
**FACULTY OF LAW**

**PAX MOOT COURT 2026**

Case study in Private International Law

Autor: Carla Montaux

4° E-1 (Francés)

Private International Law

Madrid

March 2026

**Table of contents**

## CHAPTER I. APPLICANT MEMORANDUM : ROYAL FURNITURE OOD

1. STATEMENT OF THE FACTS

- Royal Furniture OOD **[“Royal”, or “Claimant”]** is a designer of furniture for luxurious yachts, domiciled in Sofia, Bulgaria.
- Tosca Mobili s.r.l. **[“Tosca”, or “Defendant”]** is a manufacturer of high-end furniture with a perfect reputation, domiciled in Milan, Italy.
- This last company has a design team, but also makes furniture to the client's specifications.
- Swift **[“Swift”, or “Carrier”]** is a carrier, domiciled in Gdansk, Poland.
- After a meeting at the International Sustainable Furniture Fair in Milan, Royal contacted Tosca by email on 20 May 2025 to ask for two separate offers, one regarding custom furniture and the other, furniture presented during the fair. From this first communication, Royal explicitly asked Tosca to ensure that the furniture complies with the highest sustainable standards, to protect its reputation, and therefore, as a core requirement. Also, the email expressly incorporated Royal’s terms and conditions through a hyperlink, which established that Bulgarian law applies, excluding the Vienna Sales Convention 1980 **[“CISG”]**, and that the Sofia court has jurisdiction.
- Tosca responded on 23 May 2025 by email, with an offer for the custom tables and cabinets (DAP Sofia) and a separate offer for the chairs and sofas (EXW Rotterdam). Tosca’s email included a hyperlink to its terms and conditions. Also, it stated that the court at the place of performance or the court in Milan has jurisdiction and that Italian law applies. Tosca assured that they will in any case comply with the highest standards in the production of the furniture.
- On 24 May 2025, Royal instructed the Bulgarian Trade Bank to issue a Letter of Credit of 134.400 euros for the tables and cabinets, in order to secure the transaction, and paid 192.000 euros for the chairs and sofas.
- On 26 May 2025, my client officially accepted both offers, expressly stating in an email that the acceptance was made “under our terms and conditions.” Royal once again included the hyperlink to its own terms and conditions, reaffirming the applicability of Bulgarian law and the jurisdiction of Sofia’s court. Tosca did not present any objection to this mention.

- On 25 July 2025, Tosca confirmed the delivery of the tables and cabinets on 31 July 2025 to Sofia, and therefore, performed its obligations of the contract without raising any objections, under the agreed framework.
- The tables and cabinets were all delivered on 31 July 2025. At the request of one of our clients (a yacht builder), the delivery was split by half of the goods between Sofia and Rijeka (Croatia), by mutual agreement between the parties, by telephone. Ten days later, it was publicly revealed that Tosca used unethical wood in its production, violating the express requirement established by Royal made in its first email. As a direct result of this, the yacht builder avoided its contract with Royal, as he also ordered furniture made from sustainable materials in compliance with the highest standards, and claimed damages. Despite being informed of Royal's intention to seek avoidance of the contract and the resulting damages, Tosca refused to reimburse Royal.
- Consequently, Royal initiated proceedings before the courts of Sofia seeking avoidance of the contract due to a breach, and claimed damages for loss of profit on 26 August 2025.
- Regarding the chairs and sofas, Royal contracted with Swift on 10 July 2025 to arrange the transport of the goods from Rotterdam to Sofia. The carriage contract signed by Royal and Swift contained a clause granting exclusive jurisdiction to the Sofia court. In addition, Royal explicitly instructed Swift not leave the consignment unattended.
- On 15 July 2025, the driver employed by Swift parked the truck at an unsecured parking place near Graz (Austria) and left it unattended to have dinner 500 meters away, in direct violation of these instructions. This oversight meant that during dinner, some of the goods were stolen, and another part was severely damaged.
- On 21 July 2025, Swift initiated negative declaratory proceedings in the Netherlands before the Court of Rotterdam, asking the court to rule that Swift is not liable for the damage and, subsidiarily, to limit its responsibility to 8,33 SDR per kilogram, attempting to preempt liability. Royal raised an objection on the grounds that the clause conferring jurisdiction on the Sofia court was invalid.
- On 26 August 2025, my client initiated proceedings before the Court of Sofia against Swift, claiming damages arising from the incident during carriage. Royal also requested that the Rotterdam court stay its proceedings under the lis pendens rules until the jurisdiction of the Sofia court is established.

## 2. INTERNATIONAL JURISDICTION

### 2.1. Applicability of International Regulations

#### *2.1.1. The applicability of Brussels I-Bis Regulation*

Article 1(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters **["Brussels I-bis"]** states that the regulation "shall apply in civil and commercial matters whatever the nature of the court or tribunal". Article 1(2) of this regulation establishes certain assumptions where the regulation is not applicable. It is submitted that the contractual relationship between Royal and the Defendants does not fall within the scope of the exclusion mentioned in Article 1(2). Finally, Article 4(1) specifies that the regulation is applicable when the defendant is a national of a Member State of the European Union, which is the case because both Defendants are domiciled in Member States. Therefore, Brussels I-bis is applicable in the present case.

#### *2.1.2. The applicability of the Convention on the Contract for the International Carriage of Goods by Road*

The Convention on the Contract for the International Carriage of Goods by Road **["CMR"]** applies to every "carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a Contracting country, irrespective of the place of residence and the nationality of the parties" (Article 1(1) CMR). In addition, the contract between Royal and Swift concerns the transport of goods by road between the Netherlands and Bulgaria. Bulgaria (since 20 October 1977) and the Netherlands (since 27 September 1960) are both contracting parties to the CMR. Consequently, this Regulation is mandatorily applicable to the present case.

### 2.2. The indivisibility of the claims

Royal maintains that the claim for the avoidance of the contract and the claim for damages regarding the "loss of profit" resulting from the cancelled yacht contract constitute an inseparable legal block. To ensure the sound administration of justice and avoid contradictory rulings, these claims must be adjudicated by the same court.

### *2.2.1. Qualification of the claims*

The Claimant asserts that both claims must be processed together, as they both arise from the contractual relationship and related to the contract.

The settled case law of Jakob Handte[1] establishes that the concept of contractual matters deals only with situations where there is no "obligation freely assumed by one party towards another". In this case, the relationship between Royal and Tosca is based on a contract of sale of goods that establishes clear, voluntary obligations for the parties.

In the decision, Marc Brogsitter[2], the Court of Justice of the European Union **["CJEU"]** ruled that a claim is contractual if the alleged misconduct can be considered as a "breach of contract", and if its interpretation is indispensable to determine its lawful or unlawful nature.

Before forming the contract, Royal informed Tosca of the importance of furniture meeting the highest sustainable and ethical standards. Tosca answered in its offer that they would, in "any case, comply with the highest standards in the production of the furniture". Tosca was fully aware of the mandatory nature of this requirement when realising the contract. By using unethical wood, Tosca breached the contract, prompting the yacht builder to avoid it. The "loss of profit" is not a separate tort but a direct consequence of the breach of the contractual obligation to deliver compliant goods. Therefore, both claims are contractual because they relate to the breach of this contract.

[1] CJEU Case C-26/91, 17 June 1992, Jakob Handte & Co. GmbH and Traitements Mécano-chimiques des Surfaces SA (TMCS) [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:1992:268]

[2] CJEU Case C-548/12, 13 March 2014, Marc Brogsitter v Fabrication de Montres Normandes EURL, Karsten Fräßdorf [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2014:148]

#### *2.2.2. Consolidation of the claims*

Once the contractual nature of both claims is established, it is necessary to note that separating them would undermine the efficiency of the European Union's judicial system.

The concentration of claims before a single court avoids the risk of an irreconcilable judgment arising from separate proceedings regarding the same case. It would ensure legal certainty and high predictability for the parties involved.

In addition, as established in the Wikingerhof[3] decision, procedural economy is better ensured when a court handles the whole action rather than when the dispute is divided. Consolidating the annulment with the damages for the loss of profit permits to the judge to resolve the dispute in its entirety, and with a whole comprehensive solution to the breach of contract.

It is therefore essential to deal with requests jointly in order to maintain the efficiency of the European Union's judicial system.

### 2.3.Jurisdiction

#### *2.3.1. Contractual claim against Tosca*

It is submitted that the Court of Sofia has jurisdiction to hear the claims against the Defendant. Indeed, the Claimant founds its position on Article 25 of Brussels I bis, and, subsidiarily, Article 7(1)(b) first indent of the same Regulation.

a. The exclusive choice-of-court agreement
    i. The formation of the Agreement

It is further submitted that a "Battle of Forms" scenario was in place before the conclusion of the contract, wherein the Claimant's terms ultimately prevailed. Indeed, in its offer of 23 may 2025, Tosca referred to its own terms. On the other hand, Royal's reply on 26 May 2025

[3] CJEU Case C-59/19, 24 November 2020, Wikingerhof GmbH & Co. KG v Booking.com BV [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2020:950]

constituted a counter-offer, stating that the contract was accepted under their terms and conditions. After, Tosca proceeded to the manufacturing and the delivery of the goods, without presenting any objection to the counter-offer, and therefore, accepted Royal's counter-offer by conduct. Indeed, the "Last Shot" rule states that the party making the last offer will have its terms and conditions applied to the contract, if the other parties complies with its obligations, without presenting any objection. This principle is widely known in international commercial and contract law[4], so it is presumed that the parties would be aware of it.

Therefore, the court of Sofia has jurisdiction, because Royal's choice-of-court clause prevails over Tosca's clause, and the Defendant is deemed to have manifested its assent to the Sofia jurisdiction clause.

Subsidiarily, even in default of the application of the "Last Shot" rule, the "Knock out" rule is largely accepted in legal doctrine in the recent years[5], and through multiple jurisdictions. This method involves that when parties exchange conflicting standard terms, the contradicting clauses cancel each other out, and they are replaced by the default provisions established in the applicable law.

In this case, if it were held that the contradictory clauses cancel each other out, the applicable law would therefore be article 7(1)(b) first indent, stating that "in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered". As the place of delivery was Sofia, the result remains unchanged, the Court of Sofia has competence to hear the dispute.

In all means, the courts of Sofia are competent to hear the dispute between Royal and Tosca.

ii. The validity of the choice-of-court clause

[4] "CMS Expert Guide to the battle of forms in contract law", 24 April 2018 (https://cms.law/en/int/expert-guides/cms-expert-guide-to-the-battle-of-the-forms)

[5] Mankowski, P., "Knock-out rule for conflicting jurisdiction agreements under the Brussels I-bis Regulation", EAPIL (European Association of Private International Law), 2025 (available at https://eapil.org/2025/02/07/knock-out-rule-for-conflicting-jurisdiction-agreements-under-the-brussels-i-bis-regulation/ ).

