

them if it is clear from those circumstances that there is a stronger connection with some other country? Again the court stressed the need for legal certainty counterbalanced with some flexibility. Therefore it is always necessary to determine the applicable law on the basis of the presumptions and it is only where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that identified by applying the presumptions, that the court may disregard the presumptions.

Rome I

Rome I has a new art 5 which deals with the presumption where there is no choice in a contract for the carriage of goods by sea and passengers. Recital 22 of Rome I gives contracts for the carriage of goods the same definition as art 4(4) of the Rome Convention and therefore *Interfrigo* is equally applicable to determine which contracts the presumption applies to. Art 5(1) provides that the law of the country of the habitual residence of the carrier shall be applicable, provided that that is also the place of receipt or the place of delivery or the habitual residence of the consignor. If those conditions are not satisfied, the law of the country where the parties agreed the goods would be delivered applies. Pursuant to art 5(3) where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in art 5(1), the law of that other country shall apply. This wording is clearer than the wording in art 4(5) of the Rome Convention and already seems to provide for the solution which the ECJ reached on the final issue in *Interfrigo*.

Habitual residence is helpfully defined in art 19 of Rome I. For a company it is the place of central administration (art 19(1)). Art 19(2) clarifies the position where the contract is concluded in the course of operation of a branch, agency or any other establishment. The relevant time for determining

the habitual residence is when the contract is concluded (art 19(3)). Recital 22 provides that the term ‘consignor’ refers to any person who enters into a contract of carriage. The term ‘carrier’ refers to the party who undertakes to carry the goods, whether or not it performs the carriage itself ie the contractual carrier and not the actual carrier.

Endnotes

1. The United Kingdom opted in to Rome I. See Consultation Paper CP05/08 (Rome I- Should the UK Opt In?) published on 2 April 2008 which recommended that the United Kingdom should seek the agreement of the European Commission to opt in to Rome I and apply equivalent rules between UK jurisdictions, and is currently consulting on that recommendation. It was produced by the Ministry of Justice and the Northern Ireland Department of Finance and Personnel and the Scottish Government with the assistance of HM Treasury, the Department for Business, Enterprise and Regulatory Reform and the Department for Transport. See the Ministry of Justice website at www.justice.gov.uk. The consultation ended on 25 June 2008. See the Commission’s Opinion accepting the United Kingdom’s request to accept Rome I Brussels 7.11.2008 COM (2008) 730 final.
2. The report on the Rome Convention by Professor Mario Giuliano and Professor Paul Lagarde may be considered in ascertaining the meaning or effect of any provision of the Rome Convention. O.C.J. 31.10.1980.
3. See eg *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH* [2001] 2 Lloyd’s Rep 455; *Iran Continental Shelf Oil Co. v IRI International Corp* [2004] 2 CLC 696; *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd* [2002] CLC 533; *Ennstone Building Products Ltd v Stanger Ltd* [2002] 2 All ER (Comm) 479 applied in *Waldwiese Stiftung v Lewis* [2004] EWHC 2589 (Ch); *Kenburn Waste Management Ltd v Bergmann* [2002] CLC 644; *Caledonia Subsea Ltd v Micoperi SRL* [2003] SC 70 Inner House Court of Session; *Ophthalmic Innovations International (UK) Ltd v Ophthalmic Innovations International Incorporated* [2004] EWHC 2948 (Ch).

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Review of the Brussels I Regulation

Almost four months after the deadline of 30 June 2009, preceding which the European Commission launched a broad consultation among interested parties on possible ways to improve the operation of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12/1), the member states of the European Union await the results with baited breath.

After the comparative survey of the Regulation, which resulted in the Heidelberg Report on the Application of Regulation Brussels I in the member states (Hess, Pfeiffer, Schlosser, Study JLS/C4/2005/03), the European Commission issued a Green

Paper on the review of the Regulation (COM (2009) 175 final, Brussels, 21 April 2009), accompanied by a Report on the same Regulation’s application (COM (2009) 174 final, Brussels, 21 April 2009). The suggestions given in relation to the interface between arbitration and the Regulation are particularly important for the London market, given the recent decision of the European Court of Justice in *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v West Tankers Inc* (C-185/07) [2009] 1 Lloyd’s Rep 413, where it was held that the use of an anti-suit injunction to restrain proceedings in the court of another member state, even where those proceedings have been commenced in breach of an arbitration agreement, is

incompatible with the Regulation. This is so, even though the Regulation explicitly excludes arbitration from its scope in art 1(2)(d).

