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Rules on Jurisdiction and Recognition or Enforcement of Judgments in Specialised Conventions on Transport in the Aftermath of TNT: Dynamite or Light in the Dark?

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I. Introduction

Pursuant to Article 71(1) of Regulation No. 1215/2012, of 12 December, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Ia or Recast Regulation), the Regulation "shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments". The rule has not yet been the subject of a preliminary ruling by the CJEU, but there are four decisions on its immediate – and virtually identical[1] – predecessor in Article 71 of the Brussels I Regulation[2], three of which deal with the 1956 Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR)[3], a treaty that came into force long before the Brussels I Regulation did. Most of the decisions by national courts on jurisdiction rules in conventions on particular matters are also related to the transport sector. By contrast, the subject matter of the fourth and most recent judgment delivered by the CJEU is different: it examines the validity of a provision on jurisdiction contained in a convention enacted after the entry into force of the Brussels I Regulation, the Benelux Convention on Intellectual Property of 25 February 2005[4], a situation that, as shall be seen in the next section, is *not* covered by Article 71 of the Brussels Ia Regulation.

II. Scope of application of Article 71 of the Recast

Albeit incomplete, Article 71(1) of the Brussels Ia Regulation gives some clues as to its scope of application. In the first place, the rule only refers to conventions on "particular matters", in the sense that those conventions that, in general, refer to jurisdiction or recognition and enforcement are not covered by its scope of application. As a matter of fact, the conventions between Member States that only address the recognition and enforcement of judgments have been superseded (Article 69 Brussels I Regulation). Since the CMR mainly deals with a particular matter, the contract for the international carriage of goods by road, and only contains one provision that might enter in collision with the Brussels Regulation, there is no doubt that the Convention *is* covered by Article 71.

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1 Apart from one comma that has been added in Article 71(1) of the Recast, the rule is identical to that in Article 71(1) of the Brussels I Regulation which, for its part, reproduces part of Article 57(1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done at Brussels on 27 September 1968.

2 Council Regulation (EC) No. 44/2001, of 22 December 2000, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

3 CJEU 4.5.2010, C-533/08, *TNT Express Nederland BV ./. AXA Versicherung AG*, *unalex EU-222*; CJEU 19.12.2013, C-452/12, *Nipponkoa Insurance Co. (Europe) Ltd ./. Inter-Zuid Transport BV*, *unalex EU-570*; CJEU 4.9.2014, C-157/13, *Nickel & Goeldner Spedition GmbH ./. 'Kintra' UAB*, *unalex EU-604*.

4 CJEU 13.7.2016, C-230/15, *Brite Strike Technologies Inc. ./. Brite Strike Technologies SA*, *unalex EU-669*.

In the second place, although the provision employs the expression "conventions to which the Member States are parties", it does not apply only to those conventions that have been concluded by *all* the Member States of the European Union. It becomes clear from the wording of Article 71(2)(a) that conventions to which only some Member States are parties are doubtlessly covered by its scope of application. Furthermore, although Article 71 aims at preventing Member States from infringing their international commitments[5], it is also irrelevant whether one or more third countries are a party to the convention or not[6].

Finally, with respect to the temporal scope of application of the provision, it only applies to those conventions to which the Member States "are parties". In this regard, it should be noted that Article 57 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters still referred to conventions to which the Member States "are or will be" parties, making it clear that nothing in the Convention prevented the contracting states from concluding new conventions on particular matters or from amending conventions already in force. However, this wording was not reproduced in Article 71 of the Brussels I Regulation, so that no new specialised conventions can be concluded (or already existing ones amended) to introduce rules that would derogate the provisions in the Regulation[7].

The use of the word "concluded" in Recital 36 of the Recast (rather than "ratified" or "entered into force") in relation to specialised conventions raises doubt as to whether the date to be considered is that of the signature, of ratification or accession, or that of entry into force. The 1969 Vienna Convention on the Law of Treaties does not define the expression. For some, the date of "conclusion" of a multilateral treaty is that of the signature of the Final Act or, where the case may be, the date when the convention is opened for signature, whichever is later[8]. Others, on the contrary, hold that "States which have 'concluded' are bound by a treaty without taking any further formal steps"[9], so consent to be bound thereby is required, which usually implies ratification[10]. Since Article 71(1) of the Recast refers to conventions to which the Member States "are parties" – which, as a general rule, does not seem possible without ratification – the second view appears to be more appropriate in this context.

This being said, the relevant date from which on no new rules on jurisdiction, recognition and enforcement that collide with the Brussels regime can be enacted by the Member States is that of the entry into force of the Brussels I Regulation (and not that of the Recast)[11]: 1 March 2002 (Article 76)[12]. The CMR Convention, for its part, came into force on 2 July 1961, and it has done so for virtually all Member States (except Cyprus and Malta, who declared their accession to the Convention in 2003 and 2007 respectively) *before* the entry into force of the Brussels I Regulation. Thus, Article 71 applies[13] and the private international law rules in the Convention should prevail over the provisions of the Recast.

III. Provisions on jurisdiction and the recognition and enforcement of judgments in the CMR Convention

The relevant rules are mainly contained in Article 31 CMR. Jurisdiction is envisaged by the first paragraph, *lis pendens* and *res judicata* by the second, and the recognition and enforcement of judgments is addressed in the third paragraph. As regards jurisdiction, pursuant to Article 31(1) CMR, an action based on a carriage under the Convention can be brought *a)* in any court or tribunal of a contracting country designated by agreement between the parties (e.g. by virtue of a jurisdiction clause in the consignment note); *b)* additionally – so only prorogation, but not derogation of jurisdiction is possible – in the courts or tribunals of a country within whose territory the defendant is ordinarily resident, or has his principal place of business or the branch or agency through which the contract of carriage was made; or the place where the goods were taken over by the carrier or the place designated for delivery is situated[14].

