Lis Pendens and Res Judicata in CMR cases

New 2013 ECJ Case Law Requires Immediate Action – or Immediate „Torpedoes“

I. Introduction

Last December the European Court of Justice rendered a long expected judgment which for the first time very clearly establishes priority rules in cases of lis pendens in litigation concerning international transport of goods by road.

Facts of the case

There is nothing very particular about the facts of the case. In summary and leaving away all the details there was an international transport of goods by road from Germany to the Netherlands. The goods were Canon products, so you can already see that the CMR limits of liability per kilogram were going to be crucial.

The CMR contract was between two companies which for the purpose of this speech I will refer to as “Nippon Express” as the sender and a Dutch company called “Inter-Zuid Transport BV” as the carrier. There was a sub-carrier, but that is not crucial for this decision.

The goods were thus transported from the Netherlands to Germany but arrived so late that it was not possible anymore to unload the truck on the day of arrival so that it was parked on the compound of the consignee – which was unguarded. The next morning part of the cargo had been stolen.

International conventions and national interpretation

Simple facts, clear case, governed by an international convention, namely the Convention on the Contract for International Carriage of Goods by Road of 1956, the CMR: What dispute could there be about jurisdiction?

Unfortunately (or fortunately for lawyers?) international conventions can very nicely give the impression of a harmonized or even unified law in a certain area of law, but as long as such international conventions are applied and construed by national courts, there is always a risk that the rules of such international conventions are understood and applied in very different ways by different national jurisdictions – and with very different results.

The CMR is a famous example for this. As you know the liability of the carrier for loss of and damage to the goods is limited to 8.33 Special Drawing Rights per kilo, but such limitation, according to art. 29 CMR is not applicable in case of willful misconduct of the carrier or its employees or sub-carriers nor in cases which the law of the court seized considers as equivalent to willful misconduct.

It is, therefore, obvious that it plays a role which state's court is seized with a claim for liability under CMR. In view of the limited time for this presentation it is allowed to exaggerate a lot and say that it is almost impossible to break the limitation in Dutch courts whereas in German courts it is most common for a court to assume willful misconduct of the carrier. A carrier's liability insurer would, therefore, prefer a Dutch court to decide whereas the sender's cargo insurers would prefer a German court to decide.

Let me just add, that such type of conflict between jurisdictions applying in the same international conventions is not particular to the CMR. Germany is a member state of the Montreal Convention in air transport law, the

Budapest Convention in inland waterway shipping, the CIM in railway transport and the Hague Rules in maritime law. Many other states are as well. Nevertheless, the application and construction of such identical rules in different jurisdictions remains and leads to quite different results depending on which court decides.

Forum shopping, jurisdiction and "torpedoes!"

As a consequence, it is very important for a claimant to choose the forum for introducing a claim. The claimant always has the choice of where to introduce his claim; that gives him the possibility of so-called forum shopping. Of course, the chosen forum needs to have jurisdiction. Generally speaking, the rules on jurisdiction within the European Union for all claims against persons or companies domiciled or seated in the European Union is determined by the European Regulation 44/2000, the so-called Brussels I Regulation, whereas not all of the mentioned international conventions– have comprehensive rules on jurisdiction.

I said that the claimant may choose the forum. That is always true. However, the claimant is not always the creditor. Some jurisdictions allow the debtor to introduce a claim against the creditor aiming at a negative declaratory judgment that the creditor may not claim anything or not more than a certain amount from the debtor. So the debtor has the possibility to choose a forum for his negative declaratory claim as well. Such type of negative declaratory claim has been referred to as a "torpedo", mainly in cases where it was introduced in a jurisdiction which is ill-reputed for very lengthy proceedings.

Be that as it is, it is clear that the rules on jurisdiction, on lis pendens and res judicata can be crucial for the result of litigation even where the claim is based on the uniform law of an international convention.

Particularity of the CMR

The CMR has one particularity in comparison to most other international conventions on contracts of carriage by goods. Its art. 31 contains not only rules on jurisdiction, but also on lis pendens and res judicata.

I should add that this is the same for the CIM which contains a rule which is modeled on the CMR. The Budapest Convention and the Hague Rules contain no rules on these issues at all. The Montreal Convention provides for a jurisdiction rule only for claims against the carrier, no rules for lis pendens nor res judicata.

Distinction lis pendens – res judicata

Now what is this "lis pendens" and "res judicata"?

Generally speaking, "lis pendens" means that when a litigation is pending in one court this blocks the parties from introducing it to another court a second time, namely the court of another country.

