

CONNECTIONS AND DISCONNECTIONS BETWEEN BRUSSELS IA REGULATION AND INTERNATIONAL CONVENTIONS ON TRANSPORT MATTERS

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Despite the crucial role played by transports in the sound development of the internal market, the new EU Regulation No 1215/2012 (“Brussels Ia Regulation”) does not clarify the relationship between its own rules and the provisions on jurisdiction or recognition and enforcement of judgments laid down by the international conventions in the transport sector.

As a matter of fact, the EU Court of Justice (“ECJ”) has laid down a test establishing the conditions upon which – pursuant to Art. 71 – issues of jurisdiction or recognition and enforcement of judgments are to be dealt with in accordance with an international convention instead of with the Regulation. However, the said test (i) does not seem apt, as such, at ensuring that degree of predictability as to the courts having jurisdiction and therefore legal certainty for litigants, which – as remarked by the ECJ itself – should underlie judicial cooperation in civil and commercial matters; (ii) has been conceived with specific regard to the case when issues of jurisdiction or recognition and enforcement of judgments fall within the scope of application of both the regulation and the CMR convention. On the other hand, the so-called “disconnection clauses” – which can be almost invariably found in the acts whereby the EU has acceded to the various transport conventions and which serve the purpose of granting the primacy of EU law – raise problems as to how they should operate in practice vis-à-vis the Brussels Ia Regulation. In the light of the above still open issues, the paper is aimed at (i) ascertaining

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whether the ECJ, in setting out the terms whereby the Regulation should interface with the transports conventions, will either stick to the approach so far consolidated or revise it with a view to making it consistent with the principles of legal certainty and predictability as to the court having jurisdiction, (ii) clarifying the conditions that must be met for a given transport convention to be deemed to fall within the scope of Art. 71 of the Regulation; (iii) assessing how to handle the relationship between the Regulation and the transport conventions not covered by Art. 71; (iv) examining whether such relationship is governed by a specific clause (disconnection clause); (v) searching for an interpretative solution which permits, even in the absence of such a specific clause, to establish with a reasonable degree of certainty which provisions – among those of Brussels Ia and those laid down in the relevant transport convention – are to be applied for the purposes of establishing jurisdiction or recognising the effects of judgements in the case at stake.

Keywords: Brussels Ia Regulation, issues of jurisdiction or recognition and enforcement, disconnection clauses, transport conventions

INTRODUCTION*

The EU has progressively become an international actor in the fields of both private international law (“PIL”) and transports. As a consequence, interactions are growing between the rules concurrently laid down on these matters by EU law instruments and international conventions.

Such interactions give rise to practical problems with issues of jurisdiction and of recognition or enforcement of judgments: it has to be established which set of rules among those provided by the new Regulation No 1215/2012 (hereinafter also referred to as the “Brussels Ia Regulation” or “Recast Regulation”)¹

* The present contribution is the result of a joint effort by both Authors and is unitary in nature. Only for academic purposes, Part I is attributed to Chiara E. Tuo and Part II to Laura Carpaneto.

¹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2012 OJ L351. This Regulation entered into force on 9 January 2013 and became applicable on 10 January 2015. It is therefore since this latter date that, pursuant to its Article 80, the new Regulation has replaced Brussels I. Further amendments to the Recast have recently been adopted, first, by Regulation (EU) No 542/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU) No 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice, 2014 OJ L163; second, by Commission Delegated Regulation (EU) 2015/281 of 26 November 2014 replacing Annexes I and II of Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2015 OJ L54.

and the relevant transport convention, respectively, is to be given precedence over the other.

Article 71 of the Brussels Ia Regulation establishes a “non-affect” clause with regard to international conventions “on particular matters” to which EU Member States are parties, but in its practical application this rule has proven to be far from clear.

In this context, the present paper intends to focus, in Part I, on the main problems connected with the interaction between Brussels Ia and the transport conventions which (may be reasonably deemed to) fall within the scope of application of Article 71; in Part II, on the questions related to the interaction of the Regulation with the transport conventions not covered by Article 71 (or which may be reasonably deemed not to be covered by the said Article).

PART I

1. BRUSSELS IA AND INTERNATIONAL CONVENTIONS ON “PARTICULAR MATTERS”: THE “NON-AFFECT” CLAUSE CONTAINED IN ARTICLE 71 OF THE REGULATION

In continuity with both the 1968 Brussels Convention² and Regulation No 44/2001 (hereinafter also referred to as the “Brussels I Regulation”)³, the Recast Regulation provides a specific rule – namely, Article 71 – aimed at ensuring that international conventions which Member States are contracting party to alongside with third countries, and which uniformly regulate jurisdiction and recognition of judgments in relation to “*particular matters*” (such as for example, in the field of transports, arrest of vessels or international carriage of goods by road), fully display their effects and generally take precedence over the Regulation itself.

In that vein, Article 71(1) of the Recast Regulation takes into account, and aims to avoid that the Regulation’s provisions might overlap, if not even conflict, with those concurrently envisaged by specialised conventions, establishing that “*any conventions to which the Member States are parties and which, in relation*

² The 27 September 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters has been amended several times. A consolidated version was published in 1998 OJ C27.

³ Regulation (EC) No 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 OJ L12.

to particular matters, govern jurisdiction or the recognition or enforcement of judgments” “shall not be affect[ed]” by the Regulation itself.

The article at issue – framed in exactly the same terms as Article 71 of Regulation No 44/2001 – has been commonly understood as aimed at giving precedence to international conventions regarding “*particular matters*” on the basis of the assumption that such conventions are designed to uniformly govern issues of international commercial law and that, as such, are generally acceded by a large number of States as contracting parties thereto.

The view has in fact been taken that – if read in these terms – the Article in question would have granted that international conventions on particular matters be duly complied with and, at the same time, the Member States be put in such a position as to accomplish them, thus avoiding the risk of incurring international responsibility for any such violations.⁴

It is however worth noting from the outset that, unlike Article 57 of the 1968 Brussels Convention⁵, Article 71 of the Regulation only refers to international conventions on “*particular matters*” to which Member States became contracting party prior to the date of entry into force of the Regulation.⁶

⁴ As in fact it is suggested by the content of the new Regulation’s Recital 35, according to which “*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*”.

⁵ For ease of reference, the content of the Article is hereby transcribed: “1. *This Convention shall not affect any conventions to which the Contracting States are or will be 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 Convention shall not prevent a court of a Contracting 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 Contracting State which is not a party to that Convention. The court hearing the action shall, in any event, apply Article 20 of this Convention; (b) judgments given in a Contracting State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognized and enforced in the other Contracting State in accordance with this Convention. Where a convention on a particular matter to which both the State of origin and the 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 Convention which concern the procedure for recognition and enforcement of judgments may be applied. 3. This Convention shall not affect the application of provisions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts*” (emphasis added).

⁶ As in fact it can be inferred from the wording of Recital 36 of Brussels Ia, which reads: “*Without prejudice to the obligations of the Member States under the Treaties, this*

The more restrictive scope of application featured in the Regulation's provision rests on the exclusive external competence that the EU has in the meantime acquired in the field of judicial cooperation in civil and commercial matters as a consequence of the same adoption of Regulation No 44/2001.⁷

As a matter of principle, this means that (i) Member States are no longer entitled to autonomously enter new conventions or amend existing conventions which govern jurisdiction or the recognition and enforcement of judgments in relation to "*particular matters*"; (ii) even if any such conventions were (wrongfully) concluded or amended by the Member States independently of the EU, the rules on jurisdiction or the recognition and enforcement of judgments contained therein could not be deemed as falling within the scope of Article 71, that is to say that they would not be given any precedence whatsoever over the Regulation.⁸ And it is worth underlining that – owing to the said exclusive external EU competence in civil and commercial matters – any international conventions on these very issues that the EU has, or will have, entered into itself are in principle to be regarded as prevailing – albeit within the limits of their own scope of application and under the conditions set out below – over Regulation No 1215/2012.⁹

Moreover, it is noted that Article 71 of the Recast Regulation fails to indicate the date relevant for the purposes of identifying the specialised conventions falling within its scope of application.

Regulation should not affect the application of bilateral conventions and agreements between a third State and a Member State concluded before the date of entry into force of Regulation (EC) No 44/2001 which concern matters governed by this Regulation".

⁷ That this is the reason for Article 71 Brussels Ia having been drafted differently from Article 57 of the 1968 Convention has in reality been appropriately set out by H. Ringbom, "EU Regulation 44/2001 and its implications for the International Maritime Liability Conventions", (2004) *Journal of Maritime Law & Commerce* 1, i.e. before than the ECJ reached the same conclusion by giving Opinion 1/03, of 7 February 2006, *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters*, in *Eur. Court Reports*, 2006, p. I-1145 ff. On this opinion see extensively F. Pocar (ed.), *The External Competence of the European Union and Private International Law*, Padua, 2007. On the impact of Brussels I on the distribution between EU and Member States of external powers in PIL matters, see also K. Takahashi, "External competence implications of the EC Regulation on jurisdiction and judgments", (2003) *ICLQ* 529.

⁸ In this sense see ECJ, judgment of 4 May 2010, case C-533/08, *TNT Express Nederland*, [2010] ECR I-4107, para 38. In doctrinal writings see P. Mankowski, in U. Magnus, P. Mankowski, *Brussels I Regulation*, 2nd ed., München, 2012, Art. 71, note 3.

⁹ See below Part II.

Indeed, at least on the basis of a purely literal reading of the article at hand, one could even allege that the “*non-affect*” clause thereby envisaged operates with regard to all the conventions to which Member States became contracting party prior to the same Recast Regulation’s entry into force, *i.e.* prior to 9 January 2013.

This is not, however, the present authors’ view. As it will be set out below, in fact, Article 71 is to be read as applying only insofar as Member States have become parties to international conventions on “*particular matters*” before the entry into force of Regulation No 44/2001.

In support of that position stands, first, the argument that, as seen above, the exclusive external competence as regards judicial cooperation in civil and commercial matters has shifted from the Member States to the EU as a result of the entry into force of Brussels I; second, the consideration that Regulation No 1215/2012 constitutes, both in form and in substance, nothing more than the last updated version of Brussels I, so much so that, as it results from its title and is further confirmed by Recital No 1, that Regulation is also referred to as the “Recast” of Brussels I. Hence, since such recast in no way regarded Article 71, the specialised conventions referred to therein are to be considered – as under Brussels I – to refer to those, and only those, to which Member States became parties before 1 March 2002. Thirdly, the present authors’ position is confirmed in Recital No 36 Brussels Ia which, albeit pertaining to bilateral conventions or agreements between a third State and a Member State, clearly sets out that the “*non-affect*” clause provided by the Regulation operates only insofar as such conventions or agreements were concluded “*before the date of entry into force of (EC) Regulation No 44/2001*”.

Despite this conclusion being hardly disputable, it is nonetheless submitted that the EU legislature would have better served the objectives of legal certainty and predictability which – as will be remarked below – underline the Regulation if the new Article 71 had contained the clarification that the specialised convention shall not “*be affected*” provided that Member States are parties thereto as of the date of 1 March 2002.

2. THE COORDINATION MECHANISM BETWEEN BRUSSELS IA AND INTERNATIONAL CONVENTIONS ON “*PARTICULAR MATTERS*” AS CONCEIVED BY ARTICLE 71 OF THE REGULATION

Except for the abovementioned difference, the relationship between the Regulation and the specialised conventions to which, at the time of the Bru-

ssels I Regulation's entry into force, the Member States were already parties, is governed by the new Article 71 in the same way as it was under Article 57 of the 1968 Convention.

