OPINION OF ADVOCATE GENERAL

BOT

delivered on 19 May 2009 [1]

1. By the present case, the Court is, for the first time, being asked to interpret the Convention on the law applicable to contractual obligations [2] and, more particularly, Article 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.

2. In this case, the Court 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 Article 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 Article 4(2) and a specific presumption, in Article 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 Article 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 Article 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 Article 4(1) of the Rome Convention, ascertain the law of the country with which that contract is most closely connected.

1 — Original language: French.

2 — Convention opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1) ('the Rome Convention').

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 Article 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 Article 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 Article 4(1) of that Convention, '[t]o 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'.

13. Article 4(2) of the Rome Convention states as follows:

'Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the

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.

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.'

14. Contracts for the carriage of goods are subject to a specific presumption. Article 4(4) of the Rome Convention provides as follows: '[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'.

15. Article 4(4) goes on to state that, '[i]n 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'.

16. Finally, the Rome Convention provides national courts with the possibility of setting aside the presumption in Article 4(2) thereof in the case where the characteristic performance cannot be identified and of setting aside the presumptions in Article 4(2) to (4) thereof where it appears from the circumstances as a whole that the contract is more closely connected with another country.

II — Facts and the main proceedings

17. Intercontainer Interfrigo SC ('ICF') is a company established in Belgium. Balkenende Oosthuizen BV ('Balkenende') and MIC Operations BV ('MIC') are companies established in the Netherlands.

18. In the context of a projected rail link for the transport of goods between Amsterdam (Netherlands) and Frankfurt (Germany), ICF made wagons available to Balkenende, on behalf of MIC. ICF was to carry out the rail transport and, to that end, bought the locomotives and services necessary. MIC leased the loading capacity which it had available to third parties and was to oversee the operational phase of the transport.

19. No written contract was concluded between the parties. ICF sent only a draft contract, designating Belgian law as the law applicable thereto. That draft contract was not signed by the parties. However, agreements were implemented between 20 October and 13 November 1998 and between 16 November and 21 December 1998.

20. On 27 November 1998, ICF sent an initial invoice to MIC in the amount of EUR 107 512.50 relating to services provided over the period from 20 October 1998 to 13 November 1998. On 22 December 1998, a second invoice was sent to MIC in the amount of EUR 67 100 in relation to the implementation of the agreements between 16 November and 21 December 1998.

21. Since MIC had not paid the invoice of 27 November 1998, on 7 September 2001 ICF called on MIC to settle that invoice, but without success.

22. ICF brought an action before the Rechtbank te Haarlem (Local Court, Haarlem) (Netherlands) and sought an order requiring Balkenende and MIC to pay the invoice of 27 November 1998 and the value added tax thereon, together with interest and costs. ICF submitted that the law applicable to the contract was Belgian law.

23. By judgment of 28 January 2004, the Rechtbank te Haarlem ruled that Netherlands law applied to the contract. Since ICF's debt claims were time-barred under Netherlands law, it declared the action inadmissible.

24. ICF appealed to the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam). That court confirmed the judgment at first instance. It rejected ICF's argument that the parties had chosen Belgian law as the law applicable to the contract, as that contract had been sent to Balkenende and to MIC but had never been signed by them.

25. Before the Gerechtshof, ICF argued that Belgian law applied by virtue of Article 4(2) of the Rome Convention. In the view of that court, the contract at issue was to be regarded as having as its main purpose the carriage of goods, within the meaning of the last sentence of Article 4(4) of that Convention. Furthermore, in the opinion of the Gerechtshof, that contract was more closely connected with the Netherlands than with Belgium, with the result that the presumption contained in Article 4(2) of the Convention did not apply.

26. ICF appealed on a point of law to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) (Netherlands).

27. The Hoge Raad, being unsure as to the correct interpretation of Article 4 of the Rome Convention, has referred a series of questions to the Court for a preliminary ruling.

III — The questions referred for a preliminary ruling

28. The Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court:

'(1) Must Article 4(4) of the [Rome 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 Question [1] is answered in the affirmative, must Article 4(4) of [the Rome 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 Rome Convention]?

(3) If Question [2] 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 Question [2] 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 Rome Convention]?

(5) Must the exception in the second clause of Article 4(5) of [the Rome Convention] be interpreted in such a way that the presumptions in Article 4(2), (3) and (4) of [the Rome 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?'

