Erik Røsæg

From: Manuel Alba [malba@der-pr.uc3m.es]
Sent: 4. mars 2011 11:41
To: nifs-rr@jus.uio.no
Subject: Re: Correspondence group on the implementation of the Rotterdam Rules
Attachments: ATT00176.txt

Dear Erik,

Thanks for your message and all the interesting questions that you pose, which indeed are important. As you already know, Spain has ratified the Rotterdam Rules. I did not take part in the information process that usually precedes the deposit of the ratification instrument. In such context, the Spanish Council of Ministers acts upon the recommendations of the Spanish Ministry of Foreign Affairs and Cooperation, as well as the reports feasibly issued by the interested Ministries (in this case: the Ministry of Justice and the Ministry of Infrastructure and Development -which is competent in transportation matters). I do not know if any of such ministerial departments made remarks regarding the particular questions in your message. Our recommendation as Delegates (mine, along with the rest of the members of the Spanish Delegation) was in favor of the ratification. Nevertheless, in this message you will find only my particular views and not Spain's official position in any of the topics discussed. For clarification purposes, I enclose a paper that I presented in Yaoundé (Cameroon) in the course of a conference and a workshop on the Rotterdam Rules. You'll see that it is very simple, but its aim is merely explanatory of what I think the Convention says.

As you know, an important distinction that ought to be clearly made between Art. 82 and 26 is that, while the former is a provision on conflicts of conventions, and therefore deals with the application of the Rotterdam Rules as a whole, the latter is a provision on the carrier's liability (and thus its application requires first that the RR apply to the contract).

Therefore, Art. 82 determines whether the Rotterdam Rules apply or not where a conflict with other convention exists. As you also point out, the four paragraphs of Art. 82 are "thinking" on Montreal (see Arts. 1 & 38), the CMR (see Arts. 1 & 2), the COTIF-CIM (see Art. 1 par. 4 of the CIM Rules and Art. 24 COTIF) and the CMNI (see Art. 1 par. 2). I think the effect of Art. 82, along with the rules on the scope of application of those conventions is that, whenever any of them applies to the contract of carriage (maritime plus), the Rotterdam Rules do not apply at all (and even if the contract satisfies the conditions of their scope of application as well).

This might not appear obvious in Art. 82 if we look at its drafting, but my assumption has always been that such is the meaning of the chapeau or the provision, when it says that nothing in the Convention "affects the application" of the other conventions, and in the paragraphs, when they give preference to each of the conventions provided such convention "according to its provisions applies" to the carriage of the goods. I am aware that the paragraphs also use a somehow ambiguous expression, which is "to the extent" (right before the words just quoted), but, as I say, my interpretation of the structure is precisely that the Rotterdam Rules won't apply at all to the extent that other preexisting convention (with which a conflict may arise) apply to the contract of carriage according to its terms.

In the case you describe, consequently, if a controversy is tried before a court in a State party to both the Rotterdam Rules and the CMR (and, for the sake of simplicity, assuming that all countries involved are parties, not only to the CMR, but also to the RR)

1. If it were not for Art. 82 RR, a conflict of Convention would arise (Art. 1, par. 1, and art. 5 RR; Arts. 1 and 2 CMR), but

2 The Rotterdam Rules do not apply, and the CMR does. All relevant matters (including transport documents) must be solved according to the CMR, except (and only) to the extent that provisions of the RR apply by effect of Art. 2 CMR.

In this context, the most complicated relationship is the one between the RR and Montreal. This is so, not so much as a result of the structure and technique of Art. 82 RR, but as a consequence of the operation of ARt. 38 of the Montreal Convention, which says that, in "combined carriage" contracts including an air leg, Montreal applies to the "carriage by air" (see art. 18) if the requirements of Art. 1 of Montreal are complied with. This means that (leaving aside the case dealt with in Art. 18.4 of Montreal), if a contract falls within the scope of application of the RR (Arts. 1 and 5) and of Montreal (by operation of the articles referred to), the maritime leg would be subject to the RR, but the "carriage by air" would be subject to the Montreal Convention. This entails the need to treat the contract in a segmented manner, which in practice might be very delicate, for damages or losses arising during the sea leg ought to be claimed (entirely) relying on the RR, whereas damages arising during the carriage by air ought to be claimed (entirely) relying on Montreal (and therefore the claimant would find him or herself in the need to determine where the damage or loss took place). This is not an ideal outcome, but the Montreal convention was already there when we negotiated the RR.

That being said, the operation of Art. 26 is very different. It firstly requires that the RR apply (and therefore that there is no initial conflict with other convention to be addressed under Art. 82). And the conditions are quite definite (in brief, "localization" of the damage, loss or the cause of the delay in the sense of the article). The conditions of the provisions that may apply by the reference made in ARt. 26 are also quite straight (although i have some doubts as to the reach of the expression "the carrier's liability" in letter b).