"Res judicata" generally means that when a court rendered a decision, then the matter is over and the court is bound by what it decided. Other courts are bound as well. Whether courts in other countries are bound as well is then mainly a question of recognition of the decision.

II. Lis pendens and res judicata under the Brussels Regulation

Brussels Convention, Brussels I Regulation, BR 2012/2015

As I already briefly exposed the questions of jurisdiction, lis pendens and res judicata are governed by European law for inner-European cases. Whenever you want to sue a company or person domiciled or seated in a member

state of the European Union, such rules are applicable, and whenever a case is pending in two different member states of the European Union or one member state is requested to recognize a judgment of another member state, these rules are applicable as well.

These rules were laid down in the Brussels Convention of 1968 the first time, this was followed by several amendments whenever the European Union grew and new member states were added. In the year 2000 the Convention was transformed into a regulation, the so-called Brussels I Regulation, Regulation 44/2000. This Regulation has now been reformed and will enter into force in the reformed version in January next year, but for the time being we still deal with the Brussels I Regulation of the year 2000.

Lis pendens – definition and consequences

Art. 27 BR provides that where proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established and when it is established, the courts other than the court first seized shall decline their jurisdiction. This rule will basically remain in the new 2015 version of the Regulation.

So the requirements of lis pendens are “same cause of action” and “same parties”. If these are fulfilled, then only the court first seized may continue the proceedings.

This rule has been completed by the case law of the European justice which is competent for the interpretation of the Brussels Regulation (and already had competence for the interpretation of the former Brussels Conventions):

- Two proceedings involve the same cause of action once the same subject matter “lies at the heart of the two actions” (ECJ, 8 December 1987, C-144/86, Gubisch); in order to determine this, it must be looked that “the facts and the rule of law relied on as the basis of the action” (ECJ, 6 December 1994, C-406/92, Tatry).
- The procedural position of the parties is irrelevant (Tatry) and no account must be taken of any grounds of defense raised by the defendant (ECJ, 8 May 2003, C-111/01, Gantner).
- The “same persons” are involved not only if the parties are identical, but also if there is “such a degree of identity between the interests [of the parties] that a judgment delivered against one of them would have the force of res iudicata against the other” (ECJ, 19 May 1998, C-351/96, Drouot). This namely concerns insurers subrogated in the rights of their insured.
- There is no exception to the priority rule, not even the manifest lack of jurisdiction of the court first seised, not even the exclusive jurisdiction of the court second seised on the grounds of a jurisdiction agreement, nor even the manifest abuse of proceedings instituted at the court first seised. The court second seised may simply not examine the jurisdiction of the court first seised (ECJ, 27 June 1991, C-351/89, Overseas Union, and ECJ, 9 December 2003, C-116/02, Gasser).
- Anti-suit injunctions are incompatible with the system of the Convention (ECJ, 27 April 2004, C-159/02, Turner).

The torpedo option in contrast to the German civil procedure

As you can see from the above, European law supports the negative declaratory actions by the debtor and gives such negative declaratory claims priority over later claims for payment by the creditor against the debtor.

That is in sharp contrast to domestic German civil procedure law. German civil procedure law traditionally gives priority to the claim for payment, independent of when such claim was introduced. If the debtor introduces a negative declaratory claim against the creditor, and the creditor later introduces a payment claim against the debtor for the same matter, then the later will prevail, and the court first seised will terminate the proceedings. The reasoning behind this is that the object of the litigation is not identical: whereas the object of the negative declaratory claim is simply the question whether a claim exists, the object of the payment claim is twofold: whether the claim exists and whether the debtor must pay.

Res judicata – definition and consequences

Art. 33 of the Brussels I Regulation provides that a judgment given at a Member State shall be recognized in the other member states without any special procedure being required.

The case law developed by the European Court of Justice specifies that this does not only concern judgments which are final, but also already the judgment of a first instance.

The case law further says that the effects of the judgment shall be recognized in the state of recognition to the extent to which they exist in the state where the judgment was rendered.

Last, there is case law specifying that if the court of one state sentenced the debtor to pay a certain sum to the creditor, then the creditor was not allowed to introduce the same claim in another Member State again, but has to choose the way of recognition of the first judgment. The creditor does not have the choice between having the first judgment recognized or introducing a second claim with the aim of obtaining the same result. The purpose of this rule is that it is avoided to have several executory titles.

