



Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU

delivered on 14 December 2023¹

Case C-90/22

‘Gjensidige’ ADB

other parties:

‘Rhenus Logistics’ UAB,

‘ACC Distribution’ UAB

(Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania, Lithuania))

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Regulation (EU) No 1215/2012 – Article 71 – Relationship to an international convention governing jurisdiction or the recognition or enforcement of judgments in relation to particular matters – Convention on the Contract for the International Carriage of Goods by Road (CMR) – Non-exclusive choice-of-court agreement – Recognition, before a court of a Member State, of a judgment falling within the scope of the CMR – Court of origin having established its jurisdiction on a different basis – Compatibility with the principles underlying the operation of Regulation No 1215/2012 – Grounds for the refusal of recognition of a judgment – Article 45)

I. Introduction

1. Cross-border disputes often commence with the need for the court seised to ascertain whether it has international jurisdiction to rule on the matter before it. Within the European Union, and as far as disputes in civil and commercial matters are concerned, that examination is governed, in principle, by the rules established to that effect in Regulation (EU) No 1215/2012.²

2. At the same time, and as I will explain in more detail below, this regulation gives priority to specific rules laid down in specialised international conventions entered into by the Member States.

¹ Original language: English.

² Regulation of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

3. That said, in its judgment in *TNT Express*,³ the Court of Justice stated, in essence, that the application of such specific rules must not undermine certain fundamental principles underlying the system of judicial cooperation in the European Union, such as the predictability of jurisdiction or the sound administration of justice.

4. The complexity of the ensuing exercise is illustrated by the dispute that led to the present request for a preliminary ruling. That dispute arose following a theft of cargo during its transportation from the Netherlands to Lithuania. The insurer concerned claimed compensation from the carrier and it did so in Lithuania, relying on a choice-of-court agreement contained in the contract of carriage.

5. However, at that point in time, the carrier had already initiated judicial proceedings in the Netherlands, with the aim of establishing that its liability in this particular context was limited. Before granting that claim, the Netherlands court affirmed its jurisdiction by applying one of the jurisdictional rules contained in the Convention on the Contract for the International Carriage of Goods by Road ('the CMR'),⁴ despite the choice-of-court agreement referred to above, which, from the point of view of that court, could not exclude the other (alternative) grounds of jurisdiction set out in the CMR.

6. Following recognition by the Lithuanian courts of that judgment, 'Gjensidige' ADB ('Gjensidige') filed an appeal in cassation before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania, Lithuania), the referring court. It argues that recognition of the judgment of the Netherlands court is at odds with Regulation No 1215/2012, as that regulation establishes, in principle, the *exclusivity* of the jurisdiction resulting from a choice-of-court agreement.

7. In those circumstances, the referring court wonders, first, which rules of jurisdiction apply. It notes that Regulation No 1215/2012 confers primacy of application to rules laid down in a specialised international convention, such as the CMR. Nevertheless, it doubts whether such precedence may permit a choice-of-court agreement to be disregarded, in view of the enhanced protection accorded to those agreements by Regulation No 1215/2012. Second, it seeks clarification on whether this increased protection must result in the recognition of the judgment of the Netherlands court being refused. Although Regulation No 1215/2012 does not expressly allow for such an approach, the referring court enquires whether broader interpretation thereof is called for so as to safeguard, in essence, the intentions of the parties, as documented in the choice-of-court agreement at issue.

³ Judgment of 4 May 2010, *TNT Express Nederland* (C-533/08, EU:C:2010:243) ('the judgment in *TNT Express*'). That judgment concerned the regulation preceding Regulation No 1215/2012, namely 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 L 12, p. 1). The latter replaced the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36) ('the 1968 Brussels Convention'). Pursuant to established case-law 'in so far as, [Regulation No 1215/2012] repeals and replaces Regulation No 44/2001, which itself replaced the 1968 Brussels Convention, the Court's interpretation of the provisions of the last two legal instruments also applies to Regulation No 1215/2012 whenever those provisions may be regarded as "equivalent"'. See, for example, judgment of 10 March 2022, *BMA Nederland* (C-498/20, EU:C:2022:173, paragraph 27).

⁴ Concluded in Geneva, 19 May 1956, *United Nations Treaty Series*, Vol. 399, p. 189; as modified by a Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR), Geneva, 5 July 1978, *United Nations Treaty Series*, Vol. 1208, p. 427 and by Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR) concerning the Electronic Consignment Note, Geneva, 20 February 2008, *United Nations Treaty Series*, Vol. 2762, p. 23.

II. Legal framework

A. *International law*

8. The CMR applies, in accordance with Article 1 thereof, ‘to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery ... are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties’.⁵

9. Article 31 of the CMR states that:

‘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,

and in no other courts or tribunals.’⁶

2. 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 judgment 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 judgment 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.

3. When a judgment 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.

4. The provisions of paragraph 3 of this article shall apply to judgments after trial, judgments by default and settlements confirmed by an order of the court, but shall not apply to interim judgments or to awards of damages, in addition to costs against a plaintiff who wholly or partly fails in his action.

...’.

⁵ The referring court observes that the official text of the CMR in the Lithuanian language is not accurate when compared to versions written in other languages.

⁶ I note that some of the publicly available versions of the CMR do not seem to contain the sentence ‘and in no other courts or tribunals’, featuring at the very end of Article 31(1) of the CMR. However, the official version available in the United Nations Treaties Series (UNTS) does.

10. Article 41(1) of the CMR provides that ‘subject to the provisions of Article 40, any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract’.

B. European Union law

11. Recital 21 of Regulation No 1215/2012 provides that ‘in the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions ...’

12. Recital 22 of the same regulation states that ‘however, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general *lis pendens* rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings.’

13. Section 6 of Chapter II of Regulation No 1215/2012 contains Article 24, entitled ‘Exclusive jurisdiction’, which reads as follows:

‘The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

- (1) in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.
...
- (2) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. ...
- (3) in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;
- (4) in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place.

...

- (5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.’

14. Article 25(1) of Regulation No 1215/2012, forms part of Section 7 of Chapter II of that regulation and provides that ‘if the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. ...’

15. Article 29 of Regulation No 1215/2012 provides that:

‘1. Without prejudice to Article 31(2), 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 seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

...’

16. Article 31 of Regulation No 1215/2012 is worded as follows:

‘....

2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

...’

17. Article 45 of Regulation No 1215/2012 provides:

‘1. On the application of any interested party, the recognition of a judgment shall be refused:

- (a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed;

... or

(e) if the judgment conflicts with:

- (i) Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or

(ii) Section 6 of Chapter II.

...

3. Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction.

...'

18. Article 71 of Regulation No 1215/2012 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:

...

(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 on recognition and enforcement of judgments may be applied.'