I will pose two questions regarding art. 26 for discussion (if you find it interesting):

1. The application of the provisions of another international instrument as foreseen in Art. 26 ¿is to be decided ex officio by the court? or alternatively ¿is to be decided only if one of the parties so requests, with the previous proof of all conditions laid down in ARt. 26? (the response that I would give to this question is that such provisions apply only if one of the parties in the controversy so request, and upon proof by such party of the conditions of Art. 26 -this is the interpretation already expressed by Francesco Berlingieri, in his paper of the CMI 2009 colloquium).

2. Under the "separate" or "hypothetical contract" rule that art. 26 is based upon: ¿is a court in a country not bound by the international instrument in question obliged to apply the provisions of such instrument by effect of art. 26 RR? My response, for the moment, is no. I will try to illustrate this with an example:

Contract of carriage of goods between Buenos Aires (Argentina) and Rotterdam (The Netherlands) by sea, and subsequently by road between Rotterdam and Madrid (Spain).

The Netherlands and Spain are States party to the CMR.

Assume that Argentina and Spain are party to the RR (Argentina has opted-in chapter 14).

The goods are damaged entirely during the road carriage.

The Rotterdam Rules apply (in Argentina and Spain).

The claimant sues the carrier in Buenos Aires (under the jurisdiction provisions in the RR).

Conditions of art. 26 are complied with, namely those regarding the damage, the nature of the CMR, the contents and other features of its provisions. But as to the "hypothetical

contract" principle I think that the provisions of the CMR would have not applied to the separate contract according to "the provisions of such international instrument", for such provisions also require for the application of the CMR that the Sate where the case is tried is a party to it, and therefore that its courts are obliged to apply the CMR. In this case (even if the "separate contract" of carriage by road between Rotterdam and Madrid would fall under the CMR, both in Spain and in The Netherlands), the argentinean judge is not bound by the terms of the CMR, for Argentina is not a party to it, and therefore its provisions would have not applied in Argentina if a separate contract had been concluded between the parties. I think in this case (and cases like this), the CMR would apply only to the extent that the provisions of argentinean law on private international law and conflicts of laws would point to either the dutch o the spanish law as the law applicable to the "separate contract". But I would like to hear also your (and the rest of the people's opinion).

Sorry for the length of the message, it's Friday morning...

All the best,
Manuel

"Maritime plus" Aspects of the Rotterdam Rules: Period of Responsibility of the Carrier (Art. 12), Liability in Cases of Localized Damage under "Door-to-Door" Contracts (Art. 26) and Conflicts with Other Conventions on the Contract for the Carriage of Goods (Art. 82)

Manuel Alba*

1. Introduction

One of the important and sometimes complicated aspects of the Rotterdam Rules is essentially linked to the fact that it applies to "door-to-door" contracts of carriage. The "maritime plus" approach finally adopted by the new Convention entail that contracts falling within its scope of application will be, not only contracts for the carriage of goods by sea, but also contracts that include one or more maritime legs and one or more legs by other modes. In some areas of the world there are other conventions that preexist the Rotterdam Rules and that apply to contracts for the carriage of goods by one mode feasibly employed in "door-to-door" operations and contracts. The question then arises as to what is the relationship between the Rotterdam Rules and such other instruments, especially if they contain (as in occasions happens) rules extending their application to contracts that comprise more than one mode of transport[1].

In a different vein, but with the same background, the fact that some of the contracts that may fall under the Rotterdam Rules include more than one mode of transport pose some questions regarding the liability of the carrier. Multimodal contracts of carriage have frequently been characterized for entailing a carrier's liability regime to a varying extent structured and dependent upon the different legs covered by the contract, and on that basis resorting to a –in some points– different liability scheme for each one of the legs. If we take a look, for instance, to documents used in

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[1] Although Cameroon is not a party to any of them, this is the case of the conventions governing contracts for the carriage of goods by rail, road and inland waterways in Europe and some surrounding countries; respectively: Uniform Rules Concerning the Contract of International Carriage of Goods by Rail 1999 (hereinafter COTIF-CIM, for the form part of the Appendix B to the Convention concerning International Carriage by Rail of 9 of May 1980, as amended by the Protocol of 3 of June 1999, hereinafter COTIF), the Convention for the International Carriage of Goods by Road of 19 of May 1956, amended by the Protocol of 5 of July 1978 (hereinafter CMR), and the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway of 3 of October 2000 (hereinafter CMNI or the Budapest Convention). The Montreal Convention for the Unification of Certain Rules for International Carriage by Air of 28 of May 1999 (hereinafter the Montreal Convention, to which Cameroon is a party) also responds to this profile.

international trade in the framework of such operations and the corresponding contracts, we can see how some of them (the FIATA Bill of Lading, and those transport documents based on the UNCTAD/ICC Rules for Multimodal Transport Documents) aim at establishing a general uniform liability regime for the whole operation, but foresee different limits of liability depending on the modes involved in the contract (in particular, depending on whether there is a maritime leg or not). They also call for the application of specific unimodal regimes were the damage is localized in one of the legs. And finally, and regardless of the liability scheme they set out, they preserve the application of any mandatory international convention that might apply to any part of the contract of carriage in spite of being multimodal (for they could not do otherwise). A similar technique is also followed by the 1980 Geneva Convention[2], which nonetheless hasn't come into force (and it is very unlikely by now that it will ever do).