Under Article 25(1) of Brussels I-bis, if the parties have agreed that a court has jurisdiction "to settle any disputes which have arisen or which may arise in connection with a particular legal relationship", this court shall have jurisdiction. The Claimant asserts that the agreement between Royal and Tosca **["Agreement"]** conferring jurisdiction satisfies the requirement of being "in writing or evidenced in writing", since Article 25(2) effectively equates "communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'".

The CJEU ruled in its case Estasis Salotti[6] that the requirement of writing for a clause conferring jurisdiction is fulfilled, only if the contract signed by both parties contains an express reference to the general conditions that include the mentioned clause. Also, its acceptance must be clearly and precisely demonstrated.

This case was relevant to Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters **["Brussels Regulation of 1968"]**, and was reaffirmed on the same basis in the Casteletti decision, which was ruled in 1999[7]. These decisions apply to the present case, as in a ruling of 2016, the CJEU established in its decision Profit Investment Sim[8], that the Article 17 of Brussels Regulation of 1968 had to be interpreted as Article 23 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters **["Regulation Brussels I"]**, as they have the same redaction and the same objective. Also, the judges reiterated the obligation to provide a clear and precise demonstration of the parties' consent to be bound by the choice-of-jurisdiction agreement. Finally, by analogy, the case law regarding these two Articles applies to Article 25 of Brussels I-bis, as they share the same wording and objective and are interpreted the same way. Therefore, the precedent case law applies to the case, since a decision of 2022[9].

---

[6] CJEU Case 24/76, 14 December 1976, Estasis Salotti di Colzani Aimo et Gianmario Colzani v Rüwa Polstereimaschinen GmbH [electronic version – data base *EUR-Lex*. Ref. [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:1976:177]

[7] CJEU Case C-159/97, 16 March 1999, Trasporti Castelletti Spedizioni Internazionali SpA and Hugo Trumpy SpA [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:1999:142]

[8] CJEU Case C-366/13, 20 April 2016, Profit Investment SIM SpA v Stefano Ossi and Others, [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2016:282]

[9] CJEU Case C-358/21, 24 November 2022 Tilman SA / Unilever Supply Chain Company AG, [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2022:923]

In this sense, in its first e-mail, Royal expressly and repeatedly referred to its terms and conditions, and their applicability and accessibility via a hyperlink. Also, in its e-mail accepting the offer, Royal reiterated its position by stating "We accept your offer of price, payment, and delivery terms under our terms and conditions." The clause was therefore, validly constituted.

Then Tosca proceeded to fulfil its obligations under the contract, without opposition to Royal's counter-offer. According to these facts, it is clear that Tosca was aware that Royal terms and conditions applied to the contract, as this was reiterated on various occasions. Consequently, Tosca's acceptance of the choice-of-jurisdiction clause is clearly and precisely demonstrated, as the Defendant proceeded with the contract after being properly notified of the applicable terms and conditions.

iii. The validity of its inclusion via a hyperlink

In order to adapt the regulation to the modern society, the Brussels I-bis Regulation expanded the article 25 to "communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'" in its Article 25(2). Continuing with this logic, numerous jurisdictions as the English jurisdiction for example, accepted that the requirement of Article 25(2) was validly constituted when the inclusion of the terms and conditions was made through a hyperlink, but only under certain conditions[10][11]. This logic also affected the European Union logic, that established this principle through a series of decisions. It is fundamental for the justice to adapt to the constant changes of the society. The acceptance of theses practices are commonly adopted worldwide, whether it is in the European Union or third countries. Therefore, the Claimant contends that the inclusion of terms and conditions via hyperlink is fully valid and binding.

[10] Arbor Law, "Are your hyperlinked contract terms legally enforceable?", Arbor Law Insights, 2023 (available at https://arbor.law/insights/are-your-hyperlinked-contract-terms-legally-enforceable/)

[11] Cuniberti, G., "Austrian Supreme Court rules on the validity of a jurisdiction clause based on a general reference to terms of purchase on a website", Conflict of Laws.net, 2024 (available at https://conflictoflaws.net/2024/austrian-supreme-court-rules-on-the-validity-of-a-jurisdiction-clause-based-on-a-general-reference-to-terms-of-purchase-on-a-website/)

The CJEU ruled in a 2015[12] case that "click-wrapping," or the acceptance of general terms via a hyperlink, constitutes a communication by electronic means that provides a durable record of the agreement, as mentioned as a formal requirement under Article 25(2) of Brussels I-bis. This case law has evolved, and in 2022[13], the CJEU ruled that a choice-of-jurisdiction agreement is valid if the contract refers to it and contains a hyperlink that contains it. These are accepted upon communication, if they can be viewed, downloaded, and printed by any person with reasonable diligence. Also, the court specified that the hyperlink do not need to lead directly to the terms and conditions, but that they must be found through reasonable diligence.

In the present case, the hyperlink was communicated twice: in the first e-mail and in the confirmation e-mail, in which Royal mentions their acceptance of the offer under their terms and conditions. The application of their general terms and conditions was therefore clearly communicated. In addition, the hyperlink directed to Royal's website, where the terms and conditions could be easily found after one click, read, and downloaded. Indeed, the terms and conditions mentioned that "the court of Sofia has jurisdiction". The choice-of-court clause is then valid, and the court of Sofia has exclusive jurisdiction, as the parties did not agree otherwise (Article 25(1) of Brussels I-bis) and as the Claimant provided all necessary means for the Defendant to be informed.

b. Subsidiary grounds

Even if the jurisdiction agreement was considered to be invalid, the Court of Sofia nonetheless has competence under Article 7(1)(b) first indent of Brussels I-bis, as it is the place of performance of the obligation. This article states that a person domiciled in a Member State can be sued in the Member State of the place of performance of the obligation, unless otherwise agreed. Moreover, in the case of a sale of goods, the place of performance is the place where "under the contract, the goods were delivered or should have been delivered" (Article 7(1)(b), first indent).

[12] CJEU Case C-322/14, 21 May 2015, Jaouad El Majdoub v CarsOnTheWeb [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2015:334]

[13] CJEU Case C-358/21, 24 November 2022, Tilman SA v Unilever Supply Chain Company AG [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2022:923]

i. Nature of the Agreement

The contract for the supply of custom furniture constitutes a "sale of goods" in the sense of Article 7(1)(b), first indent. Indeed, the CJEU ruled in the case Car trim[14], that a contract that has for object the supply of goods that need to be manufactured, even to specific requirements, is a "sale of goods", and not a provision of services, unless the purchaser supplies the materials. Since the Claimant provided only the designs and not the materials, the contract corresponds to a sale of goods, therefore triggering the jurisdiction of the place of delivery of the goods.

ii. Principal place of delivery

The contract stipulated the Incoterm "DAP Sofia". As established in the judgment given by the CJEU in the case Electrosteel Europe[15], the supreme court specified that Incoterms and similar commercial clauses are contractual provisions that have to be taken into account to determine the "place of delivery", mentioned under Article 7(1)(b) of Brussels I-bis. Tosca's mention of "DAP Sofia", as agreed by Royal, defined Sofia as the place of performance. In consequence, The Claimant asserts that Sofia was the contractual place of delivery.

Even though a portion of the goods was delivered in Croatia, Article 7(1)(b) first indent expressly states that the place of performance will be the one established in the contract. The fact that part of the goods were delivered in Croatia was a mere logistical accommodation and did not constitute a formal modification of the contract's terms and conditions.

### *2.3.2. Contractual claim against Swift*

[14] CJEU Case C-381/08, 25 February 2010, Car Trim GmbH v KeySafety Systems Srl [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2010:90]

[15] CJEU Case C-87/10, 3 March 2011, Electrosteel Europe SA v Edil Centro SpA [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2011:116]

It is submitted that the Court of Sofia has international jurisdiction to hear the dispute relative to the claim for damages against Swift. The Claimant maintains that the Court of Sofia is competent under a clause of an exclusive choice-of-court agreement validly concluded between the parties.

a. Qualification of the claim

Article 12 of the CMR establishes that the sender has the right to give instructions to the carrier under the contract. It is the carrier's mandatory obligation to comply with those obligations if the cumulative conditions of Article 12(5) are met. First, the instruction must be possible to carry out at the time it reaches the person who has to perform it; secondly, the instruction must not interfere with the normal running of the carrier's business, and thirdly, the order must not result in any prejudice to the senders of other goods being carried in the same vehicle.

It is manifest that in this instance, the obligation not to leave the consignment unattended at an unsecured parking place was given before the carriage, so it is definitely possible to carry it out, it could not interfere in any way with the running of the carrier's business, as it is a simple obligation of vigilance, and it could not prejudice other goods, as it ensures their good state.

In addition, Article 12(7) sets out the consequences in the event of non-compliance with said instructions. Indeed, a carrier who has not carried out the instructions given shall be liable to the person entitled to make a claim for any loss or damage caused thereby.

In consequence, the claim relative to the damages suffered as a consequence of the incident during carriage is categorically a contractual claim.

b. Validity of the exclusive jurisdiction

i. The existence of an exclusive choice-of-court agreement

The contract between Royal and Swift, signed by both parties, contained a clause for the exclusive jurisdiction of the court of Sofia "to decide all disputes arising out of or in connection with this contract".

Article 25(1)(a) of Brussels I-bis states that a jurisdiction agreement is valid if it is in writing or evidenced in writing. In this case, the contract containing such a clause was signed by both parties, providing irrefutable evidence of their consent to be subject to this jurisdiction, in accordance with the strict formal requirements of Article 25.

It follows that the Sofia courts have exclusive competence to hear the dispute.

ii. Validity of the jurisdiction clause under the Convention on the Contract for the International Carriage of Goods by Road Convention

Article 71(1) of Brussels I-bis states that this regulation "shall not affect any conventions to which the Member States are parties". Therefore, the CMR rules on the choice-of-jurisdiction clauses are primarily and mandatorily applicable.

Indeed, Article 31(1) of the CMR explicitly authorises the claimant to bring an action in front of any court of a contracting state, designated by agreement between the parties. This same Article presented alternatives to an agreement, such as (a) where 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", (b) the "place where the goods were taken over by the carrier or the place designated for delivery is situated".

Furthermore, it was specified in the case TNT Express Nederland[16] that Article 31(1) must be applied in a manner that guarantees a high degree of predictability, the sound administration of justice, and the minimising of the risk of concurrent proceedings, to ensure the free circulation of judgments and mutual trust within the European Union.

In this case, the high degree of predictability is manifested in Swift's voluntary submission to an exclusive jurisdiction clause in favor of the Sofia court, making any legal action before this court perfectly foreseeable. Regarding the sound administration of justice, it is emphasized that Sofia is the place of delivery of the goods and also where Royal incurred the financial loss.

Considering these factors, the court of Sofia allows a close connection to the facts of the case. To finish, recognising Sofia's jurisdiction allows the concentration of all related claims before

[16] CJEU Case C-533/08, 4 May 2010, TNT Express Nederland [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2010:243]

a single jurisdiction. The judge will have a better understanding of the case if the same court handles the two proceedings. This eliminates the risk of irreconcilable judgments, in line with the objectives highlighted in the Wikingerhof[17] opinion.