Given that Article 71 of Brussels Ia perfectly mirrors not only Article 71 of Brussels I but also – save for the difference indicated above – Article 57 of the 1968 Brussels Convention, in accordance with Recital No 34 of the new Regulation¹⁰, that Article is to be interpreted in continuity with the reading elaborated by the ECJ for the purposes of interpreting the corresponding provisions of both the 1968 Brussels Convention and Regulation No 44/2001.¹¹

As such, Article 71(1) of Brussels Ia establishes that international conventions providing for uniform rules on jurisdiction or recognition and enforcement of judgments in relation to “*particular matters*” “*shall not be affected*” by the corresponding rules laid down by the Regulation.

Thus, pursuant to Article 71 of the Regulation, issues of jurisdiction and of recognition or enforcement of judgments in civil and commercial matters should in principle be governed on the basis of criteria and rules other than those, of either general or specific character, laid down by the Regulation itself, *i.e.* the rules and criteria provided by the specialised convention coming into play in the case at hand.

In this regard, however, the position has been convincingly set out that Article 71 is rather aimed at fostering compatibility and coordination between the Regulation itself and the relevant specialised convention (*i.e.* at ensuring that such instruments supplement one another by means of a combined application thereof).¹² In other words, the objective of Article 71 is not that of

¹⁰ Which reads as follows: “*Continuity between the 1968 Brussels Convention, Regulation (EC) No 44/2001 and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation by the Court of Justice of the European Union of the 1968 Brussels Convention and of the Regulations replacing it*”.

¹¹ In these same terms see (albeit obviously with regard to the relationship between the 1968 Convention and Brussels I) paras 36 and 39 of the *TNT* judgment.

¹² Reference is made to the opinion rendered by AG Tesauro in *Tatry* (Case C-406/92 *Tatry* [1994] ECR I-05439), whereby he rejected the argument that in cases falling within the scope of application of a specialised convention the Brussels Convention was to be deemed completely overridden, regardless of whether or not the specialised convention concerned contained, for example, no *lis pendens* rule. In the AG's view (as set out in para 8 of his opinion), the “non-affect” clause was not aimed at making the Brussels Convention totally irrelevant, but rather at allowing for a coordination of the two instruments: “there can in my view be no question of Article

radically preventing the Regulation from ever coming into play in cases where its provisions are concurrent with those of a specialized convention. Rather, Article 71 is to be read as providing for the application of Brussels Ia on a subsidiary basis, whenever the need arises for the international convention's provisions to be supplemented or completed as regards the specific procedural issue arisen in the case at hand.

It thus seems appropriate to define the Article at hand as an “*integration clause*” designed to embed single provisions from specialised conventions into the larger legal framework of the Brussels I Regulation.¹³ A confirmation of the above is eventually provided by Article 71(2)(b) of the Regulation, which establishes that if the relevant specialised convention fails to autonomously govern the recognition or enforcement of judgments, such issues are to be dealt with in accordance with the Regulation's provisions.

3. THE ECJ'S APPROACH AS REGARDS THE CONCRETE OPERATION OF THE “NON-AFFECT” CLAUSE LAID DOWN BY ARTICLE 71: FROM THE *TATRY* CASE ...

In light of the ECJ case law, however, it bears underlining that, in practice, the coordination mechanism conceived by Article 71 almost systematically results in the Brussels Ia Regulation being given precedence over the corresponding provisions laid down in the relevant international convention, at least to the extent that the latter, despite providing for specific rules apt at governing the case at issue, is nonetheless deemed unsuitable to ensure that the same effects as those stemming from the application of Brussels Ia be displayed within the EU judicial area.

57 [as seen, the precursor of Article 71 of the Regulation] being interpreted merely as a subordinating provision, that is to say one which purely and simply affirms the primacy of the provisions of a particular convention, [...] a provision by virtue of which, therefore, the existence of the connecting factors contemplated in the special convention means that the provisions of the Brussels Convention cannot be applied at all. [...] on the contrary, a systematic reading of that provision shows that it is more in the *nature of a coordinating provision*, designed to allow the respective provisions *to be applied in combination*” (emphasis added).

¹³ As remarked elsewhere (C.E. Tuo, “Regolamento Bruxelles I e convenzioni su “materie particolari”: tra obblighi internazionali e *primauté* del diritto dell'Unione europea”, (2011) *Rivista di diritto internazionale privato e processuale* 378), the mechanism whereby Article 71 makes reference to specialised conventions cannot be described as one of full integration of the latter into the former, but rather as one of “fictitious implantation” of single provisions from the relevant convention into the Regulation.

In fact, it is undeniable that, starting from the *Tatry* case (*i.e.*, since the very first occasion in which it was asked for the interpretation of the rule in question), the ECJ made clear that the “*non-affect*” clause contained therein “*must be understood as precluding the application of the provisions of the Brussels Convention solely in relation to questions governed by a specialized convention*”.¹⁴

The point to be dealt with in the aforesaid case was whether (the then applicable) Article 57 of the 1968 Convention could be interpreted as meaning that a Member State court – seized in accordance with the relevant provisions of the 1952 Convention on arrest of vessels¹⁵ – had jurisdiction over a dispute arisen out of a relationship which was already dealt with in the context of a parallel proceeding pending in another Member State between the same parties, albeit on the basis of different pleadings.

The argument in favour of the alleged prevalence of the Arrest Convention was that since the second-seized court was to be deemed vested with jurisdiction on the basis of a specific criterion as laid down by the said specialised convention, the entire 1968 Convention – included, therefore, the *lis pendens* provisions contained therein – could not even be taken into account by the Member State’s second-seized court.

However, the ECJ did not accept such argument. On the basis of the consideration that the Arrest Convention, despite providing jurisdiction rules, nonetheless fails to specifically address, let alone govern, the case of *lis pendens*, the Court in fact established that the discipline thereof was to be found in the 1968 Convention. Accordingly, the gap affecting the Arrest Convention was to be closed resorting to the *lis pendens* provisions laid down in the 1968 Convention, which in fact resulted in the specialized convention being incorporated into the 1968 Convention’s scope of application.¹⁶

4. ... TO THE TNT AND NIPPONKOA DECISIONS

It bears pointing out, however, that Brussels I has been found as prevailing also over international conventions which, unlike that on Arrest of vessels, do

¹⁴ ECJ, judgment of 6 December 1994, case C-406/92, *Tatry*, [1994] ECR I-05439, para 24.

¹⁵ Brussels International Convention of 10 May 1952 relating to the arrest of seagoing ships.

¹⁶ Result which – as pointed out by Mankowski (see fn 8 above) – is actually in line with the above mentioned subsidiary nature featured in Article 71 of the Regulation (as well as by its precursor, Article 57 of the 1968 Convention, as applicable at the time when the *Tatry* case was dealt with).

not contain any gaps whatsoever, but rather bring a set of provisions governing *lis pendens* and the recognition or enforcement of judgments in a complete and autonomous manner, albeit differently from Brussels I.

More specifically, the Court has been requested to clarify how Article 71 should operate in case of judicial actions featuring such characteristics as to fall – albeit with effects totally irreconcilable with each other – within the scope of application of both the Brussels I Regulation and the 1956 Convention on the Contract for the International Carriage of goods by road (CMR).¹⁷

In short, (i) in the *TNT* case the Court was asked to establish whether the courts of a Member State are empowered to refuse the enforcement of another Member State's judgment relying on the fact that such judgment has been given in violation of the CMR rules on *lis pendens* and that – pursuant to the same CMR, but differently from what provided by Brussels I – this violation may be invoked as a specific ground for the denial of *exequatur*.¹⁸

(ii) In the *Nipponkoa* case¹⁹, the Court was required to clarify if the judgment whereby a Member State court found a sub-carrier not liable for the damage occurred during international carriage of goods by road was to be deemed as having the same cause of action as a claim for indemnity filed in respect of the very same damage by the insurance company of the cargo's owner. In fact, whilst according to the CMR the Member State court with which this latter action was filed should have been deemed vested with jurisdiction to adjudicate thereon, the opposite conclusion was to be reached in case the Regulation was found to be applicable, as in such a case the seized court would have been bound to decline jurisdiction in accordance with the Brussels I rule on *lis pendens*.²⁰

¹⁷ Convention on the Contract for the International Carriage of goods by road (CMR) 1956, United Nations Treaty Series, vol. 3999, p. 189. The parties to the Convention, which came into force in 1961, are 55, including all the EU Member States, whereas the EU is not itself a party.

¹⁸ ECJ, judgment of 4 May 2010, case C-533/08, *TNT Express Nederland* (fn 8 above).

¹⁹ ECJ, judgment of 19 December 2013, case C-452/12, *Nipponkoa*, ECLI:EU:C:2013:858.

²⁰ In particular, the party (*i.e.* the insurance company) in favour of the applicability of the CMR took the view that despite the existence of a negative declaratory judgment the court seized had jurisdiction under Article 31(1) of the CMR as that Article should have been interpreted autonomously and given precedence over Article 27 of Regulation No 44/2001 by virtue of Article 71 thereof. The opposite view (*i.e.* the one taken by the defendant before the second-seized court) was that under both Article 31(2) of the CMR and Article 27 of the Regulation the proceedings could not be pursued on account of the negative declaratory judgment given previously by another Member State's court.

In both the abovementioned rulings, the Court confirmed the principles laid down in the *Tatry* decision, establishing that Article 71 was a provision aimed at coordinating the Regulation with the international convention coming into play in the case at hand.²¹ But immediately after having made this clarification, the Court set out that such coordination is to be enacted without undermining the fundamental principles underlying the Regulation, the principles specifically identified as those 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*”.²²

Since Article 71 or, more precisely, the coordination clause incorporated therein, aims at fostering the application of specialized conventions only if, and to the extent that, the latter does not affect the abovementioned fundamental principles, such conventions shall therefore be precluded from displaying any effect whenever their application might give rise “*to results which are less favourable for achieving sound operation of the internal market than the results to which the regulation’s provisions lead*”, as it would have happened, according to the Court, in the two cases at hand.²³

Hence, the question raised in the *TNT* case was replied by the Court in the sense that a judgment given by a Member State court on the basis of an international convention dealing with a particular matter – such as, in the case at hand, the CMR – is to be enforced in accordance with the relevant Regulation’s provisions whenever the application of the corresponding, more restrictive provisions laid down by the relevant specialized convention would result in the enforcement of such judgment being subject to more stringent conditions, if not even denied.²⁴

Should Article 71 be interpreted as aimed at giving precedence to international provisions of such a character, in fact, the principle of free movement of judgments whereupon the Regulation’s regime on recognition and enforce-

²¹ See, in particular, paras 45-48 and para 36 of, respectively, the *TNT* and the *Nipponkoa* judgments.

²² See para 49 of the *TNT* judgment and para 36 of the *Nipponkoa* judgment. Such principles, as set out by the Court, are enshrined in Recitals 6, 11, 12 and 15 to 17 of the Brussels I Regulation.

²³ In these terms, see para 51 and para 38 of the *TNT* and the *Nipponkoa* judgments, respectively.

