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INSTITUTO JURÍDICO
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RISCO, TRANSPARÊNCIA E
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Fundação
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COMEMORANDO OS 100 ANOS DAS REGRAS DE HAIA

*COMMEMORATING 100 YEARS
OF THE HAGUE RULES*

VOLUME II

Coordenador

ALEXANDRE DE SOVERAL MARTINS



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A publicação do presente trabalho inscreve-se nas atividades do IJ/UCILeR (Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra), no contexto do projeto estratégico UID 04643 - Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra (financiado pela FCT - Fundação para a Ciência e a Tecnologia).

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JURISDICTION IN DISPUTES CONCERNING CARRIAGE OF GOODS BY SEA

✉ (<https://doi.org/10.47907/ComemorandoRegrasdeHaia/2/03>)

FABRIZIO MARONGIU BUONAIUTI*

Summary: 1. Rules of jurisdiction in international maritime conventions: some introductory remarks. – 2. The rule under Article 3.8, Hague Rules, and its interpretation in terms of limiting freedom of choice of court in maritime disputes. – 3. The rules of jurisdiction under the 1978 Hamburg Rules. – 4. The rules of jurisdiction under the Rotterdam Rules. – 5. The subsidiary role of the rules of jurisdiction under Regulation (EU) No. 1215/2012 (the Brussels I-*bis* Regulation or Brussels I Recast Regulation), with special regard to the rules on choice-of-court agreements. – 6. The feasibility of an integration of the special rules of jurisdiction contained in maritime conventions with the general rules in the Brussels I-*bis* Regulation, and the yardsticks posed by the EU Court. – 7. The prospective impact of other international conventions, such as the 2005 Hague Choice of Court Convention. – 8. Concluding remarks.

Keywords: Jurisdiction; Carriage of Goods by Sea; Hague Rules; Choice of Court Agreements; Bills of Lading; Brussels I-*bis* Regulation

1. Rules of jurisdiction in international maritime conventions: some introductory remarks

International carriage of goods by sea is a field largely regulated by international conventions providing for uniform substantive rules,

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which are currently styled as uniform law conventions, in view of keeping them distinct from private international law conventions. This means, conventions, such as those adopted within the framework of the Hague Conference on Private International Law or of the European Communities prior to the conferral on the EC of a legislative competence on judicial cooperation in civil matters, containing uniform rules of private international law, that is, common criteria as among their contracting parties for finding the law applicable to the legal relationships falling within the scope of application *ratione materiae* of the relevant convention¹.

On the one side, it may be assumed as fairly common for private international law conventions to set out, in parallel to rules on the law applicable to the relevant legal relationships, rules concerning the jurisdiction of the courts belonging to the contracting States and/or the recognition and enforcement of judgments between those countries. In fact, both sets of rules, those on the applicable law and those on jurisdiction and enforcement of judgments, address the typical problems arising from transnational disputes and inherent in their being connected with more than one legal system. On the other side, this is less frequent with uniform law conventions. In fact, international conventions bearing uniform substantive rules in respect of a given matter tend to dispose of the problem inherent in the presence of connections with more legal systems by introducing uniform substantive rules deemed to apply *in lieu* of the otherwise applicable law, therefore directly setting aside, at least as a matter of principle, the need to convene common criteria for finding the applicable law².

¹ See generally Antonio MALINTOPPI, «Les rapports entre droit uniforme et droit international privé», *Recueil des cours de l'Académie de droit international de la Haye*, The Hague: Brill – Nijhoff, 116 (1965) 1-87; Edoardo VITTA, «International Conventions and National Conflict Systems», *Recueil des cours de l'Académie de droit international de la Haye*, The Hague: Brill – Nijhoff, 126 (1969) 111-232; Charalambos PAMBOUKIS, «Droit international privé holistique: droit uniforme et droit international privé», *Recueil des cours de l'Académie de droit international de la Haye*, The Hague: Brill – Nijhoff, 330 (2007) 142-146.

² Nonetheless, the determination of the applicable law may have a bearing also on the application of the rules contained in a uniform law convention, as in the well-known example posed by the United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, Article 1 (1) (b). See James J. FAWCETT / Jonathan M. HARRIS / Michael BRIDGE, *International Sale of Goods in the Conflict of Laws*, Oxford: Oxford University Press, 2005, 919.

Nonetheless, it shall be considered, as a first point, that it is not unfrequent for uniform law conventions to leave unaddressed some of the legal questions which might arise in the practice of their application. This may happen either deliberately, in terms of excluding certain issues from their substantive scope of application, or inadvertently, due to a failure in properly identifying, at the drafting stage, the entire array of legal issues to be dealt with in respect of the subject matter concerned, or to a difficulty in reaching an agreed solution on controversial points. In the absence of express rules in the relevant convention on a given issue, recourse will need to be had either to the general principles to which the relevant convention is inspired, or, where such principles are of little avail in finding a sufficiently clear-cut solution to the issue at hand, to the law applicable pursuant to private international law rules³. Secondly, even in case the rules contained in a uniform law convention are likely to completely dispose of the issues to be dealt with in a given case, without posing the need for a subsidiary reference to the otherwise applicable national law, questions might arise concerning the spatial applicability of the rules contained in such a convention. Typically, most uniform law conventions presuppose for that purpose the existence of a relevant connection of the legal relationship at hand with one or more contracting States, such as, in the specific context of carriage of goods by sea, the location of the place of shipment of the goods or of the place of issuance of the bill of lading in a Contracting State⁴. Furthermore, and *a fortiori*, it shall be considered that the rules