III. Facts, national proceedings and the questions referred

19. 'ACC Distribution' UAB ('ACC Distribution'), the customer, and 'Rhenus Logistics' UAB ('Rhenus Logistics'), the carrier, concluded a contract for the carriage of computer equipment from the Netherlands to Lithuania. During that carriage, part of the cargo was stolen.

20. Clause 3 of the contract of carriage provided that 'in the event that disputes and disagreements are not settled by negotiations between the parties, they shall be heard by the court in whose district the legal address of the Customer is registered'. Since the registered office of ACC Distribution (the customer) is in Lithuania, the parties have agreed on the jurisdiction of the Lithuanian courts.

21. Following the theft, Gjensidige, an insurance company that had insured the consignment, made an insurance payment in the value of EUR 205 108.89 to ACC Distribution on 21 April 2017.

22. On 3 February 2017, an action was brought before the rechtbank Zeeland-West-Brabant (District Court of Zeeland-West-Brabant, Netherlands; 'the District Court of Zeeland-West-Brabant') by, inter alia, Rhenus Logistics against, among others, ACC Distribution and Gjensidige. Subject to verification by the referring court, it appears from the file that Rhenus

Logistics relied on the CMR (within the scope of which the dispute fell), on the basis of which the claimant can bring the claim, inter alia, before the courts of a country within whose territory the place where the goods were taken over by the carrier is situated.⁷

23. The purpose of that action was to seek a declaration establishing that the carrier's civil liability arising in the context of the abovementioned theft was limited. ACC Distribution and Gjensidige objected to the jurisdiction of the Netherlands court, referring to the choice-of-court agreement contained in the contract of carriage. That objection was dismissed on the ground that the choice-of-court agreement was null and void under Article 41(1) of the CMR because it restricted the choice of the courts to hear the dispute at issue under Article 31(1) of that convention.

24. On 19 September 2017, Gjensidige initiated legal proceedings against Rhenus Logistics before the Kauno apygardos teismas (Regional Court, Kaunas, Lithuania; 'the Regional Court'), seeking damages in the amount of EUR 205 108.89 with interest. That action was based on subrogation claimed by Gjensidige after it made the insurance payment to ACC Distribution.

25. In response, Rhenus Logistics requested the dismissal of the action, contending that it created a situation of *lis pendens* that needed to be resolved by recognising the jurisdiction of the District Court of Zeeland-West-Brabant, which had been the first jurisdiction seised of this matter.

26. In that context, the Regional Court stayed the proceedings. That decision was upheld on appeal by the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania; 'the Court of Appeal').

27. By judgment of 25 September 2019, the District Court of Zeeland-West-Brabant declared that the liability of, inter alia, Rhenus Logistics towards, inter alia, ACC Distribution and Gjensidige, was limited and could not exceed the amount of compensation pursuant to Article 23(3) of the CMR.⁸ No appeal has been lodged against that judgment.

28. In compliance with that decision, Rhenus Logistics transferred the relevant sum to Gjensidige. The latter then requested the partial withdrawal of its action pending in Lithuania and that the remainder thereof be upheld.

29. By its judgment of 22 May 2020, the Regional Court accepted that partial withdrawal while dismissing the remainder of the action, and held that the judgment of the District Court of Zeeland-West-Brabant had acquired legal force. The Court of Appeal upheld that position.

30. On 2 June 2021, an appeal in cassation was lodged by Gjensidige before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania). Gjensidige argued, inter alia, that, contrary to the CMR, Regulation No 1215/2012 establishes the exclusivity of the jurisdiction determined by a choice-of-court agreement and that the situation that had arisen in the main proceedings should result in that regulation taking precedence. According to that party, the contrary solution would have less favourable consequences for the proper functioning of the internal market and would not safeguard the principles of, in particular, the predictability of jurisdiction and the sound administration of justice.

⁷ See also, in more detail, footnote 13 below.

⁸ Article 23(1) of the CMR states that 'when, under the provisions of this Convention, a carrier is liable for compensation in respect of total or partial loss of goods, such compensation shall be calculated by reference to the value of the goods at the place and time at which they were accepted for carriage'. Article 23(3) thereof adds that 'compensation shall not, however, exceed 8.33 units of account per kilogram of gross weight short'.

31. Harboursing doubts in that respect, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Can Article 71 of Regulation No 1215/2012, having regard to Articles 25, 29 and 31 and recitals 21 and 22 thereof, be interpreted as permitting the application of Article 31 of [the CMR] also in cases where a dispute falling within the scope of both those legal instruments is the subject of an agreement conferring jurisdiction?
- (2) Having regard to the legislature’s intention to strengthen the protection of agreements conferring jurisdiction in the European Union, can Article 45(1)(e)(ii) of Regulation No 1215/2012 be interpreted more broadly, as covering not only Section 6 of Chapter II of that regulation but also Section 7 thereof?
- (3) After assessment of the specific features of the situation and the resulting legal consequences, can the term “public policy” used in Regulation No 1215/2012 be interpreted as covering the ground for deciding not to recognise a judgment of another Member State where the application of a specialised convention, such as [the CMR], creates a legal situation in which both the agreement conferring jurisdiction and the agreement on the applicable law are not observed in the same case?’

32. Written observations have been submitted by Rhenus Logistics, Gjensidige, the Lithuanian Government, and the European Commission. Those parties also presented oral argument at the hearing, which took place on 23 March 2023.

IV. Assessment

33. After providing introductory remarks about the relevant elements of the dispute at issue in the main proceedings (A) and the judgment of the Court in *TNT Express*, which forms, at least in part, the basis of the questions raised by the referring court (B), I will address the merits of the questions referred (C).

34. To that end, I will first turn to the premiss on which the present request relies, namely that it is still possible to review the jurisdiction of the District Court of Zeeland-West-Brabant as the court of origin, within the proceedings pending before the referring court which concern the recognition of a judgment delivered in another Member State. I will explain that that premiss is incorrect and that, in such a situation, the cross-border effects of a judgment may be prevented only where a party has successfully invoked one of the grounds for refusing its recognition provided for in Regulation No 1215/2012 (C.1). The referring court considers that option in the second and third questions referred. I will explain that those grounds do not include the situation in which, in essence, the court of origin established its jurisdiction, even though it was not a court of the Member State designated by a choice-of-court agreement (C.2).

35. For the sake of completeness, and to address the extensive discussion within these proceedings on the matter, I will explain that the relevant jurisdictional rule contained in the CMR does not, in any event, contradict the principles underlying Regulation No 1215/2012, as per the application of the test set out in the judgment in *TNT Express* (D).