Extension of the Regulation to arbitration

Suggestions given in the Green Paper significantly include a (partial) deletion of the exclusion of arbitration from the scope of the Regulation. The extent of such a 'partial' deletion however is not explained any further. It is inconceivable that the Commission continues to propose an extension of the Regulation to arbitration, given the critical attitude of such a move by the majority of stakeholders interviewed during the Heidelberg Report. Practitioners of the London Bar in particular, 'unanimously' expressed that any extension of the Regulation would be undesirable, as it would undermine the proper functioning of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 UKTS 20(1976), Cmnd 6419).

A deletion would result in all court proceedings in support of arbitration falling under the Regulation's regime, in addition to those that come within the definition of 'provisional measures' by virtue of art 31. It is further suggested that exclusive jurisdiction could be granted to the courts of the member state of the place of arbitration. This proposal however barely solves the current problem before creating a new one. Where the place of arbitration has not been determined prior to the dispute arising, and in the likely event of the parties not reaching an agreement afterwards, how is the arbitral seat to be decided? The Green Paper incredibly proposes that the courts of the member state which would have jurisdiction over the dispute under the Regulation in the absence of an arbitration agreement should be given such jurisdiction. Not only are there numerous heads of jurisdiction that may be applicable, but a lengthy trial would be needed to determine which rules are to be used in each case. Further, where the main rule in art 2 is preferred, the defendant may gain an unfair advantage, as most parties opt for a neutral seat and a neutral choice of law.

In relation to recognition and enforcement of judgments, in particular to those determining the validity of an arbitration agreement, the Green Paper suggests that the deletion of the arbitration exception would enforce recognition of such judgments (note art 33 et seq). It is submitted that this result may prevent parallel proceedings between the courts of different member states, yet, as arbitral tribunals do not come within the regime of the Regulation, there is nothing preventing tribunals continuing in the face of a negative judgment – an excellent example being *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm).

Determination of validity of arbitration agreements

It is proposed that priority should be given to the courts of the Member State where the arbitration takes place to decide on the existence, validity and scope of an arbitration agreement. Once again problems arise if the seat of arbitration has not and cannot be determined. If the 'priority' rule is one over the courts of other member states, the merits of the proposal may be accepted, yet, if the 'court first seised rule' in art 27 continues after the current revision of the Regulation, it is hard to see how this will work in practice. Fundamentally however, if the Green Paper is proposing that the courts have priority over an arbitral tribunal to determine the validity of an arbitration agreement, on the mere basis that a court judgment must be recognised by other member states' courts, then the suggestion is completely flawed. This reading would result in rendering ineffective an arbitration agreement as a defence to judicial proceedings, essentially bestowing a 'second class status' upon arbitration (See Merkin, 'Anti-suit injunctions: The future of anti-suit injunctions in Europe', *ArbLM*, 2009, Apr, 1-9). Furthermore, significant delay and additional costs that may not be recoverable would be incurred by the party forced to respond to the court proceedings, as well as all confidentiality being lost. The proposal crucially ignores the very much accepted principal of 'competence-competence', which denotes that arbitrators are to determine their own jurisdiction and does nothing to prevent the likelihood of Regulation's provisions being abused by tactical litigants, for example, *Turner v Grovit* (C-159/02) [2004] 2 Lloyd's Rep 169 and *JP Morgan Europe Ltd v Primacom AG* [2005] EWHC 508 (Comm). That being said, unless the reach of the Regulation is to become so extensive that it governs arbitral tribunals also, as stated, the arbitral proceedings may continue on regardless, although enforcement of an arbitral award in a foreign state may prove difficult.

Quite sensibly, the Green Paper discusses refusal of enforcement of judgments that are irreconcilable with arbitral awards and exclusive competence being given to the courts of a member state where the arbitral award was given to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community. Given the logical and what should be minimal change these provisions would produce, it is hoped that they are accepted by the Community. The suggestions close with a more drastic proposal, permitted by art VII of the New York Convention, of a separate Community instrument to facilitate the recognition of arbitral awards. Such a drastic step is bound to be criticised by the majority although it is the opinion of this author that a European instrument regulating arbitration is nothing more than inevitable.

