Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

23 October 2014*

(Reference for a preliminary ruling — Rome Convention on the law applicable to contractual obligations — Article 4(1), (2), (4) and (5) — Law applicable by default — Commission contract for the carriage of goods — Contract for the carriage of goods)

In Case C-305/13,

REQUEST for a preliminary ruling pursuant to the First Protocol of 19 December 1988 on the interpretation by the Court of Justice of the European Communities of the Convention on the Law applicable to Contractual Obligations, from the Cour de cassation (France), made by decision of 22 May 2013, received at the Court on 4 June 2013, in the proceedings

Haeger & Schmidt GmbH

v

Mutuelles du Mans assurances IARD (MMA IARD),

Jacques Lorio,

Dominique Miquel, in his capacity as liquidator of Safram intercontinental SARL,

Ace Insurance SA NV,

Va Tech JST SA,

Axa Corporate Solutions SA,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, A. Ó Caoimh, C. Toader (Rapporteur), E. Jarašiūnas, and C.G. Fernlund, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Haeger & Schmidt GmbH, by D. Le Prado, avocat,

* Language of the case: French.

— the French Government, by J.-S. Pilczer and D. Colas, acting as Agents,

— the Greek Government, by F. Dedousi, acting as Agent,

— the European Commission, by M. Wilderspin, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(1), (2), (4) and (5) of the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1) ('the Rome Convention').

2 The request has been made in proceedings between Haeger & Schmidt GmbH ('Haeger & Schmidt'), a company governed by German law, and Mutuelles du Mans assurances IARD (MMA IARD), Mr Lorio, Mr Miquel, in his capacity as liquidator of Safram intercontinental SARL ('Safram'), a company governed by French law, Ace Insurance SA NV, Axa Corporate Solutions SA and Va Tech JST SA ('Va Tech') concerning compensation for loss suffered by Va Tech during the carriage of a transformer it had purchased for the purposes of its business.

Legal context

The Rome Convention

3 Article 4 of the Rome Convention, headed 'Applicable law in the absence of choice', provides:

'1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

…

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract 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. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.'

Regulation (EC) No 593/2008

4 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6) has replaced the Rome Convention. Under Article 28 thereof, that regulation applies to contracts concluded after 17 December 2009.

5 Recital 20 in the preamble to that regulation states:

'Where the contract is manifestly more closely connected with a country other than that indicated in Article 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts.'

6 Recital 22 in the preamble to that same regulation reads as follows:

'As regards the interpretation of contracts for the carriage of goods, no change in substance is intended with respect to Article 4(4), third sentence, of the Rome Convention. Consequently, single-voyage charter parties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods. …'

7 Article 5 of Regulation No 593/2008, entitled 'Contracts of carriage', provides:

'1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

…

3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 By contract concluded on 24 December 2002, Va Tech, a company governed by French law having its registered office in Lyon (France), engaged Safram, established in Dechy (France), as principal freight forwarding agent, to organise the carriage of a transformer originating from the United States from the port of Antwerp (Belgium) to Lyon.

9 Safram, acting in its own name but on behalf of Va Tech, concluded a second commission contract with Haeger & Schmidt, whose registered office is in Duisbourg (Germany), for the carriage of the transformer by inland waterway. Haeger & Schmidt chose for that purpose Mr Lorio, a carrier established in Douai (France), owner of the barge *El-Diablo*, registered in Belgium.

10 While it was being loaded in Antwerp on 23 January 2003, the transformer slid on the slipway, causing the barge to capsize and sink with its cargo.

11 Va Tech sought compensation for its loss before the Tribunal de commerce de Douai (Commercial Court, Douai) from Safram and Haeger & Schmidt. Haeger & Schmidt in turn, sought to join Mr Lorio and his insurer, Mutuelles du Mans assurances IARD (MMA IARD), which has its registered office in France, as third parties.