A. The relevant elements of the dispute at issue

36. It must be recalled that the dispute in the main proceedings arose from the theft of part of the cargo during its international transport. Although the contract of carriage contained a clause granting jurisdiction to the Lithuanian courts,⁹ the litigation occasioned by that theft was ultimately heard and determined by the Netherlands court.¹⁰

37. This was due to the fact that that dispute fell, *ratione materiae*, within the scope of the CMR, which includes not only substantive rules on liability in the context of the carriage of goods by road, but also, inter alia, jurisdictional rules applicable to disputes arising from such carriage.

38. Specifically, the first paragraph of Article 31 of the CMR provides the applicant with a choice between four possible venues, namely, first, the courts of the country agreed upon by the parties, second, the courts of the country of – in essence – the defendant’s domicile,¹¹ third, the courts of the place where the goods were taken over or, fourth, the courts of the place designated for delivery.

39. Although it follows from those rules that the parties can conclude a choice-of-court agreement, it would seem that, at least according to the position taken by the District Court of Zeeland-West-Brabant, such an agreement cannot be *exclusive*.¹² That also appears to be the view expressed by the referring court.

40. I understand that it was in reliance on the third category referred to in point 38 above that Rhenus Logistics, the carrier concerned, brought its claim before the District Court of Zeeland-West-Brabant.¹³ Its action appears to have been pre-emptive in that that company sought to obtain a judicial declaration that its liability for the damage resulting from the theft was limited to a certain amount.

41. As I understand it, Article 23(3) of the CMR limits, in principle, the liability that the carrier can incur for loss of the goods.¹⁴ However, it appears that in application of Article 29(1) of the CMR, such limitation of liability does not apply when the damage was caused by ‘wilful misconduct or by such default on [the carrier’s] part as, in accordance with the law of the court or tribunal [seised] of the case, is considered as equivalent to wilful misconduct’.

⁹ As explained in more detail above in point 20 of this Opinion.

¹⁰ Gjensidige argues that both actions do not have the same object and considers that they do not involve the same parties. It follows from the order for reference that the referring court considers that the conditions of *lis pendens* are satisfied. As that court correctly points out, an action for a negative declaratory judgment and an action for indemnity brought in respect of the same damage are to be considered as having the same cause of action for the purposes of the application of the *lis pendens* rule in Article 29 of Regulation No 1215/2012. Judgment of 19 December 2013, *Nipponkoa Insurance Co. (Europe)* (C-452/12, EU:C:2013:858, ‘the judgment in *Nipponkoa*’, paragraphs 40 to 49), which concerned the equivalent rule laid down in Regulation No 44/2001, or of 6 December 1994, *Tatry* (C-406/92, EU:C:1994:400, ‘the judgment in *Tatry*’, paragraph 44).

¹¹ Article 31(1) of the CMR refers more specifically to the defendant’s ordinary residence, its principal place of business and to the branch or agency through which the contract of carriage was made.

¹² See point 23 of this Opinion. The positions of the contracting parties to the CMR appear to differ on that issue. See point 7.3 of the summaries written by the Institut du Droit International des Transports on the application of Article 31 of the CMR, which may be found at: <https://www.idit.fr/rapports-pays/index.php?lang=en>. See also Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR), United Nations 1975, paragraph 240, p. 64, ECE/TRANS/14.

¹³ Subject to verification by the referring court, it follows from the file that the goods at issue were to be transported from the Netherlands to Lithuania. By contrast, all the other connecting factors recalled in point 38 of this Opinion appear to lead to the jurisdiction of the Lithuanian courts.

¹⁴ See footnote 8 above.

42. In that regard, the courts of the contracting parties to the CMR may take different views as to the conditions under which the latter clause applies.¹⁵ That tends to result, when a dispute arises, in a race to the court most likely to give a favourable interpretation for the party concerned. In turn, that may result in parallel judicial proceedings being instituted in different States with the view to obtaining, in the case of a party having the right of disposal of the goods, compensation for the damage or loss, and, conversely, in the case of the carrier, a declaration excluding or limiting the liability for such a damage or loss.¹⁶

43. In these proceedings, Gjensidige made reference to the diverging positions taken by the Netherlands courts, on the one hand, and the Lithuanian courts, on the other, as regards the conditions under which the carrier's liability may be held to be unlimited. That party argued that the position taken by the Netherlands courts is more favourable to carriers in so far as the conditions triggering their unlimited liability are more difficult to be met. The referring court appears to take the same view.

44. Rhenus Logistics successfully obtained a declaration limiting its liability in the Netherlands. That judgment was subsequently recognised by the courts in Lithuania at the stages of the main proceedings which preceded those pending before the referring court. In those proceedings, Gjensidige first sought to obtain compensation for the loss of part of the cargo. It subsequently limited its claim to the amount in excess of the sum already paid to it by Rhenus Logistics in compliance with the Netherlands judgment.

45. In that context, Gjensidige argues that the recognition of that judgment was unlawful because the Netherlands court established its jurisdiction in breach of the applicable choice-of-court agreement. According to Gjensidige, that agreement should have been given priority because, pursuant to Article 25(1) of Regulation No 1215/2012, the jurisdiction resulting from a choice-of-court agreement is, in the given case, *exclusive*.¹⁷

46. More specifically, that party argues that, given that the dispute at issue falls both under the CMR and (the more general) Regulation No 1215/2012 – and that both instruments appear to contain contradictory rules on the effects to be given to a choice-of-court agreement – the recognition of the Netherlands judgment must be rejected because the application of the CMR jurisdictional rules on which that judgment relies has less favourable consequences for the proper functioning of the internal market, compared to, as I understand the argument, the application of Regulation No 1215/2012, with respect to the effects of a choice-of-court agreement.

47. It is in this context that the referring court enquires as to which jurisdictional rules should apply and whether the recognition of the Netherlands judgment is to be refused.

48. In order for the reader fully to grasp Gjensidige's arguments as well as the referring court's queries, and especially the first question referred, I will first turn to what, arguably, constitutes their source of inspiration, namely the judgment of the Court in *TNT Express*.

¹⁵ See, in that regard, Opinion of Advocate General Kokott in *TNT Express Nederland* (C-533/08, EU:C:2010:50, 'Opinion in *TNT Express*', point 22). It follows from the file that differences in that respect exist also between the Netherlands and the Lithuanian case-law.

¹⁶ Ibid.

¹⁷ I note that, pursuant to Article 25(1) of Regulation No 1215/2012, a choice-of-court agreement is presumed to be exclusive unless indicated otherwise.

B. Specialised international conventions: priority ... with strings attached

49. Article 71(1) of Regulation No 1215/2012 acknowledges the existence of specific jurisdictional and enforcement rules that may be contained in specialised international conventions entered into by Member States and gives priority to those instruments. Indeed, that provision states that it ‘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’.