³ See, among others, Antonio MALINTOPPI, «Les rapports entre droit uniforme et droit international privé», 66 ff.; Stefania BARIATTI, *L'interpretazione delle convenzioni internazionali di diritto uniforme*, Padova: CEDAM, 1986, 150; Charalambos PAMBOUKIS, «Droit international privé holistique: droit uniforme et droit international privé», 141; Fabrizio MARONGIU BUONAIUTI, «The Interpretation of Uniform Law and Private International Law Conventions: What Role for the General Interpretation Rules under the Vienna Convention on the Law of Treaties?», in Giuseppe PASCALE / Sara TONOLO, *The Vienna Convention on the Law of Treaties. The Role of the Treaty on Treaties in Contemporary International Law*, Napoli: Edizioni Scientifiche Italiane, 2022, 189-210.

⁴ See Article 10 of the Hague Rules (1924), providing for their application to all bills of lading issued in any of the contracting States, whereas Article 10 of the Hague-Visby Rules (the Hague Rules as amended by the Brussels Protocol 1968) provides for the application of the Rules to every bill of lading relating to the carriage of goods between ports in two different States if (a) the bill of lading is issued in a contracting State, or (b) the carriage is from a port in a contracting State, or (c) the contract

contained in a uniform law conventions, including those setting out their scope of application both in spatial and substantive terms, are applicable as a matter of principle only before the courts of a contracting State, while they have no effect in the courts of a third country, unless these courts would apply them as part of the law of a contracting State which they would deem applicable to the case at hand, based on their rules of private international law.

Accordingly, the issue of determining the competent jurisdiction is of inevitable bearing on the concrete extent to which the rules contained in a uniform law convention will be deemed as applicable in respect of disputes falling within their substantive scope of application, and for this reason the absence, namely, in the Hague Rules, of provisions concerning jurisdiction has first given rise to an operation of gap-filling by national courts, tending, as we shall see in due course, to read implied jurisdiction rules into the provision conferring mandatory nature vis-à-vis a contracting State to the most salient rules contained in the relevant convention. Eventually, the awareness subsequently arisen from the practice as concerns the critical bearing of the allocation of jurisdiction for the applicability of the uniform rules being adopted has induced, within the framework of later conventions such as the Hamburg Rules or, more recently, the Rotterdam Rules, an attempt to set out express rules of jurisdiction, including in terms of limiting the parties' freedom to agree on the jurisdiction of a court of their choice, insofar as this would turn out in a risk of ousting the application of the substantive rules of liability set out in the relevant convention.

2. The rule under Article 3.8, Hague Rules, and its interpretation in terms of limiting freedom of choice of court in maritime disputes

The Hague Rules, as adopted in Brussels in 1924 and as later amended by the Brussels Protocol of 1968 (Hague-Visby Rules), while

contained or evidenced in the bill of lading provides that the Rules, or legislation of any State giving effect to them, are to govern the contract, irrespective of the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person. Criteria similar to the latter are retained for the same purposes under Article 2 of the Hamburg Rules (1978) as well as under Article 5 of the Rotterdam Rules (2008).

representing the first attempt to introduce internationally uniform rules on contracts of carriage of goods by sea⁵, do not contain provisions expressly intended to regulate the jurisdiction of Contracting States' courts in disputes related to the contracts governed by the Rules. Nonetheless, an implied jurisdiction rule has been read in the case law in the provision contained under Article 3.8 of the Rules, whereby clauses contained in a contract of carriage of goods by sea relieving the carrier or the ship from liability for loss or damage to the goods, as contemplated in the Rules themselves shall be null and void and of no effect.

The said rule, apparently, limits itself to confer a mandatory nature to the liability regime established in the Rules, thereby vacating any agreement to the contrary which the parties might have entered into. Eventually, the rule in question could also operate as a limit to the parties' freedom to choose the law applicable to the contract of carriage of goods by sea, to the extent to which the law chosen by the parties would be the law of a third country, which would not be bound to incorporate the regime of liability of the carrier or of the ship as set out in the Rules. As the House of Lords stated in its well-known judgment in *The Hollandia*⁶, Article 3.8 of the Hague Rules shall also be intended as capable of posing a limit to the parties' freedom of choice of court, insofar as the chosen court or courts would be a court or the courts of a third country, which, in turn, relying on their own conflict of laws rules, would end up applying either their own law or the law of another third country, which, in turn, would result in evading the mandatory regime of liability contemplated by the Rules. The same would apply, as in the case before the House of Lords, where a choice of court agreement included in a bill of lading provided for the jurisdiction of the courts of a country bound by the initial Hague Rules, whereas the contract of carriage was such as to fall within the spatial scope of application of the revised Hague-Visby Rules, in consideration of the fact that the revised rules provide for a stricter regime of liability, which would

⁵ See, for a broad overview, Francis REYNOLDS, «The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules», *Australian and New Zealand Maritime Law Journal*, St. Lucia, Australia: University of Queensland, 4 (1990) 16-34.

⁶ *Owners of the Cargo on Board the Morviken v. Owners of the Hollandia* [1983] 1 AC 565. See Francis REYNOLDS, «The Hague Rules», 23 f.

risk being eluded as a consequence of the choice of court agreement concluded.