12 The Tribunal de commerce de Douai upheld the claim for damages brought before it by judgment of 23 June 2010, ruling that French law was the only law applicable to the contracts in question and declaring Safram and Haeger & Schmidt, in their capacity as forwarding agents, liable for the losses incurred on 23 January 2003.

13 Haeger & Schmidt appealed against that judgment.

14 By judgment of 2 October 2011, the Cour d'appel de Douai (Court of Appeal, Douai) upheld the first judgment and ordered Haeger & Schmidt to pay Axa Corporate Solutions SA and Ace Insurance SA NV, which had been subrogated to the rights of Va Tech, damages in the sum of EUR 285 659.64, plus legal interest. That same amount was entered as a debt in the insolvency of Safram, which in the meantime had gone into liquidation. The appeal court thus ruled that French law was applicable to the contractual relations between the various companies involved and that, as regards Safram and Haeger & Schmidt, there could be no reason to apply German law to the contract for the carriage of goods for the purpose of Article 4(4) of the Rome Convention since it was concluded by a company established in France on behalf of another French company and the place of unloading was also situated in France.

15 Haeger & Schmidt brought an appeal before the Cour de cassation, putting forward a single ground of appeal, alleging incorrect determination of the law applicable to the dispute and stating that it had effected the performance characteristic of the commission contract for the carriage of goods between the parties and that it is established in Germany. Accordingly, in its submission, the Cour d'appel de Douai could decide to apply French law under the exception provided for in Article 4(5) of the Rome Convention only after comparing the connections that exist between the contract and (i) Germany, German law being designated by the general presumption for the determination of the law applicable established in Article 4(2) of the Convention, and (ii) France, in order to ascertain, in the light of all the circumstances of the case, the country with which the contract is most closely connected within the meaning of Article 4(5) of the Convention.

16 In those circumstances the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. May a commission contract for the carriage of goods by which a principal entrusts an agent, acting in his own name and under his own responsibility, with the organisation of the carriage of goods, which the agent will arrange to have carried out by one or more carriers on behalf of the principal, have as its main purpose the carriage of goods within the meaning of the last sentence of Article 4(4) of the [Rome Convention] and, if so, under what conditions?

2. If a commission contract for the carriage of goods may be regarded as a contract for the carriage of goods for the purpose of Article 4(4) of [the Convention] but the special presumption for the determination of the relevant law laid down by that provision is not applicable — since the requirement in the provision that the country in which the carrier has his principal place of business must also be the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated is not fulfilled — is the first sentence of that provision, to the effect that a contract for the carriage of goods is not subject to the general presumption laid down in Article 4(2), to be interpreted as meaning that the court is invited in

such circumstances to ascertain the law applicable, not on the basis of that presumption, which has been definitively ruled out, but in accordance with the general principle of determination laid down in Article 4(1), namely by identifying the country with which the contract is most closely connected, without specific regard for the country in which the party which effected the performance which is characteristic of the contract is established?

3. On the assumption that a commission contract for the carriage of goods is subject to the general presumption in Article 4(2), is it possible, where the initial contractor concluded an agreement with the first agent, who subsequently arranged for his replacement by a second agent, to allow the law applicable to the contractual relationship between the contractor and that second agent to be determined on the basis of the place of establishment of the first agent, the law of the country thus designated being deemed generally applicable to the carriage of goods transaction as a whole?'

Consideration of the questions referred

The first question

17 By its first question, the referring court asks in essence whether the last sentence of Article 4(4) of the Rome Convention must be interpreted as applying to a commission contract for the carriage of goods and, if so, what are the requirements for a commission contract for the carriage of goods to be considered a contract for the carriage of goods.

18 It should be borne in mind at the outset, as a preliminary point, that in the absence of a choice by the parties as to the law applicable to the contract, Article 4 of the Convention provides for connecting criteria on the basis of which the court must determine that law, which apply to all categories of contracts (see the judgment in *ICF*, C-133/08, EU:C:2009:617, paragraph 25).

