 3 Rome II). As evidenced by Recital 7 of the regulation, the material scope of application and the different provisions of Rome II must, as far as possible, be consistent with the Brussels I Regulation[3] and with Rome I.[4]

On 23 September 2010, the Lower House passed a bill to adopt and introduce Book 10 (International private law) Dutch Civil Code. The bill aims to codify and consolidate the different laws of conflict in a new Book 10 DCC. The consolidation is preceded by general provisions of international private law which in principle apply to all cases. The bill is currently before the Upper House.[5]

As regards non-contractual liability, this contribution is only concerned with the doctrine of tort (wrongful act). Other doctrines such as management of another's affairs and unjust enrichment are not reviewed. Firstly, Rome II and the draft of Book 10 DCC are going to be addressed in brief, more attention is subsequently paid to the liability for the prospectus in the event of a cross-border offering of securities. Torts can also play a role in other disputes in the field of financial law, possibly in addition to liability on the basis of an agreement. Think for example of damage which, after the shares have been listed at a stock exchange, arises as a result of misleading information issued by a listed company.[6] What is stated in the context of prospectus liability applies *mutatis mutandis* to those subjects.

2. Rome II

In this regulation, damage means every consequence resulting from a tort, unjust enrichment, management of another's affairs *[negotiorum gestio]* or pre-contractual liability *[culpa in contrahendo]* (article 2(1) Rome II). The regulation also applies to the non-contractual obligation and the damage which *threatens* to arise (article 2(2) and (3) Rome II).

Starting principle is that the law that applies to a tort, is the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to damage occurs and irrespective of the countries in which the indirect consequences of that event occur (article 4(1) Rome II). When the injured party and the injuring party both have their habitual residence in the same country at the time the damage occurs, the law of that country shall apply (article 4(2) Rome II). Where it is clear from circumstances as a whole that the tort is manifestly more closely connected with a country other than those referred to above, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a previous existing relationship between the parties, such as a contract, that is closely connected to the tort in question (article 4(3) Rome II). The scope of this exception is not totally clear and it shall be for the court to which the specific case is submitted for ruling to determine which factors play a role and the weight to be allocated to those factors. It is however clear that the court will have to use this exception very cautiously.[7]

The liability for broken-off negotiations is set out in Chapter III of Rome II. The non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, is governed by the law that applies to the contract or that would have been applicable to it had it been entered into (article 12(1) Rome II). It is therefore referred to Rome I (the *lex contractus*). Where the applicable law cannot be determined, alternative connecting factors are set out, including the law of the country in which the damage occurs (article 12(2) Rome II).

On the basis of Recital 30 of Rome II, it is established that the pre-contractual investigation and disclosure obligations fall under this provision. It is considered that for the application of this regulation, pre-contractual liability is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breaking-off of negotiations. Article 12 Rome II therefore offers a solution for the fact that in some countries pre-contractual liability is viewed as a special form of contractual liability and in other countries as a liability arising out of a tort.

Article 12 Rome II provides for pre-contractual obligations 'arising from negotiations'. This will normally not be the case in the event of a flotation. The referral of article 12 Rome II applies therefore in principle not to the issuing institution (the issuer) and neither to the relevant syndicate leader (*lead manager*). This could be different for example with a *private placement.* Van der Velden[8] deems is arguable that the investors in the acquired issues do not buy the securities from the issuing institution but from the merchant bank with which they subscribe. I concur with this point of view and it means that in a particular case these investors are not only able to rely on the doctrine of prospectus liability[9] , but also have the possibility of challenging their banks on the basis of the contract entered into by them.[10]

The possibility of choice of law is set out in article 14 Rome II. The parties may agree to submit non-contractual obligations to the law of their choice. This can be done by means of an agreement entered into after the event giving rise to the damage that has occurred. It is also possible if they both pursue commercial activities (think of professional investors) and before the event giving rise to the damage occurred, have freely agreed on the applicable law. This choice of law must be expressly agreed or has to be sufficiently clear from the circumstances of the case. The choice shall not prejudice the rights of third parties. The regulation also includes a restriction on the basis of which the provisions of mandatory law of another country remain in force if at the time of the event giving rise to the damage, all possible connecting factors are located in that other country. In the choice for the law of a non-member state, the same applies in respect of mandatory provisions of Community Law as implemented in the law of the member state of the court which has been applied to, if the relationship between the parties has a close connection with that member state.[11]

The law applicable on the basis of Rome II to non-contractual obligations sets out, inter alia, the basis and the extent of the liability including the determination of the persons who may be held liable for the acts; the grounds for exemption from liability; any limitation of liability and division of the liability; the existence, the nature and the assessment of the damage or the remedy claimed and the manner in which an obligation may be extinguished and the prescription and limitation period, including the rules of commencement, interruption and the suspension of a period of prescription or limitation (article 15 Rome II).