IV — Analysis

A — *Preliminary observations*

29. First of all, it must be stated that, by virtue of the Protocols of 19 December 1988, [4] which entered into force on 1 August 2004, the Court has jurisdiction to interpret the provisions of the Rome Convention.

30. Furthermore, pursuant to Article 2(a) of First Protocol 89/128, the Hoge Raad der Nederlanden is entitled to request the Court to give a preliminary ruling on a question raised in a case pending before it and concerning the interpretation of the provisions of the Rome Convention.

4 — First Protocol 89/128/EEC on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (OJ 1989 L 48, p. 1), along with the Accession Agreements of 10 April 1984, 18 May 1992 and 29 November 1996, and Second Protocol 89/129/EEC conferring on the Court of Justice of the European Communities certain powers to interpret the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (OJ 1989 L 48, p. 17), along with the Accession Agreements of 10 April 1984, 18 May 1992 and 29 November 1996.

B — *The questions referred*

31. For the first time, the Court is called upon to interpret the Rome Convention and, more exactly, the provision of that Convention relating to the law applicable to a contract in the absence of a choice by the parties.

32. The examination of the questions referred by the national court first requires a presentation of the system introduced by the Rome Convention.

1. The system introduced by the Rome Convention

33. It was in order to continue, in the field of private international law, the work of unification of law set in motion by the adoption of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [5] that the Member States adopted the Rome Convention.

5 — OJ 1972 L 299, p. 32. That Convention has been replaced by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

34. The objective of that Convention, according to its preamble, is to establish uniform rules concerning the law applicable to contractual obligations. The Report on the Convention on the law applicable to contractual obligations [6] states that that Convention was born of a wish to eliminate the inconveniences arising from the diversity of the conflict-of-law rules, notably in the area of contracts. The great advantage of the Rome Convention, in the view of Mr Vogelaar, at that time Director-General for the internal market and harmonisation of laws at the Commission, was that the level of legal certainty was raised, confidence in the stability of legal relations was strengthened, agreements on jurisdiction according to the applicable law were facilitated and protection of acquired rights for the whole of private law was increased.

35. The objective which the Rome Convention pursues is therefore to make uniform the conflict-of-law rules in order that the same laws are applied no matter where the decision is made.

36. In order to achieve that objective, the Rome Convention enshrines, in its Article 3, the principle of the parties' autonomy in their choice of the law applicable to contractual obligations. In accordance with that principle, common to the Member States, contracts are governed by the law chosen by the parties.

37. In the absence of a choice, we have seen that Article 4 of the Rome Convention offers courts the necessary elements for determining the applicable law. In my view, the system thus introduced by that article is constituted in the following manner.

38. Article 4(1) of the Rome Convention provides that, if no choice of applicable law has been made by the parties, 'the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable 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'.

39. The first sentence of that provision, which may appear a little vague, seems in reality to reflect quite well the concepts adopted by the courts of the Member States.

40. The Giuliano Lagarde report shows us that, in most Member States, the objective concept for application of the law to the contract takes precedence over fixed and rigid connecting factors. [7] In the absence of a choice by the parties of the law applicable to the contract, the court must look for pointers

6 — Report by M. Giuliano, Professor, University of Milan, and P. Lagarde, Professor, University of Paris I (OJ 1980 C 282, p. 1; 'the Giuliano Lagarde report').

7 — See Article 4(1) of the Giuliano Lagarde report.

enabling it to place that contract within a particular country.

41. The second sentence of Article 4(1) of the Rome Convention relates to what is commonly called the 'severability' of a contract. I shall return more specifically to the issue of possible severability in the final part of this discussion.

42. The apparent flexibility of Article 4(1) of the Rome Convention is somewhat restrained by a whole series of presumptions set out in the subsequent paragraphs.

43. Thus, Article 4(2) of the Rome Convention provides that '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'.

44. The Giuliano Lagarde report states that that provision gives specific form and objectivity to the concept of 'closest connection' and greatly simplifies the problem of determining the law applicable to the contract in default of a choice by the parties. [8] It also states that application of the connecting factor of the contract 'from the inside' makes it possible to avoid that connection being made from the outside by elements that are external to the contract and are not truly connected thereto, such as the nationality of the contracting parties or the place where the contract was concluded. [9]

45. The choice of place of residence, central administration or establishment of a supplier of the characteristic performance, like that of the law applicable to the contract, may also be explained, in my view, by the fact that that law has the advantage of being that of which the supplier of that service may easily have knowledge, in particular without a language barrier, and that on the application of which he may legitimately rely.