The Rotterdam Rules contain two provisions precisely aimed at dealing with all these matters. Such rules are found in Arts. 26 and 82 of the Convention.

Art. 82 sets the rules that aim at clarifying the relationship existing between the Rotterdam Rules and other unimodal conventions whose scope of application might overlap with the one resulting from Art. 1, par (1), and 5 RR. This article, consequently, determines whether the Rotterdam Rules apply or not, particularly in cases in which, given the characteristics of the contract, another Convention is applicable.

On the other hand, Art. 26 is aimed at establishing specific rules on certain aspects of the liability of the carrier, in cases in which the Rotterdam Rules apply and the damage has arisen during the carriage of the goods by a mode of transport other than the maritime one.

Although the order of these two articles in the Convention is the opposite, we shall deal first with Art. 82, for it is the rule specifically purported to avoid conflicts with other carriage conventions, and therefore determines whether the Rotterdam Rules and Art. 26 apply.

2. Possible conflicts between the Rotterdam Rules and other conventions and their solution in the text.

[2] United Nations Convention on International Multimodal Transport of Goods, (Geneva, 24 May 1980); see Arts. 18 and 19.

As stated in a previous presentation, the scope of application of the Rotterdam Rules must be determined by first looking to the notion of contract of carriage contained in Art. 1, par. 1 RR. This is so to the extent that Art. 5 RR begins by stating that the Convention applies to "contracts of carriage" as defined therein. The definition of contract of carriage comprises two types of contracts. First, contracts of carriage by sea, and second, contracts for the carriage of the goods by different modes, one of them necessarily being the maritime one, according to the "maritime plus" approach of the new Convention.

Like many national systems, international conventions dealing with the contract for the carriage of goods have traditionally addressed such contract on a "mode-by-mode" basis. This means that each of the different existing conventions is focused on a specific type of contract by reference to the mode employed: sea, inland waters, road, rail and air. As widely known, due to the evolution of the economic reality and the transportation practice, many of such conventions extend their application to operations or contracts where more than one mode is employed, provided that one of them (in some cases, the "principal" one in an economic sense) is the mode in each case specifically envisaged. Each of the conventions that are to a larger or shorter extent based in this approach has a different solution and entails a different outcome, but what all of them have in common, therefore, is that they may apply to multimodal contracts of carriage.

In the framework of the Rotterdam Rules this fact could actually be a source of conflicts. A conflict between the Rotterdam Rules and any of the aforesaid conventions would namely arise in cases in which a contract fell within the scope of application of the two of them. This can only be the case if the contract of carriage is a "maritime-plus" one, that is, when the contract provides for the carriage by sea and by other modes of transport, and what this basically means is that a contracting party to both conventions could not comply with one of them without ignoring (and breaching) the other[3]. Let's look into to some examples.

[3] In contracts for the carriage of the goods by sea only a conflict can also arise between the different existing conventions (The Hague or The Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules), as long as all of them apply to the same type of contract. Nonetheless, the assumption of the Rotterdam Rules is that no such conflict will arise in practice since, for their ratification, denunciation of any of the other conventions in force in a ratifying country is required (see Art. 89 RR)

The Montreal Convention applies to contracts for the international carriage of goods by air, but contains a provision that extends the application of its rules to contracts for the "combined carriage performed partly by air and partly by any other mode of carriage" provided the carriage by air falls within the terms employed for determining the general scope of application of this Convention (see Art. 38, par. 1[4]).

Likewise, the CMR scope of application is in a broad sense targeted at contracts for the international carriage of goods by road. However, it contains a provision that extends its application to contracts for the carriage of goods by road and by other modes of transport if the goods are to remain loaded on the road vehicle during the performance of the whole contract. In other words, this Convention applies, among other agreements, to contracts and operations covering, in addition to the road leg or legs, a phase to be performed resorting to "roll on-roll off" sea transportation services (see Art. 2, par. 1 CMR[5]).

We face a very similar situation if we turn to other Conventions. Namely, Art. 1, par. 4 COTIF-CIM also includes within the scope of application of this instrument contracts for the carriage of goods that include, in addition to their carriage by rail, carriage by sea performed as a supplement thereof[6]. And finally, the rules of the CMNI, which is intended to apply to the contract of carriage by inland waterways, extend its scope of application to contracts for the carriage of goods on such waters and by sea without transshipment under certain conditions[7].