Therefore, the court of Sofia retains exclusive competence to hear the dispute.

## 3. LIS PENDENS AND STAY OF THE PROCEEDINGS

It is submitted that a lis pendens exists between the proceedings commenced in Rotterdam and those commenced in Sofia. Nonetheless, contrary to the general rule of priority based on time, the Court of Rotterdam is mandated to stay its proceedings under Article 31(2) of Brussels I-bis due to the exclusive agreement on jurisdiction in favor of the court of Sofia.

### 3.1.Existence of Lis Pendens

The proceedings initiated by Swift in Rotterdam (negative declaratory action) and by Royal in Sofia (claim for damages) concern the same dispute and the same parties, thereby triggering the lis pendens rules of Article 29 of Brussels I-bis.

As the CJEU ruled in the case Folien Fischer[18], there is no distinction in the cause of action between a claim to deny liability and a claim to establish liability. Therefore, it is certain that the two proceedings involve the same cause of action because they share the same central legal question: whether the defendant is liable for the damage.

Therefore, the two proceedings cannot coexist in front of different courts, without a risk of irreconcilable judgments. Therefore, one court must stay its proceedings.

[17] CJEU Case C-59/19, 24 November 2020, Wikingerhof GmbH & Co. KG v Booking.com BV [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2020:950]

[18] CJEU Case C-133/11, 25 October 2012, Folien Fischer AG v Ritrama SpA [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2012:664]

### 3.2.Exception to the “First in Time” rule

Swift initiated proceedings in Rotterdam first (21 July 2025) in a clear attempt to block Royal’s claim in Sofia (26 August 2025), characteristic of a tactical “Italian torpedo” action.

Under Article 29 of Brussels I-bis, “any court other than the court first seised shall of its own motion stay its proceedings until the jurisdiction of the court first seised is established”. In this case, the Court of Sofia would normally have to stay the proceedings. However, Article 31(2) of Brussels I-bis expressly states that when a court of a Member State has jurisdiction under Article 25 of the same regulation, any other court must suspend its proceedings until the chosen court in the agreement rules about its jurisdiction.

The Claimant maintains that the contract between Royal and Swift contains a valid exclusive jurisdiction clause in favor of the court of Sofia, as established in Section 2.2.2. Consequently, the Rotterdam court is deprived of its priority, and should stay the proceedings until the Court of Sofia rules on its jurisdiction.

### 3.3.Interaction with the CMR

Article 31(2) of the CMR establishes a lis pendens rule stating that the first court seised must rule on its competence before other courts can be seised. As under Article 29 of Brussels I-bis, the cases must involve the same parties and the same grounds.

While Swift relies on the lis pendens rule under Article 31(2) of the CMR to favor the Court of Rotterdam (first seised), the Claimant asserts that this application is incompatible with modern European Private International Law.

Following the precedent of Nipponkoa Insurance[19], while Article 71 of Brussels I-bis respects specialized conventions such as the CMR, these conventions must be applied in harmony with the current objectives and regulations of the European Union. The CJEU ruled that the

[19] CJEU Case C-452/12, 19 December 2013, Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2013:858]

application of such conventions must not undermine to results less favorable than those produced by Brussels I-bis.

Indeed, historically national courts often allowed parallel proceedings regarding the CMR, ruling that a carrier's negative declaratory proceeding and a client's indemnity action did not share the same cause. However, the Nipponkoa case ruled by the CJEU, determined that Article 71 of Brussels I-bis prohibits this interpretation to prevent the risk of concurrent litigation. The Court decided then that both actions should be treated as having the same cause and object under the CMR[20]. Consequently, the court seized second is now strictly required to stay its proceedings.

Moreover, the 2012 recast of the Regulation Brussels I introduced Article 31(2) that regulates the "torpedo actions". This situation arises when a party knows they are about to be sued in an unfavourable court and files a negative declaratory action in a more favourable jurisdiction. The other court then stays frozen until the first court ceases to rule on its competence. The Claimant contends that last Article 31(2) establishes a primary rule that, when an exclusive jurisdiction agreement exists, the chosen court has priority in determining its own competence, and any other court seised must stay its proceedings.

Applying the stricter CMR lis pendens rule would allow a party to breach a contract by evading after its contractual obligations and would render Article 31(1) of the CMR ineffective. To ensure the high degree of predictability required by the case law, TNT Express Nederland[21], the court designated by the parties must be given the first opportunity to rule on the case.

This principle must be interpreted according to the fundamental objectives of Brussels I-bis, where Article 71 cannot be used to by pass the agreement reached between the parties. Even though Article 71 affirmed the superiority of international conventions such as the CMR, the CJEU's case law ensures that its application does not lead to results less favourable than those contained in European regulations, particularly regarding the prevention of "torpedo actions". By initiating proceedings in Rotterdam despite a clear and signed exclusive jurisdiction clause

[20] Hoeks, M. "CMR of EEX? Van samenloop, litispendentie en het vrij verkeer van beslissingen in Europa. Hof van Justitie EU 4 mei 2010, zaak C-533/08 (TNT Express/AXA)", 2011 (available at https://repub.eur.nl/pub/31847)

[21] CJEU Case C-533/08, 4 May 2010, TNT Express Nederland [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2010:243]

for Sofia, Swift is acting with procedural bad faith, in order to obtain the exclusion of its liability.

The torpedo technique rewards the carriers, that act wrongfully, and are awarded with the blocking of the dispute. Consequently, a big part of the doctrine[22], notably in France, argue that such conflicts should be treated as related actions rather than a strict lis pendens, as it would allow the judge the to refuse stay of proceedings in cases of clear procedural abuse.

Consequently, Article 31(2) of Brussels I-bis is applicable and the application of the CMR is ruled out.

Therefore, the Court of Rotterdam is legally obligated to stay its proceedings. To decide otherwise would validate procedural bad faith and, most importantly, undermine the principle of party autonomy, a fundamental principle of European judicial practice.

## 4. APPLICABLE LAW

It is submitted that the contractual obligations between the parties are governed exclusively by the Bulgarian law. The CISG would ordinarily apply to a contract between parties domiciled in Italy and Bulgaria. But in this case, the Claimant maintains that the parties have validly excluded the mentioned convention in favour of domestic Bulgarian law. This exclusion was made under a choice-of-laws agreement governed by the "Last shot" rule. This clause is enforceable under Article 3 of the Rome I Regulation **["Rome I"]**.

### 4.1. Validity of Royal's hyperlink

The choice-of-law clause stipulated by Royal is fully incorporated, as it is contained in the general terms and conditions, which are accessible via a hyperlink contained in the first e-mail of the Claimant and in its e-mail of confirmation.

[22]Tuo, C. "Connections and disconnections between Brussels IA Regulation and international conventions on transport matters", Collected Papers of the Law Faculty of the University of Rijeka, vol. 36, n. 1, 2015 (available at https://hrcak.srce.hr/file/232275)

In its case, El Majdoub[23], the CJEU ruled on the possibility of accepting general terms and conditions via a hyperlink using the technique of "click-wrapping". In 2022[24], the CJEU updated this to adapt it to current societal needs. As a result, it is now only necessary that the general terms and conditions can be viewed, downloaded, and printed by any person with reasonable diligence. Also, the contract must refer to this page and include a hyperlink to it. The Claimant asserts that even if the hyperlink did not lead directly to the terms and conditions, the requirement is satisfied if someone with reasonable diligence can find them on the website.

Regarding this dispute, the hyperlink was communicated twice: in the first e-mail and in the confirmation e-mail, clearly stating that acceptance was subject to Royal's terms and conditions. It is manifest that someone with normal diligence would have found the terms and conditions on the Royal website after two clicks, as the link directed there. Furthermore, Royal terms and conditions can be downloaded directly, ensuring full compliance with CJEU case law.

In consequence, the clause of choice of law contained in the terms and conditions of Royal is validly and legally constituted.

### 4.2.The Last Shot Rule under a Battle of Forms scenario

The Claimant contends that in commercial transactions where both parties confront their own standard terms and conditions, a Battle of Forms scenario, the general principles of contract law help determine which terms prevail. Under the traditional "Last Shot" rule, the contract is governed by the terms of the party who sent the final document before the performance of the contract began. Each time a party sends other terms and conditions in response to an offer, that response does not constitute an acceptance, but is a counter-offer. The initial proposal constitutes the first offer, and any subsequent communication or documentation with different terms constitutes a counteroffer. Finally, by proceeding with the execution of the contract without making objections to these new terms, the recipient is deemed to have accepted the counter-offer by conduct.

[23] CJEU Case C-322/14, 21 May 2015, Jaouad El Majdoub v CarsOnTheWeb [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2015:334]

[24] CJEU Case C-358/21, 24 November 2022, Tilman SA v Unilever Supply Chain Company AG [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2022:923]

In the present case, Royal effectively fired the "last shot." The Claimant sent its terms and conditions via email for acceptance of the offer on 26 May 2025. On 25 July 2025, Tosca confirmed that the consignment was ready and would be picked up by the carrier for delivery. The Defendant then proceeded to deliver the goods, complying with its obligations. Therefore, Tosca fulfilled its obligations under the contract, without raising any objections to the terms and conditions communicated by Royal in its confirmation e-mail.

Consequently, Tosca cannot now seek to rely on its own previous terms, as Royal's final counter-offer superseded those.

### 4.3.The valid exclusion of the CISG

Article 6 of the CISG expressly permits the parties to agree to exclude this Convention.

Because Royal's terms and conditions, and therefore also its clause of choice-of-law apply to the present case, by accepting Royal's terms and conditions, Tosca agreed on the exclusion of the CISG.

### 4.4.Application of the Rome I regulation

The applicable law must be determined according to the conflict-of-laws rules under the European Regulation (EC) No 593/2008 **["Rome I"]**.

Rome I is mandatorily applicable "in situations involving a conflict of laws, to contractual obligations in civil and commercial matters", as stated in Article 1(1). The Claimant maintains that the litigious case does not fall within the scope of the exclusion under Article 1(2). Therefore, Regulation Rome I applies to the dispute.

Article 3(1) of this regulation establishes the parties' freedom to agree on the applicable law. This provision is valid only if it is made expressly or is "clearly demonstrated by the terms of the contract or the circumstances of the case".

Given that the “Last Shot” rule applies to the case and the contract was formed strictly on Royal’s terms, the parties have clearly agreed to apply Bulgarian national law to any dispute arising from this relationship.

In consequence, Bulgarian law governs all aspects of the dispute.

