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### **The law applicable to freight-forwarding contracts<sup>1</sup>**

(About the *Haeger & Schmidt* case: ECJ, 23 October 2014. Case C-305/13).

#### **Introduction**

When an undertaker needs to have goods transported, as he is not necessarily a specialist in transport organization, he frequently uses the services of a professional, a freight forwarding agent. According to Black's Law Dictionary online, a freight forwarder is a «company that handles the tasks of preparing goods for transport for a shipper. Transport tracking, document preparation, warehousing. Storage, cargo space booking, negotiating freight charges, consolidating freight, getting insurance, and filing claims are some of the tasks handled. Shipping security and destination services are additional provisions using house (forwarder's) bill of lading or house air waybill and using their agents or associates at the destination. Known also as "forwarder" ». This definition includes a wide range of obligations on behalf of the service provider. In practice, the service offered may only provide some of these or include additional duties. Which raises the problem of the legal characterisation of such a contract, which is necessary to determine the legal regime governing it, especially when international.

A first impression is that a freight-forwarding contract includes different material and intellectual operations around the performance of the carriage. Thus, from a legal point of view, freight forwarding contracts seem to be distinguished from contracts of carriage. Assuming such a distinction, it seems obvious that in international relations, there are no international conventions governing such contracts. When an international carriage contract is concluded with a carrier through an agent in charge of organizing the voyage, the issue of the legal regime likely to govern such freight-forwarding contract raises. The same as for a freight-forwarding subcontract. In terms of conflicts of laws, what is the law applicable to freight forwarding contracts? Indeed, given the lack of international convention, when litigation arises, the applicable regime has to be determined through a conflict-of-law mechanism.

To answer this question, first will be exposed the EU instruments governing conflicts of laws in contractual relations (1). Second, the recent *Haeger & Schmidt* case<sup>2</sup> in which the European Court of Justice interpreted the conflict-of-law rules in a case concerning freight forwarding contracts will be analysed (2) and discussed (3).

#### **1. EU instruments governing conflicts of laws in contractual relations**

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<sup>1</sup> This text is a draft presentation of the communication delivered at Edinburgh University, on 3 – 4th September 2015 during the colloquium : *Current Issues in Freight Forwarding: Law and Logistics*.

<sup>2</sup> ECJ, Judgment of the Court (Third Chamber) of 23 October 2014. *Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (MMA IARD) and Others*. Case C-305/13.

As the legal regimes that can be found in Europe are very different from a legal system to another, the determination of the applicable law is a very sensitive issue. And this issue is frequent in practice as rather few freight-forwarding contracts contain choice of law clauses. In France for instance, the distinction between a ‘commission contract’ (*contrat de commission de transport*), which is a pure organizational contract, and a carriage contract is very strict. This contract is defined in the new Standard contract<sup>3</sup> for commissionnaire de transport in France<sup>4</sup> as « any service provider who organizes freely and has performed, in its own name and under its responsibility, the movement of goods from one place to another using means of his choice, on behalf of the principal »<sup>5</sup>. Quality of agent, free choice of routes and means of transport, independent professional acting on its own name, these are the three criteria necessary for the characterization of a commission contract under French law. In other countries however, the terms ‘freight forwarding contract’ may relate to both a mere carriage contract, but also to different types of service contracts (organization of forwarding, logistics...etc.). As a consequence, characterization of the contract is decisive to determine the appropriate domestic regime.

In the EU legal context, conflicts of laws rules have been harmonized and issued at a European level. Two instruments successively applicable govern the determination of the applicable law. First, the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 (‘the Rome Convention’, herein designated as ‘RC’). And following, the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (‘Regulation Rome I’, herein designated as ‘RR I’)<sup>6</sup>, which has been adopted to replace the Rome Convention and now governs all contracts concluded after the 17<sup>th</sup> of December 2009<sup>7</sup>.

Both these instruments first allow parties to choose the applicable law to a contract (Art. 4 RC and RR I). Subsidiarily, if the parties –which is rather frequent in practice – have made no choice of law these texts provide for conflict-of-law rules to identify the domestic relevant law. The mechanism adopted by the convention and the Regulation is quite different, although the very content of the conflicts of laws rules are rather similar.

