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The UK Supreme Court on Jurisdiction over successive CMR carriers and European Union Rules

Simone Lamont-Black*

I. Introduction

In the recent case of *British American Tobacco Switzerland SA and others v Exel Europe Ltd and others*¹ the English courts had to decide on the application and interpretation of the jurisdiction rules of the CMR² on successive carriers, as well as to reassess the interaction between the jurisdictional rules of international transport conventions and EU law.

The CMR, as most other transport conventions, has rules on jurisdiction for claims arising out of the carriage of goods under the convention. These jurisdictional rules are enshrined in article 31.1, and for claims between successive carriers in article 39.2 of the CMR. In parallel, EU law has its own regime for jurisdiction in civil and commercial matters as nowadays enshrined in the Brussels I/Brussels I bis Regulations. The Brussels I Regime allows for joinder of defendants at the place of the domicile of one of them. While the same domicile rule is absent from the CMR, the latter enables suit of all carriers under different criteria, focusing instead on the cornerstones of the transport journey. The application of these jurisdictional systems and rules and their potential interaction was key to the BAT saga.

The main CMR question was whether “successive carriers” could be joined to the action against the primary carrier by virtue of this defendant’s domicile within the jurisdiction even though neither the successive carriers themselves nor the goods’ transportation had any connection to England. In the alternative, the questions were whether a jurisdiction agreement between the cargo claimant and the primary carrier could be extended to the successive carriers and, further, whether the primary carrier’s place of business could constitute the branch or agency through which the successive carriers’ contracts were made. Last, but not least, as the final alternative, the claimants submitted that the jurisdictional rules of the CMR had to be supplemented by those of the Brussels I Regulation in order to allow for suit of all defendants at the domicile of one of them, here at the domicile of the primary carrier within the English jurisdiction.

The case was hotly debated and proceeded through the instances all the way to the United Kingdom (UK) Supreme Court. The reasoning in these decisions is of interest, both in the context of the CMR and as well in respect of the interaction of jurisdictional rules between the CMR and the Brussels I /Brussels I bis Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. With respect to the latter, the Court of Justice of the European Union (CJEU) has handed down several preliminary rulings relating to transport law and the interaction of carriage conventions with the Brussels I Jurisdiction Regime.³ While the general rule is clear, that the Brussels I Jurisdiction Regime is to step back to allow application of the specialised rules of specialised conventions,⁴ the exact application of

* Assessorin iur. (Germany), Dr. (iur.), Lecturer in International Trade Law at the University of Edinburgh, UK/Scotland.

¹ *British American Tobacco Switzerland SA and others v (1) Exel Europe Ltd and (2) H Essers Security Logistics BV and another and British American Tobacco Denmark A/S and others v (1) Exel Europe Ltd and (2) Kazemier Transport BV* [2015] UKSC 65; [2015] 3 W.L.R. 1173, on appeal from [2013] EWCA Civ 1319; [2014] 1 Lloyd's Rep. 503, which was in turn on appeal from [2012] EWHC 694 (Comm); [2013] 1 W.L.R. 397; [2012] 2 Lloyd's Rep. 1 (hereafter *BAT v Exel*).

² The United Nations Convention on International Carriage of Goods by Road 1956.

³ The EU Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L351, 20.12.2012, p1, replacing as of 10th January 2015 Council Regulation (EC) No 44/2001. Regulation 44/2001 itself was based on and superseded the 1968 Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which operated between EU Member States.

⁴ See Art 71 of the EU Regulation 1215/2012 and Art 57 of the Brussels Convention of 27th September 1968.

this principle has been fraught with difficulty and so far was explored by the CJEU in *The Tatry*⁵, *TNT Express Nederland BV v AXA Versicherung AG*,⁶ *Nipponkoa Insurance v Inter-Zuid Transport*⁷ and, more recently, *Nickel & Goeldner Spedition GmbH v "Kintra" UAB*.⁸ In *BAT v Exel*, the UK Supreme Court added its view on the matter.

After discussing the UK Supreme Court's decision in *BAT v Exel* in light of the relevant CJEU case-law, this paper further investigates the question of interaction of the jurisdiction regimes of specialised transport conventions and Brussels I. It concludes that the import of Brussels I rules should be limited to a "second or negative stage" review only, without interfering with "direct, positive" allocation of jurisdiction by specialised conventions.

II. The facts of the case

"Cigarettes attract smokers, smugglers and thieves",⁹ leading to the loss that was the object of the proceedings in *BAT v Exel*. Various members of the British American Tobacco Group (BAT), shipped tobacco products with the English freight forwarder Exel, who contracted as main contractor and primary carrier under a framework contract and a local agreement. Exel, as permitted by the contract, subcontracted to Esser and Kazemier and was thus neither involved in the physical movement of the goods nor in the issuing of the consignment note. Two consignments, one to be carried between Hungary and Denmark and the other between Switzerland and The Netherlands, ended with cargo loss. Part of the cargo of cigarettes of the shipment to Denmark was lost while the vehicle was parked overnight, contrary to instructions, in a carpark near Copenhagen. The cargo of tobacco of the cargo bound for the Netherlands was allegedly stolen en route in an armed robbery in Belgium.

For each of the two consignments the actual road carriers had taken over the goods for transportation and issued a road consignment note as carrier. The members of the BAT group as cargo claimants sued both Exel, the primary contractual carrier, and Essers and Kazemier, the actual road carriers, in the English courts. The motivation to sue in England was high, due to a difference in assessment of damages, which in England includes duty because of the loss,¹⁰ in contrast to most continental jurisdictions, and notably the

⁵ C-406/92 *Owners of Cargo Lately Laden on Board the Tatry v Owners of the Maciej Rataj (The Tatry)* [1994] ECR I-5439; [1999] QB 515.

⁶ Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* [2010] ILPr 35.

⁷ Case C-452/12 *Nipponkoa Insurance Co (Europe) Ltd v Inter-Zuid Transport BV* [2014] ILPr 10.

⁸ C-157/13 *Nickel & Goeldner Spedition GmbH v "Kintra" UAB* [2015] Q.B. 96, [2015] ILPr 1.

⁹ *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [1].

¹⁰ According to the decision of the House of Lords in *Buchanan & Co v Babco Forwarding and Shipping (UK) Ltd* [1978] A.C. 141, art.23.4 CMR as "other charges incurred in respect of carriage" included excise duty which had to be paid by the claimant where the cargo of whisky bound for export was lost whilst still within the jurisdiction. However contrast *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113; [2003] QB 1270, where damages for guarantee payments which the claimant had to make to tax authorities due to the loss of tax seals by the defendant carrier were held too remote. The broad interpretation of "other charges" in *Buchanan*, however, seems, by no means, to express a general standard throughout CMR states. See the discussion of the then CIM 1980, art.40.3 in the Bulletin of International Carriage by Rail No.1/2004, Case Law (p.15) expressed in summary as: "Other amounts incurred in connection with carriage of the lost goods' within the meaning of Article 23 (4) of CMR and Article 40 § 3 of CIM only include such expenses as would also have been incurred to the same extent in carriage according to contract and which would have contributed to the value of the goods at the place of destination, i.e. which have not been incurred as the result of loss"(p.III). The text of CIM 1999, art.30.4, now explicitly excludes compensation of excise duties which only become due because of the loss; and see also CIM Explanatory Report art.30 paras 6 and 7 clearly differentiating between customs and excise duties. See insofar also the commentary in Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa Law, 2014), para 98; Koller, *Transportrecht, Kommentar*, (7th edn, Verlag C H Beck, 2010) (hereafter Koller), CMR, art 23, para 10 and CIM, art.30 para 1; Schmidt, Czerwenka, Herber, *Münchener Kommentar zum Handelsgesetzbuch, Band 7, §§ 407 - 475h Transportrecht* (2nd edn, Verlag C H Beck, 2009) (hereafter MüKo HGB), CMR, art 23, paras 35, 37-38 (Jesser-Huß) and CIM, art 30, para 7 (Freise) and Thume, *Kommentar CMR*,

Netherlands where both road hauliers had their places of business. Duty paid amounted to approximately 90% of the cost of the cigarettes. Exel accepted jurisdiction, having both, its place of business in England and having signed a jurisdiction agreement in favour of the English courts in its contracts with the consignors. However, Exel was not represented and played no part in the proceedings. Essers and Kazemier, in turn, contested jurisdiction of the English courts and the question arose whether jurisdiction could be validly founded over all defendants in England.

