**Choice of law for Contract of Carriage of Goods in the European Union**

1. **Introduction**

The law that applies to a contract is of considerable legal and commercial significance.[[1]](#footnote-1) Courts of Member States under Article 3 of both the Rome Convention and Rome I are generally mandated to respect the right of parties to a commercial transaction to make an express choice of law, or an implied choice of law that can be demonstrated with reasonable certainty from the terms of the contract and the circumstances of the case.[[2]](#footnote-2) This rule is based on party autonomy.[[3]](#footnote-3) However, where the parties fail to make a choice of law or the choice of law is invalid, the Rome Convention and Rome I provides for default rules that determine the applicable law to a contractual transaction.[[4]](#footnote-4)

This article principally focuses on the law that applies to a contract of carriage of goods [in the absence of choice] under both the Rome Convention and Rome I Regulation, but a brief commentary is made in relation to the law applicable to commercial contracts in order to better appreciate the special rules made for default rules applicable to contract of carriage of goods. Thus, some of the brief observations made in relation to the default rules that apply to commercial contracts would by way of analogy also apply to a contract for the carriage of goods.[[5]](#footnote-5)

The contract of carriage of goods is singled out for attention because it is “a complex contract which has numerous and diverse connecting factors.”[[6]](#footnote-6) Also, the law applicable to a contract of carriage of goods [in the absence of choice] has been interpreted twice by the Court of Justice of the European Union (“CJEU”)[[7]](#footnote-7) and at least once by the English High Court.[[8]](#footnote-8) This article analyses these three case law decisions relating to the law applicable to a contract of carriage of goods as decided under the Rome Convention, and further discusses how the law applicable to a contract of carriage of goods should be determined under Rome I. Also, a comparison is made between the Rome Convention and Rome I regime.

The principal conclusion reached in this article is that some of the complex problems of determining the law applicable to a contract of carriage of goods through the default rules under the Rome Convention appear to have been improved under Rome I, which creates more certainty. However, the Rome I regime for determining the law applicable to a contract of carriage of goods is by no means perfect, and a resort to some case law decisions from the CJEU may prove to be helpful in the future.

1. **Choice of Law for Commercial Contracts**

Article 4(1) of the Rome Convention provides that the choice of law for is to be determined by the law of the country that is most closely connected with the contract [of carriage of goods]. This is also known as the principle of closest connection which is based on proximity.[[9]](#footnote-9) In applying the principle of closest connection, a very significant factor which may be taken into account is the existence of a contract or contracts which have a very close relationship with the contract [of carriage of goods].[[10]](#footnote-10) Other factors which may also be taken into account also include the place where the contract was concluded, the place of performance, the place of residence of the parties, and the object of the contract.[[11]](#footnote-11) Article 4(1) also provides that a severable part of a [contract of carriage of goods] which has a closer connection with another country may by way of exception be governed by the law of that country. This proviso (also known as dépeçage) is to be utilised by the court on exceptional grounds, especially where the [contract of carriage] is independent and can be severed from the rest of the other contracts.[[12]](#footnote-12)

Article 4(2) provides that subject to Article 4(5) it shall be presumed that the law of the country that is most closely connected shall be the law of the [habitual residence] of the party who is to carry out the performance which is characteristic of the contract.

Article 4(4) provides that a contract for the carriage of goods shall not be subject to the presumption in Article 4(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. Also Article 4(4) has a proviso 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.

Article 4(5) provides that the presumptions set out in in Article 4(2)-(4) shall not apply if the “characteristic performance cannot be determined” and it shall also be disregarded “if it appears from the circumstances as a whole that the contract is more closely connected with another country.” Article 4(5) has two main elements. The first element is that if the characteristic performance cannot be determined, the principle of closest connection (discussed above) is applied. The second element is that where it appears from the circumstances as a whole that a [contract of carriage] is more closely connected with another country, the presumption in Article 4(2) is disregarded. The second element is also known as the escape clause.[[13]](#footnote-13) It has been held by the CJEU that the escape clause is to be utilised under Article 4(5) of the Rome Convention where the presumption has no genuine connecting value to a contract [of carriage of goods] and where it is clear from the circumstances as a whole that the contract [of carriage of goods] is more closely connected with another country when compared with the presumption(s).[[14]](#footnote-14) In embarking on this exercise the goals of legal certainty and foreseeability are to be counter-balanced with the goals of flexibility.[[15]](#footnote-15) It has also been held by the CJEU that “ the court called on to rule in a particular case cannot automatically conclude that the [main] rule laid down … must be disregarded solely because, by dint of their number, the other relevant circumstances…would result in the selection of another country.”[[16]](#footnote-16) In this regard, in applying the escape clause the court “must conduct an overall assessment of all objective factors characterising the contractual relationship and determine which of those factors are, in its view most significant.”[[17]](#footnote-17) In relation to a commercial contract [of the carriage of goods], it has been further held by the CJEU, that the “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.”[[18]](#footnote-18)

Article 4(1) of Rome I presents a structure of fixed rules (as opposed to presumptions under the Rome Convention) in determining the law that applies to the contract of the parties in the absence of choice.[[19]](#footnote-19) Article 4(2) functions as an exception to Article 4(1) by providing that the contract shall be governed by the law of the country of the habitual residence of the party who is to carry out the characteristic performance based on two conditions.[[20]](#footnote-20) The first is where the contract is not covered by Article 4(1). The second is where the elements would be covered by more than one of the sub-paragraphs under Article 4(1)(a)-(h). The escape clause is provided for under Article 4(3) which is similar to what obtains under the Rome Convention, save that there is a provision that the main rule should be displaced where another country is manifestly more closely connected with the contract.[[21]](#footnote-21) Article 4(4) provides for the principle of closest connection where the main rules under Article 4(1)&(2) cannot be determined.[[22]](#footnote-22) In addition Article 4 of Rome I does not expressly provide for judge made dépeçage.

