Jurisdiction in road transport cases – Concurrence of CMR and Brussels I (recast): unsettled issues (1)

Willem BOONK, LL.M.

1. Introduction

This Article deals with the international jurisdiction of the courts in cases where the CMR convention is applicable. (2)

In the day-to-day practice of the CMR claims handler, it is well-known by now that courts in the different contracting states have different ways of dealing with (inter alia) the force majeure defence of the carrier and with the question under what circumstances the carrier may be held liable for more than the standard limitation of liability of 8.33 SDR per kilogram. In many cases, the outcome may very well depend on whether – for example – a German or a Dutch court is to decide the matter. For this reason, the question *'what court has jurisdiction?'* is always a hot item in CMR cases.

One of the 'problems' that arise in case law on CMR and jurisdiction, is the relationship between the jurisdiction rules contained in Article 31 CMR and the more general rules as laid down in the European Regulation *'Brussels I (recast)'*. (3)

Below, the present state of affairs with respect to the problem of concurrence of CMR and Brussels I (recast) will first be discussed. Subsequently, two examples taken from relatively recent Dutch case law with seemingly contradictory outcomes will be examined.

2. Concurrence of CMR and Brussels I (recast)

2.1 The jurisdiction rules in Article 31 CMR

The jurisdiction rules of the CMR are contained in Article 31. Article 31 confers jurisdiction on the following courts:

1. the court chosen by the parties, if applicable;
2. the court of the place of domicile of the defendant;
3. the court of the place where the goods were taken over by the carrier; and
4. the court of the place of delivery.

(1) An earlier, Dutch language version of the present paper was published in *Weg en Wagen*: Willem Boonk, *Jurisdictie in het wegvervoer – Samenloop van CMR en EEX-Vo II: nog steeds geen uitgemaakte zaak*, in: Weg en Wagen, oktober 2019, nr. 88.

(2) Convention on the contract for the international carriage of goods by road (CMR), Geneva 1956.

(3) EU Regulation no. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

The CMR provides for alternative competent forums: the claimant may choose freely before which of the above courts he brings his claims. Furthermore, these grounds of jurisdiction apply to all legal proceedings arising out of carriage under the CMR, including the (negative) declaratory proceedings that has become popular with carriers, especially in the Netherlands.

In principle it is the first court seized that ultimately decides the case. As courts in different countries tend to come to different outcomes in CMR cases, the freedom of choice of the claimant in practice has led to what is commonly known as the 'race to the courts': in case of loss or damage to cargo, both the carrier and the cargo interests quickly determine which of the courts available under Article 31 is likely to generate the most beneficial outcome for their respective positions and subsequently attempt to be the first party to initiate proceedings, in that court.

2.2 CMR and Brussels I (recast)

For civil and commercial cases generally, the international jurisdiction of the courts in the EU is determined by the rules of EU Regulation 'Brussels I (recast)'. This Regulation would also apply in cases concerning the carriage of goods, but for claims subject to the CMR, an exception applies. Briefly put, this exception stipulates that international conventions that cover a particular subject-matter and contain rules governing international jurisdiction, have preference over the more general rules of Brussels I (recast).(4)

The CMR convention is such a 'convention on a particular matter' within the meaning of Article 71 Brussels I (recast): it covers a particular subject-matter, i.e. the contract of international carriage by road, and in Article 31 it provides for its own jurisdiction rules.

It follows that the starting point is that the jurisdiction rules in the CMR have preference over the more general rules contained in Brussels I (recast). In other words: in CMR cases, Article 31 CMR applies and not Brussels I (recast).

However, this starting point has been qualified by the European Court of Justice in some respects.

In the *Tatry* case,(5) the ECJ held that a convention on a particular matter only excludes the applicability of Brussels I (recast) in those instances that are actually covered by the jurisdiction rules of that convention, and not in the instances that are not actually covered. In order words, if the convention on a particular matter does not regulate the specific circumstances of the case, the jurisdiction rules in Brussels I (recast) would still apply.

Further conditions for the application of the jurisdiction rules in a convention on a particular matter instead of Brussels I (recast), were set by the ECJ in the cases of

(4) Article 71 Brussels I (recast).
(5) ECJ 6 December 1994, C-406/92 (*'Tatry'*).

TNT/AXA and *Nipponkoa/Inter-Zuid*.(6) According to the Court, these jurisdiction rules can only apply with preference over the rules of the Regulation, if they do not infringe the principles that underly the judicial cooperation between the Member States. In concrete terms, the ECJ in TNT /AXA held that the jurisdiction rules in a convention on a particular matter apply:

> *"provided that they are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimised and that they ensure, under conditions at least as favourable as those provided for by the regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the European Union (favor executionis)."* (7)

The upshot is, that in CMR cases, the jurisdiction rules in Article 31 CMR apply and not those in Brussels I (recast), provided the jurisdiction rules in Article 31 CMR are consistent with the principles of the European jurisdiction law.