Where an action is already pending[15] before a court that is competent according to the aforementioned rules *(lis pendens)* or a judgment has been delivered by such a court *(res judicata)* with respect to a claim between the same parties and on the same grounds, no new action shall be started, unless the judgment of the first court seised is not enforceable in the country in which the fresh proceedings

5 Recital 25 of the Brussels I Regulation and Recital 35 of the Recast.

6 See CJEU 13.7.2016, *op.cit.*, nos. 49 and 50.

7 CJEU 4.5.2010, *op.cit.*, no. 38; CJEU 13.7.2016, *op.cit.*, nos. 51 and 52.

8 *Aust*, Modern Treaty Law and Practice, 2000, 74.

9 *Villiger*, Commentary on the 1969 Vienna Convention on the Law of Treaties, 2009, 78 *et seq.*

10 See *European Commission*, Vademecum on the external action of the European Union, SEC(2011)881, p. 38, albeit referred to the conclusion of agreements by the European Union.

11 See Recital 36 of the Recast; CJEU 4.5.2010, *op.cit.*, no. 39; and *Tuo/Carpaneto* in *Zbornik* 2-3/2016, 141, 146.

12 However, in its judgment of 13.7.2016, *op.cit.*, the CJEU held that, under certain circumstances, the Member States can still conclude conventions that contain provisions on jurisdiction and recognition or enforcement of judgments.

13 BGH (DE) 18.12.2003, I ZR 228/01, *unalex DE-20* (albeit for Article 57 of the Brussels Convention); OGH (AT) 14.11.2003, 7 Nc 70/03h, *unalex AT-31*; Cour de Cassation (BE) 29.4.2004, C.02.0250.N, *unalex BE-108*.

14 Article 31 CMR only establishes international jurisdiction (courts or tribunals "of a country"), while territorial jurisdiction is governed by the autonomous rules of civil procedure of the State with international jurisdiction. See e.g. *Jesser-Huß* in MüKo HGB, Vol. 7, 3rd ed., Article 31 CMR, no. 16; OGH (AT) 13.12.2002, 10 Nc 108/02t, *unalex AT-642*.

15 The relevant moment from which on an action is "pending" is not envisaged by the CMR, so two alternatives are possible: the time when the document instituting the proceedings is lodged (which is the solution now provided by Article 32(1)(a) of the Recast; see also High Court 21.6.2005, [2005] EWHC 1408 (COMM), *unalex UK-117*, although the decision was eventually overturned on appeal, for different reasons) or the moment when the action has been served to the defendant (see EWCA 23.1.2001, [2001] EWCA Civ 61, with recourse to English national law).

are brought [Article 31(2) CMR]. Finally, judgments entered by a court of a contracting country that have become enforceable in that country shall become enforceable in each of the other contracting states of the Convention as soon as the formalities required in the country where enforcement is sought are fulfilled; nonetheless, such formalities shall not permit the reopening of the merits of the case (Article 31(3) CMR).

An action can also be brought before an arbitration tribunal, whenever the parties agree to submit their disputes to arbitration and the relevant clause provides that the tribunal shall apply the Convention (Article 33 CMR)[16]. Nonetheless, since the Brussels Ia Regulation does not apply to arbitration (Recital 12), there is no possible conflict between Article 33 CMR and Article 71 of the Recast.

IV. The rulings of the Court of Justice in the *TNT*, *Nipponkoa* and *Kintra* cases

However clear the wording of Article 71 of the Brussels I and Ia Regulations, the Court of Justice has analysed the possibility of applying Article 31 CMR in the light of the Brussels regime as a whole in three different cases: *TNT* (2010), *Nipponkoa* (2013) and *Kintra* (2014)[17].

1. The *TNT* judgment of 4 May 2010: recognition and enforcement of judgments

The facts of the case are as follows: In 2002, a contract for the carriage of goods between the Netherlands and Germany was entered into by Siemens Nederland as a shipper and TNT as a carrier. The goods were lost during transportation and the carrier filed an action against the insurer of the shipper (AXA) in Rotterdam (Netherlands) for a declaration that the carrier's liability is limited to the amount envisaged by Article 23(3) CMR, as amended by the Geneva Protocol of 5 July 1978[18]. The claim was eventually dismissed by the Rotterdam court in 2005, but pending its decision, in 2004, the insurer filed an action for compensation of the full amount of the damages before the Landgericht München (Germany). The carrier appealed the Dutch decision to the Regional Court of 's-Gravenhage, but before its judgment was handed down the Landgericht München ruled on the merits, having previously dismissed the carrier's contention that the *lis pendens* rule in Article 31(2) CMR prevented the court from hearing the action. The insurer then requested enforcement of the decision in the Netherlands, which was granted by an Utrecht court. However, the decision was appealed by the carrier to the Hoge Raad der Nederlanden, who then referred the matter to the Court of Justice for a preliminary ruling to decide, *inter alia*, whether the *lis pendens* rules in Article 31 CMR take precedence over those in the Brussels I Regulation and whether the enforcing court was allowed to review the jurisdiction of the court of the Member State of origin.

Unfortunately, the CJEU fails to give a clear answer to the questions referred by the Hoge Raad[19]. According to the Court, to the extent to which Article 71 of the Brussels I Regulation and of the Recast does not only apply to the relationships between a Member State and a third country but also to judicial proceedings that involve two Member States, the application of a specialised convention may not compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union[20]. On the basis of these considerations, a test – we might call it the "*TNT* test" – is established, according to which the rules governing jurisdiction, recognition and enforcement laid down by a convention on particular matters apply, but only "provided that they are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimised and that they ensure, under conditions at least as favourable as those provided for by the Regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the European Union *(favor executionis)*".

