



CMR Advisory Council

CMR ACADEMY

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Jurisdiction, arbitration and enforcement of judgments



Project 'The Modernisation of Passenger and Freight Transport Regulation: legal regime of the contract of carriage and related issues', financed by MICIU/AEI/10.13039/501100011033 and by FEDER, EU

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Introduction

BlaR and the CMR





Introduction

Brussels Ia and the CMR

- 🚚 the Regulation shall not affect the rules on **jurisdiction and recognition or enforcement of judgments** contained in **conventions on particular matters** to which the Member States **are parties** (or rather were, by the time of the entry into force of Regulation 44/2001 (1 March 2002)) (Art. 71(1) BlaR)
- 🚚 jurisdiction can be based on the convention although the defendant is domiciled in a Member State that is not a contracting country (Art. 71(2) BlaR)
- 🚚 where the convention envisages rules on recognition and enforcement, such rules shall be applied, although BlaR may be applied between MMSS (Art. 71(2))

I love you just the way you are

Billy Joel
Just the Way You Are (Strangers)



Introduction

Brussels Ia and the CMR

- 🚚 the rules on jurisdiction, *lis pendens* and enforcement laid down in conventions on particular matters **shall apply provided that** they
 - 📦 are highly predictable
 - 📦 facilitate the sound administration of justice
 - 📦 enable the risk of concurrent proceedings to be minimized
 - 📦 ensure, *under conditions at least as favourable as those in BlaR*, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the European Union (*favor executionis*)

**ECJ 4 May 2010,
TNT, C-533/08**

*We'll love you just the way you are
If you're perfect*

Alanis Morissette
Perfect



Introduction

Brussels Ia and the CMR

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**TNT
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meter**

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Introduction

Brussels Ia and the CMR

-  when the defendant is **served with a statement of claim**, they should check whether the court has international jurisdiction
 -  if they enter an appearance, they tacitly submit to the jurisdiction of the court, even if it lacked international jurisdiction (Art. 26 BlaR)
 - contest jurisdiction before responding to the merits of the case
 -  the court will only check if it has jurisdiction on its own motion if the defendant does *not* enter an appearance (Art. 28 BlaR)
-  they should also check whether the claim is time-barred (Art. 32 CMR)



Jurisdiction





Jurisdiction

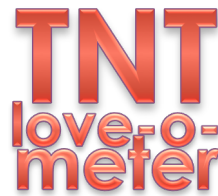
Article 31 CMR

1. 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.



Jurisdiction



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even in the light of the

the fora envisaged by Article 31(1) CMR apply (even though it establishes two places of performance where Art. 7 BlaR only mentions one) because

- 🚚 the ECJ has previously accepted that, under a contract of carriage, the claimant may have the choice between the courts of the place of departure and that of arrival (ECJ 9 July 2009, *Rehder*, C-204/08)
- 🚚 the criteria of proximity, predictability, and legal certainty are fulfilled (the competent courts are easily identified and the applicant's choice is limited to two possible judicial fora)

ECJ 4 September 2014, *Kintra*, C-157/13



Jurisdiction

-  **aim** of Art. 31(1) CMR: reduce the burden of cross-border litigation by limiting the number of available fora (i.e. protecting the defendant from having to litigate in an unforeseen venue completely unrelated to the contract of carriage)
 -  only **international** jurisdiction (in which country can the claim be brought) accordingly,
 -  objective (which type of court, e.g. commercial courts)
 -  territorial (at which specific place)
- jurisdiction depend on national law, but a choice of jurisdiction clause may indicate a specific court agreed by the parties



Jurisdiction

'legal proceedings **arising out of carriage** under this Convention'

 claims **based on a provision** of the CMR

 **claims by senders and consignees** for damages to or loss of the goods, or for delay in delivery (Arts. 17 et seq., 36 CMR), but also issues related with the right of disposal of the goods (Art. 12(7) CMR); or cash on delivery (Art. 21 CMR); or failure to include a reference to the CMR in the consignment note (Art. 7(3) in relation with Art. 6(1)(k) CMR)

 **claims by the carrier against the sender**, e.g. damages caused by defective packaging (Art. 10 CMR); absence, inadequacy, and irregularity of customs documents and information (Art. 11(2) CMR); or failure to declare the dangerous nature of the goods (Art. 22 CMR)