The provisions of Rome II leave unaffected the application of the rules of law of the country of the court which, irrespective of the law applicable to non-contractual obligations, have a mandatory character in respect of the matter (article 16 Rome II).

As evidenced by article 1(1) Rome II, the regulation does not apply to revenue, customs or administrative matters and neither to the liability of the state for acts and omission in the exercise of State authority *(acta jure imperii)*. The determination of the applicable law to such actions must take place on the basis of the internal legal rules governing the choice of law for torts. This provision raises the question whether the liability of regulatory authorities such as De Nederlandsche Bank and the Netherlands Authority for the Financial Markets fall under the scope of Rome II. I assume that Rome II does not apply to these regulatory authorities. The rule governing the choice of law is therefore determined by the Unlawful Act (Conflict of Laws) Act *[Wet conflictenrecht onrechtmatige daad (WCOD)]*. Article 3(1) determines that the applicable law is the law of the State on whose territory the tort takes place (*lex loci delicti*).[12]

3. Book 10 DCC bill

Starting point will be the bill as put before the Upper House on 28 September 2010. Article 10:2 DCC determines that the rules of international private law, and the law indicated by those rules, have to be applied ex officio. The application of the law of a state means, as evidenced by article 10:5 DCC, the application of the legal rules in force in that state with the exception of international private law (no renvoi therefore).

Book 10 DCC does not purely have the character of a manual for the legal practitioner. It is the totality of statutory provisions which the court has to apply on its own initiative and any non-appliance or incorrect application can be complained about in cassation.[13]

Within the Kingdom, there are differences in the legal systems of the Countries. Questions of interregional private law could therefore arise. The rules set out in Book 10 DCC for international cases do not apply to these cases. The bill does also not contain a separate scheme for interregional law. This does not, according to the Explanatory Memorandum, alter the fact that in a concrete case the provisions of Book 10 DCC could qualify for analogous application.[14] It is not yet clear whether the new status of the islands of Bonaire, St. Eustatius and Saba (BES-Islands) as a special Dutch municipality means that Dutch international private law applies automatically. The VVD-party *[People's Party for Freedom and Democracy]* has asked the Minister whether the assumption that if questions of international private law between third countries and the BES-islands arise, Book 10 DCC applies in full, is correct.[15]

Title 14, Book 10 DCC deals with non-contractual obligations. This Title contains only three articles. Article 10:157 DCC sets out what is meant by Rome II and article 10:158 DCC determines that Rome II leaves the applicability of two treaties (concerning road traffic accidents and product liability) unaffected. Article 10:159 DCC subsequently declares Rome II to be equally applicable to obligations arising from any tort falling outside the scope of the regulation and the relevant treaties.[16] Where it concerns a tort in the financial law sphere, it will not often happen that Rome II does not apply but should such an occasion arise, it is laid down that Rome II shall have analogous application.

4. Prospectus liability

The liability for the prospectus published by the issuing institution has for years been a topic of interest. There is therefore a substantial body of case law and literature available on the subject.[17] Under Dutch international and interregional private law, prospectus liability is considered to be a species of tort.

Rome II applies to events giving rise to damage which occurs after 11 January 2009 (article 31 Rome II). As regards non-contractual obligations it concerns, insofar relevant here, obligations arising from (statutory) liability for compensation on the basis of a tort. In my view, prospectus liability falls under the reach of Rome II. Article 2(1) Rome II determines after all in rather general terms that 'damage' means *any* consequence arising out of the tort, unjust enrichment, management of another's affair or pre-contractual liability. This, therefore, also includes pure financial loss (loss suffered, loss of profits), which is what prospectus liability is mostly concerned with.[18] In addition, none of the exceptions of Rome II apply.[19]

The exception referred to in article 1(2) under c Rome II, concerns non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character, is not relevant here as prospectus liability is not the result of negotiability.

