

# SHIPPING & TRADE LAW

## Law applicable to contracts for the carriage of goods

### where the parties have made no choice

*The European Court of Justice (ECJ) has given its first judgment on the interpretation of the Convention on the Law Applicable to Contractual Obligations of 1980 ('the Rome Convention') which is given the force of law by s2 of the Contracts (Applicable Law) Act 1990 in the United Kingdom. Although that Convention has been in force since 1 April 1991, the First Protocol of 19 December 1988 on the interpretation of the European Communities of the Rome Convention did not come into force until 1 August 2004. Therefore although the ECJ has referred to the Rome Convention when interpreting other conventions and regulations, this is the first case on the Rome Convention itself.*

The irony is that for all contracts concluded after 17 December 2009 a new regulation, Regulation (EC) No 593/2008 on the Law Applicable to Contractual Obligations ('Rome I'), will apply in all EC Member States, except Denmark, and some of the issues referred to the ECJ are answered in Rome I. However, the court's judgment in Case C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuisen BV*, MIC Operations BV is important for the interpretation of contracts of carriage of goods concluded up to 17 December 2009 and will also help with some issues of interpretation of Rome I.

### The Rome Convention

Both the Rome Convention and Rome I recognise party autonomy and if the parties choose the law applicable to their contract, that choice, provided it is clear enough, will, subject to limited exceptions, be recognised. Where the parties have not made a choice, art 4(1) provides that the contract will be 'governed by the law of the country with which it is most closely connected'. Exceptionally a severable part of the contract may be governed by a different law if that part 'has a closer connection with another country' – the concept of depeçage.

In order to determine the country with which the contract is most closely connected arts 4(2), (3) and (4) provide for presumptions. Art 4(2) would apply to contracts such as an international sale contract or insurance contract and provides that a contract is presumed to be most closely connected with the country where the party who is to effect the characteristic performance of the contract (not usually payment of the price or premium) has its principal place of business. Art 4(4) provides for a special presumption to apply to a contract for the carriage of goods. Single voyage charterparties and other contracts the main purpose of which is the

November 2009  
Volume 9 - Number 9

### IN THIS ISSUE

- 2 **Review of the Brussels I Regulation**
- 5 **Case update**
- *Soufflet Negoce v Bunge SA* [2009] EWHC 2454 (Comm)
  - *Bunge SA v ADM Do Brasil Ltda (The 'Darya Radhe')* [2009] EWHC 845 (Comm)

#### Editor

**Johanna Hjalmarsson**

Informa Research Fellow in Maritime and Commercial Law, University of Southampton

#### Editorial board

**Jason Chuah**

Reader in Commercial Law,  
University of Westminster

**Jeremy Davies**

Partner, Davies Johnson & Co

**Filippo Lorenzon**

Lecturer, Institute of Maritime Law,  
University of Southampton and Solicitor (n.p.)

**David Martin-Clark**

Barrister, Stone Chambers,  
Shipping and Insurance Consultant, Maritime  
Arbitrator and Commercial Disputes Mediator

**Roger Miles**

Partner, Elborne Mitchell

**Professor Baris Soyer**

Professor, Institute of International Shipping  
and Trade Law, University of Wales, Swansea

**Professor D Rhidian Thomas**

Professor of Maritime Law and Director of the  
Institute of International Shipping and Trade Law,  
University of Wales, Swansea

**Professor Richard Williams**

Consultant, Ince & Co, Institute of  
International Shipping and Trade Law,  
University of Wales, Swansea

**Haris Zografakis**

Partner, Stephenson Harwood

**informa**  
law

carriage of goods (not passengers) shall be treated as such contracts. In contracts for the carriage of goods, if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. The *Giuliano-Lagarde* Report<sup>2</sup> states that the carrier's place of business is that at the time the contract is concluded (at p22). Similarly the places of loading and unloading are those agreed at the time when the contract is concluded and the carrier is 'the party who undertakes to carry the goods whether or not he performs the carriage himself' (ibid). Art 4(5) provides that the presumptions will not, however, apply if it appears from the circumstances as a whole that the contract is more closely connected with another country. Thus if an Italian charterer who is also the contracting carrier issues bills of lading for carriage of goods from Rotterdam to Genoa, the presumption is that the law applicable is Italian unless it appears from the circumstances as a whole that the contract is more closely connected with another country.