III. Lis pendens and res judicata under the CMR

Jurisdiction

Art. 31 CMR provides four different places of jurisdiction for claims under the CMR:

- The courts of the country chosen in a jurisdiction clause,
- the principle place of business / branch / agency of the defendant,
- the place where the goods were taken over by the carrier or
- the place designated for delivery.

The jurisdiction clause may not exclude any of these. There is, therefore, by definition always a multitude of possible fora.

Lis pendens and res judicata – definition and consequences

The text of the CMR does not distinguish well between lis pendens on the one hand and res judicata on the other hand. Its art. 31 sec. 2 the CMR simply provides that where an action is pending before a court or where the judgment has been entered by a court, no new action shall be started between the same parties on the same grounds – unless the judgment of the court before which the first action was brought is not enforceable in the country in which the fresh proceedings are brought.

The preconditions of lis pendens are thus, again, “the same parties” and a claim “on the same grounds”. If these conditions are fulfilled then there must not be a second claim in another court. It is not entirely clear from the text of the convention whether there is an additional requirement for the lis pendens consequence that the judgment of the court before which the first action was brought is not enforceable in the country in which the fresh proceedings are brought. But let us leave this away for a moment.

The requirements for res judicata are equally “the same parties”, a claim “on the same grounds” and the enforceability of the judgment of the first country in the second country.

So, under the CMR, where you have a judgment in one state which is enforceable in other states you cannot claim in such other state a second time. Where you have no judgment yet, but commenced proceedings in one state, you cannot start new proceedings between the same parties for a claim based on the same grounds in another member state of the CMR.

I previously explained that the very similar wording of such rules in the European law context lead to the priority of earlier negative declaratory claims over later payment claims. This is – or at least was – not necessarily the same under the CMR.

Priority of the CMR? – The German approach

As I also already reported, the German approach under domestic law and also under domestic international law was different: A later payment claim would require priority over an earlier negative declaratory claim. So which of the rules would prevail: The German way of handling domestic cases and in CMR cases or the European way under the Brussels Regulation?

This is where art. 71 BR I comes in.

Under art. 71 sec. 1 BR I it is clearly said that the Brussels 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. This is clearly the case of the CMR. So art. 71 BR I, in the first glance, seems to give priority to CMR over the Brussels Regulation.

However, that is not entirely the intention of the Brussels Regulation nor of the European Court of Justice. The purpose of the article is rather to enable such international conventions to go beyond the Brussels Regulation, but not to restrict it. Art. 71 par. 2 describes this as follows:

(a) This Regulation shall not prevent a court of a Member State from assuming jurisdiction in accordance with such a convention, even where the defendant is domiciled in another Member State which is not a party to that convention.

(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 recognized and enforced in the other Member States in accordance with this Regulation.

The question now was how such rule would be applied in the case initially described and which was decided by the European Court of Justice last December.

IV. ECJ judgment of 19 December 2013

Procedures in the Netherlands and in Germany

In above mentioned case the carrier Inter-Zuid carried the Canon products from the Netherlands to Germany where they were (partly) stolen.

Seen the above you can imagine that Inter-Zuid had an interest in having the case decided in the Netherlands. They, therefore, sued their contractual partner, the sender Nippon Express, in a Dutch court.

The cargo insurers of Nippon Express, the Nipponkoa Insurance, had an interest of having the case decided by a German court, so they sued the carrier Inter-Zuid in Germany, namely in Krefeld.

The Dutch were the quicker ones: The claim in the Netherlands was introduced very early and a judgment was rendered in January 2009. The Dutch court had declared that Inter-Zuid was liable only to the extent of the CMR limits of liability (8.33 SDR per kilogram).

The claim in Krefeld was introduced only in September 2010, when the procedure in the Netherlands was long over. Nevertheless, the Court of Krefeld seems to have considered this rather a lis pendens matter than a res judicata matter.

The Court of Krefeld wondered whether it might or not continue with proceedings in Germany. On the basis of the German domestic rule it would have had such possibility even if the procedure in the Netherlands had still been pending. As there was already a Dutch judgment, the German court would of course have had to take that into consideration (and recognize it).

On the basis of the ECJ case law in respect of lis pendens the German court would not have been allowed to continue if the procedure had still been pending in the Netherlands. But that was not the case. The German court would have had to recognize the Dutch judgment, but would then – in my opinion – have had the possibility to continue the proceedings on such basis.

The Court of Krefeld somehow had doubts about this, probably because of the wording of art. 32 sec. 2 CMR which could possibly be understood as prohibiting all further proceedings once there was an earlier litigation or a judgment.

