

“When the Court gets it wrong”

Case C-533/08 TNT Express Nederland BV v AXA Versicherung AG. Judgment of the Court (Grand Chamber) of 4 May 2010. Reference for a preliminary ruling: Hoge Raad der Nederlanden - Netherlands.

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The judgment and its context

This case – the *TNT Express* case² – concerns conflict of laws: jurisdiction and the rule of *lis pendens* under Regulation 44/2001 (the Brussels Regulation)³ and the Convention on the Contract for the International Carriage of Goods by Road (CMR).⁴ It thus concerns the relationship between EU legislation and the international conventions to which the Member States – but not the EU – are party. It might appear to centre on a technical discussion of *lis pendens* and review of jurisdiction, but it raises some important questions about the role of the Court of Justice in interpreting legislation, and potential tensions between deepening EU integration and wider international cooperation. It is a Grand Chamber judgment, which makes it hard to argue that the approach the Court adopts is merely a wayward accident.⁵

Here I will summarise and simplify the facts and legal background so as to focus on the key issues. In April 2001 a contract, which was covered by the CMR, was entered into between Siemens and TNT Express for the carriage of goods from the Netherlands to Germany; but the goods did not arrive. TNT made a pre-emptive

¹ I should like in particular to thank Loic Azoulai and Stefan Grundmann for very helpful comments on a draft of this paper; of course the views expressed are mine and they do not necessarily agree with my conclusions.

² Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG* [2010] ECR I-4107.

³ Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1. From 10 January 2015 the Regulation will be replaced by Regulation 1215/2012/EU 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 L 351, 20.12.2012, p. 1.

⁴ Convention on the Contract for the International Carriage of Goods by Road (CMR) 1956, United Nations Treaty Series, vol. 399, p. 189, which came into force in 1961. The Convention has 55 parties including all the Member States of the EU but the EU itself is not a party.

⁵ The judgment has since been applied in case C-452/12 *Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV*, judgment 19 December 2013, not yet reported; and by analogy in case C-589/10 *Wencel v Zakład Ubezpieczeń Społecznych w Białymstoku*, judgment 16 May 2013, not yet reported; see further discussion of these cases below.

application (May 2002) to a court in Rotterdam (Rechtbank Rotterdam) for a declaration that its liability to Siemens' insurers (AXA) was limited under the CMR;⁶ that application was dismissed (May 2005) and TNT appealed to the Regional Court of Appeal in The Hague. Meanwhile (August 2004) AXA had brought an action against TNT in the Landgericht Munich claiming compensation for the loss of the goods. TNT raised a plea of *lis pendens* under Article 31(2) of the CMR, but the Munich court dismissed this plea on the grounds that the application for a negative declaration made by TNT and the claim made by AXA were not, under German law, actions 'on the same grounds' within Article 31(2) CMR; the Munich court then entered judgment against TNT (April and September 2006). In March 2007 AXA sought enforcement of these Munich judgments in the Rechtbank Utrecht, this application was granted (March 2007) and an appeal by TNT was dismissed. TNT then appealed on a point of law to the Hoge Raad, claiming that Article 31(2) CMR should override Article 35(3) of Regulation 44/2001 which (in this case) prohibited the Dutch court in Utrecht from reviewing the jurisdiction accepted by the German court in Munich. The Hoge Raad referred a number of questions to the Court of Justice on the relationship between the Brussels Regulation and the CMR, as a 'specialised convention' referred to in Article 71 Regulation 44/2001.

The drafters of the Brussels Regulation, and indeed its predecessor the Brussels Convention, had foreseen the need to handle the relationship between this legislative initiative of general scope but applicable only to EU Member States and conventions such as the CMR with much broader participation but narrower sectoral coverage. Recital 25 in the Regulation's Preamble stated 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', and this principle was given effect in Article 71 of the Regulation, which provides in its para 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'.⁷

As was noted by AG Kokott in her Opinion, the courts of the CMR parties have taken different views as to the interpretation of the liability limitation clause and its

⁶ According to the report the goods were worth DEM 103 540 (approx. 52 000 euros); TNT claimed that under the CMR liability was limited to approx. 110 euros.

⁷ For the full text of Article 71 see para 16 of the judgment of the Court in case C-533/08, n 2 above. Both the Preamble paragraph and Article 71 are reproduced in the replacement Regulation 1215/2012/EU, n 3 above (Preamble para 35 and Article 71).

exceptions in the CMR, tending to result in a race by the parties to the court most likely to give a favourable interpretation; in addition, different interpretations of the CMR's *lis pendens* rule in the contracting States mean that parallel proceedings are not impossible. The Brussels Regulation does of course contain its own *lis pendens* provision;⁸ the issue here however was not just that there might be a conflict between different interpretations of *lis pendens*. It was rather that under the Brussels Regulation⁹ the Dutch court should not review the jurisdiction of the German court (that jurisdiction being based on the Munich court's interpretation of *lis pendens* under the CMR) whereas under Article 31(2) CMR such a review of jurisdiction may have been possible on the basis of the Dutch court's interpretation of that provision.

The specific legal background of the case renders the judgment important for the development of private international law in the EU and for the EU as a locus for the development of private international law, regionally and globally. The EU itself is a relative late-comer to engagement with private international law, despite the 1968 Brussels Convention. However a growing *acquis* has led to a greater involvement of the EU at an international level, and the EU became a member of the Hague Conference in 2007.¹⁰ This new internal and external activity of the EU operates alongside an extensive framework of international conventions in the field and the relationship between these international commitments and EU law can be complex, especially where – as often – it is the Member States but not the EU that are party to the international convention.¹¹ The general principles which apply are familiar: as between Member States the provisions of an international agreement may apply unless and until they are superceded by EU law;¹² if there is a conflict, the Member

⁸ Articles 27-30 Regulation 44/2001; see also Articles 29-34 Regulation 1215/2012. Under the case law of the Court of Justice an application for a declaration of non-liability and an action for damages may amount to the same 'cause of action' and thus fall within the *lis pendens* rule: case C-406/92 *Tatry* [1994] ECR I-05439.