As becomes clear from a simple lecture of the above quote, the *TNT* test is hardly appropriate for providing legal certainty, which is why it has been harshly criticised in legal literature[21]. Furthermore, it seems to be contrary to the wording of Article 71 of the Brussels I(a) Regulations. But be that as it may, the conclusion to be drawn from the *TNT* judgment is that the enforcing court may not review the jurisdiction of the court of the Member State of origin, whatever the rule in Article 31 CMR. Certainly, this is not the final answer given in the ruling, but the CJEU expressly refers to its earlier decision in the *Allianz and Gen-*

16 Arguably, the choice of an arbitral tribunal *may* derogate the jurisdiction of national courts. See *Haak*, The Liability of the Carrier under the CMR (1986), 282-283; *Jesser-Huß* in MüKo HGB, *op.cit.*, Art. 33 CMR, no. 5a; *Koller*, Transportrecht, 9th ed., Art. 33 CMR, no. 1; *Puetz* in Arbitraje – Revista de Arbitraje Comercial y de Inversiones, 3/2011, 869, 879 *et seq.*; OLG Koblenz (DE) 22.2.2007, 6 U 1162/06, *unalex DE-1410*; LG Gießen (DE) 31.7.2008, 8 O 81/07; LG Rostock (DE) 13.3.2009. *Contra*, *Boesche* in: Ebenroth/Boujong/Joost/Strohn, HGB, Vol. 2, 2nd ed., Art. 31 CMR, no. 12; *Demuth* in: Thume, Kommentar zur CMR, 2nd ed., no. 29; *Helm*, Frachtrecht II, 2nd ed., Art. 31 CMR, no. 21; OGH (AT) 5.5.2010, 7 Ob 216/09d, *unalex AT-716*, according to which a clause that assigns exclusive jurisdiction to an arbitral tribunal is (at least partially) null and void (Article 41 CMR).

17 Supra note 3.

18 The Protocol replaced the reference to the Germinal franc in Article 23 CMR with the Special Drawing Right (SDR) as defined by the International Monetary Fund. With respect to the loss of goods, Article 23(3) CMR now limits the amount of compensation to 8.33 SDR per kilogram of gross weight short.

19 This is probably due to the fact that the Court lacks jurisdiction to interpret Article 31 CMR: the Convention is no part of the *acquis communautaire*, which is recognised by the Court itself in nos. 57 *et seq.* of the decision in the *TNT* case. See however CJEU 19.12.2013, *op.cit.*, nos. 40 *et seq.*, and 4.9.2014, *op.cit.*, nos. 35 *et seq.*, where the Court does interpret Article 31(1) and (2) CMR. Actually, as has been pointed out by *Mankowski*, in Transportrecht, 4/2014, 129, 134, the CJEU already had to analyse Article 31 in its *TNT* judgment in order to compare it with the rules in the Brussels I Regulation.

20 That is, the principles of free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union.

21 See e.g. the references in *Mankowski*, in TranspR, 4/2014, 129, 131 *et seq.*; *Mankowski* in: Magnus/Mankowski, Brussels I Regulation, 2nd ed., no. 4a *et seq.*; *Tuo/Carpaneto*, *op.cit.*, 153 *et seq.*

erali Assicurazioni Generali case, pursuant to which the court of the State where recognition and enforcement is sought is never in a better position than the court of the State of origin to determine whether the latter had jurisdiction to hear the case[22].

2. The *Nipponkoa* judgment of 19 December 2013: *lis pendens* and *res judicata*

The facts that underlie the *Nipponkoa* case are strikingly similar to those in the *TNT* judgment. After certain goods were lost during a carriage by road between the Netherlands and Germany, the shipper brought an action against the contracting carrier in Germany. However, by the time the dispute was settled in 2010, one of the transport subcontractors had already obtained a negative declaratory judgment against the contracting carrier in the Netherlands, according to which his liability was limited to the amount envisaged by Article 23(3) CMR. Thus, when the liability insurer of the contracting carrier brought an indemnity action against the transport sub-contractor in Germany, the latter claimed that the proceedings could not be pursued on account of the final negative declaratory judgment handed down in the Netherlands.

In this context, the German Bundesgerichtshof referred two questions to the CJEU for a preliminary ruling. As regards the first question – in which the Bundesgerichtshof inquired whether Article 71 of the Brussels I Regulation precludes an entirely autonomous interpretation of a specialised convention, in the sense that the objectives and principles of the Regulation have to be considered – the Court reiterates, as was to be expected from the outset, its ruling in the *TNT* case. The answer to the second question, however, has far-reaching consequences for the transport sector, since it deals with the effects of a so-called negative declaratory action, mainly with respect to the *lis pendens* and *res judicata* rules in the CMR Convention.

Such negative declaratory actions have their origin in a different interpretation of the CMR Convention in the contracting states, especially as regards Article 29 CMR[23]. Among other shortcomings[24], the provision refers the answer to the question as to whether there is a category of negligence that is considered "as equivalent to" *dol* or wilful misconduct to national law. This rule has given rise to *forum shopping* all around Europe[25], although the most well-known example is that of Germany and the Netherlands. While German courts are feared for their utmost severity with respect to road carriers, thus many judgments resulting in the non-application of the limitations to the liability of the carrier, the approach of Dutch courts is more lenient[26]. As a consequence, where permitted by the jurisdiction rules in Article 31 CMR, carriers frequently seek a "negative declaratory judgment" from a "carrier-friendly" Dutch *forum* that declares the absence of liability (or, at least, the non-application of Article 29 CMR) before the person entitled to compensation files a (positive) action for damages in a *forum* like Germany, that is not[27].

Specifically, the question referred to the CJEU aimed at clarifying whether a negative declaratory action and a (positive) action for performance have the same cause of action and the same object in order to trigger the application of the rules on *lis pendens* and *res judicata*. The doubt arises because, while the cause of action (i.e. the facts and the rule of law relied on as the basis of the different actions) is the same, the object (i.e. the end the actions have in view)[28] seems to be different: in the case of a negative declaratory action, the declaration that the claimant is not liable (or that he is liable only to a certain extent); in the case of an action for performance, the order to pay damages to the claimant.