A possible conflict of conventions between the Rotterdam rules and any of the referred instruments could be solved under the general regime set out in public international law, and namely in Art. 30 of the Vienna Convention on the Law of Treaties of 1969. However, several specific articles have been introduced in order to deal with this problem for different reasons. First, the rules contained in this latter

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[4] The complete provision reads: "In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1".

[5] See the initial phrase of this provision: "Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage".

[6] A second condition for the application of the uniform rules is that the complementary sea transportation services are included in the list referred to in Art. 24, par. 1 COTIF.

[7] See Art. 1, par. 2 CMNI

provision do not always provide for entirely satisfactory solutions when it comes to situations and conventions relating to contracts of carriage, whereby several parties from more than two countries might become involved in a single controversy. Additionally, and as far as the unimodal conventions are concerned, the intention of the Rotterdam Rules is precisely not to disrupt or anyhow affect the application and operation of previous conventions, for that might be a barrier for the ratification of the new Convention and generally engender further problems of application.

The purpose of Art. 82, therefore, is to avoid conflicts with all the above referred conventions by preserving their application where a court might otherwise have found itself under the obligation to simultaneously apply two instruments to some extent incompatible. To this end, the article states that nothing in the Convention "affects the application" of previous conventions that comply with certain features listed in four different paragraphs. This means that a court, in case of conflict, is under the Rotterdam Rules enabled to apply the previous applicable convention to the detriment of the former. Each one of the paragraphs of Art. 82 RR has been drafted with the specific intention to bring into harmony the Rotterdam Rules, in the referred aspects, respectively with the Montreal Convention, the CMR, the COTIF-CIM, and the Budapest Convention (CMNI).

a. Application of the Montreal air carriage Convention in case of conflict

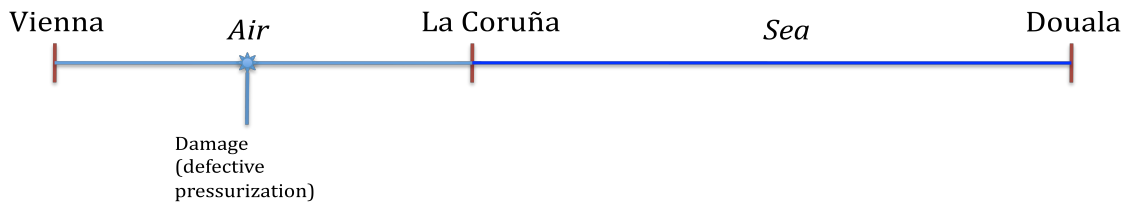
Starting with the first of the Art. 82 RR paragraphs, letter a) refers to "(a)ny convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage". This part of Art. 82 is probably the most interesting one from a global point of view, for it refers to the air carriage regime, which is the only one of all the international single-mode contractual schemes whose application and significance is not confined to a certain region (and actually the Montreal Convention is the only of all the referred instruments to which Cameroon is a party). On the other hand, of all the feasible described conflicts that can be identified with this background, this would have probably been the less likely to arise in practice, given the scarce cases in which an air and a maritime leg are covered by a single contract.

Like every part of Art. 82, the drafting of this first letter a) has been very carefully "calculated" in order to provide a suitable and peaceful relationship between

the two conventions involved. It requires that the alternative previous convention applies to any part of the carriage according to its terms, so in order to determine to what extent the Montreal convention applies we have to turn to its above referred Art. 38, par. 1, which in case of combined carriage of the goods provides the application of the Convention's regime (only) to the carriage by air. The overlap and conflict feasibly arising between the Rotterdam Rules and the Montreal Convention is only partial, and it imposes the need, under both Conventions, to consider the different parts of the contract of carriage separately, in order to submit the air carriage to the Montreal Convention and the rest of it to the Rotterdam Rules (provided that all conditions for the application of such instruments are satisfied). The resulting regime is easier to understand with some examples.

Example A. Application of the Montreal Convention

Contract for the carriage of goods between Vienna and Douala, partly by air between Vienna and La Coruña, and partly by sea, on a vessel covering a regular line between La Coruña and Douala.



The goods get damaged during carriage, due to defective pressurization of the aircraft holds. The consignee sues the carrier before the courts of Douala.

Austria, Spain and Cameroon are States parties to the 1999 Montreal Convention. Conditions for the application of the Montreal Convention: **YES**, Arts. 1 (pars. 1 & 2) and 38 (par. 1).

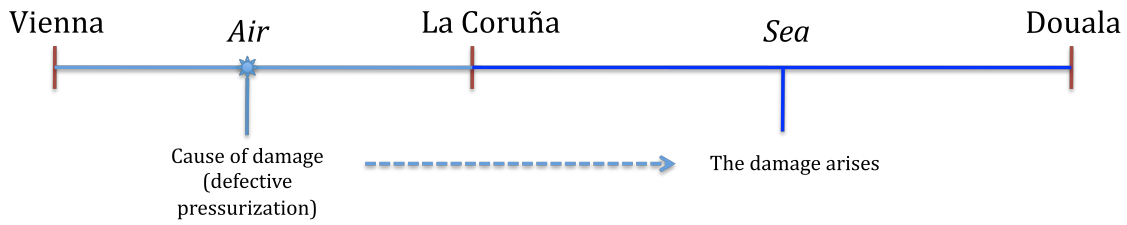
Assume Austria and Cameroon are contracting States to the Rotterdam Rules. Conditions for the application of the Rotterdam Rules: **in principle yes**, Arts. 1 (par. 1) and 5 (par. 1, subpar. a, c or d), **but in this case do NOT apply** by effect of Art. 81, par. a.