This note will consider the decision in *Intefrigo* which concerns whether the presumption in art 4(4) of the Rome Convention applies to a contract for the carriage of goods where the parties have not made any choice of law. It will further consider the changes made by Rome I to this presumption.

### The facts

In *Intefrigo ICF*, a company established in Belgium, entered into a charterparty with Balkenende and MIC, both established in the Netherlands, in the context of a project for a train connection for freight traffic between Amsterdam in the Netherlands and Frankfurt am Main in Germany. Under the charterparty ICF undertook, *inter alia*, to make train wagons available to MIC and ensure their transport via the rail network. MIC was responsible for all operational aspects of the transport of the goods concerned and had hired out the acquired load capacity to third parties. ICF brought proceedings in the Netherlands against Balkenende and MIC for unpaid invoices and the defendants argued that the claim was time barred under the law applicable to their contract with ICF ie the law of the Netherlands. ICF argued that the law of Belgium applied as the contract was not a contract of carriage within art 4(4) and therefore the law should be determined on the basis of art 4(2) according to which the law applicable to the contract was that of the country in which ICF's principal place of business was situated. In that event the claim was not yet time barred.

The first issue that the European Court had to consider was whether art 4(4) only applies to voyage charterparties

and whether other forms of charterparty fall outside its scope. After considering the *Giuliano-Lagarde* Report, the ECJ considered the submission of the Czech Government that the last sentence of art 4(4) 'is intended to extend the scope of art 4(4) to certain categories of contracts connected with the carriage of goods although those contracts cannot be categorised as contract of carriage of goods'. In contrast the Commission of the European Communities argued for a restrictive interpretation that art 4(4) only applies to 'certain categories of charter-parties, namely those by which a means of transport is made available by a carrier on a single occasion and those entered into by a carrier and a consignor which relate exclusively to the carriage of goods'. The ECJ accepted the wider interpretation and held that art 4(4) applies to a charterparty other than a single voyage charterparty, only where the main purpose of the contract is not merely to make available a means of transport, but the actual carriage of goods.

The second issue the Court had to consider was the position where a contract may be severable: when may different laws apply to the same contract, in particular as to time limits? If the contract is mainly for the purpose of carriage of goods within art 4(4), does it come entirely within the scope of art 4(4) or by contrast does the presumption in art 4(4) only apply to the aspects of the contract relating to the carriage of goods and the rest of the contract is governed by art 4(2)? If the contract does not concern mainly the carriage of goods is it completely excluded from the scope of art 4(4)? The Commission argued that if the contract fell within art 4(4) there would be no need to sever it and the right to payment for the performance of the contract and the issue of the time bar were 'connected so closely with the principal contract that it is not possible to separate them without infringing the principle of legal certainty'.

The Court held that in the interests of legal certainty different laws could only be applicable to different parts of the same contract where a number of parts of the contract could 'be regarded as independent of each other'. Thus a part of a contract may only be governed by a law other than that applied to the rest of the contract where the object of that part is independent. Where the presumption is that set out in art 4(4), that criterion must be applied to the whole of the charter, unless the part of the contract relating to carriage is independent of the rest of the contract.

Lastly the court had to consider when the presumptions in art 4(2), (3) and (4) may be disregarded. This issue has been considered in the English case law<sup>3</sup>. Can they be disregarded only if it is evident from the circumstances in their totality that the presumptions do not have 'any genuine connecting value'? Alternatively can the court also refrain from applying

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](http://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).

*Yvonne Baatz, professor of maritime law and member of the Institute of Maritime Law, University of Southampton*

## 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