OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 28 January 2010 [1]

I – Introduction

1. This reference for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) concerns the relationship between Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2] on the one hand, and the Geneva Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956 ('the CMR'), [3] on the other hand.

2. Article 71 of Regulation No 44/2001 allows international conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction, recognition and enforcement to continue to apply under certain circumstances. The referring court seeks clarification as to the relationship between certain rules in the CMR and the regulation. In this context, it asks whether the Court of Justice has jurisdiction to interpret the CMR and, if so, what meaning is to be given to the provisions governing *lis pendens* and the enforcement of foreign judgments contained in Article 31 of that convention.

II – Relevant legislation [4]

A – *The CMR*

3. The CMR lays down special rules concerning the international contract for the carriage of goods by road and includes both substantive provisions and procedural rules.

1 — Original language: German.

2 — OJ 2001 L 12, p. 1, in the version applicable here, as last amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1).

3 — The authentic language versions of the CMR are the English and French versions (published in *United Nations Treaty Series* 1961, No 5742, p. 190). The translation used [in the original text of this Opinion] is the official German translation printed in the German *Bundesgesetzblatt* (Federal Official Journal), 1961 II, p. 1120. The official abbreviation 'CMR' comes from the French title of the convention ('***C**onvention relative au contrat de transport international de **m**archandises par **r**oute*').

4 — Given that the EC Treaty was replaced by the TEU and the TFEU following the entry into force of the Treaty of Lisbon on 1 December 2009, in this Opinion I shall refer to provisions in accordance with their numbering in the Treaties now in force, unless the provisions to be applied are those of the EC Treaty. When citing the case-law of the Court on the previous provisions, I shall assume that that case-law also applies to the new provisions, unless these have been significantly amended. Finally, I shall use the names employed in the new Treaties (in particular using 'European Union' instead of 'Community').

The CMR was already recognised, at the time when the convention preceding Regulation No 44/2001, the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, [5] was in force, as a specialised convention for the purposes of the provision preceding Article 71 of Regulation No 44/2001. [6] It has since been ratified by all the Member States.

4. Article 31 of the CMR reads as follows:

'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.

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 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 — OJ 1978 L 304, p. 36; consolidated version, OJ 1998 C 27, p. 1.

6 — See the list in the Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by P. Jenard (OJ 1979 C 59, p. 1, at p. 60).

5. Article 47 of the CMR, which governs jurisdiction to interpret the convention, provides:

'Any dispute between two or more Contracting Parties relating to the interpretation or application of this Convention, which the parties are unable to settle by negotiation or other means may, at the request of any one of the Contracting Parties concerned, be referred for settlement to the International Court of Justice.'

B – *European Union law*

6. The first and second paragraphs of Article 351 TFEU are worded as follows:

'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.'

7. Recitals 16, 17 and 25 in the preamble to Regulation No 44/2001 read:

'(16) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.

(17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.

...

(25) 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.'

8. Article 27 of Regulation No 44/2001 lays down the following rules governing instances where proceedings involving the same cause of action are pending concurrently before the courts of more than one Member State (*lis pendens*):

'1. 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.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.'

9. Article 34 of Regulation No 44/2001 provides for the following grounds for refusing to recognise a foreign judgment:

'A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

…

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

…'

10. Article 35 of Regulation No 44/2001 sets out further grounds for refusal. Article 35(3) reads:

'Subject to … paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.'

11. Where the decision on the application for a declaration of enforceability is appealed against under Articles 43 and 44 of Regulation No 44/2001, Article 45(1) provides that the aforementioned grounds for refusal of recognition are to apply *mutatis mutandis*.

12. Article 71 governs the relationship between Regulation No 44/2001 and conventions to which the Member States are parties, as follows:

'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:

(a) this Regulation shall not prevent a court of a Member State, which is a party to a convention on a particular matter, from assuming jurisdiction in accordance with that convention …

(b) judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be 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 which concern the procedure for recognition and enforcement of judgments may be applied.'

III – Facts and questions referred

13. In April 2001, Siemens Nederland NV ('Siemens') and TNT Express Nederland BV ('TNT') entered into a contract for the carriage of goods to the value of DEM 103 540 and weighing 12 kg from Zoetermeer in the Netherlands to Unterschleissheim in Germany, where, however, they did not arrive. According to the referring court, the provisions of the CMR are applicable to that contract.

14. On 6 May 2002, TNT applied to the Rechtbank Rotterdam (Rotterdam Court) for a declaration that its liability to AXA Versicherung AG ('AXA'), Siemens' insurer, did not extend beyond the maximum liability limit laid down in Article 23 of the CMR (8.33 Special Drawing Rights – corresponding now to EUR 8.98 – per kilogramme of goods). The application was dismissed by judgment of 4 May 2005. TNT appealed to the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague) against that judgment.

15. On 20 August 2004, AXA brought an action against TNT before the Landgericht München I (Munich Regional Court I) in which it sought compensation for the damage caused to its client by the loss of the goods.

16. In those proceedings, TNT raised a plea of *lis pendens* under Article 31(2) of the CMR. However, the Landgericht held itself to have jurisdiction since, in accordance with settled case-law of the German Bundesgerichtshof (Federal Court of Justice), the action for a negative declaration [*negative Feststellungsklage* – that is to say, an action for a declaration that a right or legal relationship does not exist] brought by TNT and the action seeking performance subsequently brought by AXA did not relate to 'the same grounds' within the meaning of Article 31(2) of the CMR, and, by judgments of 4 April and 7 September 2006, it ordered TNT to pay compensation.

17. On 6 March 2007, AXA applied to the Rechtbank Utrecht (Utrecht Court) for a declaration of enforceability of the judgments of the Landgericht München I in the Netherlands. That application was granted by way of an interim measure on 28 March 2007. The appeal brought against that decision under Article 43 of Regulation No 44/2001 was unsuccessful.