⁹ Article 35(3) Regulation 44/2001.

¹⁰ Council Decision 2006/719/EC of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law OJ L 297, 26.10.2006, p.1. See also 'Aspects of judicial cooperation in civil matters in the framework of the Strategy for the External Dimension of JHA: Global Freedom, Security and Justice', Council doc. 8140/06, 11 April 2006, and 'External relations strategy in the field of judicial cooperation in civil matters', Council doc. 9045/08, 7 May 2008.

¹¹ See generally, Editorial Comments, 'The Union, the Member States and international agreements' (2011) 48 *Common Market Law Review* 1.

¹² In case 10/61 *Commission of the European Economic Community v Italian Republic*, judgment of 27 February 1962, [1962] ECR English Special Edition p 1, the Court held that "In matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of GATT." In *Van Gend en Loos* the Court applied the same principle to a later international agreement.

States will be bound by the primacy of EU law; obligations towards third states are protected by Article 351 TFEU but Article 351 TFEU does not apply to Member States' *inter se* obligations under prior agreements.¹³ We may also point to cases where the Court has shown itself prepared to 'take account of' such international commitments of the Member States in interpreting EU law.¹⁴

These are the general principles. However either the international agreement or the relevant EU law may contain a provision which seeks to govern the relationship. In some cases, especially within the framework of the Council of Europe, the EU has negotiated the inclusion within international multilateral conventions of a so-called 'disconnection clause' whereby as between the EU Member States it is EU law rather than the convention that will apply.¹⁵ In other cases, and in an opposite direction, EU legislation may make an explicit *renvoi*, or 'connection' to an international convention. The *renvoi* may state that it is the international convention which should apply in certain circumstances,¹⁶ or it may establish the procedures under which provisions of a convention will be implemented in the Union,¹⁷ or make clear that the EU legislation is intended to comply with the rules of the convention.¹⁸ In our case the Brussels Regulation does not include a list of specific conventions; instead we have a more general reference to conventions which govern jurisdiction or the

¹³ C-301/08 *Bogiatzi v Deutscher Luftpool and Others* [2009] ECR I-10185, paras 18-19.

¹⁴ Eg case C-308/06 *Intertanko* [2008] ECR I-4057, para 52 with reference to Marpol; the Court based itself on 'the customary principle of good faith, which forms part of general international law' and on the principle of sincere cooperation found in Article 10 EC (now Article 4(3) TEU). Note that we are not here referring to the obligation of conforming interpretation applicable to international agreements binding the EU, as articulated for example in case C-61/94 *Commission v Germany* [1996] ECR I-3989, para 52 and case C-53/96 *Hermes International v. FHT Marketing* [1998] ECR I-3603, para 28.

¹⁵ See for example Art 64 of the Lugano II Convention OJ L 339, 21.12.2007, p. 3; Art 11(4) of the European Convention on the Legal Protection of Services based on or consisting of Conditional Access, CETS No.178. See further M Cremona, 'Disconnection Clauses in EC Law and Practice' in C Hillion and P Koutrakos (eds) *Mixed Agreements Revisited - The EU and its Member States in the World*, Oxford: Hart Publishing 2010.

¹⁶ For example, Art 4(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, OJ 2004 L 143, p. 56, provides 'This Directive shall not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in Annex IV, including any future amendments thereof, which is in force in the Member State concerned.'

¹⁷ For example, Article 11 of Regulation 2201/2003/EC on jurisdiction and the recognition and enforcement of judgments in matrimonial matters OJ 2003L 338/1 refers to the implementation of a procedure under the 1980 Convention on Civil Aspects of International Child Abduction.

¹⁸ For example, Regulation 2423/88/EEC as interpreted in case C-69/89 *Nakajima* [1991] ECR I-2069.

recognition or enforcement of judgments ‘in relation to particular matters’.¹⁹ Here the Regulation appears to deal with the question of which law to apply by directing us – by way of the ‘shall not affect’ clause – to apply the relevant specialised conventions.

The Court in *TNT Express* agreed with this as a starting point: ‘it is apparent from the wording of Article 71(1) of Regulation No 44/2001, according to which the regulation ‘shall not affect’ specialised conventions, that the Community legislature provided for the application of those conventions in the event of there being concurrent rules.’²⁰ The Court also accepted that Article 71 is worded in such a way as to make it clear that this provision is intended to apply to intra-EU situations, such as the case under consideration, as well as to cases involving third country courts.²¹ However, the Court then made a big leap. It develops a novel argument, the centre-piece of the judgment. It postulates the existence of, and then identifies using the Preamble, what it calls the principles which underlie the Regulation: free movement of judgments, predictability and legal certainty, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union.²² These principles are ‘necessary for the sound operation of the internal market, which is the *raison d’être*’ of the Regulation.²³ The Court then argued that Article 71 of the Brussels Regulation *cannot have* a purport which conflicts with these principles, and therefore it *cannot be interpreted* as meaning that a specialised convention such as the CMR ‘may lead to results which are less favourable for achieving sound operation of the internal market than the results to which the regulation’s provisions lead.’²⁴

The consequence of this imperative is that the *renvoi* to the specialised conventions envisaged by Article 71 is, the Court holds, a conditional one; it only applies insofar as the rules in those conventions comply with the principles defined by the Court. As far as rules on jurisdiction are concerned, including *lis pendens* rules, they must be ‘highly predictable, facilitate the sound administration of justice and enable the risk

¹⁹ It might be noted that whereas the equivalent provision in the Brussels Convention (Article 57) referred to both existing and future conventions (‘conventions to which the Contracting Parties are or will be parties ...’), the Brussels Regulation limits itself to existing conventions, as does Regulation 1215/2012.

²⁰ Case C-533/08 *TNT Express*, n 2 above, para 46.