19 Article 4 of the Convention is based on the general principle, which is enshrined in Article 4(1), that in order to establish a contract's connection with a national law, it is necessary to ascertain the country with which that contract is 'most closely connected' (see judgment in *ICF*, EU:C:2009:617, paragraph 26).

20 However, the application of that general principle is tempered by the presumptions laid down in Article 4(2) to (4) of the Rome Convention.

21 In particular, Article 4(2) lays down a general presumption, consisting in using as a connecting criterion the place of residence of the contractual party who effects the characteristic performance.

22 In the first two sentences, Article 4(4) of the Rome Convention reflects the specific nature of the contract for the carriage of goods which, at least in a cross-border context, does not lend itself easily to being connected with the country of residence of the contractual party who effects the characteristic performance since, given that the principal purpose of such a contract is the transport of goods and the carrier's habitual residence has no objective connection with that contract. Thus, the second sentence of Article 4(4) of the Convention sets out an exhaustive enumeration of the connecting criteria concerning the law applicable to contracts for the carriage of goods.

23 Article 4(5) of the Convention contains an exception clause which makes it possible to disregard those presumptions when the circumstances as a whole establish that the contract is more closely connected with another country (see, to that effect, *ICF*, EU:C:2009:617, paragraph 27).

24 On the basis of those considerations and for the purposes of answering the first question from the referring court, the third sentence of Article 4(4) of the Rome Convention, which states that 'single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods'.

25 It must be remembered with regard to the expression 'shall be treated as contracts for the carriage of goods' and the conditions under which another contract may be considered a contract for the carriage of goods that consistent and independent criteria are necessary in order to guarantee the full effectiveness of the Rome Convention in view of the objectives which it pursues (see, by way of analogy, *Koelzsch* C-29/10, EU:C:2011:151, paragraph 32 and the case-law cited).

26 It should also be borne in mind that, in paragraphs 32 to 34 of the judgment in *ICF* (EU:C:2009:617), the Court interpreted the last sentence of Article 4(4) as meaning that it allows other contracts to be equated with contracts for the carriage of goods, since one of the purposes of that provision is to extend the application of the second sentence of Article 4(4) to contracts which, despite being categorised as charter-parties under national law, have as their principal purpose the carriage of goods. In order to ascertain that purpose, it is necessary to take into consideration the objective of the contractual relationship and, consequently, all the obligations of the party who effects the performance which is characteristic of the contract.

27 The same holds true for a commission contract for the carriage of goods which is a separate contract the characteristic performance of which consists in organising the carriage of goods. As the carriage of goods per se is not its principal purpose, a commission contract for the carriage of goods cannot be considered to be a contract for the carriage of goods.

28 However, taking account of the purpose of the contractual relationship, the actual performance effected and all of the obligations of the party who must effect the characteristic performance, and not the parties' categorisation of the contract, a commission contract for the carriage of goods may turn out to relate to the specific nature of a contract for the carriage of goods as referred to in paragraph 22 of this judgment, if its principal purpose is the transport as such of the goods.

29 In the main proceedings, it is apparent from the order for reference that the first two contracts concluded, on the one hand, by Va Tech and Safram and, on the other, by Safram and Haeger & Schmidt, were categorised by the referring court as commission contracts for the carriage of goods. In order to have effected carriage of the transformer by inland waterway, Haeger & Schmidt concluded a contract for the carriage of goods with Mr Lorio, owner of the barge *El-Diablo*, which capsized during the loading of the goods.

30 It is also apparent from the order for reference that the principal purpose of the contract concluded by Safram and Haeger & Schmidt was 'the overall organisation of carriage and not simply legal representation of the contractor', with Haeger & Schmidt acting as intermediary under its own responsibility and in its own name, but on behalf of the contractor, in order to complete the tasks necessary for the carriage of the transformer in question.