The case history

At first instance in 2012, in the High Court, Cooke J. declined jurisdiction against the actual road carriers and set aside the proceedings against them. On appeal, in a leading judgment by Sir Bernard Rix and with agreement of McFarlane LJ and Sir Timothy Lloyd, the Court of Appeal reached the opposite conclusion. The Supreme Court, with Lord Mance delivering the leading judgment and Lord Neuberger, Lord Clarke, Lord Sumption, Lord Reed in agreement, allowed the appeal and reinstated the order of Cooke J setting aside service of the proceedings against the actual road carriers for lack of jurisdiction. What were the reasons and what has been clarified by this lengthy trial over 3 instances?

Common ground

The parties had agreed on the following common ground, which was therefore to be the accepted basis of the case¹¹: The two BAT companies as consignors were parties to the framework and/or local agreement with Exel which provided for English law and exclusive jurisdiction of the English courts. Further, the arrangement between the parties was a contract of carriage by Exel within the meaning of the CMR. In relation to the CMR and the provisions of its Chapter VI the carriage was performed as carriage by successive carriers; Exel was the first carrier and Essers and Kazemier respectively the last carrier and also the performing carriers at the time of the loss under the CMR successive carrier provisions.¹²

Under Article 34 CMR successive carriage requires a movement of goods under a single contract of carriage, with the second carriers and each succeeding carrier becoming party to the contract of carriage under the terms of the consignment note by virtue of taking over the goods and the consignment note.¹³ However Exel never took over the goods or issued the consignment note. There is, however, support in the English courts that this does not deter from categorising this arrangement as successive carriage, as long as Exel is the primary contracting carrier and the sub-contractors take over the goods and issue the consignment note (also) on the primary carrier's behalf.¹⁴ While the Supreme Court questioned whether this approach was in fact appropriate, it did not have to decide the matter.¹⁵ Instead, the question was whether the

Übereinkommen über den Beförderungsvertrag im internationalen Straßengüterverkehr (3rd edn, Deutscher Fachverlag GmbH Fachmedien Recht und Wirtschaft, 2013), art 23, paras 34-35 (Thume/Riemer).

¹¹ And equally not open to the court to debate or decide upon.

¹² See arts 34 and 35 CMR.

¹³ Art 34: "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."

¹⁴ See both Donaldson J and the Court of Appeal in *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1975] 2 Lloyd's Rep 502, 507; [1977] 1 Lloyd's Rep 346, 358-361 (the primary carrier does not have to carry itself to be deemed a successive carrier) and *in this context see also SGS-Ates Componenti Elettronici SpA v Grappo Ltd* [1978] 1 Lloyd's Rep. 281 (QB), 284, Goff J (acceptance of the consignment note did not require physical acceptance, but could take place through the intermediary of a servant or agent) and *Coggins T/A PC Transport v LKW Walter International Transportorganisation AG* [1999] Lloyd's Rep 255 (CLCC (BL) = Central London County Court (Business List)) Hallgarten QC (to be successive carrier one has to have taken over the goods and the consignment note, although this could take place via an agent). See also discussion and critique in Clarke, *International Carriage of Goods by Road: CMR*, 3rd edn, Sweet & Maxwell, 2014 (hereafter Clarke) at 50a ff, esp 50b. Further also note the recent decision of the Dutch Supreme Court in *C&V Veldhuizen Holding B.V. v Beurskens Allround Cargo B.V.* of 11. September 2015 (Case Nr. 14/03211), NJB 2015/1635, S&S 2016/1, which seems to adopt the same approach in applying art 34 to the relationship between the merely contractual carrier and the actual (and sub-contracting) carrier.

¹⁵ *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [12-13].

consignors could found jurisdiction in England, not only against the main contractor Exel, but also against the sub-contractors as successive CMR carriers, by relying on Exel's presence in England and the proceedings brought against it, and/or on the jurisdiction agreement in the main contract between the consignors and Exel.

III. The Issues

The particular questions to be decided on in the context of the case were framed by Lord Mance¹⁶ as follows:

- “(i) First, can articles 31 and 36 be read together, so that, once a claimant has established jurisdiction against one defendant under article 31.1(a), it can then bring into that jurisdiction any other successive carrier potentially liable under article 36 ?
- (ii) Second, is it under article 31 sufficient to enable the BAT companies to sue Essers and Kazemier as successive carriers in England that the English courts were designated by agreement in the carriage contracts made between such BAT companies and Exel?
- (iii) Third, can the BAT companies sue Essers and Kazemier in the English courts, on the basis that “the branch or agency through which the contract of carriage was made” was in England?
- (iv) Fourth, do the provisions or principles of the Brussels I Convention on Civil Jurisdiction and Judgments, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L12, p 1) (“the Brussels Regulation”) either enable jurisdiction to be established over Essers and Kazemier or inform or dictate the answer to any of the previous questions?”

The issues in turn:

1. Article 36¹⁷ as jurisdictional rule, in conjunction with 31.1¹⁸?

Once a claimant had established jurisdiction against one defendant under article 31.1(a), could it bring into that jurisdiction any other successive carrier potentially liable under article 36? That this was so was the argument of the cargo claimants which had been rejected at First Instance but accepted by the Court of Appeal, with reference to the structure of the CMR and obiter dicta from previous decisions.¹⁹ In the UK

¹⁶ *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [15].

¹⁷ Art 36 CMR: “Except in the case of a counter-claim or a set-off raised in an action concerning a claim based on the same contract of carriage, legal proceedings in respect of liability for loss, damage or delay may only be brought against the first carrier, the last carrier or the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred; an action may be brought at the same time against several of these carriers.”

¹⁸ Art 31.1 CMR: “In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory
(a) 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
(b) the place where the goods were taken over by the carrier or the place designated for delivery is situated, and in no other courts or tribunals.”

¹⁹ See *BAT v Exel* [2013] EWCA Civ 1319 at [32 – 75, 99]. The Court of Appeal had drawn the following conclusions from the obiter dicta in *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd* [1981] 1 W.L.R. 1363, [1981] 2 Lloyd's

Supreme Court Lord Mance, in his leading judgment, also referred to the structure of the CMR as a key consideration for the case and on this point, but adopted a very different approach to that taken by the Court of Appeal.²⁰ Lord Mance suggested that the CMR had to be taken as a whole; it could not be separated into a series of sequential provisions.²¹ From this holistic investigation the following could be observed:

Chapter V, containing article 31.1 and its jurisdictional rules, could not be read as only dealing with cargo interests and the original CMR carrier, but had to apply also to situations where successive carriers were involved. This could be observed from all other provisions in this same chapter, such as article 30 dealing with checking of goods and time limits for making reservations, article 32 dealing with the one-year limitation period for actions and also paragraphs (2)-(5) of article 31 dealing with matters of *lis pendens*, enforceability of judgments, and security for costs. A holistic perspective therefore also had to be contained in the jurisdictional rules of article 31.1, thus also covering cases of successive carriage.

