Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

19 December 2013*

(Judicial cooperation in civil and commercial matters — Regulation (EC) No 44/2001 — Articles 27, 33 and 71 — Lis pendens — Recognition and enforcement of judgments — Convention on the Contract for the International Carriage of Goods by Road (CMR) — Article 31(2) — Rules for coexistence — Action for indemnity — Action for a negative declaration — Negative declaratory judgment)

In Case C-452/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Krefeld (Germany), made by decision of 10 September 2012, received at the Court on 9 October 2012, in the proceedings

Nipponkoa Insurance Co. (Europe) Ltd

v

Inter-Zuid Transport BV,

intervening parties:

DTC Surhuisterveen BV,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, C.G. Fernlund, A. Ó Caoimh, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure and further to the hearing on 18 September 2013,

after considering the observations submitted on behalf of:

— Nipponkoa Insurance Co. (Europe) Ltd, by T. Pünder, Rechtsanwalt,

— Inter-Zuid Transport BV, by J.P. Eckoldt and C.P. ten Bruggencate, advocaten,

— DTC Surhuisterveen BV, by D.A. Nickelsen, Rechtsanwalt, and J. Van Blaaderen and A.J.W. Spijker, advocaten,

— the German Government, by T. Henze, J. Kemper and F. Wannek, acting as Agents,

* Language of the case: German.

— the Portuguese Government, by L. Inez Fernandes and S. Duarte Afonso, acting as Agents,

— the European Commission, by M. Wilderspin and W. Bogensberger, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 71 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 (OJ 2001 L 12, p. 1).

2 The request has been made in proceedings between Nipponkoa Insurance Co. (Europe) Ltd ('Nipponkoa Insurance') and Inter-Zuid Transport BV ('Inter-Zuid Transport') concerning the payment of EUR 500 000 compensation for damage suffered as a result of an international transport of goods by road.

Legal context

Regulation No 44/2001

3 Recital 1 in the preamble to Regulation No 44/2001 reads:

'The Community has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market.'

4 Recital 6 of the amending regulation reads as follows:

'In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable.'

5 Recitals 11, 12 and 15 to 17 in the preamble state:

'(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations …

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.

…

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. …

(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. …'

6 Recital 25 in the preamble to Regulation No 1206/2001 is worded as follows:

'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.'

7 Under Article 1(1) and (2) of Regulation No 44/2001:

'1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. This Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration.'

8 Article 27 of Regulation No 44/2001, which appears in Section 9 ('Lis pendens – related actions') of Chapter II thereof entitled 'Jurisdiction', provides:

'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 32 of that regulation, in Chapter III thereof entitled 'Recognition and Enforcement', provides:

'For the purposes of this Regulation, "judgment" means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.'

10 Article 33 of Regulation No 44/2001, in Section 1 entitled 'Recognition' in Chapter III, provides:

'1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.

3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition, that court shall have jurisdiction over that question.'

11 Article 71 of the regulation, which appears in Chapter VII ('Relations with other instruments'), provides:

'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, even where the defendant is domiciled in another Member State which is not a party to that convention. The court hearing the action shall, in any event, apply Article 26 of this Regulation;

(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.'

The CMR

12 The Convention on the Contract for the International Carriage of Goods by Road ('CMR'), signed in Geneva on 19 May 1956, as amended by the Protocol signed in Geneva on 5 July 1978 ('the CMR') applies, in accordance with Article 1(1), 'to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery … are situated in two different countries, of which at least one is a contracting country, … irrespective of the place of residence and the nationality of the parties'.

13 The CMR was negotiated under the auspices of the United Nations Economic Commission for Europe More than 50 States, including the Federal Republic of Germany and the Kingdom of the Netherlands are signatories to the CMR.

14 Article 23 of the CMR provides:

'1. When, under the provisions of this Convention, a carrier is liable for compensation in respect of total or partial loss of goods, such compensation shall be calculated by reference to the value of the goods at the place and time at which they were accepted for carriage.

…

3. Compensation shall not, however, exceed 8.33 units of account per kilogram of gross weight short.

4. In addition, the carriage charges, customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss, but no further damages shall be payable.