31 It is for the referring court, in examining the overall circumstances of the dispute in the main proceedings, namely the contractual stipulations reflecting the economic and commercial reality of the relations existing between the parties and the purpose of Article 4(4) of the Rome Convention, to ascertain whether and to what extent the commission contract for the carriage of goods in question has as its principal purpose the actual carriage of the goods concerned.

32 In the light of the foregoing considerations, the answer to the first question is that the last sentence of Article 4(4) of the Rome Convention must be interpreted as applying to a commission contract for the carriage of goods solely when the main purpose of the contract consists in the actual transport of the goods concerned, which it is for the referring court to verify.

The second question

33 By its second question, the referring court asks, in essence, whether, where the law applicable to a contract for the carriage of goods cannot be fixed under the second sentence of Article 4(4) of the Rome Convention, it must be determined in accordance with the general rule laid down in Article 4(1) or the general presumption laid down in Article 4(2).

34 According to the Court's case-law, the court must always determine the applicable law on the basis of the presumptions set out in Article 4(2) to (4) of the Convention, which satisfy the general requirement of foreseeability of the law and thus of legal certainty in contractual relationships (see, to that effect, judgment in *ICF*, EU:C:2009:617, paragraph 62).

35 Consequently, is must be ascertained whether the potential inapplicability of the presumption laid down in Article 4(4) of the Rome Convention means that the general presumption laid down in Article 4(2) may not be relied on, meaning in turn that the general rule in Article 4(1) must be applied.

36 Under the first sentence of Article 4(4) of the Convention, the contract for the carriage of goods is not subject to the presumption in Article 4(2). Under the second sentence of Article 4(4), the contract for the carriage of goods is governed by the law of the country in which, at the time the contract is concluded, the carrier has his principal place of business, if that 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.

37 Thus, Article 4 provides explicitly that the presumption laid down in Article 4(2) does not apply to a contract for the carriage of goods and lays down a number of specific connecting criteria enabling the law applicable to that type of contract to be determined, as the carrier's place of residence is not deemed sufficient on its own.

38 In those circumstances, it would be contrary to both the wording and logic of Article 4(4) of the Rome Convention to apply the presumption laid down in Article 4(2) to a contract such as the one at issue in the main proceedings where, since the criteria laid down in the second sentence of Article 4(4) of the Convention are not fulfilled, it is established that the presumption laid down therein cannot apply.

39 The interpretation as set out in the preceding paragraph is, moreover, compatible with the wording of the rules of conflict pertaining to contracts for the carriage of goods provided for in Regulation No 593/2008, which is, however, not applicable ratione temporis to the main proceedings. Where the connecting criteria enumerated therein are not fulfilled, Article 5 of that regulation precludes applying the law of the country in which the carrier has his habitual residence to contracts for the carriage of goods and provides expressly that, in that case, the law of the country where the place of delivery as agreed by the parties is situated must apply.

40 Thus, where the requirements laid down in the second sentence of Article 4(4) of the Rome Convention are not fulfilled, the national court must ascertain which law is applicable to the contract not on the basis of the presumption laid down in Article 4(2), which is definitively ruled out, but by applying the general principle laid down in the first sentence of Article 4(1), that is to say, by identifying the country with which the contract is most closely connected.

41 As rightly observed by the French Government in its written observations, since Article 4(5) of the Convention requires the national court to apply the law of the country with which the contract is most closely connected and refrain from applying the law applicable determined on the basis of the criteria set out in Article 4(2) to (4), a fortiori that court must apply the law of the country with which the contract is most closely connected, as provided for in Article 4(1), where Article 4(4) does not enable the law applicable to a contract for the carriage of goods to be identified (see, to that effect, *ICF*, EU:C:2009:617, paragraphs 63 and 64).

42 In the light of the foregoing, the answer to the second question is that Article 4(4) of the Rome Convention must be interpreted as meaning that where the law applicable to a contract for the carriage of goods cannot be fixed under the second sentence of that provision, it must be determined in accordance with the general rule laid down in Article 4(1), that is to say, the law governing that contract is that of the country with which it is most closely connected.