According to Art. 38, par. 1 of the Montreal Convention, it applies to the carriage performed by air. The courts of Douala are obliged to apply it (Art. 82 allows the courts

to do so without breaching the Rotterdam Rules), and therefore the consignee should base its claim on the air carriage convention (including provisions on jurisdiction).

Example B. Application of the Montreal Convention

Contract for the carriage of goods between Vienna and Douala, partly by air between Vienna and La Coruña, and partly by sea, on a vessel covering a regular line between La Coruña and Douala.



The goods get damaged during carriage. The damage is due to defective pressurization of the aircraft holds, but it does not arise until later, during sea carriage. The consignee sues the carrier before the courts of Douala.

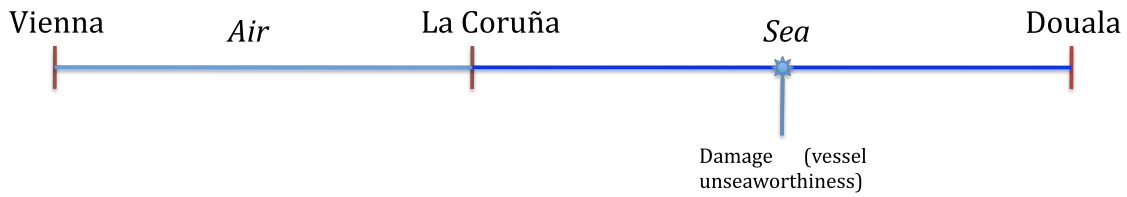
Austria, Spain and Cameroon are States parties to the 1999 Montreal Convention. Conditions for the application of the Montreal Convention: **YES**, Arts. 1 (pars. 1 & 2) and 38 (par. 1) -as well as Art. 18 ruling the carrier's liability (see par. 1: "The carrier is liable for the damage sustained in the event of the destruction or loss of or damage to cargo, upon condition only that the event which caused the damage so sustained took place during the carrier by air").

Assume Austria and Cameroon are contracting States to the Rotterdam Rules. Conditions for the application of the Rotterdam Rules: **in principle yes**, Arts. 1 (par. 1) and 5 (par. 1, subpar. a, c or d), **but in this case do NOT apply** by effect of Art. 81, par. a.

According to Art. 38, par. 1 of the Montreal Convention, it applies to the carriage performed by air. The courts of Douala are obliged to apply it (Art. 82 allows the courts to do so without breaching the Rotterdam Rules), and therefore the consignee should base its claim on the air carriage convention rules (including provisions on jurisdiction).

Example C. Application of the Rotterdam Rules.

Contract for the carriage of goods between Vienna and Douala, partly by air between Vienna and La Coruña, and partly by sea, on a vessel covering a regular line between La Coruña and Douala.



The goods get damaged during the sea transport, due to the defective condition of the vessel. The consignee sues the carrier before the courts of Douala.

Austria, Spain and Cameroon are States parties to the 1999 Montreal Convention. Conditions for the application of the Montreal Convention: **only to the carriage by air**, Arts. 1 (pars. 1 & 2) and 38 (par. 1), and in this case the damage (like its cause) is outside the carriage by air, **so it does NOT apply to this damage**.

Assume Austria and Cameroon are contracting States to the Rotterdam Rules. Conditions for the application of the Rotterdam Rules: **YES**, Arts. 1 (par. 1) and 5 (par. 1, subpar. a, c or d).

In this situation there is no conflict. Thus, the Rotterdam Rules apply and the consignee should base its claim thereupon.

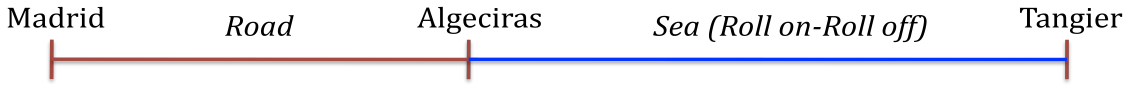
b. Application of the CMR in cases of conflict.