3. The rules of jurisdiction under the 1978 Hamburg Rules

Differently from the Hague Rules, the Hamburg Rules contain express rules on jurisdiction in respect of disputes concerning contracts of carriage under those Rules. These allow the plaintiff a choice among alternative venues presenting a substantial connection with either the parties or the material circumstances of the contract of carriage, consisting namely of the courts at the principal place of business, or, failing this, at the habitual residence of the defendant, or of the courts at the place where the contract of carriage was concluded, insofar as this coincides with a place where the defendant has a place of business, a branch or an agency through which the contract was made, or the courts either at the place of loading or at the place of discharge. The Rules, in an effort of fostering party autonomy, also allow for a designation of a court at a place other than those specified, provided this designation is made in the contract of carriage, while providing that in case no such designation was made in the contract the parties might still conclude a choice-of-court agreement after a claim has arisen⁷.

Reflecting a widespread practice in the field of maritime litigation, the Hamburg Rules also contemplate the possibility of founding jurisdiction on the arrest, at a port or other place in a Contracting State, of either the ship used for the carriage in question or of another vessel of the same owner, when this is consistent with the law at the port or place where the arrest takes place and with international law⁸. Nonetheless, in order to pose a limit to the potentially exorbitant nature of the jurisdiction based on such a far-fetched ground of jurisdiction, the Rules allow the defendant to request the removal of the action to

⁷ See the Explanatory note by the UNCITRAL Secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), A/CN.9/306, p. 29. See also Francis REYNOLDS, «The Hague Rules», 30.

⁸ Two subsequent multilateral conventions come for consideration in this respect: the International Convention relating to the Arrest of Seagoing Ships, signed at Brussels, 10 May 1952, *Nations Unies – Recueil de traités*, 1962, 195, and the later International Convention on Arrest of Ships, Geneva, 12 March 1999, UNTS, vol. 2797, I-49196.

a court possessing jurisdiction under any of the grounds set out above. Nonetheless, in an attempt to preserve the equality of arms between the parties, the Rules provide that in such a case the defendant shall provide security in a measure sufficient to ensure payment of the judgment likely to be awarded to the claimant. The court at the port or place of the arrest shall retain competence to decide on the sufficiency of the security provided.

The rules of jurisdiction set out under Article 21 of the Hamburg Rules, however based on a sufficiently broad range of alternative *fora* as well as allowing for a broad margin of party autonomy, are expressly qualified as exclusive in nature, while at the same time allowing for provisional or protective measures to be issued by the courts of other Contracting States. The Rules, in a welcome attempt to prevent the occurrence of parallel litigation as might be disclosed by the very fact of providing a broad range of alternative *fora* open to the option of the plaintiff, also contain a rule on *lis pendens* and *res iudicata*, barring subsequent litigation of a claim between the same parties and on the same ground in respect of which an action has already been brought or a judgment has been delivered by a court of a Contracting State having jurisdiction under the said rules, unless the judgment delivered by the court first seized is unenforceable in the country of the court subsequently seized. The Rules, rather tautologically, specify that the ban on subsequent litigation does not apply in respect of measures sought for the purposes of obtaining the enforcement of a judgment, nor to the removal to a different court having jurisdiction under the Rules of an action commenced through the arrest of a ship, as mentioned above.

4. The rules of jurisdiction under the Rotterdam Rules

The more recently adopted Rotterdam Rules follow to a certain extent the model set out by the Hamburg Rules, dedicating a chapter to the rules concerning jurisdiction in respect of disputes arising from contracts of carriage governed by the Rules, which appear largely inspired to those adopted under the Hamburg Rules. Nonetheless, in an attempt to avoid the unwelcome rigidity of a framework imposing on the Contracting Parties a binding set of jurisdiction rules deemed to apply to the exclusion of any other rule, the Rotterdam Rules expressly

confer an optional nature to the jurisdiction rules they provide, by making them binding only on Contracting States declaring their consent to be bound by them⁹.

Apart from this fundamental difference which is likely to have a non-negligible impact on the concrete significance of the rules so introduced, as far as the content of the rules of jurisdiction provided for under the Rotterdam Rules is concerned these show a significant degree of similarity to the rules set out under the Hamburg Rules as examined above. In fact, the Rotterdam Rules in turn allow either an *ex ante* choice-of-court agreement embodied in the contract of carriage or an *ex post* one, concluded after the dispute has arisen, while regulating in greater detail the critical question, which the Hamburg Rules left rather unspecified, of the effects deriving from such an agreement. In this respect, the Rotterdam Rules clarify that a choice-of-court agreement entered into by the parties within the contract of carriage shall not be intended to confer an exclusive jurisdiction on the designated court or courts unless the parties so specify, and this is subject to a series of conditions, which are expressly set out for the purposes of protecting the equality of arms between the litigants which is likely to be endangered by the stronger party, usually identified with the carrier, imposing on the shipper a pre-defined choice-of-court clause. Accordingly, a choice-of-court clause embodied in a contract of carriage may be exclusive in nature only if included in a volume contract¹⁰ and if either individually negotiated or marked by a prominent statement pointing to its presence and to the section within the contract embodying it. In respect of a person who is not a party to a volume contract the possibility to oppose an exclusive choice-of-court agreement is even more narrowly defined, since it presupposes a coincidence of the designated court with any of

⁹ See Rupert COLDWELL, «Jurisdiction and the UN *Convention on Contracts for the International Carriage of Goods: Where the Freedom of Contract Prevails*», *International Trade and Business Law Review*, Perth, Australia: Curtin University, 17 (2014) 108-125.