18. TNT pursued its claim by means of an appeal on a point of law to the Hoge Raad. In support of the appeal, it submits that Article 31 of the CMR overrides the prohibition laid down in Article 35(3) of Regulation No 44/2001 against a review of the jurisdiction of the court of the Member State of origin. At the time when the appeal on a point of law was lodged, the Gerechtshof te 's-Gravenhage had not yet given judgment on the appeal brought by TNT against the judgment of the Rechtbank Rotterdam dismissing the application for a negative declaration.

19. Against that background, the Hoge Raad decided to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the second subparagraph of Article 71(2)(b) of Regulation No 44/2001 be interpreted as meaning:

(a) that the rules on recognition and enforcement laid down in Regulation No 44/2001 yield to those of a specialised convention only if the rules of the specialised convention claim exclusivity, or

(b) that, in the event of the simultaneous applicability of the conditions for recognition and enforcement laid down in the specialised convention and those laid down in Regulation No 44/2001, the conditions laid down in the specialised convention must always be applied and those laid down in Regulation No 44/2001 are not to be applied, even though the specialised convention makes no claim to exclusive effect vis-à-vis other international rules on recognition and enforcement?

(2) Does the Court of Justice have jurisdiction, with a view to forestalling divergent judgments with regard to the concurrence referred to in the first question, to interpret – in a manner binding on the courts of the Member States – the Convention on the Contract for the International Carriage of Goods by Road, signed in Geneva on 19 May 1956 (the CMR), in so far as the matters governed by Article 31 of that convention are concerned?

(3) If the answer to the second question is in the affirmative and the answer to part (a) of the first question is likewise in the affirmative, must the rules on recognition and enforcement laid down in Article 31(3) and (4) of the CMR be interpreted as meaning that that convention does not claim exclusivity and leaves room for the application of other international enforcement rules making recognition or enforcement possible, such as Regulation No 44/2001?

Should the Court of Justice answer part (b) of the first question in the affirmative and likewise answer the second question in the affirmative, the Hoge Raad also refers the following three questions for the further appraisal of the appeal on a point of law:

(4) In the event of an application for a declaration of enforceability, does Article 31(3) and (4) of the CMR permit the court of the State addressed to examine whether the court of the State of origin had international jurisdiction to hear the dispute?

(5) Must Article 71(1) of Regulation No 44/2001 be interpreted as meaning that, in the event of the concurrence of the *lis pendens* rules of the CMR and those of Regulation No 44/2001, the *lis pendens* rules of the CMR take precedence over those of Regulation No 44/2001?

(6) Do the declaration applied for in the present case in the Netherlands and the compensation in respect of damage sought in Germany relate to "the same grounds" within the meaning of Article 31(2) of the CMR?'

20. In the proceedings before the Court of Justice, observations have been submitted by TNT, the Netherlands, Czech and German Governments and the European Commission.

IV – Legal assessment

A – *Preliminary remark*

21. In the case of damage or loss relating to carriage, actions may be brought by both parties: an action by the party with the right of disposal (sender or recipient) for compensation and, conversely, an action by the carrier for a declaration that he is not liable for the damage or, at most, that his liability is confined to a maximum limit (an action for a 'negative declaration').

22. However, the rules on compensation contained in the CMR are interpreted in different ways by the courts of the contracting States party to that convention. The exemption – on the basis of the degree of fault – from the liability limit, which is granted by Article 29 of the CMR, is interpreted more restrictively by some courts and more extensively by others. [7] This may lead to a race by both parties to the court whose interpretation is favourable to each of them. [8] The result of this, not infrequently, is parallel proceedings before the courts of different States.

23. It is true that Article 31 (2) of the CMR provides that, in principle, no new action may be brought where proceedings 'between the same parties on the same grounds' are already pending (*lis pendens* rule). However, since there is also no consensus among the courts

7 — See the review in H. Jesser-Huß, *Münchener Kommentar zum Handelsgesetzbuch*, 2nd edition, Munich 2009, Article 29 of the CMR, paragraphs 8 to 13.

8 — See the opinion delivered by Advocaat-Generaal Strikwerda of the Hoge Raad der Nederlanden on 5 September 2008 in the main proceedings, p. 4, paragraph 9 and the further references.

of the contracting States with respect to the interpretation of this *lis pendens* rule, [9] parallel proceedings are ultimately not precluded.

24. The courts of some contracting States party to the CMR, including the German courts, interpret the phrase 'the same grounds' restrictively. They take the view that the aforementioned reciprocal actions do not relate to 'the same grounds' since one action seeks only a (negative) declaration while the other action seeks performance. In their view, the legal protection sought in an action for performance goes beyond the subject-matter of an action for a declaration, which means that the two do not share the same subject-matter. The fact that an action for a negative declaration has been brought does not therefore preclude the bringing of an action for performance. [10]

25. Accordingly, the Landgericht München I considered itself to have jurisdiction to give judgment on the action for performance brought by AXA, even though the action for a negative declaration brought by TNT was already pending in the Netherlands.

26. The Hoge Raad, on the other hand, in common with the courts of other contracting States, [11] takes the view that, under Article 31 (2) of the CMR, an action for a negative declaration which has been brought first also takes precedence over an action for performance brought subsequently. In this connection, reference is made, inter alia, to the case-law of the Court of Justice on the *lis pendens* rule in Article 21 of the Brussels Convention. [12]

27. However, the main proceedings are already at an advanced stage. It is no longer directly a matter of whether the court seised has jurisdiction to give judgment on an action for performance even though the party proceeded against has previously brought an action for a negative declaration that is pending before the courts of another Member State, as the Landgericht München I has already delivered an enforceable judgment. It is for the Netherlands courts alone to decide whether that judgment is to be recognised and enforced in the Netherlands. Whether the jurisdiction of the court of the Member State of origin can still be reviewed at all in these circumstances is one of the key questions of the present proceedings.

9 — See the references cited in J. Haubold, CMR und europäisches Zivilverfahrensrecht – Klarstellungen zu internationaler Zuständigkeit und Rechtshängigkeit, *Praxis des Internationalen Privat- und Verfahrensrechts – IPRax* 2006, 224, 227 and footnotes 24 to 25.