²⁴ See paras 54-55 of the *TNT* judgment.

ment is grounded would be manifestly undermined, which in turn would seriously impair judicial cooperation in civil and commercial matters as a crucial policy promoted by the EU for the sound operation of the internal market.²⁵

Likewise, in the *Nipponkoa* case the Court preliminarily recalled that, pursuant to the Regulation's regime on *lis pendens*, Member States courts have no jurisdiction to try an action for the declaration of responsibility of the defendant if, in relation to the very same facts grounding such action, another proceeding has already been introduced by the defendant himself seeking a declaration that no such responsibility exists.²⁶

The Court has therefore drawn the conclusion that the Regulation's provisions on *lis pendens* as well as those on recognition of judgments are to be put into play also when these types of actions are brought in accordance with the CMR within the EU judicial area.²⁷

To reach the opposite conclusion would in fact result in the principles of not only minimisation of the risk of concurrent proceedings, but also free movement of judgments and mutual trust underlying the Regulation, being inadmissibly compromised.²⁸

5. THE INTERACTION BETWEEN THE REGULATION AND THE TRANSPORT CONVENTIONS IN LIGHT OF THE ECJ CASE LAW ON ARTICLE 71 OF THE REGULATION: SOME CONTROVERSIAL ISSUES

In light of the current status of the ECJ case law on Article 71, it appears that for the purposes of establishing that international provisions on "*particular matters*" are to take precedence over Brussels Ia, such provisions cannot limit themselves to regulate in a complete and autonomous manner the procedural issue arisen in a given case. Rather, the said provisions must also, and above all, be deemed capable of providing a solution that, *prima facie*, may be regarded as consistent with the rationale underlying the Regulation as well as instrumental for the achievement of the objectives thereby pursued.

To put it differently, it is not sufficient that a given specialized convention governs – albeit in an exhaustive manner as regards the particular matter it is concerned with – the very same jurisdictional issues covered by the Regulation. As it arises from the above cited ECJ case law, the provisions on jurisdiction

²⁵ See paras 49-50 of the *TNT* judgment.

²⁶ See para 42 of the *Nipponkoa* judgment.

²⁷ See para 47 of the *Nipponkoa* judgment.

²⁸ See paras 44-49 of the *Nipponkoa* judgment.

or the recognition and enforcement of judgments laid down by international conventions in relation to particular matters are in fact allowed to display their effects only to the extent that their application in the case at stake does not compromise the fundamental principles underpinning the Brussels Ia system.

As pointed out by commentators, the ECJ's approach briefly summarised above may be criticised under several aspects.²⁹ However, what the present authors wish to focus on is the impact that such critical aspects are liable to have on the concrete interplay between the Regulation and the transport conventions that may be reasonably deemed to fall within the scope of Article 71.

In this perspective, the test elaborated by the Court shall hereunder be addressed with the aim of verifying, (i) first, whether or not it is apt, as such, to ensure that degree of predictability as to the courts having jurisdiction and therefore legal certainty for litigants, which – as remarked by the ECJ itself – should underlie judicial cooperation in civil and commercial matters (below, §6); (ii) second, if – despite having been conceived with specific regard to cases in which the Regulation's provisions were concurrent with those specifically laid down by the CMR convention – the test is eventually also capable of being applied in the very same terms in cases where the effects of Article 71 are to be assessed *vis-à-vis* other transport conventions (below, §7).

6. (CONTINUED) SOUND OPERATION OF THE INTERNAL MARKET V. LEGAL CERTAINTY: IS THERE ANY ROOM LEFT FOR THE CONCRETE OPERATION OF ARTICLE 71 OF THE REGULATION?

As regards the issue raised under (i) above, it bears recalling that the approach followed by the ECJ since the *TNT* case has been criticised by most

²⁹ See among others, M. Cremona, "The Internal Market and Private International Law Regimes: a comment on Case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG*, judgment of the Court (Grand Chamber) of 4 May 2010", (2014) *EUI Working Paper, Law* 8, available at http://cadmus.eui.eu/bitstream/handle/1814/31896/LAW_2014_08.pdf?sequence=1 (last accessed on July 2015); Editorial Comments, "The Union, the Member States and international agreements" (2011) 48 *Common Market Law Review* 1; P.J. Kuijper, "The Changing Status of Private International Law Treaties of the Member States in Relation to Regulation 44/2001: case C-533/08 *TNT Express Nederland BV v AXA Versicherung AG*" (2011) 38 *Legal Issues of European Integration* 89; C.E. Tuo (fn 13 above); M. Atal, "Droit international privé communautaire et conventions internationales: une délicate articulation", *Petites affiches*, 30 novembre 2010 No 238; G. Rossolillo, "Convenzioni concluse dagli Stati membri e diritto processuale civile internazionale dell'Unione europea: interpretazione conforme o rispetto degli obblighi internazionali?", (2010) *Cuadernos de Derecho Transnacional* 305.

distinguished scholars in that it relies upon “*a far-reaching teleological interpretation*” of Article 71, which results in doing “*some violence*” to the wording of Article 71³⁰, inasmuch as it gets close to an “*interpretation contra legem*”.³¹

As the present authors have pointed out from the outset, the aim of Article 71 unequivocally consists in setting out the conditions at which specialised conventions such as those on transports are allowed to display their effects in place of the Regulation.

That this is the real objective behind the Article at hand and that such objective is not normatively subject to any of the conditions set out by the Court is further confirmed by the clear wording of Recital No. 35 of the Regulation³². It follows that, as appropriately observed in literature, the EU legislator’s intention in drafting such a rule must have been that of “*delimiting the scope of the Regulation by reference to pre-existing established international rules*”.³³ And despite there being no doubt as to the legislature’s choice giving rise to the risk that the completeness of the single market judgments be compromised, it nonetheless amounts to “*a political choice within the powers of the legislature*”.³⁴

However, in the *TNT* case the Court opted for an interpretation of Article 71 which is hardly reconcilable with the EU legislator’s view.

As seen above, the ECJ’s position is that primary goal of Article 71 is to protect certain underlying principles of the Regulation, which the Court itself derived from some of the Recitals thereof. In so doing, the Court therefore showed to hold paramount the objectives of EU law³⁵ as opposed to the objective, likewise to be found in the Recast Preamble, of preserving the application of sectoral rules such as those concerning international transports.

In this regard, it must be observed that the objectives which, in the Court’s view, should drive the interpretation of Article 71 are not the only ones underlying the Regulation. No doubt these are important goals, but the objective behind Article 71 is likewise to be found in the Regulation’s Preamble and the Court does not explain why this should have less importance.³⁶ On the

³⁰ P.J. Kuijper (fn 29 above), at 99.

³¹ M. Cremona (fn 29 above), at 5.

³² See fn 4 above.

³³ M. Cremona (fn 29 above), at 6.

³⁴ M. Cremona (fn 29 above), at 6.

³⁵ P. Mankowski (fn 8 above), note 4a.

³⁶ As pointed out by Mankowski (fn 8 above), nothing in the Recitals specifically relates to Article 71 for the purposes of solving the possible conflict arising between

contrary, the Court itself recognizes that among the said principles those of certainty and predictability should also be included on exactly the same level.³⁷

Moreover, to consider the interpretation of Article 71 as conditional upon the observance of the above mentioned principles implies not only a proper understanding thereof, but also the ability to interpret the specialised convention in the light of those principles, so as to assess the extent to which Article 71 may be allowed to take effect. As a consequence, the approach followed by the ECJ results in Article 71 being made a conditional rule.³⁸

Undoubtedly, the Court's reasoning results in a clear rule such as Article 71 being replaced with a conditional one. According to the Court, specialised conventions apply only insofar as they satisfy certain requisites, regardless of the latter being not even remotely envisaged by Article 71. This means that, in practice, rules on jurisdiction as laid down in a transport convention are allowed to operate in place of the Regulation only to the extent that they are as highly predictable, capable of facilitating the sound administration of justice and minimising the risk of concurring proceedings as the Brussels provisions are.³⁹

But, as said, the question remains open as to how, on the one hand, the principles identified by the Court are to be put into play in each concrete case, and, on the other hand, the provisions laid down by the relevant specialised convention are to be effectively weighed against the said principles so as to establish whether or not Article 71 is enabled to operate.

Indeed, the Court's choice seems to be in the sense that a one-size-fits-all solution is unavailable and that, as a consequence, the concrete interplay between the Regulation and the relevant convention's provisions is to be found out on a purely case-by-case basis.

A confirmation of the above may actually be drawn from the recent *Kintra* case⁴⁰, in which the Court reached the conclusion that Article 71 of the

the principles underlying the Regulation and those underpinned by conventions on special matters, which means that if such a conflict actually arises it has to be dealt with on the basis of Article 71 rather than through any Recital whatsoever.

³⁷ A confirmation of the above may indeed be found in the said *TNT* and *Nipponkoa* judgments (see, respectively, para 49 and para 36) given that, as seen, the set of principles with which specialised conventions must be consistent in order to be given precedence over the Regulation expressly include «*predictability* as to the courts having jurisdiction and therefore *legal certainty* for litigants» (emphasis added).

³⁸ M. Cremona (fn 29 above), at 4.

³⁹ P. Mankowski (fn 8 above), note 4a.

⁴⁰ ECJ, judgment of 4 September 2014, case C-157/13, *Nickel & Goeldner Spedition GmbH v. Kintra UAB*, ECLI:EU:C:2014:2145.

Regulation is to be interpreted as meaning that an action for the payment of carriage of goods services falling within the scope of application of the CMR may be brought in accordance with Article 31(1) thereof instead of with the corresponding heads of jurisdiction laid down by the Regulation.

The Court first recalled the fundamental principles underlying the Regulation's rules on jurisdiction as inferable from the relevant Recitals of the Preamble, and, second, carried out an analysis of the jurisdiction criteria laid down by Article 31(1) CMR together with a confrontation thereof with the corresponding criteria envisaged by the Regulation. Given that, in the Court's view, the outcome of such analysis and confrontation is that the CMR rules on jurisdiction can be deemed as consistent with the principles of predictability and legal certainty as the Regulation's corresponding provisions (as laid down by its Article 5(1), now Art. 7(1) of the Brussels Ia Regulation), in case of a dispute falling within the scope of both the said instruments a Member State court may, pursuant to Article 71, apply the CMR rules in place of those of the Regulation.⁴¹

In light of the foregoing, it is however difficult to deny that the Court's approach results in nothing other than Article 71 and the priority principle thereby enshrined being restricted⁴² – if not even rendered “*meaningless and illusory*”⁴³ – and, as a consequence, the objectives of predictability and legal certainty pursued by the Regulation being unavoidably undermined.⁴⁴

As observed in literature⁴⁵, it is not the teleological approach followed by the Court which brings about the aforesaid drawbacks. Indeed, even though it

⁴¹ The Court based itself on the consideration that Article 31 CMR entitles the claimant to choose among as many alternative *fora* as the corresponding Regulation's rule (namely, Article 5(1) Brussels I, now Article 7(1) Brussels Ia) substantially does (see paras 39-40 of the *Kintra* judgment). Nor has the circumstance that among the CMR *fora* stands one (namely, that of the country where the goods have been taken over by the carrier) which is not mirrored by the corresponding Regulation's provision been considered as conflicting with the principles underlying the Regulation. As stated by the Court in *Rehder* (case C-204/08, EU:C:2009:439), in fact, it is accepted in relation to contract for carriage that, in certain circumstances, the applicant may have the choice between the courts of the place of departure and those of the place of arrival (para 41 of the *Kintra* judgment).