¹⁰ As such there shall be intended a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range: see the definition provided under Article 1.2 of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, UN Publication E.09.V.9, Vienna: United Nations, 2009.

the courts contemplated under the alternative grounds of jurisdiction applicable in the absence of choice. The Hamburg Rules require, at the same time that the agreement is contained in the transport document or in the electronic transport record, and that the person concerned shall be given adequate and timely notice of the court seized under the agreement and of the fact that its jurisdiction is exclusive. In apparent contradiction with the autonomy of the rules introduced in point of jurisdiction, these also require that the law of the court seized allows for that person to be bound by the agreement in question¹¹.

5. The subsidiary role of the rules of jurisdiction under Regulation (EU) No. 1215/2012 (the Brussels I-*bis* Regulation or Brussels I Recast Regulation), with special regard to the rules on choice-of-court agreements

Ultimately, the limited success in terms of ratifications by countries having a significant impact on the shipping sector which the Hamburg Rules have obtained, as a likely consequence of their over-regulatory attitude and the even narrower success which the more modern but not less convoluted Rotterdam Rules have so far achieved, implies that most of the current shipping industry continues to run on the Hague or Hague-Visby Rules. These, as noted already, do not provide for express rules as concerns jurisdiction in respect of contracts of carriage governed by the Rules, if exception is made for the said implied limitation on choice-of-court agreements in favour of third-country courts which the courts of some influential Contracting States have read into their Article 3.8, as a rule vacating agreements implying a derogation from the regime of liability set out in the Rules¹².

This state of affairs inevitably leaves a significant role, insofar as EU Member States are concerned, to the rules on jurisdiction in civil and commercial matters embodied in Regulation (EU) No. 1215/2012,

¹¹ See Rupert COLDWELL, «Jurisdiction and the UN *Convention on Contracts for the International Carriage of Goods*», 119 ff.

¹² In the UK, *Owners of the Cargo on Board the Morviken v. Owners of the Hollandia* [1983] 1 AC 565, cited above, followed, in the US, by the US Supreme Court in *Vimar Seguros y Reaseguros SA v. M/V Sky Reefer*, 515 U.S.528, 540-1 (1995). See Rupert COLDWELL, «Jurisdiction and the UN *Convention on Contracts for the International Carriage of Goods*», 118.

the so-called Brussels I-*bis* or Brussels I Recast Regulation. Even though the said Regulation, not differently from its predecessors, that is, the 1968 Brussels Convention originally entered into by the Member States of the European Community and, by means of later accession conventions, by the acceding Member States, and the Brussels I Regulation No. 44/2001, does not contain provisions specifically addressing contracts of carriage of goods by sea, these plainly fall within its substantive scope of application¹³. As concerns actions against a carrier, or a shipper, domiciled in a Member State arising from those contracts, both the jurisdiction of the courts of the Member State where the defendant is domiciled, pursuant to the general rule of jurisdiction under the Regulation, and the special rule of jurisdiction in respect of contractual disputes, particularly the sub-rule in respect of contracts for the provision of services¹⁴, are likely to apply. Alongside these broader rules, the Brussels I-*bis* Regulation also features other special rules of jurisdiction addressing specific types of maritime disputes, which were introduced into the text of the 1968 Brussels Convention through the 1978 Convention for the accession of the UK, Ireland and Denmark, and which have then moved into the text of both the Brussels I and then the Brussels I-*bis* Regulation. These further rules concern, on the one side, disputes on the payment of remuneration claimed in respect of the salvage of a cargo or freight¹⁵, and, on the other side, actions for liability from the use or operation of a ship and for limitation of such a liability¹⁶.

Nonetheless, in the practice the rule as currently contained in the Brussels I-*bis* Regulation to have revealed itself as most significant in respect of disputes arising out of contracts for the carriage of goods by sea is its Article 25 concerning choice-of-court agreements. This

¹³ See Peter MANKOWSKI, «Article 7», in Ulrich MAGNUS / Peter MANKOWSKI, *European Commentaries on Private International Law, Commentary*, Vol. 1, *Brussels I-bis Regulation*, Köln: Otto Schmidt, 2016, 185.

¹⁴ Article 7, 1, (b), second hyphen. See Peter MANKOWSKI, «Article 7», 240 ff.

¹⁵ Article 7, 7. See Matthias LEHMANN, «Special Jurisdiction, X. Salvage (Art. 7(7))», in Andrew DICKINSON / Eva LEIN, *The Brussels I Regulation Recast*, Oxford: Oxford University Press, 2015, 181-183; Peter MANKOWSKI, «Article 7», 366 ff.

¹⁶ Article 9. See Marie-Elodie ANCEL, «Special Jurisdiction in Shipping Cases, XII. Limitation of Liability (Art. 9)», in Andrew DICKINSON / Eva LEIN, *The Brussels I Regulation Recast*, 195-196; Horatia MUIR-WATT, «Article 9», in Ulrich MAGNUS / Peter MANKOWSKI, *Brussels I-bis Regulation*, 405-407.

rule, as it currently stands, applies whenever the jurisdiction of a court or the courts of a Contracting State is stipulated, irrespective of the domicile of the parties. Even though as a consequence of the withdrawal of the UK from the EU, the so-called *Brexit*, the rule is no longer applicable in respect of choice-of-court clauses in favour of the English courts¹⁷, with the High Court of Justice in London occupying notoriously a significant position as a venue for maritime disputes, the rule might still be of relevance in practical terms in respect of agreements designating the courts at other major European shipping centres. Questions concerning the application of the rules on choice-of-court agreements set out first in the Brussels Convention, and then in the two Regulations having in turn replaced it, to choice-of-court clauses contained in bills of lading have notoriously formed the subject of a significant line of judgments by the European Court of Justice, which have shed light on the most significant intricacies inherent in the application of such rules in the said domain¹⁸.

