

**Case C-90/22****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

10 February 2022

**Referring court:**

Lietuvos Aukščiausiasis Teismas (Lithuania)

**Date of the decision to refer:**

10 February 2022

**Appellant:**

‘Gjensidige’ ADB

**Other parties:**

‘Rhenus Logistics’ UAB

‘ACC Distribution’ UAB

**Subject matter of the main proceedings**

A claim by the applicant, ‘Gjensidige’ ADB, against the defendant (other party in the proceedings in cassation), ‘Rhenus Logistics’ UAB, for compensation of loss on the basis of subrogation.

**Subject matter and legal basis of the request for a preliminary ruling**

The proceedings in cassation are concerned with the legal provisions governing the significance of an agreement conferring jurisdiction, entered into by the parties to a contract for international carriage, in the context of determining both the jurisdiction of the court hearing the dispute that arose from that contract and the legal consequences of a breach of the *lis pendens* rules. The question that has arisen in the case as to the determination of the jurisdiction of the courts of the Member States that have to hear the dispute falls within the regulatory scope of 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 (‘Regulation No 1215/2012’) and the Convention on the Contract for the International Carriage of Goods by Road (1956) (‘the CMR Convention’).

### **Questions referred for a preliminary ruling**

1. Can Article 71 of Regulation No 1215/2012, having regard to Articles 25, 29 and 31 and recitals 21 and 22 thereof, be interpreted as permitting the application of Article 31 of the CMR Convention also in cases where a dispute falling within the scope of both those legal instruments is the subject of an agreement conferring jurisdiction?
2. Having regard to the legislature’s intention to strengthen the protection of agreements conferring jurisdiction in the European Union, can Article 45(1)(e)(ii) of Regulation No 1215/2012 be interpreted more broadly, as covering not only Section 6 of Chapter II of that regulation but also Section 7 thereof?
3. After assessment of the specific features of the situation and the resulting legal consequences, can the term ‘public policy’ used in Regulation No 1215/2012 be interpreted as covering the ground for deciding not to recognise a judgment of another Member State where the application of a specialised convention, such as the CMR Convention, creates a legal situation in which both the agreement conferring jurisdiction and the agreement on the applicable law are not observed in the same case?

### **Provisions of EU and international law and case-law of the Court of Justice cited**

Recitals 21 and 22 and Articles 25, 29, 31, 45 and 71 of Regulation No 1215/2012; Articles 31 and 41 of the CMR Convention.

Judgment of 9 December 2003, *Gasser*, C-116/02, point 2 of the operative part; judgment of 28 April 2009, *Apostilides*, C-420/07, paragraph 58; judgment of 4 May 2010, *TNT Express Nederland*, C-533/08, paragraphs 48, 49 and 51; judgment of 19 December 2013, *Nipponkoa Insurance Co. (Europe)*, C-452/12, paragraphs 40, 42 and 44; judgment of 4 September 2014, *Nickel & Goeldner Spedition*, C-157/13, paragraph 2 of the operative part; judgment of 23 October 2014, *flyLAL-Lithuanian Airlines*, C-302/13, paragraph 49; judgment of 16 July 2015, *Diageo Brands*, C-681/13, paragraph 39 and point 1 of the operative part; Opinion of Advocate General Bot of 6 September 2018 in *Liberato*, C-386/17, points 74 to 90 and 94; judgment of 16 January 2019, *Liberato*, C-386/17, operative part.