The Rome convention provides for a general rule governing all type of contracts<sup>8</sup>: “the contract shall be governed by the law of the country with which it is most closely connected”. In order to guide the courts in the identification of the closest law, the following paragraphs of Article 4 set a series of presumptions. A general one dedicated to all contracts<sup>9</sup>, presumes 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”, what can be summarized as ‘the law of the characteristic performer’. But the following paragraphs also contain special presumptions including one

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<sup>3</sup> It must be noted that the terms ‘Standard contract’ are quite inappropriate as they designate actually a series of rules of legal value governing specific contracts in the field of transportation, automatically applicable provided that French law governs the contract in issue, and that parties have not decided otherwise when it is authorized.

<sup>4</sup> Art 2.2. Standard transport commission contract, published by Decree n° 2013-293 du 5 avril 2013 portant approbation du contrat type de commission de transport, OJ 7 April 2013.

<sup>5</sup> Loose translation by the author.

<sup>6</sup> OJ L266, 9 October 1980, p. 1 (80/934/EEC).

<sup>7</sup> And also contracts remaining in force for Denmark according to Recital (46) of the regulation and Articles 1 and 2 of the Protocol on the Position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community.

<sup>8</sup> Article 4(1) of the Convention.

<sup>9</sup> Article 4(2) of the Convention.

dedicated to contracts of carriage of goods<sup>10</sup>. Indeed, authors of these instruments have considered that the general conflict of law rule could not apply directly to carriage contracts. They thus introduced additional conditions for the law of the performer (here: the carrier) to apply<sup>11</sup>.

The scheme of the Rome I regulation is slightly different. As this Regulation aimed at a simplification in the identification of the relevant law, Article 4 begins by stating clearly a series of conflicts of law rules, relating to a limited list of contracts in its paragraph 1. Especially, are concerned the sale of goods contract (Article 4 (1)(a)) and the service contract (Article 4 (1)(b)). As for the latter, the rule states that “a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence”. Other provisions are dedicated to specific contracts, such as Article 5, which determines the law applicable to contracts of carriage. The content of this provision is, subject to minor differences, quite close to Article 4(5) of the Rome Convention. A significant difference exist however between the two articles relating to contracts of carriage. In the Rome Convention, when the conditions for the application of the law of the carrier are not met, the connecting factor is the closest connection (Art. 4(1)), while in the Regulation, it the law of the place of delivery as agreed by the parties, which tends to strengthen predictability. As for the contracts that are not mentioned in the above articles, they remain governed by the law of the performer<sup>12</sup>. In both instruments the law designated by the conflict of law rule can be set aside by the escape clause according to which when all the circumstances of the case show that the contract is more closely connected with a country, the law of that other country shall apply<sup>13</sup>.

As a special conflict of law rule has been specially drafted for carriage contracts, in theory, only contracts which can be characterized as contracts of carriage should be governed by the special conflict-of-law rule dedicated to such contracts. The difficulty comes from the absence of definition of a carriage contract according to EU law, even if such an autonomous definition is obvious. However, the EU instruments determine the scope of application of the rule dedicated to carriage contracts, extending its scope of application to contracts that are not mere carriage contracts, which could be defined as contracts by which a carrier undertakes to carry goods or passengers from one place to another, performing himself the movement of the goods or passengers.

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<sup>10</sup> Article 4(5) of the Convention : « 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». See : Lamont-Black, S. (2009). *Transporting Goods in the EU: an interplay of international, European and national law*, p.11; Legros, C. *Commentaire de l'article 5 (« loi applicable au contrat de transport ») du règlement CE n° 593/2008 du 17 juin 2008 sur la loi applicable aux obligations contractuelles, dit « Rome I »*, *Revue des transports*, feb. 2009, p.12 ; Czepelak M., *The Law Applicable to the Contract of Carriage under the Rome I Regulation*, *Czech Yearbook of International Law* 2009, p.47; Gebauer, *Art. 5 Rome I*, in Calliess (ed.) *Rome Regulations* (2nd. ed 2015), mn. 5.