3. Court of Limburg 29 March 2017: third-party action

In the first judgment to be examined, from 2017, the Court of Limburg (the Netherlands) had to deal with the question of jurisdiction in third-party proceedings.(8) The Dutch carrier Inter-Zuid was sued by AMM in respect of loss suffered by the actual carrier, apparently resulting from their trucks being held by French customs in connection with unpaid excise duties and subsequent fines. Inter-Zuid then brought a third-party action before the same Court of Limburg against the Germany based company Howasped.(9)

With respect to the jurisdiction of the court in the third-party action, Inter-Zuid relied on Article 8(2) Brussels I (recast). Under this provision, the court that has jurisdiction to hear the principal action also has jurisdiction to hear the third-party action. Under the CMR convention, there is no such specific rule for jurisdiction in third-party proceedings. The question before the court was, therefore, whether in this case Article 8(2) Brussels I (recast) could be applied, complementary to the jurisdiction rules in the CMR.

The court considered that further to the case law of the European Court of Justice (inter alia *TNT/AXA*), the (sole) application of the CMR should not infringe the principles underlying the judicial cooperation between the Member States in civil and commercial matters, amongst which specifically the minimisation of the risk of concurrent proceedings and irreconcilable judgments, and mutual trust in the administration of justice in the European Union. As the decision in third-party proceedings was especially dependent on the decision in the principal action, the court

(6) ECJ 4 May 2010, C-533/08 (*'TNT/AXA'*) and ECJ 19 December 2013, C-452/12 (*'Nipponkoa/Inter-Zuid'*).
(7) ECJ 4 May 2010, C-533/08 (*'TNT/AXA'*), decision para. 1).
(8) Court of Limburg 29 March 2017, ECLI:NL:RBLIM:2017:3038, *Schip & Schade* 2018/6
(9) Unfortunately, the judgment as published provides little insight in the precise facts of the case.

held that for this reason alone, it would be undesirable that these two proceedings should take place before courts in different countries.

In addition, the court held:

> *"In view of the aforementioned judgments of the European Court of Justice, and in view of the fact that the CMR does contain certain rules on jurisdiction, but no provisions regarding lis pendens or related actions, the Court holds Article 8(2) Brussels I (recast) can be applied in this case."* ([10])

One could question the consideration of the court that the CMR does not contain provisions regarding lis pendens or related actions. However, it is true that the CMR does not contain a provision with respect to third-party proceedings specifically and the judgment appears to be well in line the ECJ's decision in the *Tatry* case.

4. Court of Rotterdam 3 July 2019: co-defendants

The second judgment to be examined is from the Court of Rotterdam in 2019. The case regarded the theft of a container with tobacco during the carriage from Lübeck in Germany to Dagmarsellen in Switzerland. ([11])

The carrier Van Velthoven brought an action against various parties before the Court of Rotterdam in negative declaratory proceedings, seeking a declaration of non-liability or alternatively a declaration that the CMR limitation of liability could be relied upon. Of the defendants, only one was domiciled in the Netherlands. This was Containerships Rotterdam.

The legal relationships between the parties involved were subject to the CMR convention. As the carriage in question was not to or from the Netherlands, on the basis of Article 31 CMR the court could only assume jurisdiction vis-à-vis Containerships Rotterdam. With respect to the other defendants, the CMR did not provide any grounds of jurisdiction.

The claimant Van Velthoven, however, did not rely on the provisions of the CMR, but rather on Article 8(1) Brussel I (recast). ([12]) According to this provision a court that has jurisdiction over one of the defendants on the basis of their place of domicile, also has jurisdiction over the co-defendants, provided that – briefly put – the claims against the different defendants are closely connected. This was indeed the case here: Containerships Rotterdam was domiciled within the district of the court and for all defendants, the case was in respect of the same carriage and the same theft.

The CMR convention does not provide specific rules for jurisdiction in respect of co-defendants. The question put before the court was, whether in this case – like in

([10]) The translation from the original Dutch is my own.

([11]) Court of Rotterdam 3 July 2019, ECLI:NL:RBROT:2019:5301, *Schip & Schade* 2019/110

([12]) As some of the parties concerned are domiciled outside the EU, the court also considers the application of the 2007 Lugano Convention and Dutch domestic jurisdiction law. For the present paper, the considerations of the court in this respect are not relevant.

the case before the Court of Limburg discussed above – Article 8 Brussels I (recast) (this time subsection 1 of the provision) could be applied, complementary to the jurisdiction rules of the CMR.