## 5. PETITUM

For the reasons stated above, may it please the Court, the Claimant respectfully requests the Court to:

1. ADJUDGE AND DECLARE that the Court of Sofia has exclusive jurisdiction to hear the claims against Tosca, pursuant to Article 25 of the Brussels I-bis Regulation, by virtue of the valid choice-of-court agreement;
2. SUBSIDIARILY, should the jurisdiction agreement be contested, RECOGNIZE the jurisdiction of this Court under Article 7(1)(b) of the Brussels I-bis Regulation, as Sofia is the place of performance for the delivery of the goods (DAP Sofia);
3. ADJUDGE AND DECLARE that the Court of Sofia has exclusive jurisdiction to hear the claims against Swift, pursuant to the jurisdiction clause in the carriage contract, in accordance with Article 25 of Brussels I-bis and Article 31(1) of the CMR Convention;
4. DISMISS any application to stay these proceedings in favor of the Court of Rotterdam, and AFFIRM the priority of the Sofia Court pursuant to Article 31(2) of the Brussels I-bis Regulation;
5. RULE that Bulgarian National Law is exclusively applicable to the dispute with Tosca, as the CISG was validly excluded by the parties under Article 6 of the CISG and the choice-of-law agreement formed under Royal’s terms and conditions, under Article 3 of Rome I;
6. DECLARE the avoidance of the contract formed with Tosca due to a fundamental breach of the contract;
7. ORDER Tosca to pay damages to the Claimant for the loss of profit and loss of chance resulting from the cancellation of the yacht-builder’s contract;
8. ORDER Swift to pay full compensation for the stolen and damaged goods, because the carrier failed to comply with mandatory safety instructions (Article 12 CMR) by leaving the cargo unattended in an unsecured location;

9. ORDER the Defendants to bear all legal costs and interests arising from these proceedings.

## CHAPTER II. RESPONDANT MEMORANDUM : TOSCA MOBILI S.R.L.

1. STATEMENT OF THE FACTS

- Tosca Mobili s.r.l. **["Tosca", or "Defendant"]** is a renowned manufacturer of high-end furniture with an impeccable reputation for Italian quality, domiciled in Milan, Italy.
- Royal Furniture OOD **["Royal", or "Claimant"]** is a designer of luxury yacht furniture domiciled in Sofia, Bulgaria.
- Representatives of both companies met at a furniture fair in Milan. Royal initiated contact, via an email on 20 May 2025, requesting the manufacture of 6 tables and 6 cabinets, based on designs provided by Royal. The Claimant also asked to order 14 of the chairs and 6 of the sofas shown at the fair, and to make separate offers regarding their demands.
- The mail established that Royal's terms and conditions were applicable via a hyperlink established in the word "this" and that Bulgarian national law applies exclusively to all transactions, and the court of Sofia has jurisdiction.
- However, the hyperlink gave access to the website, where the terms and conditions could be found, but not directly. Also, it was possible to download the terms and conditions that contained the following choice of law and jurisdiction clause: "Bulgarian national law, with the exclusion of the CISG (Vienna Sales Convention 1980), applies to all transactions and the court of Sofia has jurisdiction."
- Tosca responded on 23 May 2025 with a formal offer for the manufacturing of custom tables and cabinets (DAP Sofia) and the sale of chairs and sofas (EXW Rotterdam). Tosca also communicated that the payment for the tables and cabinets shall be made "via a letter of credit for 80% of EUR 168.000. L/C to be issued subject to the UCP 600," and that the payment for the chairs and sofas needs to be made in full before delivery.
- This mail explicitly stated that Tosca's own terms and conditions were applicable via a hyperlink, which stipulated the exclusive application of Italian law and the jurisdiction of the courts of Milan or at the place of performance.
- On 24 May 2025, Royal signalled its full agreement to these terms through performance of the required payment. Royal voluntarily instructed its bank to issue a letter of credit for the tables and cabinets and paid the full purchase price of €192,000 for the chairs and sofas, realizing acts that showed the acceptance of Tosca's offer. It was only after

completing these payments, that Royal sent an email to Tosca on 26 May 2025, stating that its acceptance was made “under our terms and conditions”, attempting to retroactively impose its own terms and conditions. Tosca proceeded with the contract based on the general terms and conditions established in our offer.

- On 25 July 2025, Tosca demonstrated its commitment, and confirmed the delivery of the custom-made furniture on 31 July 2025, in the agreed time frame.
- On 30 July 2025, Royal made an urgent request, by phone, to modify the place of delivery of the custom goods, and to deliver half of the consignment to Rijeka, Croatia, before delivering the rest in Sofia, as agreed. Tosca confirmed that the delivery could be arranged on the same day, accommodating its client by immediately responding to last minutes needs.
- A few days later, news reports alleged that Tosca used unethical wood. My client received multiple claims from various counterparties, and based solely on these external reports and without proof of a defect in the specific goods delivered, Royal sought to avoid the contract and ask for damages. Facing a multitude of requests, Tosca was unable to reimburse Royal, despite its full performance of its obligations.
- On 26 August 2025, Royal initiated proceedings before the Court of Sofia against both Tosca and Swift. Royal also requested that the Rotterdam court stay its proceedings pending the Sofia court's jurisdictional decision.

## 2. INTERNATIONAL JURISDICTION

### 2.1.Applicability of the relevant Regulations

#### *2.1.1. Applicability of the Brussels I-Bis Regulation*

Article 1(1) of Brussels I-bis Regulation **[“Brussels I-bis”]** states that the regulation “shall apply in civil and commercial matters whatever the nature of the court or tribunal”. Also, Article 1(2) of the same regulation establishes a list of exclusions to its scope, but the contractual relationship between Royal and Tosca is not subject to it. The geographical scope is established in Article 4 of the present regulation is defined by the European Union Member States. Brussels I-bis is hence, applicable to the present case.

#### *2.1.2. Applicability of the United Nations Convention on Contracts for the International Sale of Goods*

Article 1 of the United Nations Convention on Contracts for the International Sale of Goods **["CISG"]** defines the scope of application of the convention. It is submitted that it applies to contracts for the sale of goods between parties whose places of business are in different contracting states. Both Italy and Bulgaria are contracting states of the CISG. Therefore, the convention is applicable between the parties.

Neither party has validly excluded the convention under Article 6 CISG. Even though the convention is not applicable for contracts related to services, Article 3 clarifies that the supply of goods to be manufactured is considered as a sale when the party who orders the goods undertakes to supply a substantial part of the materials necessary. Royal only furnished the designs, but not any material.

Consequently, this contract must be characterized strictly as a sale of goods under the convention, which is applicable.

### 2.2.International Jurisdiction

The Defendant maintains that the Court of Milan has exclusive jurisdiction to hear the claims. Indeed, the Article 25 of Brussels I-bis, and, subsidiarily, the Article 4 of the same Regulation, found this competence.

#### *2.2.1. Existence of an international jurisdiction clause*

a. The formation of the contract

Under Article 14 of the CISG, an offer is characterised when there is a proposal to specific persons, that is sufficiently definite (if it indicates the goods and expressly fixes the quantity and the price) and if it "indicates the intention of the offeror to be bound in case of acceptance". Royal asked for two separate "offers," as written in the e-mail, for the tables and cabinets on one side and the chairs and sofas on the other.

In Tosca's response e-mail, the company made two clear offers, defining the goods, quantity, and price for both demands, which constitutes sufficiently definite offers. It also mentioned the Incoterms and the payment method for both demands. As a result of these elements, the proposition to Royal was sufficiently definite, and indicated clearly its intention to be bound, as Royal previously asked for an offer and the e-mail mentioned "We would be happy to manufacture your beautifully designed tables and cabinets, and we have the required materials available" and "Please let me know whether the above offer is acceptable to you for the tables and cabinets".

Therefore, Tosca's e-mail constituted two distinct offers.

Article 18(1) of CISG establishes that "A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance". Furthermore, regarding Article 18(2), an acceptance becomes effective when the indication of assent reaches the offeror. However, the acceptance can be characterised by performing an act, as for example the payment of the price without notice to the offeror (Article 18(3) CISG). The acceptance is then effective when the act is performed.

In the present case, Tosca mentioned in its offer the method of payment for each offer. It is submitted that the contract was irrevocably formed on 24 May 2025, by the payment of the tables and cabinets, that had to be made "via a letter of credit for 80% of EUR 168.000. L/C to be issued subject to the UCP 600" and by the full price had to be paid prior to delivery for the chairs and sofas. Tosca's representative also said in her e-mail "Please let me know whether the above offer is acceptable to you for the tables and cabinets.". After this communication, Royal instructed its bank to issue a Letter of Credit for the amount of EUR 134.400 on 24 May 2025 for the tables and cabinets, paid EUR 192.000 for the chairs and sofas. Without any prior communication, Royal paid the entire price mentioned in the offers, which constitutes an acceptance according to Article 18(3). Because the acceptance is effective when the act is performed, the contract was formed when Royal instructed those payments and not with the "acceptance" mentioned in the following e-mail.

Therefore, any modification of the terms of the offer are not submitted to Article 19 of CISG, as the contract is already formed, but are regulated by Article 29 which concerns the

modification of a contract. Indeed, a decision of 2024[25], relative to the interpretation of Article 19 ruled that this provision does not negate the existence of a contract. Rather, it was a mere intent to modify an existing contract under Article 29. Since Tosca never manifested assent to this modification, the original terms remain exclusively applicable. If the parties initially formed an agreement consisting of the three components (the product, the price, and the quantity), any disagreements about any additional terms arose after this contract was formed.

Thereby, the following e-mail of Royal mentioning "We accept your offer of price, payment and delivery terms under our terms and conditions." does not constitute a counter-offer but a solicitation to modify the contract. Nonetheless, a contract can be modified by the agreement of both parties (Article 29(1) CISG). Tosca did not agree to this modification in any way and only realised its obligations under the contract formed by the payment made by Royal, under my client terms and conditions.

In conclusion, Tosca's general terms and conditions, and therefore also the jurisdiction clause contained in them, apply to the case.

b. The nature of the contract

The contract formed between both parties is relative to a sale of goods.

Even though the designs are provided by the client, the contract is considered as a sale of goods if the client do not supply the materials, according to the CJEU case law[26].

Because Royal did not provide the materials, the contract is a sale of goods.

c. The valid choice-of-court clause

[25] Fertilizantes Tocantins S.A. v. TGO Agriculture (USA), Inc., 04 mars 2024 [electronic version – data base *CISG Online*. Ref. 8:21-cv-2884-VMC-JSS]

[26] CJEU Case C-381/08, 25 February 2010, Car Trim GmbH v KeySafety Systems Srl [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2010:90]

The Defendant asserts that the Bulgarian courts in Sofia lack international jurisdiction over the claim brought by Royal against Tosca, because the agreement conferring exclusive jurisdiction to the courts of Milan was validly established under Article 25 of Brussels I-bis.

Indeed, Article 25 states that if the parties have agreed to a court's jurisdiction, that agreement must be in writing. In addition, Article 25(2) expressly states that any "communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'". In the present case, Royal attempts to enforce a jurisdiction clause in favor of the courts of Sofia, based on the terms and conditions set out in its email footers.

The CJEU ruled in its decision "Estasis Salotti"[27] that when a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, it can comply with the requirement of writing if the contract signed by both parties contains an express reference to those general conditions. It is specified that written agreements must clearly show that the parties intended to include the general conditions of sale and the jurisdiction clause in the contract. This ruling was relative to the first paragraph of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters **["Brussels Regulation of 1968"]**. Decisions of 1999[28] and 2000[29] reiterated the CJEU' position. In this last decision, the CJEU developed its case law on the subject. Still, regarding Article 17 of the Brussels Regulation of 1968, the court specified that the judges did not have to restrict their analysis to the exact wording of the agreement clause. It affirmed that it was sufficient that the clause state the objective factors on which the parties agreed to choose a court.