50. Recital 35 of that regulation presents that ‘conflict of laws clause’¹⁸ as an expression of respect for the international commitments of the Member States. Although that wording may perhaps lead the reader to consider that Article 71 of Regulation No 1215/2012 concerns commitments undertaken vis-à-vis third countries, the text of Article 71, and especially the second sentence of its second paragraph, makes it clear, as the Commission observes, that it also applies in intra-EU relations.¹⁹

51. At the same time, Article 71 has also been described as acknowledging the specificity of the fields that are governed by the respective specialised conventions.²⁰

52. Previously, that rule was expressed, in identical terms, in Article 71(1) of Regulation No 44/2001, which preceded Regulation No 1215/2012.

53. The interpretation of that rule was central to the Court’s judgment in *TNT Express*,²¹ delivered in the context of proceedings between an eponymous carriage company and the insurer of cargo lost during its transportation. In those proceedings, TNT opposed the enforcement, in the Netherlands, of a judgment of a German court ordering it to pay compensation for such loss.

54. The main thrust of the questions referred revolved around the issue – similar to the implicit one in the present case – whether the court of the State addressed (*in casu* the Netherlands) could review the jurisdiction of the German court (as the court of origin).²² Although that was prohibited under (the then applicable) Regulation No 44/2001 (as it is today under Regulation No 1215/2012), the same solution would not necessarily follow from the CMR.

55. It is for this reason that the Court had to examine the interplay between both instruments. In that regard, the Court made it clear that primacy conferred by Article 71 of that regulation upon specialised international conventions, such as the CMR, came with an important condition attached: their rules take precedence, *provided* that they ‘are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimised

¹⁸ Cremona, M., ‘The Internal Market and Private International Law Regimes: A Comment on Case C-533/08 TNT Express Nederland BV v AXA Versicherung AG, Judgment of the Court (Grand Chamber) of 4 May 2010’, EUI Department of Law Working Paper No 2014/08, July 2014, p. 12. Recital 35 of Regulation No 1215/2012 provides that ‘respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.’

¹⁹ Judgment in *TNT Express*, paragraph 47.

²⁰ Judgment in *Tatry*, paragraph 24. See also judgment in *TNT Express*, paragraph 48 and the case-law cited, and Opinion of Advocate General Saugmandsgaard Øe in *Brite Strike Technologies* (C-230/15, EU:C:2016:366, point 31). Arguably, that rationale was particularly present in Article 57 of the 1968 Brussels Convention. That provision, at issue in the judgment in *Tatry*, preceded Article 71 of Regulation No 44/2001 and differed therefrom only (but importantly) in that it preserved the possibility for the Member States to conclude such specialised conventions *pro futuro*. Judgment in *TNT Express*, paragraph 38.

²¹ Referred to above in footnote 3 of this Opinion.

²² Opinion in *TNT Express*, point 27.

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*).²³

56. The Court arrived at that conclusion after explaining that the rules contained in international specialised conventions cannot 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’²⁴ and cannot ‘compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union ...’.²⁵

57. I will address the specific conclusion that the Court has drawn, in that case, from those considerations. At this stage, suffice it to say that scholarly reactions to the general test established in that judgment were mixed, pointing out, in essence, that it would be hard to apply²⁶ – where the rules laid down in Article 71 were meant to be straightforward rules of conflict – and that its existence ‘does some violence’²⁷ to the text of that provision.²⁸ At the same time, the judgment was also recognised as devising a solution to the perceived threat that could occur for the common jurisdiction and recognition regime, should diverging rules of specialised conventions apply to intra-EU situations.²⁹

58. Be that as it may, the test developed in the judgment in *TNT Express*, which now informs the application of Article 71 of Regulation No 1215/2012, has become an unavoidable element of the comparative assessment of potentially competing jurisdictional and enforcement regimes.³⁰ Understandably, considerations based on that test have found their way into the pleadings in the main proceedings and into the reflections that have led the referring court to make the present request for a preliminary ruling which I will now consider in more detail.

C. The questions referred in the present case

59. The three questions referred in the present case appear to reflect the referring court’s concern that the choice-of-court agreement entered into by the parties in the main proceedings was not respected when the District Court of Zeeland-West-Brabant agreed to hear and decide Rhenus Logistics’ claim.

²³ Judgment in *TNT Express*, paragraph 56.

²⁴ *Ibid.*, paragraph 51.

²⁵ The Court identified those principles as the free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union, by reference to recitals 6, 11, 12 and 15 to 17 of Regulation No 44/2001. The judgment in *TNT Express*, paragraph 49.

²⁶ Cremona, M., cited above in footnote 18, at p. 6.

²⁷ Kuijper, P.J., ‘The Changing Status of Private International Law Treaties of the Member States in Relation to Regulations No. 44/2001’, *Legal Issues of Economic Integration*, 2011, pp. 89 to 104, at p. 99.

²⁸ See also Attal, M., ‘Droit international privé communautaire et conventions internationales : une délicate articulation’, *Petites affiches*, No 238, 2010, p. 22.

²⁹ Kuijper, P.J., cited above in footnote 27, at p. 102. See for a different position, Cremona, M., cited above in footnote 18, at p. 6.

³⁰ Recalled in judgments in *Nipponkoa*, paragraphs 36 to 39; of 4 September 2014, *Nickel & Goeldner Spedition* (C-157/13, EU:C:2014:2145, ‘the judgment in *Nickel & Goeldner Spedition*’, paragraph 38); and of 14 July 2016, *Brite Strike Technologies* (C-230/15, EU:C:2016:560, ‘the judgment in *Brite Strike Technologies*’, paragraph 65).

60. The first question referred enquires more specifically about whether Article 71 of Regulation No 1215/2012, read in the light of its recitals 21 and 22, allows for the application of the alternative jurisdictional rules set out in Article 31(1) of the CMR, where the dispute at issue is governed by a choice-of-court agreement.

61. I am afraid that that question is based on the premiss that it is still possible, for the referring court, to review the jurisdiction of the court of origin at the recognition stage. I will explain below that such a review is precluded and that, therefore, the reply to the first question is irrelevant for the purposes of the main proceedings (C.1).

62. Rather, when a party seeks to prevent the cross-border effects of a judgment, it has to invoke, to that effect, one of the grounds for refusing its recognition, as provided for in Regulation No 1215/2012. I will therefore turn to that issue, and more specifically, to the second and third questions referred, by which the referring court enquires whether the fact that the choice-of-court agreement has remained ineffective must lead to the refusal of recognition of the Netherlands judgment. I will explain that those questions must receive a reply in the negative (C.2).

