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The third issue of 2011 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht* includes the following contributions on the Brussels I Recast (lis pendens and choice of court), Voluntary Assignment, and case notes on *TNT Express v. Axa* and *Pammer/Hotel Alpenhof*:

Marielle Koppenol-Laforce, Herschikking Brussel I: litispendentie en forumkeuze, een positieve stap voorwaarts!?, p. 452-460. The English abstract reads:

This article deals with the proposed changes to the Brussels I Regulation in the field of the choice-of-forum clause and the related lis abili pendens provisions. The aim was to make choice-of-forum clauses more effective. The proposal of the Commission is that the chosen court be given priority over the other courts to deal with the questions of the validity and scope irrespective whether it is the first or the second court seized. The proposed articles, however, do not make clear to what extent the non-chosen court may deal with questions of validity and scope. The proposal also introduces a conflict of law rule for the applicable law to the substantive validity of the choice-of court clause, which is somewhat controversial. The conclusion of this article is nonetheless that the proposals are definitely an improvement. The priority given to the chosen court can certainly help to increase effectiveness of such clauses. However, for the proposed measures to be really effective in practise, the text could be made more precise and some inconsistencies should be resolved. This would also prevent courts from having to follow different approaches when dealing with a choice-of-court clause under the Brussels I Regulation and under the Hague Choice-of-Forum Convention.

Cornelis A. de Visser, The law governing the voluntary assignment of claims under the Rome I Regulation, p. 461-467. The conclusion reads:

Although the assignee and assignor can agree to whatever they wish and that shall be the law as between them, such an agreement cannot affect the rights of third parties, whether such third party is the debtor of the assigned claim or

another third party. The position of the debtor of the assigned claim under the assignment is exclusively governed by the law governing the claim. Based on the private international version of the nemo plus principle, it is a straightforward, simple and consistent conclusion that the law governing the claim should also determine the validity and the effect of the assignment against third parties other than the debtor. Any proposal for a different EU conflict of laws rule on the third-party effect of the assignment of a claim does not provide a solution to the conflict of laws, will lead to situations of deadlock, will provide meaningless flexibility, will increase legal uncertainty and would thus only complicate the already rather complex litigation and practice in the cross-border voluntary assignments of claims.

M.A.I.H. Hoeks, CMR of EEX? Van samenloop, litispendentie en het vrij verkeer van beslissingen in Europa, p.468-472. The English abstract reads:

The seed from which the problem sprouted in the TNT-AXA case is the fact that the CMR, an international road carriage convention, refers to national law in Article 29 CMR. This Article determines that if the CMR carrier has caused damage to the cargo 'by such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct', he is no longer entitled to exclude or limit his liability under the CMR. As a result, it is more likely for a German court of law to consider that a CMR carrier has caused damage by such default than for a Dutch court. Since this type of default denies the carrier the option to limit his liability to approximately Euro 11½ per kilogram as per Article 23 CMR, it is in the carrier's best interest to avoid the German legal system. Initially carriers thereto sped to Dutch courts in order to gain declaratory judgments of non-liability, or at least limited liability when damage occurred. As soon as the case became pending, it was thought that the lis pendens rule of Article 31(2) CMR would bar the cargo interest's access to any other forum, including the German one. However, when the German Bundesgerichtshof (the BGH) determined that such an action for a negative declaration did not concern the same subject as an action for a substantive claim, parallel proceedings before a German court became an option. At that point it was no longer sufficient for the carrier to be the first to address a court. It became necessary to be the first to gain a final decision in order to bar the recognition and enforcement of any German decisions on the subject in the Netherlands. Unfortunately for TNT, the Dutch court of first instance that was addressed in the

web of the TNT-AXA proceedings failed to decide in a manner that was favourable to the carrier. TNT was therefore forced to appeal, with the result that there was no final decision on the matter when the cargo interest's insurer, AXA, attempted to have the judgment it had sought in Germany recognised and enforced in the Netherlands. To prevent this, TNT asserted that, according to Article 71 Brussels I Regulation, it is not the Brussels I Regulation but the CMR that determines whether this is possible, because it was of the opinion that the CMR would prevent the recognition and enforcement of the German judgment on the grounds that the German court had no jurisdiction, due to the CMR's lis pendens rule. Conversely, the Brussels I Regulation only offers the option to refuse recognition because the court whose decision is to be recognised lacked jurisdiction in a very limited set of situations. None of which occurred in the TNT-AXA case. All in all, it took six legal procedures and seven years for the parties to reach the ECJ, the European Court of Justice. When asked whether the recognition and enforcement was in this case governed by the CMR or by the Brussels I Regulation, and whether some light could be shed on the meaning of Article 31 CMR, the ECJ determined that it was indeed the CMR that regulated the matter as it, in principle, is granted precedence by Article 71 Brussels I Regulation, and that it did not have the authority to interpret the meaning of the provisions of the CMR as this is not an EU instrument. However, since Article 71 Brussels I Regulation cannot be interpreted as leading to a result that is irreconcilable with one of the basic principles of the Brussels I Regulation, the favor executionis principle in this case, the rules of the CMR can only apply in the EU Member States insofar as they lead to a result that is in accordance with this principle. The precedence of the CMR can therefore not result in the recognition and enforcement of the German decision being rejected. Thus, it is only in theory that the rules of the CMR govern the matter, not in actual practice.

W. van den Aardweg, De gerichte activiteit van artikel 15 lid 1, onderdeel c, Brussel I: meer duidelijkheid door Luxemburgse gezichtspunten, p. 473-477. The English abstract reads:

This article reviews the recent ECJ decision in the joined cases of Alpenhof and Pammer on the notion of 'directed activity' as contained in Article 15, paragraph 1, under c, of the Brussels I Regulation in the context of e-commerce. This rule assigns jurisdiction to the courts of the country where the consumer resides whenever a trader directs commercial or professional activities to that Member

State and the contract falls within the scope of such activities. In this case, the Grand Chamber clarified that in order to have 'directed activity' an intention on the part of the trader to target his activity towards a certain Member State is required. The mere use of a website with information which enables a consumer to contact the trader is insufficient to conclude that such an intention exists on the part of the trader. The Court considered several factors which could provide evidence of an intention on the part of the trader to target his professional and commercial activities towards a Member State. In his note the author comments on the decision and reviews several factors considered to be relevant by the Court, in particular the role of information required by statute and how the factors considered by the Court should be considered and duly weighed.

If you are interested in contributing to this journal, please contact Ms. Wilma van Sas at W.van.Sas-Wildeman@asser.nl