The exception referred to in article 1(2) under d Rome II, concerns legal entities and, despite the somewhat unclear wording, is clearly limited to the structure and organisation of the legal entity, and the obligations and standards in force for that legal entity on the basis of legal entities law, including the possible personal liability of the officers for the debts of the legal entity and the personal liability of the accountant towards a legal entity for the statutory audit of accounting documents. The regulation does not provide a single starting point for the argument that prospectus liability would be excluded from the scope of application. Claims (of a non-contractual nature) against the issuing institution, the officers of such as well as claims against the syndicate leader and others who are (apparently) intensively involved in the preparation, supervision and implementation of the issue, fall therefore under the scope of Rome II.

Pursuant to Rome II, the applicable law has to, also by the Dutch court, be determined by the place where the damage occurs irrespective in which countries the indirect consequences of that event occur. In case of financial loss, the court has to decide in which country the loss has been suffered or profit missed out on; pure financial loss does after all occur in that country (article 4(1) Rome II). The country where the damage occurs shall in many cases (also) be a different country than the country where for the first time an appeal to the investing public is made by means of the prospectus. Think for example of the investor residing in Austria who, via his investment account in Germany, subscribes to securities which are offered in a, also in Austria available, prospectus.[20] Not infrequently the loss shall occur with investors in several countries. For example, under Rome II the law of the primary publication location is not applicable but the law of the country where the investor has his investment account. For each investor it has to be established in which country he has suffered his loss or missed out on profit.

If from the circumstances as a whole it appears that the tort is manifestly closer connected with a country other than the country where the damage occurs, the law of that other country shall apply. A manifestly closer connection with a different country could in particular be based on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort in question (article 4(3) Rome II). In case of prospectus liability, the question is to what extent it is possible to rely on this exception.[21] The law that applies to the non-contractual obligation is, on the basis of this regulation, also applicable insofar as it contains rules which raise presumptions of law or determine the burden of proof (article 22(1) Rome II).

Recital 16 of Rome II states that a connection with the country of the place where the direct loss has occurred (*lex loci damni*) strikes a fair balance between the interests of the person held liable and the person suffering the loss and that such connection is also in line with the modern approach to liability law and the development of systems of strict liability. Question marks could be raised in respect of this 'observation'. The intention of the European harmonisation of rules relating to prospectuses is after all to allow the access to the capital markets of the different European countries (European passport) to be as easy and simple as possible. But this also implies that if there is a defective prospectus, the damage could also occur in various countries. The issuing institution could then be confronted with (numerous) claims from investors from all those countries and therefore by claims which are governed by different national rules. It becomes extremely complicated if those investors then pool their resources and jointly commence proceedings. In that case, the court appointed to give the ruling must assess each claim on the law that applies to it. Furthermore, it applies that in the determination of the various elements of the tort, the court also has to take account of the applicable rules of conduct or prospectus obligations of the law of the country of origin which, on the basis of mutual recognition, could be deemed to form part of the law of the country in which the loss occurs. The question to what extent the public-law regulation colour the private law norm is not further addressed here.[22]

As regards the law applicable to a claim on the basis of a tort it also has to be said that the question remains if, and to what extent, the European harmonisation, (think in that context for example of the Prospectus Directive and the Markets in Financial Instruments Directive (MiFID)), brings its influence to bear. If it, by way of example, concerns (pre)contractual investigation and information obligations, it then applies in principle that the extent of such is determined by the law of the country where the investment company is based. If there is a cross-border case in which - as a result of a breach of these obligations - damage is suffered in another country, then on the basis of Rome II, the law of that other country applies to the claim. In this example, the question is on the basis of which law the scope of the obligations has to be determined and whether the breach is such that the claim (in principle) could be allowed. On this Tison & Ravelingien[23] note the following in the context of prospectus liability:

'From the perspective of private law assertion, in particular through liability law, the current European unification leads at best to a Gleichschaltung of the 'failure'- concept [for Dutch lawyers: the unlawfulness of the behaviour – KF]: *The law of the country of origin will determine the content of the information obligation or rules of conduct to be adhered to by the financial institution or issuer and this norm shall form the standard for the determination of any possible failure which might compromise the liability of the issuer or the service. The claims for legal rehabilitation arising from this, in particular in*

the field of the assessment of the damage and the causal link with the failure, are, in contrast with the material legal standard, not involved in the country of origin principle'.