Certainly, the identity of the object of an action seeking compensation for loss and that of a previous action brought by the defendant seeking a declaration that he is not liable for that loss had already been established by the Court in its 1992 *Tatry* judgment[29]. However, while the 1952 Convention on the Arrest of Sea-Going Ships – which was the rule of law to be applied in the *Tatry* case – did not contain any rules on *lis pendens* or related actions (so the 1968 Brussels Convention applied directly), Article 31 CMR contemplates provisions on both *lis pendens* and *res judicata*. As a consequence, the Bundesgerichtshof had traditionally held that the CJEU's *Tatry* decision is not directly applicable to the international carriage of goods by road and that, interpreting the CMR Convention in an autonomous manner, the filing of a negative declaratory action in one State does not preclude the shipper or the

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22 CJEU 10.2.2009, C-185/07, *Allianz SpA and Generali Assicurazioni Generali SpA ./. West Tankers Ins.*, *unalex EU-171*, no. 29.

23 Pursuant to Article 29(1) CMR, the limitations to the liability of the carrier laid down in the Convention shall not apply where he acted with wilful misconduct or by such default as, in accordance with the law of the *forum* state, is considered as equivalent thereto.

24 A first problem raised by the provision is the fact that the two official language versions (English and French) do not match entirely, since the French concept of "dol" is more restrictive than the common law concept of "wilful misconduct".

25 Divergent interpretations of other provisions of the CMR in the contracting States, e.g. those on the charges to be reimbursed by the carrier (see *infra* in the text), give also rise to *forum* shopping, but the most relevant issue is doubtlessly Article 29 CMR.

26 This is so because only intentional and consciously reckless misconduct entails the obligation to pay full compensation. See e.g. the judgment of the Hoge Raad (NL) of 5.1.2001, C99/162HR, *Cigna v Overbeek*.

27 The situation described in the text is sometimes referred to as "The Dutch Trick" ("Der holländische Trick"). See *Hoeks*, in: Soyer/Tettenborn, Carriage of Goods by Sea, Land and Air (2013). There appear to be cases where carriers have filed an action for negative declaratory relief even before notifying the sender or consignee of the loss or damage. In detail on the controversy on this issue between German and Dutch courts see *Haak*, in TranspR, 5/2009, 189 *et seq.*

28 Note that the English version of Article 27 (1) of the Brussels I Regulation and 29 (1) of the Recast does not distinguish between "cause" and "object" of an action. However, the CJEU had already established in its *Tatry* decision (see *infra*) with respect to the predecessor of both provisions in Article 21 of the Brussels Convention that "that language version must […] be construed in the same manner as the majority of the other language versions in which that distinction is made" (no. 37).

29 CJEU 6.12.1994, C-406/92, *The owners of the cargo lately laden on board the ship "Tatry" ./. the owners of the ship "Maciej Rataj"*, *unalex EU-128*.

consignee from bringing an action for performance (i.e. for damages) in another State[30].

In its *Nipponkoa* judgment, the Court held that the principles that underlie the Brussels I Regulations (specifically, the aim of minimising the risk of concurrent proceedings) preclude an interpretation of Article 31(2) CMR according to which an action for negative declaratory relief has not the same "cause of action" in the sense of Articles 27(1) of the Brussels I Regulation and 29(1) of the Recast. Accordingly, once a negative declaratory action has been filed, no (fresh) action seeking compensation can be brought between the same parties (or their successors, in particular, insurance companies)[31]. If one of the parties nonetheless brings a new action, the court seised in the second place has to stay the proceedings until a judgment is delivered by the court seised in the first place[32].

3. The *Kintra* judgment of 4 September 2014: rules on jurisdiction

The CJEU's *Kintra* decision is a *rara avis* among the judgments that deal with the relationship between the CMR and the Brussels I(a) Regulations, since it is delivered within the framework of an insolvency procedure against one of the parties involved. Accordingly, in its first question referred for a preliminary ruling, the Lithuanian Supreme Court asked whether an action for the payment of a debt that derives from an international carriage of goods by road falls within the scope of application of Regulation No. 1346/2000 – recently replaced by Regulation (EU) No. 2015/848, of 20 May 2015, on Insolvency Proceedings – or of the Brussels I(a) Regulations. By holding that the action is not closely connected with the insolvency proceedings since it could have been brought by the creditor before the winding-up of the debtor – in which case the action would have been subject to the ordinary rules governing jurisdiction in civil and commercial matters – the Court ruled that jurisdiction is governed by the Brussels I(a) Regulation.

The referring court also asked whether, if the Brussels Regulation applies, jurisdiction has to be determined according to the latter or applying the rules concerning jurisdiction in the CMR. Although in its earlier decision in the *TNT* case the Court had ascertained that it lacked jurisdiction to interpret Article 31 CMR, in the *Kintra* judgment it did analyse the provision in the light of Article 71(1) of the Brussels Ia Regulation. After reproducing its findings in the *TNT* ruling, it eventually concludes that the rules on jurisdiction in Article 31(1) CMR are consistent with the requirements established in the decision (the "*TNT* test"), even though the precept envisages two places of performance (the place where the goods were taken over by the carrier and the place designated for delivery) while Article 7(1)(b) of the Recast only mentions one. It did so for two reasons. On the one hand, because the Court had previously accepted that, under a contract of carriage, the claimant might have the choice between the courts of the place of departure and that of arrival[33]; on the other hand, because the criteria of proximity, predictability and legal certainty are fulfilled, since the courts are easily identified and the applicant's choice is limited to previously determined judicial *fora*. Consequently, whenever the matter at hand falls within the scope of application of the CMR, the courts in the Member States may apply the rules on jurisdiction contained therein.

V. Other issues related to the rules on jurisdiction and recognition or enforcement in the CMR

Although the judgments by the Court of Justice shed some light on the interpretation of Article 31 CMR in the light of the Brussels I regime, one cannot but think that some of the problems addressed by the CJEU would not even exist if Article 71 of the Regulations were applied in its proper terms. But then again, the existence of a European Area of Civil Justice may well justify a "particular" (and harmonised) interpretation of the rules on jurisdiction and recognition or enforcement in the CMR when all countries involved are Member States of the EU. Be that as it may, apart from the questions analysed hereabove, there are still other issues worth mentioning, most of which have not (yet) been addressed by the CJEU.