<sup>11</sup> The main connecting factor is the law of the country of habitual residence of the carrier, but such law will only apply if another relevant element is also situated there: the place of loading or the place of discharge or the principal place of business of the consignor is situated (Art. 4(4) RC) ; the place of receipt, place of delivery or the habitual residence of the consignor must be located in the same country (Art. 5(1) RR I).

<sup>12</sup> Article 4(2) of RR I, same as 4(2) of RC.

<sup>13</sup> Article 4(5) of RC and Article 4(3) of RRI. It should be noted that Article 4(3) of RRI specifies that the ‘other law’ must be ‘manifestly’ closer to the contract than the one designated by the relevant conflict of law rule. This precision aims to limit the use of such a derogation. See under page 9 ff.

Article 4(4) of the Rome Convention specifies *in fine*: “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”. The Guiliano-Lagarde report<sup>14</sup> may bring an authoritative guidance on the interpretation of the Convention on this point. In paragraph 5, the report addresses the issue of “ a person who contracts to carry goods for another (and) does not carry them himself but arranges for a third party to do so”. Is then explained “the wording of paragraph 4 is intended to make it clear that charter-parties may be considered to be contracts for the carriage of goods in so far as that is their substance”. This precision thus seems to have been drafted especially to extend the scope of application of the rule to certain charter-parties, namely single-voyage charter parties. But other contracts related to carriage of goods could be concerned.

A similar provision can be found in Recital 22 in the preamble to Regulation No 593/2008: “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”. The recital 22 of Rome I regulation even adds definitions of the carrier and of the consignor for the needs of its application. Thus, “the term ‘consignor’ should refer to any person who enters into a contract of carriage with the carrier and the term ‘the carrier’ should refer to the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself”. The analysis of both provisions shows that the law applicable to contracts, which are not carriage contracts but whose main purpose still is ‘the carriage of goods’, will fall under the scope of this special conflict-of-law rule. Several contracts involving movement of goods without being mere carriage contracts are concerned with this interpretation. For instance voyage charter-parties as ECJ had already the occasion to rule on in the *Intercontainer Interfrigo SC (ICF)* case<sup>15</sup>, where the ECJ ruled that not only single voyage charter-parties may be governed by Article 4(4) of the Convention, but also charter-parties when the main purpose of the contract is not merely to make available a means of transport, but the actual carriage of goods.

Obviously, freight forwarding contracts could be concerned. When a forwarding agent undertakes to organise a shipment, thus concluding subcontracts in its own name but on behalf of the shipper in order to perform the carriage of the goods, it is questionable whether the main purpose of such a contract is or not the carriage of goods. If so, the same law will apply to both contracts: freight forwarding contract and contract of carriage. According to an author, the forwarding agent, who does not have the obligation to perform the carriage himself, « will nevertheless be treated like a carrier in the sense of Article 5(1) »<sup>16</sup>. Such broader interpretation corresponds, according to this same author, to « the prevailing opinion in the German and English<sup>17</sup> legal literature regarding Article 4(4) of the Rome Convention ». On the contrary, another author mentions freight forwarding contracts in the list of contracts that do not fall within Article 5(1) of Rome I as the main duty of the freight forwarder is to “arrange for the carriage” and not to perform it personally<sup>18</sup>.

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<sup>14</sup> Official Journal of the European Communities [1980] OJ 282/1.

<sup>15</sup> *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV, MIC Operations BV*, ECJ, 6 oct. 2009, n° C-133/08, D. 2010. 236, comm. F. Jault-Seseke ; *RTD eur.* 2010. 195, comm. L. Grard ; *Rev. crit. DIP* 2010. 199, comm. P. Lagarde ; *JDI* 2010. 183, comm. C. Legros.

<sup>16</sup> Gebauer, *op. cit.*, spec. p. 148.

<sup>17</sup> Dicey/Morris/Collins, *Conflict of Laws* (Collins ed., 15th ed. 2012), para. 33–101.