As stated, we face a similar situation when we turn to the CMR. Letter b of Art. 82 of the Rotterdam Rules is consequently aimed at likewise setting the needed framework for render compatible both conventions. With that purpose, it namely states that the Rotterdam Rules do not affect the application of any convention which according to its provisions applies to "the carriage of goods that remain loaded onboard a cargo vehicle carried onboard a ship". This wording intends to fit into the terms of Art. 2 of the CMR, which extends the application of such convention to contracts of carriage by more than one mode if the goods are to remain loaded on the truck. As opposed to the Montreal

convention, the aforesaid condition triggers the application of the CMR to the whole contract, provided all other requirements for its application are satisfied. A case where the Rotterdam Rules should give way to the application of the CMR can be found in the following example.

Example D. Application of the CMR

Contract for the carriage of goods on a truck between Madrid and Tangier.



Spain and Morocco are contracting parties to the CMR (1956 version). Conditions for the application of the CMR: **Yes**, Arts. 1, par. 1, and 2, par. 1 CMR

Assume Spain and Morocco are contracting States to the Rotterdam Rules. Conditions for the application thereof: **in principle yes**, Arts. 1 (par. 1) and 5 (par. 1, subpar. a, b, c or d), **but it does NOT apply** in this case by effect of Art. 82, par. b.

In this case the CMR applies to the whole carriage according to it Art. 2, par. 1, so the courts should apply it to the detriment of the Rotterdam Rules, whether the consignee sues the carrier in Spain or in Morocco.

c. Application of the COTIF-CIM and of the Budapest Convention in cases of conflict.

Letters c and d of Art. 82 deal with the two specific cases of the COTIF-CIM uniform rules for the carriage of goods by rail, and of the Budapest Convention on the contract for the carriage of goods on inland waterways. Like in the previous provisions, what Art. 82 in this respect basically seeks is to preserve the application of these two conventions to the extent that their scope of application overlaps with the one of the Rotterdam Rules.

As stated, the provisions of the COTIF-CIM include within its scope of application those contracts that foresee the carriage of the goods by rail and by sea as a

supplement thereof, if the sea leg is performed through services included in the list established by Art. 24 COTIF. The supplementary character of the sea carriage required by the CIM rules (and referred also by Art. 82 RR) suggests that it is the less significant part of the carriage from an economic or geographic standpoint. In any case, the listing requirement, other than being a condition for the application of the COTIF-CIM rules, will normally cast some light on the supplementary nature of the sea leg.

The Budapest Convention sets the conditions for its application to contracts covering the carriage of the goods both by inland waterways and by sea in Art. 2, par. 2, under which the CMNI will apply if, according to the contract, the carriage takes place without transshipment. Two exceptions are however laid down to this rule: first, the CMNI will not apply if a marine bill of lading in issued "in accordance with the maritime law applicable"; second, it won't apply either if the distance to be covered by sea is the greater.

Like in previous situations, these two conventions will continue to apply to the contracts set out in their respective scopes of application, including the area in respect of which they overlap and therefore are mutually exclusive with the Rotterdam Rules. Consequently, the latter Convention won't apply even if according to its general scope, and if it was not for Art. 82, the contract in each case envisaged would have been subject to its provisions. It is important to note that Art. 82 RR limits its application to preexisting conventions, and that any future convention would not be covered by its content regardless of its wording. Contracting States to the Rotterdam Rules, therefore, should carefully look into any feasible future convention prior to committing themselves under its terms.

3. Special rules regarding the liability of the carrier in "door-to-door" contracts of carriage under the Rotterdam Rules (Art. 26).

The second of the provisions referred at the outset and in the title of this presentation, Art. 26 RR, provides for some specific rules targeted to "door-to-door" contracts of carriage. The new Convention sets out a regime for the liability of the carrier that applies to all contracts falling within its scope: contracts for the carriage of goods by sea and contracts for the carriage of the goods by sea and by other modes. However, in this latter case, the Convention takes into account the multimodal ("maritime plus") character of the contract and the transport operation, for setting the

conditions that may lead to the application of certain rules regulating particular modes of transport other than the maritime mode. The two basic approaches or techniques that in this context can be followed are the so called uniform liability principle, which is based on a single and uniform liability regime for the whole contract, and the so called network principle, which consists of applying a, to a larger or shorter extent, different liability scheme to each of the different modes and stages of the carriage. As previously stated, the approach in most of legislative and contractual instruments has evolved to be neither of these two, and instead a combination of both of them is usually adopted. This is what Art. 26 also does, for, as we will see, departing from the general scheme of the liability of the carrier, it adopts a (likewise usually called) "limited network" liability scheme.

Before going into the details of Art. 26 RR, and as obvious as it may appear, it is important to note that its application requires that the Rotterdam Rules apply. One of the feasible outcomes of this particular provision is that the rules of another international convention are resorted to in order to determine the liability of the carrier. But in any case such an outcome will only take place as a consequence of Art. 26 and the application of the Rotterdam Rules. Therefore, the difference between this provision and Art. 82 is that, whereas the latter is a conflict of conventions provision that in some cases determines whether the Rotterdam Rules as a whole apply or not, the former is a provision on the liability of the carrier whose operation can only be addressed once we have come to the conclusion that the Rotterdam Rules apply.