The relationship between articles 31.1, 36 and 39.2 was not one of jurisdiction. BAT's submission that article 36 as jurisdictional rule for claims by cargo interests to join successive carriers provided symmetry to the joinder provision in article 39.2, 2nd sentence, in respect of recourse claims between carriers was not acceptable. Instead, Lord Mance explained the significant differences in content and structure between articles 31.1 and 32.9 as follows:

- “(i) article 31.1 does not only offer a claimant the jurisdiction of any individual defendant's ordinary residence, principal place of business or branch or agency. It offers the additional advantage of jurisdiction against all carriers potentially liable under article 36 (the first, the last and the performing carriers) in the place either of taking over or designated for delivery of the goods. No such jurisdiction is available under article 39.2 to a carrier seeking recourse from another carrier.
- (ii) article 39.2 concerns recourse claims which fall under articles 37 and 38 to be divided pro rata, potentially between all carriers and not just the first, last or performing carrier. This is so, having regard to the specific provisions covering cases where more than one carrier was responsible for the loss or damage, or where it cannot be ascertained who was responsible or where a carrier otherwise liable to contribute is insolvent. There is an obvious imperative under article 39.2 to enable a claimant to bring all such claims in one jurisdiction. The same imperative does not exist under article 31.1, since cargo interests are under article 36 entitled to look to any one of the relevant carriers (first, last or performing) to meet their full claim, each being liable 100%. Further, in so far as cargo interests do wish to pursue all such relevant carriers together, they are able to do so in the place either of taking over or designated for delivery as stated in point (i).”²²

Rep. 402, (CA) and *ITT Schaub-Lorenz Vertriebsgesellschaft mbH v Birkart Johann Internationale Spedition GmbH & Co KG* [1988] 1 Lloyd's Rep. 487, (CA): recourse claims between carriers could be heard at the same time as the main claim for compensation; that article 31.1(a) could be read as referring to several defendants and that articles 31.1¹⁹ with 34 and 36 meant that a cargo claimant could sue all successive road carriers together in one proceeding at the place of domicile of one of the carriers. The structure of the CMR showed that while in article 31.1 jurisdiction was covered for claims between cargo interest and carriers, this did not cover successive carriers as they had yet to be introduced in the later article 34. As article 39.2 dealt with jurisdiction over recourse claims between successive carriers, the relevant chapter also ought to comprise rules on jurisdiction over successive carriers by cargo interests. In its view, this was indeed provided in Article 36¹⁹; alternatively, if this was not accepted, domestic law was to apply to fill this gap. Article 36 showed that the carriers open to suit by cargo claimants could be sued at the same time and thus in the same court of one of the carriers. Here the primary contractual carrier Exel provided this link to the English courts.

²⁰ Which had only focused on article 31.1 and chapter VI on successive carriers; see n. 19 above.

²¹ *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [19 - 20].

²² *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [37]. See also S Grignon-Dumoulin, “Forum shopping: Article 31 de la CMR”, (2006) 3 Univ L Rev 609, 613, applying a clear separation from art 31.1 and limitation of the jurisdictional grounds for suit between successive carriers under art 39.2.

According to the UK Supreme Court, the *obiter dicta* referred to by the cargo interests and accepted in the Court of Appeal were not convincing as they had been based on claims of a different nature.²³ Articles 36 *in fine* only clarified that several successive carriers could be sued together in one action, that is, their joint and several liability. A similar clarification could be found in the Warsaw Convention in articles 30.3, 2nd sentence. That there was a requirement of applying the jurisdictional provisions of article 31.1 to a carrier eligible to be sued under article 36 was also explained in literature as a practical curtailing of the severity of the joint and several liability as a successive carrier.²⁴

Therefore, jurisdiction over the actual carriers Essers and Kazemier could only be given if the provisions of article 31.1 were fulfilled with respect to themselves and not that of another carrier, even if all were considered successive carriers.

2. Jurisdiction agreement?

The cargo claimants argued that the terms of the contract with the primary carrier, including the jurisdiction clause, also bound the successive carriers, whether they had notice of all the clauses or not. The High Court and the Supreme Court both rejected this suggestion. While the Court of Appeal had not needed to decide the issue, it had opined that it was at least positively inclined towards such argumentation.

The relevant part of article 31.1 provides: “In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action **in any court or tribunal of a contracting country designated by agreement between the parties**²⁵ and, in addition, in the courts of tribunals of a country within whose territory ..., and in no other courts or tribunals.”

The Supreme Court in its decision²⁶ referred to the general principle that a contract is based on agreement,²⁷ a principle that in respect to jurisdiction clauses was also enshrined in the CMR and the Brussels I Regime.²⁸ The original contract contained such an agreement, but could it bind the successive carrier? The successive carrier, according to article 34, became party to the contract of carriage concluded between the original parties, but only “under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note”. For clauses of the original contract, such as a jurisdiction agreement, to be valid against the successive carrier, notice had to be given to him, by inclusion in the consignment note. According to articles 4 and 9.1 of the CMR the consignment note confirmed the contract and was *prima facie* evidence of the making of the contract of carriage and its conditions. The consignment note also required a number of particulars set out in article 6, which by their nature disclosed the core terms of the main carriage contract. Article 6.3 and the relevant box on consignment notes entitled “Conventions particulières” or “Besondere Vereinbarungen” contemplated the addition of any other particulars the parties deemed useful, which would have allowed the inclusion of a jurisdiction agreement or any other instructions. If the parties wanted to bind successive carriers by such a clause or instructions they would have to include it within the consignment note, as required by article 34.²⁹ Thus, while the

²³ The *obiter dicta* had been recourse claims and the cases’ themes and parties’ interests therefore had been different. In particular, due to this different focus, the *dicta* had been made in passing without having necessitated any precise investigation of the respective issues and, of further importance was that the opinion expressed in the relevant *dicta* in *Cummins* had not been shared by all the judges; see *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [38 -41].

²⁴ *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [42].

²⁵ Emphasis added.

²⁶ *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [17, 21-30], Lord Sumption at [65].

²⁷ *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [26].

²⁸ See art 31.1 CMR and arts 23.1 Br I Reg/art 25.1 Br I bis Reg.

²⁹ The contrary opinion expressed by Prof Loewe²⁹ (that a jurisdiction clause would bind the successive carriers even without inclusion in the consignment note and that the successive carriers could sue the primary carrier if he had not

jurisdiction clause bound the original parties, it could not provide jurisdiction of the English courts against Essers and Kazemier.

3. Branch or agency?

On the submission that the primary carrier Exel was to be seen as acting as branch or agency through which the contract with the successive carriers was made, had been rejected by all courts. According to the UK Supreme Court, the reference in article 31.1(a) to “the branch or agency through which the contract of carriage was made” applied to the original parties to the contract of carriage, but not to any statutory parties who according to article 34 only became parties to the contract in consequence of their taking over the goods and the consignment note.³⁰

4. Brussels I overriding principles?

a) The submissions

The submissions of BAT in the context were as follows: The application of specialised conventions within the European Union were based on and subject to article 71.1³¹ of the Brussels I Regulation,³² allowing pre-existing conventions, such as the CMR, generally to be applied in priority to the Brussels I Regime. However according to *C-406/92 The Tatry*³³ gaps left by the specialised convention were to be filled by the Brussels I Regime. Joinder of several defendants at the place of domicile of one of them was a principle of general international acceptance and was enshrined in article 6.1 of the Brussels I Regulation³⁴ and also in a non-Union context in domestic English civil procedure law³⁵. Since a comparable provision was missing in the CMR the gap had to be filled via the Jurisdiction Regulation. Alternatively and according to Cases *C-533/08 TNT v AXA*³⁶ and *C-452/12 Nipponkoa v Inter-Zuid*³⁷, if the CMR precluded the application of article 6.1 Brussels I this would lead to results less favourable for achieving sound operation of the internal market compared to those of the Brussels I Regime which therefore had to be applied to uphold the principle underlying the Jurisdiction Regulation of minimising the risk of concurrent proceedings and that of irreconcilable judgments. Article 6.1 Brussels I was therefore paramount.