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 The customer, 'ACC Distribution' UAB, and the carrier, 'Rhenus Logistics' UAB, concluded a transportation services contract ('the Transportation Contract') concerning the carriage of a consignment of computer equipment from the Netherlands to Lithuania. 'Rhenus Logistics' UAB itself did not transport the consignment and the actual carrier was the Polish company 'Kark-Trans' PPHU. On the night of 23 to 24 January 2017, a part of the consignment (5 155 kg) was stolen when the driver of the lorry transporting it stopped at an unprotected parking lot in Germany.
- 2 Clause 2 of the section of the Transportation Contract headed 'Liability of the Parties' stated that 'disputes and disagreements which may arise in the performance of this contract shall, as far as possible, be settled by negotiations between the parties'. Clause 3 of that section stated that 'in the event that disputes and disagreements are not settled by negotiations between the parties, they shall be heard by the court in whose district the legal address of the Customer is registered'. Since the registered office (address) of the customer, 'ACC Distribution' UAB, is in Lithuania, it was the jurisdiction of the Lithuanian courts in resolving disputes arising from the performance of the contract which was agreed upon by the parties to the Transportation Contract.
- 3 The insurer, 'Gjensidige' ADB, had insured consignments belonging to the policyholder, 'ACC Distribution' UAB, against all risks for the term of the contract from 1 January 2017 to 31 December 2017. 'Gjensidige' ADB recognised the event of theft of a consignment to be an insured event and made an insurance payment of EUR 205 108.89 to the policyholder, 'ACC Distribution' UAB, on 21 April 2017.
- 4 On 3 February 2017, Civil Case No C/02/329931/HA ZA 17-290 was brought before the District Court, Zeeland-West-Brabant, in the Kingdom of the Netherlands ('the Netherlands court') by the companies Post & Co Belgium BVBA and 'Rhenus Logistics' UAB against the defendants 'ACC Distribution' UAB, 'Gjensidige' ADB, Dell Technology and solutions Limited and Dell (PS) Limited for a negative declaration determining the limits of the carrier's civil liability. In the proceedings, the defendants 'ACC Distribution' UAB and 'Gjensidige' ADB raised the issue of jurisdiction, claiming that the court should declare that it had no jurisdiction to hear the case due to the fact that an agreement conferring jurisdiction had been entered into between the parties to the Transportation Contract. By decision of 23 August 2017, the Netherlands court dismissed that claim of the defendants on the ground that the agreement conferring jurisdiction entered into by the parties to the Transportation Contract, restricting the choice of courts that had jurisdiction under Article 31 of the CMR Convention, was contrary to that provision of the CMR Convention and was null and void under Article 41(1) of the CMR Convention.

- 5 On 19 September 2017, civil proceedings were brought before the Kauno apygardos teismas (Regional Court, Kaunas; ‘the Regional Court’) by the applicant, ‘Gjensidige’ ADB, against the defendant, ‘Rhenus Logistics’ UAB, for damages of EUR 205 108.89 and interest. The applicant, ‘Gjensidige’ ADB, stated that after it made the insurance payment for theft of a consignment to the policyholder, ‘ACC Distribution’ UAB, the latter’s claim against the carrier ‘Rhenus Logistics’ UAB for civil liability under the Transportation Contract passed to it on the basis of subrogation.
- 6 The defendant, ‘Rhenus Logistics’ UAB, requested that the action not be heard. It stated that the initiation of proceedings before the Regional Court resulted in a situation of *lis pendens* which should be resolved by recognising the jurisdiction of the Netherlands court to hear the dispute between the parties because the judicial proceedings before the Netherlands court had been instituted earlier.
- 7 By order of 12 March 2018, the Regional Court stayed the proceedings pending final judgment in Civil Case No C/02/329931/HA ZA 17-290 that was being heard by the Netherlands court; it did not grant the request of the defendant, ‘Rhenus Logistics’ UAB, that the action not be heard. By order of 19 July 2018, the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania; ‘the Court of Appeal’) upheld the order of the Regional Court of 12 March 2018. The Court of Appeal, having regard to the agreement conferring jurisdiction entered into in the Transportation Contract and Article 25(1) of Regulation No 1215/2012, found that the Lithuanian courts had jurisdiction. In addition, it ruled that application of the provisions on alternative jurisdiction and the *lis pendens* rules laid down in Article 31(1) and (2) of the CMR Convention was not justified in the present case because that would be contrary to the fundamental principles of Regulation No 1215/2012, in particular, predictability of jurisdiction and the effectiveness of the agreement between the parties.
- 8 By judgment of 25 September 2019 in joined cases Nos C/02/329931/HA ZA 17-290 and 17-824, the Netherlands court declared that the liability of the applicants before it, ‘Rhenus Logistics’ UAB and Post & Co Belgium BVBA, to the defendants, ‘ACC Distribution’ UAB, ‘Gjensidige’ ADB, Dell Technology and solutions Limited and Dell (PS) Limited, was limited and could not exceed the amount of compensation laid down in Article 23(3) of the CMR Convention. This judgment was not appealed against.
- 9 In execution of the judgment of the Netherlands court of 25 September 2019, the defendant, ‘Rhenus Logistics’ UAB, transferred compensation of EUR 61 229.05 (damages of EUR 40 854.20 plus interest) to the applicant, ‘Gjensidige’ ADB, on 14 February 2020. On 11 May 2020, the applicant filed a request for partial withdrawal of the claim (in an amount of EUR 40 854.20) and requested that the remainder of the claim for damages in the amount of EUR 164 254.69 be satisfied. By order of 12 February 2020, the Regional Court resumed consideration of the stayed civil proceedings.