1. Jurisdiction

As regards jurisdiction, it should be borne in mind that the *fora* established by the CMR are no exclusive *fora* in the sense of Article 24 of the Recast, so that an eventual lack of jurisdiction cannot be declared *ex officio* by the court (*ex* Articles 26 and 27)[34], unless the defendant does not enter an appearance (Article 28(1)). If he does appear but fails to submit pleas as to the merits of the case, the court seised may, when deciding on its own jurisdiction, consider the rules on jurisdiction envisaged by the CMR[35].

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30 For the former position in Germany see BGH 20.11.2003, I ZR 102/02 and I ZR 294/02, *unalex DE-15* and *DE-16*.

31 This conclusion had already been reached by the Austrian OGH in a decision of 17.2.2006, 10 Ob 147/05y, *unalex AT-260*.

32 See Rechtbank Arnhem (NL) 27.6.2007, 153815/HA ZA 07-534, *unalex NL-984*, that analyses the opposite situation: the claim for damages was filed before the negative declaratory action was brought.

33 CJEU 9.7.2009, C-204/08, *Peter Rehder ./. Air Baltic Corporation*, *unalex EU-181*. Certainly, the decision refers to Regulation (EC) No. 261/2004, of 11 February 2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, that is, to passenger transport by air. However, there should be no obstacle to extend the rule to any contractual obligation that arises under a contract of carriage (by air). See *Mankowski*, in TranspR, 7/8-2009, 303; *Lehmann*, in NJW, 2010, 655, 656; *Puetz*, in: Deiana, Profili giuridici del trasporto aereo *low cost* (2013), 433, 449 *et seq.*

34 Barcelona Court of Appeal (ES) (Section 15) 16.3.2005, ECLI: ES:APB:2005:1300A.

35 CJEU 28.10.2004, C-148/03, *Nürnberger Allgemeine Versicherungs AG ./. Portbridge Transport International BV*, *unalex EU-96*.

a) Jurisdiction clauses inserted in the contract of carriage

With respect to jurisdiction clauses, although Article 31(1) CMR expressly permits their inclusion in the contract of carriage, it remains unclear which are the formal requirements for a valid agreement on jurisdiction. In the absence of any indication in Article 31(1) CMR, it might be alleged that the form requirements established in Article 25 of the Recast apply. It should, however, be noted that Article 31(1) CMR is *lex specialis* with respect to the European Union provisions on jurisdiction[36] (Article 71 of the Recast). But if the latter do not apply, it is still unclear which rules are to be considered. While some tribunals take recourse to the *lex fori*[37] or the law applicable to the contract[38], for others[39] there is no need for a recourse to national law, since the CMR does not establish any formal requirements. If this were so, the agreement on jurisdiction would be valid whatever its form; a conclusion that seems adequate in view of the fact that only prorogation but not derogation of jurisdiction is possible[40]. It is nonetheless advisable to include the jurisdiction clause in the consignment note, since it is enforceable against the consignee only if he is aware thereof upon receipt of the goods[41].

As to the effects of a validly agreed jurisdiction clause, unlike Article 25(1) of the Recast, Article 31(1) CMR only allows for additional *fora*. Since all stipulations that are contrary to the Convention are considered to be null and void (Article 41(1) CMR), a jurisdiction clause that establishes an exclusive *forum* is unenforceable. It seems, however, reasonable to consider that not the whole clause is null and void[42], but that the nullity is only partial, in the sense that the exclusive choice is turned into an additional one[43].

b) Connected claims and successive carriage under Articles 34 *et seq.* CMR

In many contracting States of the CMR, successive carriage as envisaged by Articles 34 *et seq.* CMR[44] is a modality hardly ever found in practice[45]. However, the courts of some countries adopt a wide interpretation of Article 34 CMR to cover situations in which the first or contractual carrier (who celebrates the contract of carriage with the shipper) does not even receive the cargo (i.e. a so-called "paper carrier")[46]. If a transport operation is considered a successive carriage, Article 36 CMR allows the shipper or the consignee to bring a claim against the first or the last carrier, as well as the carrier who performed the leg where the damage occurred. However, the question arises whether all actions can be brought in the same court. The issue is relevant since, depending on the court seised, the interpretation of Article 29 CMR may vary and some duties and charges are to be reimbursed or not by the carrier under Article 23(4) CMR[47].

To bring a claim against all successive carriers in one single *forum* is of course possible if the contract of carriage contains a jurisdiction clause, but such an agreement can only be invoked *vis-à-vis* the succeeding carriers if they have accepted it, e.g., by accepting the consignment note containing the clause[48]. On the contrary, in the absence of a binding jurisdiction clause it does not seem possible to sue all carriers by way of a single action, since the CMR does not refer to "connected claims" in the sense of Article 8 (1) of the Recast[49]. Article 36 CMR cannot be invoked either, because it only envisages the standing to be sued, but does not contain a rule on jurisdiction. The jurisdiction of a court can thus only be established by application of Article 31 CMR, so that every one of the successive carriers has to be sued in one of the *fora* envisaged by the Convention (which may, however, coincide).

c) Multimodal transport and the rules on jurisdiction in Article 31 CMR

A last problem worth mentioning is the possibility of invoking Article 31 CMR within the framework of a multimodal transport. The problem lies with the fact that CMR does not apply to multimodal transports as a whole, at least when different from a ro-ro or piggyback transport (Article 2 CMR), but it usually does apply to the international road leg when the damage was caused during car-

36 See OGH (AT) 16.12.1997, 7 Nd 510/97, albeit referred to the 1988 Lugano Convention; BGH 27.2.2003, I ZR 58/02, *unalex DE-152*; and Supreme Court of the Czech Republic 16.2.2011, *unalex CZ-28*, with reference to the CIM Uniform Rules for rail transport.

37 OGH (AT) 27.11 2008, 7 Ob 194/08t, *unalex AT-615*.

38 Cour de Cassation (Belgium) 29.4.2004, *op.cit*.

39 LG Aachen (DE) 16.1.1976; AG Köln (DE) 6.2.1985 [*non vidi*, cited by *Jesser-Huß* in MüKo HGB, *op.cit.*, Article 31 CMR, no. 25]. See also *Pesce*, Il contratto di trasporto internazionale di merci su strada (1984), 325; *Magnus*, in: Magnus/Mankowski, Brussels I Regulation, *op.cit.*, no. 12.