1. On the impossibility, for the referring court, to review the jurisdiction of the court of origin

63. As follows from recital 26 to Regulation No 1215/2012, the rules on recognition and enforcement laid down by that regulation are based on mutual trust in the administration of justice within the European Union. Those rules operate on the premiss that a judgment delivered by the courts of one Member State should be treated as if it had been delivered in the Member State addressed.³¹

64. Accordingly, and as the Commission pointed out, in essence, at the hearing in these proceedings, one of the fundamental features of the system established by Regulation No 1215/2012 is the automatic recognition of judgments in civil and commercial matters handed down by the courts of a different Member State. In particular, that system rules out the possibility, for the courts of the Member State addressed, of reviewing the jurisdiction of the courts of the Member State of origin, as stated in Article 45(3) of Regulation No 1215/2012.³²

65. However, the situation at issue in the present case is not governed (or, at least, not exclusively, as I will explain below) by Regulation No 1215/2012, but by the specialised rules of the CMR, on which Article 71 of Regulation No 1215/2012 confers priority. The question thus arises whether the prohibition on reviewing the jurisdiction of the court of origin applies also in such a situation.

66. In my view, it does.

67. In that respect, I note, first, that the CMR is not an EU law instrument, and therefore remains outside the remit of the Court's jurisdiction.³³

³¹ See also, in the context of Regulation No 44/2001, judgment of 16 July 2015, *Diageo Brands* (C-681/13, EU:C:2015:471, 'the judgment in *Diageo Brands*', paragraph 40 and the case-law cited).

³² As confirmed in the established case-law of the Court. See, recently, judgment of 7 April 2022, *H Limited* (C-568/20, EU:C:2022:264, 'the judgment in *H Limited*', paragraph 31 and the case-law cited). In the context of Regulation 44/2001, see judgments of 28 April 2009, *Apostolides* (C-420/07, EU:C:2009:271, paragraph 49), and of 15 November 2012, *Gothaer Allgemeine Versicherung and Others* (C-456/11, EU:C:2012:719, paragraph 35 and the case-law cited). In the context of the 1968 Brussels Convention, judgment of 28 March 2000, *Krombach* (C-7/98, EU:C:2000:164, paragraph 31).

³³ Judgment in *TNT Express*, paragraph 63.

68. That limitation does not, however, mean that the Court cannot take into consideration the text of such instruments in order to take cognisance of their content. Otherwise, it would be impossible to ascertain whether those conventions contain competing rules.³⁴

69. On that basis, turning, second, to the specific content of the CMR, I note that the rules of the CMR concerned with recognition and enforcement are rather rudimentary, a point that was also acknowledged in these proceedings by both Rhenus Logistics and Gjensidige.³⁵

70. Those rules are included in Article 31(3) of the CMR which makes the enforceability of a judgment, issued in one contracting party, mandatory in the others, subject to compliance with ‘formalities’, and excludes a review of the case on the merits.

71. Other aspects of recognition and enforcement appear unregulated, which means that such rules are to be identified in the law of the State addressed.³⁶

72. When it comes to the Member States, that law is set out in Regulation No 1215/2012. The applicable regime is, in my view, therefore, the one provided for in Article 45 et seq. of that regulation, including the cardinal rule referred to above prohibiting, in the intra-EU legal space, the review of the jurisdiction of the court of origin.

73. Moreover, and independently of the foregoing, the judgment in *TNT Express* leads to the same conclusion.

74. Indeed, after setting out the general test restricting the scope of Article 71 of Regulation No 1215/2012, as described in the previous section, the Court recalled that ‘the court of the State addressed is never in a better position than the court of the State of origin to determine whether the latter has jurisdiction’.³⁷ The Court explained that it is precisely that fact which led to such review being prohibited as a matter of EU law.

75. Although the Court made no express statement as to whether the principles underlying the operation of Regulation No 44/2001 effectively precluded the review of the court of jurisdiction as a matter of application of a specialised convention, the judgment in *TNT Express* has been generally understood as confirming the latter option.³⁸ During the hearing in the present proceedings, the Commission and the Lithuanian Government expressed, in essence, the same view.

76. Thus, and in summary, I am of the view that whether it is considered through the prism of the test set out in the judgment in *TNT Express* or based on the wording of the CMR, a court of a Member State, requested to recognise a judgment delivered by a court of another Member State in application of that convention, is not permitted to review the jurisdiction of the court of origin. Consequently, the reply to the first question referred is irrelevant for the resolution of the

³⁴ I agree that the situation is no different from that which requires the Court to take into account provisions of domestic law so as to establish whether EU law precludes them. Opinion in *TNT Express*, points 76 and 78. Nor is it different from the Court taking into account the content of international agreements within the meaning of Article 351 TFEU in order to establish whether there is a need for the Member States to eliminate ‘incompatibilities’ under that provision.

³⁵ To recall, that convention dates from 1956 and has been amended in 1978 and in 2008 (see above footnote 4). Those amendments are not relevant in the context of the present case.

³⁶ See, to that effect, Opinion in *TNT Express*, point 93.

³⁷ Judgment in *TNT Express*, paragraph 55.

³⁸ See, for example, Lamont-Black, S., ‘The UK Supreme Court on jurisdiction over successive CMR Convention carriers and European Union rules’, *Uniform Law Review*, Vol. 21, Issue 4, 2016, pp. 487 to 509, at p. 498, as well as Kuijper, P.J., cited in footnote 27, at p. 99 (pointing out nevertheless that that conclusion was not fully certain).

dispute pending before the referring court since the latter cannot review whether the District Court of Zeeland-West-Brabant correctly established its jurisdiction before handing down the judgment the recognition of which is at issue in the main proceedings.

77. With that being clarified, I will now turn to the question whether the fact that that court established its jurisdiction irrespective of the choice-of-court agreement at issue may constitute a ground allowing the recognition of the resulting judgment to be refused.

2. If a choice-of-court agreement is ignored, may the recognition of the judgment be refused?

78. As explained earlier, the dispute pending before the referring court falls within the scope of the CMR. By application of Article 71 of Regulation No 1215/2012, that convention takes precedence over that regulation.³⁹ At first sight, it may thus seem surprising to turn to Regulation No 1215/2012 in order to ascertain whether its provisions permit the refusal of recognition of the abovementioned judgment.

79. However, I have already explained that in the absence of specific rules to this effect in the CMR, the applicable rules are those provided for in the law of the Member State addressed, which in the case of Lithuania, is Regulation No 1215/2012. The referring court is thus correct to consider that legal instrument in more depth.

80. Regulation No 1215/2012, as has already been noted, operates on the basis of the automatic recognition of judgments in civil and commercial matters handed down by the courts of another Member State.

81. By exception to that rule, recognition may be refused only on the basis of one of the grounds specifically provided for in Article 45(1) of Regulation No 1215/2012 (when, as the Commission emphasises, an application to that end is made).