⁴² C.E. Tuo (fn 13 above), at 24-25. In the same terms see also Mankowski (fn 8 above), note 4a, who states that the ECJ restricts Article 71 for this rule is said that it cannot have a purpose that conflicts with these basic principles.

⁴³ M. Attal (fn 29 above), at para 29.

⁴⁴ For similar considerations see C.E. Tuo (fn 13 above), at 25-26.

⁴⁵ M. Cremona (fn 29 above), at 6.

is undeniable that teleology is, *per se*, likely to give rise to unpredictable interpretative results, it is not on the basis of this sole reason that the said approach is to be disregarded. Rather, the Court's approach is to be criticised in that it "has created exceptions to an extremely clear rule giving precedence to one objective over another on the basis of a teleology which is itself unclear". Despite there being no doubts as to the free circulation of civil and commercial judgments representing the ultimate goal of the Brussels system, it is nonetheless likewise undisputable that – as it clearly arises from the Regulation itself – such very aim cannot be achieved without ensuring legal certainty and predictability.

In this perspective, it is surely possible to maintain that in the *Nipponkoa* and *Kintra* cases the Court has, at least partially, mitigated the above said uncertainty in that it has provided national courts with some indications as to how to interpret the CMR.

Notably, in *Nipponkoa* the ECJ first clarified that, on the basis of *TNT*, Article 71 is to be understood as preventing domestic courts from interpreting CMR in a sense "which fails to ensure under conditions at least as favourable as those provided for by [the Brussels Regulation], that the underlying objectives and principles of that regulation are observed". Against this background, the ECJ then indicated what interpretation of Article 31(2) CMR would satisfy Article 71, *i.e.* what interpretation of the relevant provision laid down by the specialised convention come into play in the case at stake would "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". And it bears underlying that in *Kintra* the Court has gone even beyond such approach in that it directly carried out the analysis as to whether the relevant CMR's provision could be deemed consistent with the Regulation's principles and, as a consequence, applied in place of the corresponding provisions of the Regulation itself. In such latter decision the Court has, in other words, done what – as per the *TNT* ruling – the national court should have done: namely, it has verified if, in light of the circumstances featuring the concrete case, the international provision on jurisdiction come into play could be considered in line with the Regulation's relevant principles and, as such, be applied in place of Brussels I pursuant to its Article 71.

But, in the present authors' view, these recent developments of the ECJ's case law fails to fully satisfy the need to overcome the uncertainty which, as seen above, is inherent in the very same test elaborated in *TNT* for the purposes of establishing whether or not, pursuant to Article 71, a given specialised convention is to take precedence over the Regulation.

The reason for this position is that, in principle, the test is to be put into play at the national level, *i.e.* by the domestic court which, in light of the concrete circumstances featuring the dispute, is called upon to establish whether the procedural issue it is faced with may be governed consistently with the relevant international provisions or has rather to be disciplined in accordance with the Regulation. It is, however, well-known that there is no uniformity as to the terms in which the Member States' judicial authorities interpret the international transports conventions which are in force within their own legal system. And this lack of homogeneity is all the more evident if one has regards to the very field of transports, as the conventions dealing with such matter are generally given remarkably different meanings one from the other depending on the Member State courts before which proceedings are commenced.⁴⁶

Therefore – unless the Court is specifically requested to clarify if, and to what extent, Article 71 allows a given international rule on jurisdiction to display its effects in place of the Regulation and the Court, as in the *Kintra* case, decides to directly indicate whether the rule at hand is applicable or not – no certainty can be said to exist as to the jurisdiction provisions laid down by international transport conventions which may be considered as capable of prevailing over the corresponding rules of the Regulation.

The persistence of the abovementioned uncertainty also results in the question as to the actual effectiveness of Article 71 of the Regulation remaining still open. Indeed, as Marise Cremona has put it, “*the TNT decision has emptied the provision of all real legal force*”.⁴⁷

One might therefore have expected the EU legislator to take the occasion of the Brussels I Recast for revising Article 71 so as to adapt it to the ECJ case law. But, as seen above, the Article at hand has undergone no revision at all.

The fact that Article 71 of Brussels Ia perfectly mirrors Article 71 of Brussels I may indeed be regarded as a confirmation, on the one hand, that from the EU legislature's viewpoint the codification of the Court's jurisprudence would be of no avail to legal certainty and predictability being enhanced and, on the other hand, that the relationship between Brussels Ia and specialised conventions is nonetheless to be assessed on the basis of such jurisprudence, *i.e.* on a case-by-case basis, with a view to primarily ensuring that the principles identified by the Court as underlying the Regulation are not compromised by

⁴⁶ On this very issue see, among others, M. Lopez de Gonzalo, “Diritto uniforme dei trasporti e ‘forum shopping’”, (2010) *Diritto marittimo* 234.

⁴⁷ M. Cremona (fn 29 above), at 13.

the relevant provision of the specialised convention coming into play within the national dispute.

It therefore arises that while at the time of the *TNT* decision the EU legislature's and the ECJ's viewpoints as regards the aim behind Article 71 turned out to be dramatically irreconcilable with one another, no such irreconcilability may be said to exist anymore as of today.

To put it differently, one might argue that by maintaining the wording of Article 71 exactly as it was under Brussels I, the EU legislature has implicitly accepted that such rule is to be interpreted consistently with the Court's approach, *i.e.* in such a way as to almost always give precedence to the Regulation and, by so doing, to the objectives underlying therein as strictly instrumental into the establishment of the internal market. Of no importance to the contrary has, in other words, been considered the fact that this necessarily results in the objective, likewise to be still found in the Recast Preamble, of preserving the application of sectorial rules (such as those concerning international transports) being almost completely disregarded.

If the above is the proper way of understanding the EU legislature's choice not to amend Article 71, it may indeed be criticised for exactly the same reasons set out above as regards the Court's approach. Namely, the broader application of specialised conventions such as those dealing with transports should have been favoured in that it "*may be more important and conducive to legal certainty in commercial transactions than the preservation of internal homogeneity in the EU through privileging the Brussels Regulation*".⁴⁸

7. (CONTINUED) FROM THEORY TO PRACTICE: THE IMPACT OF THE ECJ CASE LAW ON SOME TRANSPORT CONVENTIONS

Another issue that emerges from the analysis of the *TNT* test is (as said, §5 above) the one pertaining to the applicability of the said test in case the international rules on jurisdiction or recognition and enforcement of judgments are contained in a transport convention other than the CMR.

Before delving into a discussion on this point, it seems appropriate to preliminarily address the question as to which of the said conventions may be considered covered by Article 71.

As seen above (see §1), the Article in question generally refers to the specialised conventions to which the Member States were contracting party at the time of the entry into force of Regulation No 44/2001, *i.e.* on 1 March 2002.

⁴⁸ M. Cremona (fn 29 above), at 12.

The Regulation does not provide for a list of the specialised conventions falling within the scope of application of Article 71. Neither has the Court so far been specifically requested to clarify which these conventions are. In *Kintra*, nonetheless, the ECJ expressly pointed out that the CMR was to be deemed covered by Article 71 insofar as the Member State of the court before which the main dispute was pending (namely, Lithuania) had acceded to such convention in 1993, *i.e.* before the entry into force of Brussels I.⁴⁹

Therefore, a transport convention may be considered covered by Article 71 if, and to the extent that, disputes falling within both the Regulation and the transport convention itself are connected with Member States which acceded to such convention before 1 March 2002. It follows that the provision at hand certainly applies to the international conventions referred to (albeit in a non-exhaustive manner) in the Schlosser Report with a view to shedding light on the scope of application of Article 57 of the 1968 Brussels Convention.⁵⁰

In doctrinal writings, however, the position has been held that, in addition to the conventions existing at the time when the Report was drawn up, the 1999 Montreal Convention on international carriage by air⁵¹ and the 1999 Arrest Convention⁵² may also be considered as specialised conventions falling within the scope of Article 71.⁵³ That position rests on these two conventions being the successors of, respectively, the 1929 Warsaw Convention⁵⁴ and the 1952 Arrest Convention, *i.e.* of conventions to which the Member States were parties before the Brussels I Regulation's entry into force.

If this position is accepted⁵⁵, the question as to whether the two above-mentioned conventions may be considered as prevailing over the Regulation in cases where a dispute falls within both the latter and, depending on the dispute's subject-matter, the 1999 Montreal Convention or the 1999 Arrest Convention, should be answered by resorting to the *TNT* test.

⁴⁹ See para 37 of the *Kintra* judgment.

⁵⁰ P. Mankowski (fn 8 above), note 9.

⁵¹ Montreal Convention of 28 May 1999 for the unification of certain rules relating to international carriage by air.

⁵² International Convention on Arrest of ships, done at Geneva on 12 March 1999.

⁵³ P. Mankowski (fn 8 above), note 9.

⁵⁴ Warsaw Convention of 12 October 1929 for the unification of certain rules relating to international carriage by air.

⁵⁵ This is however highly debatable as, if one considers the dates on which Member States became contracting parties, for instance, to the Montreal Convention, it plainly arises that such dates are all subsequent to the Brussels I's entry into force.

As regards the Montreal Convention, the view has been expressed that the heads of jurisdiction laid down therein – namely, those envisaged by Article 33⁵⁶ – would take precedence over the Brussels Regulation. More particularly, it is the opinion of Peter Mankowski that “*it would appear not only far-fetched but beyond any belief*” if the heads of jurisdiction as contained in Art. 33 of the Montreal Convention “*were alleged to be unpredictable*”.⁵⁷

Indeed, if one sticks to the conditions under which, according to the *TNT* ruling, specialised conventions may be given precedence over the Regulation as per Article 71, the Montreal Convention should no doubt be considered as prevailing over Brussels Ia. It seems, in fact, hardly disputable that, if subject to *TNT* test, the jurisdiction criteria set forth by Article 33 of the Montreal Convention would be deemed consistent with the principles underlying the corresponding rules of the Regulation.

As seen above, according to the ECJ the conditions to be met by the specialised conventions’ rules on jurisdiction are that such rules ensure (i) high predictability as of the court having jurisdiction over the dispute, (ii) sound administration of justice and (iii) minimisation of the risk of parallel proceedings. Thus, the Regulation may be replaced by the corresponding rules on jurisdiction enshrined in a specialised convention only to the extent that such latter rules are deemed capable of ensuring at least the same results as those to which the Regulation would lead.

Hence, if indeed no doubts can be raised as to Article 33 of the Montreal Convention satisfying the requirements under (i) and (ii) above, one could wonder if the Article would likewise have been deemed apt at minimising the risk of parallel proceeding as per the requirement under (iii) above.

In this regard, however, it bears remembering that, as set out by the Court since the *Tatry* decision, the prevalence given to a specialised convention for the

⁵⁶ Which reads as follows: “1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination. 2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier’s aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement”.

⁵⁷ P. Mankowski (fn 8 above), note 4c.

purposes of establishing jurisdiction does not preclude the same Regulation's rules on *lis pendens* or the recognition and enforcement of judgments from eventually being put into play on a subsidiary basis. Thus, as appropriately remarked⁵⁸, since the Brussels Ia provisions on *lis pendens* and the free movement of judgments appear perfectly consistent with both Article 33 of the Montreal Convention and its rationale, the said provisions shall undoubtedly also be deemed applicable in the case that, pursuant to Article 71, jurisdiction is established on the basis of one of the specialised criteria laid down by the Montreal Convention.