40 *Jesser-Huß* in MüKo HGB, *op.cit.*, Article 31 CMR, no. 25. Obviously, although no special form is required, the clause nonetheless has to be accepted by both parties: Spanish Supreme Court 21.1.1986.

41 See *Pesce*, *op.cit.*, 324.

42 Nonethless, this is the conlusion reached in OLG Oldenburg (DE) 5.1.2000, 4 U 34/99, *unalex DE-1421*; and, probably, in BGH (DE) 18.12.2003, I ZR 228/01, *unalex DE-20*.

43 OGH (AT) 27.11.2008, *op.cit*.

44 "If carriage governed by a single contract is performed by successive road carriers, each of them shall be responsible for the performance of the whole operation, the second carrier and each succeeding carrier becoming a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note".

45 For the reasons see *Zurimendi*, in: Duque/Martínez Sanz, Comentarios a la Ley de Transporte Terrestre (2010), 765, 766.

46 Hoge Raad (NL) 11.9.2015, *Veldhuizen ./. Beurskens*. See also the references in *van Dijk/Spiker*, in TranspR, 9-2016, 341 *et seq.*

47 As regards e.g. import and excise duties or VAT, such charges are to be reimbursed in the UK (House of Lords 9.11.1977, *Buchanan ./. Babco*), while this is not the case in the Netherlands (Hoge Raad (NL) 14.7.2006, *Philip Morris Holland B.V.*).

48 According to its wording, Article 34 CMR *only* applies if the consignment note is accepted by the successive carriers, but not necessarily in the case of a paper carrier, who at no moment receives the goods from the sender.

49 The omission does not seem to be a gap and an interpretation in the light of the Brussels Ia Regulation would affect the predictability of *fora*: UK Supreme Court 28.10.2015, *British American Tobacco (BAT) v Exel, Kazemier and Essers*. For a detailed analysis see *Lamont-Black*, in TranspR, 9-2016, 333 *et seq.*

riage by road. It is not clear, however, whether it applies autonomously or directly to such a road leg. For the English Court of Appeal[50], it seems to do so, although the relevant judgments refer to the application of Article 29 CMR. On the contrary, the rules on jurisdiction of the CMR should not apply "directly" as regards the multimodal transport as a whole[51], and although there is an international road leg, Article 31 CMR cannot be invoked. It is indeed undesirable to give jurisdiction to all courts mentioned in any one of the sector specific conventions and acts that may apply to the different legs of a multimodal transport, because it would impose on the multimodal transport operator the risk of facing legal claims in an infinite number of *fora*. Legal certainty and predictability, as required by the CJEU in its *TNT* judgment, could not be guaranteed any more.

While no international regulation on multimodal transport comes into force, Brussels Ia Regulation should rather apply directly (within the European Union) so that, in the absence of a jurisdiction clause, the operator can only be sued at his domicile or at the place where the services were provided or should have been provided[52]. However, where the operator brings an action against the road carrier subcontracted by him (or vice versa), it seems obvious that the *fora* envisaged by Article 31(1) CMR apply.

2. Lis pendens

As explained above, Article 31(2) CMR establishes that, where an action is pending before or a judgment has been entered by a tribunal, no second action is possible when both the parties and the ground of action are the same. The relevant difference between this rule and its equivalent in Article 29(1) of the Recast has to be seen in the fact that Article 31(2) CMR requires the action to be pending before a tribunal that is competent under paragraph 1 (i.e. a tribunal that has jurisdiction according to the rules laid down in the Convention itself), while Article 29(1) of the Recast omits any reference to the competence of the court seised in the first place.

The main problem related to *lis pendens* in the CMR is the question as to whether a negative declaratory action triggers the application of the *lis pendens* rule in the Convention. Since this issue has been resolved by the CJEU in its *Nipponkoa* decision, I would like to briefly address a second problem, generally referred to as the "Italian torpedo", i.e. the seizure of a court that lacks jurisdiction in order to delay a decision on the merits. Under the 1968 Brussels Convention and the Brussels I Regulation, this was possible even where an agreement between the parties had conferred exclusive jurisdiction on a single court or tribunal: according to the CJEU[53], the court seised in the second place, even having exclusive jurisdiction by virtue of an agreement between the parties, had to stay proceedings.

This situation is only partially envisaged in Article 31(2) of the Recast, pursuant to which any tribunal seised has to stay the proceedings until the court upon which a jurisdiction agreement confers *exclusive* jurisdiction declares that it has no jurisdiction to hear the case. The problem lies with the fact that, as has been shown above, Article 31(1) CMR – which prevails over the presumption of exclusivity established in Article 25 of the Brussels Ia Regulation – only allows for non-exclusive choice of jurisdiction agreements. As a consequence, Article 31(2) of the Recast cannot possibly apply in relation to a contract for the international carriage of goods by road.

3. Recognition and enforcement of judgments

Finally, as regards the recognition and enforcement of judgments, the CMR establishes that a (final)[54] judgment that has become enforceable in the state where it was entered shall be enforceable in any other contracting state "as soon as the formalities required in the country concerned" have been fulfilled (Article 31(3) CMR). Such formalities are those of the Brussels Ia Regulation whenever both countries involved are Member States of the European Union (Article 71(2)(b) of the Recast)[55], so that an *exequatur* procedure, which has been abolished by the Brussels Ia Regulation, should not be required.

Consequently, the recognition and enforcement of a judgment can only be refused on the basis of the grounds envisaged by Article 45 of the Recast. On the contrary, recognition may not be denied on the ground of a lack of jurisdiction on the part of the court that rendered the judgment, since such a refusal would affect the free movement of judgments and the mutual trust in the administration of justice[56].

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50 EWCA 27.3.2002, *Quantum ./. Plane Trucking*, [2002] EWCA Civ 405.

51 See, in particular, BGH (DE) 17.7.2008, I ZR 181/05, and 25.10.2012, I ZR 167/11, as well as Hoge Raad (NL) 1.6.2012 (*Godafoss*).

