Michaelmas Term
[2015] UKSC 65
On appeal from: [2013] EWCA Civ 1319

JUDGMENT

British American Tobacco Denmark A/S and others (Respondents) *v* Kazemier Transport BV (Appellant)

British American Tobacco Switzerland SA (Respondents) *v* H Essers Security Logistics BV and another (Appellants)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Sumption
Lord Reed

JUDGMENT GIVEN ON

28 October 2015

Heard on 29 June 2015

Appellants	*Respondents*
John Passmore QC	Charles Priday Benjamin Parker
(Instructed by Holman Fenwick Willan LLP)	(Instructed by Gateley UK)

LORD MANCE: (with whom Lord Neuberger, Lord Clarke, Lord Sumption and Lord Reed agree)

Introduction

1. Cigarettes attract smokers, smugglers and thieves. In the two appeals now before the court, one container load was allegedly hi-jacked in Belgium en route between Switzerland and The Netherlands in September 2011, while another allegedly lost 756 of its original 1386 cartons while parked overnight contrary to express instructions near Copenhagen en route between Hungary and Vallensbaek, Denmark.

2. The consignors are claiming against English main contractors who undertook responsibility for the carriage and against sub-contractors in whose hands the cigarettes were when the alleged losses occurred. The carriage was subject to the Convention on the Contract for the International Carriage of Goods by Road 1956 ("CMR"), given the force of law in the United Kingdom by the Carriage of Goods by Road Act 1965.

3. Although the Act only incorporates the English language version, CMR was agreed at an international level in English and French, each text being equally authentic. Lord Wilberforce said this about the proper approach to its interpretation in *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 152D-F:

> "I think that the correct approach is to interpret the English text, which after all is likely to be used by many others than British businessmen, in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation: *Stag Line Ltd v Foscolo, Mango and Co Ltd*·[1932] AC 328, per Lord Macmillan, at p 350. Moreover, it is perfectly legitimate in my opinion to look for assistance, if assistance is needed, to the French text. This is often put in the form that resort may be had to the foreign text if (and only if) the English text is ambiguous, but I think this states the rule too technically. As Lord Diplock recently said in this House the inherent flexibility of the English (and, one may add, any) language may make it necessary for the interpreter to have recourse to a variety of aids: *Carter v Bradbeer* [1975] 1 WLR 1204, 1206. There is no need to impose a preliminary test of ambiguity."

It appears that some 55 states have ratified, or acceded or succeeded to participation in CMR, of which half are states not members of the European Union, including states as wide-spread as Azerbaijan, Kazakhstan, Kyrgystan, Jordan, Mongolia, Moldova, Morocco, Syria, Tajikistan, the former Yugoslav Republic of Macedonia and Uzbekistan. There is no international court to which national courts may refer issues of interpretation of CMR.

4. The present appeals each involve the issue whether the consignors can found jurisdiction in England not only against the main contractors but also against sub-contractors as successive carriers within the meaning of CMR, by relying on the presence here of, and the proceedings brought against, the main contractors and/or upon a provision in the main contract for English jurisdiction. The goods had a high value, put in the case of the first container at €624,000 plus €2.9m duty and/or taxes demanded by Belgian Customs, and in the case of the cartons missing from the second container at €30,000 plus over €500,000m duty and/or taxes. English law and English jurisdiction are said to offer the advantage that such duty and/or taxes are recoverable in a CMR claim against carriers, which is not the case in some other jurisdictions. Joinder of all carriers in English proceedings is said to have the advantage that it will ensure that all parties concerned and their witnesses will be involved in the same proceedings, in which the consignors intend to seek to establish wilful misconduct, so preventing any carrier liable from availing itself of the limit of liability otherwise provided under Chapter IV of CMR (see articles 23 and 29).

5. In a clearly reasoned judgment, given on 23 March 2012 within a week of the hearing before him, the judge (Cooke J) held that the consignors could not succeed in doing this, and set aside the proceedings against the sub-contractors: [2010] EWHC 694 (Comm); [2013] 1 WLR 397. The Court of Appeal (McFarlane LJ, Sir Bernard Rix and Sir Timothy Lloyd) heard argument over two days on 5-6 February 2013, and in a detailed judgment given by Sir Bernard Rix on 30 October 2013 reached the opposite conclusion: [2013] EWCA Civ 1319; [2014] 1 WLR 4526. The matter now comes to this court with our permission.

The circumstances in greater detail

6. The two consignors were companies in the British American Tobacco group. They are respondents on the appeal and have been referred to together as "BAT". The transport of the container loads took place under a framework agreement made by British American Tobacco (Supply Chain WE) Ltd ("BAT SCWE") and a local agreement made by British American Tobacco (Holdings) Ltd ("BAT Holdings") with the first defendants Exel Europe Ltd (Exel"), who have played no part on these appeals.

7. The appellants are in the first appeal H Essers Security Logistics BV ("Essers Security") and H Essers Transport Co Nederland BV ("Essers Transport"), referred to collectively as "Essers", and in the second appeal Kazemier Transport BV ("Kazemier"). All the appellants are ordinarily resident in and have their principal place of business in the Netherlands. Essers Security was engaged by Exel to carry the first container, and maintains that it in turn engaged Essers Transport to do this. Kazemier was engaged by Exel to carry the second container.

8. Two CMR consignment notes are before the court. In relation to the first container, we have the consignor's copy issued in Switzerland on 2 September 2011, showing the relevant BAT company as consignor and Maersk Shipping Lines as intended consignee and signed simply by "Essers" as carriers. In relation to the second container, we have the carrier's copy issued in Hungary on 15 September 2011 showing the relevant BAT company as consignor, an associated Danish company as consignee and Kazemier as carrier. It is signed by a *chauffeur*, presumably Kazemier's driver, and, on receipt of the container at destination on 20 September 2011, by the Danish company with a notation regarding the missing cartons.

The common ground about the CMR position

9. There is much common ground between the parties. First, the two BAT companies who are consignors have been treated as parties to the framework and/or local agreement, each of which provides that it is governed by English law, and that "each party irrevocably submits to the exclusive jurisdiction of the English courts in relation to all matters arising out of or in connection" with it. I note in parenthesis that the sub-contracts made by Exel with respectively Essers Security and Kazemier also contained identical provisions, regarding choice of law and court. Second, the arrangements between each BAT consignor and Exel constituted a contract for carriage by Exel within the meaning of CMR. Third, under the provisions of Chapter VI of the Convention relating to carriage performed by successive carriers, Exel was the first carrier, while one or other of the Essers companies was the last carrier and the carrier performing the carriage at the time of the loss of the first container, and Kazemier was the last carrier and the carrier performing the carriage at the time of the loss of the second container.

10. Chapter VI of the Convention commences with article 34, providing:

> "If carriage governed by a single contract is performed by successive road carriers, each of them shall be responsible for the performance of the whole operation, the second carrier and each succeeding carrier becoming a party to the contract of carriage, under the terms of the

> consignment note, by reason of his acceptance of the goods and the consignment note."

In the French version (equally authentic at an international level), that reads:

> "Si un transport régi par un contrat unique est executé par des transporteurs routiers successifs, chacun de ceux-ci assume la responsabilité de exécution du transport total, le second transporteur et chacun des transporteurs suivants devenant, de par leur acceptation de la marchandise et de la lettre de voiture, parties au contrat, aux conditions de la lettre de voiture."

11. Article 35 gives a further indication as to how this system is envisaged as working. It provides:

> "1. A carrier accepting the goods from a previous carrier shall give the latter a dated and signed receipt. He shall enter his name and address on the second copy of the consignment note. Where applicable, he shall enter on the second copy of the consignment note and on the receipt reservations of the kind provided for in article 8, paragraph 2.
>
> 2. The provisions of article 9 shall apply to the relations between successive carriers."

12. The common ground between the parties in the present case involves necessarily their acceptance that one or other of the Essers companies in the case of the first container and Kazemier in the case of the second was a successive carrier within article 34. In this connection, the present parties are content to proceed on the basis, said in Professor Malcolm Clarke's work *International Carriage of Goods by Road*: CMR, 6th ed (2014), para 50a(i) to be "disputed" but accepted by both Donaldson J and the Court of Appeal in *Ulster-Swift v Taunton Meat Haulage* [1975] 2 Lloyd's Rep 502, 507 and [1977] 1 Lloyd's Rep 346, 358-361 and by other national courts, that, where (as here) a company contracts to carry goods, but sub-contracts the whole performance, the first company is for CMR purposes the first carrier, while the second becomes a successive carrier. Further, although article 4 of CMR provides that "The contract of carriage shall be confirmed by the making out of a consignment note", it continues by saying that

> "The absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage which shall remain subject to the provisions of this Convention."