Before engaging with the Supreme Court decision and providing further commentary on the issues, here firstly the prior EU case-law to which the courts referred.

informed them of the clause; see Loewe, “Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR)”, [1976] ETL 311, 399, [No. 282] was unconvincing as it was made in “simple conclusionary terms”, without reference to the drafting history of the convention or other relevant explanations. Equally other scholars have not accepted Prof Loewe’s view on this point.

³⁰ *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [32], Lord Sumption at [66].

³¹ Article 71.1 states:

“This 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.”

³² Hereafter also referred to as the “Jurisdiction Regulation” or as “Brussels I”.

³³ *C-406/92 Owners of Cargo Lately Laden on Board the Tatry v Owners of the Maciej Rataj (The Tatry)* [1994] ECR I-5439; [1999] QB 515.

³⁴ Article 6.1 Brussels I provides:

“A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

³⁵ See Practice Direction 6B para 3.1 (3) Civil Procedure Rules 1998.

³⁶ Case *C-533/08 TNT Express Nederland BV v AXA Versicherung AG* [2010] ILPr 35.

³⁷ Case *C-452/12 Nipponkoa Insurance Co (Europe) Ltd v Inter-Zuid Transport BV* [2014] ILPr 10.

b) Prior case-law of the ECJ in more detail

The Court of Justice of the European Union³⁸ had qualified the principle that specialised conventions take precedence over the Brussels I Regime³⁹ in several decisions.

The Tatry

The landmark decision was Case C-406/92 *The Tatry*⁴⁰ and at its core dealt with questions on *lis pendens* and related actions. It concerned actions *in personam* and *in rem*. An action for declaration of non-liability and limitation of liability was brought by shipowners on the one hand; on the other, the vessel was arrested and claims for damages due to contamination of the cargo brought by various groups of cargo owners. Jurisdiction *in rem* was based on the International Convention Relating to the Arrest of Sea-Going Ships of 1952.⁴¹ The ECJ decided firstly that gaps in a specialised Convention, although generally taking priority, could be filled by reference to the Brussels Convention.⁴² The Arrest Convention contained no rules on *lis pendens* or related actions and since the specialised Convention therefore left a gap the relevant rules of the Brussels Convention were applicable. Further the court decided what was to be interpreted as the same cause of action for the purpose of the *lis pendens* rule.⁴³ It was to be seen broadly and included a matter where, between the same parties, one claim was for damages and the other for a declaration of non-liability.

TNT v AXA

In *TNT v AXA*⁴⁴ a German court had accepted jurisdiction over a liability claim, even though the carrier had already sought a declaration of non-liability in the Netherlands. This caused problems when enforcement of the decision was sought in the Dutch courts. According to the interpretation of the CMR in the Netherlands, the German court had failed to apply the *lis pendens* rule of article 31.2 CMR and thus had never had jurisdiction, notwithstanding that German law preferred a narrow interpretation of *lis pendens*.⁴⁵ The question thus arose whether the Dutch courts could review jurisdiction of the court of origin in enforcement proceedings under article 31.3 CMR or, whether instead the rules of the stricter Brussels I Regulation prohibiting such review,⁴⁶ applied.

The Court of Justice, interpreting article 71 Brussels I, pointed out that while the specialised convention rules would be applied in respect of jurisdiction and enforcement of judgments, for intra-EU cases this needed to be done in the light of the standards provided for by the Jurisdiction Regulation. The fact that a convention was concluded with states within and outside of the EU did not change this. If the dispute was one between courts of Member States of the European Union the principles which underlay judicial co-operation in civil and commercial matters in the European Union could not be compromised. These were, in particular, the principles recalled in recitals 6, 11, 12 and 15 – 17 of the Preamble of the Regulation “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 risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union”.⁴⁷

³⁸ Hereafter CJEU; formerly called European Court of Justice (hereafter ECJ).

³⁹ According to the former art 57 BC; since 1 March 2002 by virtue of art 71 Br I Reg, and as of 10 January 2015 by virtue of art 71 Br I bis. See insofar on the priority of art 31 CMR: MüKo HGB, CMR, art 31, paras 9-14 (Jesser-Huß); Thume, art 31, paras 13 & 38 (Demuth) and Koller, CMR, art 31, para 1.

⁴⁰ C-406/92 *Owners of Cargo Lately Laden on Board the Tatry v Owners of the Maciej Rataj (The Tatry)* [1994] ECR I-5439; [1999] QB 515.

⁴¹ Hereafter Arrest Convention 1952.

⁴² And now the relevant instrument of the Brussels I regime.

⁴³ See art 21BC, which became art 27 Br I Reg, and see now Br I bis, arts 29 and 31.

⁴⁴ Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* [2010] ILPr 35.

⁴⁵ On this point see further the discussion below of Case C-452/12 *Nipponkoa Insurance v Inter-Zuid Transport*.

⁴⁶ Br I Reg, arts 41, 43 with 35.3.

⁴⁷ Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* [2010] ILPr 35, [49].

The CJEU stated further:

“Article 71 of Regulation No 44/2001 cannot have a purport that conflicts with the principles underlying the legislation of which it is part. Accordingly, that article cannot be interpreted as meaning that, in a field covered by the regulation, such as the carriage of goods by road, a specialised convention, such as the CMR, may lead to results which are less favourable for achieving sound operation of the internal market than the results to which the regulation’s provisions lead.”⁴⁸

After citing previous case law on some of the principles stated, the CJEU decided that article 71 Brussels I “must be interpreted as meaning that, in a case such as the main proceedings, the rules governing jurisdiction, recognition and enforcement that are laid down by a convention on a particular matter, such as the *lis pendens* rule set out in article 31.2 of the [CMR], and the rule relating to enforceability set out in article 31.3 of that convention, apply 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*).”⁴⁹

In effect, therefore, the decision means that EU Member States, amongst each other, cannot re-examine jurisdiction of the court of origin, irrespective of whether the recognition and enforcement rules are those of the EU or of a specialised convention. Indeed, the approach to use EU rules and principles for recognition and enforcement between EU Member States is now also clarified by the amended version of article 71.2(b) the Brussels I bis Regulation. The article clarifies specifically for recognition and enforcement that the provisions of the Regulation may be applied in any event, even where the conditions for recognition and enforcement of the specialised convention are to apply.⁵⁰ This, therefore, ought to ensure an EU compatible approach amongst EU Member States *inter se*.

Nipponkoa v Inter-Zuid

Case C-452/12 *Nipponkoa Insurance v Inter-Zuid Transport*⁵¹ involved again the issue of *lis pendens* between negative declaratory relief obtained by a carrier and a later positive action for indemnity by the insurer of the primary carrier who had paid damages to the cargo claimant. According to the case-law of the German *Bundesgerichtshof* (BGH)⁵² the CMR had to be interpreted autonomously with the result that an action for negative declaratory relief and an action for indemnity were not treated as the same cause of action; in contrast to the European case-law under the Brussels I Regulation. The German court of first instance seized with the indemnity claim sought guidance from the CJEU as to whether the importation of the CMR, into the Brussels I Regime by virtue of article 71 of the Brussels I Regulation meant that it had to ensure conformity with EU principles when interpreting the rules of the CMR on jurisdiction and *lis pendens*.⁵³ This, the CJEU confirmed: It referred to its comments in *TNT v AXA*⁵⁴ where it had held that article 71 precluded an interpretation of an international convention in a manner which failed to ensure, under conditions at least as favourable as those provided for by the Brussels I Regulation, that the underlying objectives and principles of the Regulation were observed. But, this time, the court did not stop here. It decided, more specifically, that article 71.1 precluded an interpretation of the CMR *lis pendens* rules in article 31.2 which

⁴⁸ Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* [2010] ILPr 35, [51].

