

Erik Røsæg

From: Erik Røsæg [erik.rosag@jus.uio.no]
Sent: 8. mars 2011 21:04
To: Erik Røsæg
Subject: [Correspondence Group on Rotterdam Rules] RE: Correspondence group on the implementation of the Rotterdam Rules

Dear Correspondents,

Reference is made to my contribution to the correspondence group of 4 March 11, where I asked for help on the following problem:

"Problem 1: There is a transport from Norway by truck via Sweden and then via ferry to Denmark. The truck is carried on board, and the goods are not unloaded from it. The Rotterdam Rules clearly apply (RR article 6). But also the CMR applies by explicit provisions (CMR articles 1 and 2), even if one generally should hold that CMR does not apply to multimodal transports.

Which convention should then govern which transport documents can and should be issued? Should article 35 of the Rotterdam Rules apply, which allows negotiable transport documents? Or should article 1(5) of the CMR prevail, which disallows them? Both provisions cannot apply, and it is at least not very clear from article 82 of the Rotterdam Rules that the CMR should prevail. Also, if article 82 had such a wide scope, that would render the confinement of article 26 to carrier's liability, limitation of liability and time for suit rather meaningless."

I am much indebted to Professors Manuel Alba and Gertjan van der Ziel for their time and effort used to clarify these matters to me in their contributions 4 and 6 March, respectively. In the following, I will attempt to develop the thinking further.

For easy reference, the texts of the conventions can be found at <http://folk.uio.no/erikro/WWW/cog/cog.html> and the texts of contributions to the Correspondence Group at <http://folk.uio.no/erikro/WWW/RRcorr/index.htm>.

Dear Gertjan, dear Manuel,

If I have understood their points correctly, in respect of the CMR the complicated wording of RR art 82 simply means that if CMR applies by virtue of its art 2, then the RR yields for the CMR not only in respect of the sea carriage, but for the entire transport, and not only in respect of liability, but in all respects.

Similar conflict rules presumably apply in respect of the other unimodal conventions. For the sake of simplicity, I refer to the CMR in the following.

I would be happy to accept this reading. But although it is great to be able to rely on your authority, other delegates have explained this differently to me, and the travaux préparatoires are not entirely clear. The wording could just as well indicate that the precedence of e.g. the CMR only applies

"to the extent" the goods actually remain loaded on a road cargo vehicle carried on board a ship

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"to the extent" the carriage at all involves a sea carriage when the goods remain loaded on a road cargo vehicle, but not limited to the sea leg.

Indeed, under RR art 82 a) the former, narrower, type of reading is perhaps obvious, as the Montreal convention generally only applies during the air carriage itself. So how can I persuade others that the other, wider reading is the correct one?

One additional point in this respect: The reference in RR art 82 to "liability of the carrier for loss of or damage to the goods" is perhaps an indication that it was carrier's liability, and not e.g. documentation, the draftsmen had in mind. In this way, the words are a support for the narrower reading. However, the quoted words could also arguably be remarkably insignificant.

Your reading would imply that the RR would not apply in conflict with CMR when trucks are carried from Norway to the Continent on ferries without unloading. The impact of the RR in this respect would be minimal; perhaps mainly that CMR art 2 would refer to the liability regime of the RR in respect of on board damage.

The RR would, on the other hand, apply to truck and sea combinations when the goods do not remain on the truck on board. It is only in these situations RR art 26 will apply, sometimes making the CMR liability system (etc.) to some extent applicable on the land leg.

When drafting implementation legislation, one would have to address some issues on the basis of your reading:

First, one must clarify what it means that nothing in the RR convention "affects the application" of the CMR in the CMR art 2 situations. You both maintain that the RR do not apply at all (presumably unless the CMR explicitly refer to them, as in art 2), as opposed to the result where the RR supplement the CMR when not in conflict with it. I cannot see why this follows from the wording, but I have no objections to the result. But does this result follow clearly from the travaux préparatoires?

Second, national law must advise courts that they shall only consider the CMR applicable on multi-modal transports when CMR art 2 applies. If they are left free to construe the CMR otherwise, conflicts may arise, as RR art 82 only resolves conflicts in the art 2 cases, assuming that the CMR will be construed so that conflicts will not arise in other cases. Luckily, there is no problem in Norway that courts can be instructed in such matters (by an act of Parliament), as we have a dualistic system of international public law.

Thirdly, the distinction between the CMR art 2 situations and the non-CMR art 2 situations must be made operational. When documents are issued, one must know whether the CMR or the RR apply. After the completion of the transport this is easy, as one can see whether the criteria in CMR art 2/ RR art 82 are satisfied by ascertaining whether the goods in fact remained unloaded from the truck during the sea carriage. But the parties would need advice on how to handle this if documents are to be issued before one knows whether or not there will be a sea leg without unloading. Which convention would in that case apply? And what will happen if they make the choice under the wrong assumptions?

I am afraid I already have addressed too many issues, and have to postpone my comments on the interesting additional point raised by Manuel till later.
I am, however, confident that one can find satisfactory solutions to all issues necessary to resolve in order to implement the Rotterdam Rules.

Best regards,
Erik

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Professor Erik Røsæg (Rosaeg)
Scandinavian Institute of Maritime Law

University of Oslo
POB 6706 St. Olavs plass
N-0130 Oslo, Norway

Visiting address:

Room 403, St Olavs gt 23 (entrance from Pilestredet)

<http://www.1881.no/Map/?Query=st+olavsgt+23+oslo>

Call me if the doors are locked (B+59752 on the entry phone)

Tel: (+47) 2285 9752 - (+47) 4800 2979

Fax: (+47) 9476 0189

erik.rosag@jus.uio.no

<http://folk.uio.no/erikro/index.html>

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