- 10 By judgment of 22 May 2020, the Regional Court accepted the partial withdrawal of the claim of the applicant, 'Gjensidige' ADB (in an amount of EUR 40 854.20), and discontinued that part of the case, while dismissing the remainder of the action. The Regional Court ruled that the final judgment of the Netherlands court had legal force in the present case.
- 11 By order of 25 February 2021, the Court of Appeal upheld the judgment of the Regional Court of 22 May 2020. The Court of Appeal stated that, given the relevant agreement between the parties to the contract of carriage regarding the place of settlement of their disputes, an action could be brought in a Lithuanian court both in accordance with Article 25(1) of Regulation No 1215/2012 (exclusive jurisdiction) and pursuant to the alternative rules for determining international jurisdiction laid down in Article 31(1) of the CMR Convention. It decided that application in the present case of the alternative rules for determining international jurisdiction laid down in the CMR Convention, in order to resolve the dispute that had arisen between the parties, would not infringe the essential principles of Regulation No 1215/2012 and would not have consequences for the proper functioning of the internal market less favourable than those which would result from the application of Article 25(1) of Regulation No 1215/2012. After assessing the identity of the civil case being heard for compensation of loss on the basis of subrogation and the civil case concerning determination of the limits of the carrier's civil liability heard by the Netherlands court, the Court of Appeal ruled that they did not satisfy the condition of identity of disputes (there were different parties, the legal basis of the claims made by means of the action differed) but should be considered to be unconditionally related (the objectives of both cases and the facts on which both cases are based coincide). According to the Court of Appeal, the court of first instance correctly relied on the judgment of the Netherlands court – which determined the limited civil liability of the defendant – as an established fact and concluded that it was not justified to reconsider the issue of the application of a greater extent of civil liability.
- 12 On 2 June 2021, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania; 'the court of cassation') admitted the appeal in cassation brought by the applicant, 'Gjensidige' ADB, seeking review of the order of the Court of Appeal of 25 February 2021 and also requesting a reference to the Court of Justice in order to determine whether the agreement conferring jurisdiction should be classified as exclusive in the present case and what the legal consequences of its breach would be. In its appeal in cassation, the applicant states, inter alia, that, as there was conflict between the rules of jurisdiction laid down in the CMR Convention and in Regulation No 1215/2012, priority should have been given to the legal provision laid down in Article 25(1) of Regulation No 1215/2012, which equates the jurisdiction of courts of a Member State that are specified in the agreement conferring jurisdiction to exclusive jurisdiction. The Court of Appeal unjustifiably applied the alternative rules for determining international jurisdiction laid down in Article 31(1) of the CMR Convention, because their application had less favourable consequences for the proper functioning of the internal market and did not safeguard the principles of the functioning of the European Union.



- 13 In its response to the appeal in cassation, the defendant, ‘Rhenus Logistics’ UAB, requested that the applicant’s request for a reference to the Court of Justice for a preliminary ruling be rejected, the appeal in cassation be dismissed, and the order of the Court of Appeal of 25 February 2021 be upheld.

**Arguments of the court of cassation and its position in the preliminary ruling proceedings**

- 14 In the view of the referring court, on the basis of the Court of Justice’s case-law, the following preliminary conclusions are to be drawn: (i) the provisions of the CMR Convention are applicable to matters of international jurisdiction, including Article 31 of that Convention, according to which agreements conferring jurisdiction are not exclusive and may be disregarded by bringing an action before one of the courts specified in that article (judgment in *Nickel & Goeldner Spedition*); (ii) the assessment of the identity of actions for the purposes of *lis pendens* is to be carried out in accordance with the rules laid down in the EU regulation; (iii) in the present case, the actions brought before the Netherlands court and the Lithuanian court are identical (judgment in *Nipponkoa Insurance Co. (Europe)*). Consequently, as far as the entities involved in both sets of legal proceedings in Lithuania and the Netherlands are concerned, in the present case Article 29 of Regulation No 1215/2012 in particular is legally significant.
- 15 Article 29(1) of Regulation No 1215/2012 states in particular that it is without prejudice to Article 31(2) which, establishing an exception to the *lis pendens* rule, obliges a court of any other Member State to stay the proceedings until such time as the court seised on the basis of the agreement conferring jurisdiction declares that it has no jurisdiction under the agreement. Second, Article 31(3) of Regulation No 1215/2012 obliges any other court to decline jurisdiction if the court designated in the agreement conferring jurisdiction has established that it has international jurisdiction. Therefore, Article 29(1) and Article 31(2) and (3) provide for an exception to the general *lis pendens* rule based on priority in time, in cases where an agreement conferring jurisdiction has been entered into.
- 16 As is apparent from the wording of Article 31 of the CMR Convention, the court designated in the agreement conferring jurisdiction is not considered to have exclusive jurisdiction. According to Article 25(1) of Regulation No 1215/2012, jurisdiction conferred by the agreement conferring jurisdiction is regarded as exclusive, unless the parties agree otherwise. Consequently, agreements conferring jurisdiction are assessed in a contrary manner under the Convention and the regulation. The view can be taken that Article 31 of the CMR Convention, in so far as it establishes non-exclusive agreements conferring jurisdiction and allows actions to be brought before courts other than those designated in the agreement conferring jurisdiction, may be contrary to EU law. The court of cassation has doubts as to the compatibility of Article 31 of the CMR Convention, in so far as it provides for a particularly free assessment of agreements conferring jurisdiction, with Regulation No 1215/2012 from the point of view of