On the other hand, those factors must be sufficiently precise for the court to determine whether the tribunal seised has jurisdiction, or be determined by the particular circumstances of the case. The clause does not have to designate the competent jurisdictions precisely, but they must be

[27] CJEU Case 24/76, 14 December 1976, Estasis Salotti di Colzani Aimo et Gianmario Colzani v Rüwa Polstereimaschinen GmbH [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:1976:177]

[28] CJEU Case C-159/97, 16 March 1999, Trasporti Castelletti Spedizioni Internazionali SpA and Hugo Trumpy SpA [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:1999:142]

[29] CJEU Case C-387/98, 09 November 2000, Coreck Maritime GmbH Handelsveem BV and Others [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2000:606]

determinable by predictable and objective criteria. This ruling was confirmed by the decision Refcomp[30].

Also, with the decision C-222/15[31], the CJEU approved that when a jurisdiction clause was in the general terms and conditions of a party, in the instruments witnessing the contract and transmitted during the conclusion, and that it designates as the court with jurisdiction, the court of a city of a Member State, this jurisdiction clause meets the requirements relative to the consent of the parties and the precision of its content. In addition, a clause is deemed valid if a person with normal diligence would have known of it and if it was communicated previously.

The clause was clearly communicated in the email of our offer, stating that "the court at the place of performance or the court in Milan shall have jurisdiction .The terms and conditions of Tosca are applicable". Also, it facilitated the access to these terms and conditions, through a hyperlink mentioned expressly "may be found via this hyperlink", that were directly accessible, and did not direct to the website of the company. Any person with the most basic diligence would have found the mentioned clause.

To finalise, the CJEU ruled in its decision Tilman[32] that Article 23(1) and (2) of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007 **["Lugano II"]** need to be interpreted. Even though the ruling was relative to the Lugano II Convention, the CJEU specified that Article 23(1) and (2) of Lugano II, Article 23(1) and (2) of the Brussels I Regulation and Article 25(1) and (2) of the Brussels I-bis had to be interpreted jointly, and that the case law applies to the three conventions, because those three dispositions have the same wording and purpose. Therefore, all the case law presented before applies to the case.

Consequently, the clause conferring jurisdiction under the terms of Article 25 has to be expressly agreed during the formation of the contract, which was the case, as it was clearly mentioned in the e-mail containing the offer that Tosca's general terms and conditions were applicable, and also that "the court at the place of performance or the court in Milan shall have jurisdiction". The application of Tosca's terms and conditions was communicated, and any

[30] CJEU Case C-543/10, 7 February 2013, Refcomp SpA v Axa Corporate Solutions Assurance SA, Axa France IARD, Emerson Network, Climaveneta SpA [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2013:62]

[31] CJEU Case C-222/15, 7 July 2016 [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2016:525]

[32] CJEU Case C-358/21, 24 November 2022, Tilman SA v Unilever Supply Chain Company AG [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2022:923]

individual with normal diligence should have known the existence of the clause. The requirement of Article 25(1) and (2) for the agreement clause to be in writing is then complied with. Royal still proceeded to accept Tosca's offer, knowing full well that their terms and conditions were not applicable.

### d. Terms and conditions accessible via hyperlinks

The jurisdiction clause is contained in the general terms and conditions of both companies, accessible via hyperlinks. Consequently, it must be determined whether both hyperlinks meet the validation requirements established by international regulations.

#### i. Enforceability of Tosca's explicit terms and conditions

The evolution of international contract law was seen in Brussels I-bis, which introduced the equality with electronic records with formal writing under Article 25(2), to comply with the modern society's needs. Numerous courts followed this pattern such as those in England[33] and Austria, that allow the acceptance of general terms and conditions through hyperlinks. This approach is now firmly established in the European Union as in other countries, adapting therefore the law to needs of the society[34].

A decision given by the CJEU named "El Majdoub"[35] established that the method of accepting the general terms and conditions of a contract for sale by "click-wrapping" satisfies the requirement of Article 25(1)(a) of Brussels I-bis, that obligates the parties to have the agreement

[33] Arbor Law, "Are your hyperlinked contract terms legally enforceable?", Arbor Law Insights, 2023 (available at https://arbor.law/insights/are-your-hyperlinked-contract-terms-legally-enforceable/)

[34] Cuniberti, G., "Austrian Supreme Court rules on the validity of a jurisdiction clause based on a general reference to terms of purchase on a website", Conflict of Laws.net, 2024 (available at https://conflictoflaws.net/2024/austrian-supreme-court-rules-on-the-validity-of-a-jurisdiction-clause-based-on-a-general-reference-to-terms-of-purchase-on-a-website/)

[35] CJEU Case C-322/14, 21 May 2015, Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2015:334]

conferring jurisdiction in writing or evidenced in writing, thanks to the alternative of Article 25(2) of Brussels I-bis.

The case law evolved on the subject, and the decision Tilman SA established a new criteria: "as meaning that a jurisdiction clause is validly concluded where it is contained in the general terms and conditions to which the contract concluded in writing refers by the inclusion of a hypertext link to a website, access to which allows those general terms and conditions to be viewed prior to that contract being signed, without the party against whom that clause operates having been formally asked to accept those general terms and conditions by ticking a box on that website"[36].

In this case, the offer contained in writing the inclusion of the general terms and conditions, but also the inclusion of the hyperlink to access them "The terms and conditions of Tosca are applicable and may be found via this hyperlink".

Therefore, the inclusion of the choice-of-court agreement via Tosca's hyperlink is fully valid and binding.

### ii. Invalidity of Royal's terms and conditions

It is submitted that Royal's terms and conditions fail to meet the same standard of validity.

As mentioned before, Tilman established the possibility of accepting a choice-of-court agreement via a hyperlink. Furthermore, the Claimant demonstrated a clear lack of diligence by failing to properly incorporate their terms within the core of the offer. Even though the CJEU did not specify that the link had to lead directly to the terms and conditions, the doctrine[37] developed the uselessness of this decision without this requirement[38].

---

[36] CJEU Case C-358/21, 24 May 2022, Tilman SA / Unilever Supply Chain Company AG, 24 novembre 2022 [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2022:923]

[37] Nourissat, C., "Chronique Espace de liberté, sécurité et justice - Coopération judiciaire en matière civile", en Annuaire de Droit de l'Union Européenne 2022, Éditions Panthéon-Assas, Paris, 2023, pp. 1063-1102 (available at https://droit.cairn.info/annuaire-de-droit-de-l-union-europeenne--9782376510567-page-1063?lang=fr)

[38] Cuniberti, G., "Austrian Supreme Court rules on the validity of a jurisdiction clause based on a general reference to terms of purchase on a website", Conflict of Laws.net, 2024 (available at https://conflictoflaws.net/2024/austrian-supreme-court-rules-on-the-validity-of-a-jurisdiction-clause-based-on-a-general-reference-to-terms-of-purchase-on-a-website/)

Undoubtedly, the speed of internet transmission compensates for the time required to search for these general terms and conditions on the other party's website, and this ease of access justifies a specific solution for the contract's made electronically. This shows a certain liberalism regarding such clauses in business-to-business contexts, as the Court reminds us in the Tilman case law that these rules respond to the concern of not impeding commercial use while, at the same time, neutralising the effects of clauses that might pass unobserved in contracts.

Even if the terms and conditions would be valid following the case law Tilman, the doctrine today is against such a consideration.

Moreover, the doctrine[39] considers that that if the notice of incorporation of terms and conditions is hidden, it is not valid. Royal did not mention the inclusion of its terms and conditions in the first e-mail, but only in the footers. As a professional, the client knew its obligations, and voluntarily tried to hid the notice of incorporation.

In any event, even on the assumption that Tosca had not validly included a choice-of-court clause, the Claimant's terms and conditions were not included properly during the negotiation leading to the formation of the contract, in order to preserve the objective of efficiency targeted by the case law.

#### *2.2.2. Subsidiary grounds: the place of delivery*

In the European Union, the determination of the competent jurisdiction in contractual matters is regulated by the Article 7 of Brussels I-bis. The Article 7, paragraph 1, point b) first indent created a special competence rule for the contracts relative to the sell of goods. Indeed, a person can be pursued before the courts of the place, where according to the contract, the goods have been or should have been delivered. The fundamental objective of this article is to entrust the dispute to the judge geographically and factually closest to the performance of the contract.

When the delivery of goods is spread across several Member States according to a contract, a strict and literal application of the rule could lead to a fragmentation of the dispute. This

[39] Wang, F. F., "Law of Electronic Commercial Transactions: Contemporary Issues in the EU, US and China", 2ª ed., Routledge, 2014, p. 93 - 97 (available at https://lawramadicollege.uoanbar.edu.iq/catalog/file/22/library/Law_of_Electronic_Commercial_Transactions_Contemporary_Issues_in.pdf)

fragmentation was constantly rejected by European Law, because a single court must have jurisdiction to hear the entire dispute in order to guarantee the proper administration of justice.

The CJEU established a method to find a solution to those type of cases: what have to be taken into account is the principal place of delivery. This was first affirmed for deliveries in different places in the same member state in 2007[40], and was extended with the case law Wood Floor Solutions[41], to theses situations, in different member states. Effectively, the judges have to analyse the facts and the contract to determine which place really represents the principal place of delivery. This analysis rests on several criteria such as the volume or quantity of goods delivered in each member state or the financial value of the goods. The member state where the delivery was more important economically[42] is considered as the principal place of delivery.

Also, Article 29 of CISG mentions that a contract can be modified by the mere agreement between the parties.

In this case, it was agreed by the Royal, by phone on the 30 July, to change the place of delivery, so that half of the consignment had to be delivered to Rijeka in Croatia, and the other half to Sofia, Bulgaria. The parties validly modified the contract through mutual agreement, as permitted by Article 29 of the CISG. Indeed, the obligation to modify the contract in writing is imposed only if a clause of the contract imposes the modification in writing.

Moreover, half of the consignment was delivered in Rijeka and the other half in Sofia on 31 July. Taking into account the contract and the facts, the place of delivery of the tables and cabinets was divide in half, between two member states.

Therefore, Article 7(1)(b) first indent is not applicable to the present case, because the deliveries made between both Member State had the same economic importance.

---

[40] CJEU Case C-386/05, 03 May 2007, Color Drack GmbH v Lexx International Vertriebs GmbH [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2007:262]

[41] CJEU Case C-19/09, 11 March 2010, Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2010:137]

[42] Echebarría Fernández, J., "Jurisdiction and applicable law to contracts for the sale of goods and the provision of services including the carriage of goods by sea and other means of transport in the European Union", Transnational Law Notebooks, vol. 11, n. 2, 2019 (available at https://openaccess.city.ac.uk/id/eprint/23766/1/document%20%281%29.pdf)

Because Article 7(1)(b) first indent is not relevant to the case, the general provision stated in Article 4(1) is applicable[43], and a person domiciled in a Member State shall be sued in the courts of that Member State. As Tosca is being sued, the competent courts would be the courts of Milan. The unique rule that guarantees the predictability and good administration of justice is the domicile of the defendant.

