ECJ: First Ruling on the Rome Convention

On March 2008, the Hoge Raad der Nederlanden (Netherlands) made reference for a preliminary ruling to the ECJ, regarding the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (see Giorgio Buono's post). The reference relates to Article 4 of the convention, which establishes the applicable law in the absence of a choice by the parties. AG Bot's opinion was delivered on 19 May 2009; the ECJ judgment (Grand Chamber) has been released today.

The dispute in the main proceedings concerned a contract entered into in August 1998 between Intercontainer Interfrigo SC (ICF) and Balkenende and MIC. That contract provided that ICF was to make train wagons available to MIC, and would ensure their transport via the rail network. Although the contract was not in written, ICF sent to MIC a written draft contract, which contained a clause stating that Belgian law had been chosen as the law applicable; that draft was never signed by any of the parties to the agreement. On November and December 1998, ICF sent invoices to MIC for the amounts of EUR 107 512.50 and EUR 67 100 respectively. Only the second of those amounts was paid by MIC. On December 2002, ICF brought an action against Balkenende and MIC before the Rechtbank te Haarlem (Local Court, Haarlem) (Netherlands) seeking an order for payment of the sum corresponding to the first invoice. Balkenende and MIC submitted that the claim at issue in the main proceedings was time-barred under the law applicable to the contract , in this case Netherlands law. By contrast, according to ICF, Belgian law was applicable to the contract, and the claim was not yet time-barred.

Both the Rechtbank te Haarlem and the Gerechtshof te Amsterdam (Netherlands) (Regional Court of Appeal, Amsterdam) (Netherlands), applied Netherlands law and upheld the objection of limitation raised by Balkenende and MIC. The courts categorised the contract at issue as a contract for the carriage of goods, but they also said that if, as ICF maintained, the contract at issue in the main proceedings was not categorised as a contract of carriage, then Article 4(2) of the Convention was not applicable since it was apparent from the circumstances of the case that that contract was more closely connected with the Kingdom of the Netherlands,

and thus the derogating provision in the second sentence of Article 4(5) of the Convention must be applied.

ICF appealled alleging an error of law in the categorisation of the contract as a contract of carriage, and also the possibility of the court's derogating from the general rule laid down in Article 4(2) of the Convention to apply Article 4(5) thereof. In view of those divergences on the interpretation of Article 4 of the Convention, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Article 4(4) of the … Convention … be construed as meaning that it relates only to voyage charter parties and that other forms of charter party fall outside the scope of that provision?

2. If [the first question] is answered in the affirmative, must Article 4(4) of the … Convention then be construed as meaning that, in so far as other forms of charter party also relate to the carriage of goods, the contract in question comes, so far as that carriage is concerned, within the scope of that provision and the applicable law is for the rest determined by Article 4(2) of the … Convention?

3. If [the second question] is answered in the affirmative, which of the two legal bases indicated should be used as the basis for examining a contention that the legal claims based on the contract are time-barred?

4. If the predominant aspect of the contract relates to the carriage of goods, should the division referred to in [the second question] not be taken into account and must then the law applicable to all constituent parts of the contract be determined pursuant to Article 4(4) of the … Convention?

5. Must the exception in the second clause of Article 4(5) of the … Convention be interpreted in such a way that the presumptions in Article 4(2) [to] (4) of the … Convention do not apply only if it is evident from the circumstances in their totality that the connecting criteria indicated therein do not have any genuine connecting value, or indeed if it is clear therefrom that there is a stronger connection with some other country?"

Bringing together the first question and the first part of the second question, both relating to the application of Article 4(4) of the Convention to charter-parties, the ECJ has stated that the last sentence of Article 4(4) of the Convention "must be

interpreted as meaning that the connecting criterion provided for in the second sentence of Article 4(4) applies to a charter-party, other than a single voyage charter-party, only when the main purpose of the contract is not merely to make available a means of transport, but the actual carriage of goods".

As for the second part of the second question and the third and fourth questions, relating to the possibility of the Court's dividing the contract into a number of parts for the purpose of determining the law applicable, the ECJ has answered that "the second sentence of Article 4(1) of the Convention must be interpreted as meaning that a part of a contract may be governed by a law other than that applied to the rest of the contract only where the object of that part is independent".

Through the fifth question the ECJ is asked whether the exception in the second clause of Article 4(5) of the Convention must be interpreted in such a way that the presumptions in Article 4(2) to (4) of the Convention do not apply only if it is evident from the circumstances in their totality that the connecting criteria indicated therein do not have any genuine connecting value, or whether the court must also refrain from applying them if it is clear from those circumstances that there is a stronger connection with some other country. In this regard, the ECJ has stated that "as is apparent from the wording and the objective of Article 4 of the Convention, the court must always determine the applicable law on the basis of those presumptions", but that "however, where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that identified on the basis of the presumptions set out in Article 4(2) to (4) of the Convention, it is for that court to refrain from applying Article 4(2) to (4)".