⁴⁹ Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* [2010] ILPr 35, [55].

⁵⁰ This goes beyond the wording of the current Br I Reg, art 71.2(b), which only refers to the application of the provisions of the Regulation which concern the procedure for recognition and enforcement alongside the conditions of the specialised convention.

⁵¹ Case C-452/12 *Nipponkoa Insurance Co (Europe) Ltd v Inter-Zuid Transport BV* [2014] ILPr 10.

⁵² The German Supreme Court; see judgments of 20th November 2003, case numbers I ZR 102/02 and I ZR 294/02.

⁵³ CMR, arts 31.1 and 31.2.

⁵⁴ In particular at [49, 51 and 55]; as set out above under *TNT v AXA*.

resulted in an action for negative declaration or a negative declaratory judgment in one Member State not being classed as having the same cause of action as an action for indemnity between the same parties in another Member State.⁵⁵

All in all, this decision clarified the required intra-EU understanding of *lis pendens*, but also that preliminary rulings could be sought on the interpretation of a specialised convention in its interaction with the Brussels I Regime via article 71.1.

c) The UK Supreme Court on joinder and European principles

The Supreme Court first discussed the desirability to join all defendants in one forum and considered firstly whether there was a gap that needed filling, possibly by means of an expansive construction of the CMR provisions, before subsequently analysing whether, based on EU law, article 6.1 of Brussels I would prevail over article 31.1 of the CMR.

Necessity of an expansive construction of the CMR jurisdictional rules to allow joinder?

While there clearly was an interest to be able to sue several carriers in the same forum and such interest was enshrined in European⁵⁶ and domestic rules⁵⁷, the approach in achieving this aim invariably did not have to be the same, Lord Mance stated. The European and English domestic rules focused on domicile jurisdiction as pivotal factor. Yet, the approach in the Warsaw Convention was different, as was the one in the CMR. Indeed, the aim of joining all defendants was provided for in Article 31.1(b) CMR⁵⁸ where all carriers could be sued either at the place where the goods had been taken over or at the place designated for delivery.⁵⁹ That this may not be in the jurisdiction preferred by the claimant could not lead to the construction of other, for the claimant more favourable, rules of jurisdiction: article 31.1 clearly provided “and in no other courts or tribunals”. Compared to the Warsaw Convention which provided only for the place of destination, the CMR provided for additional fora. The CMR overall provided a balanced and comprehensive regime on jurisdiction. While the CMR had several jurisdictional rules that paralleled the Brussels I jurisdiction regulation, there were also several differences, such as the rules on joining several defendants. That this was so had to be accepted and did not constitute a gap simply because a rule similar to article 6.1 of the Brussels I Regulation, to allow suit of several defendants together at the place of one’s domicile, was not available.

Overall, there was no gap and thus no need to expand the interpretation of the CMR provisions by the desirability to join defendants according to the rules and approaches taken in other regimes.⁶⁰

Article 6.1 Brussels I enshrining an overriding principle?

On the question whether article 6.1 Brussels I Regulation or the principle behind it⁶¹ prevailed over article 31.1 of the CMR, the Supreme Court, first of all, referred back to the EU Treaties and recalled the wording of, what is now, article 351 of the Treaty on the Functioning of the European Union (TFEU),⁶² highlighting

⁵⁵ Case C-452/12 *Nipponkoa Insurance Co (Europe) Ltd v Inter-Zuid Transport BV* [2014] ILPr 10 [36–38].

⁵⁶ Art 6.1 Brussels I Reg and art 8.1 Brussels I bis Reg.

⁵⁷ In English procedural law, see Practice Direction 6B para 3.1(1) to the Civil Procedure Rules 1998.

⁵⁸ And see the solution in Art 28.1 in fine Warsaw Convention: “the court having jurisdiction at the place of destination”.

⁵⁹ *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [31, 37, 45].

⁶⁰ *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [43-47].

⁶¹ *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance in his leading judgment at [48 – 58] with whom Lord Neuberger, Lord Sumption and Lord Reed agreed.

⁶² Art 351 TFEU:

- 1) “The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

that pre-existing agreements, such as the CMR, should not be affected by EU law and even by the Treaties themselves. This principle had also found entry to the Brussels I Regime by article 71.⁶³ Although the position established was clear, the CJEU had interpreted it in the Joined Cases C-402/05P and C-415/05P *Kadi v Council of the European Union*.⁶⁴ The CJEU had decided that while the primacy of international obligations allowed derogations even from primary EU law, the EU provisions foreseeing this could not be understood as authorising any challenge to the principles that formed the very foundation of the Community legal order and, as such, the protection of fundamental rights including the review by the Community judicature of the lawfulness of measures taken and their consistency with such fundamental rights. *Kadi* was a decision at a high level of importance for individual freedoms, and it was surprising that the thinking was applied to the “tarmacadam of the world’s roads”.⁶⁵ Yet, in *TNT* and *Nipponkoa* the European Court had suggested that a specialised convention had to lead to results which were as favourable for achieving sound operation of the internal market as that of the Brussels I Regulation, in reasoning that was essentially circular. The European Court had done so without referring to any relevant Treaty provisions. These however enshrined the purpose of allowing derogations even from the Treaties themselves, a position that had been highlighted extra-judicially also by Judge Rosas,⁶⁶ and pre-existing case-law of the CJEU.^{67, 68}

While at a high level the preservation of the internal market was of course fundamental to the EU and the CJEU in *TNT* and *Nipponkoa* had gone further and elevated the principles which underlay judicial

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- 2) To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
 - 3) In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.”

⁶³ Article 71 states:

“1. This 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.

2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:

- (a) this Regulation shall not prevent a court of a member state, which is a party to a convention on a particular matter, from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another member state which is not a party to that convention. The court hearing the action shall, in any event, apply article 26 of this Regulation;
- (b) judgments given in a member state by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other member states in accordance with this Regulation.

Where a convention on a particular matter to which both the member state of origin and the member state addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation which concern the procedure for recognition and enforcement of judgments may be applied.”

⁶⁴ Joined Cases C-402/05P and C-415/05P *Kadi v Council of the European Union* [2008] ECR I-6351, [2009] AC 1225.

⁶⁵ *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [51].

⁶⁶ Who had not been a member of the CJEU in *TNT* or *Nipponkoa* ; see Allan Rosas, “The Status in EU Law of International Agreements Concluded by EU Member States”, *Fordham International Law Journal* (Vol 34, Issue 5 (2011) article 7) 1304, 1321, with references to authorities inter alia including C-812/79 *Attorney-General v Juan Burgoa* [1980] ECR 2787; [1981] 2 CMLR 193, at [8]: „ As the Court has already held in its judgment of 27 February 1962 in *Case 10/61 EC Commission v Italy*, the purpose of [Art 351 TFEU] is to lay down, in accordance with the principles of international law, that the application of the Treaty does not affect the duty of the member-State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder..“

⁶⁷ See C-812/79 *Attorney-General v Juan Burgoa* [1980] ECR 2787, [1981] 2 CMLR 193, and *Case 10/61 EC Commission v Italy* [1962] ECR 1, [1962] CMLR 187.