10 — Bundesgerichtshof, judgments of 20 November 2003, I ZR 102/02 and I ZR 294/02, downloadable from www.bundesgerichtshof.de.

11 — See, for example, Austrian Oberster Gerichtshof (Supreme Court), judgment of 17 February 2006 (10 Ob 147/05 y), and judgment of the Court of Appeal of England and Wales (United Kingdom) in *Andrea Merzario Ltd* v *Internationale Spedition Leitner Gesellschaft GmbH* [2001] EWCA Civ. 61, paragraphs 80 to 98 and 103 to 109.

12 — See Case 144/86 *Gubisch Maschinenfabrik* [1987] ECR 4861, paragraphs 14 to 19, and Case C-406/92 Tatry [1994] ECR I-5439, paragraphs 37 to 45.

28. Article 45(1) in conjunction with Article 35(3) of Regulation No 44/2001 prohibits review of the jurisdiction of the court of the Member State of origin as a condition for recognition and enforcement. Consequently, even if the court responsible for enforcement were to take the view that the court which gave judgment wrongly assumed jurisdiction, this could not, under Regulation No 44/2001, result in a refusal to grant a declaration of enforceability. The question whether Article 31 of the CMR likewise precludes such a review of jurisdiction at this stage of the case requires clarification in these proceedings.

29. For the purposes of enforcement of the judgment of the Landgericht München I in the Netherlands, it is therefore important to determine how the respective fields of application of the CMR and Regulation No 44/2001 are to be delimited. Only if the provisions of the regulation concerning recognition and enforcement are overridden by the CMR might the court responsible for enforcement be entitled to review the jurisdiction of the court which delivered the judgment to be enforced.

B – *The first question*

30. By the first question, the referring court seeks an interpretation of Article 71 of Regulation No 44/2001 with regard to the relationship between that regulation and conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments ('specialised conventions'). In essence, it wishes to ascertain whether Article 71 requires that, in order for the provisions of a specialised convention to take precedence, those provisions must claim exclusive effect.

31. Before answering that question, a number of general remarks must be made on the meaning of Article 71 of Regulation No 44/2001.

32. As Advocate General Tesauro rightly stated in *Tatry* with respect to the preceding provision in Article 57 of the Brussels Convention, the provision in question is a special provision intended to provide coordination between the Brussels Convention or Regulation No 44/2001, on the one hand, and existing conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments, on the other hand. [13]

33. Article 71 of Regulation No 44/2001 allows those specialised conventions to which the Member States are parties to apply by excluding the application of the regulation subject to certain conditions.

13 — Opinion of Advocate General Tesauro in *Tatry* (cited in footnote 12), point 8.

34. As the Court held in *Tatry*, the purpose of that exception is to ensure compliance with the rules laid down by specialised conventions with respect to jurisdiction and the recognition and enforcement of foreign judgments, since, in enacting those rules, account was taken of the specific features of the matters to which they relate. [14] Moreover, as is clear from recital 25 in the preamble to Regulation No 44/2001, Article 71 is intended to enable the Member States to meet their international commitments.

35. However, there is a degree of tension between that restriction of the field of application of Regulation No 44/2001 and the fundamental claim to applicability of European Union law and its precedence over national law, including conventions concluded by the Member States. 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. Moreover, restrictions on the field of application of the regulation must be interpreted restrictively and are required only where observance of a specialised convention makes them necessary.

36. This has two consequences:

— Article 71 of the regulation gives precedence to rules of international law only selectively, that is to say, in relation to questions which are governed by a specialised convention. [15] If a question is not or is only incompletely governed by the convention, the provisions of the regulation must be applied, where appropriate on a supplementary basis.

— Even if a question is governed by a convention, but that convention itself does not claim exclusivity, declaring its application instead to be merely subordinate to other regimes or to be a freely-electable alternative to them, the rules of the regulation likewise do not yield. [16] Rather, they may be applied in place of the specialised convention.

37. Those principles also found expression in the provisions of Article 71 (2) of the

14 — *Tatry* (cited in footnote 12), paragraph 24, a judgment which concerned Article 57 of the Brussels Convention. However, that finding can be transposed to the almost identical wording of Article 71 of Regulation No 44/2001, since, as stated in recital 19 in the preamble to the regulation, continuity between the convention and the regulation must be ensured (see Case C-167/08 *Draka NK Cables and Others* [2009] ECR I-3477, paragraph 20, and Case C-292/08 *German Graphics* [2009] ECR I-8421, paragraph 27).

15 — See, to this effect, *Tatry* (cited in footnote 12), paragraph 25.

16 — Thus, for example, Article 23 of the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, concluded on 2 October 1973 (downloadable from www.hcch.net.), provides that the convention is not to preclude the application of provisions of other instruments for recognition and enforcement.

regulation, which to some extent implement or give concrete form to Article 71 (1). [17]

38. It thus follows from the first subparagraph of Article 71(2)(b) that the provisions of the regulation relating to recognition and enforcement are also to be applied where jurisdiction to deliver the judgment in question is based on a specialised convention. It is true that a convention which contains rules conferring jurisdiction takes precedence in this regard over the provisions of Chapter II of Regulation No 44/2001. However, this does not mean that the regulation is overridden in its entirety, with the result that, on questions not governed by the convention (in particular questions concerning recognition and enforcement), recourse might thereafter be had to national law. The provisions of the regulation relating to recognition and enforcement remain applicable – subject to the second subparagraph of Article 71(2)(b).

39. The second subparagraph of Article 71(2)(b) is of central importance to this case. In accordance with the first sentence of that subparagraph, 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 and enforcement of judgments, those conditions are to apply. It follows, by converse inference, from that form of words that the regulation may be relied on where such a convention contains no rules or only incomplete rules.