In light of the above, and at least having regard to the impact that the TNT test is likely to have on Article 33 of the 1999 Montreal Convention, the view taken by Professor Mankowski that “*in practical effect*” the ECJ's approach might be “*less subject to criticism than with regard to its theoretical and dogmatic ambition*” as “*practical results might differ less than policy statement*” seems to be confirmed. So much so that, in his opinion, TNT “*should be taken as a mere programmatic statement and not a truly operational device*”.⁵⁹

A different conclusion might however be reached if one comes to consider the interaction between the Regulation and the 1999 Arrest Convention's rules on recognition and the enforcement of judgments.

Unlike its predecessor (*i.e.*, as said above, the 1952 Arrest Convention), the 1999 Convention lays down rules on the recognition and enforcement of judgments (namely, those contained in Article 7(5)) determining the merits of the dispute in relation to which an arrest order has already been issued. The principle underlying such discipline is that of mutual recognition, the concrete operation of which is however subject to the conditions that (i) the defendant was given reasonable notice of the proceedings and a reasonable opportunity to present the case for the defence; (ii) recognition is not against (the requested State's) public policy.

Given that the Recast Regulation has abolished the *exequatur* procedure⁶⁰, the question arises as to what impact Article 71 of the Regulation would have

⁵⁸ S.M. Carbone, “Criteri di collegamento giurisdizionale e clausole arbitrali nel trasporto aereo: le soluzioni della convenzione di Montreal del 1999”, (2000) *Rivista di diritto internazionale privato e processuale* 1, 5.

⁵⁹ P. Mankowski (fn 8 above), note 4c.

⁶⁰ See Article 39 Brussels Ia, which reads: “A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required”. It bears underlining, however, that despite the Commission's proposal to the contrary, the Recast has maintained the very same grounds for refusal of *exequatur* formerly envisaged by Brussels I as grounds for refusal of enforcement (see Article 46 Brussels Ia).

in case a judgment given by the court of a Member State which is also party to the 1999 Arrest Convention is requested to be recognised or enforced by the courts of another Member State which is likewise party to the same Convention.

According to the ECJ's approach, it seems that the question as to which one of the said instruments prevails over the other for the purposes of governing recognition or enforcement should be answered in favour of the Regulation. Indeed, should the opposite solution be endorsed, the principle of *favor executionis* as enhanced by the new Regulation would be unacceptably compromised.

However, a solution of this type cannot be reached other than on the basis of a proper balancing of the specific interests of the parties involved in the dispute. Mutual enforcement of judgments rendered in accordance with the Arrest Convention implies that the debtor is in principle deprived of the possibility of precluding the foreign judgment from fully displaying its effects in the requested Member State.

Giving precedence to the Regulation over the 1999 Convention means, in other words, that no *exequatur* procedure is requested for such judgments and that, as a consequence, they are automatically enforceable throughout the EU judicial area subject only to the procedural rules existing in the requested Member State. No doubt that, according to Brussels Ia, the debtor is eventually entitled to invoke the grounds for refusal of enforcement envisaged by the Regulation itself as well as those provided to the same effect by the domestic rules of the requested State. But it seems hardly disputable that the *exequatur* procedure envisaged by the Arrest Convention would provide the debtor with an additional, if not even definitive, means to oppose the foreign judgment's enforcement against him.

It is therefore submitted that, for a proper application of Article 71, the ECJ's approach based on *favor executionis* should not be applied to the letter. Preference should not be aprioristically given to the EU rules on the sole basis of the principle of the *primauté* of EU law and the related major objectives. As appropriately pointed out, the latter principle bears relevance only to the extent that the rules conflicting with one another belong exclusively to the EU legal system, whereas it cannot display any effect in case of conflicts between EU rules and international law. Consequently, to pretend that the *primauté* principle is definitive for the purposes of giving precedence to EU rules is tantamount to providing no valid justification at all for the Regulation to be given precedence over the corresponding international provisions.

On the contrary, it seems preferable to stick to a teleological interpretation which, far from being exclusively focussed on the Regulation's objectives (as indeed the ECJ has shown to conceive it in its case law on Article 71), also implies a detailed consideration of the very objectives underlying the concurrent provisions laid down by the relevant specialised convention. This approach, which French scholars also refer to as "*règle de l'efficacité maximale*", consists in comparing the interests that each set of concurrent rules aims at protecting with a view to giving precedence to those of them which are deemed most capable of satisfying such interests to the maximum possible extent.⁶¹

Accordingly, Article 71 should function as a coordination clause, on the basis of which the relevant provisions of, respectively, the Regulation and the special convention should be compared with each other as regards their respective underlying principles and rationale. As an outcome of such a confrontation, precedence should be given to the rules that, among those concurrently aimed at governing the recognition and enforcement of judgments, are found to be the most capable of achieving, up to the maximum possible extent, the objectives that both the Regulation and the special convention regard as fundamental. Indeed, as remarked in literature⁶², the only limit to such a coordination mechanism being fully put into play should be that of the respect of international commitments "not being affected".

PART II

8. THE GROWING EU'S EXTERNAL COMPETENCES IN PIL AND TRANSPORT MATTERS

As remarked from the outset, the EU's competences in the fields of both private international law and transports have grown significantly.

This has resulted in a major change⁶³ as regards the relationship between Brussels I and international conventions: Article 71 of the Recast Regulation expressly confirms the priority of the conventions "*to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recog-*

⁶¹ B. Dutoit, F. Majoros, "Le lacis des conflits de conventions et leurs solutions possibles", (1984) *Rev. crit. DIP* 565, at 577.

⁶² S.M. Carbone, "Art. 2" in F. Pocar, T. Treves, S.M. Carbone, A. Giardina, R. Luzzatto, F. Mosconi, R. Clerici, *Commentario del nuovo diritto internazionale privato*, Padova, 1996, 8 at 12-14.

⁶³ See P. Mankowski (fn 8), at 860.

tion or enforcement of judgments”, but any further reference to the conventions to which Member States will be parties has been deleted.⁶⁴

The above mentioned change rests upon the shift of competence in favour of the European institutions, a shift which has progressively taken place not only in the field of private international law, but also in that of transport.

As was the case with competences in PIL matters, the external competence of the EU in the transport sector also traces its origin back to the so-called *AETR* doctrine⁶⁵, according to which the EU alone is in a position to undertake international obligations *vis-à-vis* third countries as far as EU rules have already been adopted that deal with (substantially) the same matter.

At the internal level, transports fall within the shared competence between the EU and the Member States⁶⁶, which is to be exercised consistently with the principle of subsidiarity. As a consequence, the EU and the Member States may both legislate and adopt legally binding acts in the area of transport. More precisely, the Union is entitled to act “*only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*”.⁶⁷ On the other hand, the Member States’ competence may be exercised to the limited extent that the Union has not yet exercised, or has decided to cease exercising, its own. Therefore, where EU rules in the field of transport are adopted, Member States have the duty not only to ensure the fulfilment of the obligations arising from the Treaties or resulting from the action taken by the institutions, but also to abstain from any measure capable of jeopardising the attainment of the objectives of the Treaty; in addition, they are not allowed – independently from the EU institutions – to undertake obligations which might affect EU rules or alter their scope.⁶⁸

Having said that, the exercise of the EU competence in the field of transports has never been easy notwithstanding a specific provision on the adoption of common rules applicable to international transports having always existed in the Treaties.⁶⁹

⁶⁴ See above para 1.

⁶⁵ See ECJ, judgment of 31 March 1971, case 22/70, *Commission v Council (ERTA)*, [1971] ECR 263, paras 17 and 18.

⁶⁶ See Article 4.2 lett. g TFEU.

⁶⁷ See Article 5 TEU.

⁶⁸ ECJ, judgment of 12 February 2009, case C-45/07, *Commission v. Greece*, paras 17 and 18.

⁶⁹ See Article 91.1 lett. a) TFEU.

The power to establish relationships with non-Member States and/or international organisations in the field of transport has been recognised by the ECJ since the above mentioned *AETR* case⁷⁰, in which the theory of implied powers was expressed for the first time, and was later further developed through the *Open skies* case law.⁷¹ The Treaty of Lisbon has finally clarified, under Article 3(2) TFEU, in the sense that the EU enjoys exclusive competence for the conclusion of an international agreement (i) when its conclusion is provided for in a legislative act of the Union, or (ii) is necessary to enable the Union to exercise its internal competence (i.e. the so-called exclusive external competence of necessity, deriving from the above mentioned *AETR* and *Open skies* case law), or (iii) in so far as its conclusion may affect common rules or alter their scope (i.e. the so-called exclusive external competence for occupation, as stated in the *AETR* case law).

Therefore, the EU may accede to international treaties in the field of transports on the grounds of the relevant TFEU rules on common European transport policy provided by Articles 90-100, to be read in combination with Article 218 TFEU (which lays down the rules on the negotiation and conclusion of international treaties).

Today the EU is a relevant actor in the field of international transports and regularly cooperates with the most important international organizations⁷²; suffice to recall that it has become a member of the OTIF, which has modified its statute in order to give regional organizations the chance to adhere to the conventions.⁷³ Other international organizations – which have not made a similar change in their statute (as for example the International Maritime Organization and the International Civil Aviation Organization) – recognize

⁷⁰ ECJ, judgment of 31 March 1971, case 22/70, *Commission v Council (ERTA)* (fn. 65 above). See S. Amadeo, *Unione europea e treaty-making power*, Milan, 2005, 90.

⁷¹ ECJ, judgment of 5 November 2002, case C-466/98, *Commission v UK*; ECJ, judgment of 5 November 2002, case C-467/98, *Commission v Denmark*; ECJ, judgment of 5 November 2002, case C-468/98, *Commission v Sweden*; ECJ, judgment of 5 November 2002, case C-469/98, *Commission v Finland*; ECJ, judgment of 5 November 2002, case C-471/98, *Commission v Belgium*; ECJ, judgment of 5 November 2002, case C-472/98, *Commission v Luxemburg*; ECJ, judgment of 5 November 2002, case C-475/98, *Commission v Austria*; ECJ, judgment of 5 November 2002, case C-476/98, *Commission v Germany*.

⁷² See F. Munari – L. Schiano di Pepe, “Sovranità e trasporti: organizzazioni internazionali e fonti normative indirette”, (2002) *Diritto marittimo* 107-160.

⁷³ The accession is effective from 1 July 2011.

however to the EU a privileged *status*, which the ECJ tends to protect⁷⁴ by asking EU Member States – in strict observance of the duty of loyal cooperation – not to make any proposals capable of affecting EU law in the context of the work of such international organizations.

9. GROWING COMPETENCES ... GROWING INTERACTIONS: THE GENERAL PRINCIPLES GOVERNING THE RELATIONSHIPS BETWEEN EU AND INTERNATIONAL LAW

Understandably, the more the EU expands its competences, the more it is likely that EU law might interact with other sources of law adopted at the international level.⁷⁵ Therefore, the need to connect EU law to – or, as the case may be, to disconnect it from – international law arises.⁷⁶

A very specific rule has been provided for the case of collision between EU law and international conventions concluded before 1 January 1958 (or, for acceding States, before the date of their accession). Under Article 351 TFEU, the rights and obligations arising from “ante-1958 conventions” “*shall not be affected by the provisions of the Treaties*”.⁷⁷ As a result of EU membership, the

⁷⁴ Reference is made to ECJ, judgment of 12 December 2009, case C-45/07, *Commission v. Greece*, where the ECJ stated the principle under which, on the basis of the duty of loyal cooperation, a Member State is not allowed to make in the context of the works of the IMO a proposal which is capable to affect EU law.