²¹ *Ibid.*, para 47.

²² *Ibid.*, para 49.

²³ *Ibid.*, para 50.

²⁴ *Ibid.*, para 51.

of concurrent proceedings to be minimised'.²⁵ As far as the recognition and enforcement of judgments are concerned the relevant principles are 'free movement of judgments and mutual trust in the administration of justice'.²⁶

It becomes immediately clear that this approach requires not only an understanding of the 'principles underlying the Regulation' but also the ability to interpret the specialised convention in the light of those principles, so as to judge to what extent Article 71 may be allowed to take effect. The Court thus moves on to the question of the interpretation of the CMR. The EU is not a party to the CMR and the Court applies the *International Fruit Company* line of case law (the so-called doctrine of 'functional succession'),²⁷ to the effect that it is only where powers in a field have been completely transferred to the EU that it may be argued that the provisions of a convention to which the Member States are parties have the effect of binding the Union, on the basis of which the Court then has jurisdiction to interpret the convention. It does not enter into an analysis, simply stating that 'it cannot be asserted that' the CMR rules on jurisdiction, recognition and enforcement bind the EU on the basis of functional succession, and therefore it has no jurisdiction to interpret the CMR.²⁸ To support this conclusion the Court relies on its earlier finding that the *renvoi* to the CMR is conditional: since the CMR only applies subject to conditions laid down by EU law it cannot (according to the Court) be binding on the EU.

In what follows I will offer a critique of this judgment on a number of points, the aim being to try to tease out the implications of the ruling and to offer a different perspective.²⁹ We will start with the Court's approach to the interpretation of both the Brussels Regulation and the CMR. We will then turn to the core issue addressed by the Court in this case, what one commentator has referred to as the 'underlying problem of discontinuity between the internal legislation and the external

²⁵ Ibid., para 53, drawing from recitals 11, 12 and 15 in the preamble to the Regulation.

²⁶ Ibid., para 54, drawing from recitals 6, 16 and 17 in the preamble to the Regulation.

²⁷ Cases 22-24/72 *International Fruit Company* [1972] ECR 1219; C-308/06 *Intertanko* [2008] ECR I-4057; C-301/08 *Bogiatzi v Deutscher Luftpool and Others* [2009] ECR I-10185; see now also C-366/10 *The Air Transport Association of America and Others*, judgment of 21 December 2011. This case law is primarily concerned with the possibility of assessing the legality of secondary legislation in the light of the provisions of such conventions but the Court is here applying the same principles to interpretation outside that context (*Bogiatzi* being another such example).

²⁸ Case C-533/08 *TNT Express*, n 2 above, paras 62-63.

²⁹ To avoid too much repetition I have not here offered a summary of the lucid opinion of AG Kokott but will be referring to it below.

obligations of the Union'³⁰ – and, we may add, of its Member States – before briefly considering its implications in the specific context of private international law, and in other policy fields where internal legislation incorporates a similar *renvoi*.

The limits of interpretation? Interpreting Article 71 of the Brussels Regulation

The first set of questions concerns the role of the Court as the authoritative interpreter of EU law. Does the Court here simply disregard the will of the legislature as expressed in the Regulation? If so, is it justified in doing so? Is its argument based on 'underlying principles' convincing? Is it then right to refuse to interpret the CMR and what will be the outcome of that refusal, given its position on Article 71?

Of course it is within the Court's powers – and duty – to interpret the Brussels Regulation as part of EU law. Nonetheless here the Court gets close to an interpretation *contra legem*. Pieter Jan Kuijper called it a 'far-reaching teleological interpretation' which 'does some violence' to the wording of Article 71.³¹ According to Michel Attal the judgment renders the principle of priority established in Article 71 meaningless and illusory.³² As the Court accepts, '*according to the wording of Article 71 of Regulation No 44/2001, where the dispute falls within the scope of a specialised convention the rules set out in that convention and not those laid down by Regulation No 44/2001 should in principle be applied*'.³³ It seems clear – as also from recital 25 of the Preamble – that the legislature intended that conventions such as the CMR should, where they apply, simply replace the Regulation.³⁴ No conditions were attached. The choice was to delimit the scope of the Regulation by reference to pre-existing established international rules. No doubt this may have the

³⁰ Editorial Comments, 'The Union, the Member States and international agreements' (2011) 48 *Common Market Law Review* 1, at 3.

³¹ PJ Kuijper, 'The Changing Status of Private International Law Treaties of the Member States in Relation to Regulation 44/2001: case C-533/08 TNT Express Nederland BV v AXA Versicherung AG' (2011) 38 *Legal Issues of European Integration* 89 at 99.

³² 'L'article 71, posant un principe de primauté des instruments spéciaux sur les règles de droit international privé communautaire mais vidé de son sens par la Cour de justice de l'Union européenne, apparaît dès lors comme une illusion.' Michel Attal, 'Droit international privé communautaire et conventions internationales: une délicate articulation' Petites affiches, 30 novembre 2010 n° 238, p. 22, at para 29.

³³ Case C-533/08 *TNT Express*, n 2 above, para 45, emphasis added.

³⁴ Case C-406/92 *Tatry* [1994] ECR I-05439, paras 23-24, in which the Court held that the purpose of what is now Article 71 'is to ensure compliance with the rules on jurisdiction laid down by specialized conventions, since in enacting those rules account was taken of the specific features of the matters to which they relate'.

effect of compromising the completeness of the single market in judgments, the ‘common judicial area based on the principle of mutual recognition of judicial decisions’,³⁵ but this was a political choice within the powers of the legislature. This choice was however denied by the Court, which insisted on a ‘purer’ approach giving priority to harmonisation within the EU. In other contexts the Court has been perfectly prepared to accept legislative choices which envisage a less than complete single market.³⁶ Certainly the Court should seek to interpret provisions of secondary legislation in conformity with the Treaties and general principles of law, including fundamental rights, which take precedence over secondary law.³⁷ In this case, however, although the Court may regret the political choice there appear no grounds for deciding that the natural interpretation of Article 71 would be incompatible with a superior rule of law.