Despite the change in structure of Article 4 of Rome I, it appears the case law of the CJEU under the Rome Convention would be significant to interpreting Article 4 of Rome I, particularly due to the fact that the CJEU has made reference to Rome I in interpreting the Rome Convention in relation to the default rules for commercial contracts.

1. **Carriage of Good under the Rome Convention: Case Law Analysis**

The complex issues that arose under the Rome Convention regime in applying the default rules to contract of carriage of goods had to do with categorisation. Categorisation is used here in at least two contexts. The first is the categorisation of the legal bases for determining the law applicable to a contract of carriage of goods. The second is the classification of what type of commercial contract is essentially or in substance a contract of carriage of goods for the purpose of determining the applicable law.

The first case where the CJEU had to address this problem is the case of *Intercontainer Interfigo SC* *(ICF) v Balkenende Oosthuizen BV & Anor*.[[23]](#footnote-23) In that case ICF entered into a charter-party with Balkendende and MIC. ICF was established in Belgium, Balkenende and MIC were established in the Netherlands, and the transport was between Amsterdam and Frankfurt. The said contract provided, *inter alia*, that ICF was to make train wagons available to MIC and [ICF] would ensure their transport through the rail network. MIC, which had hired out the acquired load capacity to third parties, was responsible for all operational aspects of the transport of the goods concerned. The contract was not governed by a choice of law, save that the draft contract contained a choice of Belgian law which was ineffective as a choice of law. A dispute subsequently arose between the parties regarding payment. ICF instituted a claim for payment against Balkendende and MIC before the Dutch court(s). Balkendende and MIC contended that the action was time-barred under Dutch law, which they argued was the applicable law. ICF on the other hand contended that the action was not statute barred under Belgian law, which it argued was the applicable law. The Dutch Court of first instance (*Rechtbank te Haarlem*) agreed with Balkendende and MIC and dismissed the case of ICF. On appeal to the Dutch appellate court (*Gerechtshof te Armsterdam*), the *Gerechtshof* sustained the decision of the lower court. The court held that the contract in issue was to be regarded as having its main purpose for the carriage of goods, within the meaning of the last sentence of Article 4(4) of the Rome Convention. In addition, the *Gerechtshof* held that the contract was more closely connected with the Netherlands than with Belgium so that the presumption in Article 4(2) was inapplicable. ICF further appealed to the Hoge Raad, which being unsure of the correct interpretation of Article 4 of the Rome Convention referred some questions to the CJEU. The following questions, which are relevant to the discussion in this article is stated hereunder:

(1) Must article 4(4) of the Rome Convention be construed as meaning that it relates only to voyage charterparties and that other forms of charterparty fall outside the scope of that provision?

(2) If question 1 is answered in the affirmative, must article 4(4) of the Convention then be construed as meaning that, in so far as other forms of charterparty also relate to the carriage of goods, the contract in question comes, so far as that carriage is concerned, within the scope of that provision and the applicable law is for the rest determined by article 4(2) of the Convention?

(3) If 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?

A.G Bot in his opinion [to the CJEU] and the ruling of the CJEU adopted different approaches to answering the above referred questions. This point is significant as would be demonstrated in a latter case where the CJEU had to determine what law applies to a contract of carriage of goods and the issue of categorisation.[[24]](#footnote-24)

In answering the above questions, A.G Bot in expressing his opinion to the CJEU began with the main premise that Article 4(4) cannot apply where there is no convergence of either the place of loading, discharge or principal establishment of the consignor with the principal establishment of the carrier.[[25]](#footnote-25) This observation made by A.G Bot is significant because he considered a further discussion on whether the contract between the parties was actually a contract for the carriage of goods as otiose.[[26]](#footnote-26) A.G Bot in justifying the main premise explained that the specific presumption in Article 4(4) relating to contract for carriage of goods could be rationalised on the basis that generally in [international] cross-border commercial transactions, the habitual place of residence of the characteristic performer (the carrier in the case of carriage of goods), does not have significant connection to a contract of carriage of goods which involves the movement of goods, where the carrier established in country X may contract to transport the goods of consignor Y from country Y to country Z.[[27]](#footnote-27) It is the convergence of either the place of loading, discharge or principal establishment of the consignor with the principal establishment of the carrier that makes Article 4(4) a [presumptive] significant factor in determining the applicable law for contract of carriage of goods.[[28]](#footnote-28) A.G Bot based on this premise reached the conclusion that where the conditions in Article 4(4) are not met, Article 4(1) is to apply rather than Article 4(2).[[29]](#footnote-29) A.G Bot in reaffirming this conclusion further emphasised that “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.”[[30]](#footnote-30) Also, applying “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.”[[31]](#footnote-31) In applying the law to the facts of the case, A.G Bot observed that in the instant case there was no convergence of the required connecting factors to bring Article 4(4) into operation since ICF was established in Belgium, Balkenende and MIC were established in the Netherlands, and the transport was between Amsterdam and Frankfurt, which implied that loading was to take place in Netherlands and the discharge in Germany. Thus, A.G Bot was of the opinion that even if the contract in question was to be classified as a contract for the carriage of goods, Article 4(4) was inapplicable in this case, and a further discussion on what should be classified as a contract of carriage of goods would be “unimportant”.[[32]](#footnote-32)