Primarily, and then subsidiarily, the exclusive competent jurisdiction is the courts of Milan.

## 3. APPLICABLE LAW

It is submitted that, pursuant to Article (3)(1) of regulation (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations **["Rome I"]**, and subsidiarily on Article 4(1)(a) of the same regulation, the applicable laws to the case are the Italian law, jointly with the CISG.

### 3.1. The application of Tosca's terms and conditions

The Defendant maintains that Tosca's choice of law clause is contained in their general terms and conditions. Consequently, it is necessary that the clause is validly constituted, and that it exclusively governs the contract, to the exclusion of Royal's terms.

#### *3.1.1. Validity of Tosca's Hyperlink*

Under Article 14 the CISG, an offer is characterised when it exists a proposal to specific persons, that is sufficiently definite (if it indicates the goods and expressly fixes the quantity and the price) and if it "indicates the intention of the offeror to be bound in case of acceptance".

[43] Poon, A., "Determining the Place of Performance under Article 7(1) of the Brussels I Recast", International and Comparative Law Quarterly, vol. 70, n. 4 (available at https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/determining-the-place-of-performance-under-article-71-of-the-brussels-i-recast/CC793AA55F47B7DDBE1FD9177CF5453E)

Royal asked for two separate “offers” as written and its e-mail, for the tables and cabinets on one side, and for the chairs and sofas on the other side. On Tosca’s e-mail of response, the company issued a clear and definite offer, defining the goods, the quantity and the price regarding both demands. It also mentioned the incoterms and the method of payment, for both demands. As a result of these elements, the proposition to Royal was sufficiently definite, and indicated clearly its intention to be bound, as Royal previously asked for an offer and the e-mail mentioned “We would be happy to manufacture your beautifully designed tables and cabinets, and we have the required materials available” and “Please let me know whether the above offer is acceptable to you for the tables and cabinets”. These elements demonstrate a manifest intention to be bound. Therefore, Tosca’s communication unequivocally constituted two distinct offers.

Article 18(1) of CISG establishes that “A statement made by or other conduct of the offeree indicating ¬assent to an offer is an acceptance”. Furthermore, regarding Article 18(2), an acceptance becomes effective when the indication of assent reaches the offeror. However, the acceptance can be characterised by performing an act, as for example the payment of the price without notice to the offeror (Article 18(3)). The acceptance is then effective when the act is performed. In the present case, Tosca mentioned in its offer the method of payment for each offer. Regarding the tables and cabinets, the payment had to be made “via a letter of credit for 80% of EUR 168.000. L/C to be issued subject to the UCP 600” and the full price had to be paid prior to delivery for the chairs and sofas. Tosca’s representative also said in her e-mail “Please let me know whether the above offer is acceptable to you for the tables and cabinets.”. After this communication, Royal instructed its bank to issue a Letter of Credit for the amount of EUR 134.400 on 24 May 2025 for the tables and cabinets, paid EUR 192.000 for the chairs and sofas. Without any prior communication, Royal paid the entire price mentioned in the offers, constituted an effective acceptance by conduct according to Article 18(3).

Because the acceptance becomes effective when the act is performed, the contract was formed when Royal instructed those payments and not with the “acceptance” mentioned in the following e-mail.

Therefore, any modification of the terms of the offer are not submitted to Article 19 of CISG, as the contract is already formed, but are regulated by Article 29 which concerns the modification of a contract. Indeed, a decision of 2024 , relative to the interpretation of Article 19 ruled that this provision does not negate the existence of a contract. If the parties initially

formed an agreement consisting of the three components (the product, the price, and the quantity), any disagreements about any additional terms arose after this contract was formed.

Thereby, the following e-mail of Royal mentioning "We accept your offer of price, payment and delivery terms under our terms and conditions." cannot be characterized as a counter-offer but a solicitation to modify the contract. Nonetheless, a contract can be modified by the agreement of both parties (Article 29(1) CISG). Tosca did not agree with this modification in any way and just realised its obligations, according to the contract formed by the payment made by Royal.

In conclusion, Tosca's general terms and conditions, and therefore also the jurisdiction clause contained in them, are the sole terms and conditions applicable to the case.

#### *3.1.2. The inexistence of a battle of forms situation*

It is submitted that because the CISG was not excluded by the parties, as demonstrated in section 2, the convention strictly governs the present case, and notably, the principles regarding the modification of a contract under article 29 of the CISG.

##### a. Formation of the contract

The Defendant maintains that, as presented in section 2.2.1.b), a contract under CISG rules (article 14) is formed when an acceptance is characterised, in response to an offer sufficiently definite and that indicates the intention of the offeror to be bound in case of acceptance. In the present dispute, the acceptance was constituted by the payment of the price mentioned.

Therefore, the contract was formed on 24 May 2025.

##### b. Exclusion of article 19 and application of article 29 of the CISG

Article 19 of the CISG addresses situations in which a response to an offer constitutes a counter-offer and refers to a "Battle of Forms" scenario. Following Article 19(1), because the acceptance

e-mail of Royal mentioned its terms and conditions, and Tosca complied with is obligations, the Last shot rule would apply, and Royal's terms and conditions would be applicable as they were accepted by conduct by Tosca. Nonetheless, this supposes evidently that the contract is not already formed.

Established doctrine[44] explained that Article 19 applies exclusively to the pre-contractual relations and governs the process of offer and acceptance. The application of Article 19 ends when the contract is legally formed. Accordingly, any attempt to introduce new terms and conditions after that moment is mandatorily regulated by Article 29, which expressly governs the modification of contracts.

As demonstrated in section 2.2.1., the formation of the contract was made by the payments realised by Royal to Tosca and not with the acceptance e-mail. Therefore, the contract was already formed when Royal communicated its own terms and conditions, and any ulterior modification of the offer accepted would correspond to a modification of the contract. Article 19 of the CISG which governs the formation process is therefore entirely irrelevant to any communications sent after the conclusion of the contract.

Since the contract was already in force, the Claimant's email of 26 May 2025 cannot be qualified as a counter-offer, but must be characterized as a proposal for modification of an existing contract under Article 29(1) CISG. Article 29(1) states that "a contract may be modified or terminated by the mere agreement of the parties". Furthermore, it is a fundamental principle of the CISG that silence or inactivity does not constitute an acceptance (Article 18(1)). Moreover, the case law of the CISG reaffirmed that the mere reception of goods, payment, or silence in response to a possible modification of contract does not constitute an agreement to modify a contract under Article 29 (Chateau Des Charmes Wines Ltd. v. Sabate, USA, Inc. et. Al, 2005-10-28[45]). The Defendant's subsequent delivery of the goods was categorically not an acceptance of a counter-offer, but rather the execution of its pre-existing obligations under the

[44] DiMatteo, L. A., "CISG as Basis of a Comprehensive International Sales Law", part of the Contracts Commons and the International Law Commons (available at https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=3192&context=vlr)

[45]Sentencia de la Corte de Apelaciones de Ontario (Canadá), de 22 de marzo de 2005, caso Château des Charmes Wines Ltd. v. Sabaté USA Inc. [electronic version - https://cisg.ca/uploads/6/5/8/7/65876561/chateau_des_charmes_ltd_v._sabat%C3%A9_usa_inc._2005_canlii_39869.pdf]

original contract formed on 24 May 2025. Given that Tosca never expressly consented to modify the terms and conditions applicable, the demand of modification by Royal was never applied to the contract.

Consequently, it is established that Tosca's choice of law clause is applicable.

#### *3.1.3. Subsidiary grounds: the inefficiency of the Last Shot Rule*

The Defendant acknowledges that the Claimant may argue that the Last Shot Rule applies to the case under Articles 19(1) and 19(2) of the CISG. Effectively, "any reply to an offer that contains additions or modifications is a rejection and constitutes a counter-offer". It is submitted, however, that the "Last Shot Rule" is an outdated mechanical approach that rewards procedural bad faith. The prevailing modern interpretation of the CISG favors the "Knock-Out Rule" (supported by the CISG Advisory Council Opinion No. 13[46]).

According to this rule, when the parties exchange conflicting terms and conditions, the contradicting clauses cancel each other out, and they are replaced by the default provisions.

Under this more balanced approach, the Claimant cannot unilaterally impose Bulgarian law, but the default provisions are applicable.

#### *3.1.4. The applicability of Italian Law and the CISG*

It is further submitted that the European Regulation (EC) No 593/2008 ["Rome I"] applies according to Article 1(1) "in situations involving a conflict of laws, to contractual obligations in civil and commercial matters" and the dispute is not concerned by the exclusions mentioned in Article 1(2). Consequently, the present regulation applies to the case.

[46] Poon, A., "Determining the Place of Performance under Article 7(1) of the Brussels I Recast", International and Comparative Law Quarterly, vol. 70, n. 4 (available at https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/determining-the-place-of-performance-under-article-71-of-the-brussels-i-recast/CC793AA55F47B7DDBE1FD9177CF5453E)

The agreement of a choice of law is possible under Article 3(1) of Rome I, provided that it is made expressly or is "clearly demonstrated by the terms of the contract or the circumstances of the case".

Given that Tosca's terms and conditions exclusively apply to the contract as stated above, it is manifest that the parties agreed to apply Italian national law and to include the CISG for any dispute that may arise between them.

Accordingly, the laws of Italy and the CISG apply to all possible disputes arising from the contractual relationship.

### 3.2.Subsidiary grounds: in the absence of an agreement

In the alternative, sould the Court find that no agreement was made between the parties by defect, Article 4(1) of Rome I governs the contractual relationship. This provision stipulates in its point (a) that when the law has not been chosen in accordance with Article 3, "a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence".

As Tosca is the seller, Italian law applies, and the CISG remains applicable because Royal's terms and conditions were not validly incorporated.

In all cases, Italian law and the CISG are definitively applicable.