52 Pursuant to the abovementioned decision of the CJEU in the *Rehder* case, the place where the service is to be provided is probably both the place where the goods are taken over by the multimodal transport operator and the place designated for their delivery to the consignee.

53 CJEU 9.12.2003, C-116/02, *Erich Gasser GmbH ./. MISAT Srl.*, *unalex EU-69*, nos. 54 and 73. Although the decision referred to the 1968 Brussels Convention, it could be extended to the situation under the Brussels I Regulation, which provided for similar rules on *lis pendens*.

54 As regards non-final judgments, there is a gap that has to be filled with recourse to the Brussels I(a) Regulation. See OGH (AT) 20.10.2004, 3 Ob 189/04x, *unalex AT-62.*

55 See OGH (AT) 18.7.2002, 3 Ob 31/02h, *unalex AT-591*, and 17.2.2006, *op.cit.* This conclusion is also reached by the Girona Court of Appeal (Section 2) (ES) in a judgment of 3.6.2009, ECLI:ES:APGI:2009:1239, although it bases the preferential application of the CMR on Article 67 of the Regulation instead of on Article 71. Furthermore, it implicitly applies the CJEU's ruling in the *Tatry* case – i.e. European rules apply where there is a gap in the relevant convention – but once again the basis for doing so is mistaken: it wrongly assumes that the CMR does not contain any rules on recognition and enforcement and, by applying directly the Brussels I Regulation, concludes that recognition and enforcement cannot be denied on the only basis that the court who delivered the judgment lacked jurisdiction.

56 CJEU 4.5.2010, *op.cit.*

VI. *Quid iuris* when the European Union has acceded to or approved the relevant convention?

Some of the most recent conventions on the international carriage of goods and passengers envisage the possibility that "regional economic integration organisations" such as the EU accede thereto. This is the case, e.g., for the Convention concerning International Carriage by Rail (COTIF), as amended by the 1999 Vilnius Protocol (Article 38 COTIF/1999); or for the Montreal Convention (MC) for the Unification of Certain Rules for International Carriage by Air (Article 53(2) MC). In exercise of this power, the EU deposited its instrument of approval of the Montreal Convention, together with the instruments of ratification of all Member States, on 29 April 2004[57] and declared its accession to the COTIF on 23 June 2011[58].

According to the concept of "conclusion" analysed hereabove, both conventions were concluded (and came into force) some years after the Brussels I Regulation entered into force[59], so Article 71 of the Recast arguably does not apply[60]. The solution might be different if the agreements had been ratified by the Member States prior to the entry into force of the Regulation – the Montreal Convention was signed on 28 May 1999 and the Vilnius Protocol on 3 June 1999 – and there is still some doubt with respect to those States who ratified the Conventions before becoming Member States of the EU.

But be that as it may, the situation has certainly changed with the approval of the MC and the accession to the COTIF on the part of the EU itself. Pursuant to Article 216(1) TFEU, the European Union may conclude agreements with other countries or with international organisations, which are then binding both upon the institutions of the Union and on its Member States (Article 216(2) TFEU). And since the agreements concluded by the EU itself are a part of Community law from the moment of their entry into force for the Union[61], it seems appropriate to apply Article 67 of the Recast rather than Article 71[62], which gives preference to provisions governing jurisdiction, *lis pendens* and the recognition and enforcement of judgments contained in instruments of the EU[63]. A similar result can be achieved if it is understood, with the Court of Justice, that agreements concluded by the Union prevail over the provisions of secondary Community legislation[64].

While this solution should not give rise to major problems where the carriage of goods is concerned (the rules on jurisdiction and *lis pendens* in Article 46 of the CIM Uniform Rules[65] are virtually identical to those in Article 31 CMR, and the *fora* envisaged by Article 33 MC are similar, although no action can be brought at the place of origin), the situation seems to be different for passenger transport, especially as regards carriage by rail. Indeed, pursuant to Article 57 § 1 of the CIV Uniform Rules[66], actions based on the Rules can only be brought in a *forum* agreed by the parties or at the domicile of the defendant (or his principal place of business or the branch or agency which concluded the contract). No mention is made, either to the place of departure or to that of destination. Although the "defendant" is not necessarily the rail undertaking that performed the carriage during which the damage occurred, but rather any carrier with standing to be sued according to Article 56 of the CIV Rules, the choice of possible *fora* is still likely to be more limited than under the Recast Regulation.

In the case of air transport, additionally to the traditional *fora* that already appeared in the 1929 Warsaw Convention (domicile of the carrier, principal place of business, place of business through which the contract was made, place of destination), an action can now also be brought in the State of residence of the passenger, albeit only in the case of death and injury of the latter (Article 33(2) MC), and provided that the carrier operates air services to or from this State. This so-called "fifth jurisdiction" awards a protection to the passenger that is not available under the Recast Regulation, because the special jurisdiction over consumer contracts does not apply to contracts of carriage (Article 17(3) of the Recast). On the other hand, the fact that no action can be brought at the place of origin might hamper the exercise of the passenger's rights in the – more and more frequent – cases where a one-way (and not a return) ticket is purchased[67].

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57 Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (2001/539/EC). The Convention entered into force for the Community – as well as for the Member States – on 28 June 2004.

58 Council Decision of 16 June 2011 on the signing and conclusion of the Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (2013/103/EU). The Convention came into force for the EU on 1 July 2011.

59 The Montreal Convention entered into force on 4 November 2003 and the 1999 Protocol amending the COTIF did so on 1 July 2006. While, as indicated in the text, the instruments of ratification of the former were deposited by all Member States on 29 April 2004, the latter was ratified at different moments in time, but the States that by then belonged to the EU did so after 1 March 2002.

60 CJEU 4.5.2010, *op.cit.*, and Recital 36 of the Recast.

61 See e.g. CJEU 30.4.1974, 181/73, *R. & V. Haegeman ./. Belgian State*, no. 5; CJEU 30.9.1987, *Meryem Demirel ./. Stadt Schwäbisch Gmünd*, no. 7; and, specifically with respect to the Montreal Convention, CJEU 10.1.2006, C-344/04, *IATA-ELFAA ./. Department for Transport*, *unalex EU-595*, no. 36.