13. However, article 34 provides that a second or succeeding carrier only becomes a successive carrier by "becoming a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note". At this point, therefore, it might seem that the existence of a CMR note was of importance, and Professor Loewe, in a "Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR)", prepared for the United Nations in 1975 and expressed at paragraph 16 to be "based on the preparatory work, on personal notes and recollections of the negotiations, and on the logic and spirit of the Convention itself", indicates at paragraph 275 that the language of article 34 was directed to ensuring that successive carriers were made aware through the consignment note that the carriage which they were undertaking (perhaps only for one part, and possibly even within only one country's territory) was international carriage subject to the provisions of CMR. There appears in the present cases at least a real possibility that the two CMR consignment notes only came into existence at the time when the relevant Essers company and Kazemier collected the respective consignments and signed the relevant CMR consignment notes. Whether article 34 can apply to such a case is a point which we can however leave open, since the parties are prepared without further examination to proceed on the basis that these appeals both concern successive carriage, by the relevant Essers company or companies and by Kazemier, within the terms of article 34.

Further provisions of CMR

14. The appeals raise a number of particular issues, to address which it is necessary to set out further provisions of CMR:

> "CHAPTER II
>
> PERSONS FOR WHOM THE CARRIER IS RESPONSIBLE
>
> Article 3. For the purposes of this Convention the carrier shall be responsible for the acts and omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment, as if such acts or omissions were his own.

CHAPTER III

CONCLUSION AND PERFORMANCE OF THE CONTRACT OF CARRIAGE

Article 4. [See above, para 12]

…

Article 5. The consignment note shall be made out in three original copies signed by the sender and the carrier. …

Article 6.1. The consignment note shall contain the following particulars:

(a) the date of the consignment note and the place at which it is made out;

(b) the name and address of the sender;

(c) the name and address of the carrier;

(d) the place and the date of taking over of the goods and the place designated for delivery;

(e) the name and address of the consignee;

(f) the description in common use of the nature of the goods and the method of packing, and, in the case of dangerous goods, their generally recognised description;

(g) the number of packages and their special marks and numbers;

(h) the gross weight of the goods or their quantity otherwise expressed;

(i) charges relating to the carriage (carriage charges, supplementary charges, customs duties and other charges incurred from the making of the contract to the time of delivery);

(j) the requisite instructions for Customs and other formalities;

(k) a statement that the carriage is subject, notwithstanding any clause to the contrary, to the provisions of this Convention.

2. Where applicable, the consignment note shall also contain the following particulars:

(a) a statement that transhipment is not allowed;

(b) the charges which the sender undertakes to pay;

(c) the amount of ‘cash on delivery’ charges;

(d) a declaration of the value of the goods and the amount representing special interest in delivery;

(e) the sender’s instructions to the carrier regarding insurance of the goods;

(f) the agreed time-limit within which the carriage is to be carried out;

(g) a list of the documents handed to the carrier.

3. The parties may enter in the consignment note any other particulars which they may deem useful.

…

Article 8.1. On taking over the goods, the carrier shall check:

(a) the accuracy of the statements in the consignment note as to the number of packages and their marks and numbers, and

(b) the apparent condition of the goods and their packaging.

2. Where the carrier has no reasonable means of checking the accuracy of the statements referred to in paragraph l(a) of this article, he shall enter his reservations in the consignment note together with the grounds on which they are based. He shall likewise specify the grounds for any reservations which he makes with regard to the apparent condition of the goods and their packaging. Such reservations shall not bind the sender unless he has expressly agreed to be bound by them in the consignment note. …

Article 9.1. The consignment note shall be prima facie evidence of the making of the contract of carriage, the conditions of the contract and the receipt of the goods by the carrier.

…

Article 13.1. After arrival of the goods at the place designated for delivery, the consignee shall be entitled to require the carrier to deliver to him, against a receipt, the second copy of the consignment note and the goods. If the loss of the goods is established or if the goods have not arrived after the expiry of the period provided for in article 19, the consignee shall be entitled to enforce in his own name against the carrier any rights arising from the contract of carriage.

…

CHAPTER V

CLAIMS AND ACTIONS

Article 30.1 [Deals with checking of the goods by the consignee]

30.2. When the condition of the goods has been duly checked by the consignee and the carrier, evidence contradicting the result of this checking shall only be admissible in the case of loss or damage which is not apparent and provided that the consignee has duly sent reservations in writing to the carrier within seven days, Sundays and public holidays excepted, from the date of checking.

3. No compensation shall be payable for delay in delivery unless a reservation has been sent in writing to the carrier, within 21 days from the time that the goods were placed at the disposal of the consignee.

…

5. The carrier and the consignee shall give each other every reasonable facility for making the requisite investigations and checks.

Article 31.1

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

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

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

and in no other courts or tribunals.

2. Where in respect of a claim referred to in paragraph 1 of this article an action is pending before a court or tribunal competent under that paragraph, or where in respect of such a claim a judgment has been entered by such a court or tribunal no new action shall be started between the same parties on the same grounds unless the judgment of the court or tribunal before which the first action was brought is not enforceable in the country in which the fresh proceedings are brought.

…

Article 32: The period of limitation for an action arising out of carriage under this Convention shall be one year. Nevertheless, in the case of wilful misconduct, or such default as in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct, the period of limitation shall be three years.

…

Article 33. The contract of carriage may contain a clause conferring competence on an arbitration tribunal if the clause conferring competence on the tribunal provides that the tribunal shall apply this Convention.

CHAPTER VI

PROVISIONS RELATING TO CARRIAGE PERFORMED BY SUCCESSIVE CARRIERS

Articles 34 and 35 [See above, paras 10 and 11]

…

Article 36. Except in the case of a counter-claim or a set-off raised in an action concerning a claim based on the same contract of carriage, legal proceedings in respect of liability for loss, damage or delay may only be brought against the first carrier, the last carrier or the carrier who was performing that portion of the carriage during which the

event causing the loss, damage or delay occurred; an action may be brought at the same time against several of these carriers.

Article 37. A carrier who has paid compensation in compliance with the provisions of this Convention, shall be entitled to recover such compensation, together with interest thereon and all costs and expenses incurred by reason of the claim, from the other carriers who have taken part in the carriage, subject to the following provisions:

(a) the carrier responsible for the loss or damage shall be solely liable for the compensation whether paid by himself or by another carrier;

(b) when the loss or damage has been caused by the action of two or more carriers, each of them shall pay an amount proportionate to his share of liability; should it be impossible to apportion the liability, each carrier shall be liable in proportion to the share of the payment for the carriage which is due to him;

(c) if it cannot be ascertained to which carriers liability is attributable for the loss or damage, the amount of the compensation shall be apportioned between all the carriers as laid down in (b) above.

Article 38. If one of the carriers is insolvent, the share of the compensation due from him and unpaid by him shall be divided among the other carriers in proportion to the share of the payment for the carriage due to them.

Article 39.1. No carrier against whom a claim is made under articles 37 and 38 shall be entitled to dispute the validity of the payment made by the carrier making the claim if the amount of the compensation was determined by judicial authority after the first mentioned carrier had been given due notice of the proceedings and afforded an opportunity of entering an appearance.

2. A carrier wishing to take proceedings to enforce his right of recovery may make his claim before the competent court or tribunal of the country in which one of the carriers concerned is ordinarily resident, or has his principal place of business or

> the branch or agency through which the contract of carriage was made. All the carriers concerned may be made defendants in the same action."

The issues

15. The following particular issues arise:

(i) First, can article 31 and 36 be read together, so that, once a claimant has established jurisdiction against one defendant under article 31.1(a), it can then bring into that jurisdiction any other successive carrier potentially liable under article 36?

(ii) Second, is it under article 31 sufficient to enable the BAT companies to sue Essers and Kazemier as successive carriers in England that the English courts were designated by agreement in the carriage contracts made between such BAT companies and Exel?

(iii) Third, can the BAT companies sue Essers and Kazemier in the English courts, on the basis that "the branch or agency through which the contract of carriage was made" was in England?