Among these, in its well-known judgment in *Castelletti*¹⁹, the Court clarified that a choice of court clause contained in a bill of lading as part of a set of standard clauses in small print on the back side of the document is to be considered as valid as concerns the form even though the signatures of the representatives of the parties appear only on the front of the document, where a reference in larger capital letters is made to the clauses on the back, insofar as this is consistent with an established practice in the relevant field of international trade, so that the parties were likely to be aware of such a practice or could not have ignored it without fault²⁰. The Court also clarified that, in consideration of the needs of international trade and of an autonomous and uniform interpretation of the rules contained, at the relevant time,

¹⁷ See Andrew TETTENBORN, «The nuts and bolts of maritime contracts: BREXIT and choice of law and choice of court agreements», *Boletín informativo ANAVE – Tribuna Profesional*, Madrid: ANAVE – Asociación de Navieros Españoles, 2018, 14-17, 15.

¹⁸ See generally FRANCISCO GARCIMARTÍN, «Prorogation of Jurisdiction. I. Choice of Court Agreements», in Andrew DICKINSON / Eva LEIN, *The Brussels I Regulation Recast*, 277-306, 299 f.; Ulrich MAGNUS, «Article 25», in IDEM / Peter MANKOWSKI, *Brussels I-bis Regulation*, 584-669, 653 f.

¹⁹ *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA*, Judgment of 16 March 1999, Case C-159/97, ECLI:EU:C:1999:142.

²⁰ *Ibid.*, para. 21. See FRANCISCO GARCIMARTÍN, «Prorogation of Jurisdiction», 299; Ulrich MAGNUS, «Article 25», 653 f.

in the 1968 Brussels Convention as amended through the subsequent accession conventions, in the absence of a reference to the relevant national provisions, rules such as those contained in the Italian Civil Code, requiring a specific approval of the clauses imposing a special burden on any of the parties, such as those implying a derogation from the jurisdiction of the otherwise competent courts, could not apply in respect of a clause appearing as consistent with the requirements posed by the Convention²¹.

In its later judgment in *Coreck*²², the Court provided appropriate clarification concerning the question, which frequently arises as a consequence of an assignment of a bill of lading from the shipper to a subsequent holder, as to whether the person to whom the bill of lading containing a choice of court clause is assigned shall be bound by such a clause. The Court clarified that insofar as the holder of the bill of lading succeeded to original party in the whole of the rights and obligations under the bill of lading, something which falls to be determined pursuant to the applicable national law to be identified pursuant to the conflict of laws rules of the *forum*, he or she shall also be bound by the choice-of-court clause embodied in the bill of lading, without need for a specific acceptance of the said clause. A specific acceptance of the clause shall instead be required in case it cannot be established that the holder succeeded to the original party in the whole of the rights and obligations under the bill of lading²³.

As the Court clarified in its more recent *Maersk* judgment²⁴, this conclusion is left unaffected by the newly introduced rule under Article 25, para. 1, Brussels I-*bis* Regulation, pointing to the law of the chosen court as the law governing any question concerning the validity of a choice-of-court agreement as to its substance²⁵. In fact, as

²¹ *Trasporti Castelletti*, para. 39.

²² *Coreck Maritime GmbH v. Handelsveem BV and Others*, Judgment of 9 November 2000, Case C-387/98, ECLI:EU:C:2000:606.

²³ *Ibid.*, para. 27. See FRANCISCO GARCIMARTÍN, «Prorogation of Jurisdiction», 299 f.; ULRICH MAGNUS, «Article 25», 654.

²⁴ *Maersk A/S v. Allianz Seguros y Reaseguros SA and Mapfre España Compañía de Seguros y Reaseguros SA v. MACS Maritime Carrier Shipping GmbH & Co.*, Judgment of 25 April 2024, Joined Cases C-345/22 to C-347/22 ECLI:EU:C:2024:349.

²⁵ See as concerns the new rule introduced in this respect under Article 25, para. 1, Brussels I-*bis* Regulation, FRANCISCO GARCIMARTÍN, «Prorogation of Jurisdiction», 293 ff.; ULRICH MAGNUS, «Article 25», 626 ff.

the Court clarified, issues concerning the succession of a subsequent holder of a bill of lading to the choice-of-court agreement entered into between the original parties, is to be construed as a question pertaining to the effects of a choice of court agreement, and not to its substantive validity, since questions of validity attach to the formation of the agreement between the original parties²⁶. Furthermore, following the line already set out in its previous judgments concerning the need to uphold a uniform and autonomous interpretation of the rules in question as now contained in the Brussels I-*bis* Regulation, the Court declared the application of national rules, belonging in the case at hand to Spanish law, subjecting the extension to the subsequent holder of a bill of lading of a choice-of-court clause contained therein to a specific acceptance even in case the holder succeeded to the original party in the whole of its rights and obligations thereunder, as incompatible with the relevant rules contained in the Regulation, as they result from the interpretation provided by the Court in its case law²⁷.