## 4. PETITUM

In light of the arguments set above, may it please the Court, the Defendant respectfully requests the Court to:

1. DECLINE JURISDICTION over the claims brought by Royal, on the grounds that the Court of Sofia lacks of international competence under the Brussels I-bis Regulation;
2. ADJUDGE AND DECLARE that the Court of Milan has exclusive jurisdiction over the present dispute pursuant the valid choice-of-court agreement, pursuant to Article 25 of Brussels I-bis;

3. RULE that the contract was finalized upon the Claimant’s acts of performance, and therefore, was subject to the Defendant’s terms and conditions;
4. SUBSIDIARILY, should the jurisdiction agreement be deemed invalid, RECOGNISE the competence of the Court of Milan under Article 4(1) of Brussels I-bis (Defendant's domicile);
5. ADJUDGE AND DECLARE that the laws of Italy and the CISG are the sole laws applicable to this dispute;
6. SUBSIDIARILY, in the absence of a valid choice, APPLY Italian law as the law of the seller’s habitual residence under Article 4(1)(a) of Rome I;

## CHAPTER III. RESPONDANT MEMORANDUM: SWIFT

### 1. STATEMENT OF THE FACTS

- Swift Global Logistics B.V. **["Swift", or "Carrier"]** is a professional transport company with a seat in Gdansk, Poland.
- Royal Furniture OOD **["Royal", or "Claimant"]** is a luxury furniture designer based in Sofia, Bulgaria.
- Following the contract formed between Royal and Tosca Mobili s.r.l. **["Tosca"]**, Royal contracted Swift for the transport of the consignment by road, from the warehouse of Tosca in Rotterdam to Sofia.
- Before the carriage, Royal demanded to Swift not to leave the consignment unattended at an unsecured parking place.
- Also, the contract signed by both parties contained a choice of jurisdiction clause, in favor of the court in Sofia, Bulgaria, "to decide all disputes arising out of or in connection with this contract".
- During the carriage on 15 July 2025, an unforeseen incident occurred near Graz, Austria. The driver parked the truck at a parking place only 500 meters away to have dinner and, when he returned, he discovered that part of the consignment had been stolen and another part damaged.
- Following the delivery on 16 July 2025, Royal realised that 4 chairs and 2 sofas were stolen, and 4 chairs were a total loss due to damage, for a total value of 84,000€.
- On 21 July 2025, Swift validly initiated a negative declaratory proceeding against Royal before the court of Rotterdam, in the Netherlands. Swift requested that the court decide that it is not liable for the damage, or, subsidiarily, that its liability is limited to 8.33 SDR per kilogram pursuant to mandatory provisions of Article 23(3) of the CMR Convention.
- As the Court of Rotterdam was the fist court seised, it has priority to determine its own jurisdiction. However, Royal objected to the incompetence of the Rotterdam court, invoking the exclusive jurisdiction clause in favor of the courts of Sofia.
- On 26 August 2025, Royal initiated proceedings in Sofia, Bulgaria, against both Tosca and Swift, claiming damages against Swift for the incident during carriage, despite the pending litigation in the Netherlands.

- Royal proceeded to ask the Rotterdam court to stay the proceedings until the court in Sofia decides on its jurisdiction, before the court of Rotterdam made any decision.
- Swift requested that the court of Sofia stay its proceedings until the court of Rotterdam decides on its own jurisdiction under the lis pendens rules, as it had an established priority.

## 2. INTERNATIONAL JURISDICTION

### 2.1 Applicability of international standards

#### *2.1.1 Applicability of Brussels I-bis regulation*

It is established that the material scope of Brussels I-bis Regulation ["Brussels I-bis"] is defined in Article 1(1). It states that "shall apply in civil and commercial matters, whatever the nature of the court or tribunal". The Claimant maintains that the contractual relationship between Royal and Tosca is not subject to the exclusions mentioned in Article 1(2). To conclude, the geographical scope is defined by Article 4 (1) as the member states of the European Union. Brussels I-bis is therefore, manifestly applicable to the present case.

#### *2.1.2 Applicability of the Convention on the Contract for the International Carriage of Goods by Road*

The Convention on the Contract for the International Carriage of Goods by Road **["CMR"]** applies when during a carriage of goods by road in vehicles for reward, the place of taking over of the goods and the place designated for delivery are situated in two different countries and in which at least one is a Contracting country, as specified in the contract, and in accordance with Article 1(1) CMR. Poland (since 13 June 1962) and Bulgaria (since 20 October 1977) are both contracting parties to the CMR. Consequently, it is submitted that the CMR mandatorily applies to the present case.

## 2.2 The competence of the court of Rotterdam

### *2.2.1. The Primacy of the CMR Convention over Brussels I bis*

Article 71 of Brussels I-bis states that the regulation shall not affect the conventions to which the Member States are parties when they relate to "particular matters, govern jurisdiction or the recognition or enforcement of judgments".

The CMR is a specialised international convention that contains rules regarding international jurisdiction.

Consequently, the Claimant asserts that the competence of the courts must be assessed exclusively under the rules set out by the CMR, which prevail over than those established in Brussels I-bis.

### *2.2.2. The Non-Exclusive Nature of Jurisdiction Clauses under the CMR*

Article 31(1) of the CMR gives the plaintiff multiple choices of jurisdiction. The parties may reach an agreement, but it is not an exclusive option. It is obligated that the Claimant can also demand the defendant where the defendant has his principal place of business, where the goods were taken over or at the place designated for delivery.

Article 41(1) also establishes that any stipulation that directly or indirectly derogates the provisions of the CMR shall be null and void.

Consequently, it is submitted that the existence of an agreement of a choice of court under Article 25(1) of Brussels I-bis is a disposition null and void, as it stipulates that the jurisdiction of Sofia is "exclusive to decide all disputes arising out of or in connection with this contract", which is contrary to the liberty of choice established in Article 31(1) CMR.

The court with jurisdiction to hear the dispute can therefore be the court where the Defendant has his principal place of business, where the goods were taken over, or at the place designated for delivery.

In addition, the decision of TNT Express Nederland[47] established that the CMR rules apply only if they pass a compatibility test, because the application of a special convention must not undermine the principles underlying judicial cooperation in Europe. The dispositions of the CMR are applicable, provided they offer a high degree of predictability, facilitate the proper administration of justice, and minimize the risk of concurrent proceedings. It is obvious that they also must ensure the free movement of judgments. This case law has been consistent since, and has been reiterated in decisions such as Nipponkoa Insurance[48], where the CJEU imposed a strict interpretation of lis pendens under CMR. Also, this decision ensured that an action for a negative declaration and an action for damages involve the same cause of action and the same parties and therefore must be judged by the same courts. In 2024, the case Gjensidige[49] also reaffirmed the importance of the compatibility test that must be carried out.

In the present case, the high degree of predictability is justified because the jurisdiction of the Rotterdam court was obviously foreseeable to both parties, given that the goods were taken over there. The Claimant maintains that the proper administration of justice point is best served by this location, as the origin of the carriage provides direct access to the contract's geographical and factual context.

To conclude, this minimizes the risk of concurrent proceedings because, as noted in the decision Nipponkoa, an action for a negative declaration (Swift's action) and an action for damages (Royal's action) must be tried together.

In conclusion, the Court is requested to find that Swift validly initiated proceedings before the courts of Rotterdam under Article 31(1) CMR, as the place where the goods were taken over, in order to comply with the criteria of the compatibility test established by the European case law.

[47] CJEU Case C-533/08, 4 May 2010, TNT Express Nederland [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2010:243]

[48] CJEU Case C-452/12, 19 December 2013, Nipponkoa Insurance [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2013:858]

[49] CJEU Case C-90/22, 21 mars 2024, Gjensidige [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2024:252]

## 3. LIS PENDENS AND STAY OF THE PROCEEDINGS

### 3.1 The primacy of the CMR

It is submitted that, pursuant to Article 71(1) of Brussels I-bis, this European 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."

Consequently, conventions such as the CMR are primarily applicable, and Bruxelles I-bis is subsidiarily applicable, as mentioned in section 2.2.1.

It is specified in a 2010 decision[50] that the CMR rules are applicable under a compatibility test, which is validated if they respect the principles of predictability, the sound administration of justice, and the minimization of concurrent proceedings.

In this case, it was manifestly predictable that the court of Rotterdam would be seised, given that Swift could have demanded Royal before this court, as the goods were taken there, in accordance with Article 31(1) of the CMR.

The Defendant maintains that the competence of the Rotterdam court and the interruption of the proceedings in Sofia would be fully compatible with the sound administration of justice and the minimization of concurrent proceedings, as it would mean economies for the jurisdiction, in a geographical place directly related to the case. It would ensure a harmonised decision, and not a distortion between the tribunals of Sofia and the courts of Rotterdam.

Hereby, the application of the CMR to the case of lis pendens, rather than Bruxelles I-bis, is entirely compatible with Article 71(1) of Brussels I-bis.

### 3.2 The existence of Lis Pendens

[50] CJEU Case C-533/08, 4 May 2010, TNT Express Nederland [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2010:243]

The Defendant asserts that a state of lis pendens exists when two courts in different Member States are seised of disputes involving the same parties, the same object, and the same cause of action.

Swift initiated negative declaratory proceedings in Rotterdam on 21 July 2025 to demand the exclusion of its liability and, in a second instance, to establish its limited liability. On the other hand, Royal filed a claim for damages in Sofia on 26 August 2025.

While these actions appear different in form, the CJEU confirmed in Gubisch[51] and Tatry[52] that an action for a negative declaration and an action for performance or damages share the same object and cause of action, a principle reaffirmed by legal doctrine[53][54]. The CJEU also applied this logic to the CMR in Nipponkoa Insurance[55], where the Court ruled that it violated the objective of minimizing concurrent proceedings to allow a damage claim to proceed alongside a prior negative declaratory action.

Because Swift is the party that first seised a competent court under the CMR, the court of Rotterdam is competent.

### 3.3 The obligation of the court of Sofia to stay proceedings

Article 31(2) of the CMR regulates the lis pendens, establishing that when a claim refers to Article 31(1), and "an action is pending before a court or tribunal competent under that paragraph, or where in respect of such a claim a judgement 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

[51] CJEU Case C-144/86, 8 December 1987, Gubisch Maschinenfabrik KG and Giulio Palumbo [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:1987:528]

[52] CJEU Case C-406/92, 6 December 1994, The owners of the cargo lately laden on board the ship 'Tatry' and The owners of the ship 'Maciej Rataj' [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:1994:400]

[53] Silvestri, C., "Lis pendens, related actions and parallel litigation", Common Market Law Review, vol. 50, n. 4, 2013 (available at https://www.cplj.org/publications/5-4-lis-pendens-related-actions-and-parallel-litigation)

[54] Opinion of Advocate General Tesauro, 16 December 1993, Case C-406/92, Tatry v. Maciej Rataj, ECLI:EU:C:1993:942 (available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A61992CC0406)

[55] CJEU Case C-452/12, 19 December 2013, Nipponkoa Insurance [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2013:858]

judgement 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".

Therefore, the second court seised has to wait for the first one to pronounce on its competence.

Subsidiarily, Article 29(1) of Brussels I-bis, any court other than the court first seised is under a mandatory obligation to stay the proceedings of its own motion until the jurisdiction of the first court is established. This article is applicable when the proceedings involve the same cause of action and between the same parties.

Also, in 2024, the CJEU ruled that the principle of mutual trust is fundamental. Therefore, once a court of a member state is seised, its jurisdiction must be respected to allow for the free circulation of judgments.

Because both proceedings initiated in Rotterdam and Sofia refer to the same parties and the same cause of action, the Court of Sofia is requested to stay its proceedings immediately.