predictability as to the courts having jurisdiction, legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, mutual trust in the administration of justice in the European Union and other principles.

*The legal consequences of a breach of the lis pendens rules where an agreement conferring jurisdiction has been entered into*

- 17 Article 29 of Regulation No 1215/2012 does not directly deal with the legal consequences if the court first seised does not follow the agreement conferring jurisdiction entered into by the parties which points to another court, and assumes jurisdiction over the action brought before it.
- 18 The wording of Regulation No 1215/2012 does not establish *expressis verbis* a ground for not recognising a judgment given in another Member State in breach of an agreement conferring jurisdiction. Interpreting the provisions of that regulation as meaning that a breach of the *lis pendens* rule where there is an agreement conferring jurisdiction does not produce any legal consequences may lead to a situation where, essentially, two sets of judicial proceedings are allowed to be brought at the same time in identical actions. In such a case, the principle of *ubi jus ibi remedium* could no longer have meaning and favourable conditions could be created for circumventing the aim of Regulation No 1215/2012 of protecting agreements conferring jurisdiction and giving them exclusive meaning.
- 19 The court of cassation raises the question whether the provisions of Regulation No 1215/2012 should be interpreted as encompassing the protection of agreements conferring jurisdiction also at the level of recognition and enforcement of judgments. Although, unlike in the case of Article 24 of Regulation No 1215/2012, which governs exclusive jurisdiction, the parties to an agreement conferring jurisdiction may change their wish to bring proceedings before the court designated in the agreement and may make use of the possibility of prorogation of jurisdiction provided for in Article 26(1) of that regulation, Article 25 of that regulation uses the concept of exclusive jurisdiction to define an agreement conferring jurisdiction. In addition, Article 31 of Regulation No 1215/2012 requires that, in order for the *lis pendens* rules to apply where an agreement conferring jurisdiction has been entered into between the parties, proceedings must be brought before the court designated in the agreement, and this already indicates the intention of at least one of the parties to observe the agreement conferring jurisdiction.
- 20 The situation in the present case also raises questions as to its compatibility with public policy requirements. Failure to observe agreements conferring jurisdiction may have practical consequences for parties to proceedings and those consequences are not limited merely to litigation in a court other than the court agreed upon in the agreement conferring jurisdiction. Article 29 of the CMR Convention, which governs the possibility for the carrier of relying on the limitation of liability, links the question of the applicable law to the jurisdiction of

the court seised. Failure to observe an agreement conferring jurisdiction may also result in applicable law different from that which would apply if the agreement conferring jurisdiction were observed. This fact raises reasonable questions about the compatibility of Article 29 of the CMR Convention and its relationship with Article 3 and Article 5(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), which recognise the right of the parties to choose the law applicable to a contract of carriage.

- 21 The fact must not be overlooked that, in a case where a court not designated in the agreement conferring jurisdiction assumes jurisdiction and the law of the court seised (Latin *lex fori*) is applied in the relevant matter, the defendant faces problems of jurisdiction and applicable law because the case of such a person is not only heard in a court other than that reasonably expected by him or her but also in accordance with rules under which that person did not have the opportunity to regulate his or her conduct in the legal relationship. Thus, in exceptional circumstances, for instance where the *lis pendens* rules would be infringed owing to disregard of the applicable regulations and of the case-law of the Court of Justice or if that infringement would result in breach of more important procedural rights, it would seem to be justifiable to invoke non-recognition on the basis of public policy in the Member State in which recognition is sought.

#### **Concise justification of the request for a preliminary ruling**

- 22 The answer to the questions set out in the operative part of this order and referred to the Court of Justice is of fundamental importance for the present case because it would enable the proper application of provisions of Regulation No 1215/2012 on which the Court has not yet ruled.