40. It is true that the wording of that provision does not make it entirely clear whether the rules of the convention must also claim exclusivity. However, since restrictions on the field of application of the regulation are to be interpreted narrowly, it would be contrary to the regulation's objectives if its provisions could also remain inapplicable in cases where the specialised convention does not make such inapplicability compulsory in order to secure exclusive application for its own provisions. [18]

41. Moreover, a narrow interpretation of this kind of Article 71 of Regulation No 44/2001 in the context of recognition and enforcement is supported by the principle of *favor executionis* which underpins the regulation. [19] The Court has thus already held in *Tatry* that the purpose of the Brussels Convention is 'to strengthen in the Community the legal protection of persons therein established and to facilitate recognition of judgments in order to secure their enforcement.' [20]

17 — Opinion of Advocate General Tesauro in *Tatry* (cited in footnote 12), point 8.

18 — See, in this regard, the example of the Rhine Navigation Convention in the Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland by P. Schlosser (OJ 1979 C 59, p. 71, at p. 79, paragraph 243).

19 — See recitals 16 and 17 in its preamble.

20 — *Tatry* (cited in footnote 12), paragraph 25.

42. If the convention in question does not provide that a foreign judgment may be enforced only under the conditions which it itself lays down, but permits other provisions to be applied as an alternative, it is consonant with the principle of *favor executionis* that the rules which are favourable to enforcement may be applied.

43. In this regard, the provisions of Regulation No 44/2001 in particular will often make enforcement easier than it would be under international conventions. Because of the mutual trust which underpins the close cooperation between the courts of the Member States, the regulation usually imposes more modest requirements in the context of recognition and enforcement than is the case with international instruments. This can be seen, for example, from the fact that, pursuant to Article 35(3) of the regulation, the jurisdiction of the court of the Member State of origin may not be reviewed.

44. In the light of all the foregoing, the reply to the first question must be as follows:

The second subparagraph of Article 71(2)(b) of Regulation No 44/2001 is to be interpreted as meaning that the provisions of the regulation relating to the conditions for the recognition and enforcement of judgments given by the courts of another Member State yield to the corresponding provisions of a specialised convention to which the Member State of origin and the Member State addressed are parties only in so far as the provisions of the convention are definitive and exclusive in that they preclude the application of the regulation.

C – *The second question*

45. By its second question, the Hoge Raad wishes to ascertain whether the Court of Justice has jurisdiction to interpret the CMR. On closer examination, it is clear that there are two aspects to this question.

46. On the one hand, it must be determined whether, in the context of applying the second subparagraph of Article 71(2)(b) of Regulation No 44/2001, the Court of Justice may examine the CMR in order to determine the field of application of the regulation.

47. On the other hand, by raising this question, the Hoge Raad addresses a broader concern, which is to determine whether, in general, the Court of Justice can interpret a specialised convention to which Member States are parties in order to secure a uniform interpretation of the *lis pendens* rules in the convention and Regulation No 44/2001.

48. If, however, further examination were to show that the CMR does not contain any provisions which override the provisions on recognition and enforcement contained in

the regulation, the second aspect of the question would be hypothetical. For, in that event, the Netherlands courts would, in accordance with Article 35(3) of Regulation No 44/2001, not be entitled to review the jurisdiction of the court of the Member State of origin. In those circumstances there would therefore likewise be no reason to consider more closely whether that court correctly interpreted the *lis pendens* rule in Article 31 of the CMR.

49. The question whether the CMR contains provisions which override the provisions on recognition and enforcement in the regulation can, however, be determined only by interpretation. The Court must therefore give a ruling on the question whether it is for it or the national courts to undertake that interpretation. This will make it clear whether the Court subsequently interprets the CMR directly or whether it may only interpret the regulation in relation to the CMR.

1. Agreements to which the European Union is a party

50. Under Article 267 TFEU (formerly Article 234 EC), the Court of Justice has jurisdiction to interpret the Treaties and acts of the institutions, bodies, offices and agencies of the European Union. In accordance with settled case-law, acts of the institutions include international conventions to which the European Union itself has become a party in accordance with the procedure laid down in Article 218 TFEU (formerly Article 300 EC). Those conventions are an integral part of the legal order of the European Union and, within the framework of that legal order, the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of the law. [21]

51. However, the European Union as such is not a party to the CMR; only the Member States are. This means that the jurisdiction of the Court of Justice to interpret that convention cannot be based directly on the European Union's participation.

2. Analogy with mixed agreements?

52. It is true that the CMR is also not a 'mixed agreement' which, because of the shared competence in respect of the matters governed, has been concluded by both the Member States and the European Union. However, the referring court raises the question, by

21 — See Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 2 to 6; Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7; Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 36; Case C-308/06 *Intertanko* [2008] ECR I-4057, paragraph 53; and Case C-301/08 *Bogiatzi* [2009] ECR I-10185, paragraph 23 et seq.

reference to the judgment in *Hermès* [22] concerning interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), whether there is an analogy with the jurisdiction to interpret mixed agreements.

53. Mixed agreements also constitute agreements concluded by the European Union which the Court of Justice has jurisdiction to interpret, in any event within the framework defined by the competence of the European Union. [23] However, the respective spheres of competence cannot always be readily and clearly separated from each other. In its case-law on Article 50 of the TRIPs Agreement, the Court has thus held that it also has jurisdiction to interpret that provision concerning rules governing provisional measures to protect intellectual property rights where, in a particular dispute, it is to be applied to protect not a Community trade mark but a national trade mark. [24] The reason which the Court gave for that jurisdiction was that, whatever the nature of the trade mark concerned, the same national provisions are applied to implement Article 50 of the TRIPs Agreement and a uniform interpretation of those provisions may therefore be desirable. [25]

54. The referring court wonders whether it follows from the foregoing case-law that the Court has jurisdiction to interpret the *lis pendens* rule in the CMR even though it is not contained in an agreement concluded by the European Union, since there may none the less be a similar need for a uniform interpretation of Article 31 of the CMR and Article 27 of Regulation No 44/2001.