6. The feasibility of an integration of the special rules of jurisdiction contained in maritime conventions with the general rules in the Brussels I-*bis* Regulation, and the yardsticks posed by the EU Court

A somewhat more complicated scenario is likely to be displayed in case a dispute concerning a contract of carriage of goods subject to the Hamburg Rules should come before the courts of a Member State being at the same time a Contracting Party to those Rules, for rather infrequent that this case might be, since at present just three Member States, Austria, Czech Republic and Romania, are Contracting Parties to the said rules and of these just Romania has access to the sea²⁸. In such a case, the rules on jurisdiction contained in the Hamburg

²⁶ *Maersk A/S*, para. 55.

²⁷ *Ibid.*, para. 68.

²⁸ See the table of *status* of the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978) (the “Hamburg Rules”), on the official website of the United Nations Commission on International Trade Law (UNCITRAL), at Status: United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978) (the “Hamburg Rules”) | United Nations Commission On International Trade Law (last accessed 29.04.2025).

Rules, just as those contained in the later Rotterdam Rules the day on which they will ever be in force, would take priority as a sort of *lex specialis* on the rules of jurisdiction, including those on choice-of-court agreements, contained in the Brussels I-bis Regulation. Article 71 of the latter provides, in fact, that the rules of jurisdiction contained in international conventions concluded prior to the adoption of the Regulation between one or more Member States and third countries which contain rules on jurisdiction and/or on the recognition and enforcement of judgments applicable in specific matters shall prevail over the rules set out under the Regulation²⁹.

The said rule substantially corresponds to the functionally equivalent rule contained under Article 57 of the 1968 Brussels Convention, apart from the fact that the latter rule saved the rules contained in international conventions concluded in respect of specific matters irrespective of their having been adopted earlier or later than the Brussels Convention itself. This difference is plainly due to the fact that the adoption of a Regulation in the field concerned has triggered, pursuant to the interpretation adopted by the European Court of Justice, a parallel external competence of the EU, exclusive in nature, to conclude international agreements with third countries in the same field, so that the possibility for the Member States to conclude later agreements with third countries on the matters covered by the Regulation shall be considered as ruled out altogether³⁰. The Court had the opportunity to clarify the application of the rule as then contained under Article 57 of the Brussels Convention in its well-known judgment in the case of *Tatry*³¹, where the rules of jurisdiction

²⁹ See generally Pippa ROGERSON, «Relationship with Other Instruments. V. Relationship with International Conventions on Jurisdiction and the Recognition and Enforcement of Judgments in Particular Matters (Art. 71)», in Andrew, DICKINSON / Eva LEIN, *The Brussels I Regulation Recast*, 567-572; Peter MANKOWSKI, «Article 71», in Ulrich MAGNUS, MANKOWSKI, Peter, *Brussels I-bis Regulation*, 1044-1066.

³⁰ See particularly Opinion of the Court of 7 February 2006, *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, Opinion 1/03, ECLI:EU:C:2006:81, paras 114 ff.; Opinion 1/13 of the Court of 14 October 2014, *Convention on the civil aspects of international child abduction – Accession of third States*, ECLI:EU:C:2014:2303, paras 67 ff.

³¹ *The owners of the cargo lately laden on board the ship Tatry v. The owners of the ship Maciej Rataj*, Judgment of 6 December 1994, Case C-406/92, ECLI:EU:C:1994:400.

contained in the 1952 Brussels Convention on the Arrest of Seagoing Ships came for consideration. The Court, in admitting that the 1952 Brussels Convention fell within the purview of the rule in question as a convention entered into between some of the Member States and third countries regulating jurisdiction in respect of a specific field within the broader domain of civil and commercial matters, nonetheless envisaged a cumulative application of the two Conventions. The Court in fact stated that the special rules contained in the 1952 Convention should prevail in respect of the issues, such as the grounds of direct jurisdiction, expressly regulated by that convention, whereas the general rules contained in the 1968 Brussels Convention should remain applicable in respect of those issues, such as *lis pendens* and related actions, which the 1952 Convention did not address³².

A similar need to complement the special rules of jurisdiction contained in a convention regulating a specific matter with the general rules contained, currently, in the Brussels I-*bis* Regulation would not arise, as concerns *lis pendens*, in the case of a contract of carriage of goods governed by the Hamburg Rules, since these Rules, as noted above, contain themselves a rule on *lis pendens*³³, which should equally prevail, as *lex specialis*, on those contained in the Brussels I-*bis* Regulation. The latter, alongside cases of parallel proceedings pending before courts of different Member States, as contemplated already under the 1968 Brussels Convention and the Brussels I Regulation, has introduced also rules concerning cases where parallel proceedings are pending before the courts of third countries³⁴.

³² *Ibid.*, paras 25, 28.

³³ Article 21, para. 4, (a), United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). See above, section 3.

³⁴ Articles 33 and 34, Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). See Fabrizio MARONGIU BUONAIUTI, «*Lis alibi pendens* and Related Actions in the Relationships with the Courts of Third Countries in the Recast of the Brussels I Regulation», *Yearbook of Private International Law*, Köln: Otto Schmidt – De Gruyter European Law Publishers, 15 (2013/2014) 87-111; IDEM, «*Lis alibi pendens* and related actions before third country courts under the Brussels Ibis Regulation», in Peter MANKOWSKI, *Research Handbook on the Brussels Ibis Regulation*, Cheltenham – Northampton, Mass.: Edward Elgar Publishing, 2020, 250-284; Pietro FRANZINA, «*Lis pendens* Involving a Third Country under the Brussels I-*bis* Regulation: An Overview», *Rivista di diritto internazionale privato e processuale*, Padova: CEDAM, (2014) 23-42.