⁶⁸ *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [48-52].

cooperation in civil and commercial matters as necessary for the sound operation of the internal market,⁶⁹ the context in which the rulings and these statements had been made was important. Both cases had dealt with competing proceedings between the same parties in different member states. Both had concerned free movement of judgments and mutual trust in the administration of justice and could be seen only to oust review of jurisdiction of another Member State's courts in *TNT* and, in *Nipponkoa*, to import the understanding concerning *lis pendens* under the Regulation and overriding that of the CMR.⁷⁰

The case at hand in *BAT*, however, did not concern or present the risk of competing judgments involving the same parties, as *BAT* could sue *Exel* under the CMR for the whole of any loss. If *BAT* wanted to expand their target to pursue other defendants, they could do so in separate proceedings and could even join all together, although possibly not in a jurisdiction most favourably to its position. Any evidential advantages and aims of the claimants to sue and join the defendants in one rather than another jurisdiction, could not be associated with any fundamental propose of Union law in the field of jurisdiction or justice.

In any event, the CMR represented a balanced jurisdictional regime which was adopted across some 55 states, only half of which were EU Member States, which did not impinge on any of the principles the CJEU suggested had to be applied. Surely EU law would also allow bearing in mind the interests of third party states in a regime which operated with a certain degree of consistency across all contracting states. Thus, Lord Mance cautioned to confine overriding interests of Union law relatively narrowly. Restrictions under Union law on the ordinary application of an international convention would potentially undermine the uniformity and predictability which was the very aim of such conventions.

The rules of jurisdiction of the CMR could therefore not be supplemented or overridden by the joinder rules of the Brussels I Regulation.

IV. Comment

The decision of the Supreme Court has re-established the status quo under the CMR and its interaction with the Brussels Regulation in the UK, which, for a while, had been called into question due to the decision and obiter dicta of the Court of Appeal in the same case. It is a welcome decision, emphasising the jurisdictional solutions as enshrined in the CMR in its article 31 without adding layers of understanding artificially imported from different regimes, such as domestic law and the EU judgments regulation.

The Supreme Court summarised the (only) jurisdictional provisions available between cargo and carriers, which are contained in article 31.1 insofar:

- “(i) a provision enabling the enforcement of any jurisdiction clause in favour of the court or tribunal of a contracting state which was (a) agreed between the parties to the original carriage contract, or (b) to be taken, in the light of article 34, to be agreed as between the original goods interests and any successive carrier becoming party to that original contract on terms in the consignment note incorporating the jurisdiction clause, or (d) [sic] agreed in some other way between the parties to the litigation;
- (ii) provisions in paragraph (a) regarding ordinary residence and a principal place of business which can be relied on as against any carrier or successive carrier liable to suit under article 36, as well as by a carrier bringing proceedings arising out of carriage under CMR against a consignor or consignee;
- (iii) a further provision in paragraph (a) which can only sensibly apply in proceedings between original parties to the carriage contract;⁷¹ and

⁶⁹ As cited above in text to n.47, citing *TNT* at [49].

⁷⁰ *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [53-55].

⁷¹ Referring to “branch or agency through which the contract of carriage was made”.

- (iv) further provisions in paragraph (b) which open up jurisdiction in any claim arising out of CMR carriage to cover the courts or tribunals of the place of taking over or designated for delivery of the goods.

The important corollary of these provisions is that, under the final words of article 31.1, a claimant may not bring an action arising out of carriage under CMR in any other courts or tribunals.”⁷²

Further, the decision gives thought and consideration to the interaction of specialised conventions with the Brussels I regime at the level of jurisdictional norms. Insofar however, a few further considerations may be appropriate.

The CJEU case-law, as cited above, had, so far, not dealt with questions of direct or positive, initial jurisdiction and thus the potential interaction of rules founding jurisdiction between a specialised convention and the Brussels I Regulation, as argued in *BAT*. The CJEU decisions had only covered questions arising at a later, “second or negative” stage of proceedings: at the secondary jurisdictional stage of *lis pendens*, that of querying whether proceedings (for which jurisdiction had been assumed) had to be stayed, in order to avoid irreconcilable judgments (*The Tatry* and *Nipponkoa*); or at enforcement stage, by abiding to the principle of mutual trust, with the consequence of avoiding to review jurisdiction of the court of origin (*TNT*). This seemed to suggest that jurisdiction as a first (and positive) step was left to the specialised convention as its domain. However, in the meantime, the CJEU had occasion to discuss the appropriateness of applying CMR jurisdictional rules over those of the Brussels I Regulation:

Nickel & Goeldner Spedition GmbH v “Kintra” UAB

In *Nickel & Goeldner Spedition GmbH v “Kintra” UAB*⁷³ the question was put before the court whether the divergence in jurisdictional rules between the Brussels I Regulation and the CMR would be cause for concern. The CJEU answered in the negative. It confirmed that, in principle, the jurisdictional rules of a specialised convention ousted those of the Brussels I Regulation and that, in particular, the CMR jurisdiction rules did not compromise the principles which underlay judicial co-operation in civil and commercial matters in the EU; in particular, article 31.1 CMR fulfilled the objective of legal certainty and therefore could be applied. So far, so good. In its reasoning, however, the court entered into a detailed comparison of the jurisdictional provisions and set out:

“It is true that the second indent of Article 5(1)(b) of Regulation No 44/2001, the wording of which refers to only one place of performance, offers the claimant less choice than Article 31(1) of the CMR, which allows him to choose between the place where the goods were taken over by the carrier and the place designated for delivery of the goods. However, that fact is not such as to affect the compatibility of Article 31(1) of the CMR with principles which underlie judicial cooperation in civil and commercial matters in the EU. The Court has accepted in relation to contracts for carriage that, in certain circumstances, the applicant may have the choice between the courts of the place of departure and those of the place of arrival. In that respect, it has stated that such a choice granted to the applicant, apart from respecting the **criterion of proximity**, also satisfied the **requirement of predictability**, in so far as it allowed the applicant, as well as the defendant, easily to identify the courts before which proceedings might be brought. What was more, it was consistent with the objective of legal certainty, since the applicant’s choice was limited to two possible judicial fora within the framework of the second indent of Article 5(1)(b) of Regulation No 44/2001, as set out in its previous case-law in *C-204/08 Rehder v Air Baltic Corp*n [2009] ECR I-6073).”⁷⁴

⁷² *BAT v Exel* [2015] UKSC 65; [2015] 3 W.L.R. 1173, Lord Mance at [33].

⁷³ C-157/13 *Nickel & Goeldner Spedition GmbH v “Kintra” UAB* [2015] Q.B. 96, [2015] ILPr 1.

⁷⁴ C-157/13 *Nickel & Goeldner Spedition GmbH v “Kintra” UAB* [2015] Q.B. 96, [2015] ILPr 1 [41]. See also Collins & J. Harris, *Dicey, Morris and Collins on the Conflict of Laws*, (2nd Cumulative Supplement to the 15th ed., Sweet & Maxwell, 2015) at 15-026.

The tenor of the decision is welcome in that it clarifies that the jurisdictional rules of the CMR are to be applied and are compatible with the EU principles underlying judicial co-operation in this area. It also clarifies that a choice for the claimant between different possible fora based on particular grounds is fully appropriate.

Legal uncertainty by means of detailed evaluation of the regimes?