55. It is true that, in *Hermès*, the Court held that it is clearly in the Community interest that, in order to forestall future differences of interpretation, a provision which can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law should be interpreted uniformly, whatever the circumstances in which it is to apply. [26]

56. However, it cannot be inferred from this that there is a requirement under European Union law that the *lis pendens* rules in the CMR and Regulation No 44/2001 must likewise be interpreted uniformly. After all, TRIPs is a convention to which the European Union is a party. Its provisions are transposed into European Union law and its interpretation in that context is therefore important.

22 — Case C-53/96 *Hermès* [1998] ECR I-3603.

23 — See *Haegeman* (cited in footnote 21), paragraphs 2 to 6; *Demirel* (cited in footnote 21), paragraph 7; *Hermès* (cited in footnote 22), paragraph 29; Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, paragraph 33; and Case C-459/03 *Commission* v *Ireland* [2006] ECR I-4635, paragraph 84.

24 — *Hermès* (cited in footnote 22), paragraph 32, and *Dior and Others* (cited in footnote 23), paragraph 47 et seq.

25 — *Hermès* (cited in footnote 22), paragraph 32, and *Dior and Others* (cited in footnote 23), paragraph 47 et seq.

26 — *Hermès* (cited in footnote 22), paragraph 32.

57. The CMR and Regulation No 44/2001, on the other hand, are different legal instruments which, in accordance with Article 71 of the regulation, stand independently alongside each other: the regulation does not affect the provisions of the CMR relating to jurisdiction. Consequently, unlike in the sphere of the TRIPs Agreement or in the sphere of competition law, [27] there is in the relationship at issue here between Regulation No 44/2001 and the CMR no crossover between the provisions applicable to circumstances governed by European Union law and those relevant to circumstances falling outside the field of application of European Union law. There is therefore no comparable European Union interest in a uniform interpretation of the applicable legal provisions which might justify an extension of the Court's jurisdiction to interpret to the provisions of the CMR.

3. Interpretation of agreements to which the European Union is not a party

58. Agreements which the Member States alone have concluded do not normally become part of the legal order of the European Union and are not binding on it. [28] Nor, therefore, is it in principle the task of the Court to interpret such conventions. [29] There are, however, some circumstances where the Court has none the less assumed jurisdiction to interpret conventions even though they have not been concluded by the European Union (or the former Community).

(a) Jurisdiction to interpret by virtue of functional succession

59. The Court exceptionally assumed jurisdiction to interpret the then applicable GATT Agreement ('GATT 1947') before the former Community acceded to the WTO. Its explanation for doing so was that the Community, although not itself a signatory to the agreement, had taken on the obligations incumbent on the Member States under the agreement. According to the Court, the corresponding competences were transferred to the Community by the Member States in Articles 111 and 113 of the EEC Treaty. In particular, in accordance with the formerly applicable Article 114 of the EEC Treaty, the Community has since concluded the agreements on tariffs and trade within the framework of the GATT 'on behalf of the Community'. [30]

27 — See, in this regard, Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 20, and Case C-280/06 *Ente Tabacchi Italiani* [2007] ECR I-10893, paragraph 26.

28 — See, to this effect, Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 16, and Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, paragraph 85, as well as point 84 of my Opinion in that case.

29 — See Case 130/73 *Vandeweghe* [1973] ECR 1329, paragraph 2; Case C-158/91 *Levy* [1993] ECR I-4287, paragraph 21; *Peralta* (cited in footnote 28), paragraph 16; and *Bogiatzi* (cited in footnote 21), paragraph 24.

30 — Joined Cases 21/72 to 24/72 *International Fruit Company* [1972] ECR 1219, paragraphs 15 to 18. See also, in this regard, *Peralta* (cited in footnote 28), paragraph 16; *Intertanko and Others* (cited in footnote 21), paragraph 48; *Commune de Mesquer* (cited in footnote 28), paragraph 85; and *Bogiatzi* (cited in footnote 21), paragraph 25.

60. It is true that, in the field of international law of civil procedure, the European Union has competence to adopt measures aimed at ensuring the recognition and enforcement of judgments – and of decisions in extrajudicial cases – in civil and commercial matters, pursuant to Article 81 (2)(a) TFEU (formerly Article 65 EC). Moreover, in Opinion 1/03, the Court held that the European Union now also has exclusive external competence to conclude international conventions in that field. [31]

61. However, the CMR governs questions of civil procedure only incidentally. The principal provisions are the rules on the contract for the carriage of goods by road. Even if the European Union possibly has concurrent competence in this field, for example on the basis of the provisions on transport (Article 90 et seq. TFEU) or the approximation of laws (Article 114 TFEU), it is not apparent that it has already availed itself fully of those powers. Functional succession by the European Union to the powers of the Member States under the CMR is therefore ruled out for that reason alone. [32]

62. As I have, moreover, already stated at greater length in my Opinion in *Intertanko*, [33] it is doubtful – irrespective of the scope of the European Union's powers – whether the existence of corresponding competences is itself sufficient to conclude that the European Union is bound by the Member States' obligations under international law and that the Court of Justice has competence to interpret that law. The GATT is a special case in this regard, as the transfer of commercial powers was governed expressly by the then EC Treaty. Moreover, because of the development-based world trade system, there was a particular need for functional succession.

63. The CMR, on the other hand, is a convention concluded by the Member States alone which lays down rules governing relationships under civil law. It does not have an inherently evolutionary nature in the same way as the GATT.

64. In the field of jurisdiction and the recognition and enforcement of judgments, it is Article 71 of Regulation No 44/2001 which militates most strongly against the proposition that the European Union should in some way take the place of the Member States as a party to conventions on particular matters. That article specifically provides that conventions to which the Member States are parties are, as such, to remain unaffected, despite the action taken by the European Union legislature.

31 — Opinion 1/03 [2006] ECR I-1145.

32 — See, to this effect, *Intertanko and Others* (cited in footnote 21), paragraph 49, and *Bogiatzi* (cited in footnote 21), paragraph 33.