The CJEU in its ruling agreed that Article 4(4) applied only where there was the required convergence of connecting factors.[[33]](#footnote-33) However, the CJEU did not go as far as making any pronouncement on the legal implication where Article 4(4) was inapplicable, nor did it discuss the categorisation of the legal bases for resolving this complex problem as A.G Bot did in his opinion. In addition, the CJEU actually resolved the question of whether the contract in this case was a carriage of goods contrary to the approach of A.G Bot who regarded this issue as “unimportant”.[[34]](#footnote-34) The CJEU held that Article 4(4) applies to a charter-party, other than a single voyage charter-party, only when the “owner’s obligation relate not merely to making available the means of transport but also the carriage of goods proper.”[[35]](#footnote-35) The CJEU also held that 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.”[[36]](#footnote-36) The CJEU justified its conclusion on the basis that the wording of Article 4(4) “equates with contracts of carriage not only single voyage charter-parties but also other contracts, in so far as the main purpose of those contracts is the carriage of goods.”[[37]](#footnote-37) In addition, the CJEU held that the main purpose of the provisoin Article 4(4) was to categorise other contracts as carriage of goods even though they may be classified as charter-parties under national law.[[38]](#footnote-38)

In *Martrade Shipping & Transport GmbH v United Enterprises Corporation*,[[39]](#footnote-39) the English court was faced with perhaps an even more interesting scenario on the categorisation of a contract of carriage of goods, as the determination of terminology “contract of carriage of goods” under Article 4(4) of the Rome Convention in effect became a pun as a result of the manner in which counsel for the parties argued their case before the court. The case before the High Court was an appeal from the decision of the London arbitration tribunal on a partial award. The claimant at the material time was a Marshall Islands company owner of a vessel registered in Panama, which was managed by a Liberian company registered in Greece. The defendant (a German company) had chartered the vessel under a charterparty contract dated 2 July 2005. The contract was an amended form of the NYPE standard contract. An additional clause in the charterparty expressly provided for English law and London arbitration. A dispute arose between the parties particularly relating to the power to award interest under the Late Payment of Commercial Debts (Interest) Act 1998 (“1998 Act”).[[40]](#footnote-40) The High Court in overturning the ruling of the London arbitral tribunal held *inter alia* that English law was inapplicable to the parties’ contract under Section 12 of the 1998 Act.[[41]](#footnote-41) In interpreting section 12(1)(a), the court held that the factors relied upon by the tribunal in reaching the conclusion that the charterparty contract had a significant connection with England in reality had very little significant connection with England. Secondly, in interpreting section 12(1)(b), the court held that English law would have been inapplicable to govern the charterparty contract had the parties not made a choice of English law.

The relevant issue [in *Martrade*] to this article was whether the charter-party in this case was to be classified as a contract of carriage of goods under Article 4 (4) of the Rome Convention so that the presumption in Article 4(2) was displaced.[[42]](#footnote-42) Popplewell J held in the negative. He held that “Article 4(4) applies to a charter-party, other than a single voyage charterparty, only when the main purpose of the *owner’s contractual undertaking* is to perform the actual carriage of goods, not merely to make available a means of transport.”[[43]](#footnote-43) Thus, Popplewell J explained that a time charter is not the type of charter-party that could be classified as a contract of carriage of goods within the meaning of Article 4(4). The principal basis of his holding was that in a time charter the charterer assumes control or ownership over the carriage of goods,[[44]](#footnote-44) rather than the type of charter-party situation that arose in *ICF* where the owner who makes available a means of transport could [in substance] be the carrier for the goods of the charterer. Popplewell J admitted that in this case the time-charter was in substance a contract for the carriage of goods, but it was not in the sense envisaged by the decision of the CJEU in *ICF*.[[45]](#footnote-45) Popplewell J also observed that the same position in the case he was considering also applied to a term time charter where the charterer assumes control over the transport and carriage of goods.[[46]](#footnote-46) In his final analysis, Popplewell J applied Article 4(2) of the Rome Convention since the contract in issue was not to be classified as a contract of carriage of goods, and he was of the opinion that the contract was probably governed by Greek law, but held that it was definitely not governed by English law.[[47]](#footnote-47)