Nonetheless, account shall be taken of the limits which the Court of Justice has posed to the prevalence of the rules contained in a convention dealing with specific matters, pursuant to the rule currently under Article 71, Brussels I-*bis* Regulation, in its TNT judgment³⁵. In that judgment, which appears to curtail to a certain extent the purview of the provision in question, the Court declared that the rules contained in a special convention concluded by Member States with third countries shall prevail over those contained in the Brussels I Regulation, as applicable at the relevant time, only insofar as they are consistent with the general principles inspiring the allocation of jurisdiction within the European judicial area³⁶. In the case at hand, the question concerned specifically the rule on *lis pendens* and *res iudicata* set out under Article 31, para. 2, of the CMR Convention of 1956 concerning contracts for the carriage of goods by road, which is set out in quite similar terms to those figuring in the corresponding provision of Article 21, para. 4, (a), of the Hamburg Rules. The rule in question provides that whenever an action based on a contract of carriage to which the Convention applies is pending before a court of a Contracting State possessing jurisdiction under the Convention, or a judgment was adopted by such a court, no new action may be commenced between the same parties and on the same grounds, unless the judgment delivered by the court first seized is not enforceable in the country of the court second seized³⁷. The critical question referred to the Court was whether for that purpose the court second seized would be entitled to review the jurisdiction of the court first seized under the rules set out in the CMR Convention, as would have been consistent with the system of that Convention, or whether such a review ought to be considered as precluded by virtue of the principle of mutual trust applying within the European judicial area. The Court, considering that the case involved the courts of two Member States, decided in the second sense³⁸.

³⁵ TNT *Express Nederland BV v. AXA Versicherung AG*, Judgment of 4 May 2010, Case C-533/08, ECLI:EU:C:2010:243.

³⁶ TNT *Express Nederland*, para. 49.

³⁷ See on the said rule embodied in the CMR Convention Malcom A. CLARKE, *International Carriage of Goods by Road: CMR*, 3rd ed., London: Sweet & Maxwell, 1997, 177; Andrew D. MESSENT / David A. GLASS, *CMR, Contracts for the International Carriage of Goods by Road*, 3rd ed., London: LLP, 2000, 241.

³⁸ TNT *Express Nederland*, paras 52-56.

The approach adopted by the Court in that case needs probably being adapted to the updated legal framework resulting from the current Brussels I-*bis* Regulation, which, as mentioned, alongside rules concerning *lis pendens* and related actions in the relationships between courts of different Member States, embodies a separate set of rules concerning the corresponding cases occurring in the relationships between the courts of a Member State on the one side and those of a third country on the other side. The latter rules are clearly not inspired to the same principle of mutual trust presiding over the relationships between the judicial systems of the Member State, as is made evident by the fact that both rules on *lis pendens* and related actions concerning proceedings before the courts of a third country expressly contemplate as a requirement for their application that the court second seized in a Member State estimates that the judgment to be delivered by the court first seized in a third country will be capable of recognition and, if relevant, enforcement, in the Member State concerned³⁹. The latter evaluation, in the absence, at present, of common rules on the recognition and enforcement in the Member States of judgments delivered by third country courts, will inevitably be deemed to be carried out based on the national law of the Member State court concerned, and it is a fairly common pattern for national rules on the recognition and enforcement of foreign judgments to contemplate a review of the jurisdiction of the court of origin, with a view ensure that court possessed a sufficient connection with the case⁴⁰. Accordingly, the rationale upheld by the Court in its TNT judgment in order to limit the supremacy granted to the rules contained in international conventions on specific matters, in such terms as to make them subject to a scrutiny of compatibility with the general principles inspiring the relationships between the judicial systems of the Member States within the European judicial area, is probably not likely to apply in

³⁹ See, respectively, Article 33, para. 1, (a), Brussels I-*bis* Regulation, in respect of *lis pendens*, and Article 34, para. 1, (b), of the same Regulation, as concerns related actions.

⁴⁰ See in this respect Fabrizio MARONGIU BUONAIUTI, «*Lis alibi pendens* and Related Actions in the Relationships with the Courts of Third Countries», 97; IDEM, «*Lis alibi pendens* and related actions before third country courts under the Brussels I-*bis* Regulation», 272 f.; Pietro FRANZINA, «*Lis pendens* Involving a Third Country under the Brussels I-*bis* Regulation», 33.

case a situation of *lis pendens* or of *res iudicata* should arise between two Contracting States of a convention like the CMR or the Hamburg Rules, of which one only is an EU Member State while the other a third country.

7. The prospective impact of other international conventions, such as the 2005 Hague Choice of Court Convention

As concerns the relationships between Contracting Parties of either the Hague or Hague-Visby Rules, or, less frequently as noted, the Hamburg Rules, which are in turn EU Member States and third countries, including, most notably, as a European country which stands as an important venue for maritime disputes, the UK, a role may be likely to be played by other international conventions, containing rules on jurisdiction and/or on the recognition and enforcement of judgments in civil and commercial matters.

Among these, mention shall be made of the 2005 Hague Convention on Choice of Court Agreements, of which the EU, on behalf of its current Member States, is a party alongside with a certain number of third countries, including some important maritime countries, like Mexico, Singapore, and the UK, which acceded to the Convention after its withdrawal from the European Union with effect from the date it was initially bound by it as an EU Member State⁴¹. The Convention, which stands as a side-product of a larger project tabled by the Hague Conference on Private International Law in the late 1990s with a view to conclude a convention of a universal scope on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁴², contains rules fostering the recognition of choice-of-court agreements entered into by parties to commercial relationships, as well as the recognition and enforcement of judgments

⁴¹ See the table of status of the Hague Convention on Choice of Court Agreements on the official website of the Hague Conference on Private International Law, at <HCCH | #37 - Status table>, last accessed on 30 April 2025.