<sup>18</sup> *Contra* : Czepelak M., *op. cit.*, spec. p. 60.

Such was the issue raised by the *Haeger & Schmidt* case<sup>19</sup>. In fact the case was slightly more complex as it also involved a freight-forwarding subcontractor who had been engaged by the principal freight forwarder.

## 2. *The Haeger & Schmidt case*

This case was referred to the European Court of Justice by the French courts. The litigation related to a loss of goods in a transport organized from Belgium to France, by two successive freight forwarders.

A contract had been concluded in December 2002 between Va Tech, a company governed by French law having its registered office in Lyon (France), and 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. Safram (the first freight forwarder), acting in its own name but on behalf of Va Tech, concluded a second freight-forwarding contract with Haeger & Schmidt, whose registered office was 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. While it was being loaded in Antwerp the transformer slid on the slipway, causing the barge to capsize and sink with its cargo.

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

The Tribunal de commerce de Douai upheld the claim for damages, 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. Haeger & Schmidt appealed against that judgment. 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.

Haeger & Schmidt had recourse before the Cour de cassation<sup>20</sup>, putting forward a single ground of recourse alleging incorrect determination of the law applicable to the dispute. The Cour de cassation then decided to stay the proceedings and to refer to the Court of Justice for a preliminary ruling. Four questions were referred.

**The first question** concerned the application or not of the last sentence of Article 4(4) of the

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<sup>19</sup> ECJ, 23 October 2014. *Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (MMA IARD) and Others*. Case C-305/13: Legros C., (2015) Rev. crit. DIP, pp. 221-236.

<sup>20</sup> Cour de cassation, chambre commerciale, 22 May 2013, N°12-13052:

<http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000027453613>

Rome Convention<sup>21</sup> to a 'commission contract' 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, and if yes of the conditions to be met.

**The second question** the ECJ was asked was whether a commission contract for the carriage of goods might be regarded as a contract for the carriage of goods for the purpose of Article 4(4) of the Convention. And in the event that the special presumption for the determination of the relevant law laid down by that provision was not applicable<sup>22</sup>, what would be the relevant law: the one determined by the general presumption laid down in Article 4(2) or 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.

**The third question** contemplated the situation where a commission contract for the carriage of goods would be subject to the general presumption in Article 4(2). In such a case would the law applicable to the contractual relationship between the principal freight forwarder and its subcontractor 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? In other terms, would the law governing the first freight-forwarding contract also govern the freight-forwarding subcontract?

The different questions referred to the ECJ thus raised several concerns as the extent of the scope of the special presumption governing the determination of the relevant law for carriage contracts, the impact of the relevant law applicable to a freight-forwarding contract, on a subcontract, but also the application of the 'escape clause'<sup>23</sup> in carriage contracts.

The ECJ ruled as following:

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.

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<sup>21</sup> Referring to the scope of application of the conflict-of-law rule : See before p. 4.

<sup>22</sup> The provision requires for the application of the law of the carrier's country, 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.

<sup>23</sup> Article 4(5) Rome Convention ; Articles 4(4) and 5(3) of the Rome I Regulation.

The three questions referred to the ECJ and the answer of the Court can be synthesized. In the first question, ECJ was asked whether a ‘commission contract’ could be included (or not) of in the scope of application of Article 4(4) of the Rome Convention. The Court answered positively, however setting a condition, consistent with the very terms of the convention: the main purpose of the contract has to consist in the actual transport of the goods, condition to be established by the seized court.

In case of assimilation of a freight-forwarding contract with a contract or carriage for conflict-of-law purposes, the Court specified in the answer to the second question, that if the conditions set by Article 4(4) of the Rome Convention for the application of the law of the carrier were not met, the relevant law would have to be determined in accordance with the general rule laid down in Article 4(1), and not by application of Article 4(2), that is the law of the country with which the contract is the most closely connected. On the contrary, if the freight-forwarding contract is governed by Article 4(2) (when the main purpose of the contract is not transport), the law of the service provider (the freight-forwarder) designated by such presumption, can be disregarded if it can be demonstrated by the national court that the contract in issue has a closer connection with a country other than that the law of which is designated by the presumption of Article 4(2). Thus, 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.