In *Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (MMA IARD) and others,*[[48]](#footnote-48)the consignor a French company engaged a [principal] freight forwarding agent, also a French company, to organise the carriage of equipment from Belgium to France. The principal agent, acting on its own name but on behalf of the consignor, concluded a second commission contract with the second forwarding agent, a German company, for the overall organization of the carriage of equipment by inland waterway. The second agent entered a third contract with the carrier, based in France, to transport the goods by barge. The barge sank during loading, destroying the goods, whereupon the consignor brought a claim for damages against both the principal and second agents, which in turn joined the barge owner and his insurer as third parties. The French Court of first instance applied French law to the parties’ dispute. On appeal, the French Supreme Court referred some questions to the CJEU. The relevant questions referred to the CJEU, [which is relevant to this article] was whether (i) the last sentence of Article 4(4) of the Convention applied to a commission contract for the carriage of goods; and (ii) where the law applicable to a contract of carriage of goods could not be determined in accordance with the first two sentences of article 4(4), that law had to be determined in accordance with the general rule in article 4(1) or the general presumption in article 4(2).

In relation to the first question posed, the CJEU applied its previous decisions to the instant case.[[49]](#footnote-49) The CJEU observed that in general a commission contract could not be classified *per se* as a contract of carriage of goods because its characteristic performance consists in organizing the carriage of goods.[[50]](#footnote-50) However, a commission contract could in substance be regarded as contract of carriage of goods taking into account the purpose of the contractual relationship, the actual performance effected and all of the obligations of the party who carries out the characteristic performance.[[51]](#footnote-51) In addition, the CJEU held that it is not the parties’ categorisation that makes it a contract for the carriage of goods, rather it was for the court in determining whether a contract is in substance a contract for the carriage of goods within the meaning of Article 4(4) of the Rome Convention, to pay attention to the “contractual stipulations reflecting the economic and commercial reality” of the transaction between the parties.[[52]](#footnote-52)

In relation to the second question, the CJEU was faced with resolving a question which it did not address in *ICF*, but was addressed by A.G Bot in his opinion [in *ICF*]. The CJEU reached the same conclusion as A.G Bot[[53]](#footnote-53) in holding that where there was no convergence of the required connecting factors under Article 4(4) in relation to a contract of carriage of goods, Article 4(1) was applicable rather than Article 4(2).[[54]](#footnote-54) The CJEU however rationalized its decision on the basis that it would not be logical to apply Article 4(2) which is a general presumption to Article 4(4) which is a specific presumption that applies to a contract of carriage of goods.[[55]](#footnote-55)The CJEU also supported this position by referring to Article 5 of Rome I which precludes applying the law of the country in which the carrier has its habitual residence to contracts for carriage of goods, where the required convergence of connecting factors does not exist, and expressly provides that the law of the country of the place of delivery as agreed by the parties is the applicable law.[[56]](#footnote-56)

1. **Choice of Law for Contract of Carriage of Goods: Rome I**

Article 5 of Rome I provides that the law applicable to a contract of carriage of goods 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. Article 5(1) also has a proviso that states that 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. Article 5(3) of Rome I provides that 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 Article 5(1), the law of that other country shall apply.

It is observed that unlike the Rome Convention regime, the Rome I regime creates a special section to deal with choice of law for contract of carriage of goods. Article 5(1) of Rome I retains the same solution as Article 4(4) of the Rome Convention by providing that where the required convergence of connecting factors does not exist, the law of the habitual residence of the carrier is inapplicable. However, Article 5 of Rome I creates certainty (when compared with Article 4(4) of the Rome Convention) by providing that where there is no convergence of the either the connecting factor of the place of receipt or delivery, the habitual residence of the consignor, with the habitual residence of the carrier in one country, then the law of the country where the place of delivery as agreed by the parties is situated shall apply. It appears that the intendment of this proviso is really to dispense with the vague concept of closest connection (as was the case under Article 4(1) of the Rome Convention). There is thus no need to embark on assessing the significance of connecting factors where the required convergence of connecting factors does not exist: the law of the country of the place of delivery as agreed by the parties is applied.

A useful synergy and analogy can be derived from the Brussels I regime[[57]](#footnote-57) (and the CJEU jurisprudence that has applied it) in determining what “place of delivery” is.[[58]](#footnote-58) The place of delivery should be given an autonomous meaning without reference to national law.[[59]](#footnote-59) In this regard, the “place of delivery” is in reality the “place of performance of the characteristic obligation” for a contract for the carriage of goods.[[60]](#footnote-60) A contract for the carriage of goods is in this sense a contract for the provision of services.[[61]](#footnote-61) What the proviso of Article 5 of Rome I does is to give the “place of performance of the characteristic obligation” for a contract of carriage of goods absolute significance [as the main rule] where there is no required convergence of connecting factors, but creates more certainty by particularly providing that the place of delivery as agreed by the parties applies in this situation. To this extent, it is once more submitted here that the Brussels I regime (and the CJEU jurisprudence that has applied it) on the allocation of jurisdiction in commercial contracts is relevant to the interpretation of the meaning of “place of delivery as agreed by the parties” under Article 5(1) of Rome I.