82. For what is relevant to the present case, those grounds include, on the one hand, and pursuant to Article 45(1)(e)(ii) of Regulation No 1215/2012, a breach of *jurisdictional rules* set out in Section 6 of Chapter II of that regulation (second question referred) and, on the other hand, a situation in which the recognition of the given judgment is considered manifestly contrary to *public policy* in the Member State addressed, as provided for under Article 45(1)(a) of Regulation No 1215/2012 (third question referred).

83. The referring court is aware that neither of those grounds covers, in principle, the situation in the present case. However, it enquires, by its second and third questions, which I will address below, whether the recognition of the Netherlands judgment may be refused on the basis of a broad interpretation of those grounds.

(a) Broad interpretation of the ground set out in Article 45(1)(e)ii of Regulation No 1215/2012?

84. It follows from Article 45(1)(e)(ii) of Regulation No 1215/2012 that, when an application to that effect has been made, recognition of a judgment shall be refused if that judgment conflicts with the jurisdictional rules set out in Section 6 of Chapter II of that regulation.

³⁹ See also Article 71(2)(b) and the second sentence of Article 71(2) of Regulation No 1215/2012.

85. The rules described therein (and more specifically in Article 24, which constitutes the sole provision of the section referred to above) establish exclusive jurisdiction in respect of disputes relating to five listed subjects. In short, those areas are (i) certain aspects of real estate property, (ii) certain corporate matters, (iii) the validity of the entries into the public registers, (iv) the validity of patents, trade marks, designs, or other similar rights, as well as (v) the enforcement of judgments.

86. Those jurisdictional rules cannot be departed from by an agreement⁴⁰ and their rationale has been described by reference to the particular connection between the areas covered and the given Member State.⁴¹

87. In particular, it follows from the description above that Section 6 of Chapter II of Regulation No 1215/2012 does not apply to choice-of-court agreements. I recall that those agreements are covered by Section 7 of that chapter.

88. The referring court is aware of that fact but asks, by its second question, whether the legislative changes brought about by Regulation No 1215/2012, by which the protection of choice-of-court agreements had been strengthened, mean that the rule in Article 45(1)(e)(ii) should be interpreted broadly so as to include not only the infringement of the rules under Section 6 of Chapter II of that regulation, but also the infringement of Section 7.

89. I do not believe so.

90. The referring court rightly points out that, in comparison to Regulation No 44/2001, Regulation No 1215/2012 enhances the effectiveness of such agreements by providing a specific *lis pendens* rule in Article 31(2) and (3).⁴²

91. However, notwithstanding that change, the EU legislature chose not to reflect it in the system of grounds which permit the refusal of recognition of a judgment.

92. The list of those grounds is provided in Article 45(1) of Regulation No 1215/2012 and is *exhaustive*.⁴³

93. The same must logically be held true as regards, specifically, the ground listed in Article 45(1)(e)(ii) of the same instrument concerned with a breach of rules establishing exclusive jurisdiction in application of Section 6 of Chapter II of Regulation No 1215/2012.

⁴⁰ As that follows from Article 25(4) of Regulation No 1215/2012 providing that ‘agreements ... conferring jurisdiction shall have no legal force ... if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.’

⁴¹ Judgment of 13 July 2000, *Group Josi* (C-412/98, EU:C:2000:399, paragraph 46) in the context of Article 16 of the 1968 Brussels Convention. See also and for instance, Opinion of Advocate General Kokott in *Apostolides* (C-420/07, EU:C:2008:749, point 83) as regards the jurisdiction over disputes having as their object rights *in rem* in immovable property.

⁴² It follows from those provisions that, where parallel proceedings are in process, one of which is pending before the court seised on the basis of a choice-of-court agreement, any court of another Member State shall refrain from ruling on the matter, when the designated court confirms that it has jurisdiction, and until such court declares that that is not the case. See also recital 22 of Regulation No 1215/2012.

⁴³ See, judgment in *H Limited*, paragraph 31 or, in the context of Regulation No 44/2001, judgment of 23 October 2014, *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2319, ‘the judgment in *flyLAL*’, paragraph 46 and the case-law cited). See also recital 30, rightly recalled by the Lithuanian Government, according to which ‘the recognition of a judgment should, ..., be refused only if one or more of the grounds for refusal provided for in this Regulation are present’.

94. However, the referring court notes that, if there is no ground allowing for the refusal of recognition of a judgment which infringes an exclusive choice-of-court agreement, then the infringement of such an agreement will have no consequences.

95. I am afraid that this is the logic of the functioning of Regulation No 1215/2012, as currently designed, which favours the automatic recognition of judgments, even where jurisdictional rules provided therein have not been respected, save in exhaustively listed situations set out in Article 45(1) of that regulation.⁴⁴

96. When it comes to a breach of jurisdictional rules, that provision specifies that refusal of recognition is permissible only when the conflict concerns (i) rules set out in Section 6 of Chapter II that regulation, as I have discussed here (Article 45(1)(e)(ii) of Regulation No 1215/2012), or (ii) rules set out in other sections of that chapter that aim, in short, at protecting the party considered to be the weaker party (Article 45(1)(e)(i) of the same regulation).⁴⁵ By contrast, Article 45(1) does not include a breach of any other jurisdictional rules laid down in Regulation No 1215/2012.

97. It should be recalled that the grounds set out in Article 45(1) of Regulation No 1215/2012 constitute exceptions to the general rule pursuant to which judgments handed down by the courts of another Member States are to be recognised automatically. In the context of the present case, I consider it, nevertheless, redundant to recall the general principle of interpretation according to which exceptions are to be construed narrowly. Such a principle is useful when the scope of the exception is vague. However, that is not the case here. Article 45(1)(e)(ii) of Regulation No 1215/2012 is clear, referring to precise jurisdictional rules the infringement of which may fall within its scope. In those circumstances, the interpretation considered by the referring court and suggested by Gjensidige would simply go against the wording of that provision.

98. To conclude on that point, I am of the view that had the EU legislature wished for the protection to be provided to choice-of-court agreements to go as far as taking the form of a new ground for refusal in the event of their breach, one would have expected that the legislature would have done so expressly. By contrast, the wording of the provision at issue, allowing for the recognition of a judgment to be refused, indicates that that was clearly not the intention of the legislature.

(b) Broad reading of the public policy-related ground?

99. By the third question referred, the referring court enquires whether the situation at issue could lead to a broad interpretation of the ground set out in Article 45(1)(a) of Regulation No 1215/2012, pursuant to which the recognition of a judgment is, in principle, to be refused if such recognition is manifestly contrary to the public policy of the State addressed.

100. I am of the view that all my observations made in respect of the ground set out in Article 45(1)(e)(ii) apply *mutatis mutandis* because the text of Article 45(1)(a) of Regulation No 1215/2012 is equally clear.

⁴⁴ As the referring court notes, the alleged infringement of jurisdictional rules may be contested through the remedies available in the Member State of the court concerned.