The Court’s argument is that the legislature must be presumed to have intended to ensure respect for certain underlying principles of the Regulation, which it derives from its Preamble. No doubt these are important objectives, but the objective behind Article 71 is also to be found in the Preamble and the Court does not explain why this should have less importance (we will return to this point below). The Court replaces a clear rule with a conditional one; the external convention rules will only apply if they satisfy certain conditions, but it is by no means obvious how the principles the Court identifies (such as facilitation of the sound administration of justice) are to be applied in concrete cases, in weighing CMR rules against the Regulation. Courts may readily differ on the relative weight, priority, scope and application of these principles. What appeared on its face to be a clear rule determining which law should apply (Regulation or Convention?) has become highly speculative. It is true that a teleological approach to interpretation is likely to lead to less predictable results and I would not want to argue that it should therefore be avoided. However in this case the Court creates exceptions to an ostensibly clear rule, giving preference to one objective over another on the basis of a teleology

³⁵ A phrase used in the preambles to several legislative acts in this field, see eg Council Decision 2003/93/EC authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, OJ L 48, 21.2.2003, p. 1.

³⁶ For example in accepting the so-called ‘export prohibition’ in the directive on depositor guarantees despite it being ‘an exception to the minimum harmonization and mutual recognition which the Directive generally seeks to achieve’: Case C-233/94 *Germany v European Parliament and Council* [1997] ECR I-02405, para 43.

³⁷ See case C-61/94 *Commission v Germany* [1996] ECR I-3989, para 52; joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351, paras 281-284.

which is itself unclear. The ultimate aim may be free circulation of civil and commercial judgments, but it has generally been held that certainty and uniformity are central features of the Brussels Regulation's approach to achieving that aim.³⁸ The effect of *TNT Express* is to undermine certainty and predictability in such a way that although greater uniformity is the apparent goal (ensuring that the Regulation's underlying principles are not compromised) this will not necessarily be the result.

Some commentators have accepted the Court's argument on the basis of a primacy rule: that EU law prevails over other treaty commitments between the Member States.³⁹ However since in this case the Regulation itself makes an explicit *renvoi* to the specialized conventions, this argument can only apply if there were to be an incompatibility with a provision of EU law which is superior in status to the Regulation, such as the EU Treaties or general principles of law including fundamental rights.⁴⁰ But this is not the case here; on the contrary, the Court derives the principles it applies from the Regulation itself, and does not claim that they have a higher status.

The strongest argument for a conditional reading of Article 71 is found in paragraph 55 of the judgment. Here the Court refers to the principle of mutual trust which undoubtedly underlies the Regulation. Certainly, the Regulation and other components of EU law on civil justice are based on the assumption of a high level of mutual trust between Member States (a sometimes questionable assumption), to a greater degree than is found in private international law conventions. It is arguable

³⁸ For example, case C-281/02 *Owusu v Jackson* [2005] ECR I-1383. R Fentiman, 'Brussels I and Third States: Future Imperfect?' (2010-2011) 13 *Cambridge Yearbook of European Legal Studies* 65.

³⁹ For example, M Attal, n 32 above, para 29 ('la Cour de justice ... ne fait qu'appliquer strictement l'idée de test de compatibilité communautaire aux conventions internationales. '); Laurence Idot also argues that the Court applies 'une jurisprudence traditionnelle selon laquelle les conventions conclues par les États membres avec des États tiers ne peuvent être appliquées dans les relations entre États membres au détriment des objectifs du droit de l'Union.' L Idot, 'Conflit de conventions', *Europe* 2010 Juillet Comm. n° 260 p.34. See case C-533/08 *TNT Express*, n 2 above, para 52 and cases cited in n 12 above.

⁴⁰ Of the cases cited by the Court in para 52, case 286/86 *Deserbais* involved a possible incompatibility with primary law on the free movement of goods and there was no Community law *renvoi* to the international convention at issue. In Joined Cases C-241/91P and C-242/91P *RTE and ITP v Commission*, para 84, referred to by the Court, simply makes it clear that Article 351 TFEU does not apply to obligations between the Member States (a point which was not disputed in this case). The same is true of para 19 of case C-301/08 *Bogiatzi*, n 13 above, also cited by the Court. The judgment in *Bogiatzi* in fact held that the Regulation in question intended to replace, as between the Member States, elements of the Warsaw Convention on limits to carriers' liability; however since this replacement did not include the provision of the Warsaw Convention in question, the Regulation 'did not preclude' the application of the Convention, the two regimes being 'complementary and equivalent' to each other.

that this level of mutual trust should influence the interpretation of the CMR when it is being applied in an internal EU context – for example in the interpretation of the ‘formalities’ referred to in Article 31(3) CMR. One might argue even for a principle of conforming interpretation – not in this case interpretation of EU law so as where possible to conform to the EU’s international obligations,⁴¹ but the interpretation of the Member States’ international commitments – explicitly preserved by EU law – so as where possible to conform to the objectives of that EU law.⁴² Thus in *Lesoochránárske zoskupenie VLK* the Court argued that ‘if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law’, and thus it held that national courts should interpret national law as far as possible in accordance with the objectives of both the Aarhus Convention and effective judicial protection of rights conferred by EU law.⁴³

The limits of interpretation? Interpreting the CMR

But this brings us to a further problem: how is the Court of Justice to assess the compatibility of the CMR rules with the underlying principles it identified if it does not have jurisdiction to interpret the Convention? At one level the answer is easy: this is a job for the national courts since the CMR is binding on the Member States, not the EU. But we must remember that the national courts – given the Court’s interpretation of Article 71 – will not simply be interpreting the CMR, they will be determining the reach of Article 71 and thus the scope of the Regulation. We already know that the national courts differ in their interpretation of the *lis pendens* rules in Article 31 of the CMR. The result will certainly undermine the unity which the Court has said is such an important principle of the Regulation.