However, the question is why the CJEU embarked on its detailed analysis of the CMR provisions and their comparability with the Brussels I Regime, as set out above, and whether it was indeed necessary. Was this simply to show that such convention rules are compatible with EU principles or was the aim to assert that even rules of jurisdiction should be examined on compatibility in each case? In the case of the comparison of the CMR with the EU Jurisdiction Regulation, the interpretation by the CJEU of article 5.1(b) of Brussels I had already lead to a similar interpretation to the solution enshrined in article 31.1(b) CMR.⁷⁵ What would be the CJEU's conclusion if the fora of the regimes to be compared were differing more significantly? For example, in the Warsaw and Montreal Conventions⁷⁶ the fora are more restricted: the forum comparable to the Brussels I "place of performance" is limited to the place of destination and prorogation is not possible. Does it matter that jurisdiction agreements, where acceptable by the various transport conventions,⁷⁷ can merely act as additional fora but are not exclusive, in contrast to the status quo under the jurisdiction regulation?⁷⁸

Non-exclusive jurisdiction agreements and the new Brussels I *lis pendens* rule

The effects may be compounded by the new *lis pendens* rule in the Brussels I bis Regulation,⁷⁹ which gives the court exclusively designated by the parties priority to decide the validity of the jurisdiction agreement.⁸⁰ A question in the current context may thus be whether the new *lis pendens* rule enshrines a principle underlying judicial co-operation in civil and commercial matters and whether it thus might provide another

⁷⁵ And see also art 46.1 CIM, similarly to the CMR providing for jurisdiction at the place of taking over of the goods and the place designated for delivery; and art 21.1 (c) HambR at the port of loading or port of discharge; and art 66 (a) (ii) to (iv) RR at the place of receipt or the place of delivery, both as agreed in the contract of carriage, or the port of initial loading or of final discharge from a ship; and see also art 71 RR for rules on consolidation of actions against the carrier and a maritime performing party.

⁷⁶ Arts 33 Montreal Convention and 28 Warsaw Convention; assuming that they would fall within the scope of article 71 Brussels I as pre-existing Conventions, see also C. E. Tuo, L. Carpaneto, "Connections and Disconnections between Brussels I Regulation and International Conventions on Transport Matters", *Zhornik PFZ*, 66 (2-3) (2016) 141, 160.

⁷⁷ See art 21 HambR, ch 14 RR (apart from jurisdiction agreements after the damaging event or ones under volume contracts provided certain requirements are met); art 31 CMR; art 46 CIM; and without scope for a jurisdiction agreement altogether: art 33 MC and art 28 WC.

⁷⁸ Art 25.1, 2nd sentence, Br I Reg.

⁷⁹ See art 31.2 with art 25 Br I bis Reg.

⁸⁰ However, before the first seised (non-designated) court must stay its proceedings, the court designated by agreement must be seised and the court first seised should at least be satisfied that there is a *prima facie* case that such an **exclusive** jurisdiction agreement exists (see I. Bergson, "The death of torpedo actions? The practical operation of the Recast's reforms to enhance the protection for exclusive jurisdiction agreements within the European Union", [2015] *J Priv Int Law* 1, 6ff. and T Domej, "Die Neufassung der EuGVVO; Quantensprünge im europäischen Zivilprozessrecht", 78 (2014) *RabelsZ* 508, 535f.). This may also entail the question of whether the jurisdiction agreement is exclusive or not (see also A. Briggs, *Civil Jurisdiction and Judgments*, (6th edn, Informa 2015) at 2.277 and I. Bergson, "The death of torpedo actions? The practical operation of the Recast's reforms to enhance the protection for exclusive jurisdiction agreements within the European Union", [2015] *J Priv Int Law* 1, 21); and the questions on how, on the basis of which rules, this existence and validity is determined is not straightforward (see art 25.1 and Recital (20) of Br I and see discussion in Q Forner-Delaygua, "Changes to jurisdiction based on exclusive jurisdiction agreements under the Brussels I Regulation Recast", [2015] *J Priv Int Law* 379, 394ff.; I. Bergson, "The death of torpedo actions? The practical operation of the Recast's reforms to enhance the protection for exclusive jurisdiction agreements within the European Union", [2015] *J Priv Int Law* 1, 12f. and T Domej, "Die Neufassung der EuGVVO; Quantensprünge im europäischen Zivilprozessrecht", 78 (2014) *RabelsZ* 508, 526f.).

inroad into the application of the rules of transport conventions.⁸¹ However, this appears rather questionable as the new rule is an exception to a principle of the general “first come - first served” rule. Further and since the rule still needs to be tested and consolidated in its application by the CJEU, as it currently offers many issues of uncertainty⁸² and the potential for parallel proceedings,⁸³ its elevation to an overriding principle seems, at least at this stage, difficult to justify. In any event, where a matter falls squarely into the scope of a specialised transport convention, jurisdiction agreements can only be non-exclusive⁸⁴ and clauses providing for exclusivity are likely to be deemed null and void,⁸⁵ even on a precursory *prima facie* review by a court first seized. However, where the carriage is multimodal or the contract a freight forwarding contract, this issue of validity of a forum clause will be more difficult to determine as different views on the applicability and the scope of the various conventions exist.⁸⁶

Whether a jurisdiction agreement is exclusive or additional to other grounds of jurisdiction, it is submitted, does not impede predictability and certainty for litigants; both are envisaged in Brussels I although exclusivity is seen as the norm.⁸⁷ What is more, non-exclusivity is designed to fulfil another important EU principle which can be observed also in the EU jurisdictional framework: that of safeguarding the perceived weaker party from being forced to exclusively submit to a potentially detrimental jurisdiction.⁸⁸ Indeed the decision to allow only additional fora to be agreed is a deliberate statement of the drafters of specialised transport conventions, retaining a wide range of choices for the claimant. This solution, in turn, may encourage performance of services to a higher standard, particularly because suit in a pre-selected forum cannot be ensured and duties may thus be tested against a wider number of legal frameworks; even more so in areas where performance duties and mandatory rules have been interpreted differently across the contracting states.⁸⁹ Certainty for litigants is not created by a single rule but is the matter of provisions of a convention on jurisdiction as a whole.

Joinder of parties – the issue in *BAT v Exel*

Equally, the matter of joinder of several defendants should be decided, bearing the overall framework in mind. While the Brussels I Regime allows for joinder of several defendants at the place of the domicile of one of them,⁹⁰ Brussels I does not necessarily emphasise the connecting factor of domicile as a jurisdictional

⁸¹ As argued by W. Verheyen, “Forum clauses in carriage contracts after the Brussels I (bis) Regulation: procedural (un)certainly?” (2015) 21 JIML 23, 36 and A. Spijker, “Revised Brussels I regulation offers opportunities for CMR carriers”, ILO, 3rd February 2015, at https://www.akd.nl/Downloads/PublicatiesPDF/1760445_2015-02-03_aspijker_ilo.pdf (last accessed 12.08.2016).

⁸² See above n.81.

⁸³ See Q Forner-Delaygua, „Changes to jurisdiction based on exclusive jurisdiction agreements under the Brussels I Regulation Recast“, [2015] J Priv Int Law 379, 386ff.; I. Bergson, “The death of torpedo actions? The practical operation of the Recast’s reforms to enhance the protection for exclusive jurisdiction agreements within the European Union”, [2015] J Priv Int Law 1, 6ff. and see T Domej, “Die Neufassung der EuGVVO; Quantensprünge im europäischen Zivilprozessrecht“, 78 (2014) RabelsZ 508, 533f.

⁸⁴ Apart from certain specific volume contracts or agreements after the event under the Rotterdam Rules, arts 67 and 72 RR.

⁸⁵ Art 41 CMR; art 5 CIM; art 49 MC and art 32 WC, art 79 RR and art 23.1 HambR.