…

7. The Unit of Account mentioned in this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amount mentioned in paragraph 3 of this article shall be converted into the national currency of the State of the court seised of the case …

…'

15 Article 29 of the CMR provides:

'1. The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct.

2. The same provision shall apply if the wilful misconduct or default is committed by the agents or servants of the carrier or by any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment. Furthermore, in such a case such agents, servants or other persons shall not be entitled to avail themselves, with regard to their personal liability, of the provisions of this chapter referred to in paragraph 1.'

16 Under Article 31 of the CMR:

'1. In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory:

(a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or

(b) The place where the goods were taken over by the carrier or the place designated for delivery is situated,

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 judgement has been entered by such a court or tribunal no new action shall be started between the same parties on the same grounds unless the judgement of the court or tribunal before which the first action was brought is not enforceable in the country in which the fresh proceedings are brought.

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

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

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 It appears from the order for reference and the national file lodged at the Court Registry that, in August 2007, Canon contracted the Netherlands companies Nippon Express (Nederland) BV ('Nippon Nederland') and Nippon Express Euro Cargo BV ('Nippon Euro') to transport by road several of its products between the Netherlands and Germany.

18 Nippon Euro contracted Inter-Zuid Transport to carry out that transportation. In turn, the latter entrusted transportation to DTC Surhuisterveen BV ('DTC'), another transport sub-contractor. The transportation was ultimately carried out by Kingma, the transporter engaged by DTC.

19 The goods were loaded on 22 August 2007 at two of Canon's depots in the Netherlands and were to be delivered on 23 August 2007 to Germany. After loading the goods, the driver left Amstelveen in the Netherlands on 22 August 2007 to go to Canon's premises in Willich in Germany, where he arrived the same day at a time too late to unload the goods with the result that he left the lorry overnight at the recipient's unguarded premises. Some of the consignment was stolen during the night.

20 On 27 August 2007, Canon brought an action before the First Commercial Chamber of the Landgericht Krefeld (Germany) claiming damages and interest from Nippon Nederland and Nippon Euro, and the latter undertook, by way of a court settlement on 1 March 2010, to pay EUR 500 000 as joint and several debtors. That amount was intended to compensate for the damage suffered on the night of 22 August 2007.

21 On 29 September 2010, Nipponkoa Insurance brought an action for indemnity before the Second Commercial Chamber of the Landgericht Krefeld against Inter-Zuid Transport, seeking an order for payment of EUR 500 000 for damages and interest it had paid to Canon as the insurer for Nippon Nederland and Nippon Euro ('the indemnity action').

22 However, on 21 January 2009, that is more than one year and a half prior to the indemnity action, Inter-Zuid Transport had already obtained a negative declaratory judgment against Nippon Nederland and Nippon Euro in the Netherlands in respect of the same facts ('the negative declaratory judgment'). According to that judgment given by the Rechtbank te Haarlem (Netherlands), which became final in November 2010, Inter-Zuid Transport was responsible for the damage suffered only up to the maximum amount provided for in Article 23 of the CMR.

23 Nipponkoa Insurance takes the view that the requirements for willful misconduct or default, within the meaning of Article 29(2) of the CMR are fulfilled with respect to Inter-Zuid Transport and that, despite the existence of the negative declaratory judgment, the Landgericht Krefeld has jurisdiction under Article 31(1) of the CMR to adjudicate on the indemnity action as that article must be interpreted autonomously and prevails over Article 27 of Regulation No 44/2001, by virtue of Article 71 thereof.

24 Inter-Zuid Transport claims that, under Article 27 of Regulation No 44/2001 and Article 31(2) of the CMR, the proceedings cannot be pursued before the Landgericht Krefeld on account of the negative declaratory judgment given previously in the Netherlands. It argues that, in any event, it may be held liable only up to the maximum amount set out in Article 23(3) of the CMR.