Here the opinion of AG Kokott provides a valuable alternative perspective. If the conditional interpretation of Article 71 is to operate effectively, then her more

⁴¹ See cases cited at n 14 above.

⁴² AG Kokott considers this possibility in the context of a possible analogy with Article 351 TFEU; she rejects it on the ground that Article 351 TFEU serves a very different purpose and operates in a very different context from Article 71: case C-533/08 *TNT Express*, n 2 above, opinion of AG Kokott, paras 81-87. While I agree with her analysis of Article 351, this does not preclude a possible application of the principle of conforming interpretation independently of that provision.

⁴³ C- 240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, [2011] ECR I-1255, paras 49-52.

nuanced approach to the question of interpretation of the CMR by the Court of Justice is helpful. Kokott in fact takes a different view of the relationship between the Regulation and the CMR (discussed below) and in doing so she canvasses fully the possible basis on which the Court might have jurisdiction to interpret the CMR. She mentions various possibilities: functional succession (which was the only possibility mentioned by the Court); the interpretation of customary international law enshrined in treaties; a specific conferral of competence by the treaty itself (as in the Brussels Convention); the interpretation of treaties expressly referred to in EU law.⁴⁴ None of these apply to the CMR; in this it is hard to disagree either with the analysis of AG Kokott or with the conclusions reached in the Court's judgment.

However, AG Kokott does not stop there. If the Court does not have jurisdiction to interpret the CMR directly, it can nevertheless be argued that the Court must be able to 'take cognisance' of the CMR in its interpretation of Article 71. The rules of the CMR form, as she says, part of the 'legal and factual background' of the Regulation; the Court may take a view of the scope of the CMR in order to determine the field of application of the Regulation, although this analysis of the CMR (in contrast to the interpretation of Article 71) will not be binding on the national courts.⁴⁵ She draws two analogies to support her argument. The first is to the way the Court may take cognisance of the rules of national law in a preliminary reference procedure where a question has been raised as to the compatibility of national law with Union law; the Court cannot rule directly on the interpretation of national law but gives a ruling on the interpretation of Union law which takes account of the national law in question. As Kokott says, this is not simply an exercise in formalism but safeguards the primary competence of the national courts. The second parallel she draws is with the way in which the Court of Justice, in the context of Article 351 TFEU, is required to take cognisance of the substantive content of treaties to which Member States are parties, although it is ultimately for the national court to determine whether the treaty presents an obstacle to the application of Union law in a particular case. As already noted, the Advocate General stops short of extending the parallel to an obligation of consistent interpretation on the ground that here 'the legislature

⁴⁴ The Advocate General mentions here the *Fediol / Nakajima* case law and the reference in the EU Trademark Regulation to the Paris Convention for the Protection of Intellectual Property which enabled the Court to interpret the Convention (case C-40/01 *Ansul* [2003] ECR I-2439, para 32). As she rightly says, the reference to specialized conventions in Article 71 makes it clear that these conventions are not 'incorporated' into Union law, but rather that the regimes are kept separate; this is in fact a case of '*renvoi sans réception*'. Case C-533/08 *TNT Express*, n 2 above, opinion of AG Kokott, paras 68-72.

⁴⁵ Case C-533/08 *TNT Express*, n 2 above, opinion of AG Kokott, paras 74-80.

deliberately left in being the co-existence of the regulation and the special rules in conventions, including in relations between the Member States, in order to give the special rules precedence. Consequently, there is no need for any adjustment or consistent interpretation of the convention in order to avoid divergences from European Union law.⁴⁶ However the Court's approach to Article 71, in giving ultimate priority to Union law, is closer to – though still different from – the logic of Article 351 TFEU, and if its interpretation of Article 71 is accepted the case for consistent interpretation is stronger.

The Advocate General therefore takes a more nuanced – and in my view more constructive – view of the distribution of functions between the Court of Justice and national courts, one which is based on a different assessment of the purpose of Article 71. The outcome is important given the number of conventions – especially in private international law – to which Member States but not the EU are party, and which may relate in different ways to EU law.

From this perspective the judgment in the subsequent case of *Nipponkoa* is to be welcomed.⁴⁷ The case raised very similar questions to *TNT Express*, on Article 71 of the Brussels Regulation and *lis pendens* under the CMR. While accepting the *TNT Express* interpretation of Article 71,⁴⁸ the Court offers more assistance to the national courts on the interpretation of the CMR. Relying on the fact that in *TNT Express* the Court had expressly been asked whether it had jurisdiction to interpret the CMR, the Court explains that in this case, in contrast, the questions have been worded in such a way as to focus on the interpretation of the Brussels Regulation. In its ruling it effectively 'takes cognisance' of the CMR so as to give guidance to the national court as to how it might apply Article 71 in the light of the *TNT Express* conditions. It starts by affirming that Article 71, as interpreted by the Court in *TNT Express*, precludes an interpretation of the CMR by national courts 'which fails to ensure, under conditions at least as favourable as those provided for by [the Brussels Regulation], that the underlying objectives and principles of that regulation are observed.'⁴⁹ The Court then goes on to indicate what interpretation of Article 31(2) CMR would be precluded on these grounds, and what interpretation would satisfy Article 71, and in so doing it refers to case law on the interpretation of *lis pendens* under Article 27 of the Brussels Regulation. In other words, it seeks to ensure a

⁴⁶ *Ibid.*, para 87, footnote omitted.

⁴⁷ C-452/12 *Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV*, judgment 19 December 2013, not yet reported.

⁴⁸ The President of the chamber which decided *Nipponkoa* was juge-rapporteur in *TNT Express*.