46. Furthermore, by the very reason of its professional activity, the supplier of the characteristic performance will enter into a large number of contracts. It therefore appears desirable for practical reasons that all of the contracts which it concludes should be subject to the same law. The objection could, admittedly, be made that the same is true, in a bilateral contract, of the other party to the contract. However, in the great majority

8 — See the seventh subparagraph of Article 4(3) of the Giuliano Lagarde report.

9 — See the second subparagraph of Article 4(3) of the Giuliano Lagarde report.

of cases, the consideration consists solely of payment of a sum of money.

47. Accordingly, the choice of place of residence, central administration or establishment of the supplier of the characteristic performance as that of the law applicable to the contract appears to be the most appropriate.

48. This general presumption is subject to two exceptions, which are set out in Article 4(3) and (4) of the Rome Convention.

49. Firstly, 'to the extent that the subject-matter of the contract is a right in immovable property or a right to use immovable property, it shall be presumed that the contract is most closely connected with the country where the immovable property is situated'.

50. The subjection of that type of contract to a specific presumption which designates the *lex rei sitae* may be explained by the fact that, in that case, the centre of gravity is the property itself.

51. Moreover, that appears to be the reason why the Giuliano Lagarde report states that Article 4(3) of the Rome Convention does not extend to contracts for the construction or repair of immovable property.[10] In such contracts, the subject-matter is not a right over the property, but a supply of services, such as work to be carried out on that property. In that case, it may be assumed that the law applicable in default of a choice by the parties will be defined by the general presumption and will be the law of the place of residence of the supplier of the characteristic performance.

52. Secondly, Article 4(4) of the Rome Convention provides that '[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 or other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods'.

53. The establishment of a specific presumption for contracts relating to the carriage of goods may be explained by the fact that, very

10 — See the fourth subparagraph of Article 4(4) of the Giuliano Lagarde report.

often, in international relations, the habitual place of residence of the supplier of the characteristic performance, that is to say, the carrier, as the main object of such a contract is the movement of the goods, does not have any objective connection with the contract. Such is the case, for example, of a carrier established in Germany contracted to transport the goods of a French consignor from France to Italy.

54. Accordingly, it is only if the country within the territory of which the carrier has his habitual place of residence is the same as that of the place of loading or discharge or the principal establishment of the consignor that the contract will be governed by the law of that country. There is thus a convergence of a number of locational factors in a single place.

55. If those two conditions are not met, Article 4(4) of the Rome Convention cannot apply.

56. That provision does not state, in that event, what solution is to be adopted.

57. It appears to me reasonable to take the view that, in such a situation, the court tasked with defining the law applicable to the contract must refer to the general rule laid down in Article 4(1) of that Convention. It can then assess the elements of the contract which will enable it to identify that contract's centre of gravity.

58. Accordingly, the question which arises is whether, in that situation, the matter comes within the scope of the general presumption laid down in Article 4(2) of that Convention. For the following reasons, I do not think so.

59. I reiterate that Article 4(4) of the Rome Convention provides that '[a] contract for the carriage of goods shall not be subject to the presumption in paragraph 2'.

60. I take the view that that first sentence must be understood as meaning that, if the place of residence of the carrier and that of loading or discharge or the principal establishment of the consignor are not the same, the presumption in Article 4(2) can never be applicable.

61. The specific presumption laid down in Article 4(4) of the Rome Convention amounts, in reality, to applying the law of the place of residence of the supplier of the

characteristic performance, that is to say, the carrier.

62. We have seen that those who drafted the Rome Convention took the view that the residence of the carrier was not sufficient to connect the contract to the law of the place of that residence. Another element, namely, the place of loading, discharge or the principal establishment of the consignor, is therefore necessary to confirm the contract's close connection with the country of the carrier's residence.

63. Although those draftsmen took care to make the connection of a contract for the carriage of goods to the law of the place of residence of the carrier subject to those conditions, it seems to me that a reference to the general presumption laid down in Article 4(2) of the Rome Convention in the case where those conditions are not met would hinder the usefulness of Article 4(4) of that Convention.