The Court of Krefeld, therefore, turned to the ECJ basically asking whether the proceedings in Germany were "on the same grounds" as the prior proceedings in the Netherlands (as would be the case under above mentioned ECJ case law on the Brussels Regulation) or whether they were not on the same grounds because the proceedings in the Netherlands were for a negative declaratory claim whereas in Germany they were for payment claim (as a German court would traditionally see it).

No jurisdiction of ECJ to interpret the CMR

The ECJ has no jurisdiction to interpret the CMR. It may only interpret the European law, namely the Brussels Regulation. It should, therefore, in my opinion, not have heard this case: There was no issue of lis pendens under the Brussels Regulation, because the judgment in the Netherlands has long been rendered. The only issue was one of res judicata, and that was clear: The German court had to recognize the Dutch judgment. The further question whether the German court was allowed to continue the proceedings at all, was merely a question of the CMR, not of the Brussels Regulation.

Nevertheless, the question by the Court of Krefeld was smartly worded. It essentially asked whether art. 71 BR I had to be interpreted as a meaning that it precluded an interpretation of art. 31 sec. 2 CMR according to which an action for a negative declaration or a negative declaratory judgment in a Member State does not have the same cause of action as an action for indemnity brought in respect of the same damage and against the same parties or the successors to their rights in another Member State.

This way it opened the door for the ECJ to pronounce itself on the case.

TNT / Axa (ECJ 2010)

There had been an earlier case decided by the ECJ on the issue, but the question submitted by the Hoge Raad of the Netherlands at the time was worded differently, the ECJ remained more reluctant and although the tendency was clear, the judgment was anything but clear.

This was also a case where goods were transported from the Netherlands from Germany and where the Dutch carrier (TNT) had sued the German transport insurer (Axa) in the Netherlands in May 2002 (negative declaratory claim) whereas the insurer Axa had sued the carrier TNT in Munich in August 2004 and obtained a judgment in September 2006 which had then tried to have recognized and executed in the Netherlands. This went up to the Hoge Raad which referred the case to the ECJ. The Hoge Raad asked the ECJ essentially whether the rules of the Brussels Regulation remained applicable next to the rules of the CMR or whether they might not be applied, and it also asked whether the court was competent to rule on the interpretation of the CMR rules.

The ECJ in the TNT / Axa case clearly stated that it had no jurisdiction to interpret the CMR.

It further found that in a case as the one which lead to the decision the rules on jurisdiction, recognition and enforcement in the CMR as well as the lis pendens rule in the CMR applied, but "*provided that they are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimized and that they ensure, under conditions at least as favorable 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 executions")*".

Finally clear: ECJ 2013 – Nipponkoa

In the Nipponkoa judgment the ECJ finally decided the question quite clearly:

Art. 71 BR I must be interpreted as a meaning that it precludes an international convention from being interpreted in a manner which fails to ensure, under conditions at least as favorable as those provided for by that Regulation, that the underlying objectives and principles of that Regulation are observed.

More precisely: Art. 71 BR I must be interpreted as meaning that it precludes an interpretation of art. 31 sec. 2 CMR according to which an action for a negative declaration or negative declaratory judgment in one Member State does not have the same cause of action as an action for indemnity between the same parties in another Member State.

V. Perspective and conclusion

New BR 2012-2015

The ECJ judgment was rendered on the basis of the Brussels Regulation of the year 2000 which has been reformed in 2012 and will enter into force in the new form in 2015. However, the wording of art. 71 remains the same and the rules on lis pendens basically remain the same as well as far as here concerned. There is no time to go into details here and develop on other interesting aspects of such rules.

What do cargo insurers learn?

We have seen that it can make a huge difference which court decides on a particular CMR case. And it will now always make a huge difference where a

claim is first introduced. Cargo insurers which learn from their insured that there was a case of loss or damage for which the courts of several European Union member states have jurisdiction should now be aware that it might be dangerous to wait one year and then hand the case over to their lawyer on the last day of the time bar. Acting quickly may mean that they collect considerably more damages.

They should also think of a mechanism to enable them to learn of any cases of damage or loss as quickly as possible. This is something to be discussed with their insured.

What do liability insurers learn?

The same is true to the liability insurers of the carriers. They should make sure that they learn quickest possible of any cases of damage or loss caused by their carriers (or the subcarriers!) and for which their carriers might be liable.

So the overall conclusion is:

Be quick!!!

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