⁴⁹ C-452/12 *Nipponkoa*, n 47 above, para 39.

consistent interpretation between Article 31(2) CMR and Article 27 of the Brussels Regulation since only thus can it be ensured that the CMR will 'guarantee, in conditions at least as favourable as those laid down by Regulation No 44/2001, observance of the aim of minimising the risk of concurrent proceedings'.⁵⁰

The Court in *Nipponkoa* thus follows the interpretation of Article 71 established in *TNT Express*; however it nuances the effect of that judgment by offering guidance as to what interpretation of the CMR would be consistent with Article 71. The final interpretation of the Convention (can it bear the meaning which would achieve this consistency?) is properly left to the national court. This approach is more helpful to the national court and is likely to mitigate the uncertainty and fragmentation which would arise if different national courts are simply left to apply the *TNT Express* conditions to different clauses in the CMR (or other specialized conventions). Like *TNT Express* itself, it will operate over time to bring the interpretation of specialized conventions by Member State national courts closer and closer to the Brussels Regulation; a convergence of interpretation which will favour Brussels, since the principle of conditional application introduced by *TNT Express* means that consistent interpretation can move only in one direction.

Internal versus external objectives

Whether or not one agrees with the Court's judgment in this case, a striking feature is the prioritization of internal over external objectives. The Court prioritises those objectives which are linked to the establishment of the internal market (deeper integration), as opposed to the objective, likewise found in the preamble, of preserving the application of sectoral rules which although they may be less integrationist apply to a larger number of countries, including third countries. When what is at stake, as the Court sees it, is internal market integration (free movement of judgments in the EU) the Court does not hesitate to prioritise this objective over an international regime, although insofar as the derogation is explicit ('this Regulation shall not affect') it suggests a reverse preference by the legislature.

What is striking here is the Court's willingness to identify an objective – the internal market – which underlies the immediate objective of the Regulation – free movement of judgments – and then to derive from that the necessary conditions for achieving that objective (mutual trust, legal certainty, minimising the risk of

⁵⁰ Ibid., para 44.

concurrent proceedings etc), elevating these to non-derogable principles. Where the Union legislature sought to preserve an international sectoral regime, the Court insists on the need to protect the unity of the Union's internal legal space.

This is, in many ways, an understandable reaction, both in general terms and in the more specific context of private international law. As Pieter Jan Kuijper points out there are a considerable number of special regimes in this field, which 'raises the question of maintaining a minimum of unity in the Union system of private international law'.⁵¹ Kuijper, while recognizing that the judgment will attract criticism, indeed concludes that it is 'fully defensible and not overly radical'. In his comments on the case the sectoral specialised conventions are regarded as a threat to the unity of the EU's system of private international law, and he emphasizes the importance of the shift from the Brussels Convention to the Brussels Regulation. In some sense there may be a trade-off between preserving the unity of the Union system and its integration into a broader network of international law. The Court in *TNT* sets limits to the ability of the legislature, in creating a unified internal judicial space, to compromise this through the recognition of alternative rules. But, I would suggest, it is not necessary to regard the survival of the specialised conventions as a threat to the EU's judicial space. Ways might be found to enable the two to live together, and Article 71 is one such attempt, which should be taken seriously.

Earlier case law of the Court, on the equivalent provision in the Brussels Convention (case law which the Court in this case held was still relevant for the interpretation of the Brussels Regulation⁵²) took a different approach to the problem. In *Tatry*,⁵³ the Court, following AG Tesauro, rejected an argument to the effect that in cases covered by a specialised convention, the Brussels Convention was completely excluded, so that if for example the specialised convention were to contain no *lis pendens* rule then the *lis pendens* rule of the Brussels Convention could not apply. As AG Tesauro put it, the 'non affect' clause was not intended to exclude the operation of the Brussels Convention, but rather to allow for a coordination of the two systems: 'there can in my view be no question of Article 57 [the precursor of Article 71 of the Regulation] being interpreted merely as a subordinating provision, that is to say one which purely and simply affirms the primacy of the provisions of a particular

⁵¹ PJ Kuijper, 'The Changing Status of Private International Law Treaties of the Member States in Relation to Regulation 44/2001: case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG*' (2011) 38 *Legal Issues of European Integration* 89. See also Editorial Comments, (2011) 48 *Common Market Law Review*, n 11 above.

⁵² Case C-533/08 *TNT Express*, n 2 above, para 39.

⁵³ Case C-406/92 *Tatry* [1994] ECR I-05439.

convention, ... a provision by virtue of which, therefore, the existence of the connecting factors contemplated in the special convention means that the provisions of the Brussels Convention cannot be applied at all. ... on the contrary, a systematic reading of that provision shows that it is more in the nature of a coordinating provision, designed to allow the respective provisions to be applied in combination.’⁵⁴ Article 57, the Court held in *Tatry*, means that the Brussels Convention should apply except insofar as its application conflicts with the specialised convention. The contrast with the *TNT* judgment is striking: according to the Court in *TNT* the specialised convention may apply except insofar as it conflicts with the principles of the Regulation; according to *Tatry* the Regulation will apply unless it conflicts with the specialised convention.⁵⁵

This formulation makes it clear that this approach is not less defensive of EU law. It is simply that the defence takes a different form. Instead of a potentially wider but conditional application of the international convention it would suggest a narrower interpretation of the ‘non affect’ clause in Article 71, minimising the occasions on which it will be necessary to set aside the Regulation but recognising that there will be cases where the two sets of rules cannot operate concurrently, and where the convention will apply, taking seriously the desire of the legislature not to disconnect the EU judicial space from broader international agreements in private international law.

Indeed, the conditional application of the specialized conventions advocated in *TNT Express* is likely in practice to mean that the Regulation will almost always prevail. To take review of jurisdiction as an example: since the Brussels Regulation takes a very strict approach to review of jurisdiction in Article 35(3), it is almost bound to offer greater freedom of movement of judgments than any specialised convention which may allow the possibility of review, so it seems unlikely that as far as recognition and enforcement of judgments is concerned any specialised convention

⁵⁴ *Ibid.*, opinion of AG Tesouro, para 8.