64. As I have stated, a contract for the carriage of goods is a complex contract which has numerous and diverse connecting factors. The carrier may be established in France, the consignor in Italy, and the carriage may take place between the Netherlands and Belgium. None of those places appears to be more significant than any other. In my opinion, it is particularly for that reason that a specific presumption is applied, in the Rome Convention, to contracts for the carriage of goods.

65. It appears to me, therefore, that, if the conditions in Article 4(4) of that Convention are not met, the court must, on a case-by-case basis, seek to identify the country which has the strongest connections with the contract, in accordance with the general rule set out in Article 4(1) of that Convention. [11]

66. Although the Rome Convention seeks to introduce, by way of the presumptions, greater predictability in the application of the conflict rule, there is, however, one element, reproduced in the Rome I Regulation, which suggests that a certain flexibility remains in the system under that Convention.

11 — 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; 'the Rome I Regulation') appears to remedy that gap left by Article 4(4) of the Rome Convention. Article 5(1) of the Rome I Regulation, which applies to contracts for the carriage of goods, provides that, if the requirements set out in Article 4(4) of that Convention and reproduced in the Rome I Regulation are not met, the law of the country where the place of delivery as agreed by the parties is situated is to apply. One may take the view, accordingly, that legal certainty and the foreseeability of the applicable law have taken preference over the flexibility of application of the conflict rule.

67. Article 4(5) of the Rome Convention provides that '[p]aragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2 [to] 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country'.

68. In my view, that provision must be read in the following manner. If the characteristic performance cannot be determined by application of Article 4(5) of the Rome Convention, reference must be made back to the general rule laid down in Article 4(1) of that Convention, which provides that the contract is governed by the law of the country with which it is most closely connected.

69. Furthermore, even in a case where the characteristic performance is determined, the presumption laid down in Article 4(2) of that Convention may be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country. The same is true in regard to the presumptions laid down in Article 4(3) and (4) of the Rome Convention.

70. The Giuliano Lagarde report states that the purpose of Article 4(5) is that, since the Rome Convention establishes a general conflict rule which is intended to apply to almost all types of contract, the inevitable counterpart of this is to leave the judge a margin of discretion each time the circumstances as a whole show that the connection first assumed to be the closest is supplanted by another. [12]

71. The application of Article 4(5) of the Rome Convention is the subject of debate. There appear to be two clear trends. According to the first, that provision is subsidiary to the general and specific presumptions. That trend, which is a minority one, appears to have been adopted by the courts in Scotland and the Netherlands. On that view, that provision comes into play only where, having regard to the particular circumstances of the case, the principal establishment of the supplier of the characteristic performance of the contract is without real importance as a connecting factor. [13]

12 — See the fourth and fifth subparagraphs of Article 4(7) of the Giuliano Lagarde report.

13 — See, inter alia, judgments of the Hoge Raad der Nederlanden of 25 September 1992 in *Société Nouvelle des Papeteries de l'AA SA* v *BV Machinefabriek BOA* (Nederlandse Jurisprudentie 1992, No 750), and of the Court of Session (Scotland) (United Kingdom) of 12 July 2002 in *Caledonia Subsea Ltd* v *Micoperi Srl* (2002 SLT 1022).

72. The presumptions laid down in Article 4(2) to (4) of the Rome Convention are thus considered strong.

73. The second trend which emerges with regard to the operation of Article 4(5) of that Convention is more fluid and flexible. It seems that the presumptions are disregarded without the application of strict rules in that regard, [14] the courts choosing to apply that provision either without first studying the presumptions, or by giving reasons for disregarding them.

74. I take the view that, for reasons related to compliance with the principle of legal certainty and in order to ensure the objective of predictability which the Rome Convention seeks to achieve, it is appropriate to apply Article 4(5) of that Convention in so far as it has been shown that the presumptions laid down in Article 4(2) to (4) of the Convention do not reflect the true connection of the contract with the locality thus designated. [15]

75. It has been seen that the Rome Convention was adopted in order to eliminate the inconveniences arising from the diversity of conflict rules and to increase the predictability of the application of those rules. Furthermore, the Rome I Regulation replicates those objectives. Recital 16 in the preamble to that regulation states that, '[t]o contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable'.