25 The referring court agrees with Inter-Zuid's arguments concerning the binding nature of the final negative declaratory judgment and, in that regard, criticises the case-law of the Bundesgerichtshof (Germany) deriving from its judgments of 20 November 2003 (I ZR 102/02 and I ZR 294/02) according to which, notwithstanding the judgment in Case C-406/92 *Tatry* [2006] ECR I-5439, the CMR must be interpreted autonomously so that the existence of an action for a negative declaration brought by the debtor against the creditor before a court with international jurisdiction seeking a

judgment that the presumed debtor is not liable for damage, does not preclude an action for indemnity being brought subsequently by the successor to the rights of the creditor before the competent court of another State party to the CMR.

26 Thus, the Landgericht Krefeld takes the view that the action for indemnity brought before it, and the negative declaratory judgment, have the same cause of action and concern the same parties because Nipponkoa Insurance is the successor to the rights of Nippon Nederland and Nippon Euro. Therefore, it takes the view that it is incompatible with the principles of mutual trust in the administration of justice and of minimising the number of concurrent proceedings, that, in the context of an action for indemnity, the authorities of a Member State to refuse, on the ground of an interpretation of a convention referred to in Article 71 of Regulation No 44/2001, to recognise a negative declaratory judgment delivered previously in relation to the same cause of action.

27 Furthermore, that court states that in Case C-533/08 *TNT Express Nederland* [2010] ECR I-4107, paragraph 63 and operative part, the fact that the Court of Justice held that it did not have jurisdiction to interpret Article 31 of the CMR does not prejudge the present case.

28 In those circumstances the Bundesgerichtshof decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:

‘1. Does Article 71 of [Regulation No 44/2001] preclude an interpretation of a convention which is exclusively autonomous or are the objectives and principles of the regulation also to be taken into account when applying such conventions?

2. Does Article 71 of [Regulation No 44/2001] preclude an interpretation of a convention by which an action for a declaration decided in one Member State does not preclude an action for performance brought later in another Member State, where that convention also makes an interpretation possible in that respect under Article 27 of Regulation No 44/2001?’

The questions referred for a preliminary ruling

Jurisdiction of the Court

29 Nipponkoa Insurance and the German Government question the jurisdiction of the Court, as a preliminary point, arguing essentially that the questions referred concern the interpretation of Article 31 of the CMR and that the Court does not have jurisdiction to interpret that convention.

30 In that connection, it is true that the jurisdiction of the Court to give a preliminary ruling extends only to rules which are part of EU law and, as it was held in paragraph 63 of *TNT Express Nederland*, the Court does not have jurisdiction to interpret Article 31 of the CMR.

31 However, although, in *TNT Express Nederland* (paragraphs 32 and 57), the second question referred concerned the jurisdiction of the Court to interpret Article 31 of the CMR, that is not the case the present proceedings.

32 It suffices to state in that regard that the wording of the questions referred themselves concern the interpretation of provisions of EU law, specifically Regulation No 44/2001, in respect of which the Court has jurisdiction under Article 267 TFEU.

33 In the light of those considerations, it must be held that the Court has jurisdiction to answer the questions referred for a preliminary ruling.

Substance

The first question

34 By its first question, the referring court asks essentially whether Article 71 of Regulation No 44/2001 must be interpreted as meaning that it precludes an international convention from being interpreted in such a way that it undermines the objectives and principles which underlie that regulation.

35 It must be held that, in its case-law, the Court has already answered that question.

36 The Court has held that, although it is common ground that Article 71 of that regulation provides, in relation to matters governed by specialised conventions, such as the CMR, for the application of those conventions, the fact remains that their application cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union, such as the principles, recalled in recitals 6, 11, 12 and 15 to 17 in the preamble to Regulation No 44/2001, of free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union (see *TNT Express Nederland*, paragraph 49).

37 Article 71 of Regulation No 44/2001 cannot have a purport that conflicts with the principles underlying the legislation of which it is a part. Accordingly, that article cannot be interpreted as meaning that, in a field covered by the regulation, such as the carriage of goods by road, a specialised convention, such as the CMR, may lead to results which are less favourable for achieving sound operation of the internal market than those resulting from the provisions of the regulation at issue (*TNT Express Nederland*, paragraph 51).

38 Therefore, the relevant provisions of the CMR can be applied in the European Union only if they enable the objectives of the free movement of judgments in civil and commercial matters and of mutual trust in the administration of justice in the European Union to be achieved under conditions at least as favourable as those resulting from the application of Regulation No 44/2001 (see, to that effect, *TNT Express Nederland*, paragraph 55).