⁵⁵ See AG Kokott’s opinion in case C-533/08 *TNT Express*, n 2 above, para 35: ‘In order to take account of the regulation’s claim to applicability, recourse must always be had to it where its application is not at odds with a specialised convention.’ In general Kokott seems more inclined to follow this line of reasoning; see the discussion in paras 36-44 of her opinion on the way in which the Regulation and the CMR interact as regards jurisdiction on the one hand and recognition and enforcement on the other, and her analysis of the relationship between Article 31 CMR, Article 71 and the rules in Article 35(3) of the Regulation on review of jurisdiction: as the CMR neither precludes nor requires a review of jurisdiction prior to enforcement, Article 71 creates no obstacle to the application of Article 35(3) which precludes review.

will satisfy the *TNT Express* tests.⁵⁶ Where a convention provision is flexible enough to allow the operation of the rule contained in the Brussels Regulation, the latter can be applied; where the convention precludes such operation it will come up against the conditional applicability tests, with the result that the Regulation will (again) be applied. The judgment therefore creates a type of judicial *de facto* disconnection clause;⁵⁷ despite the apparent *renvoi* to external conventions, the practical result is that in every case involving the Member States either EU law or a convention rule that has been interpreted to conform to EU law will apply. However unlike a disconnection clause which makes it clear that EU law will always apply between the Member States, here we have the uncertainty of conditional application.

Setting aside for a moment the uncertainty question, does this result pose problems for the EU? The Court is protecting the unity of the EU system, an understandable goal, but in what sense? Article 71 of the Brussels Regulation, we remember, is not a case where an external source of law is ‘transposed’ by reference into the EU system, in which case it becomes an ‘integral part’ of the system of EU law and naturally falls under the interpretative jurisdiction of the Court.⁵⁸ Article 71 is a reference out of the system to an external source. The Court reacts by insisting that the external source must be ‘disinfected’ before it can be applied. The principles against which it must be tested are presented as derived from the Regulation (and not as primary law) but undoubtedly they represent general principles which govern the operation of the internal market and judicial cooperation in civil and commercial matters, including mutual trust and free movement of judgments. The Court has in fact used a similar tactic when interpreting a *renvoi* to national law found in EU secondary legislation. For example, in *JP Morgan* the Court held that although the Sixth VAT Directive provided that a certain term was to be defined by Member States’ national law, in so doing the Member States do not have complete discretion: ‘they may not prejudice the objectives pursued by the Sixth Directive or the general principles underlying it, in particular the principle of fiscal neutrality.’⁵⁹ The similarity to *TNT Express* is clear. Can this approach simply be transposed to a case where the *renvoi* is not to national law, but to an international convention? The situations, in my view, are very

⁵⁶ Michel Attal, ‘Droit international privé communautaire et conventions internationales : une délicate articulation’ Petites affiches, 30 novembre 2010 n° 238, p. 22, at paras 25-26.

⁵⁷ See n 15 above.

⁵⁸ C.f. case 181/73 *Haegeman* [1974] ECR 449. For an example see case C-439/01 *Libor Cipra & Vlastimil Kvasnicka v Bezirkshauptmannschaft Mistelbach* [2003] ECR I-745, paras 23-24.

⁵⁹ Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust plc and The Association of Investment Trust Companies v The Commissioners of HM Revenue and Customs* [2007] ECR I-5517, para 22. Thanks to Loic Azoulai for suggesting this comparison.

different. A Member State transposing a Directive, even where the Directive grants a wide discretion, is acting in order to achieve the results defined by the Directive.⁶⁰ In the case of a *renvoi* of the type found in Article 71 there is no necessary commonality of intended result between the EU law and the international convention. The convention is not part of the Regulation regime; it is, on the contrary, establishing a distinct international regime of judicial cooperation in civil and commercial matters with a large number of parties in addition to the EU Member States. It might not have been the intention of the Court (which was concerned to protect the unity of the EU system), but its judgment, although concerned with a case between two Member States, will impact on the convention regime more broadly. We have seen that it is likely to affect the interpretation of the convention in EU Member State courts; in effect the internal priorities of the EU will spill over into the convention regime, not necessarily to its advantage. It makes it more difficult to maintain a distinct specialised convention regime with broader participation than the EU, and with its own distinctive priorities. Thus the unity of the EU's internal system is bought at the expense of the risk of fragmentation of the international regime.

I would argue that this matters especially in the context of private international law. Conflicts of laws – private international law – is based not on harmonising the applicable law but on ensuring that there are clear rules determining which law will apply – including laws on jurisdiction and enforcement of judgments. From this perspective the broader application of a specialised convention such as the CMR may be more important and conducive to legal certainty in commercial transactions than the preservation of internal homogeneity in the EU through privileging the Brussels Regulation. Presumably this was the reason behind Article 71 – which remains in the current Regulation. But wherever this balance may be struck, it is important that the rule be a clear one. Article 71 is essentially a conflicts of laws clause, indicating which law will apply; the Court in *TNT Express* treated it as a (potential) derogation from the substantive principles of EU law and by subjecting its application to substantive conditions it undermines the procedural, allocative function of the rule. The tension arises out of the fact that the Brussels Regulation juxtaposes the harmonisation model and the allocation model; it (inter alia) harmonises Member States laws on allocation of jurisdiction.⁶¹ Thus where the Regulation offers incomplete harmonisation (Article 71) the Court, instead of accepting the choice of a simple allocation rule, tries to limit this effect by imposing a

⁶⁰ Article 288 TFEU.

⁶¹ Hence the Court's refusal in *Owusu*, n 38 above, to countenance a *forum non conveniens* doctrine.

certain 'minimum' harmonisation through its formulation of the 'underlying principles' of the Regulation to which any law referred to (any specialised convention) must conform if it is to replace the rule in the Regulation. While this is understandable within the logic of Union law, the choice should have been explicitly argued; it also fails to address a further consideration: that the international conventions referred to in Article 71 themselves offer a degree of harmonisation and include more jurisdictions.