76. With a view to raising the level of legal certainty, those who drafted the Rome Convention therefore took care to establish presumptions. Those presumptions are intended to designate the law of the country which is deemed to have the strongest connections with the contract. That is the case, for example, with regard to a lease, the designated law of which will, pursuant to Article 4(3) of that Convention, be the law of the country in which the property concerned is located.

14 — See, inter alia, the judgment of the Cour de cassation (France) of 19 December 2006 (cass com nº 05-19.723). Thus, the Cour de cassation held that, 'by application of Article 4(1) of the Rome Convention, the contract is governed by the law of the country with which it has the closest connection; it follows from a combined reading of Article 4(2) and (5) that, in order to determine the most appropriate law, the court hearing the case must compare the connections existing between the contract and, on the one hand, the country where the party which must supply the characteristic performance had, when the contract was concluded, its habitual residence and, on the other, the other country in question, and ascertain that to which the contract is most closely connected'. See also the judgment of the High Court of Justice (England and Wales) (United Kingdom) of 13 December 1993 in *Bank of Baroda* v *Vysya Bank* ([1994] 2 Lloyd's Rep. 87, 93), in which the English court set aside the presumption in Article 4(2) of the Rome Convention in favour of Article 4(5) thereof, which links the contract to the law with which it has, according to the circumstances of each case, the closest connections.

15 — See, to that effect, *Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation* (COM(2002) 654 final, pp. 27 and 28).

77. However, and this is, in my view, the justification for Article 4(5) of the Convention, if the court considers that the law of the country thus designated does not have genuine connections with the contract, the presumptions, which are no more than that, [16] may be rebutted. [17]

78. To return to the example of a lease, it may be assumed that such a contract concluded between two French nationals, the object of which is a seasonal rental in Italy, will have stronger connections with France. In that case, a number of elements converge on a country other than that designated by the presumption. The parties to the contract are both French nationals, the contract was no doubt concluded in France and, a priori, it would be in their interest for French law to be the law applicable to the contract, if only for reasons of language and because that is the law of which they are deemed to have knowledge.

79. That flexibility in the application of the conflict rule can be justified by the desire not to impose arbitrarily the law of a country which, ultimately, has only few genuine connections with the contract.

80. Likewise, there is a certain flexibility in the application of the conflict rule in the second sentence of Article 4(1) of the Rome Convention. That provision states that, if a separable part of the contract has a closer connection with another country, that part may by way of exception be governed by the law of that other country.

81. The matter of severability in relation to a contract appears to have been debated by the working group given the task of preparing the draft of the Rome Convention.

82. It is stated in the Giuliano Lagarde report that 'no delegation wished to encourage the idea of severability', but that 'most of the experts were in favour of allowing the court to effect [such] a severance, by way of exception, for a part of the contract which is independent and separable, in terms of the contract and not of the dispute'. [18]

83. In the view of Mr Lagarde, the concept of separability in relation to a contract must be understood strictly. In particular, it is not because two obligations are performed in two different countries that they are separable. Mr Lagarde continues that, in order for part of a

16 — See Article 4(9) of the Giuliano Lagarde report.

17 — In addition, that possibility has been reiterated in Article 4(3) of the Rome I Regulation.

18 — See the second subparagraph of Article 4(8) of the Giuliano Lagarde report. See also Article 3(4) thereof.

contract to be capable of being considered separable, it must be susceptible of a separate solution, independent of the solution applied to the other components of the contract. [19]

84. Thus, a contract involving both a sale of equipment and a promise of technical assistance could be subject to different laws, since those two aspects are objectively separable. [20]

85. I note also that the Giuliano Lagarde report states that '[t]he words "by way of exception" are therefore to be interpreted in the sense that the court must have recourse to severance as seldom as possible'. [21]

86. The choice to permit severance only exceptionally can easily be understood by the desire not to disturb the coherence of a contract and not to lead to choices of law giving rise to contradictory results. [22]

87. Moreover, the national courts themselves have been reluctant to apply severance. The Court of Appeal (England and Wales) (United Kingdom), for example, has stated that severance can be contemplated only in respect of distinct provisions within the contract which can be treated as separate from the rest of the contract. [23]

88. In the same way, the Bundesgerichtshof (Federal Court of Justice) (Germany), well before the Rome Convention was drawn up, considered that, as a general rule, it was appropriate to determine the centre of gravity of a contract and to apply only one law to a legal relationship. [24]

89. Severability in relation to a contract thus has limits and must, accordingly, be applied by way of exception. It must not lead to the nullifying of the principal objective of the Rome Convention, which is to guarantee a certain predictability in the application of conflict-of-laws rules.