This means that the question whether there is any violation of standards must (in principle) be answered using the law of the country of which the norm forms a part. We are here dealing with the law that applies to the prospectus. All other questions must be answered using the law of the country where the damage was suffered. The Prospectus Directive, for example, does not set out how liability is shaped under civil law. This is left to the individual member states with as a result that there are materially different liability systems.

If there are ten investors who suffered damage in ten different countries and are of the view to have a claim on the basis of a misleading prospectus (or statements made outside the prospectus giving rise to confusion relevant for the investment among the public), then every claim shall be governed by the law of the relevant country. In addition, it is possible that one and the same investor who has investment accounts in different countries, suffers damage in more various countries.[24] As regards the doctrine of prospectus liability, Rome II therefore creates uncertainty for the issuing institution and its officers but also for the syndicate leader or others who have played a key role in the preparation, supervision and implementation of the issue. Taking the example of ten investors, the application of the law of ten countries can therefore lead to very divergent outcomes.[25] It is for example very conceivable that if the WOL-case[26] was submitted to the highest court in France, Greece or Germany and assessed in accordance with the national law of the relevant court, the final ruling would have been (partially) different. This fact is at least at odds with the principle of the European (and also Dutch) rules which state that investors shall be treated equally.

Arons[27] therefore argues rightly in favour of amending Rome II on this point in such a way that the starting point should be the law of the country where the regulated market is located on which the relevant securities (shall) be traded. I can agree with this suggestion, be it that rules have to be conceived to cover the event for when there is going to be a listing on two stock exchanges. As regards the securities which are not going to be traded as such, he opts for the *ex loci delicti*-rule, which is based on the primary publication location. This also leads in my view to a more satisfactory result than Rome II.

An alternative would of course be the European 'harmonisation' of (prospectus) liability law in the meaning of European liability law but it is doubtful whether any action can be expected in that area in the near future. It would, however, be obvious as this is the logical final piece of the underlying reasoning behind the harmonisation of regulations and supervision of the financial markets, namely an equivalent high standard of investor protection in the whole of the European Union. In addition, European liability law could contribute to issuing institutions not having to wonder whether any possible restrictions might have to be imposed on investors as regards the countries where they may keep an investment account, considering the liability regime in those countries.[28] In other words, European liability law could make a contribution to one of the European key targets: free movement of capital.

5. Conclusion

Pursuant to Rome II, as regards the liability for a prospectus, the applicable law is the law of the country where the pure financial loss has been suffered; this will often be the country where the investor has his investment account. In many cases this will (also) be a different country than the country where an appeal is made for the first time to the investing public through the use of a prospectus. The damage will therefore regularly occur with investors in various countries, so that the law of various countries has to be applied. This could lead to extremely complicated proceedings. For that reason an amendment of Rome II is advocated, namely that the connecting factor should be the law of the country where the regulated market is located and where the relevant securities (shall be) are traded, or, as an alternative, the development of European liability law.

Karel Frielink is a lawyer/partner at Spigthoff Advocaten & Belastingadviseurs. He lives and works in Curaçao. In addition, he is Dean of the Curaçao Bar Association and a member of the board of the Chamber of Commerce Curaçao. He is a lecturer in business law at the *University of Curaçao mr. dr. Moises Frumencio da Costa Gomez*. Previously he lectured International Private Law at the University of the Netherlands Antilles.

Notes

[1] In that context, consider the European passport for financial service providers (which really stirs the imagination)

[2] Regulation (EC) no. 864/2007 of the European Parliament and the Council of 11 July 2007 regarding the law applicable to non-contractual obligations, OJ. L 199 of 31 July 2007, 40 ("Rome II")

[3] EEX-Regulation - outside the Dutch language area also known as Brussels I.

[4] On 17 December 2009, the EVO-convention *[Convention on the Law applicable to Contractual Obligations]* was replaced by Rome I (Regulation (EC) no. 593/2008 of the European parliament and the Council of 17 June 2008 regarding the law applicable to obligations arising out of agreements, OJ EU 2008, L177/6). Rome I applies in the Netherlands but not in the other countries of the Kingdom (Aruba, Curaçao and St. Maarten). The EVO-convention still applies in those three countries. Rome II does not apply either in these overseas countries. Although Bonaire, St. Eustatius and Saba (the BES-islands) became part of the Netherlands on 10 October 2010, the same applies to them: Rome I and Rome II do not apply there. The position under the treaty remains after all unchanged on commencement of the new political structure, unless the Netherlands decides differently by law (Explanatory Memorandum, *Parliamentary Papers II*, 32 047, no. 3). See for an overview of the various treaties the two appendices to *Parliamentary Papers II*, 32 047, no.5).

