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