19 — P. Lagarde, 'Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980', *RC Dip*, 80(2), April-June 1991, p. 287.

20 — P. Mayer and V. Heuzé, *Droit international privé*, 9th Edition, Montchrestien, Paris, 2007, No 710.

21 — See the fourth subparagraph of Article 4(8) of the Giuliano Lagarde report.

22 — See the first subparagraph of Article 3(4) of the Giuliano Lagarde report.

23 — Judgment in *The Governor and Company of Bank of Scotland of the Mound* v *Butcher* [1998] EWCA Civ 1306. See also judgments of the High Court of Justice (England and Wales) in *CGU International Insurance plc* v *Szabo & Ors* (2002) 1 All ER (Comm) 83 and *American Motorists Insurance Co (Amico)* v *Cellstar Corp & Anor* [2003] EWCA Civ 206, paragraph 33.

24 — Judgment of the Bundesgerichtshof of 7 May 1969 (VIII ZR 142/68, DB 1969, 1053).

90. I shall now examine the questions referred in the light of the foregoing considerations.

2. The questions referred

91. In my view, it is appropriate to deal with the questions referred in the following manner.

92. First of all, by its first question, the national court wishes to know, essentially, whether a contract such as that at issue comes within the scope of Article 4(4) of the Rome Convention.

93. Next, by its fifth question, the Court is asked to define the scope of Article 4(5) of that Convention, which provides that the presumptions laid down in Article 4(2) to (4) thereof may be disregarded where it appears from the circumstances as a whole that the contract is more closely connected with another country.

94. Finally, by its second, third and fourth questions, the national court asks whether it is possible to apply severance to a contract such as that here at issue. It asks this in particular with regard to the fact that, depending on the law applicable, the time-limits governing the rights under the contract differ.

95. In my view, the first and fifth questions should be examined together. By those questions, I understand that the national court is asking the Court to determine, in the light of the system introduced by Article 4 of the Rome Convention, the law applicable to a contract such as that at issue in the main proceedings.

96. Thus, I shall state, on the one hand, the reasons for my view that that contract cannot be subject to Article 4(4) of that Convention and, on the other, the reasons for which I take the view that, in order to determine the law applicable to that contract, the national court must identify the country which has the closest connections with the contract at issue, in accordance with Article 4(1) of the Convention.

97. Finally, I shall set out the grounds for my view that the contract cannot be subject to severance.

(a) Application of the system introduced by Article 4 of the Rome Convention to the contract at issue

98. The national court wishes to determine whether the contract concluded between ICF and MIC can be classified as a contract for the carriage of goods and thus come within the scope of Article 4(4) of the Rome Convention.

99. It may be recalled that, pursuant to that contract, ICF made wagons available to Balkenende, which was itself acting on behalf of MIC, and carried goods by rail between Amsterdam and Frankfurt. MIC alone, which had leased to third parties the loading capacity at its disposal, looked after the operational aspects of the transport.

100. The national court also states that ICF is an undertaking established in Belgium, while Balkenende and MIC are established in the Netherlands.

101. As has been seen in point 54 of this Opinion, Article 4(4) of the Rome Convention is intended to apply only if the country in which the carrier resides is the same as that in which the place of loading or discharge or the principal establishment of the consignor is located. At this stage of the analysis it is unimportant whether the contract concluded between, on the one hand, ICF and, on the other, Balkenende and MIC can be classified as a contract for the carriage of goods within the meaning of that provision.

102. Thus, the view must be taken that, in the present case, those places are not the same. ICF is established in Belgium, whereas the other parties to the contract, Balkenende and MIC, are established in the Netherlands. Furthermore, the transport is between Amsterdam and Frankfurt, which means that loading takes place in the Netherlands and discharge in Germany.

103. Consequently, I think that, even if the contract at issue were to be classified as a contract for the carriage of goods within the meaning of Article 4(4) of the Rome Convention, that contract cannot come within the scope of that provision since the requisite conditions are not satisfied.

104. Therefore, in line with my comments above, if the conditions of that provision are not satisfied, I consider that the general rule set out in Article 4(1) of the Rome Convention applies.