(iv) Fourth, do the provisions or principles of the Brussels I Convention on Civil Jurisdiction and Judgments, Council Regulation (EC) No 44/2001 of 22 December 2000 (OJ 2001 L12, p 1) either enable jurisdiction to be established over Essers and Kazemier or inform or dictate the answer to any of the previous questions?

16. The answers to the first three questions all require a proper understanding of the significance of article 31, in a context where there are successive carriers. Each side has also submitted that the fourth question may bear on jurisdiction generally or at least on the first two questions. I will therefore start by outlining how they have submitted that this may be so. Article 6(1) of the Brussels Regulation provides:

> "A person domiciled in a member state may also be sued: …
>
> where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to

> avoid the risk of irreconcilable judgments resulting from separate proceedings; …"

A similar provision exists, of course, in a non-Union context in Practice Direction 6B para 3.1(3) governing the heads of English and Welsh jurisdiction. BAT submit that this reflects a principle of general international acceptance that should inform the interpretation of articles 31 and 36 of CMR, and so the answer to the first question. Alternatively, they submit that, if CMR has otherwise no like provision, there is a lacuna, which falls to be filled by article 6(1) of the Brussels Regulation. In *Frans Maas Logistics (UK) Ltd v CDR Trucking BV* [1999] 1 All ER (Comm) 737; [1999] 2 Lloyd's Rep 179, Colman J held article 31.2 of CMR to be limited to proceedings brought by same claimant against the same defendant, and that, on that basis, the lis pendens provisions of articles 21 and 22 of the Brussels Convention should be applied to preclude a mirror image claim in England raising the same issues, but with the parties' positions as claimant and defendant reversed, to those raised in prior Dutch proceedings. Colman J's decision limiting article 31.2 to claims by the same claimant against the same defendant was overruled by the Court of Appeal in *Andrea Merzario Ltd v Internationale Spedition Leitner Gesellschaft GmbH* [2001] 1 AER (Comm) 883; [2001] 1 Lloyd's Rep 490, though this does not of itself necessarily mean that Colman J was wrong to identify as a possibility gap-filling, by reference to for example article 22 of the Brussels Regulation.

17. As to the second question, Essers and Kazemier rely on the principle, which I have no difficulty in accepting, that jurisdiction clauses generally derive their validity from agreement between the parties (or their privies). This principle is clearly enshrined in article 25 of the recast Brussels Regulation ((EU) No 1215/2012 of 12 December 2012) (OJ 2012 L351, p 1):

> "1. If the parties, regardless of their domicile, have agreed that a court or the courts of a member state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that member state. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:
>
> (a) in writing or evidenced in writing;
>
> (b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."

Accordingly, Essers and Kazemier submit that, in so far as the BAT companies seek to rely against them upon jurisdiction clauses which were contained in the contract between BAT and Exel and to which they did not agree, CMR cannot and should not be interpreted as binding them by such clauses. The fact that, as it happened, the sub-contracts made by Exel with Essers Security and Kazemier were also subject to English choice of law and court clauses must, I accept, be legally irrelevant in this connection, however much it might be thought to diminish the attractiveness in non-legal terms of Essers' and Kazemier's position.

18. In the further alternative, BAT submit that, if CMR positively precludes the recognition or application of article 6(1) or of a similar principle, then CMR would "lead to results which are less favourable for achieving sound operation of the internal market than those resulting from the provisions" of the Brussels Regulation, and in particular inconsistent with "observance of the aim of minimising the risk of concurrent proceedings which is … one of the objectives and principles which underlie judicial cooperation in civil and commercial matters in the European Union", and that its provisions must to that extent be over-ridden by the provisions of, or the principle behind, article 6(1). The quotations are from the Court of Justice's judgments in *Nipponkoa Insurance Co (Europe) Ltd v Inter-Zuid Transport BV (DTC Surhuisterveen BV intervening)* (Case C-452/12) EU:C:2013:858; [2014] 1 All ER (Comm) 288, paras 37 and 44; see also *TNT Express Nederland BV v Axa Versicherung AG* (Case C-533/08) EU:C:2010:243; [2011] RTR 136, paras 51 and 53.

Article 31.1 – general

19. I turn to consider article 31.1. A significant element of the Court of Appeal's reasoning was that, looking at the overall structure of CMR, article 31 was "primarily concerned only with, on the one side, cargo interests in the form of the sender or consignee, and, on the other side, 'the carrier'" and "[p]rima facie, therefore, in its place, … is not addressed to the position of a successive carrier, who only becomes a party to the single contract of carriage by accepting the goods and the consignment note (article 34)" under what "has been called … a special statutory contract" (para 61). On that basis, the Court of Appeal approached article 31 as "not addressing the possibility of multiple carrier defendants", successive carriers being only introduced in the later Chapter VI (para 62). Article 31.1 thus balanced the

interests of cargo interests and the original CMR carrier, by providing in paragraph (a) for jurisdictions looking to the interests of defendants and in paragraph (b) for jurisdictions looking to the interests of claimants (para 63). The Court of Appeal's approach in this regard led into its view that it was natural to treat the last sentence of article 36 as a further jurisdictional provision directed to the position of successive carriers who had only been introduced in article 34.

20. The difficulty I have with this approach is that, firstly, CMR must have been conceived as a whole and cannot be read as a series of sequential provisions, each unconscious of what was to follow. Even the Court of Appeal's use of words "primarily" and "prima facie" contain a limited recognition of that truth. Secondly, the provisions of Chapter V, including article 31, must, on analysis, apply not only to disputes arising between cargo interests and the original CMR carrier, but also to situations where a successive carrier is involved. That is clearly true of article 30, dealing with checking and time limits for making reservations. It is also true of article 32 dealing with the one-year limitation period for actions. It must also be true of the provisions regarding lis pendens, enforceability, and security for costs in paras 2-5 of article 31. Article 31.1 must equally apply and have been envisaged as covering cases of successive carriage. Mr Charles Priday in his submissions for BAT recognised this by his submission that what article 31 envisaged in such a case was that the claimant would establish jurisdiction against at least one of the relevant carriers identified in article 36 (ie the first or last carrier or the carrier performing the carriage at the time of the loss, damage of delay) whereupon the last sentence of article 36 would give jurisdiction over the other relevant carrier[s]. Mr John Passmore QC's response for Essers and Kazemier is that this analysis effectively undermines and opens up the careful scheme of article 31.

Article 31.1 – jurisdiction designated by agreement

21. Rather than take the questions which the parties have identified in the order they have addressed them, I think that it is helpful to go through the various heads of jurisdiction contained in article 31 in the order in which they appear. The opening provision of article 31.1 is that "the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties". It is unnecessary on these appeals to decide whether that means between the parties to the carriage contract or the parties to the litigation. But I am of the view that it should be interpreted as meaning the latter. Article 31.1 is a provision dealing with jurisdiction to bring legal proceedings. Any agreement on jurisdiction between the parties to such proceedings is one for which one would naturally expect a Convention like CMR to cater. When article 31.2 goes on to preclude any "new action … between the same parties", it is also referring to the parties to the litigation. On this point, therefore, I would endorse Rix LJ's view in *Hatzl v XL Insurance Co Ltd* [2009] EWCA Civ 223, [2010] 1 WLR 470, para 64.

22. Whatever the position in that respect, however, the opening provision of article 31.1 clearly applies as between BAT and Exel. It provides one ground of jurisdiction for suing Exel in England (at least one other being, under paragraph (a), that Exel's principal place of business is here). The words "and, in addition" in article 31 qualify the operation of the jurisdiction clause agreed between BAT and Exel only to the extent that the clause is not under CMR exclusive. So BAT could, if they had wished, have sued in one of the other jurisdictions provided by paragraphs (a) and (b) of article 31.1. But it is common ground that they were as against Exel entitled to take advantage of the English jurisdiction clause.