⁴⁵ That is the case of Section 3, 4 or 5 of Chapter II of Regulation No 1215/2012.

101. Indeed, the reply to the third question referred is, in part, provided in Article 45(3) of Regulation No 1215/2012, as is observed, in essence, by the Lithuanian Government. That provision states that the test of public policy ‘may not be applied to the rules relating to jurisdiction’. That provision is without prejudice to the grounds set out in Article 45(1)(e) of Regulation No 1215/2012 discussed in the previous subsection of the present Opinion and I see no reason why that provision should be read differently from its very wording.

102. Moreover, by its third question, the referring court enquires, with regard to the applicability of the public policy ground, not only about a situation in which a choice-of-court agreement was not observed but also about a situation involving an infringement of an agreement on the applicable law.

103. However, the case file does not reveal any information as regards the conclusion of such an agreement between the parties involved.

104. That part of the third question thus appears inadmissible.

105. That said, the order for reference suggests that the referring court is concerned about the fact that in establishing its jurisdiction over the claim at issue, the District Court of Zeeland-West-Brabant triggered the applicability of Netherlands law to the merits of the dispute, which in turn led to the carrier’s liability being determined under Netherlands law and not under Lithuanian law. The referring court believes that the defendant in the proceedings before the Netherlands court (namely, according to my understanding, Gjensidige) could not have foreseen such consequences. I understand those remarks to mean that the issue of the carrier’s liability should have been determined by application of Lithuanian law, and not by application of Netherlands law and that the result is less favourable to a party such as Gjensidige.

106. Moreover, the referring court also notes that Article 29(1) of the CMR, which refers to national law in relation to the conditions under which the carrier’s liability may be regarded as unlimited,⁴⁶ seems to conflict with Article 3 and Article 5(1) of Regulation (EC) No 593/2008.⁴⁷

107. In addition, the referring court doubts whether the resulting situation is compatible with the fundamental right to a fair trial, as well as the principles underlying, as I understand it, Regulation No 1215/2012.

108. In that respect, I note, first, that the proceedings pending before the referring court concern, as has already and repeatedly been pointed out, the recognition of a judgment delivered in another Member State.

109. The key question in the present context is thus whether the differences in substantive law that seem to exist between Netherlands and Lithuanian law, as regards the extent of the carrier’s liability, could justify the refusal of the resulting judgment based on the application of the public policy ground under Article 45(1)(a) of Regulation No 1215/2012.

110. I do not think that they can.

⁴⁶ See above points 41 to 43.

⁴⁷ Regulation of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

111. First, according to settled case-law, while the Member States remain free to determine, according to their own national conceptions, their public policy requirements, the Court is required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from a court in another Member State.⁴⁸

112. Second, that ground may be relied on only in exceptional cases,⁴⁹ when the recognition would be ‘at variance to an unacceptable degree with the legal order of the State in which recognition is sought [or, for that matter opposed] inasmuch as it would infringe a fundamental principle’.⁵⁰

113. Third, and by contrast, the ground for refusal set out in Article 45(1)(a) of Regulation No 1215/2012 may not be triggered solely because, there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State addressed had it been seised of the dispute.⁵¹

114. The central concern of the referring court appears to be that, as a result of the allegedly wrongful determination of the court having jurisdiction over the claim at issue, that claim was ultimately determined under Netherlands law, rather than Lithuanian law.

115. In so far as that concern consists in pointing out that the Netherlands court wrongly determined Netherlands law as being the applicable law, I note that such an error, even if established, cannot, per se, lead to the refusal of recognition of the judgment.

116. It follows from the case-law referred to above that such refusal is possible only where the recognition of the resulting judgment would infringe a principle that is considered, in the State addressed, to be fundamental.

117. However, in terms of the specific consequences of the recognition of the Netherlands judgment at issue in the present case, the referring court does not explain how the substantive-law discrepancy referred to above would affect the public policy of Lithuania, and how the recognition of that judgment would be therefore at odds, to an unacceptable degree, with the legal order of that Member State in as much as it would infringe a fundamental principle.

118. In those circumstances, in reply to the second and third questions referred, I am of the view that Article 45(1)(a) and (e)(ii) of Regulation No 1215/2012 must be interpreted as not covering a situation in which the court of origin established its jurisdiction based on one of several rules contained in a specialised convention, within the meaning of Article 71 of Regulation No 1215/2012, which include – but do not classify as exclusive – a choice-of-court agreement, and when the court of origin was not the court designated by the choice-of-court agreement concluded by the parties concerned. Moreover, Article 45(1)(a) of Regulation No 1215/2012 must be interpreted as meaning that an error, when established, as to the determination of the applicable law cannot, per se, lead to the recognition of a judgment being refused on the ground that it is contrary to the public policy of the State addressed.

⁴⁸ See, for example, judgment in *flyLAL*, paragraph 47 and the case-law cited.

⁴⁹ Judgment of 28 April 2009 in *Apostolides* (C-420/07, EU:C:2009:271, paragraph 55 and the case-law cited), in the context of Article 34(1) of Regulation No 44/2001.

⁵⁰ See, judgment in *Diageo Brands*, paragraph 44 and the case-law cited.

⁵¹ See, to that effect, judgment in *flyLAL*, paragraph 48 and the case-law cited.

119. This reply, combined with that suggested above in point 76 of this Opinion provide, in my view, relevant clarification that will enable the referring court to resolve the matter pending before it. That said, for the sake of completeness and to address the extensive discussion that took place on that issue within these proceedings, I will explain that the jurisdictional rules of the CMR do not, in any event, infringe the principles underlying judicial cooperation in civil and commercial matters within the European Union as per the application of the test established in the judgment in *TNT Express*.

D. The ‘TNT Express test’ and the non-exclusive nature of a jurisdiction resulting from a choice-of-court agreement

120. Much discussion in the present case revolved around the issue of whether the jurisdictional rules set out in the CMR are at odds with the test established in the judgment in *TNT Express* and, therefore, the principles underlying the operation by Regulation No 1215/2012.

121. The problem, as perceived by the referring court arises from the fact that, on the one hand, Regulation No 1215/2012 classifies jurisdiction established by a court-of-choice agreement as, in principle, exclusive. However, on the other hand, the CMR, while allowing for jurisdiction to be established on that basis, appears to preclude it from being exclusive (at least in the interpretation thereof adopted by the District Court of Zeeland-West-Brabant, which view also seems to be embraced by the referring court).

122. In that respect, I note, first, that, in its judgment in *Nickel & Goeldner Spedition*, the Court already held, as the referring court notes, that the jurisdictional rules set out in Article 31(1) of the CMR do not conflict with the test established in the *TNT Express*. However, as the Commission observes, in that judgment, the Court examined all the rules on jurisdiction provided for in Article 31(1) of the CMR (as set out in point 38 above) *with the exception* of that at issue in the present case.⁵²

123. I understand that this is why the referring court raises the issue whether the difference in treatment that the CMR (as, again, interpreted by the District Court of Zeeland-West-Brabant) appears to apply to choice-of-court agreements, as opposed to Regulation No 1215/2012, gives rise to a conflict with the principles underlying judicial cooperation in civil and commercial matters within the European Union.