Flowing from the above, it is submitted that there are gaps as regards the proviso to Article 5(1) of Rome I, which is required to be filled through interpretation by the CJEU in the future. At least, there are three significant questions that require an answer. First, where the place of delivery is to take place in different countries, how do we determine which country is the place of delivery as agreed by the parties under the contract? Second, how is the place of delivery as agreed by the parties determined under the contract, and are the parties allowed to use non-state law or special commercial terms (such as incoterms) to determine the place of delivery under their contract? Third, is there a possibility that the place of delivery may be incapable of being determined, and what is the solution to this problem?

In relation to the first question, drawing from the jurisprudence of the CEJU in the Brussels I regime,[[62]](#footnote-62) and applying it to the proviso to Article 5 of Rome I, it is submitted here that where the place of delivery for a contract of carriage of goods is to take place in different countries, for the purpose of determining the applicable main rule, a single law should be identified to determine all claims arising out of a contract of carriage of goods, in order to enhance the objectives of predictability, unification, proximity and the avoidance of dépeçage.[[63]](#footnote-63) In this regard, the “place of delivery” must be understood as the place with the closest linking factor between the contract and the country [whose law should apply as the main rule] which will as a general rule be at the place of principal delivery, which must be determined on the basis of economic criteria.[[64]](#footnote-64) The court of the Member State must look to the terms of the contract to determine the country of the principal place of delivery in determining the applicable law.

In relation to the second question, drawing from the **provisions of Recital 13 to Rome I and the** **jurisprudence of the CEJU under the Brussels I regime,[[65]](#footnote-65) and applying it to the proviso to Article 5(1) of Rome I, it is submitted that the “palce of delivery as agreed by the parties” is the place where** the goods were delivered or should have been delivered based on the provisions of the parties’ contract. In order to verify whether the place of delivery is determined “as agreed by the parties” under the contract, the Member State Court seised should take into account all the relevant terms and clauses of the parties’ contract which are capable of clearly identifying that place, including terms and clauses which are generally recognised and applied through the usages of international trade or commerce, such as incoterms.[[66]](#footnote-66)

In relation to the third question, where the place of delivery cannot be determined despite the criteria discussed above, it is difficult to ascertain how this problem should be solved. Unlike Article 5(1)(a)&(c) of Brussels I (and Article 7(1)(a)&(c) of the Brussels I Recast) that takes care of such eventuality by providing that the place of performance of the obligation in question applies in the allocation of jurisdiction, the proviso to Article 5(1) of Rome I does not provide any solution to this problem. At least four solutions may be suggested. The first is that a resort should be made to the concept of closest connection as appears under Article 4(4) of the Rome I, but this solution appears dubious as there is no provision in Rome I (including the recitals) that supports such an approach. Also avoiding a resort to the concept of closest connection appears to have been the main intendment of the change under the proviso to Article 5(1) of Rome I. The second solution would be that dépeçage should apply so that the law of each country that is the place of delivery of the obligation in question should apply separately as the main rule. Again, there is no express mention of judge-made dépeçage for a contract of carriage of goods. In addition, resort to judge-made dépeçage is not an approach that is generally favoured by the CJEU.[[67]](#footnote-67) The third solution would be to apply the law of the habitual residence of the carrier (as appears under Article 4(2) and Article 5(2) of Rome I).[[68]](#footnote-68) However, this solution defeats the literal meaning of Article 5(1) of Rome I, which requires that the habitual residence of the carrier applies [only] where there is the required convergence of connecting factors. In addition, it is not an interpretation that would likely be favoured by the CJEU in view of its decision in *Haeger* (discussed above).The fourth solution would be for the Member State court to determine the place of delivery on the basis that, without referring to national law, [the place of delivery] should as a be the place where the physical transfer of the goods takes place, as a result of which the consignor obtained, or should have obtained, actual power of disposal over those goods at the final destination of the carriage of goods.[[69]](#footnote-70)

This fourth solution appears to be a preferable one and has support from the CJEU decision under Article 5(1)(b) of Brussels I.[[70]](#footnote-71) The CJEU also justified this solution [under Article 5(1)(b) of Brussels I] as reconciling the goals of legal certainty and flexibility; and in addition a contract of carriage of goods is not complete until the goods arrive at their final destination.[[71]](#footnote-72) Where this criteria is applied and it is determined that the place in question does not have genuine connections to the contract of carriage of goods, or there is another country that is manifestly more closely connected with the contract, then the escape clause under Article 5(3) should be applied.

In applying the escape clause, the case law analysis of the CJEU under the Rome Convention (discussed above) would remain relevant to interpreting Article 5(3) of Rome I, save that the criteria for applying the escape clause [under Article 5(3) of Rome I] is that the connection with another country must be *manifestly more closely connected* with a contract for the carriage of goods in order to displace the main rule. Apart from this, it does not appear any significant change has been made in the application of the escape clause under Article 5(3) of Rome I.

Also, the case law analysis under the Rome Convention remains relevant to the determination of how a contract of carriage of goods should be classified or categorised in determining the applicable law as no change was intended under Article 5(1) of Rome I.[[72]](#footnote-74) It thus appears that in the future some other cases would likely be referred to the CJEU (under the Rome I regime) in order to determine what type of contract is in substance a contract for the carriage of goods. In other words, since this area of the law is not precise and is indeed fact dependent, more complex questions would likely be raised for the CJEU provide further criteria on.