39 Therefore, the answer to the first question is that Article 71 of Regulation No 44/2001 must be interpreted as meaning that it precludes an international convention from being interpreted in a manner which fails to ensure, under conditions at least as favourable as those provided for by that regulation, that the underlying objectives and principles of that regulation are observed.

The second question

40 By its second question, the referring court wishes to know whether Article 71 of Regulation No 44/2001 must be interpreted as meaning that it precludes an interpretation of Article 31(2) of the CMR according to which an action for a negative declaration or a negative declaratory judgment in a Member State does not have the same cause of action as an action for indemnity brought in respect of the same damage and against the same parties or the successors to their rights in another Member State.

41 In order to answer that question it is necessary, having regard to the answer to the first question, to examine whether such an interpretation of Article 31(2) of the CMR would ensure, in conditions at least as favourable as those laid down in Article 27 or by other provisions of Regulation No 44/2001, that its underlying objectives and principles are observed.

42 In that connection, it must be recalled that, according to the case-law of the Court on the interpretation of Article 27 of Regulation No 44/2001, an action seeking to have the defendant held liable for causing loss and ordered to pay damages, such as the action for indemnity in the main proceedings, has the same cause of action as an action brought by that defendant seeking a declaration that he is not liable for that loss (see, to that effect, *Tatry*, paragraph 45, and Case C-133/11 *Folien Fischer and Fofitec* [2012] ECR, paragraph 49).

43 In the present case, an action for indemnity before the referring court was brought after a judgment of the Rechtbank te Haarlem had been entered, within the meaning of Article 31(2) of the CMR, which was based on the same elements of fact and law between the same parties for a negative declaration.

44 It must be held that the interpretation of that provision of the CMR, as meaning that that action and that judgment do not have the same cause of action, would not 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 which is, as set out in paragraph 36 of this judgment, one of the objectives and principles which underlie judicial cooperation in civil and commercial matters in the European Union.

45 In that connection, it is irrelevant that the judgment of the Rechtbank te Haarlem became binding shortly after the action in indemnity was brought before the referring court, that is in November 2010 according to the order for reference or, as stated by DTC at the hearing, 1 March 2011.

46 The fact that that judgment became final means that, if the case had been covered by Regulation No 44/2001 and not the CMR, the provisions of that regulation, not only as regards *lis pendens* but also on recognition, in particular Article 33 thereof, would have been applicable.

47 As the Court has already held, rules laid down by the special conventions referred to in Article 71 of Regulation No 44/2001, such as those deriving from Article 31(2) of the CMR, can be applied within the European Union only in so far as the principles of free movement of judgments and mutual trust in the administration of justice are observed (see, to that effect, *TNT Express Nederland*, paragraph 54 and the case-law cited).

48 Those principles would not be observed under conditions at least as favourable as those laid down in Regulation No 44/2001 if Article 31(2) were to be interpreted as meaning that a negative declaratory judgment in one Member State does not have the same cause of action as an action for indemnity between the same parties in another Member State.

49 Having regard to all of the foregoing, the answer to the second question is that Article 71 of Regulation No 44/2001 must be interpreted as meaning that it precludes an interpretation of Article 31(2) of the CMR according to which an action for a negative declaration or a negative declaratory judgment in one Member State does not have the same cause of action as an action for indemnity between the same parties in another Member State.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 71 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 must be interpreted as meaning that it precludes an international convention from being interpreted in a manner which fails to ensure, under conditions at least as favourable as those provided for by that regulation, that the underlying objectives and principles of that regulation are observed.**

2. **Article 71 of Regulation No 44/2001 must be interpreted as meaning that it precludes an interpretation of Article 31(2) of the Convention on the Contract for the International Carriage of Goods by Road, signed in Geneva on 19 May 1956, as amended by the Protocol signed in Geneva on 5 July 1978, according to which an action for a negative declaration or a negative declaratory judgment in one Member State does not have the same cause of action as an action for indemnity between the same parties in another Member State.**

[Signatures]