Jurisdiction

'legal proceedings **arising out of carriage** under this Convention' (II)

 other **claims** which **arise out of a carriage** subject to the Convention

 carriers' claims for **carriage charges**

 **claims in tort** against the carrier, or their servants and agents (ex Art. 28 CMR)

 arguably also **direct action claims**

- of the consignee against · the performing carrier
 - the carrier's liability insurer
- of the performing carrier against the original shipper for the payment of carriage charges (France, Spain)



Jurisdiction

‘court or tribunal (...) **designated by agreement** between the parties’

-  only courts and tribunals of **contracting countries**
 -  aim: to ensure the application of the Convention
 -  a clause designating a court in a non-contracting country is null and void (Art. 41(1) CMR)
 -  but if the claim *is* brought in a non-contracting country, the court will hardly declare the clause to be void, because it is not bound by the CMR
-  not necessarily in the consignment note (but: proof)



Jurisdiction

‘court or tribunal (...) **designated by agreement** between the parties’

- 🚚 only **prorogation**, but not derogation **of jurisdiction** ('in addition')
 - 📦 if an exclusive clause is agreed, either the whole clause is null and void (Art. 41(1) CMR), or it is interpreted as a non-exclusive clause
 - 📦 Art. 25 Brussels Ia Regulation, which establishes a presumption that choice of court agreements are exclusive, is arguably not applicable (Art. 71 BlaR)
 - 📦 if jurisdiction clauses are non-exclusive, Art. 31(2) BlaR is not applicable ('Italian torpedo' actions)
 - 📦 if a court enters a judgment in violation of an exclusive jurisdiction clause, it must nonetheless be enforced in another EU Member State (Gjensidige)

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Jurisdiction

'The defendant is **ordinarily resident**, or has his **principal place of business** (...)'

-  habitual residence ≠ domicile (only natural persons?)
-  principal place of business
 - prevents legal action being brought in *any* jurisdiction where the defendant has a branch or subsidiary
-  branch or *agency through which the contract was made*
 -  as a rule, dependent units
 -  if independent (e.g. a commercial agent), arguably an external appearance similar to a branch is required (not e.g. freight forwarders, freight exchange platforms)



Jurisdiction

‘place where the goods **were taken over** by the carrier’

- 🚚 language in the provisions refers to the place where the goods were actually taken over for carriage, regardless of the place designated as such in the contract

‘place **designated for delivery**’

- 🚚 here, the provision clearly refers to the place of delivery as designated in the contract (makes sense, especially if the goods are lost during carriage)



Jurisdiction

successive and performing carriers



successive carriers



single contract of carriage: each successive carrier becomes a party to the original contract, *under the terms of the consignment note*, by accepting the goods and the consignment note (Art. 34 CMR)



all carriers are **responsible for the performance of the whole operation**



but a **claim** can be brought only 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** (Art. 36 CMR)



Jurisdiction

successive and performing carriers (II)



performing carriers



there is **more than one** contract of carriage: that of the **sender** with the **contracting carrier**, and that of the **contracting carrier** with the **performing carrier** (etc.)



the **contracting carrier** remains **responsible for the whole operation**



the **CMR does not envisage a direct claim** by the sender or the consignee against the performing carrier, but courts frequently grant it

- ' consignee as third-party beneficiary of the subcontract of carriage
- ' claim in tort



Jurisdiction

performing and successive carriers – ‘direct’ action



choice of jurisdiction clause only **binding** on



successive carriers: if entered in the consignment note (single contract) or, arguably, if accepted by other means



performing carriers: arguably, if they have accepted the clause



other fora under Art. 31(1) CMR



successive carriers

- ' forum of the defendant: that of each successive carrier (connected claims under Art. 8(1) CMR?)
- ' no problem with place of taking over and place designated for delivery (single contract)



Jurisdiction

performing and successive carriers – ‘direct’ action (II)



other fora under Art. 31 (1) CMR (II)



performing carriers (consignee as third party beneficiary, claims in tort)