Where a commercial contact cannot be classified as a contract of carriage of goods, Article 4 of Rome I should generally apply (discussed above).[[73]](#footnote-75)

1. **Conclusion**

The Rome I regime default rules for contract of carriage of goods appears to create more certainty (than what existed under the Rome Convention) for determining the law applicable for a contract of carriage goods. In particular, the proviso to Article 5 of Rome I designates the law of the place of delivery as the applicable law where there is no convergence of the required connecting factors. When compared with the Rome Convention regime that resorts to the vague concept of closest connection, this is a significant improvement. However, the proviso to Article 5 of Rome I leaves some significant gaps. These gaps would likely be filled by the CJEU in the future in relation to determining the concept of the place of delivery. It is likely that the CJEU would apply its jurisprudence under Article 5(1) of Brussels I Regulation, and suit it to the context of the proviso to Article 5 of Rome I.

The Rome I regime however inherits other complex problems under the Rome Convention regime such as the application of the escape clause and the categorisation of what is in substance a contract for the carriage of goods.

1. \*LL.B (Hons), B.L (Hons) (University of Benin, Nigeria) LLM *Distinction* (International Commercial Law) University of Aberdeen, Phd Candidate/Teaching Fellow at the University of Luxembourg, and recipient of the *Fonds National de la Recherche* (“FNR”) Grant, Luxembourg. This comment is related to the author’s Phd research project titled “The Significance of Escape Clauses and their associated Connecting Factors in European Union Applicable Law Rules in the Law of Obligations”, which is funded by the FNR. I wish to specially thank Professor (Dr.) Gilles Cuniberti for his supervision and support of my research project and in particular some exposure to civil law perspectives. I also wish to thank my colleague Wilfried Bassale for his comments on an earlier planned draft of the article. I also wish to thank the reviewer for his/her helpful comments on the earlier draft of this article. As usual, I take sole responsibility for the content of the work. I welcome comments and criticisms sent to chukwuma.okoli@uni.lu.

See Section 10 of the Rome Convention (On the law applicable to contractual obligations [1980] OJ L266) and Section 12 of the Rome I Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6 (“Rome I”). Article 29 of Rome I provides that it shall apply from 17 December 2009. It replaces the Rome Convention. [↑](#footnote-ref-1)
2. See also Recital 11 to Rome I. [↑](#footnote-ref-2)
3. See also Recital 11 to Rome I. [↑](#footnote-ref-3)
4. See also Recital 19 – 22 to Rome I. [↑](#footnote-ref-4)
5. “In the absence of choice by the parties as to the law applicable to the contract, Article 4 of the Convention [and Rome I] provides for connecting criteria on the basis of which the court must determine the law. Those criteria apply to all categories of contracts.” - C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [25]; C-305/13 *Haeger & Schmidt GmBH v Mutuelles du Mans assurances IARD (MMA IARD) and others* [2014] WLR (D)  441 [18]. See also C-64/12 *Schlecker (t/a Firma Anton Schlecker) v Boedeker* [2014] 2 W.L.R. 45 [35]. The bracket in the quotation is mine. [↑](#footnote-ref-5)
6. Opinion of A.G Bot at [64] in C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687. [↑](#footnote-ref-6)
7. C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687; C-305/13 *Haeger & Schmidt GmBH v Mutuelles du Mans assurances IARD (MMA IARD) and others* [2014] WLR (D)  441. [↑](#footnote-ref-7)
8. *Martrade Shipping & Transport GmbH v United Enterprises Corporation* [2014] EWHC 1884. [↑](#footnote-ref-8)
9. See also Advocate General N Wahl in C-64/12 *Schlecker v Boedeker* [2014] 2 W.L.R. 45 [56]. [↑](#footnote-ref-9)
10. See Recital 21 to Rome I. This position is also justified by reason of the recent decision in C-305/13 *Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (MMA IARD) and others* [2015] 2 WLR 175, which made reference to provisions of Rome I in interpreting Article 4 of the Rome Convention. [↑](#footnote-ref-10)