Finally let us return briefly to the question of uncertainty. The presumably unintended effect of *TNT Express* in this respect is illustrated by the recent judgment in *Wencel*.⁶² The case raised the question of the relationship between EU law on social security and bilateral conventions between the Member States. According to Article 7(2)(c) of Regulation 1408/2001, certain provisions of social security conventions entered into by the Member States before the entry into force of the Regulation shall continue to be applicable under certain conditions, including where the convention is more favourable to the beneficiary, or where the convention arises from specific historical circumstances and its effect is limited in time. One can imagine discussion on the application of these conditions to a particular case but it seems clear under what conditions a bilateral convention may, exceptionally, be applied. However in *Wencel* the Court cut off any discussion of these conditions by applying *TNT Express* 'by analogy'. The Court argued first that the application of a bilateral convention should be excluded, not only when the conditions established in Article 7(2)(c) Regulation 1408/01 are not met, 'but also where the provisions of that convention are inconsistent with the principles on which the regulation is based.'⁶³ Those principles, the Court said, include the abolition of obstacles to the free movement of persons. The Court then determined that 'since Mrs Wencel has exercised her freedom of movement, her situation is governed by the principles on which Regulation No 1408/71 is based. Given that the international convention in question was not adopted for the purpose of putting those principles into effect, it is possible that, in a situation such as that in the main proceedings, it might undermine those principles.'⁶⁴ The conclusion is that the court should ignore the convention, not even enquiring whether it meets any of the Article 7(2)(c) conditions, and simply apply the Regulation. Now it may be that in most or many cases the removal of obstacles to freedom of movement and favouring the beneficiary will operate towards the same

⁶² Case C-589/10 *Wencel v Zakład Ubezpieczeń Społecznych w Białymstoku*, judgment of 16 May 2013, not yet reported.

⁶³ Case C-589/10 *Wencel*, n 62 above, para 38.

⁶⁴ *Ibid.*, para 40.

result, but it need not necessarily be so, and on what basis should the Court remove a clear statutory criterion and replace it with an alternative? In any event the Court did not compare the result given by the Regulation with that which would result from the application of the convention and decide which favoured free movement; it simply held that because the claimant had exercised her right of free movement, the regulation and not the convention should apply.⁶⁵

This case may be (and in my view is) a misapplication of *TNT Express* and so is not perhaps an indication of results which will inevitably follow from that ruling. However it gives us some idea of the potential the *TNT Express* judgment might have when applied outside its private international law setting.

Conclusion

The *TNT Express* case illustrates, as do others,⁶⁶ the difficulties caused where the EU *acquis* starts developing in a field hitherto dominated by international conventions to which the EU is not (yet) a party. No doubt many of the problems would, and will, be resolved by wider EU participation. However in the interim, and as things stand, ways need to be found to enable EU law to live with existing and successful international regimes.

In *TNT Express* the Court adopts an interpretation of Article 71 of the Brussels Regulation which is hard to defend in textual terms and which denies the apparent will of the legislature. It does this by applying a kind of teleology defined with reference to achieving solely internal objectives, ignoring the broader international policy choices the legislature might have had in mind. The result is to empty the provision of all real legal force (and the application of *TNT Express* 'by analogy' in *Wencel* illustrates that this effect is not restricted to the Brussels Regulation). An alternative approach based on the earlier judgment in *Tatry*, and more in line with the opinion of AG Kokott, would emphasise that the Regulation should apply unless clearly precluded by the provisions of a specialised convention but would not then subject the convention's application to any additional conditions.

⁶⁵ In contrast, AG Cruz Villalón in fact took the view that one of the conditions of Article 7(2)(c) applied and that therefore the case should be governed by the bilateral convention: Case C-589/10 *Wencel*, n 62 above, opinion of AG Cruz Villalón, paras 41-49. The AG also refers to *TNT Express*, but seems to regard it as an alternative expression of the 'more favourable' condition, concluding that the application of the convention would not impede free movement.

⁶⁶ See for example case C-301/08 *Bogiatzi*, n 13 above, and case C-308/06 *Intertanko*, n 14 above.

The Court effectively decides that certain principles which underlie the policy field (e.g. free movement of judgments and mutual trust as a basis for judicial cooperation) are constitutional in nature. This carries internal and external consequences. The principles identified by the Court are non-derogable even where the legislature has chosen to limit the scope of harmonisation and thus the degree of uniformity in the Union system. Thus certain choices in the creation of the area of freedom, security and justice are removed from the political agenda. The principles are non-derogable even where the legislature has chosen to leave space to an international regime. The case in question was 'internal' in the sense of involving the jurisdiction of courts in two Member States and this no doubt influenced the Court in its emphasis on mutual trust and in giving priority to the operation of the internal market. However the effects of the judgment will have an impact on the international regime more generally, including in cases involving third countries.⁶⁷

The interpretation adopted in *TNT Express* is based on certain of the Regulation's objectives but by replacing a clear allocation rule with a series of conditions it actually undermines another of the Regulation's key concerns: creating clear and predictable rules on jurisdiction and enforcement of judgments. The uncertainty is increased by its refusal to give guidance to the national court on the extent to which the convention might be incompatible with the principles it has identified. This aspect of the case – although not the fundamental problem of the interpretation of Article 71 – has subsequently been mitigated by the judgment in *Nipponkoa*.

It is entirely comprehensible that the Court should see its role as defending the operation of the EU legal order. However in this case the Court not only appears to be unreceptive to the idea that the legislature may choose to leave certain matters to alternative international legal mechanisms; it also pays insufficient explicit attention to the broader consequences of its decision: the undermining of alternative systems of international cooperation in private international law.

⁶⁷ Note, for example, the possibility of *lis pendens* being applied by a Member State court in relation to proceedings before a court of a third State under Article 33 of Regulation 1215/2012, note 3 above.