23. Since it is also common ground on these appeals that Essers Security and/or Essers Transport in respect of the first container and Kazemier in respect of the second were successive carriers, it follows that they must, under article 34, have become party to the respective contract or contracts of carriage made between BAT and Exel. If the matter stopped there, that would on the face of it mean party to those contracts whatever their terms. But article 34 qualifies the position, by adding that a successive carrier becomes party to the contract of carriage "under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note", or in French becomes "par leur acceptation de la marchandise et de la lettre de voiture, parties au contrat, aux conditions de la lettre de voiture". These references to the terms or conditions of the consignment note are general. They clearly refer to something different from any reservations which the first carrier may have entered regarding the number, marks, numbers, condition or packaging of the goods taken over under article 8.1, or which a successive carrier may have entered on his acceptance of the goods under article 35.1. Such reservations are not terms or conditions by which anyone is bound. Equally, since the consignment note is intended to confirm the contract of carriage (article 4) and is prima facie evidence of both its making and its conditions (article 9.1), it is difficult to understand the purpose of the reference to terms or conditions in article 34, unless it is intended to mean that a successive carrier is bound by the original contract in so far as its terms or conditions are set out in the consignment note. CMR in a number of places refers to carriage, liability or conduct "under the terms of" or "in accordance with" a Convention, contract, article or law, and these also envisage that the former will be measured or controlled by reference to the latter.

24. Article 6 contains a full list of particulars which are required to appear in a consignment note and by their nature will disclose core terms of the main carriage contract. But neither article 6 nor the present consignment notes make mention of any choice of law or court clause or agreement. Particulars of any such clause or agreement might have been added as contemplated by article 6.3 of CMR in the boxes entitled Conventions particulières or Besondere Vereinbarungen on the consignment note. But these boxes were in each case left empty. There is of course nothing unusual about either a choice of law and court clause, or a clause providing for dispute resolution before an arbitration tribunal. Both are common enough in

international trade. Article 31 contemplates that a contract of carriage may contain either, and the latter is for good measure also expressly permitted by article 33. But that does not mean that CMR necessarily intended that a successive carrier should become party to such a clause, without having any notice of it or the express opportunity to decline to carry on its terms.

25. BAT rely on the fact that neither article 6.1 nor article 6.2 of CMR requires a CMR consignment note to state the existence of a choice of law or court clause. But that to my mind tends to confirm that the transposition of application of such a clause to the relationship between the consignor or consignee and a successive carrier depends on agreement, and here in particular upon the use of the boxes provided pursuant to article 6.3. Had it been contemplated that a successive carrier would automatically be bound by such a clause, one would have expected the existence of such a clause to have been among the particulars required by these paragraphs to appear in the consignment note – for the very purpose of giving the successive carrier notice of them. That is one obvious reason why, alongside basic details relating to the parties, the carriage and the goods (including in the case of dangerous goods their generally recognised description), the consignment note is required also to include for example, a statement that the carriage is subject to CMR, and further details such as any "cash on delivery" charges, any special interest in delivery, and instructions regarding insurance, and any agreed time-limit for the carriage. These are all matters in relation to which a successive carrier would be expected to be bound and would accordingly need to know. A choice of court clause is, on the contrary, a particular which the parties to a consignment note (particularly the consignors as the most likely claimant against a successive carrier) might consider it appropriate to identify in the relevant box, Conventions particulières, if they wished to bind a successive carrier by it. It would fall within article 6.3. But there is no reason why they should be bound to do this.

26. At a more fundamental level, I am now also persuaded that it would be contrary to general principle to hold a successive carrier bound by a choice of court clause, or any other contractual clause not evidenced by the consignment note, of which he had no express notice. To do so would involve an unfamiliar and undesirable invasion of the general principle that contract depends on agreement. It is true that CMR itself provides that a successive carrier becomes a party to the original carriage contract by acceptance of the goods and the consignment note. But that is the published and, by now at least, familiar scheme of CMR, which any road carrier carrying on business within the CMR states may be taken to know, and of which the consignment note is also required to give express notice. To hold a successive carrier liable by reference to terms or conditions not mentioned in the consignment note would be a quite different matter. The consignor and a first carrier may have agreed all sorts of onerous obligations by which it would be most unfair to hold a successive carrier bound. In the present case, it is alleged that Exel had been specifically instructed not to park the second container overnight. No such

instruction was recorded on the consignment note. While we heard no argument on this specific point, it seems difficult to suggest that any such instruction could bind anyone contractually other than Exel. To attempt to distinguish between specific instructions of a usual and an unusual nature would, in my view, be to make bricks without straw. CMR neither contains nor hints at any such distinction. Article 34 makes the straightforward point that successive carriers take over the goods and become parties to the original contract on the terms or conditions of the consignment note. On that basis, I have ultimately reached the clear conclusion that there is no basis upon which Essers or Kazemier can have become bound by an English jurisdiction clause in the original contract or contracts to which they became party, but which was not identified in the terms or conditions of the CMR consignment note.

27. I note that Professor Loewe takes a different view in para 282 of the paper to which I have already referred, considering that a successive carrier who on his view becomes bound by a jurisdiction clause of which he had no notice in the consignment note could bring an action for damages against the first carrier. This view is not based on any reference to negotiations preceding CMR, and is stated in simple conclusionary terms. Why and how a successive carrier could or would have any claim for damages against a first carrier, who had no duty to identify the jurisdiction clause on the consignment note, is also unexplained. Other commentators have not accepted Professor Loewe's view on this point, though their reasoning varies. In Hill and Messent's *CMR: Contracts for the International Carriage of Goods by Road* 3rd ed (2000), paras 11.37 and 11.67 take the view which I have expressed. At the same time, paras 10.27 and 10.28 suggest that a consignee may (like a privy or assignee) be bound by a jurisdiction clause, even though it is not mentioned in the consignment note. But, if that is correct (on which I need express no concluded view), it does not undermine paras 11.37 and 11.67; rather it is because under article 13 a consignee stands, without more, in the same position as the consignor with regard to the enforcement of "any rights arising from the contract of carriage", and, unlike the position under article 34, there is no qualification that the consignee is only entitled or bound under the terms or conditions of the consignment note.

28. In contrast, Professor Malcolm Clarke in his work, cited above, para 46c suggests that "the designation of a court or tribunal by agreement between sender and carrier will not bind the consignee or a successive carrier unless the latter [sic] has notice of the designation". But he does so on a basis which makes no reference to the language of article 34 and relies on two French decisions: one by the Court of Appeal of Paris dated 14 November 1969, the other by the Court of Appeal of Colmar dated 26 November 2001. In the former, a French consignee suing in France was held not bound by any German jurisdiction clause, firstly because none had been proved even between the German consignor and the carrier, and secondly because the only document of a contractual nature evidencing the carriage terms

which the consignee ever saw and accepted was a receipt which (it appears) made no mention of any jurisdiction clause.

29. In the latter case, the French consignor ("Amural") was claiming, firstly, against the German buyer/consignee ("Neuendorf") of frozen duck fillets for withholding 15% of the invoice amount on account of the high temperature of the fillets on arrival and, secondly or alternatively, against the carriers ("TAC Transports") and sub-carriers ("Transport Michel") for having caused any damage. There was clearly French jurisdiction against both carriers under article 31.1(a) and (b), but there was an internal issue as to whether the Regional Court of Mulhouse had been chosen by agreement between Amural and TAC Transports or whether, failing such choice and as the court held, the Commercial Court of Meaux was the court assigned by the New French Code of Civil Procedure. Neuendorf as buyer/consignee accepted that CMR governed his relationship with Amural. This seems very strange in respect of a claim by Amural which appears to have been, as against Neuendorf, for the balance of the unpaid price of goods. But, on the basis that CMR applied, Neuendorf contended that he could only be sued in Bochum, Germany as the place where he resided and the place of delivery. This suggestion was summarily rejected by the court on the ground that article 31 conferred jurisdiction on France. As against Neuendorf, and on the apparently odd assumption that CMR regulated its sale of goods relationship with Amural, this was presumably on the basis that France was where the goods were taken over for carriage.

30. Neither of the French cases cited by Professor Clarke seems to me therefore to offer any real guidance as to the proper approach to the application of an agreed jurisdiction clause as against a successive carrier. However, in the light of the other considerations which I have set out, and contrary to my initial reaction, I have come the clear conclusion that the qualifying phrase in article 34 has the effect that a successive carrier will not be bound by a jurisdiction clause agreed between the consignor and the first carrier unless it is identified in the consignment note (or unless of course the successive carrier binds himself to it by agreement in some other way).