⁸⁶ See for example M Hoeks, *Multimodal transport law: the law applicable to the multimodal contract for the carriage of goods*, (Wolters Kluwer Law & Business; 2010) and W. Verheyen, “Forum clauses in carriage contracts after the Brussels I (bis) Regulation: procedural (un)certainly?” (2015) 21 JIML 23, 27ff.

⁸⁷ See Art 25.1, 2nd sentence, Br I Reg, stating that unless otherwise designated, the jurisdiction agreement is taken to be exclusive.

⁸⁸ See e.g. Arts 13, 17 and 21 Br I and Arts 15, 19 and 23 Br I bis Reg for rules limiting prorogation in insurance, consumer and employment contracts.

⁸⁹ See also Simone Lamont-Black, *Third Party Rights and Transport Documents under the DCFR – a potential for an appropriate and effective EUU unification and an improvement for the UK?*, (2015) 21 JIML 280, 294.

⁹⁰ In art 6.1 Br I and art 8.1 Br I bis Reg. They provide:

“A person domiciled in a Member State may also be sued: 1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to

rule trumping others. Rather it seems to represent a general rule in a broad regime which covers many different matters. In such a broad context, the domicile rule seems to be the most appropriate and applicable common connecting factor. However, this is different for the narrowly tailored transport conventions which have more specific foci. Equally, the Brussels I Regime allows for suit in alternative jurisdictions to the place of domicile at other relevant places, such as the place of performance of the contract.⁹¹ Exactly this latter connecting factor is the one that the CMR convention enshrines as the (possible) place for joinder, which ensures connection to the contractually agreed transportation. That it should pertain to an infringement of EU principles underlying the civil and commercial co-operation when parties are referred to this rule instead of the domicile rule seems difficult to fathom, as connecting factors are specifically chosen for their closeness with the particular subject matter. While domicile jurisdiction therefore seems particularly apt for a general jurisdiction regime, a more tailored regime to suit the emphasis of the contract envisaged, as in article 31.1(b) of the CMR, and as indeed in other transport conventions,⁹² seems highly appropriate.

Where the CMR rules, allowing for multiple defendants, do not provide an option for the preferred forum, it is not open to the claimant to import the rules of the Brussels I Regime instead, to suit its forum shopping tactics. To do so, would mean to override the express jurisdictional rules (that is intentionally limiting the parties who, and the places where, they can be sued) in favour of an altogether different regime, which would erode the specialised convention and lead to what would be tantamount to dis-applying the jurisdictional rules of specialised conventions for intra-EU matters altogether, which would ignore the subject specific value judgments. That such choices are important is however also accepted within the EU by virtue of EU Regulations such as the proposal on jurisdiction matters of matrimonial property regimes⁹³ and the Brussel II Regime.⁹⁴

Past experience also suggests that the CJEU does not perceive the minimising of risks of irreconcilable judgments above and beyond other principles. In particular, in *Case C-159/02 Turner v Grovit*,⁹⁵ by emphasising the overriding nature of the principle of mutual trust, the CJEU clearly dismissed the arguments of the House of Lords aimed to justify the use of anti-suit injunctions with the very considerations of avoiding irreconcilable judgments. Equally, that the Brussels I Regime itself allows for a multitude of fora seems to suggest that the minimising of risks of irreconcilable judgments is but one of several principles to consider. The Court of Justice in *Case C-68/93 Shevill v Presse Alliance SA* stated in the context of jurisdiction based on article 5(3) at the place where the harmful event occurred, that although there were admittedly disadvantages to having different court's ruling on various aspects of the same dispute, this had to be accepted and in any event, the plaintiff always had the option of bringing his entire claim before one, albeit another, court.⁹⁶

Indeed, as already pointed out, to choose a jurisdiction where all defendants can be sued together in one forum is available under the CMR. Thus, the need to avoid concurrent proceedings and the risk of irreconcilable judgments must be balanced in particular against the predictability of jurisdictional rules and legal certainty for litigants. The attainment of the latter principles would certainly not be helped by courts, embarking on a journey of redefining jurisdictional rules of a specialised convention in the light of rules of another more general system, as was suggested by the cargo claimants in *BAT v Exel*.

hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings..."

⁹¹ See arts 5.1 Br I and 7.1 Br I bis Reg.

⁹² See art 46.1 CIM, art 21.1 (c) HambR, art 66 (a) (ii) to (iv) RR and art 71 RR and [n.75](#) above.

⁹³ Proposal for a COUNCIL REGULATION on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2016) 106 final.

⁹⁴ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of and parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ L 338, 23.12.2003, p.1) and Proposal to Recast this regulation (COM(2016) 411/2).

⁹⁵ [2005] 1 A.C. 101; [2004] E.C.R. I-3565.

⁹⁶ *Case C-68/93 Shevill v Presse Alliance SA* [1995] 2 A.C. 18; [1995] E.C.R. I-415 at [32].

Indeed, it is submitted that all carriage conventions adhere in their unique combination of jurisdictional rules to the criteria of proximity and the requirement of **predictability and thus legal certainty for litigants**,⁹⁷ **all having clear rules according to which the parties to a potential dispute can** identify the courts before which proceedings might be brought. Specialised conventions even where they contain value judgments and tailored connecting criteria which may be different to those enshrined in the Brussels I Regulation thus ought to be accepted. A general regulation such as Brussels I simply cannot provide for all eventualities of all specialised conventions. Thus, very much on the contrary to what had been argued by the cargo claimants in *BAT v Exel*, in order to ensure the underlying EU principles are met one ought not to interfere with the specialised convention regimes, applicable between EU Member States and Third States contracting to the convention alike. Indeed, the Brussels I Regulation in recital 25 and also in recital 35 of the Recast Regulation enshrines the respect for international commitments entered into by the Member States stating that “this Regulation should not affect conventions relating to specific matters to which the Member States are parties”, thus advocating least interference.

V. Conclusion

The choices made by the negotiators of the various specialised conventions and enshrined in them ought to be accepted as valid and as providing a balanced regime of jurisdiction as appropriate for the particular mode of transport.⁹⁸ That jurisdictional matters governed by transport conventions require separate consideration from general civil and commercial matters has also been recognised by the Working Group of the Council on General Affairs and Policy of the Hague Conference on Private International Law in their preparation of a draft Convention on the recognition and enforcement of foreign judgments, excluding matters of carriage of goods and persons amongst others from the scope of the draft convention.⁹⁹

Principles underlying judicial cooperation in civil and commercial matters are sufficiently supported by applying European rules only as “second stage approach” in matters of *lis pendens* or enforcement. Interference with direct jurisdictional norms of specialised conventions should be avoided lest one was prepared to create legal uncertainty and destabilise the purpose and functioning of these conventions altogether, while ignoring the EU legislator’s intention for them to prevail in observance of international pre-existing duties and smooth cooperation with states and in matters across European boundaries.

⁹⁷ See also C. E. Tuo, L. Carpaneto, “Connections and Disconnections between Brussels I Regulation and International Conventions on Transport Matters”, *Zhornik PFZ*, 66 (2-3) (2016) 141, 159, 161 & 180.

⁹⁸ See also A. Briggs, *Civil Jurisdiction and Judgments*, (6th edn, Informa 2015) at 2.49, expressing the view that one would have assumed that the choices of the conventions and their limits are applied under art. 71 Br. I, when commenting on the Court of Appeal decision in *BAT v Exel*.

⁹⁹ See the Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments of the Hague Conference on Private International Law (completed by the Working Group during its fifth meeting in October 2015) at <https://assets.hcch.net/docs/01adb7d9-13f3-4199-b1d3-ca62de79360f.pdf> (last assessed 3.5.2016).