THE ALL ENGLAND LAW REPORTS 2010

European Cases

Editor
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REFERENCES

These reports contain references to the following major work of legal reference described in the manner indicated below.

Halsbury's Laws of England

The reference 14 *Halsbury's Laws* (4th edn) para 185 refers to paragraph 185 on page 90 of volume 14 of the fourth edition of *Halsbury's Laws of England*.

The reference 10 *Halsbury's Laws* (4th edn reissue) para 370 refers to paragraph 370 on page 163 of reissue volume 10 of the fourth edition of *Halsbury's Laws of England*.

The reference 11(1) *Halsbury's Laws* (4th edn) (2006 reissue) para 9 refers to paragraph 9 on page 27 of the 2006 reissue of volume 11(1) of the fourth edition of *Halsbury's Laws of England*.

The reference 68 *Halsbury's Laws* (5th edn) (2008) para 745 refers to paragraph 745 on page 199 of the 2008 issue of volume 79 of the fifth edition of *Halsbury's Laws of England*.

Cases reported in European Cases volume

Digest of cases reported in European Cases volume

Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV and another

(Case C-133/08)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (GRAND CHAMBER)

JUDGES SKOURIS (PRESIDENT), JANN, TIMMERMANS, ROSAS, LENAERTS, Ó CAOIMH AND BONICHOT (PRESIDENTS OF CHAMBERS), KURIS, JUHÁSZ, ARESTIS, BAY LARSEN, LINDH AND TOADER (RAPPORTEUR)
ADVOCATE GENERAL BOT

19 MAY, 6 OCTOBER 2009

Conflict of laws – Contract – Proper law of contract – Carriage of goods – Parties based in Belgium and Netherlands entering into 'charterparty' concerning use of train wagons – No express choice of law made – Claimant commencing proceedings in respect of unpaid invoice – Whether Belgian or Netherlands law applicable – Whether relevant provisions of Rome Convention applying to charterparties other than single voyage charterparty – Whether possible for different national laws to apply to same contractual relationship – Correct approach to application of connecting criteria – Rome Convention on the Law Applicable to Contractual Obligations 1980, art 4.

In the context of a project concerning a train connection for freight traffic between Amsterdam, Netherlands and Frankfurt am Main, Germany, the parties entered into a contract described as a charterparty. The claimant company was incorporated under the law of Belgium, whereas the defendant companies were both incorporated under Netherlands law. The contract provided, inter alia, that the claimant was to make train wagons available to the second defendant (MIC) and would ensure their transport via the rail network. The claimant subsequently brought proceedings in the Netherlands against the defendants in respect of an unpaid invoice. The defendants submitted that the claim was time-barred under Netherlands law. The claimant argued that the claim was not time-barred under Belgian law, and that Belgian law was the applicable law. In that regard the claimant maintained that as the contract at issue was not a contract of carriage, the law applicable had to be ascertained not on the basis of art 4(4)[a] of the Rome Convention on the Law Applicable to Contractual Obligations 1980, but on the basis of art 4(2), according to which the law applicable to the contract was that of the country in which the claimant's principal place of business was situated. The court held that the claim was time-barred and declared it to be inadmissible. That judgment was upheld on appeal. The courts categorised the contract at issue as a contract for the carriage of goods and took the view that, even though the claimant did not have the status of carrier, the main purpose of the contract was the carriage of goods. However, the courts excluded the application of the connecting criterion provided for in art 4(4) and held that the contract was more closely connected with the Netherlands than Belgium, relying on a number of circumstances of the case, such as the other contracting parties' place

a Article 4, so far as material, is set out at judgment para 3, below

of business and the route taken by the train wagons between Amsterdam and Frankfurt. The claimant appealed, and the Supreme Court referred the matter to the Court of Justice for a preliminary ruling. In essence, the referring court asked: first, whether art 4(4) of the convention applied to charterparties other than single voyage charterparties, and what factors allowed a charterparty to be categorised as a contract of carriage for the purposes of applying that provision to the contract at issue in the substantive proceedings; secondly, in which circumstances it was possible, under the second sentence of art 4(1), to apply different national laws to the same contractual relationship, in particular as regards the limitation of the rights under a contract such as that at issue in the instant proceedings; moreover, whether, if the connecting criterion provided for in art 4(4) applied to a charterparty, that criterion related only to the part of the contract concerning the carriage of goods; and thirdly, whether the exception in the second clause of art 4(5) had to be interpreted in such a way that the presumptions in art 4(2)–(4) did not apply only if it was evident from the circumstances as a whole that the connecting criteria indicated therein did not have any genuine connecting value, or whether the court had also to refrain from applying them if it was clear from those circumstances that there was a stronger connection with some other country.

Held – (1) One of the aims of art 4(4) of the Rome Convention was to extend the scope of the rule of private international law laid down in the second sentence of art 4(4) to contracts the main purpose of which was the carriage of goods, even if they were classified as charterparties under national law. In order to ascertain that purpose, it was necessary to take into consideration the objective of the contractual relationship and, consequently, all the obligations of the party who effected the performance which was characteristic of the contract. In a charterparty, the owner, who effected such a performance, undertook as a matter of course to make a means of transport available to the charterer. However, it was conceivable that the owner's obligations related not merely to making available the means of transport but also to the carriage of goods proper. In such circumstances, the contract in question came within the scope of art 4(4) where its main purpose was the carriage of goods (see judgment paras 33–35, 37, below).