- ' **forum of the defendant**: that of the performing carrier
- ' **place of taking over**, and **place designated for delivery**, especially where the performing carrier only performs a national leg
awareness of the existence of a carriage under the CMR

v

burden of international litigation imposed on the performing carrier



Jurisdiction

performing and successive carriers – recovery claims



successive carrier(s)



only the **place where one of the successive carriers** has their **habitual residence, principal place of business, or branch or agency** (Art. 39(2) CMR)



CMR allows for **action against more than one carrier** brought in that forum



time-bar: Art. 32 CMR applies (1 / 3 years), but the period of limitation does not start to run until

- a final judgment is entered, fixing the final amount of compensation
- otherwise, from the day of actual payment by the carrier taking recourse (Art. 39(4) CMR)



Jurisdiction

performing and successive carriers – recovery claims



performing carrier(s)



recovery action **not covered by CMR**



arguably, depends on whether the subcontract of carriage is

- subject to CMR: fora in Art. 31(1) CMR apply, but referred to the subcontract of carriage
- not subject to CMR: Brussels Ia Regulation, national law



time bar: either

- the limitation period runs according to the criteria in Art. 32 CMR
- Art. 39(4) CMR is applied by analogy



Arbitration





Arbitration

Article 33 CMR

The contract of carriage may contain a **clause conferring competence** on an **arbitration tribunal** if the clause conferring competence on the tribunal provides that **the tribunal shall apply this Convention**.



Arbitration

formal requirements



intrinsic requirements



the arbitration clause must expressly provide the application of the CMR (arbitration in law, not in equity)



failing this, the clause is null and void (Art. 41(1) CMR)



extrinsic requirements



no formal requirements (ex Art. 4 CMR) ▼ formal conditions as required by national law (law applicable to the arbitration agreement)



recognition of the award may require, where the case may be, written form (Art. II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958)



Arbitration

effects: prorogation v derogation of the jurisdiction of State courts

-  prevailing view: exclusion of State courts, unless otherwise agreed
-  if nonetheless a claim is brought before a state court, the defendant has to contest competence before responding to the merits (tacit submission)

extension to non-signatories

-  **extension to non-signatories**
 -  consignee: yes **v** prorogation only
 -  successive carriers: when in the consignment note
 -  performing carriers: only if they have accepted the arbitration agreement
 -  cargo insurer: depends on position of the insured, extent of subrogation



*Lis pendens
and res
iudicata*





Lis pendens and res iudicata

Article 31(2) CMR

Where in respect of a claim referred to in paragraph 1 of this article **an action is pending before a court or tribunal** competent under that paragraph, or where in respect of such a claim **a judgement has been entered** by such a court or tribunal **no new action shall be started between the same parties on the same grounds** unless the judgement of the court or tribunal before which the first action was brought is not enforceable in the country in which the fresh proceedings are brought.



Lis pendens and res iudicata

the special case of **negative declaratory actions**

-  **carriers** may have an interest in **bringing a negative declaratory action** (i.e. an action seeking a decision of the court that they are not liable, or that their liability is limited) in a carrier-friendly jurisdiction, before a claim for damages is brought in a forum that is not
-  does a **court seized afterwards** with a claim for damages have to **stay the proceedings**?
 -  yes, because both actions have the same cause of action ('on the same grounds')
 -  once a judgment has been entered, no new claim for damages may be brought in another court

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Enforcement of Judgments





Enforcement of judgments

Article 31(3) CMR

When a **judgement entered by a court or tribunal of a contracting country** in any such action as is referred to in paragraph 1 of this article **has become enforceable in that country**, it shall also become **enforceable in each of the other contracting States**, as soon as the **formalities required in the country concerned have been complied with**. These formalities **shall not permit the merits of the case to be re-opened**.



Enforcement of judgments

-  only **applies**
 -  where the judgment is entered in a **contracting country**
 -  to **final** (not interim) **judgments** (Art. 31(4) CMR): judgments after trial, default judgments, and settlements confirmed by a court order
-  compliance with the **formalities** required where enforcement is sought
 -  within the EU: BlaR
 - ' no special recognition procedure of the judgment required (Art. 36(1))
 - ' no re-examination of international jurisdiction (Art. 45(3))
 -  otherwise: national law or international conventions (e.g. Lugano)
-  **no re-examination of the merits**



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Many thanks for your
attention!

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