⁷⁵ See C. Legros, “L’intégration des conventions internationales dans le droit dérivé de l’Union européenne: l’exemple du droit des transports”, in *Le droit entre tradition et modernité. Mélanges à la mémoire de Patrick Courbe*, Paris, 2012, 367 ff.

⁷⁶ On this topic, see A. Borrás, “Diritto internazionale privato e comunitario e rapporti con Stati terzi”, in P. Picone (ed. by), *Diritto internazionale privato e diritto comunitario*, Padova, 2004, 449-483; C. Briere, “Le droit de transports: terrain de prédilection des conflits de conventions internationales”, in *Le droit entre tradition et modernité. Mélanges à la mémoire de Patrick Courbe*, Paris, 2012, 69-74; C. Legros, (fn 75 above); M. Pauknerova, “EU Regulations and international conventions – shifts in time”, in J. Forner Delagüa, C. Gonzalez Beilfuss, R. Vinas Farre (ed. by), *Entre Bruselas y la Haya. Estudios sobre la unificación internacional y regional del Derecho internacional privado. Liber amicorum Alegria Borrás*, Madrid, 2013, 671-684; C. Briere, *Les conflits de conventions internationales en droit privé*, Paris, 2001, 15.

⁷⁷ The rule under Article 351 TFEU applies only to cases of multilateral agreements, not to inter-Member-States agreements, over which Union law takes precedence irrespectively of the fact that the latter predate accession to the EU or the treaties. On this point, see M. Cremona, “Disconnection clause in EC law and practice”, in C. Hillion, P. Koutrakos (ed. by), *Mixed agreements: The EU and its Member States in the World*, Oxford, 2010, 160-186, at 161. For an application of this principle, see *Commission v. Italy*, case 10/61, where with regard to an agreement made between

Member State concerned is under a duty to take all appropriate steps to eliminate the possible incompatibilities arising out of the international conventions to which such State is party and, as expressly stated by Article 351 TFEU, it would be helpful for the Member States to adopt and follow a common attitude in this regard.

The second possible way of interaction is that between EU law and international conventions to which the EU – in its quality of Regional Economic Integration Organization (REIO) – is a contracting party alongside with the Member States, *i.e.* the so-called “mixed agreements”.⁷⁸

By virtue of Articles 216(2) and 218 TFEU, the conventions ratified by the EU are part of EU law. As a consequence, the Member States’ obligation to comply with such conventions arises not only directly from the agreement itself, but also as a matter of Union law.

Despite the above mentioned provisions making it clear that Member States are bound to respect the international agreements entered into by the EU, the TFEU fails to clarify the relationship between such agreements and EU law. This gap is indeed all the more regrettable if one considers that – given the EU’s growing competences and the strict cooperation among the Member States in the specific field concerned – EU law is likely to evolve faster towards more modern solutions than those envisaged at the international level.

In these cases, a need therefore arises for EU law to be “disconnected” from the international conventions so as to be granted priority over them. As a consequence, when the EU enters into a mixed agreement, it frequently makes use of (i) the so-called “disconnection” clauses, through which EU law is given precedence over such agreement for the purposes of governing issues arisen within disputes of a purely intra-EU character, as well as of (ii) the “declaration of competences”, through which the EU expressly defines its sphere of action in the specific field.

A third conflict which is likely to arise is one between EU law and international conventions to which all Member States or some of them are contracting parties, but the EU is not. The reason for this situation lies, in most cases,

Member States within the framework of GATT, the Court held that the Treaty took precedence.

⁷⁸ As for PIL, the best examples are those of the Hague Conventions and, in particular, the Protocol on the law applicable to maintenance obligations of 2007 and the 2005 Hague Convention on choice of court agreements. As for the transport sector, relevant examples are the Montreal Convention for the unification of certain rules for international carriage by air of 1999 as well as the COTIF, *i.e.* the Convention concerning international carriage by rail of 1999.

in the fact that those international treaties do not envisage the possibility for an actor other than a State to be a contracting party thereto.

Even when Member States conclude an international agreement independently of the EU, their *status* as EU members remains unchanged and the primacy of Union law must as a consequence be complied with. The above is in derogation from the priority rule existing under international law, according to which the provisions laid down in a later treaty are to be given precedence over the corresponding ones contained in the same treaty's previous version whenever a dispute arises involving States that are parties to both treaties.⁷⁹

Given that, as said above, the competences of the EU are exponentially growing, it is plausible that such an international convention, far from being deemed capable of affecting the EU's existing law and/or action in a specific field in some way, is rather regarded as apt at giving "a valuable contribution" in the pursuit of the EU's objectives.

In such cases, a need arises for the EU to establish some "connections" with the international law rules, but the Treaties are silent on how such connections are to be established. Two methods have therefore been resorted to at the EU level for the purpose of satisfying the said need: the first one is to authorise or recommend Member States to ratify the convention in the interest of the EU⁸⁰ and the second is to implement parallel EU legislation.

In the following paragraphs, the specific techniques whereby the EU rules are connected to – or, as the case may be, disconnected from – international conventions on transport matters will be explored with a view to assessing their impact on the sphere of application of the Brussels Ia Regulation.

10. THE MECHANISMS DESIGNED TO "DISCONNECT" EU LAW FROM INTERNATIONAL TRANSPORTS CONVENTIONS

The so-called "disconnection clauses"⁸¹ represent a crucial device for the regulation of the relationship between EU and international law and is usually

⁷⁹ By virtue of Article 30 of the Vienna Convention on the Law of the Treaties. On this point, see M. Cremona (fn 76 above), at 171.

⁸⁰ See C. Cellierino, *Soggettività internazionale e azione esterna dell'Unione europea*, Rome, 2015, 288 ff.

⁸¹ The notion "disconnection clause" is used by the EU institutions. However, other possible terms may be used. See P.J. Martín Rodríguez, *Flexibilidad y tratados internacionales*, Madrid, 2003, at 139 who quotes as examples the terms: exception, derogation, waiver, restriction, limitation, suspension, extension, reservation, claw-back clause, opt in and opt out. On disconnection clauses, see M. Cremona (fn 77 above).

to be found in international agreements to which the EU itself is a contracting party.

They aim at protecting the autonomy of the EU's legal order by providing that as between the EU Member State parties to the agreement the relevant provisions of Union law are to be applied instead of those contained in the international agreement at stake.⁸²

In this light, disconnection clauses are a sort of conflict-of-laws rules: indeed, the effect of a disconnection clause being inserted in an international treaty is that EU rules (instead of those laid down by the international treaty itself) apply in the Member States' mutual relations, irrespective of whether such States are all contracting parties to the convention or not. As a consequence, the convention's scope of application is limited to the relationships between a contracting EU Member State and a non-EU contracting State as well as to all the relationships between non-EU contracting States.

These clauses are particularly useful in cases where not all Member States have ratified the international convention, since – by granting priority to EU law – they pursue uniformity within the EU in addition to protecting the interests of Member States.

The legal basis for the clauses at hand is primarily to be found in Article 41 of the Vienna Convention on the Law of the Treaties, pursuant to which two or more of the parties to a multilateral treaty are authorised to conclude an agreement (the so called *inter se* agreement) to modify the treaty as between themselves alone.⁸³ Moreover, given their underlying purpose of protecting the

⁸² See M. Cremona (fn 77 above), at 161. As for the protection of the interests of the EU, the so called “dimension promotionnelle” of the clauses, see P.J. Martin Rodriguez (fn 81 above), at 138 and 113. For a further definition, see the Report on the consequences of the so-called “disconnection clause” in international law in general and for Council of Europe Conventions, containing such a clause, in particular, which states that the term “disconnection clause” is commonly used to refer to a provision in a multilateral treaty allowing certain parties to the treaty not to apply the treaty in full or in part in their mutual relations, while other parties remain free to invoke the treaty fully in their relations with these parties (para 10).

⁸³ More precisely, under Article 41 of the Vienna Convention on the Law of the Treaties, this is subject to: (a) The possibility of such a modification is provided for by the treaty; or (b) The modification in question is not prohibited by the treaty and: (i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole. 2. Unless in a case falling under paragraph 1(a)

autonomy of the EU's legal order, such clauses are also grounded in the duty of loyal cooperation as laid down by Article 4(3) TFEU: by virtue of the disconnection clauses, EU Member States are entitled to put aside international law obligations and to apply EU law in their mutual relationships.⁸⁴

As said above, disconnection clauses are usually contained in international agreements to which the EU is a contracting party, but they may also be included in EU instruments⁸⁵ – as it happens for Article 71 Brussels Ia – for the purposes of establishing their interrelation with other rules, of either an international or EU origin, concurrently governing the same subject-matter.

The very “first generation” disconnection clauses were worded in clear-cut terms⁸⁶ and, as a consequence, Member States had no other choice but to apply EC/EU law instead of the concurring international rules.

the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

⁸⁴ See also, C. Briere (fn 76 above), at 71.

⁸⁵ For some examples of disconnection clauses contained in EU instruments, apart from art. 71 of the Bruxelles I Recast Regulation, see also Articles 59-63 of Regulation No. 2201/2003 concerning the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels IIa Regulation), Article 69 of Regulation No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Article 75 of Regulation No. 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of successions and on the creation of a European Certificate of Succession, Article 25 of Regulation No. 593/2008 on the law applicable to contractual obligations (Rome I Regulation) and in Article 28 of Regulation No. 864/2008 on the law applicable to non-contractual obligations (Rome II Regulation).

⁸⁶ The practice of disconnection clauses aimed at protecting the EC/EU legal order started in 1988 with the first treaty adopted under the aegis of the Council of Europe and of the Organisation for economic cooperation and development in Europe, *i.e.* the Convention on mutual administrative assistance in tax matters (Strasbourg 25 January 1988, ETS No. 27). More precisely, Article 27.2 of that Treaty states: “*Notwithstanding the rules of the present Convention, those Parties which are members of the European Economic Community shall apply in their mutual relations the common rules in force in that Community*”. Similar wording is used in the disconnection clause provided by the European Convention on trans frontier television 1989, ETS No. 132, as amended by Protocol ETS No. 171, stating that “*In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned*”.

On the contrary, “modern” disconnection clauses are frequently (and unfortunately) worded in a more nuanced way⁸⁷, as they do not prohibit Member States from applying the convention, but merely state that EU law is to be given prevalence in so far as EU rules exist on the subject matter of the convention and are applicable to the case at stake.⁸⁸

Such clauses are clearly more flexible: they are grounded in notions that, like those of “subject matter” and “case at stake”, need to be interpreted taking into account that EU law is evolving and developing over time. This is particularly regrettable if one considers that disconnection clauses operate automatically, *i.e.* without the necessity to be specifically invoked and irrespectively of the existence of a real conflict between a rule of the convention and one of EU law.

With the aim of better clarifying the mechanism of disconnection, the EU has eventually further developed it by providing a declaration whereby information is offered as to the subjects covered by such clauses as well as to the distribution of competences between EU and Member States.⁸⁹

However, in practice, the combined use of these two devices – *i.e.* the disconnection clause and the declaration of competences – does not always clarify the interaction between EU and international law, as the case of rail transport clearly demonstrates.