33 — Opinion in *Intertanko and Others* (cited in footnote 21), point 40 et seq.

(b) Jurisdiction to interpret customary international law enshrined in international treaties

65. In addition, the Court of Justice interprets the provisions of international conventions which the European Union has not concluded where these are also binding on the European Union as expressions of customary rules of general international law and therefore serve as a criterion for the validity of the activities of the institutions of the European Union. [34] Such significance cannot, however, be attached to the provisions of the CMR.

(c) Jurisdiction to interpret by virtue of a special transfer of competence

66. The Court of Justice also has jurisdiction to interpret an international convention relating to the subject-matter of the Treaties where the parties to the convention expressly give it competence to do so. The Protocols on the Brussels Convention and on the European Convention concerning the law of obligations may be cited as examples of such conventions. [35]

67. The CMR, on the other hand, does not contain any such express transfer of jurisdiction to the Court of Justice. Rather, Article 47 of the CMR confers competence to interpret the convention on the International Court of Justice. Admittedly, that jurisdiction relates only to disputes between the contracting parties and does not exclude the competence of the national courts to interpret the CMR in individual cases or – as the case may be – that of the Court of Justice of the European Union.

(d) Jurisdiction to interpret by virtue of reference

68. In accordance with settled case-law, the Court of Justice may interpret individual provisions of international conventions where the rules of European Union law refer to those

34 — Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraph 9 et seq.; Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 45; and *Intertanko* (cited in footnote 21), paragraph 51.

35 — See the Protocol concerning the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed in Luxembourg on 3 June 1971 (OJ 1975 L 204, p. 28), and the First Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on the Law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (OJ 1989 L 48, p. 1).

provisions [36] or where the European Union legislation was adopted in order to transpose provisions of international conventions in the European Union. [37]

69. Article 71 of Regulation No 44/2001 cannot, however, be equated to such referring provisions. It is true that Article 71 mentions specialised conventions to which the Member States are parties. However, this does not have the effect of incorporating the provisions of those conventions into European Union law in some way. Rather, Article 71 restricts the field of application of the regulation in order to enable the conventions to continue to apply as instruments to which the Member States are parties.

70. The referring court, on the other hand, appears to contemplate that the conventions mentioned in Article 71 of the regulation are incorporated into the regulation and refers in this regard to the statement in the Schlosser Report [38] that the rules of jurisdiction contained in specialised conventions are in principle to be regarded as rules of jurisdiction under the Brussels Convention itself.

71. However, that statement is intended only to make it clear that any jurisdiction established by a specialised convention is of equal rank to that under the Brussels Convention. Jurisdiction based on a specialised convention is not to prevent the recognition and enforcement of a judgment in another Member State even if the Member State asked to recognise that judgment is not a party to the specialised convention in question. [39]

72. It does not therefore follow from the aforementioned passage from the Schlosser Report that all rules contained in specialised conventions are in some way incorporated into Regulation No 44/2001 and thereby become part of European Union law. This would be clearly contrary to the wording of Article 71, which states that the regulation *does not affect* specialised conventions.

36 — See, for example, the mentions in Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) of the Paris Convention for the Protection of Industrial Property. The Court accordingly interpreted its provisions in Case C-40/01 *Ansul* [2003] ECR I-2439, paragraph 32 et seq. Furthermore, Article 11 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1), for example, refers to the implementation of a return procedure under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

37 — Case 70/89 *Fediol* v *Commission* [1989] ECR 1781, paragraph 19, and Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 31.

38 — Cited in footnote 18, paragraph 240.

39 — See, however, the reservation, in relation to the recognition and enforcement of a judgment delivered on the basis of a rule of jurisdiction applicable only in the State of origin, in Article 57(4) of the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano on 16 September 1988 (OJ 1988 L 319, p. 9).

(e) Interim conclusion

73. It can therefore be established by way of interim conclusion that the CMR does not constitute an international agreement which has become part of the legal order of the European Union in the broadest sense of the term. Consequently, the Court of Justice does not have jurisdiction to interpret directly that agreement to which the Member States are parties.

4. Interpretation of Article 71 of Regulation No 44/2001 in relation to the rules of the CMR

74. The parties involved in the proceedings are, however, unanimously of the view that, in order to define the respective spheres of application of Regulation No 44/2001 and specialised conventions to which Member States are parties, the Court of Justice must have jurisdiction to investigate the regulatory content of such conventions.

75. Thus, in *Tatry*, the Court examined, in the context of Article 57 of the Brussels Convention – the predecessor to Article 71 of Regulation No 44/2001 – whether the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships would be compromised by the application of the *lis pendens* rule in Article 21 of the Brussels Convention. [40] However, the Court did not specify on what ground it had jurisdiction to interpret that international convention to which Member States were parties.

76. I consider the Court's approach to have been substantively correct and I also share the view of the parties in the present proceedings that the Court of Justice must have jurisdiction to take cognisance of the content of a convention on a particular matter to which Member States are parties when applying Article 71 of Regulation No 44/2001. For it would otherwise be unable to determine the field of application of the regulation and thus secure the uniform application of European Union law.

77. However, this is not a primary interpretation of the international agreement to which Member States are parties, but an interpretation of Article 71 of Regulation No 44/2001 in relation to the application of the provisions of that agreement by the national court. In a sense, therefore, the rules contained in the convention form the legal and factual background to the specific interpretation of European Union law.

78. The situation in which the Court finds itself here is similar to its position in a reference for a preliminary ruling where the question is raised whether a national provision is 'compatible' with European Union law. It

40 — Cited in footnote 12, paragraph 27.

is true that, in such proceedings, the Court does not have jurisdiction to make a binding determination as to the content of the national provision and then to give a definitive assessment of that provision in the light of European Union law. Rather, it interprets European Union law in relation to a rule which is framed in terms analogous to those of the national provision at issue.