Following the ECJ, the Cour de cassation<sup>24</sup> quashed the Court of Appeal’s previous decision as it had, on the one hand, characterized the contract in issue of ‘contrat de commission de transport’ as its purpose was the organization of an inland waterway transport, but, on the other hand, applied French Law (instead of German law) without proving that transport was the main purpose of this contract according to article 4(4) of the Rome Convention, or comparing the connections existing between that contract and, on the one hand, the country whose law is designated by the presumption (Germany) and, on the other, the other country concerned (France) according to article 4(5) of the Rome Convention. A Second Court of Appeal will now have to rule again and determine the relevant law according to the ECJ preliminary ruling.

Applied to the Haeger&Schmidt case, the EJC ruling implies that the French Court will have to determine whether the freight-forwarding German subcontractor performed or not a transport. As it does not seem to be the case in practice, German law normally applicable may however be set aside if it can be established that this contract had closer links with France than with Germany, according to the escape clause. Taking into account the circumstances as a whole, including the existence of the principal freight-forwarding contract agreed between two French companies, and that France was the place of destination, it is likely that the court will consider that the French law is indeed applicable to this relation.

### 3. Discussion

The debate will focus on the ECJ ruling and its sub sequential application by the Cour de

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<sup>24</sup> Cour de cassation, chambre commerciale, 10 février 2015, N°12-13052 : <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000030239724&fastReqId=771022558&fastPos=1>



Cassation. But will also be discussed the opportunity of applying the same law to a freight forwarding contract and to the carriage contract concluded by the freight forwarder; to a freight forwarding contract and its subcontract; and by extension, to all of the contracts belonging to a 'chain of contracts'.

**Assessment of the *Haeger&Schmidt* decision.** The ECJ's decision seems at first sight disappointing, as it does not bring a clear solution for the identification of the law governing freight forwarding contracts. It must however be approved as it avoided the extension of the conflict-of-law rule dedicated to carriage contracts to all freight-forwarding contracts. In doing so, not only the domestic courts will be able to identify the relevant applicable law according to the very characteristics of the contract, but also, this solution, will preserve the variety of legal regime governing these contracts in Europe, and as such, predictability. From the French point of view, it is clear that economic operators are quite aware of the great lines of the liability regime governing the *contrat de commission de transport*. And as such regime is quite original and rather severe for the forwarding agent, the choice of an agent settled in France by a consignor implicitly implies the choice of French law. The ECJ solution enables such a result by application of the law of the characteristic performer if the contract does not contain a duty of carriage by the agent himself.

On the contrary, systematic application of the law of the carrier to a mere freight forwarding contract would not be appropriate, and this for several reasons. First, this application proves difficult from a technical point of view. If we accept that a freight forwarding agent is the operator who arranges a carriage, it seems rather impossible to apply Article 4(4) of the convention, or 5(1) of the regulation to such a contract. According to recital 22 of the Regulation, the 'consignor' is the person who enters into a contract of carriage, that is, the freight forwarding agent. And the 'the carrier' is the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself, that is, the agent, again! And if the agent here replaces the carrier – which would be logical as he is assimilated to a carrier –, who can be considered as the consignor regarding the freight forwarding contract? The actual shipper? As a result, the law of the agent would govern the contract, provided that several conditions were met: the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in the country where the agent is settled. Is this solution satisfactory? I do not believe so as it adds conditions for the application of the law of the service provider that are not relevant for a service contract. I must confess that, apart from the situation where the freight forwarding agent performs himself the carriage, thus becoming a carrier, such provisions seem inapplicable to a freight forwarding contract. This implies that the special conflict-of-law rules dedicated to contracts of carriage have never been drafted for freight forwarding contracts. In case a forwarding agent performs himself all or part of the carriage, such contract will be converted into a carriage contract, thus governed by the appropriate law. The extension of the rules is therefore useless.