At the international level, rail transport is traditionally regulated by the Intergovernmental Organisation for the International Transport by Rail (the so-called OTIF), created by the Berne Convention of 9 May 1980 (the so-called COTIF). The 1999 Vilnius Protocol was the last to amend the Convention, which is now called COTIF 1999 and which entered into force on 1 July 2006.

⁸⁷ See M. Cremona (fn 77 above), at 171.

⁸⁸ For an example of a recent disconnection clause, see Article 27.1 of the Council of Europe Convention on the Prevention of Terrorism 2005, CETS No. 196, Article 26.3, stating that “*Parties which are members of the European Union shall, in their mutual relations, apply Community and European rules in so far as there are Community and European rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other parties*”.

⁸⁹ As pointed out by M. Cremona (fn 77 above), at 173, the declaration of competence is designed for third States, to indicate who has primary responsibility for implementation of the convention based on competence. Whilst the disconnection clause indicated to the other contracting parties that the agreement is one in which there is Union competence and Union rules apply, but does not give any indication of the scope and nature of the EU competence, the declaration clarified these aspects *vis-à-vis* third States.

COTIF 1999 provides rules regarding the functioning of the organisation itself and, in its appendices, all the conventions of international uniform law regarding rail transport⁹⁰ adopted under the aegis of the OTIF, among which particularly relevant are the CIV and the CIM.

In the light of the growing competence of the EU in the rail sector, as a result of a very difficult negotiation the OTIF has decided to amend the original Berne Convention by introducing a specific rule for the accession of REIO.⁹¹ Owing to this amendment, the EU has acquired the membership of the organization and has also become a contracting party to the Convention and its appendices.

Given the EU's signature and ratification and by virtue of Article 216 TFEU, COTIF 1999 is now binding on all EU member States, including those (as Italy, for example), which have neither signed nor ratified it. In other words, the duty to comply with the international Convention is binding on the EU Member States not (only) directly – by virtue of their ratification, if any – but (also) indirectly, by means of the signature and ratification thereof by the EU.

It is however submitted that some clarification on this “indirect” effect of the EU's accession to a treaty – in particular *vis-à-vis* those Member States which are not contracting party thereto – should perhaps be provided for the benefit of the rail transport operators: indeed, a common “European” approach towards this issue would be very welcome.

Noteworthy is, moreover, the way in which the EU acceded to COTIF 1999, *i.e.* by means of combined use of the disconnection clause included in the agreement between the EU and the OTIF⁹² and the declaration of competences.

⁹⁰ More precisely: (i) Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV - Appendix A to the Convention); (ii) Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM - Appendix B to the Convention); (iii) Regulation concerning the International Carriage of Dangerous Goods by Rail (RID - Appendix C to the Convention); (iv) Uniform Rules concerning Contracts of Use of Vehicles in International Rail Traffic (CUV - Appendix D to the Convention); (v) Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI - Appendix E to the Convention); (vi) Uniform Rules concerning the Validation of Technical Standards and the Adoption of Uniform Technical Prescriptions applicable to Railway Material intended to be used in International Traffic (APTU - Appendix F to the Convention); (vii) Uniform Rules concerning the Technical Admission of Railway Material used in International Traffic (ATMF - Appendix G to the Convention).

⁹¹ Reference is made to Article 38 of the COTIF 1999.

⁹² Reference is made to the Agreement published in OJ L 51 of 23 February 2013, p. 2.

More precisely, Article 2 of that Agreement provides that the Union rules shall be applied in mutual relations among EU Member States instead of the rules laid down by the Convention, except in case there is no Union rule governing the particular subject concerned.⁹³

The declaration of competence – *i.e.* a separate document not enclosed with the agreement – should have clarified as well as possible where the EU rules are capable of being affected by the rules of COTIF 1999 and those of the conventions enclosed therewith. However, the declaration is not particularly useful to this end.

First of all, the declaration does not add anything to the general principles enshrined in the Treaties on the division of competences between Member States and EU after the Lisbon Treaty. More precisely, the declaration confirms that (i) whilst the EU competence in the field of rail transport is exclusive as regards all rail transport matters governed by Union rules which are at risk of being affected or altered in their scope by the 1999 COTIF system, (ii) all matters which, despite being covered by Union rules, are nonetheless not affected by the 1999 COTIF system, fall within a shared competence between the EU and the Member States. Furthermore, given the continuous development of EU law, the declaration is expressly subject to possible amendments by the EU.

Moreover, the declaration is far from clear.

Even if a list of Union instruments in force at the time of its adoption is provided, it is expressly stated that the scope of EU competence in the field at stake shall be assessed “*in relation to the specific provisions of each text, especially the extent to which these provision establish common rules*”.

With specific reference to the issues related to jurisdiction and the recognition or enforcement of judgments, *i.e.* to the relationship between the COTIF 1999 system and the Brussels Ia Regulation, it is noted that the list of Union instruments does not even mention the “Brussels I system”, despite the latter clearly falling within the Union instruments capable of being “affected” by the COTIF 1999 system and, in particular, by the rules on jurisdiction envisaged

⁹³ More precisely, Article 2 reads as follows: “*Without prejudice to the object and the purpose of the Convention to promote, improve and facilitate international traffic by rail and without prejudice to its full application with respect to other Parties to the Convention, in their mutual relations, Parties to the Convention which are Member States of the Union shall apply Union rules and shall therefore not apply the rules arising from that Convention except in so far as there is no Union rule governing the particular subject concerned*”.

by the CIV and the CIM. This undoubtedly results in that very issue being far from clear from the standpoint of both the COTIF 1999 and Brussels I systems.

Indeed, it seems that the special rules on jurisdiction provided by the CIV and the CIM should be granted priority over the Brussels Ia Regulation. Still, it is not clear whether this priority is to be grounded upon either Article 71 or Article 67 of the Regulation. In favour of this latter solution stands in fact the consideration that – owing to the EU having ratified it – the 1999 COTIF system has become part of the EU *acquis* and, as such, should be given precedence over the Regulation as per the above mentioned provision of Article 67.

11. THE TECHNIQUES AIMED AT “CONNECTING” EU LAW TO INTERNATIONAL TREATIES ON TRANSPORT MATTERS

Interpretative problems also arise when the EU tries to establish “connections” with international treaties to which only States (and not REIO) are allowed to accede. In the absence of specific rules, two techniques are followed by the EU: (i) the authorisation to ratify an international treaty⁹⁴ or (ii) the adoption of parallel EU legislation.

The solution of authorisation to ratify has been resorted to, for example, in the case of the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage, which – in addition to uniform substantial rules on civil liability – also provides rules on jurisdiction and the recognition and enforcement of judgments. More particularly, the Convention’s rules on jurisdiction have been considered more suitable than those of Brussels I to strengthen the international regime of ship-owners liability for pollution damage as well as to require compulsory liability insurance. Indeed, whilst under Brussels I a claim for compensation for pollution damage against the ship-owner or its insurer may be filed, at the plaintiff’s choice, before several alternative *fora* (apart from the domicile of the ship-owner, it is possible to start a proceeding before the courts of the State where the harmful event took place and, in addition, it is

⁹⁴ Beside authorization to ratify, in theory, the EU might opt for a (an even) softer instrument: the recommendation to open negotiations towards the Member States. However, the instrument of authorization has proved not to be particularly successful, since in all the above mentioned three cases not all EU Member States have ratified the international convention. Therefore, the risk for the recommendation to be ignored is even higher than the one with the authorization. See P. Mankowski (fn 8), art. 71, at 862.

possible for the injured party to sue the insurer in the courts of the Member State of its domicile), Article 9 of the Bunker Oil Convention only envisages the exclusive jurisdiction of the courts of the coastal State.

Member States have, therefore, been authorized to ratify the Convention, subject to the condition that Member States would continue to apply the Brussels I Regulation (and now its Recast) with regard to the recognition and enforcement of judgments among themselves.⁹⁵

The same path has also been followed in the case of the 1996 HNS Convention (International Convention on Liability and Compensation for Damage in connection with the carriage of hazardous and noxious substances by sea). As it happened with the Bunkers Convention, such treaty does not provide for the ratification thereof by the EU. However, since ratification by Member States has been recognised as highly desirable, they have been authorised to ratify the HNS Convention subject to a reservation worded in terms identical to those of the Bunkers Convention.⁹⁶

The second technique applied in order to establish some form of “connection” between EU law and international treaties to which EU is not allowed to accede is the adoption of parallel EU legislation.

In the field of transport, the abovementioned interaction is emerging particularly as regards the transport of persons (*i.e.* passengers and their luggage), but it is possible (*rectius* likely) that the EU will soon expand this technique so as to cover also carriage of goods.⁹⁷

As far as transport of passengers is concerned, the EU has followed a “unimodal” approach, adopting specific rules on the duties and rights of passengers

⁹⁵ See Article 2 of the Council Decision authorizing the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the Bunkers Convention) (2002/762/EC) of 19 September 2002. As pointed out by P. Mankowski, originally a reservation had been considered in favour of applying the Brussels I Regulation if the defendant was domiciled in a Member State and the damage occurred in a Member State (see COM (2001) 675 final p. 8), but the Parliament opposed it and finally it was dismissed.

⁹⁶ 2002/971/EC: Council Decision of 18 November 2002 authorizing the Member States, in the interest of the Community, to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the HNS Convention), 2002 OJ L337.

⁹⁷ See C. Legros (fn 75 above), at 384, who believes that for the regulation of transport contracts, the EU level is appropriate more with reference to contracts regarding the transport of persons, than those regarding the transport of goods.

as well as on the liabilities of carriers, with reference to each single mode of transport. Such rules often result in the international treaties' provisions being included within the relevant EU secondary legislation.⁹⁸

Reference is made – in particular – to (i) Regulation No 2027/1997⁹⁹ (as amended by the Regulation 889/2002¹⁰⁰) for air transport, (ii) Regulation No 1371/2007¹⁰¹ for rail transport, and to (iii) the Regulation No 392/2009¹⁰² for maritime transport, which makes reference to the Athens convention.¹⁰³

The incorporation of international uniform treaties in the field of air, rail and maritime transport has not proven to be an easy task, as such treaties contain both substantive rules on the transport contracts and PIL rules (mainly rules on jurisdiction, but sometimes also rules on recognition and enforcement).

In the field of air transport, Regulation No 2027/1997 was first to implement the provisions of the Warsaw Convention and then those of the Montreal Convention related to the liability of the air carrier. When the Regulation was adopted, the rules on jurisdiction provided by the international treaty clearly prevailed over the 1968 Brussels Convention, as at that time no specific actions in the field of PIL had yet been taken by the European Community. However, in amending the original regime, Regulation No 889/2002 failed to take into account the evolution which occurred in the meantime in that very field.

⁹⁸ Such a technique – followed for air, rail and maritime transport – has not been followed in the case of transport by bus and coach, where the EU has adopted Regulation (EU) No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004, 2011 OJ L55, which does not make any reference to international treaties.

⁹⁹ Regulation (EC) No. 2027/97 of the Council of 9 October 1997 on air carrier liability of the carriage of passengers and their baggage by air, 1997 OJ L285.

¹⁰⁰ Regulation (EC) No. 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents, 2002 OJ L140.

¹⁰¹ Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, 2007 OJ L315.

¹⁰² Regulation (EC) No. 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents, 2009 OJ L131.

¹⁰³ Athens Convention of 13 December 1974 relating to the Carriage of Passengers and their Luggage by Sea.