Article 31.1 – further provisions

31. I move accordingly to the further provisions of article 31.1. It is common ground, and in any event clearly correct, that paragraph (b) refers to the places of taking over by the carrier and designated for delivery under the CMR contract made between the consignor and the first carrier. The only caveat that may be appropriate is that, as regards a successive carrier, the position could (again in the light of article 34) be different if the CMR consignment note failed correctly to reflect the place of taking over or the place designated for delivery actually agreed between the consignor and first carrier. That, hopefully rare, case does not require further

consideration here. The effect of paragraph (b) is that any carrier against whom proceedings can be brought under article 36 can be sued in either the place where the goods were taken over or the place designated for their delivery.

32. Paragraph (a) of article 31.1 is on the other hand concerned with the position of the particular defendant under consideration, whether or not there are other co-defendants. In so far as it refers to the country where that defendant is ordinarily resident, or has his principal place of business, it is capable of applying in relation to any successive carrier, or, indeed, in the case of an action by a carrier in relation to any consignor or consignee sued by such a carrier. But the reference to "the branch or agency through which the contract of carriage was made" is much less obviously apt to apply as against anyone other than one of the original parties to the carriage contract, that is basically the consignor (and perhaps the consignee, if the consignor was acting as his agent) and the first carrier. Mr Priday submits that that is wrong, and that, as successive carriers, Essers and Kazemier can be regarded as having contracted through the branch or agency of Exel because Exel made the framework and local agreement with BAT, to which Essers and Kazemier became parties under article 34. That I regard as distorting the plain purpose and effect of the relevant provisions of CMR. Essers and Kazemier are as successive carriers party to the original carriage contract under the terms of the consignment note not because anyone made a contract with them through any branch or agency, but simply because CMR makes them a party by statute in consequence of their accepting the goods and the consignment note.

33. It follows that article 31.1 contains a variety of provisions:

(i) a provision enabling the enforcement of any jurisdiction clause in favour of the court or tribunal of a contracting state which was (a) agreed between the parties to the original carriage contract, or (b) to be taken, in the light of article 34, to be agreed as between the original goods interests and any successive carrier becoming party to that original contract on terms in the consignment note incorporating the jurisdiction clause, or (d) agreed in some other way between the parties to the litigation.

(ii) provisions in paragraph (a) regarding ordinary residence and a principal place of business which can be relied upon as against any carrier or successive carrier liable to suit under article 36, as well as by a carrier bringing proceedings arising out of carriage under CMR against a consignor or consignee,

(iii) a further provision in paragraph (a) which can only sensibly apply in proceedings between original parties to the carriage contract,

(iv) further provisions in paragraph (b) which open up jurisdiction in any claim arising out of CMR carriage to cover the courts or tribunals of the place of taking over or designated for delivery of the goods.

The important corollary of these provisions is that, under the final words of article 31.1, a claimant may not bring an action arising out of carriage under CMR in any other courts or tribunals.

The relationship of articles 31.1, 36 and 39

34. BAT's case is that, once jurisdiction is established over one carrier under article 31.1 in any of the jurisdictions provided by that article, then the last sentence of article 36 opens up the further possibility of joining in the same proceedings any other carrier or carriers potentially liable under article 36, even though proceedings against them, viewed by themselves, cannot be brought within article 31.1. The alternative view of the last sentence of article 36, advocated by Essers and Kazemier, is that it is there to make clear that the liability of the first, last carrier and performing carriers under article 36 is joint and several, and not alternative as might otherwise have been capable of being suggested in view of article 36's reference to proceedings being "brought against the first carrier, the last carrier or the [performing] carrier". The provision that an action may be brought against several of these carriers "at the same time", or in the French "à la fois", is on this alternative view merely confirming or emphasising that there is no need to pursue them sequentially.

35. On BAT's case, a jurisdiction clause agreed between the consignor and first carrier, but not mentioned in the CMR consignment note accepted by a successive carrier, would nonetheless enable the successive carrier to be added to the proceedings commenced against the first carrier in the court or tribunal of the place assigned by the jurisdiction clause. Likewise, the ability to rely on any of the heads of jurisdiction provided by paragraph (a) of article 31.1 as against any relevant carrier (first, last or performing) would open up the same jurisdiction against any other of such carriers in relation to whom article 31.1 would not otherwise provide any ground of jurisdiction. As BAT contend on the present appeals, the principal place of business of any carrier (even though it was outside any contracting state) would suffice to ground jurisdiction against all relevant carriers, even though it has no connection with the physical carriage. On the face of it, such extensions of the carefully delineated jurisdiction provided by article 31.1 seem unlikely to have been intended. The interests of claimants are, as the Court of Appeal observed at para 63,

served by paragraph (b). That paragraph enables all carriers potentially liable under article 36 to be joined in one forum. The opening up of the heads of jurisdiction specified in article 31.1 which on BAT's case follows from the last sentence of article 36 sits uneasily with the final words of article 31.1 "and in no other courts or tribunals".

36. BAT submit that the interpretation of the last sentence of article 36 which they advance brings symmetry and order to CMR's treatment of claims involving multiple defendants. In a cargo claim, jurisdiction can be achieved against all by establishing it against one. That they submit is also what article 39.2 provides. The problem with this submission is that article 39.2 states this explicitly, by providing that a carrier who has paid compensation may seek recourse by making "his claim before the competent court or tribunal of the country in which one of the carriers concerned is ordinarily resident, or has his principal place of business or the branch or agency through which the contract of carriage was made" and that "all the carriers concerned may be made defendants in the same action". In contrast, article 31.1(a) in terms only confers jurisdiction against the individual defendant whose ordinary residence, principal place of business or branch or agency is relied upon. As to BAT's submission that the last sentence of article 39.2 deals, as between carriers, with jurisdiction, and must have been seen as paralleling, also in relation to jurisdiction but here as between cargo interests and carriers, the last sentence of article 36, I do not consider that either sentence necessarily or clearly refers to jurisdiction. Both are well capable of being read as emphasising or confirming no more than that all or several carriers liable may be sued at the same time.

37. BAT's submission regarding symmetry also faces the objection that the claims covered by article 39.2 differ significantly in content and structure from those covered by article 31.1:

(i) Article 31.1 does not only offer a claimant the jurisdiction of any individual defendant's ordinary residence, principal place of business or branch or agency. It offers the additional advantage of jurisdiction against all carriers potentially liable under article 36 (the first, the last and the performing carriers) in the place either of taking over or designated for delivery of the goods. No such jurisdiction is available under article 39.2 to a carrier seeking recourse from another carrier.

(ii) Article 39.2 concerns recourse claims which fall under articles 37 and 38 to be divided pro rata, potentially between all carriers and not just the first, last or performing carrier. This is so, having regard to the specific provisions covering cases where more than one carrier was responsible for the loss or damage, or where it cannot be ascertained who was responsible or where a carrier otherwise liable to contribute

> is insolvent. There is an obvious imperative under article 39.2 to enable a claimant to bring all such claims in one jurisdiction. The same imperative does not exist under article 31.1, since cargo interests are under article 36 entitled to look to any one of the relevant carriers (first, last or performing) to meet their full claim, each being liable 100%. Further, in so far as cargo interests do wish to pursue all such relevant carriers together, they are able to do so in the place either of taking over or designated for delivery as stated in point (i).

38. BAT rely on dicta in two Court of Appeal cases: *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd* [1981] 1 WLR 1363 and *ITT Schaub-Lorenz Vertriebsgesellschaft mbH v Birkart Johann lnternationale Spedition GmbH & Co KG* [1988] 1 Lloyd's Rep 487. Both cases concerned recourse claims between carriers. In *Cummins*, Cummins as consignor had contracted with Davis, another English company, for the carriage of engines from England to Amsterdam. Davis instructed Charterway to undertake the leg from Rotterdam to Amsterdam, and Charterway in turn asked Graaf, who asked Boers to do this. Charterway, Graaf and Boers were all Dutch firms and all successive carriers under CMR. Cummins issued a writ in England against all four, but served only Davis. Davis issued third party proceedings to join and seek recourse from Charterway, Graaf and Boers, who applied, successfully, to have the third party proceedings set aside on the basis that under article 39.2 any recourse proceedings against them could only be in Holland. But at p 1371 Brandon LJ made the following general statement regarding jurisdiction in the main proceedings:

> "It is clear from the provisions of CMR contained in Chapters V and VI that it contemplates two kinds of legal proceedings arising out of a contract of carriage. The first kind of legal proceedings which it contemplates are actions brought by a sender or consignee of goods against one or more carriers. Where successive carriers are involved, the effect of article 31, paragraph 1, combined with article 34, is that the plaintiff can bring a single action against one, more than one, or all the carriers concerned. Article 31, paragraph 1, further requires him to bring his action in certain courts only. These courts are, first, any court of a contracting state which has been agreed between the parties; secondly, the courts of the country where any of the carriers sued is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made; and, thirdly, the courts of the place where the goods were taken over for the carriage or the place where they were to be delivered.
>
> It is on the basis of these provisions that, in the present case, Cummins issued a writ against four parties, Davis, Charterway, Graaf and Boers, although they have only served such writ on Davis."