[5] *Parliamentary Papers I* 32 137, no. A. See the special issue on Book 10 DCC of the monthly property law magazine [*Maandblad voor Vermogensrecht]* 7/8 (2010), pages 173-220 and P. Vlas, *Rode draad*: *Boek 10 BW (IPR). Lang verwacht, toch gekomen: wetsvoorstel Boek 10 BW (IPR)*, WPNR 6819 (2009), blz. 894-898.*[Common thread: Booke 10 DCC (IPL). Long awaited, finally arrived: legislative bill Book 10 DCC (IPL)]* WPNR *[weekly magazine for private law, notarial practice and registration]* 6819 (2009), pages 894-898.

[6] Compare B. de Jong, *Schade door misleiding op de effectenmarkt [loss due to deception on the securities market]* diss. 2010, page 458 and Paul Davies, *Liability for misstatements to the market*, Capital Markets Law Journal 5 (2010), pages 443-451.

[7] Recital 18: *'Article 4(3), should be understood as an 'escape clause' from article 4(1) and (2) where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country'*

[8] J.W.P.M. van der Velden, *Contractuele prospectusaansprakelijkheid*, NV 5 *(*1997), pages 145-149 *[Contractual prospectus liability].* See also G. van Solinge, 'Doorbraak van prospectusaansprakelijkheid', *[Breakthrough of prospectus liability]* : *A-T-D* (Van Schilfgaarde-bundle), Deventer: Kluwer 2000, page 420.

[9] In practice only professional investors are able to subscribe to an issue in their own name. Small, non-professional investors will therefore not enter into an agreement with the merchant bank and will have to recoup their damage from the bank by means of an action based on tort/delict.

[10] This does however raise all sorts of questions which are beyond the scope of this contribution. What, for example, was the role of the bank in this issue and in the prospectus in particular? And if this role was limited, how far reaching is the obligation of this bank to investigate and the duty to disclose information towards the investor?

[11] For protection provisions on the basis of European material law, see European Court of Justice EC 9 November 2000 (Case C-381/98; Ingmar GB Ltd. v Eaton Leonard Technologies Inc.) legal ground 25: *It must therefore be held that it is essential for the Community legal order that a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause. The purpose served by the provisions in question requires that they be applied where the situation is closely connected with the Community, in particular where the commercial agent carries on his activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed.'*

[12] See further, also on the importance of the question of the applicable law, C.C. van Dam, *Aansprakelijkheid voor falend toezicht in tijden van financiële cholera – over coma-bankieren, vuvuzela-juristerij en De Nederlandsche Bank*, NTBR 7 (2010), pages 224-246. *[Liability for failing supervision in times of financial cholera – about coma-banking, vuvuzela-pettifoggery and De Nederlandsche Bank]*.

[13] Policy document in response to the report, *Parliamentary Papers II*, 32 137, no. 6.

[14] Explanatory Memorandum, *Parliamentary Papers II*, 32 137, no. 3. Application of Book 10 DCC provisions to questions of interregional private law is advocated by the SP *[socialist]* party in the Upper House. See Preliminary Report *Parliamentary Papers I,* 32 137, no. B. Currently Rome I and Rome II do not apply (directly) in the BES-islands. See article 355 Treaty on the Functioning of the European Union *[Verdrag betreffende de werking van de Europese Unie (VWEU)]* and also the comments of the Council of State in its 'Further report on the act approving the Treaty of Lisbon and in respect of the applicability of European law to the new Dutch overseas municipalities' *[Nader rapport bij de goedkeuringswet van het Verdrag van Lissabon ten aanzien van de toepasselijkheid van het Europese recht voor de nieuwe Nederlandse gemeenten oversee]*. Nader Report *Parliamentary Papers II*, 31 384 (R 1850), no. 4.

[15] Preliminary Report, *Parliamentary Papers I*, 32 137, no. B.

[16] Article 10:154 DCC determines the same as Rome I in respect of obligations arising from agreements.