4. PETITUM

In light of the foregoing, the Defendant respectfully requests the Court to:

1. ORDER the stay of the proceedings in Sofia until the Court of Rotterdam, as the court first seised, has ruled on its own jurisdiction, according to Article 31(2) of the CMR Convention, and subsidiarily, Article 29 of the Brussels I-bis Regulation;
2. DECLARE that the jurisdiction clause in the carriage contract designating Sofia as an "exclusive" forum is null and void under Article 41(1) of the CMR;
3. RECOGNIZE the exclusive international jurisdiction of the Court of Rotterdam, as it is the court of the place where the goods were taken over (Article 31(1)(b) CMR);
4. DISMISS the Claimant's request for the Court of Rotterdam to stay its proceedings, as Article 31(2) Brussels I-bis is inapplicable to specialized conventions like the CMR;
5. ADJUDGE AND DECLARE that the Defendant is not liable for the damage and theft occurring near Graz, Austria, as the incident resulted from circumstances which the carrier could not avoid and the consequences of which it was unable to prevent;
6. SUBSIDIARILY, should the Court establish liability, ORDER that such liability be strictly limited to 8.33 SDR per kilogram of gross weight short, pursuant to Article 23(3)

of the CMR Convention, as no willful misconduct or gross negligence can be attributed to the driver;

**BIBLIOGRAPHY**


1. LEGISLATION

- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJEC of 16 January 2001)
- Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJEC of 31 December 1972)
- Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, of 30 October 2007 (OJEU of 21 December 2007)
- United Nations Convention on Contracts for the International Sale of Goods (CISG), of 11 April 1980 (BOE of 30 January 1991)
- Regulation (EC) No 593/2008 of the European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations (Rome I) (OJEU of 4 July 2008)
- Convention on the Contract for the International Carriage of Goods by Road (CMR), of 19 May 1956 (BOE of 7 May 1974)

2. CASE LAW

**2.1.Court of Justice of the European Union**

- CJEU Case C-26/91, 17 June 1992, Jakob Handte & Co. GmbH and Traitements Mécano-chimiques des Surfaces SA (TMCS) [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:1992:268]
- CJEU Case C-548/12, 13 March 2014, Marc Brogsitter v Fabrication de Montres Normandes EURL, Karsten Fräßdorf [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2014:148]
- CJEU Case C-59/19, 24 November 2020, Wikingerhof GmbH & Co. KG v Booking.com BV [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2020:950]
- CJEU Case 24/76, 14 December 1976, Estasis Salotti di Colzani Aimo et Gianmario Colzani v Rüwa Polstereimaschinen GmbH [electronic version – data base *EUR-Lex*. Ref. [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:1976:177]

- CJEU Case C-159/97, 16 March 1999, Trasporti Castelletti Spedizioni Internazionali SpA and Hugo Trumpy SpA [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:1999:142]
- CJEU Case C-358/21, 24 November 2022 Tilman SA / Unilever Supply Chain Company AG, [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2022:923]
- CJEU Case C-322/14, 21 May 2015, Jaouad El Majdoub v CarsOnTheWeb [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2015:334]
- CJEU Case C-381/08, 25 February 2010, Car Trim GmbH v KeySafety Systems Srl [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2010:90]
- CJEU Case C-87/10, 3 March 2011, Electrosteel Europe SA v Edil Centro SpA [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2011:116]
- CJEU Case C-533/08, 4 May 2010, TNT Express Nederland [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2010:243]
- CJEU Case C-133/11, 25 October 2012, Folien Fischer AG v Ritrama SpA [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2012:664]
- CJEU Case C-452/12, 19 December 2013, Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2013:858]
- CJEU Case C-387/98, 09 November 2000, Coreck Maritime GmbH Handelsveem BV and Others [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2000:606]
- CJEU Case C-543/10, 7 February 2013, Refcomp SpA v Axa Corporate Solutions Assurance SA, Axa France IARD, Emerson Network, Climaveneta SpA [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2013:62]
- CJEU Case C-222/15, 7 July 2016 [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2016:525]
- CJEU Case C-386/05, 03 May 2007, Color Drack GmbH v Lexx International Vertriebs GmbH [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2007:262]
- CJEU Case C-19/09, 11 March 2010, Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2010:137]
- CJEU Case C-90/22, 21 mars 2024, Gjensidige [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2024:252]
- CJEU Case C-144/86, 8 December 1987, Gubisch Maschinenfabrik KG and Giulio Palumbo [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:1987:528]

- CJEU Case C-406/92, 6 December 1994, The owners of the cargo lately laden on board the ship 'Tatry' and The owners of the ship 'Maciej Rataj' [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:1994:400]
- CJEU Case C-366/13, 20 April 2016, Profit Investment SIM SpA v Stefano Ossi and Others, [electronic version – data base *EUR-Lex*. Ref. ECLI:EU:C:2016:282]

**2.2.United States District Court**

- United States District Court (Middle District of Florida), Fertilizantes Tocantins S.A. v. TGO Agriculture (USA), Inc., 04 mars 2024 [electronic version – data *base CISG Online*. Ref. 8:21-cv-2884-VMC-JSS]

3. LEGAL DOCTRINE

- Celis Aguilar, M., "Consent to Jurisdiction under the Brussels I Regulation and the 2005 Choice of Court Convention", German Law Journal, vol. 17, n. 3 (available at https://www.cambridge.org/core/journals/german-law-journal/article/consent-to-jurisdiction-under-the-brussels-i-regulation-and-the-2005-choice-of-court-convention/A240DA1663E55683157E76E1A4796EA4)
- D'Avout, L. et al., *Droit international privé de l'Union européenne (2024*), Journal du Droit International, n. 4, 2024 (https://www-lexis360intelligence-fr.faraway.parisnanterre.fr/revues/Journal_du_Droit_international_Clunet/PNO_RJDI2/document/PS_KPRE-710137_0KT8?doc_type=doctrine_revue&q=Droit%20international%20priv%C3%A9%20-%20Droit%20international%20priv%C3%A9%20de%20l%E2%80%99Union%20europ%C3%A9enne%20(2024)%20-%20Chronique%20par%20Louis%20d%27Avout,%20Jean-S%C3%A9bastien%20Qu%C3%A9guiner,%20Stefan%20Huber,%20Patrick%20%20Kinsch,%20Lukas%20Rass-Masson,%20Sixto%20S%C3%A1nchez-Lorenzo%20et%20Michael%20Wilderspin&sort=score&from=0&to=1776702489380&source=history&numero=1)

- DiMatteo, L. A., “CISG as Basis of a Comprehensive International Sales Law”, part of the Contracts Commons and the International Law Commons (available at https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=3192&context=vlr)
- Echebarría Fernández, J., “Jurisdiction and applicable law to contracts for the sale of goods and the provision of services including the carriage of goods by sea and other means of transport in the European Union”, Transnational Law Notebooks, vol. 11, n. 2, 2019 (available at https://openaccess.city.ac.uk/id/eprint/23766/1/document%20%281%29.pdf)
- Francq, S., “L’opposabilité des clauses d’élection de for : de quelques incertitudes persistantes”, (available at https://dial.uclouvain.be/pr/boreal/object/boreal%3A113103/datastream/PDF_01/view )
- Furet, M., *Droit international privé*, Gualino, Paris, 2020
- Garcimartín Alférez, F. J. y Sánchez Fernández, S., *Derecho Internacional Privado*, Civitas, Cizur Menor, 2025
- Tuo, C. “Connections and disconnections between Brussels IA Regulation and international conventions on transport matters”, Collected Papers of the Law Faculty of the University of Rijeka, vol. 36, n. 1, 2015 (available at https://hrcak.srce.hr/file/232275)
- Hoeks, M. “CMR of EEX? Van samenloop, litispendentie en het vrij verkeer van beslissingen in Europa. Hof van Justitie EU 4 mei 2010, zaak C-533/08 (TNT Express/AXA)”, 2011 (available at https://repub.eur.nl/pub/31847).
- Laborde, J. y Sana-Chaillé de Néré, S., *Droit international privé*, Dalloz, Paris, 2025
- Mailhé, F., “Annuaire de Droit de l'Union Européenne 2022”, Éditions Panthéon-Assas, Paris, 2023, pp. 1063-1102 (available at https://droit.cairn.info/annuaire-de-droit-de-l-union-europeenne--9782376510567-page-1063?lang=fr)
- Nourissat, C., “Transport international de marchandises - Convention CMR et règlement Bruxelles I”, Chronique Espace de liberté, sécurité et justice, 2023 (available at https://www-lexis360intelligence-fr.faraway.parisnanterre.fr/revues/Proc%C3%A9dures/PNO_RPROC/document/PS_KPRE-446872_0KTU?doc_type=doctrine_revue&q=CJUE,%2019%20d%C3%A9c.%20201

3,%20aff.%20C-452/12,%20NIPPONKOA%20Insurance%20Co%20.%20&typeDoc=Revues&sort=score&from=0&to=1776702262207&source=history&numero=6)

- Opinion of Advocate General Tesauro, 16 December 1993, Case C-406/92, Tatry v. Maciej Rataj, ECLI:EU:C:1993:942 (available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A61992CC0406)
- Poon, A., "Determining the Place of Performance under Article 7(1) of the Brussels I Recast", International and Comparative Law Quarterly, vol. 70, n. 4 (available at https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/determining-the-place-of-performance-under-article-71-of-the-brussels-i-recast/CC793AA55F47B7DDBE1FD9177CF5453E)
- Sieg, E., CISG Advisory Council (CISG-AC), "Inclusion of Standard Terms under the CISG", CISG-AC Opinion no. 13 (available at https://cisgac.com/opinions/cisgac-opinion-no-13/)
- Silvestri, C., "Lis pendens, related actions and parallel litigation", Common Market Law Review, vol. 50, n. 4, 2013 (available at https://www.cplj.org/publications/5-4-lis-pendens-related-actions-and-parallel-litigation)
- Wang, F. F., "Law of Electronic Commercial Transactions: Contemporary Issues in the EU, US and China", 2ª ed., Routledge, 2014, p. 93 - 97 (available at https://lawramadicollege.uoanbar.edu.iq/catalog/file/22/library/Law_of_Electronic_Commercial_Transactions_Contemporary_Issues_in.pdf)

4. ONLINE RESSOURCES

- Mankowski, P., "Knock-out rule for conflicting jurisdiction agreements under the Brussels I-bis Regulation", EAPIL (European Association of Private International Law), 2025 (available at https://eapil.org/2025/02/07/knock-out-rule-for-conflicting-jurisdiction-agreements-under-the-brussels-i-bis-regulation/ ).
- Arbor Law, "Are your hyperlinked contract terms legally enforceable?", Arbor Law Insights, 2023 (available at https://arbor.law/insights/are-your-hyperlinked-contract-terms-legally-enforceable/).
- Cuniberti, G., "Austrian Supreme Court rules on the validity of a jurisdiction clause based on a general reference to terms of purchase on a website", Conflict of Laws.net, 2024 (available at https://conflictoflaws.net/2024/austrian-supreme-court-rules-on-the-

validity-of-a-jurisdiction-clause-based-on-a-general-reference-to-terms-of-purchase-on-a-website/)