79. What at first sight appears to be pure formalism is, however, based on sound legal reasoning. For, in so doing, the Court safeguards the primary competence of the courts of each Member State to interpret their national law, including any international agreements concluded by the Member State concerned. It is thus for the referring court alone, in the light of the interpretation given by the Court, to undertake a definitive examination of national law and to disapply it if it is contrary to European Union law.

80. For the purposes of the question as to the interpretation of the CMR, this means that the Court of Justice can indeed take cognisance of its content in order to interpret Article 71 of Regulation No 44/2001. The understanding of the relevant provisions of the CMR which is used as a basis for that interpretation is not, however, binding on the national courts. They are, on the other hand, obliged to observe the interpretation of Article 71 of the regulation which the Court has adopted on the basis of its reading of the rules of the CMR.

81. This analysis of the distribution of tasks between the referring court and the Court of Justice in the context of Article 71 of Regulation No 44/2001 has a parallel in the case-law concerning Article 351 TFEU (formerly Article 307 EC).

82. That provision likewise governs the concurrent existence of obligations under prior agreements to which the Member States are parties, on the one hand, and European Union law, on the other. In that regard, the Court held in *Levy* [41] that, in proceedings for a preliminary ruling, it is not for it but for the national court to determine which obligations are imposed by an earlier international agreement on the Member State concerned and to ascertain their ambit so as to be able to determine the extent to which they constitute an obstacle to the application of the relevant legislative act of the former Community.

41 — *Levy* (cited in footnote 29), paragraph 21. In Case C-216/01 *Budějovický Budvar* [2003] ECR I-13617), the Court sets out extensive considerations on the validity of a bilateral agreement (paragraph 148 et seq.), but then once again leaves it to the referring court to make the definitive findings on the matter (paragraph 163).

83. In its case-law on Article 351 TFEU, the Court has also established the obligation to interpret prior agreements to which Member States are parties in such a way that is, to the extent possible, consistent with European Union law. [42] Consideration must therefore be given to whether a corresponding requirement of consistent interpretation applies to the concurrent existence, as governed by Article 71 of Regulation No 44/2001, of conventions to which the Member States are parties and of the regulation. This might be relevant, for example, to the question whether the *lis pendens* rule in Article 31 is to be interpreted in a manner consistent with Article 27 of Regulation No 44/2001.

84. The different arrangements for the settlement of any conflicts of laws in Article 351 TFEU, on the one hand, and Article 71 of Regulation No 44/2001, on the other hand, militate, however, against finding an obligation of consistent interpretation in the context of Article 71 of the regulation.

85. It must be pointed out first of all in this regard that, in accordance with settled case-law, Article 351 TFEU is not applicable to relations between the Member States. [43] That provision is not therefore of any direct significance for the present case, in which the rules of the CMR are to be relied on in proceedings concerning two Member States.

86. In any event, Article 351 TFEU would also be substantively inapplicable. That provision is based on the premiss that the Member States must ultimately give effect to the TEU and TFEU by eliminating, to the extent that the law will allow, any obligations under international agreements which are incompatible with the Treaties, by way of adjustment or, in the last resort, denunciation of the agreement concerned. [44] The obligation of consistent interpretation is present as it were as a negative factor there.

87. However, a conflict between an obligation of Member States under an international agreement (in this case the CMR) and a provision of European Union law (in this case Regulation No 44/2001), as Article 351 TFEU presupposes, is automatically precluded by the delimitation of the field of application of the regulation in Article 71. Through that provision, the legislature 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

42 — See *Budejovický Budvar* (cited in footnote 41), paragraph 169.

43 — See Case 286/86 *Deserbais* [1998] ECR 4907, paragraph 18, and *Bogiatzi* (cited in footnote 21), paragraph 19.

44 — Case C-84/98 *Commission* v *Portugal* [2000] ECR I-5215, paragraph 58.

precedence. [45]Consequently, there is no need for any adjustment or consistent interpretation of the convention in order to avoid divergences from European Union law.

5. Conclusion in relation to the second question

88. In conclusion, the answer to the second question should therefore be that the Court of Justice does not have jurisdiction to interpret the CMR. It does, however, fall to the Court to interpret Article 71 of Regulation No 44/2001 in relation to the application by the national court of those provisions of the CMR which affect the field of application of the regulation and, in so doing, to take cognisance of the content of the provisions of the CMR.

D – *The third and fourth questions*

89. By the third question, the Hoge Raad seeks to ascertain whether Article 31(3) and (4) of the CMR do not constitute definitive rules on enforcement, so that the corresponding rules of Regulation No 44/2001 may be applied at the same time. This question should be addressed in conjunction with the fourth question, which looks specifically at whether review of the jurisdiction of the court of the State of origin may be a condition for enforcement under the CMR.

90. In the light of the answer to the second question, however, these questions must be reformulated. Accordingly, it must be examined whether provisions such as Article 31(3) and (4) of the CMR are not to be regarded as definitive rules governing the conditions for recognition and enforcement for the purposes of the first sentence of the second subparagraph of Article 71(2)(b) of Regulation No 44/2001, with the result that the corresponding provisions of the regulation remain applicable and, in particular, preclude a review of the jurisdiction of the court of the Member State of origin in the enforcement proceedings.

91. Under Article 31(3) of the CMR, an enforceable judgment of a court of a contracting State is enforceable in all other contracting States as soon as the formalities required in the country concerned have been complied

45 — See, on the other hand, Articles 59 and 60 of Regulation No 2201/2003 (cited in footnote 36), which, in relations between Member States, give that regulation precedence over instruments of international law.

with. Article 31(4) of the CMR specifies which final decisions Article 31(3) is to apply to.

92. Also, the second sentence of Article 31(3) of the CMR lays down a negative condition to the effect that the fulfilment of those formalities must not lead to a review of the judgment on the merits ('aucune révision de l'affaire'; 'shall not permit the merits of the case to be re-opened').