11. Opinion of A.G Bot at [105] C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687. [↑](#footnote-ref-11)
12. C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [42], [43], [45], [46], [48] & [49]; Giuliano-Lagarde Report [1980] OJ C282/1, 23. [↑](#footnote-ref-12)
13. Recital 20 to Rome I. [↑](#footnote-ref-13)
14. C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [61]. [↑](#footnote-ref-14)
15. C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [55] – [60]. [↑](#footnote-ref-15)
16. (C-64/12) *Schlecker v Boedeker* [2014] 2 W.L.R. 45 [40] [↑](#footnote-ref-16)
17. C-64/12 *Schlecker v Boedeker* [2014] 2 W.L.R. 45 [40]; C-305/13 *Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (MMA IARD) and others* [2015] 2 WLR 175 [49]. [↑](#footnote-ref-17)
18. C-305/13 *Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (MMA IARD) and others* [2015] 2 WLR 175 [49]. The CJEU in [para 50] applying the doctrine of accessory allocation under Article 4(5) of the Rome Convention by relying on Recital 20 to Rome I is a significant development as there was academic and judicial controversy regarding the application of this doctrine prior to the CJEU’s decision. For a detailed treatment see CSA Okoli, “The Significance of the Doctrine of Accessory Allocation as a Connecting Factor under Article 4 of Rome I Regulation” (2013) 9 *Journal of Private International Law* 449. [↑](#footnote-ref-18)
19. It lists eight categories of contract such as contract of sale, provision of services, immovable property, distributorship, franchise, auction sales and financial instruments in which the law of the country of one of the parties is to apply. [↑](#footnote-ref-19)
20. Recital 19 to Rome I. [↑](#footnote-ref-20)
21. See Recital 20 to Rome I. [↑](#footnote-ref-21)
22. See Recital 21 to Rome I. [↑](#footnote-ref-22)
23. [2009] ECR I-9687. [↑](#footnote-ref-23)
24. C-305/13 *Haeger & Schmidt GmBH v Mutuelles du Mans assurances IARD (MMA IARD) and others* [2014] WLR (D) 441. [↑](#footnote-ref-24)
25. Opinion of A.G Bot at [5] in C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687. [↑](#footnote-ref-25)
26. Opinion of A.G Bot at [53] C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687. [↑](#footnote-ref-26)
27. Opinion of A.G Bot at [53] C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687. [↑](#footnote-ref-27)
28. Opinion of A.G Bot at [57], [62] C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687. [↑](#footnote-ref-28)
29. Opinion of A.G Bot at [57] – [60], [109], [118] C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687. [↑](#footnote-ref-29)
30. Opinion of A.G Bot at [61] C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687. [↑](#footnote-ref-30)
31. Opinion of A.G Bot at [63] C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687. [↑](#footnote-ref-31)
32. Opinion of A.G Bot at [101] – [103] C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [↑](#footnote-ref-32)
33. C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [36]. [↑](#footnote-ref-33)
34. C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [33] – [35]. [↑](#footnote-ref-34)
35. C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [35]. [↑](#footnote-ref-35)
36. C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [34], [65]. [↑](#footnote-ref-36)
37. C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [33]. [↑](#footnote-ref-37)
38. C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [34]. On independent criteria in the categorisation of contract of carriage of goods see C-305/13 *Haeger & Schmidt GmBH v Mutuelles du Mans assurances IARD (MMA IARD) and others* [2014] WLR (D)  441 [25] – [26]. [↑](#footnote-ref-38)
39. [2014] EWHC 1884. [↑](#footnote-ref-39)
40. The Act came into force on 1st of July 1999. See Section 3 of The Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No. 2) Order 1999. The Act has now been amended by The Late Payment of Commercial Debts Regulations 2013 (“2013 Regulation”), which comes into operation on the 16th of March 2013 (Statutory Instrument 2013 No. 395 The Late Payment of Commercial Debts Regulations 2013). The 2013 Regulation implements Directive 2011/7/EU of the European Parliament and of the Council of 16th February 2011 on combating late payment in commercial transactions [↑](#footnote-ref-40)
41. Section 12 (1) provides that:

	1. This Act does not have effect in relation to a contract governed by a law of a part of the United Kingdom by choice of the parties if –(a). there is no significant connection between the contract and that part of the United Kingdom; and

(b). but for that choice, the applicable law would be a foreign law. [↑](#footnote-ref-41)
42. Interestingly, a similar argument had been put forward by the Netherland’s government in *ICF* to the effect that “short-term charter-parties, in which a means of transport along with its crew is made available to a charterer for a certain period of time” falls within Article 4(4) of the Rome Convention. C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [28]. [↑](#footnote-ref-42)
43. *Martrade Shipping & Transport GmbH v United Enterprises Corporation* [2014] EWHC 1884 [28]. Italicised emphasis is mine. [↑](#footnote-ref-43)
44. “…the owner does not agree to carry goods from and to a specific or nominated ports, but rather to make the vessel available to the charterer, in return for hire, as a means for the charterer to transport goods. The defining characteristic of a time charter is that the vessel is under the directions and orders of the charterer as regards its employment. It is the charterer who determines what voyages the vessel is to undertake and what cargo it is to carry, within the geographical and other constraints contained in the particular charterparty clauses. Typically the charterer pays for the cost of fuel in employing the vessel and her crew as he chooses.” - *Martrade Shipping & Transport GmbH v United Enterprises Corporation* [2014] EWHC 1884 [28]. [↑](#footnote-ref-44)
45. *Martrade Shipping & Transport GmbH v United Enterprises Corporation* [2014] EWHC 1884 [28]. [↑](#footnote-ref-45)
46. “This is as true of a trip time charter, such as the charterparty in this case, as of a term time charter. Although the length of the period of hire is limited by a trip defined within a geographical range (and sometimes, though not in this case, by a maximum duration), the nature of the contract for the duration of the period remains that of making the vessel and her crew available to the charterers as a means for the charterers to transport goods, not a contract for carriage of the goods by the owners” - *Martrade Shipping & Transport GmbH v United Enterprises Corporation* [2014] EWHC 1884 [29]. [↑](#footnote-ref-46)
47. *Martrade Shipping & Transport GmbH v United Enterprises Corporation* [2014] EWHC 1884 [30]. [↑](#footnote-ref-47)
48. [2014] WLR (D)  441. [↑](#footnote-ref-48)
49. C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [34]; C-29/10 *Koelzch v Etat du Grand Duchy of Luxembourg* [2012] QB 210 [32]. [↑](#footnote-ref-49)
50. C-305/13 *Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (MMA IARD) and others* [2015] 2 WLR 175 [27]. [↑](#footnote-ref-50)
51. C-305/13 *Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (MMA IARD) and others* [2015] 2 WLR 175 [28], [32]. [↑](#footnote-ref-51)
52. C-305/13 *Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (MMA IARD) and others* [2015] 2 WLR 175 [31]. [↑](#footnote-ref-52)
53. “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 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”. C-305/13 *Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (MMA IARD) and others* [2015] 2 WLR 175 [↑](#footnote-ref-53)
54. C-305/13 *Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (MMA IARD) and others* [2015] 2 WLR 175 [40]. [↑](#footnote-ref-54)
55. C-305/13 *Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (MMA IARD) and others* [2015] 2 WLR 175 [37] – [38]. [↑](#footnote-ref-55)
56. C-305/13 *Haeger & Schmidt GmbH v Mutuelles du Mans assurances IARD (MMA IARD) and others* [2015] 2 WLR 175 [39]. [↑](#footnote-ref-56)
57. See Recital 7 to Rome I which provides that “[T]he substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters  (Brussels I)…”; and Recital 17 to Rome I which provides that “[A]s far as the applicable law in the absence of choice is concerned, the concept of ‘provision of services’…should be interpreted in the same way as when applying Article 5 of Regulation (EC) No 44/2001 in so far as …provision of services are covered by that Regulation”. [↑](#footnote-ref-57)
58. Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1. It is now replaced by the Brussels I Recast (Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 [2012 OJ L351/1), which applies from 10th of January, 2015. [↑](#footnote-ref-58)
59. See C-381/08 *Car Trim GMBH v Key Safety Systems Srl*  [2010] ECR I-1255. [↑](#footnote-ref-59)
60. See also Article 5(1)(b) of Brussels I and Article 7(1)(b) of Brussels I Recast. [↑](#footnote-ref-60)
61. See C-381/08 *Car Trim GMBH v Key Safety Systems Srl* [2010] ECR I-1255 [35] – [37], [40] - [43]; See also C-533/07 *Falco Privatstifung und Rabitsch* [2009] E.C.R I-3327 [29]; C-9/12 *Corman-Collins SA v La Maison Du Whisky SA* [2014] I.L.Pr. 15 [37]; C-469/12 *Krejci Lager**& Umschlagbetriebs GmbH v. Olbrich Transport und Logistik GmbH* [2014] ILPr 139. [↑](#footnote-ref-61)
62. Case C-386/05 *Color Drack Gmbh v. Lexx International Vetriebs GMBH* [2010] ECR I - 3699; Case C – 19/09; *Wood Floor Solutions Andreas Domberger Gmbh v. Silva Trade Sa* [2010] ECR I - 2121. [↑](#footnote-ref-62)
63. Recital 6 and 16 to Rome I; C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [42], [43], [45], [46], [48] & [49]; Giuliano-Lagarde Report [1980] OJ C282/1, 23 [↑](#footnote-ref-63)
64. Admittedly, the concept of “economic criteria” is notoriously vague. For a critique see also J. Harris & M. George, ‘*Rheder v. Air Baltic Corp* (C-204/08): Service Contracts, Carriage by air and the Brussels I Regulation’ (2010) LQR 31. [↑](#footnote-ref-64)
65. C-381/08 *Car Trim GMBH v Key Safety Systems Srl*  [2010] ECR I-1255; Case C-87/10 *Electrosteel Europe SA v Edil Centro SpA* [2011] ECR I-NYR. [↑](#footnote-ref-65)
66. They are created and approved by the International Chamber of Commerce for the purpose of addressing the obligations between commercial parties. [↑](#footnote-ref-66)
67. C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I-9687 [42], [43], [45], [46], [48] & [49]. [↑](#footnote-ref-67)
68. P.A Nielsen,‘The Rome I Regulation and Contract of Carriage’ in Ferrari. S and Leible. S (eds), *The Law Applicable to Contractual Obligations in Europe* (Sellier. European Law 2009) 99, 107. [↑](#footnote-ref-68)
69. **C-381/08 *Car Trim GMBH v Key Safety Systems Srl*  [2010] ECR I-1255 [46], [55-57], [60 – 62].** [↑](#footnote-ref-70)
70. C-381/08*-Car Trim GMBH v Key Safety Systems Srl* [2010] ECR I-1255 [54]- [62]. [↑](#footnote-ref-71)
71. ***Car Trim GMBH v Key Safety Systems Srl* [2010] ECR I-1255 [54]- [62]** [↑](#footnote-ref-72)
72. Recital 22 to Rome I – “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. For the purposes of this Regulation, 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”. [↑](#footnote-ref-74)
73. There could be exceptions to this rule. For example a contract for the carriage of goods, which is in substance a contract for carriage of persons would fall under Article 5(2) of Rome I rather than Article 4 of Rome I. [↑](#footnote-ref-75)