39. Brandon LJ went on specifically to address the recourse claims. In *ITT Schaub-Lorenz*, at p 494, Bingham LJ quoted the above passage and its continuation, and said that, although it could not be regarded as "having more than persuasive authority, … I think (with respect) that it is plainly right".

40. Neither *Cummins* nor *ITT Schaub-Lorenz* required any precise examination of the accuracy of Brandon LJ's statement that article 31.1 combined with article 34 allows a plaintiff to bring a single action against one, more than one, or all the carriers concerned in the courts of the country where any of the carriers concerned is ordinarily resident or has his principal place of business or the branch or agency through which the carriage contract was made. Further, it is unclear by what reasoning Brandon LJ derived his summary from articles 31 and 34, the only articles which he cited. Article 31.1(a) does not on any view confer jurisdiction over one carrier concerned, simply because "any" of the other carriers concerned is ordinarily resident or has his principal place of business or relevant branch or agency in the country where proceedings are brought. It confers jurisdiction against a carrier who has such residence, place or branch or agency. It is only the last sentence of article 36 - which Brandon LJ did not mention at all - that arguably extends this jurisdiction to enable other carriers to be added to the proceedings against the carrier defendant who satisfies article 31.1(a).

41. Further, in *Cummins* at pp 1374-1375 O'Connor LJ also described the scheme of CMR in terms which were, I think, both more specific on the present issue and significantly different in effect from those used by Brandon LJ. He said:

> "It will be seen that the scheme of the Convention, starting in article 31, is that normally, unless the parties otherwise agree, any legal proceedings are to be originated in the jurisdiction of 'the defendant' (article 31, paragraph 1(a)), and I am content, under the ordinary rules of interpretation, to read 'defendant' for 'defendants'. The only alternative there given is the place where the goods were taken over or the place designated for delivery. The place where the goods were taken over by the carrier, in my judgment, refers to the place where the contract of carriage commenced (see article 1 of the Convention) and cannot be repeated down the line where successive carriers have participated in the carriage at various stages. That in the present case was Scotland and the place of delivery was Holland. Therefore, Cummins were limited to bringing the action, as far as the jurisdiction of the defendant was concerned, either in England (Davis) or in Holland the other three."

It is clear from this passage that O'Connor LJ did not accept that Cummins could under CMR properly bring English proceedings against any defendant other than

Davis, which alone fell within article 31.1(a). That corresponds with the case advanced by Essers and Kazemier on these appeals.

42. Academic commentary also supports Essers' and Kazemier's position on this point: see Professor Loewe's paper, para 281, Hill & Messent, para 11.67 and KF Haak in *The Liability of the Carrier under the CMR* (Stichting Vervoeradres – The Hague – 1986), p 114, para 2, where the requirement to bring each successive carrier held liable under article 36 within the scope of article 31.1 is explained as a practical restriction on the severity of the joint and several liability imposed by the last sentence of article 36 on, in particular, the last carrier.

The desirability of joining all possible defendants

43. This brings me to a fundamental element of BAT's case, the desirability of, and suggested imperative to arrive at, an interpretation or solution enabling all claims by goods interests against all carriers to be resolved in one place and one set of proceedings. That this can be a relevant approach is certainly borne out by article 6(1) of the Brussels Regulation, as well as, domestically, by Practice Direction 6B para 3.1(3): see para 16 above. But it is not an invariable approach, and it is not the approach taken in the Warsaw Convention 1929 (for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929), the language of which the relevant provisions of CMR to a large degree reflect. The Warsaw Convention provided:

> "Article 28.1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination.
>
> …
>
> Article 30.1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, luggage or goods is subjected to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

…

> 3. As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee."

44. Under the Warsaw Convention, it is clear that article 28 defines jurisdiction, while the last sentence of article 30.3 deals, like the rest of that article, with liability by emphasising that all potentially liable carriers are jointly and severally liable for loss, damage or delay in respect of goods and luggage. CMR rephrases the last sentence of article 36, but not in a way which suggests that it is now intended to have the fundamentally different purpose of addressing not liability (like the rest of article 36), but jurisdiction.

45. Viewing the position more generally, article 31.1 of CMR affords clearly defined heads of jurisdiction additional to those provided by the Warsaw Convention – in particular jurisdiction based on any agreement between the parties to a court or tribunal in a contracting state, and jurisdiction at the place of taking over of the goods (and not merely at the place designated for their delivery). As to the Brussels Regulation, there are, unsurprisingly, parallels between some of its provisions and those of CMR. A defendant's domicile in a member state is the general head of jurisdiction under article 2.1 of the Brussels Regulation, while article 5.5 provides a special head as regards disputes arising out of the operations of a branch or agency. These heads broadly parallel the heads found in article 31.1(a) of CMR. In other respects, there are however differences in both directions in the jurisdictions available under CMR and the Brussels Regulation. Article 5.1 of the Brussels Regulation offers as special heads "the place of performance of the obligation in question" in a contract claim or the place where the harmful event occurred in a tort claim. Article 31.1(b) of CMR offers in contrast the place designated for delivery, which may correspond with the place for performance of the obligation in question, if the relevant law enables suit against a carrier on the basis of a failure to deliver or to deliver in good condition at destination. Finally, the Brussels Regulation does not offer any general head of jurisdiction paralleling the right to sue at the place of taking over the goods conferred by article 31.1(b).

46. On the other hand, coming to the nub of BAT's case on this point, the Brussels Regulation contains the further special head that:

> "A person domiciled in a member state may also be sued, where he is one of a number of defendants, in the courts for the place where any one of them is domiciled …."

On Essers' and Kazemier's case, CMR contains no such provision. On BAT's case, the last sentence of article 36 of CMR has an effect which is similar - similar, but necessarily wider since it would expose any successive carrier potentially liable under article 36 to being sued by cargo interests in any jurisdiction anywhere in the world which happened to be that of the principal place of business of any other such successive carrier, or which happened to be that of the branch or agency through which the first carrier happened to make the carriage contract. A lesser point, not without all practical relevance, is that BAT's reading of the last sentence of article 36 would also provide an automatic ground of jurisdiction against any such carrier without the qualifying condition inserted into article 6.1 of the Brussels Regulation, that the claims should be "so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". The absence of such a qualification could be significant if, for example, a claim was brought against a first carrier based on a special term included in the original carriage contract, but not binding on a successive carrier because it was not included in the consignment note.

47. In these circumstances, I do not consider that the desirability in some contexts of a provision such as article 6.1 of the Brussels Regulation or Practice Direction 6B para 3.1(1) can affect or impact on the interpretation of articles 31, 34 and 36 of CMR in any significant way. Equally, I do not see how it can be said that there is any gap that article 6.1 should be called upon to fill, even assuming that gap-filling by reference to the Brussels Regulation is admissible and required, in a European Union context, as Colman J thought in *Frans Maas Logistics*. The scheme of CMR appears to me to be deliberate and comprehensive. For better or for worse, and starting with the model of the Warsaw Convention, it elected for a generous range of heads of jurisdiction. There is no gap in it, as a matter of construction, merely a considered decision that the heads provided would reflect an appropriate balance between the interests of all concerned, potential claimants and potential defendants.

Does article 6.1 of the Brussels Regulation prevail over article 31.1 of CMR?

48. That leaves BAT's last and perhaps most far-reaching submission, that, if all else fails, European Union law, in particular article 6.1 of the Brussels Regulation or the principle behind it, must prevail over the scheme of CMR to enable the joinder of all carriers potentially liable under article 36 in any court or tribunal in which jurisdiction can be established under article 31.1(a) on the basis of any one of such carrier's principal place of business or branch or agency. I have already outlined statements of principle made by the Court of Justice on which BAT rely (para 18

above). The starting point, however, must be the European Treaties. CMR was concluded before 1 January 1958 between states half of which are, even today, not member states of the European Union. Article 351 TFEU provides:

> "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding states, before the date of their accession, between one or more member states on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.
>
> To the extent that such agreements are not compatible with the Treaties, the member state or states concerned shall take all appropriate steps to eliminate the incompatibilities established. Member states shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
>
> In applying the agreements referred to in the first paragraph, member states shall take into account the fact that the advantages accorded under the Treaties by each member state form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other member states."