Second, it is necessary to wonder what would be the benefit. If the goal is to apply the same law to the carriage contract and to the freight forwarding contract, one must be aware that this goal cannot be achieved systematically. Indeed, the freight forwarding contract would be governed by the law of the agent if, for instance, the place of receipt is located in the same country. While the contract of carriage would be governed by the law of the habitual residence of the carrier, if it is also the place of delivery. By contrast, the use of the escape clause allows to reaching this goal<sup>25</sup>. In the *Haeger&Schmidt* case, the Court merely adopts

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<sup>25</sup> Rémy-Corlay P., *Mise en oeuvre et régime procédural de la clause d'exception dans les conflits de lois*, Rev. crit. DIP 2003, p.37.

the method recommended in the *ICF* Case, that is a strict comparison between the law issued from the conflict-of-law rule and the law presumably closest to the contract. However, the method set by the *ICF* case has been highly criticized in France as it leads to place these laws on equal terms, whereas one of them has been specially designed for the situation in issue<sup>26</sup>. Finally, the unpredictability of the solution remains the main argument against an extension of the rule, despite that such forecast may be circumvented by the use of the escape clause.

**Escape clause in chain of contracts.** Despite the criticisms that can be addressed to the method adopted by European case law on this subject, such clauses can prove to be relevant as a corrective mechanism, notably when several contracts are closely linked. Different issues can be discussed related to conflicts of laws in chains of contracts, which may not lead to the same solutions.

*Subcontracts.* The third question referred to the ECJ in the *Haeger&Schmidt* case concerned the possible application of the law governing the first freight-forwarding contract to the freight-forwarding subcontract. This question raises the issue of the law applicable to subcontracts, meaning contracts where the main duty contained in the first contract is transferred to a subcontractor. In such case, there is a risk of frustrating the expectations of the parties by determining separately the applicable law to these contracts, especially when the first party is not aware that there will be a subcontract. In this sense, it is likely that eventually the final Court of appeal in the *Haeger&Schmidt* case will consider that the French law that governed the principal freight forwarding contract should also apply to the subcontract. But of course this solution should not be automatic and should be motivated by comparison of the links of the different laws in conflict with de contract in issue. The ECJ only recalled that the existence of a chain of contracts is one of the circumstances that can be taken into account to use the escape clause. It implies that this use is only a faculty and not an obligation.

*Successive contracts.* This expression refers to a situation where a party to a contract enters into another contract with a third party, and so on, provided that all the successive contracts achieve a common purpose. For instance, a carriage of goods from one place to another. In terms of conflict of laws, it is questionable whether the same law should govern all the contracts included in a chain of agreements of transport. Such a solution would undoubtedly constitute a significant simplification for the courts in international litigations. But would it be appropriate? Transposed to our problem, that would lead to apply the same law to a freight forwarding contract and to the carriage contract(s) concluded by the forwarding agent. But which law: the law of the agent or the law of the carrier?

My opinion is that the escape clause should be used very wisely, and only in exceptional<sup>27</sup> circumstances, which is precisely why the term “manifestly” was introduced in the escape clauses of the Rome I Regulation. The goal was to prevent domestic courts from using this clause with the sole aim being the application of national law, thus disregarding the whole conflict of laws mechanism. However, in the field of carriage of goods, a chain of operations comprising a freight forwarding contract, several carriage contracts, handling operations and so on, is not an exceptional situation. Thus, if the parties want the same law to apply to all of these contracts, the only solution is to provide for identical choice-of-law clauses, which is not so easy to achieve in practice. The mere fact of belonging to chain of contracts is not a sufficient ground for applying the same law to all contracts belonging to ‘the chain’. Each

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<sup>26</sup> See the different commentaries quoted note n°15.

<sup>27</sup> It must be noted that such clause is named ‘*clause d’exception*’ in French.

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situation has to be treated in an autonomous way, and each solution has to be motivated by the courts. That is precisely why the lower courts have been censured in the *Haeger&Schmidt* case, although eventually the solution is likely to be the same, that is the application of French law to the freight forwarding subcontract.