The results of the consultation are unlikely to be surprising, given the tendency for common law lawyers and those on the

Continent to voice quite different views over a great many things. The consequential revision of the Regulation however is very likely to cause controversy, as whatever suggestions the

Commission adopts, it will be unable to please everyone.

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Case update

Soufflet Negoce v Bunge SA [2009] EWHC 2454 (Comm)

*Readiness to load – GAFTA form 49
clause 9 – Notice of Readiness (NOR)*

The facts

The contract was for the sale of 15,000 tons of feed barley, FOB Nikotera, Ukraine; delivery 9–22 October 2006 at buyers' call; weight and quantity to be final as issued by a GAFTA approved surveyor. Terms were provided as to laytime, demurrage or despatch, with laytime to commence upon issue of a valid notice of readiness. The sale contract also incorporated the GAFTA form No 49.

At arbitration, the buyers had claimed for damages for failure to load the cargo. The NOR was tendered on the last day of the delivery period, and a dispute arose as to whether the holds were ready to load the cargo. The sellers claimed the holds were unclean thus not satisfying the readiness requirement; but the buyers argued otherwise, wanting the sellers to load after 22 October. The buyers then treated the sellers' refusal as a repudiatory breach. This was an appeal from the award made by the GAFTA Board.

The issue was whether the sellers were obliged to complete loading after the specified delivery period, and the trial judge, Mr Justice David Steel, felt that it depended on two pre-conditions: that the vessel is presented at the loading port within the delivery period 'in readiness to load'; and that loading has/should have commenced during the delivery period (at para 7).

The interpretation of cl 6 of the GAFTA form, which provides that the vessel should be at the load port 'in readiness to load', was the cause of the

dispute. The sellers (appellants) were of the view that cl 6 is satisfied if the vessel was in such condition as would enable a valid NOR to be issued under a voyage charterparty. The buyers, on the other hand, argued that the vessel only had to be physically and legally capable of loading the cargo.

The GAFTA Appeal Board had found that the issue turned on whether a requirement was imposed on the buyers by cl 6 to present a vessel which was in every sense ready to load the cargo, or whether the buyers only had to present the vessel for loading. The Board's finding was that the buyers only had to present the vessel for loading and they had complied on 22 October. They reached this decision, taking into account the fact that the claim was for failure to load under a sale contract, not for demurrage; and since the buyers had purchased on FOB terms, their responsibility was to present a vessel within the delivery period which was able to load, both physically and legally, and that the sellers were obliged to load, irrespective of any concerns they might have. As risk passes from sellers to buyers upon loading, the risk was the buyers' not the sellers', if the holds were not fit to receive the goods. Only very clear terms in the sale contract would suffice to place a duty on the sellers to ensure that the vessel was fit to receive the cargo before loading. A joint inspection clause was not sufficient, and such a right would not have been beneficial to the sellers as the contract included a certificate final clause at the port of loading, as to quality.

The buyers, not surprisingly, supported the decision by the GAFTA Board. The sellers disagreed, putting forward a number of submissions. They argued that where there is an express 'readiness to

load' clause, 'readiness' is critical in order to establish when the loading operation is to start. They also argued that as laytime and demurrage provisions were included in the contract, this was compelling reason to treat cl 6 'readiness' the same way as that required by a charterparty NOR. The sellers felt that the express incorporation of the charterparty terms into the sale contract lent further weight to these submissions. They submitted also, that buyers would take advantage of this position by presenting a vessel not fully ready to load, so as to trigger the extension of the delivery period, burdening sellers with carrying charges. The sellers argued that drawing a distinction between readiness under a charterparty and under a sale contract would lead to uncertainty and confusion; that sellers do have an interest in the condition of the holds, as there is risk of delay especially if the buyers were to take steps to render the holds fit; thus making it necessary for buyers to give a concurrent NOR.

The judgment

Steel J disagreed with the sellers' contention that the Board were wrong not to give any meaning to the phrase 'readiness to load', pointing out that the Board had interpreted the phrase to mean that it had to be 'physically and legally possible' for the sellers to load the cargo. The Board had concluded that it was both physically and legally possible to load, and it did not matter whether or not coal powder was present in the holds, or whether or not it would have prevented the shipowners from tendering a valid NOR. Steel J felt that the few possible physical or legal restrictions would not have been sufficient enough to lead to a different conclusion.