49. Reflecting article 351 TFEU, article 71 of the Brussels Regulation provides:

> "1. This Regulation shall not affect any conventions to which the member states are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.
>
> 2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:
>
> > (a) this Regulation shall not prevent a court of a member state, which is a party to a convention on a particular matter, from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another member state which is not a party to that convention. The court hearing the action shall, in any event, apply article 26 of this Regulation;

> (b) judgments given in a member state by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other member states in accordance with this Regulation.
>
> Where a convention on a particular matter to which both the member state of origin and the member state addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation which concern the procedure for recognition and enforcement of judgments may be applied."

50. On the face of it, article 351 establishes a clear position. The Court of Justice has, however, interpreted article 315. In its famous decision in *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) [2009] AC 1225, the court in considering the relationship between a European sanctions measure and the obligations imposed on member states under the United Nations Charter and general international law to give effect to UN Security Council asset freezing orders under Chapter VII of the UN Charter, said this:

> "300. What is more, such immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty.
>
> 301. Admittedly, the court has previously recognised that article 234 of the EC Treaty (now, after amendment, article 307EC) could, if the conditions for application have been satisfied, allow derogations even from primary law, for example from article 113 of the EC Treaty on the common commercial policy: see, to that effect, the *Centro-Com* case [1997] QB 683, paras 56-61).
>
> 302. It is true also that article 297EC implicitly permits obstacles to the operation of the common market when they are caused by measures taken by a member state to carry out the international obligations it has accepted for the purpose of maintaining international peace and security.

> 303. Those provisions cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in article 6(1) EU as a foundation of the Union.
>
> 304. Article 307EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights."

Article 351 TFEU is the successor to article 307EC.

51. *Kadi* was a decision at a high level of importance for individual freedoms. It is, in one sense, a surprise to find its thinking extended to the tarmacadam of the world's roads. But in *TNT Express* para 51, and *Nipponkoa*, para 37, referred to in para 18 above, the court stated that:

> "Article 71 of Regulation 44/2001 cannot have a purport that conflicts with the principles underlying the legislation of which it is part. Accordingly, that article cannot be interpreted as meaning that, in a field covered by the Regulation, such as the carriage of goods by road, a specialised convention, such as the CMR, may lead to results which are less favourable for achieving sound operation of the internal market than the results to which the Regulation's provisions lead."

The court did not refer to article 307EC or article 351 TFEU, and the court's reasoning is essentially circular. It is the purpose of article 307EC, now 351 TFEU, to derogate from not only Regulations such as (EC) 44/2001, but also from the Treaties themselves.

52. As Judge Allan Rosas, not a member of the court in *TNT* or *Nipponkoa*, explained extra-judicially in "The Status in EU Law of International Agreements Concluded by EU member states" (Fordham International Law Journal vol 34, Issue 5 (2011) article 7), at p 1321:

> "Article 351(1) TFEU allows a derogation from the principle of primacy of EU law but only in relation to agreements concluded prior to EU membership and, in principle, only to treaty relations between member states and third states (category 1 above). According to settled

> case law, the purpose of the provision is to establish that the application of EU law does 'not affect the duty of the member state concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder'. The court has also recognized that article 351(1) TFEU may allow derogations from not only Union's secondary law but also its primary law, such as provisions of the TEU and the TFEU. The court has added that the provision would not achieve its purpose if it did not imply a duty on the part of the Union institutions not to impede the performance of the obligations of member states that stem from a prior agreement.

These propositions are borne out by the prior authorities which Judge Rosas cited in their support, particularly *Attorney General v Burgoa* (Case C-812/79) [1980] ECR 2787, para 8 et seq.

53. At a high level, preservation of the internal market is of course fundamental to the Union. But the court in both *TNT* para 49 and *Nipponkoa* para 36 endorsed the more detailed statements that, although article 71 of Regulation 44/2001 provides, in relation to matters governed by specialised conventions such as CMR, for the application of those conventions:

> "the fact remains that their application cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union, such as the principles, recalled in recitals 6, 11, 12 and 15 to 17 in the preamble to Regulation 44/2001, of free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union."

In *TNT* the court added:

> "50. Observance of each of those principles is necessary for the sound operation of the internal market, which, as is apparent from recital 1 in the preamble, constitutes the raison d'être of Regulation 44/2001."

54. The context in which these statements were made and applied is however important. Both cases concerned competing proceedings between the same parties in different member states. Both concerned the free movement of judgments and

mutual trust in the administration of justice. In *TNT*, AXA as cargo-insurer was seeking to enforce in the Netherlands a German judgment obtained against TNT, the CMR carriers, who were seeking in the Netherlands to contest the German court's jurisdiction to give the German judgment on the basis that there existed prior Netherlands proceedings in which TNT were seeking a declaration of non-liability. The Hoge Raad referred the matter to the Court of Justice, which, after citing its familiar case law on mutual trust (including *West Tankers Inc v Allianz SpA (formerly RAS Riunione Adriatica di Sicurtà SpA)* (Case C-185/07) EU:C:2009:69; [2009] AC 1138, para 24) held:

> "55. Having regard to the principle of mutual trust referred to above, the court has stated that the court of the state addressed is never in a better position than the court of the state of origin to determine whether the latter has jurisdiction. Accordingly, Regulation 44/2001, apart from a few limited exceptions, does not authorise the jurisdiction of a court of a member state to be reviewed by a court in another member state (*Allianz SpA*, at para 29 and the case law cited). Therefore, article 31(3) of the CMR can be applied in the European Union only if it enables the objectives of the free movement of judgments in civil and commercial matters and of mutual trust in the administration of justice in the European Union to be achieved under conditions at least as favourable as those resulting from the application of Regulation 44/2001."

55. *Nipponkoa* also concerned competing sets of proceedings. These were Dutch proceedings in which the carriers had successfully limited their liability to the CMR limit and German proceedings in which cargo insurers were seeking to establish wilful misconduct. On a reference by the Landgericht Krefeld, the Court of Justice held that article 71 of the Brussels Regulation precluded an interpretation of article 31(2) of CMR whereby an action for a declaration of non- or limited liability did not involve the same cause of action as a positive claim for damages in respect of the same alleged loss. This slightly surprising way of putting the matter (in terms of the proper interpretation of CMR) contrasts with the court's confirmation in *TNT*, paras 58-63, that it has no jurisdiction under article 267 TFEU to interpret international agreements concluded between member states and non-member countries or, specifically, to interpret article 31 of CMR. It is however possible to understand the decision in *Nipponkoa* on the basis that what the court was really doing was treating Union law in the relevant area, particularly that covered by article 29.1 of the Brussels Regulation and *Owners of cargo lately laden on board the ship Tatry v Owners of the ship Maciej Rataj* (Case C-406/92) (Note) EU:C:1994:400; [1999] QB 515; [1995] 1 Lloyd's Rep 302, as over-riding any different regime contained in CMR. How close such reasoning and decisions may be to the thinking of the European legislators when they agreed article 351 TFEU and article 71 of the Brussels Regulation is a different matter.

56. The present case does not concern or present any risk of competing judgments involving the same parties. BAT is under CMR unquestionably entitled to look to Exel for the whole of any loss which BAT can prove. At highest, BAT may have to pursue Essers and Kazemier in different jurisdictions, if they continue to wish to expand their target beyond Exel. In so far as BAT's wish to do this is based on a belief that their evidential position, in seeking to show wilful misconduct, may be improved if they can join Essers and Kazemier, I cannot associate an evidential aim of this nature with any fundamental principle of Union law in the field of jurisdiction or justice. I add that, in so far as BAT suggest that it may not be possible to sue Essers and Kazemier elsewhere on the same basis as here, since the courts in the Netherlands would decline to recognise Exel as first carrier (since it did not actually carry the goods anywhere), the point cuts both ways, as well as leaving open both a possibility that Essers and Kazemier should then themselves be regarded as first carriers and that if, on its face surprisingly, the Dutch courts would not regard the carriage as subject to CMR at all, Essers and Kazemier would be liable under the general law.