124. I do not believe it does.

125. First and foremost, in view of the position held by the District Court of Zeeland-West-Brabant, there indeed appears to be a difference between the CMR and Regulation No 1215/2012 when it comes to the regime applicable to choice-of-court agreements.

126. However, I am of the view that such a difference does not constitute an issue per se.

127. Indeed, should each and any difference result in the specialised regime yielding to Regulation No 1215/2012, then Article 71(1) thereof would be deprived of all meaning. No specialised regime that departs from Regulation No 1215/2012 could ever be applied in intra-EU legal relations. However, such a result cannot be accepted in the light of the clear wording of that provision.

⁵² Judgment in *Nickel & Goeldner Spedition*, paragraphs 39 to 41.

128. Rather, the application of specialised rules that possibly differ from the rules provided for by Regulation No 1215/2012 must be refused only when they are genuinely at odds with the principles recalled in the judgment in *TNT Express*. As regards jurisdictional rules, the relevant principles are those, in essence, of high predictability of jurisdictional rules and legal certainty for litigants, on the one hand, and the sound administration of justice, on the other.⁵³

129. I do not think that either of those principles are put at risk.

130. First, I am of the view that, for the principle of high predictability of jurisdictional rules to be respected, what matters is that the claimant is able easily to decide where to sue, and for the defendant reasonably to predict where that may occur.

131. That is the case, in my view, with regard to Article 31(1) of the CMR. That provision does not contain a vaguely worded rule that provides for, for example, an appropriate forum to be determined on a case-by-case basis, in the light of all the circumstances, and in the interests of justice. Instead, Article 31(1) of the CMR lays down several categories of venue, clearly defined by general and easily understandable categories (namely, and in short, the defendants' seat, the place where the goods were taken over by the carrier, the place designated for delivery or, the agreement entered into by the parties).

132. Now, the crux of the matter in the present case appears to be the fact that the jurisdiction, as governed by the CMR (in the interpretation thereof adopted by the District Court of Zeeland-West-Brabant), when determined by a choice-of-court agreement, does not become exclusive. Rather, that interpretation of the CMR appears to preserve all other venues provided for in Article 31(1) of the CMR.

133. In that respect, one may indeed argue that the presumption of exclusivity conferred upon the choice-of-court agreements by Regulation No 1215/2012 reinforces legal certainty for litigants (and especially for the defendant) in that it makes clear that when a choice-of-court agreement has been concluded, and unless provided otherwise, the other hypothetical fora can, in principle, be successfully excluded.

134. However, I am of the view that the determination of whether to consider a forum designated in such a way to be exclusive or not, is, ultimately, a policy issue on which different positions in different legal orders (and in different fields thereof) may be taken.

135. In that respect, the authors of a convention governing a particular matter, such as the CMR, may have had good reasons to insist upon the availability of several fora in the light of the specificity of the sector.⁵⁴

136. Moreover, I note that, while Regulation No 1215/2012 lays down the presumption of exclusivity of choice-of-court agreements, such exclusivity is not an absolute rule and can be departed from by the parties. When that happens, the situation becomes similar to that resulting

⁵³ I note that the Court recalled, in paragraph 53 of its judgment in *TNT Express*, the relevant principles – for the issue of jurisdiction – to be those of high predictability, sound administration of justice and minimisation of the risk of concurrent proceedings. In paragraph 65 of the judgment in *Brite Strike Technologies*, those principles relate to legal certainty for litigants and the sound administration of justice.

⁵⁴ I note that a similar flexibility also appears to be sought after in Article 21 of the United Nations Convention on the Carriage of Goods by Sea, *United Nations Treaty Series*, 1978, Vol. 1695, p. 3, or in Article 46(1) of the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM), very similar to Article 31(1) of the CMR.

from Article 31(1) of the CMR. Moreover, Regulation No 1215/2012 itself limits the effect of choice-of-court agreements because those agreements cannot change the operation of jurisdictional rules in certain matters.⁵⁵

137. As regards, second, the sound administration of justice and the risk of concurrent proceedings being initiated, the fact that a choice-of-court agreement is not regarded as exclusive does indeed increase that risk. That said, I observe that Article 31(2) of the CMR contains a rule of *lis pendens*, that is – in its general expression – analogous to that laid down in Article 29 of Regulation No 1215/2012, in that it aims, in my understanding, at avoiding the risk of proceedings being held in parallel and in irreconcilable judgments being delivered.⁵⁶

138. It is true that, unlike Regulation No 1215/2012, the CMR does not contain *lis pendens* rules that would be specifically protective of choice-of-court agreements (such as those in Article 31(2) and (3) of Regulation No 1215/2012). That difference is, however, the logical consequence of the abovementioned policy choice to consider the jurisdiction resulting from such agreements as an alternative to be preserved alongside other possible rules.

139. That overview, thus, leads me to consider that Article 71 of Regulation No 1215/2012 and the test set out in the judgment in *TNT Express*, do not preclude the interpretation of the jurisdictional rule set out in Article 31(1) of the CMR, pursuant to which a jurisdiction resulting from a choice-of-court agreement cannot be considered to be exclusive.

140. I reiterate that my analysis in the present section has been conducted merely for the sake of completeness and to address the lively debate which took place in the present proceedings concerning this matter. In particular, I recall my considerations above from which it follows that the jurisdiction of the court of origin cannot be reviewed by the referring court in the main proceedings relating to the recognition of a judgment issued in another Member State.

V. Conclusion

141. In the light of the above, I propose that the Court answer the questions referred for a preliminary ruling by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania, Lithuania) as follows:

Article 45(1)(a) and (e)(ii) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

must be interpreted as meaning that the grounds for the refusal of recognition set out therein do not apply to a situation in which the court of origin established its jurisdiction on the basis of one of several rules contained in a specialised convention, within the meaning of Article 71 of Regulation No 1215/2012, which include – but do not classify as exclusive – a choice-of-court agreement, and when the court of origin was not the court designated by the choice-of-court agreement concluded by the parties concerned.

⁵⁵ See Articles 15, 19, 23 and 25(4) of Regulation No 1215/2012.

⁵⁶ Those provisions are reproduced in points 9 and 15 above.

Moreover, Article 45(1)(a) of Regulation No 1215/2012 must be interpreted as meaning that an error, when established, as to the determination of the applicable law cannot, per se, lead to the recognition of a judgment being refused on the ground that it is contrary to the public policy of the State addressed.