93. The aforementioned provisions of the CMR therefore appear not to contain comprehensive rules governing the conditions for enforcement, but to refer to the rules of national law in this regard. The only requirement imposed on the court responsible for enforcement is the prohibition of review on the merits. In view of the absence of any further such requirements in the CMR, it must be assumed that the mention of 'formalities' in the State of enforcement refers globally to the rules applicable there governing the recognition and enforcement of judgments, for example to the procedure for the grant of authority to enforce, including the examination of the substantive enforcement conditions that is necessary for this, such as the compatibility of the judgment to be enforced with public order.

94. That analysis is supported by the historical context of the convention. At the time when the convention was concluded in 1956, it was still a customary part of the process of recognition and enforcement in certain contracting States to review the foreign judgment on the merits. Against that background, the reference to 'formalities' must be understood as a reference to the purely 'formal' nature of the review ('contrôle de la régularité formelle'), to the exclusion of a review on the merits, expressly prohibited by the second sentence of Article 31 (3) of the CMR. [46] 'Formalities' in this sense therefore means all the conditions for enforcement under national law with the exception of the substantive correctness of the judgment.

95. It must therefore be assumed that rules such as the aforementioned provisions of the CMR do not definitively govern the conditions for enforcement. Accordingly, under the first sentence of the second subparagraph of Article 71(2)(b) of Regulation No 44/2001, such provisions do not preclude the application of Articles 38 to 52 of the regulation in relations between the Member States.

96. In so far as Article 31 of the CMR deals with the conditions governing enforcement, its provisions are not in any event specifically

46 — R. Loewe, Erläuterungen zum Übereinkommen vom 19. Mai 1956 über den Beförderungsvertrag im internationalen Straßengüterverkehr (CMR), *European Transport Law* 11 (1976), 503, 583; H. Jesser-Huß (cited in footnote 7, Article 31 of the CMR, paragraph 37).

geared to the carriage of goods by road. [47] This too militates against the proposition that the provisions of the regulation relating to recognition and enforcement should yield.

97. It remains to be examined whether, in derogation from Article 35(3) of Regulation No 44/2001, provisions such as those of the CMR make review of the jurisdiction of the court of the State of origin a necessary condition for enforcement.

98. This proposition has been advanced by reference to the relationship between Article 31 (3) and Article 31 (1) of the CMR. It is asserted that, in speaking of an 'action as is referred to in paragraph 1', Article 31 (3) implicitly requires that the court responsible for enforcement should also review the jurisdiction – governed by Article 31 (1) – of the court of the State of origin. [48] The basis put forward for this interpretation is the need to protect the unsuccessful party from what are considered to be the excessive enforcement rules contained in the CMR. [49]

99. However, in view of the wording of Article 31 (1) of the CMR, it seems more convincing to understand the reference in Article 31 (3) to an action within the meaning of Article 31 (1) merely as a reference to 'legal proceedings arising out of carriage under this Convention' as mentioned in Article 31 (1). [50] Moreover, Article 31 (1) governs only the question of territorial jurisdiction, not the inadmissibility of a new action where an action is already pending before another court, which is governed by Article 31 (2).

100. The rules of the CMR therefore do not make review of the jurisdiction of the court of the State of origin mandatory. In so far as domestic provisions on recognition and enforcement provide for such a review, the CMR does not, however, preclude review either.

101. In the European Union, a review of jurisdiction is precluded under Article 35(3) of Regulation No 44/2001. In the absence of a definitive alternative provision, that rule, geared towards the principle of *favor executionis*, does not yield under Article 71(2)(b) of the regulation in the present context.

47 — See P. de Meij, *Samenloop EEX-Verordening met bijzondere verdragen,* Deventer 2003, pp. 251 and 287.

48 — See, in this regard, the references cited in A. Messent/D.A. Glass, *Hill & Messent – CMR: Contracts for the International Carriage of Goods by Road*, 3rd edition, London 2000, paragraph 10.48 and footnote 103.

49 — See the references in H. Jesser-Huß (cited in footnote 7, Article 31 of the CMR, paragraph 36 and footnotes 116 to 117).

50 — See also, to this effect, the conclusion of H. Jesser-Huß (cited in footnote 7, Article 31 of the CMR, paragraph 36).

102. The answer to the third and fourth questions should therefore be that provisions such as Article 31(3) and (4) of the CMR do not constitute definitive rules governing the conditions for recognition and enforcement for the purposes of the first sentence of the second subparagraph of Article 71(2)(b) of Regulation No 44/2001 and, in particular, they do not require a review of the jurisdiction of the court of the State of origin, so that the corresponding rules of Regulation No 44/2001 are applicable.

E – *The fifth and sixth questions*

103. In the light of the answers to the first to fourth questions, there is no need to answer the fifth and sixth questions, which have been asked only in the alternative.

V – Conclusion

104. In the light of the foregoing considerations, I propose that the questions referred by the Hoge Raad should be answered as follows:

‘(1) The second subparagraph of Article 71(2)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is to be interpreted as meaning that the provisions of the regulation relating to the conditions for the recognition and enforcement of judgments given by the courts of another Member State yield to the corresponding provisions of a specialised convention to which the Member State of origin and the Member State addressed are parties only in so far as the provisions of the convention are definitive and exclusive in that they preclude the application of the regulation.

(2) The Court of Justice does not have jurisdiction to interpret the Convention on the Contract for the International Carriage of Goods by Road, signed at Geneva on 19 May 1956 (the CMR). It does, however, fall to the Court to interpret Article 71 of Regulation No 44/2001 in relation to the application by the national court of those provisions of the CMR which affect the field of application of Regulation No 44/2001 and, in so doing, to take cognisance of the content of the provisions of the CMR.

(3) Provisions such as Article 31(3) and (4) of the CMR do not constitute definitive rules governing the conditions for recognition and enforcement for the purposes of the first sentence of the second subparagraph of Article 71(2)(b) of Regulation No 44/2001 and, in particular, they do not require a review of the jurisdiction of the court of the State of origin, so that the corresponding rules of Regulation No 44/2001 are applicable.'