57. More fundamentally, as discussed in paras 44-47 above, CMR represents a balanced jurisdictional régime adopted across a wide-range of some 55 states, only half of which are Union member states. I cannot regard its tailored balance as impinging on any of the principles of Union law which have been explained by the Court of Justice in the authorities discussed above, and which it is for us to apply. I conclude that nothing in Union law prevents effect being given to article 31.1 of CMR, under which it is clear that neither Essers nor Kazemier can be sued here.

58. I add, though it is unnecessary for my decision, that I cannot believe that it is wholly inadmissible under Union law to bear in mind the interests of those third party states in a régime which operates with some certain degree of consistency across all member states. Restrictions under Union law on the ordinary application of an international convention like CMR potentially undermine the uniformity and predictability that are the aim of such conventions. This tends to suggest that any over-riding interests of Union law should be relatively narrowly confined.

Conclusion

59. It follows from the above that I would allow this appeal, and restore Cooke J's order setting aside the service of the claim forms on Essers and Kazemier.

LORD SUMPTION: (with whom Lord Neuberger, Lord Clarke and Lord Reed agree)

60. Article 34 of the CMR provides that where a single contract of carriage is performed by successive carriers, each of them is to be responsible for the performance of the whole operation. Under article 36, cargo interests are entitled to claim under the contract against the first and last carriers and the carrier in possession of the goods when the loss, damage or delay occurred. The commercial logic of these provisions points towards recognising a jurisdiction to receive claims against all three in one set of proceedings. Sir Bernard Rix makes a strong case for this outcome in the present case in his judgment in the Court of Appeal. Nevertheless, in agreement with Lord Mance, I think that the language of the CMR points clearly in the other direction. In the light of the Lord Mance's very full analysis of the Convention, I can state my reasons quite shortly.

61. Chapter V deals with "Claims and Actions". Article 31.1 provides for "legal proceedings arising out of carriage under this Convention" to be brought in:

> "any court or tribunal of a contracting country designated by agreement between the parties and in addition in the courts or tribunals of a country within whose territory,
>
> > (a) the defendant is ordinarily resident, or has his principal place of business. or the branch or agency through which the contract of carriage was made, or
> >
> > (b) the place where the goods were taken over by the carrier or the place designated for delivery is situated, and in no other courts or tribunals."

This provision cannot be limited to claims against the first or primary carrier. It is in terms directed to claims "arising out of carriage under this Convention". It must therefore apply to any carrier whom the Convention makes potentially liable. I find it impossible to attach any importance to the fact that it appears earlier in the text than the provisions regulating the liability of second or subsequent carriers.

62. As applied to actions arising out of carriage under the Convention, article 31.1 is in terms a complete code. It confers jurisdiction on the courts or tribunals of the jurisdiction (i) which has been designated by agreement between the parties, or (ii) where the defendant is present in one or other of the ways envisaged by sub-

paragraph (a), or (iii) where the place of consignment or the contractual place of delivery are situated (see sub-paragraph (b)), "and in no other courts and tribunals".

63. The courts and tribunals of the place of consignment or the contractual place of delivery (case (iii) in my categorisation) have jurisdiction over all carriers who are potentially liable. This is because these are jurisdictions identified by reference to the transportation operation and not some circumstance specific to the proposed defendant. They are also identifiable from the consignment note. The Convention envisages that in these jurisdictions all such carriers may be sued together. So far, therefore, as there is a commercial imperative to have a jurisdiction in which all carriers potentially liable may be sued, that imperative is satisfied by the existence of jurisdiction at the place of consignment or the contractual place of delivery.

64. Cases (i) and (ii) are different. In these cases, jurisdiction depends on something specific to the particular defendant, ie he has entered into a jurisdiction agreement with the claimant or is present within the relevant jurisdiction. Jurisdiction may be established under one of these two heads only against defendants who fulfil the stated criteria. There is no provision for jurisdiction to be exercisable against "necessary or proper parties" who do not fulfil them. Since in this case, England was neither the place of consignment nor the contractual place of delivery, BAT must rely on one or other of the heads of jurisdiction specific to defendants satisfying particular criteria, ie cases (i) or (ii).

65. The only way in which they could claim to have agreed with Essers or Kazemier upon English jurisdiction is by showing that those companies acceded to the contracts between BAT and Exel which contained the relevant jurisdiction clause. The agreements between BAT and Exel are framework agreements containing the terms of the relevant contract of carriage. The consignment note is not itself the contract of carriage. It is only prima facie evidence of its existence and terms: see article 9. But under article 34, a succeeding carrier becomes a party to the contract of carriage only "under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note". It follows that the only terms to which a successive carrier accedes by accepting the goods with the consignment note are those recorded in the consignment note. These are terms of the Convention itself and any additional terms specified in Box 20 ("Conditions Particulières – Besondere Vereinbarungen"). This is a wholly rational result. Those are the only terms of which the successive carrier was necessarily aware or to which he can be said to have consented.

66. That leaves only the argument that when Essers and Kazemier acceded to the contract of carriage by accepting the goods and the consignment note from Exel, they did so through a "branch or agency", namely Exel, which was located in England. This is, to my mind, an impossible argument. As the context shows, the

"branch or agency" referred to in sub-paragraph (a) of article 31.1 is relevant as one of a number of indicia of the defendant's presence in the jurisdiction in which the claimant wishes to sue. It means a branch or agency of the relevant defendant (Essers or Kazemier). The conditions are, first, that it should be located in the jurisdiction (England) where the claimant wishes to sue and, secondly, that the contract of carriage should have been made through it. It is not suggested that Essers or Kazemier has a branch or agency in England. Even if they did, they did not accede to the contract of carriage through that branch or agency but by accepting the goods and the consignment note in Switzerland and Hungary respectively. The fact that the place at which a successive carrier accedes to the contract under article 34 will necessarily be the place of consignment, which is already a relevant jurisdiction by virtue of sub-paragraph (b), indicates that paragraph (a) is in fact referring to the branch or agency through which the contract of carriage was originally made between the consignor and the first or primary carrier as principals. It is not referring to the branch or agency (if any) through which a successive carrier acceded to it.

67. The final words of article 36 ("… an action may be brought at the same time against several of these carriers") authorise proceedings "at the same time" against any or all carriers who are liable under the Convention. The effect of these words is simply that there is no prescribed order in which cargo interests must have recourse to the various parties made concurrently liable. The draftsman has no doubt assumed that proceedings will be brought in a court which has jurisdiction, but the article is not concerned with jurisdiction. It certainly does not confer jurisdiction if it does not otherwise exist.

68. This analysis is supported by articles 37-39, which deal with claims for indemnity by a carrier who has paid compensation to cargo interests, against the carrier or carriers actually responsible (or deemed to be responsible). Claims for an indemnity may be brought by the carrier who has paid against "the carriers concerned" (ie the carriers responsible or deemed to be responsible for the loss) in a jurisdiction where any one of them is present: see article 39.2. Two points may be made about this. First, it applies only to actions among carriers. There is no equivalent provision available to found jurisdiction for claims brought by cargo interests under cases (i) or (ii). Secondly, the technique used by the Convention for avoiding inconsistent findings in actions by cargo interests and subsequent actions by carriers among themselves is not to provide for them to be litigated in the same proceedings. It is to provide for the "validity" of the payment of damages previously made to cargo interests to be incapable of challenge in subsequent proceedings for an indemnity, provided that the amount was "determined by judicial authority after the [carrier against whom indemnity is claimed] had been given due notice of the proceedings and afforded an opportunity of entering an appearance": see article 39.1.

LORD CLARKE:

69. At the conclusion of the argument in this appeal I was persuaded that this appeal should be dismissed for the reasons given by Sir Bernard Rix in the Court of Appeal. I remained of that view until I received a copy of the draft judgment of Lord Mance. I am now entirely persuaded by his reasoning that Cooke J was correct at first instance and that this appeal should be allowed and his order restored. Since then I have read in draft the judgment of Lord Sumption giving his reasons for agreeing with Lord Mance. In all the circumstances, for the reasons which they give I would allow the appeal. I do so with some misgivings because I agree with Lord Sumption that the commercial logic of articles 34 and 36 points towards the recognition of a jurisdiction to receive claims against all three carriers in one set of proceedings. However, I agree with him that Lord Mance's analysis has shown that the language of the CMR points clearly in the other direction.