[17] I only refer to the Supreme Court 27 November 2009 JOR *[Jurisprudentie Onderneming & Recht - Case law, Company and Law] 2010, 43,* with commentary from KF (World Online); K. Frielink, *Aansprakelijkheidsvragen rond het prospectus: van Groningen tot Rome II [Liability issues surrounding the prospectus: from Groningen to Rome II],* Tijdschrift voor Financieel Recht 7/8 (2009), pages 300-305 *[Finance Law Journal]* and M.A. Blom, *Prospectusaansprakelijkheid van de lead manager [Prospectus liability of the lead manager]*, diss. 1996 page 264. I would like to point out that on 31 December 2010 the new Prospectus Directive has come into force. The directive has to be incorporated into national legislation before 1 July 2012.

[18] Apparently L. Strikwerda has doubts on this point, *From 'lex loci /delicti' to 'lex loci damni'*, WPNR 6780 (2008), pages 993-997. He points to the unclear wording of the second sentence of Recital 17 of Rome II cited below ('*The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.*'). In my view, that second sentence is no more than a 'clarification' in case there is personal injury or material damage and is not meant to bring cases where there is only pure financial loss outside the scope of application of Rome II.

[19] See T.M.C. Arons, *'All roads lead to Rome': Beware of the consequences! The law applicable to prospectus liability claims under the Rome II Regulation*, NIPR 4 (2008), pages 481-487. During the negotiations on the formation of Rome II, the government of the United Kingdom tried in vain to keep the liability of issuing institutions outside the scope of this directive (Council Document 7709/06 of 3 May 2006, 7). Also that fact argues in favour of the view defended in the main text.

[20] As regards the question of the court with jurisdiction, reference is made here to the ruling of the European Court of Justice (EC) of 10 June 2004, NJ *[Dutch Law Reports]* 2006, 335 with commentary by P. Vlas on Kronhofer vs Maier et al. The 'place where the event giving rise to the damage has occurred' (article 5 opening words and paragraph 3 Brussels I Regulation) does not include every place where the harmful effects can be felt. In the case of Kronhofer, this place was not in Austria, where he resided and 'felt' the loss, but in Germany because it is there where he had opened his investment account and where the loss had been suffered. In my view this means therefore that German law applies to a claim based on prospectus liability in the example given in the main text. I think that the jurisdiction rulings of the European Court of Justice in the context of article 5 paragraph 3 Brussels I Regulation could also be relevant for the application of article 4(1) Rome II. See also: Arons (2008).

[21] On secondary connection, see further C.J.H. Jansen, E.R. Schreuder and H.L.E. Verhagen, *Prospectusaansprakelijkheid*, *[Prospectus liability]* Amsterdam: NIBE 2003, pages 103-106.

[22] For this see, inter alia: T.M.C. Arons and A.C.W. Pijls, 'Prospectus liability in the Netherlands, Consequences of the Unfair Commercial Practices Act (*Wet Oneerlijke Handelspraktijken, Wet OHP*)' in: M.C.A. van den Nieuwenhuijzen (ed.), *Financial Law in the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2010, pages 443-485.

[23] Compare Michel Tison and Fran Ravelingien, 'Roma locuta, causa finita? Conflictenrechtelijke capita selecta inzake bancaire aansprakelijkheid na de Rome II-Verordening', *[Selected topics of conflicts of law in respect of banking liability after Rome II Regulation]* in: *Nieuw internationaal privaatrecht: meer*

Europees, meer globaal, [*New international private law: more European, more global]* Mechelen: Kluwer 2009, pages 239-274.

[24] It could also happen that the court of the one country has jurisdiction but that it has to apply the law of another country. I will not address this possibility and other complicating factors any further here.

[25] Rome II does provide for a scheme in the event collective interests of consumers are harmed by unfair competition (article 6) and in a scheme for class actions in the event of industrial action (article 9) but no scheme if collective interests of investors are at stake.

[26] Supreme Court 27 November 2009, JOR 2010, 43, with commentary by KF (World Online) and H.M. Vletter-van Dort, Ondernemingsrecht *[Business Law]* 2 (2010), pages 117-124.

[27] See Arons (2008).

[28] I am not aware whether any research has been undertaken into the question whether these kinds of considerations play any role with the issuing institution. For my part, I do not think they are an important factor.