105. The national court must therefore identify the country which has the closest connections with the contract at issue in the main proceedings. A number of elements may be taken into account in that search. Those elements include the place where the contract was concluded, the place of its performance, the place of residence of the parties and the object of the contract. Thus, those elements will lead the court towards a place of convergence, the centre of gravity of the contract.

106. The elements supplied by the national court appear to make the Netherlands the centre of gravity of the contract. As it will be recalled, ICF is established in Belgium, Balkenende and MIC are established in the Netherlands, and the transport was effected between Amsterdam and Frankfurt.

107. Accordingly, Netherlands law should apply to that contract. In any event, it is for the national court to determine the country that is most closely connected with the contract.

108. Having regard to all those factors, I am of the opinion that a contract the object of which is the provision of a means of transport for the purposes of the carriage of goods on a specified voyage does not come within the scope of Article 4(4) of the Rome Convention where the establishment of the undertaking responsible for making that transport available is situated in a country other than that in which the place of loading, place of discharge or principal establishment of the other contracting party is located.

109. I accordingly take the view that, in order to determine the law applicable to such a contract, the national court must, in accordance with Article 4(1) of the Rome Convention, identify the law of the country with which that contract is most closely connected.

(b) Possibility of severance

110. By its second, third and fourth questions, the national court seeks to ascertain whether it is possible to apply severance to a contract such as that at issue in the main proceedings. It asks this in particular in light of the fact that, depending on the law applicable, the time-limits governing the rights under the contract differ.

111. By those questions, I understand the national court as seeking in fact to determine whether the obligation on Balkenende and MIC to provide consideration for the obligation which ICF has performed can be separated from the remainder of the contract concluded by those parties, the issue at stake being that ICF's action may or may not be time-barred, depending on the law applicable.

112. As we have already seen, severance is provided for, by way of exception, in the second sentence of Article 4(1) of the Rome Convention.

113. Ultimately, severance is of interest only if the part to which application of a different legal system is envisaged is autonomously separable from the contract as a whole and if that part has closer connections with another country.

114. In the present case, it appears to me difficult to envisage severance. The contract concluded between ICF, on the one hand, and Balkenende and MIC, on the other, is for a single service: the supply of a means of transport for the carriage of goods on a specified voyage, and the consideration for which is the payment of a sum of money. That reciprocity of the obligations of the parties appears to require the application of a single legal system to the contract.

115. The position would be different, in my view, if the contract at issue involved multiple obligations separable from each other, such as, for example, once the goods had been transported to Frankfurt, the obligation to deliver them within Germany. Those two obligations would then appear to be objectively separable.

116. Furthermore, I would add that, even if part of the contract at issue in the main proceedings could be separated from the remainder of the contract, the fact remains that, in accordance with the second sentence of Article 4(1) of the Rome Convention, the court must satisfy itself that that autonomous part has closer connections with the law of another country. In the light of the comments which I have made in points 106 and 107 of the present Opinion, it appears to me difficult to connect any part of the contract to Belgian law, under which, it will be recalled, ICF's action is not time-barred.

117. Consequently, I am of the opinion that, in the context of a contract the object of which is the supply of a means of transport for the carriage of goods on a specified voyage, the second sentence of Article 4(1) of the Rome Convention cannot apply.

V — Conclusion

118. In view of the foregoing, I propose that the Court reply as follows to the questions referred to it for a preliminary ruling by the Hoge Raad der Nederlanden:

'A contract the object of which is the provision of a means of transport for the purposes of the carriage of goods on a specified voyage does not come within the scope of Article 4(4) of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (the Rome Convention), where the establishment of the undertaking responsible for making that transport available is situated in a country other than that in which the place of loading, place of discharge or principal establishment of the other contracting party is located.

The law applicable to such a contract, in accordance with the first sentence of Article 4(1) of the Rome Convention, is that of the country with which that contract has the closest connections. Those connections may be deduced, for example, from the fact that, in a contract such as that at issue in the main proceedings, the other parties thereto are established in the Netherlands and the place of loading is located in that country.

The second sentence of Article 4(1) of the Rome Convention must be interpreted as meaning that the law of another country may be applied to part of the contract if that part is autonomously separable from the contract as a whole. The contract such as that here at issue, the object of which is a single performance, namely, the supply of a means of transport for the carriage of goods on a specified voyage, does not satisfy that requirement.'