The limited network liability approach in Art. 26 RR entails that, under certain conditions, the rules on the liability of the carrier contained in the Rotterdam Rules can be replaced by the rules of other instruments, depending on the mode and stage where the damage or the cause of the delay has taken place (see also Art. 13, par. 1 RR).

a. The period of responsibility of the carrier in "door-to-door" contracts

The basic requirement set out in the Rotterdam Rules for the liability of the carrier to arise is that the damage, loss or delay in delivery grounding the claim, or the cause thereof, occurs during the carrier's period of responsibility. For the determination of the period of responsibility of the carrier Art. 12 RR, in particular in its par. 1, states that, as a general principle, such period covers the time during which the goods are under the custody of the carrier, that is, the period running form the moment in which

the carrier receives the goods for carriage from the shipper, untill the moment in which the carrier delivers the goods according to the contract or the Convention. The second paragraph of Art. 12 contains specific rules regarding the situations where the goods, either in the place of receipt or at destination, must be handed to public authorities or other third parties, in which case the ends of the period of responsibility are respectively when the carrier collects from and when the carrier hands the goods to such persons.

Equally important, paragraph 3 of Art. 12 contains a provision that allows the parties to determine through contractual arrangements the time and location of the receipt and delivery of the goods with the purpose to determine the period of responsibility of the carrier. This in principle means that the parties may to a certain extent modify the general rule in par. 1 of this same article (which otherwise will apply by default). However, the scope and the practical effect of this possibility may be limited by some circumstances. This rule was introduced in order to enable the parties to cope with situations in which the handing over of the goods entails a more or less complex process that makes difficult to precisely locate the moment in which transfer of possession (and custody), and of the related risks, takes place (think, for example, of cases of liquid goods carried in bulk, that are loaded on the vehicle through a pumping hose and hatch). It nevertheless clearly allows the parties to enlarge or shorten the period of responsibility according to their will and, for example, restrict it to the time running from the moment when the loading operations begin till the time when the unloading finishes (basically by agreeing that receipt and delivery must take place in a certain time and place, thereby keeping, for instance in sea carriage contracts, the "tackle-to-tackle" period)[8]. However, par. 3 of Art. 12 expressly states that the beginning and the end of the period of responsibility as agreed by the parties under this provision cannot (respectively) be subsequent to the beginning of the initial loading operations or precede the final discharge of the goods (so that will in any case be the minimum interval).

Additionally, the determination of the period of responsibility will in some cases depend upon a material test, for even if in the contract there is an agreement that fits

[8] In these situations, the carrier may nevertheless, and for operational reasons, instruct the shipper to hand it the goods prior to the initial moment (the starting of the loading operations), in which case it would initially receive the goods *but not for carriage* (plausibly, for instance, as a bailee). The period of responsibility would start to run subsequently and in the time and place agreed in the contract.

into the terms of par. 3 of Art. 12, if a transport document (therefore evidencing the receipt of the goods for carriage by the carrier) is issued in a certain date and place, that would probably entail a tacit modification of any previous agreement and call for the application of the general principle in par. 1 of Art. 12 (as far as the beginning of the period of responsibility is concerned).

Although the basic obligations of the carrier in the Rotterdam Rules include "properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods", par. 2 of Art. 13 states that the parties may agree that the loading, handling, stowing or unloading of the goods are performed by the shipper or the consignee. This provision therefore renders valid all clauses for the allocation of the loading, stowing or unloading operations (FIO and similar clauses) but only as long as they are genuinely intended to oblige the shipper (by itself or through someone acting at its request) to in fact perform the loading (and eventually stowing) of the goods and hand them over to the carrier thereafter, or, correspondingly, to allocate to the consignee the duty to receive the goods onboard the vehicle and proceed to their discharge[9].

Regardless of which of the above referred possibilities under Art. 12 RR is adopted by the parties, in the situations that we are dealing with the period of responsibility of the carrier will cover the whole contract, and therefore all and each of the different stages of the transport operation.

b. Conditions for the application of Art. 26 of the Rotterdam Rules

The conditions for the application of the special regime contained in this Art. 26 are condensed in its chapeau. Some of them have been already advanced. According to the first requirement, and as the title of the provision implies ("Carriage preceding of subsequent to sea carriage"), the contract must be a "door-to-door" one, that is, and following the language of the definition in Art. 1, par. 1 RR, it must provide for the carriage of the goods by sea and by other modes of transport in addition to the sea carriage.

[9] What the combination of Art. 12, par. 3, and 13, par. 2 RR in any case forbids are those FIO(S)(T) clauses (and similar agreements) under which the carrier receives the goods for carriage and issues the transport document, but states to act in the performance of the loading or unloading operations as an agent, or on behalf, of the shipper or consignee. Such clauses might operate as merely cost (of such operations) allocating agreements, but they would not affect the application of Art. 12 for the determination of the period of responsibility of the carrier (see also Art. 17, subpar. 3.i RR).