⁴² See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Report drawn up by Catherine KESSEDJIAN, Preliminary Document No. 7, The Hague: Permanent Bureau of the Conference, 1997.

issuing from actions based on such agreements⁴³. The Convention, which, viewed from the EU side, may be considered as substantially complementary, in the relationships with non-Member States which are parties thereto, to the rules on choice of court agreements currently contained in the Brussels I-*bis* Regulation, is nonetheless limited in its purview by an extensive list of matters excluded from its scope of application, encompassing carriage of passengers and goods, marine pollution, limitation of liability for maritime claims, general average and emergency towage and salvage⁴⁴. Accordingly, the Convention would not apply in respect of a choice-of-court agreement contained in a bill of lading designating a court or the courts of a Contracting State being a non-Member State, while it would apply, in such circumstances, to a choice-of-court agreement included in a contract of insurance covering the goods being carried, since this would not fall under the exclusions contemplated⁴⁵.

Similar considerations apply to the more recent by-product of the mentioned project carried out by the Hague Conference, that is, the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. The latter Convention stands as a single convention, that is, differently from the initial project of a double convention concerning at the same time direct jurisdiction and the recognition and enforcement of foreign judgments, as an instrument dealing only with the recognition and enforcement of judgments, based on a series of indirect grounds of jurisdiction, that is, of grounds against which the proper foundation of the originating court's jurisdiction may be checked as a prerequisite for recognition and enforcement⁴⁶. The 2019 Hague Convention is in

⁴³ See generally HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Convention of 30 June 2005 on Choice of Court Agreements*, Explanatory Report by Trevor HARTLEY and Masato DOGAUCHI, Off-print of the Proceedings of the Twentieth Session, Tome III, Choice of Court Agreements, The Hague: Permanent Bureau of the Conference, 2005, 790 ff.

⁴⁴ Article 2, para. 2, (f), (g), of the Hague Convention on Choice of Court Agreements.

⁴⁵ See Andrew TETTENBORN, «The nuts and bolts of maritime contracts: BREXIT and choice of law and choice of court agreements», 15.

⁴⁶ See generally HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Convention of 2 July 2019 on the recognition and enforcement of foreign judgments in civil and commercial matters*, Explanatory Report by FRANCISCO GARCIMARTÍN / Geneviève

force, once more, between the EU which approved it on behalf of all its Member States but Denmark, which as it is well known is not bound by EU legislative or treaty-making action in matters concerning the area of freedom, security and justice⁴⁷, and some third countries, among which, insofar as relevant for the maritime sector, Uruguay, and, soon, the UK itself, whose accession will take effect shortly⁴⁸. Nonetheless, following the line already set out by the earlier 2005 Hague Choice of Court Convention which it largely intends to complement, the 2019 Convention does not apply either to carriage of passengers and goods, or to marine pollution, limitation of liability for maritime claims, general average and emergency towage and salvage⁴⁹, whereas it would apply to the recognition and enforcement as between Contracting Parties of judgments in matters of insurance of the goods being carried.

8. Concluding remarks

That of jurisdiction concerning contracts of carriage of goods by sea stands as a complex legal framework, presupposing a coordination between different sets of legal rules, composed of uniform substantive rules on the contract of carriage, on the one side, and of rules on jurisdiction on the other side. The attempts to introduce commonly agreed rules of jurisdiction in the same legal instrument embodying the substantive uniform rules on contracts of carriage of goods has so far proved rather unsuccessful, since the first of those attempts has been made in an international convention, the Hamburg Rules, which has not met with the support and the participation of the most influential countries in the shipping industry, while the second attempt, in the later Rotterdam Rules, has been sought in a convention which, despite

SAUMIER, The Hague: Hague Conference on Private International Law – Permanent Bureau, 2020, 48 ff.

⁴⁷ Denmark is instead a party to the 2005 Choice of Court Convention, as a consequence of having independently ratified that Convention.

⁴⁸ See the table of status of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters on the official website of the Hague Conference on Private International Law, at <HCCH | #41 - Status table>, last accessed on 30 April 2025.

⁴⁹ Article 2, para. 1, (f), (g), of the Hague Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

a fair number of years having passed since its adoption, is still far from reaching the required number of ratifications set for its entry into force.

The *status quo* therefore, based on the Hague or Hague-Visby Rules as in force of most of the meaningful countries in the maritime sector, presupposes an inter-relationship between those rules, which do not regulate, at least expressly, questions related to jurisdiction, and the rules contained in the instruments governing jurisdiction in the relevant countries. These, as concerns the EU Member States, are to be found essentially in the Brussels I-*bis* Regulation, their application in respect of disputes concerning contracts of carriage of goods by sea having been addressed in many cases by the EU Court in its case law. Still, there may be cases standing at the border between the EU judicial area and third countries, and maritime disputes having the English courts as a traditional venue fall, since *Brexit*, in this frontier area. While the UK, since its withdrawal from the EU, seems to have played an active role in other, broader instances of unification of private international law, including jurisdiction, rules, such as the Hague Conference on Private International Law, the instruments more recently adopted in this broader environment fall short of addressing in a meaningful manner the field of carriage of goods by sea.