Similarly, Regulation No 1371/2007 incorporates only some of the substantial uniform rules of the CIV¹⁰⁴, whilst it fails to include the rule on jurisdiction provided by Article 57 of the CIV. This was done notwithstanding the fact that, at the time of the adoption of such Regulation, there was little doubt as to the EU powers and competences in the field of PIL both at the internal and international level.

Even if, in practical terms, no significant differences arise from the application of the rules on jurisdiction of the Brussels system as opposed to those of either the Montreal Convention or the CIV, the issue remains still open.

As of today, the most sophisticated solution envisaged by the EU as regards the interaction of its rules with international treaties on transports matters is the one provided by Regulation No 392/2009.

This Regulation fully incorporated the Athens Convention on the carriage of passengers and their luggage by sea and expressly tackled the problem of the relationship of the Athens Convention rules with those of the Brussels system. More particularly, the Regulation states that the provisions regarding jurisdiction¹⁰⁵ and the recognition and enforcement of judgments¹⁰⁶ of the Athens Convention “*fall within the exclusive competence of the Community in so far as those Articles affect the rules established by Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*” (see Recital 11).

Even if it is of course to be appreciated that the most recent EU instruments on transport matters expressly consider their possible interaction with international treaties of uniform law, a coordination between the “Europeanized” Athens convention and the Brussels system may still give rise to some uncertainty.

As regards recognition and enforcement, the new Brussels Ia rules seem more lenient than the corresponding regime of the Athens Convention and, as such, capable of prevailing over it.¹⁰⁷ As regards jurisdiction – given the incor-

¹⁰⁴ The purpose of this incorporation is expressed in clear terms under recital 14, stating that “*It is desirable that this Regulation create a system of compensation for passengers in the case of delay which is linked to the liability of the railway undertaking, on the same basis as the international system provided by the COTIF and in particular appendix CIV thereto relating to passengers’ rights*”.

¹⁰⁵ Art. 17 of the Athens Convention.

¹⁰⁶ Art. 17-bis of the Athens Convention.

¹⁰⁷ It seems reasonable to extend the above comment – made by S. Gahlen, “Jurisdiction, Recognition and Enforcement of Judgments under the 1974 PAL for Pas-

poration of the Regulation and also the ratification of the Athens Convention by the EU – the *lex specialis* rule should apply, that is to say that the rules of the Athens Convention should prevail. However, apart from the principles stated by the ECJ in its case law on Article 71 Brussels I, no further guidance is provided.

Beside the existing difficulties in interpreting the legislative framework with specific reference to the PIL issues, the *sui generis* interaction deriving from the (partial) incorporation of transport international treaties within EU instruments has some relevant positive effects, which are briefly referred to below.

First of all, the incorporation is made independently of whether the Convention itself has been ratified or not by all Member States. This means that the Member States which have not ratified it eventually find themselves bound by the international Convention as a consequence of the latter having been incorporated in the Regulation.

Italy, for example, has not ratified the new COTIF 1999, but it is however bound to respect it and its appendices as a consequence of the ratification of the Convention by the EU as well as of the incorporation of some rules of the CIV within Regulation No 1371/2007.

Furthermore, the incorporation technique also enables the EU legislature to “adjust” the rules of international conventions taking into consideration new aspects or specific needs arisen in the sector at stake as well as particular situations featuring the EU context.

The EU legislature usually extends the scope of application of the international uniform rules by making them applicable to merely internal transport, as well (and therefore taking the international character out of them).¹⁰⁸ This turns out to be particularly useful from a purely practical viewpoint, as transport operators are allowed to deal with a unitary regime – such as the regime on the rights and duties of passengers as well as that on the liability of the carrier – regardless of the service provided having a cross-border or a merely national character.

A further positive consequence deriving from the considered interaction is that the international convention – by virtue of its inclusion in the EU instruments – will be subject to the interpretation of the ECJ. And it is not to be

senger Claims, the 2002 Protocol and the EU Regulation 329/2009”, (2014) *Eur. Transport Law* 13, at 17 – with regard to the Brussels I Regulation *a fortiori* to the Brussels Ia Regulation.

¹⁰⁸ On this point see C. Legros (fn 75 above), at 380.

excluded that the interpretation of the EU regulation “modelled” on the international treaty may, in the end, result in the uniformity of the international treaty’s interpretation being really achieved at the national level, as well.

12. CONCLUSIONS

In light of all the foregoing considerations, major uncertainties exist as to the terms in which Regulation Brussels Ia is meant to interrelate with international conventions on transport matters. This conclusion is indeed all the more regrettable considering that issues of both PIL and transports are commonly addressed by the EU itself as crucial for the sound operation of the internal market to be fully achieved.

As observed in Part I, the test elaborated by the ECJ for the purposes of establishing when, and to what extent, international transport conventions may be given precedence over Brussels Ia has resulted in Article 71’s scope of application being remarkably restricted if not even emptied of all real force. Indeed, to stick to such test actually means that the concrete interplay between Brussels Ia and the relevant transport convention is to be assessed on a case-by-case basis, which puts the same Regulation’s objectives of legal certainty and predictability as to the courts having jurisdiction at risk of being seriously undermined.

Therefore, one could reasonably wonder if the approach so far developed by the ECJ is really suitable for achieving the major goal which the Brussels I system as a whole is instrumental for. As acknowledged by the Court itself, in fact, among the Regulation’s principles which should drive the concrete coordination between Brussels Ia and the relevant specialised conventions are not only “*free movement of judgments, sound administration of justice, minimisation of the risk of concurrent proceedings and mutual trust in the administration of justice*”, but also “*predictability as to the courts having jurisdiction and therefore legal certainty for litigants*”.

It is the present authors’ opinion that legal certainty and predictability will indeed be enhanced if the ECJ reviewed its test so as to have the relevant convention at stake weighed against the very whole of the objectives underlying the Regulation, included that behind Article 71 (*i.e.* the respect of Member States’ international commitments). To this end, it is suggested that the Court avail itself of the abovementioned “*règle de l’efficacité maximale*”, whereby, as seen, the rules that are to be given prevalence pursuant to Article 71 are those which, on the basis of a thorough comparison of the objectives respectively

pursued by the Regulation and the transport convention, are found to be most suitable to satisfy, to the maximum possible extent, the interests protected by both instruments.

Neither is the picture clearer if one comes to consider the interrelations between Brussels Ia and transport conventions falling outside the scope of Article 71. That aside, as said above, uncertainty exists also as to the exact identification of the specialised conventions covered by that rule, the conclusion to be drawn from Part II above is that the main problem in dealing with interactions between EU law and international transport conventions consists in the EU being in some way still “reluctant” to exercise its external competences with regard to PIL issues related to transport.

This seems paradoxical if one considers that (i) since ECJ Opinion 1/03, doubts cannot longer be raised about the exclusive character of the EU’s external competence in PIL matters; (ii) transports play a crucial role for the sound operation of the internal market, and (iii) as far as the transport of persons is concerned, protection of passengers is strictly connected with protection of consumers, a field in which the EU has acted widely thus acquiring a broad power of action at the international level, as well.¹⁰⁹

It is therefore submitted that the time has come for a more “courageous” and open approach of the EU to PIL issues related to transport.

In particular, the path followed in the case of the Athens Convention seems the correct one: the combination of the *sui generis* interaction between EU and international law by way of incorporating the rules of the international treaties within an EU instrument together with the EU’s accession to the international treaties themselves seems to be the best way for the EU to handle the connections and disconnections issues regarding the international instrument at stake. In this light, the partial incorporation of the international treaties’ substantial rules on transport – incorporation which, as seen above, occurred in the case of Regulations No 1371/2007 and No 2027/1997 – should be avoided in the future.

¹⁰⁹ On the other side, given the fact that the protection of passengers is close to the protection of consumers, with which it has in common the protection of weaker parties and where – despite it is still a shared competence – the EU has acted widely and, therefore, for the principle of pre-emption it might be even considered a topic of exclusive competence of the EU, it might be argued that it is for the EU to adopt rules in this field. See Ph. Delebeque, “Droit de transports vs. Droit de la consommation”, (2010) *RD transports*.

Furthermore, when the EU accedes to an international treaty, appropriate guidance should be provided in order to put practitioners in a position to clearly understand which provisions prevail over the others (as well as the mechanism whereby such a priority is granted).

The disconnection clause is, perhaps, the most suitable instrument for this purpose, but a clear-cut wording still needs to be elaborated with the aim of avoiding further uncertainties. To this end, a soft law instrument (such as a Commission's communication) may even be deemed sufficient.

Sažetak

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POVEZNICE I ISKLJUČENJA IZMEĐU BRISELSKE UREDBE IA I MEĐUNARODNIH KONVENCIJA O PRIJEVOZU

Unatoč ključnoj ulozi prometa u razvoju unutarnjeg tržišta nova Uredba EU-a br. 1215/2012 (“Briselska uredba Ia”) ne pojašnjava odnos između vlastitih pravila i odredaba o nadležnosti ili priznavanju i izvršenju presuda propisanih međunarodnim konvencijama u sektoru prijevoza. Sud Europske unije zapravo je utvrdio test za određivanje uvjeta prema kojima se – u skladu s člankom 71. – rješavaju pitanja nadležnosti ili priznavanja i izvršavanja presuda u skladu s nekom međunarodnom konvencijom umjesto s dotičnom Uredbom. Međutim, taj se test (i) ne čini pogodnim kao takav za osiguravanje potrebne razine predvidivosti u određivanju nadležnog suda te time pravne sigurnosti za stranke u postupku, što je – kako je sam Sud EU-a predvidio – osnova za pravosudnu suradnju u građanskim i trgovačkim stvarima; (ii) zamišljen je imajući u vidu slučajeve u kojima pitanja nadležnosti ili priznavanja i izvršenja presuda ulaze u područje primjene i Uredbe i konvencije CMR. S druge strane, nije jasno kako takozvane “isključujuće odredbe” – koje gotovo beziznimno nalazimo u aktima kojima je EU pristupio raznim konvencijama o prijevozu i čija je svrha davanje prednosti pravu EU-a – trebaju funkcionirati u praksi u odnosu na Briselsku uredbu Ia. Uzimajući u obzir navedena otvorena pitanja, ciljevi ovoga rada su (i) utvrditi hoće li se Sud EU-a, pri utvrđivanju uvjeta pod kojima se Uredba treba povezati s konvencijama o prijevozu, držati dosadašnjeg pristupa ili ga revidirati kako bi ga uskladio s načelima pravne sigurnosti i predvidljivosti vezano uz određivanje nadležnog suda; (ii) pojasniti uvjete prema kojima se za određenu konvenciju o prijevozu smatra da ulazi u okvir članka 71. Uredbe; (iii) ispitati najbolji pristup odnosu između Uredbe i konvencija o prijevozu koje nisu obuhvaćene člankom 71.; (iv) ispitati je li taj odnos uređen određenom odredbom (isključujućom odredbom); (v) potražiti interpretativno rješenje koje omogućava, čak i ako ne postoji konkretna odredba, utvrđivanje s razumnom razinom sigurnosti koje se odredbe – između odredbi Briselske konvencije Ia i onih određene konvencije o prijevozu – trebaju primijeniti kako bi se odredila nadležnost ili priznali učinci presuda u određenom predmetu.

Ključne riječi: Briselska uredba Ia, pitanja nadležnosti ili priznavanja te primjene, tzv. klauzule rastavljanja, transportne konvencije

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