The second requirement is that the damage or loss of the goods, or the cause of the delay in their delivery, must take place during the carrier's period of responsibility, but "solely before their loading onto the ship or solely after discharge from the ship". As can be easily perceived, the application of Art. 26 also requires the basic condition that the loss, damage or delay, or the cause thereof, occurs during the period of responsibility of the carrier, but it further narrows down its scope of application by additionally requiring that the damage or loss, or the cause of the delay are "localized" before or after the sea leg –the loading on and the unloading form the vessel therein included. It is worth elaborating a bit further on the consequences of this requirement or, in other words, on the meaning of the expression "localized" damage or event in the framework of the Rotterdam Rules. First, Art. 26 will only apply to situations where either the damage, the loss or the event causing the delay take place during any of the "non-maritime" stages of the carriage. Hence, where the goods have been damaged or lost, only cases where the loss or damage itself has arisen within that time-space frame will fit into this provision. The Convention leaves outside Art. 26, and submits to the general scheme of the liability of the carrier that it sets out, the situations where the event that causes the damage or loss of the goods occurs during one of the non-maritime legs, but the damage or loss itself does not arise until later (for instance, during the sea leg). If we turn to cases of delay, the chapeau of Art. 26 impliedly requires that there is actually a delay according to the terms of the Rotterdam Rules, and namely to Art. 21 (which in turn requires that there is an implied or express agreement to deliver the goods at destination within a certain time). That being satisfied, Art. 26 only covers cases where the event causing the delay occurs in any of the non-maritime legs.

Second, the loss, damage or event causing the delay must have taken place "solely" in the time-space frame referred. Consequently, cases of sequential (multiple concurring causes) or progressive deterioration, starting within one of the non-maritime legs, but concluding thereafter and onboard a vessel, or, alternatively, starting in the maritime leg, but concluding within a non-maritime stage, are, again, excluded from Art. 26 and remain subject to the liability scheme established by the Convention. The same goes for the cases where the delay is caused by two or more events within different stages of the carriage.

c. Consequences of the application of Art. 26 of the Rotterdam Rules

Where all the above-referred conditions are satisfied, Art. 26 specifies that the provisions of the Convention "do not prevail" over the provisions of other international instruments that meet certain requirements. The meaning of the expression finally included in Art. 26 (part of whose explanation must be sought in the history of the article) suggests that any of the parties can rely on such provisions in the framework of a claim against the carrier (not a maritime performing party) for loss of or damage to the goods, or delay in their delivery, thereby (subject to previous and forthcoming remarks) eliminating the application of part of the liability provisions of the Rotterdam Rules. Although questions relating to the burden of proof and its allocation in this specific context are not expressly solved by Art. 26, under national procedural law the party relying on Art. 26 for resorting to rules other than those of the Convention (be it the carrier defendant or the cargo claimant) would probably have to prove that all the conditions for its application are met. What the chapeau of the article nevertheless implies is that, once such proof is sufficiently satisfied, the provisions of other international instruments, as determined in accordance with Art. 26 RR, would apply.

The said provisions are limited by the three last paragraphs of Art. 26 according to three criteria. First, they must form part of an international instrument that would have applied according to its terms to all or part of the carrier undertakings had the parties (shipper and carrier) entered into a separate contract for the carriage of the goods by the particular mode and the stage of the carriage where the damage, loss or the event causing the delay occurred. The reference made to international instruments is meant to include not only conventions, such as those referred in the first part of this paper, but generally normative instruments with an international character, such as binding instruments of a regional character that might spring up as a consequence of the authority conferred by States with such purpose to regional organizations (European Union, African Union). Given the scope and objective of Art. 26, such instruments are likely to be focused on the contract of carriage by the mode of transport concerned and, it is worth highlighting, include instruments in force by the time the Rotterdam Rules enter into force and instruments subsequent to such entry (that is, future international legislative instruments). The only requisite in this aspect set down by Art. 26 is that the instrument in question would have applied, under the "hypothetical contract" rule, "at the time" the loss, damage or event causing delay took place.

According to the second criterion in letter b of Art. 26, among all the provisions of an international instrument that meets the foregoing features, the ones that may apply are those dealing with the carrier's liability, the limits of liability and the time for suit. These two latter references are quite clear and straightforward; the reference to the carrier's liability, on the other hand, is less precise, although it would certainly comprise the basis of the carrier's liability and the calculation of the damage. Note that these delimitative criteria would determine which of the invoked international instrument provisions would apply and correspondingly which of the Rotterdam Rules provisions would be displaced.

There is and additional and third condition that the rules applicable under Art. 26 must satisfy, which is that such rules, according to the international instrument that they belong to, cannot be modified by agreement of the parties. In other words, any rules complying with all the foregoing requirements won't even so be applicable under Art. 26 to the extent that they lack imperative character according to the international instrument invoked.

An example of how Art. 26 works can be found in Case #2 of the Workshop materials.