62 See, however, *Reuschle*, Montrealer Übereinkommen, 2005, Art. 33, no. 4; *Pokrant* in: Ebenroth/Boujong/Joost/Strohn, HGB, Vol. 2, *op.cit.*, Art. 33 MÜ, no. 5.

63 *Wagner*, in TranspR, 3/2009, 103, 109; *Tuo/Carpaneto*, *op.cit.*, 175; *Hernández*, in Cuadernos de Derecho Transnacional, 1/2011, 179, 188.

64 See, for the Montreal Convention, CJEU 10.1.2006, *op.cit.*, no. 35; CJEU 10.7.2008, C-173/07, *Emirates Airlines ./. Dieter Schenkel*, no. 43.

65 Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM – Appendix B to the 1999 COTIF Convention).

66 Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV – Appendix A to the 1999 COTIF Convention).

67 Since the definition of the term "destination" in Article 33(1) MC is the same as in Article 1 MC, the place of destination is identical to that of origin in a round flight. See *Luongo/Piera*, in Revista de Derecho del Transporte, 4/2010, 115, 123.

Certainly, the rules on jurisdiction for actions related to the air passenger rights envisaged by Regulation No. 261/2004 are those in the Brussels I Regulation (and not, e.g., those in Article 33 MC)[68], which should also be true with respect to the Rail Passenger Rights Regulation[69]. But the CJEU has not yet decided which set of rules shall prevail in the case of an action for compensation based on the MC or the COTIF. The question is particularly complex with respect to rail transport, since Article 2 of the 2011 Accession Agreement of the EU to the COTIF contains a so-called "disconnection clause" in favour of Union rules in the mutual relations between Member States[70]. It is debatable, however, whether this clause – that does not exist in the agreement on the conclusion of the Montreal Convention, so arguably the *fora* envisaged by Article 33 MC should apply directly – excludes the rules on jurisdiction of the Convention and obliges to take recourse to the Brussels Ia regime. The arguments that advocate applying the Convention are certainly strong. In the first place, the Regulation is not mentioned in the "Declaration of competences" of the Union that accompanies the Accession Agreement[71], which is a strong indicator of the fact that the European legislator did not have jurisdiction, recognition and enforcement in mind when he drew up the "disconnection clause". In the second place, although the Brussels Ia Regulation is a "Union rule governing the particular subject concerned" in the sense of the "disconnection clause", Article 67 of the Recast expressly provides for the preferential application of provisions contained in instruments on specific matters (*hic*, the COTIF).

Nonetheless, in a recent case, the French Cour de Cassation held that Article 2 of the Accession Agreement prevents the application of the rules on jurisdiction in the Convention and applied the Recast[72]. This approach not only provides for a better protection of passengers in international rail transport; it also resolves some tricky issues in relation to actions based on the Rail Passenger Rights Regulation[73]. In my opinion, the Cour de Cassation has lost a magnificent opportunity to submit a request for a preliminary ruling to the CJEU that might have shed some further light on this problem.

VI. Conclusive Remarks

The wording of Article 71 of the Recast seems to be clear in the sense that the rules on jurisdiction and on recognition or enforcement of judgments in specialised conventions concluded before the Brussels I Regulation came into force shall prevail over the provisions contained in the Regulation itself. However, in its important judgment in the *TNT* case, the CJEU held that the principles that underlie the Regulation shall in any case be respected, especially those of free movement of judgments and mutual trust in the administration of justice within the Union. The decision has been the object of severe – and justified – criticism, due to the legal uncertainty it generates. But it is equally true that Article 71 of the Recast mainly aims at preventing Member States from infringing their obligations *vis-à-vis* third States, while jurisdiction, recognition and enforcement between the Member States are, as a general rule, governed by the Recast itself. By establishing the obligation to respect the basic principles of the Brussels Regulation, the CJEU contributes to harmonise the interpretation of private international law rules in international conventions on particular matters. In this sense, although there certainly is some dynamite in TNT, it nonetheless fosters the integration of the Member States in a single European Area of Civil Justice.

Be that as it may, the decisions on Article 71 of the Brussels Regulation still leave many questions unanswered. This is especially true for the conventions to which the European Union itself is a contracting party. While, as a general rule, such conventions should fall within the scope of application of Article 67 of the Recast, the existence of a "disconnection clause" like that in Article 2 of the Accession Agreement to the 1999 COTIF Convention might lead to the direct application of the Brussels regime. But, however desirable this result might be to the extent to which it enhances the protection of passengers in international traffic, its compatibility with EU law is questionable. A clarifying judgment of the CJEU would be necessary to shed some light on the dark.

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68 CJEU 9.7.2009, *op.cit.*, nos. 27-28; CJEU 10.3.2016, C-94/14, *Flight Refund ./. Lufthansa*, *unalex EU-654*, no. 46.

69 Regulation (EC) No 1371/2007, of 23 October 2007, on Rail Passengers' Rights and Obligations.

70 The "disconnection clause" reads as follows: "Without prejudice to the object and the purpose of the Convention to promote, improve and facilitate international traffic by rail and without prejudice to its full application with respect to other Parties to the Convention, in their mutual relations, Parties to the Convention which are Member States of the Union shall apply Union rules and shall therefore not apply the rules arising from that Convention except in so far as there is no Union rule governing the particular subject concerned". There is an authentic interpretation of the term "governing the particular subject concerned" in Annex II to the Council decision on signing and conclusion of the agreement, according to which it "is to be understood as applying to the specific case which is governed by a provision of the Convention, including its appendices, and is not governed by European Union legislation".

71 *Tuo/Carpaneto*, *op.cit.*, 174.

72 Cour de Cassation (FR), 29.11.2016, 14-20172, *unalex FR-2498*.

73 In detail on such problems, *Puetz*, in: Carbone, Brussels Ia and Conventions on Particular Matters (2017), 141, 168 *et seq.*