(2) In order to determine whether a part of a contract could be made subject to a different law it was necessary to ascertain whether the object of that part was independent in relation to the purpose of the rest of the contract. If that was the case, each part of a contract had to be made subject to one single law. In particular, the rules relating to the prescription of a right had to fall under the same legal system as that applied to the corresponding obligation. It followed that the second sentence of art 4(1) of the convention had to be interpreted as meaning that a part of a contract could be governed by a law other than that applied to the rest of the contract only where the object of that part was independent. Where the connecting criterion applied to a charterparty was that set out in art 4(4), that criterion had to be applied to the whole of the contract, unless the part of the contract relating to carriage was independent of the rest of the contract (see judgment paras 46–49, below).

(3) The objective of art 4(5) of the convention was to counterbalance the set of presumptions stemming from the same article by reconciling the requirements of legal certainty, which were satisfied by art 4(2)–(4), with the necessity of providing for a certain flexibility in determining the law which was actually most closely connected with the contract in question. As the

primary objective of art 4 was to have applied to the contract the law of the country with which it was most closely connected, art 4(5) had to be interpreted as allowing the court before which a case had been brought to apply, in all cases, the criterion which served to establish the existence of such connections, by disregarding the presumptions contained elsewhere in art 4 if they did not identify the country with which the contract was most closely connected. Thus, where it was clear from the circumstances as a whole that the contract was more closely connected with a country other than that determined on the basis of one of the criteria set out in art 4(2)–(4), it was for the court to disregard those criteria and apply the law of the country with which the contract was most closely connected (see judgment paras 59–64, below).

Notes

For the applicable law under the Rome Convention where the law has not been chosen, see 8(3) *Halsbury's Laws* (4th edn reissue) para 352.

Cases cited

American Motorists Insurance Co v Cellstar Corp [2003] EWCA Civ 206, [2003] Lloyd's Rep IR 295.

Bank of Baroda v Vysya Bank Ltd [1994] 2 Lloyd's Rep 87.

Bank of Scotland of the Mound v Butcher [1998] CA Transcript 1288.

Caledonia Subsea Ltd v Micoperi Srl (2002) SLT 1022, Ct of Sess.

CGU International Insurance plc v Szabo [2002] 1 All ER (Comm) 83.

Société Nouvelle des Papeteries de l'AA SA v BV Machinefabriek BOA (1992) Nederlandse Jurisprudentie, No 750, Netherlands SC.

Reference

By a decision dated 28 March 2008, received at the Court of Justice on 2 April 2008, the Hoge Raad der Nederlanden (Netherlands Supreme Court) referred for a preliminary ruling the questions set out at para 19 of the judgment, below, concerning the interpretation of art 4 of the Rome Convention on the Law Applicable to Contractual Obligations 1980 (OJ 1980 L266 p 1). The questions arose in proceedings in the Netherlands courts brought by Intercontainer Interfrigo (ICF) SC (a company established in Belgium) against Balkende Oosthuizen BV and MIC Operations BV (companies established in the Netherlands). Observations were submitted on behalf of: the Netherlands government, by C Wissels and Y de Vries, acting as agents; the Czech government, by M Smolek, acting as agent; and the Commission of the European Communities, by V Joris and R Troosters, acting as agents. The language of the case was Dutch. The facts are set out in the opinion of the Advocate General.

19 May 2009. **The Advocate General** (**Y Bot**) delivered the following opinion[1].

1. By the present case, the Court of Justice of the European Communities is, for the first time, being asked to interpret the Convention on the Law Applicable to Contractual Obligations 1980[2] and, more particularly, art 4 of that convention, which introduces a means of designating the law applicable to a contract in the absence of a choice by the parties.

1 Original language: French.

2 Opened for signature in Rome on 19 June 1980 (OJ 1980 L266 p 1) (the Rome Convention).

2. In this case, the Court of Justice is asked to rule on what is, pursuant to that provision, the law applicable to a contract for the supply of a means of transport for the carriage of goods on a specified voyage.

3. The first sentence of art 4(1) of the Rome Convention lays down a general rule designating the law applicable to a contract where it has not been chosen by the parties. The Rome Convention also sets out a general presumption in art 4(2) and a specific presumption, in art 4(4), which applies to contracts for the carriage of goods.

4. In addition, the court is asked whether, in accordance with the second sentence of art 4(1) of the Rome Convention, the law of a country other than that to which a contract such as that at issue in the main proceedings is most closely connected can be applied to part of that contract.

5. In this opinion, I shall state the reasons for my view that a contract for the supply of a means of transport for the carriage of goods on a specified voyage does not come within the scope of art 4(4) of the Rome Convention where the establishment of the undertaking responsible for making that means of transport available is in a country other than that in which the place of lading, place of discharge or principal establishment of the other contracting party is located.

6. I shall then go on to explain why, in my view, in order to determine the law applicable to such a contract, the national court must, in accordance with the first sentence of art 4(1) of the Rome Convention, ascertain the law of the country with which that contract is most closely connected.

7. Finally, I shall set out the grounds on which I take the view that the law of a country other than that with which the contract at issue in the main proceedings as a whole is most closely connected cannot be applied to part of that contract.

I—LEGAL BACKGROUND

8. The Rome Convention entered into force on 1 April 1991. The intention of the signatory states at that time was to remedy the multitude of existing conflict of law rules by unifying the rules on the law applicable to contractual obligations.

9. Under art 1 of the Rome Convention, its provisions are applicable, in situations involving conflict of laws, to contractual obligations, with the exception of certain matters listed in art 1(2) thereof[3].

10. Article 3 of the Rome Convention enshrines the principle of autonomy of the will of the parties. Under that provision—

> '[a] contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.'

11. In the absence of a choice, the Rome Convention enunciates a general principle common to all contracts for the purpose of determining the applicable law and sets out presumptions.

12. Thus, pursuant to art 4(1) of that convention—

3 These are, for example, the status or legal capacity of natural persons, contractual obligations relating to wills and succession, matrimonial relationships, rights and duties arising out of a family relationship, parentage or marriage, or arbitration agreements and agreements on the choice of court.