The third question

43 As a preliminary point, given the answer to the first question, it should be noted that the third question is asked only in the event that the referring court finds, in the light of the circumstances of the case, that the contract at issue in the main proceedings cannot be equated with a contract for the carriage of goods and accordingly is not subject to the general presumption laid down in Article 4(2) of the Rome Convention.

44 By this question, the referring court asks, in essence, whether Article 4(2) of the Rome Convention must be interpreted as allowing a national court to determine the law applicable to contractual relations such as those in the main proceedings, where the first forwarding agent has been replaced by a second forwarding agent having its registered office in another Member State, solely according to where the principal forwarding agent has its place of business.

45 As observed in paragraph 22 above, under Article 4(2) it is presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his or its habitual residence, central administration, principal place of business or other place of business which is to effect the performance.

46 Therefore, where the matter involves a contract which comes under Article 4(2) of the Rome Convention and it is possible to identify its characteristic performance, the national court must first of all determine the applicable law on the basis of the connecting criteria set out in Article 4(2), as stated in paragraph 35 above (see, to that effect, judgment in *ICF*, EU:C:2009:617, paragraph 62).

47 As is apparent both from the wording of Article 4(2) of the Rome Convention, which makes express provision for the application of Article 4(5), and from the Court's case-law, that presumption may be disregarded when the requirements of Article 4(5) are met (see, to that effect, judgment in *ICF*, EU:C:2009:617, paragraphs 63 and 64).

48 It follows from the foregoing that the court must ascertain, secondly, whether, in the light of the overall circumstances of the dispute before it, the solution it has reached applying Article 4(2) must be disregarded. To that end, it must compare the connections existing between the contract and, on the one hand, the country in which the party who effects the characteristic performance has his or its habitual residence at the time of conclusion of the contract and, on the other, another country with which the contract is closely connected.

49 In fact the referring court must conduct an overall assessment of all the objective factors characterising the contractual relationship and determine which of those factors are, in its view, most significant (see, by way of analogy, judgment in *Schlecker*, C-64/12, EU:C:2013:551, paragraph 40). As observed by the Commission, significant connecting factors to be taken into account include the presence of a close connection between the contract in question with another contract or contracts which are, as the case may be, part of the same chain of contracts, and the place of delivery of the goods.

50 This interpretation is also supported by recital 20 in the preamble to Regulation No 593/2008, which mentions that the existence of a very close connection between the contract in question and another contract or contracts may be a relevant connecting criterion.

51 In the light of the foregoing considerations, the answer to the third question is that Article 4(2) of the Rome Convention must be interpreted as meaning that where it is argued that a contract has a closer connection with a country other than that the law of which is designated by the presumption laid down therein, the national court must compare the connections existing between that contract and, on the one hand, the country whose law is designated by the presumption and, on the other, the other country concerned. In so doing, the national court must take account of the circumstances as a whole, including the existence of other contracts connected with the contract in question.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **The last sentence of Article 4(4) of the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, must be interpreted as applying to a commission contract for the carriage of goods solely when the main purpose of the contract consists in the actual transport of the goods concerned, which it is for the referring court to verify.**

2. **Article 4(4) of the Convention must be interpreted as meaning that, where the law applicable to a contract for the carriage of goods cannot be fixed under the second sentence of that provision, it must be determined in accordance with the general rule laid down in Article 4(1), that is to say, the law governing that contract is that of the country with which it is most closely connected.**

3. **Article 4(2) of the Convention must be interpreted as meaning that, where it is argued that a contract has a closer connection with a country other than that the law of which is designated by the presumption laid down therein, the national court must compare the connections existing between that contract and, on the one hand, the country whose law is designated by the presumption and, on the other, the other country concerned. In so doing, the national court must take account of the circumstances as a whole, including the existence of other contracts connected with the contract in question.**

[Signatures]