The court first considered this was a case of concurrence between the jurisdiction rules in the CMR and those contained in Brussels I (recast). According to the court, the applicability of the CMR as a convention on a particular matter in principle excluded the application of Brussels I (recast). Interestingly, the court then considered the following:

> *"This principle is even more dominant, or is confirmed, in cases such as the present, where there is concurrence between the jurisdiction rules of Brussels I (recast) and those in Article 31(1) CMR, as from the text of Article 31(1) CMR it follows unmistakably that these jurisdiction rules are to be applied strictly: 'and in no other courts or tribunals'."* ([13])

Furthermore, the court referenced the further conditions set by the European Court of Justice in the *TNT/AXA* and *Nipponkoa/Inter-Zuid* cases, in brief: the application of the jurisdiction rules in the CMR should be consistent with the principles of European jurisdiction law.

The court continued as follows:

> *"The question is therefore whether the absence in (Article 31 of) the CMR of a jurisdiction rule similar to Article 8 subsection 1 Brussels I (recast) would (to a substantial degree) infringe the European law principles mentioned above. In the present case this question must be answered in the negative."* ([14])

After this, the court went on to further explain why the absence of a specific jurisdiction rule with respect to co-defendants did not infringe any principles of European jurisdiction law.

In any event, the outcome in this case was: no complementary application of Brussels I (recast) and therefore no jurisdiction vis-à-vis any of the defendants not domiciled in the Netherlands.

5. The two judgments compared

In brief summary, the Court of Limburg held: Article 8(2) Brussels I (recast) (third-party action) applies supplementarily in CMR cases. The effect of this ruling is that the defendant in a CMR case could initiate third-party proceedings before the same court, even though this court would not have had jurisdiction with respect to the third party under Article 31 CMR.

([13]) The translation from the original Dutch is my own.
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By (apparent) contrast, the Court of Rotterdam held: Article 8(1) Brussels I (recast) (co-defendants) does not apply supplementarily in CMR cases. ([15]) In other words, the claimant could not sue all parties involved in the Netherlands, on the sole basis that one of these parties is domiciled in the Netherlands.

It appears the Court of Limburg emphasized the absence of specific jurisdiction rules in the CMR dealing with third-party proceedings. In conformity with the *Tatry* case, the court held that in the absence of such specific rules, the corresponding rules in Brussels I (recast) should be applied.

The Court of Rotterdam, on the other hand, emphasized the exclusivity of the jurisdiction rules in the CMR, referencing the text of Article 31: *"and in no other courts or tribunals"*. The court then solved the concurrence Issue by further reference to the ECJ cases *TNT/AXA* and *Nipponkoa/Inter-Zuid*: if the jurisdiction rules in the convention on an particular matter do not infringe the principles of European jurisdiction law, only those jurisdiction rules should be applied. What appears to be missing in the approach of the Court of Rotterdam, is a consideration of the effect of the ECJ's ruling in the *Tatry* case.

The approach of the Court of Limburg in the first case would appear preferable. First, consideration should be given to whether or not the matter at hand is actually covered by the jurisdiction rules in the CMR. If not, the general jurisdiction rules in Brussels I (recast) should be relied upon. If it is covered, only then consideration should be given to whether or not the relevant jurisdictional rules comply with the conditions set by the European Court of Justice in (inter alia) the *TNT/ AXA* case.

Quite apart from the above dogmatic approach, from a practical point of view there is a lot to say for the differences in outcome in the two cases. In both cases, the claiming party has an interest in having similar cases against different parties judged by the same court: the principal and third-party action in the first case, similar claims against various (co-)defendants in the second.

The practical difference between the two cases lies in that, in the case of the co-defendants, the claiming party has a 'free choice' with respect to where it brings its claims. The claimant could have chosen a court that would have jurisdiction under Article 31 CMR in respect of all defendants (i.e. the court of the place where the goods were taken over by the carrier or of the place of delivery).

The claimant in the third-party action, conversely, is the defendant in the principal action. This claimant therefore does not have a choice. He does not have the

([15]) It should be noted that the Court of Limburg recently handed down a decision in a matter similar to the above discussed case before the Court of Rotterdam, i.e. with respect to the complementary application of Article 8(1) Brussels I (recast) (Court of Limburg 25 September 2019, ECLI:NL:RBLIM:2019:8567). In this decision, the Court of Limburg explicitly followed the reasoning of the Court of Rotterdam and held that the jurisdiction rules in the CMR do not leave room for complementary application of Article 8(1) Brussels I (recast). It would appear that the apparent divergence between the two cases discussed in the present paper is not so much a case of a difference in approach between two regional courts generally, but rather a more principled difference in approach to the specific application of subsections 1 and 2 of Article 8 Brussels I (recast), at least by the Court of Limburg.

option to choose the court that would have jurisdiction under Article 31 CMR in respect of both the principal proceedings and the third-party action.

6. In conclusion

From the two cases examined above, it follows that even with the guidelines provided by the European Court of Justice in *TNT/AXA* and *Nipponkoa/Inter-Zuid*, not all potential issues regarding concurrence of the CMR and Brussels I (recast) have been completely resolved yet.