

Text on RR art 82

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| Emne | Text on RR art 82 |
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| Vedlegg |  Translation November... |

Dear Colleagues,

Thanks for comments to previous e-mails on this list concerning multimodal transports and the Rotterdam Rules. It has been very helpful to see some support for our thinking.

It has taken a while, but now the Danish and Norwegian Maritime Law Commissions seem to agree on the way forward. This agreement will form part of the commented draft implementation legislation on the Rotterdam Rules. The reports are supposed to be submitted in January.

The agreed text is enclosed. As one can see, the idea is that the transport law Conventions should be construed quite narrowly, so that there is no overlap (the German approach). Outside the scope of the Conventions, e.g., for contracts of carriage with no named mode of transport, no mandatory rules are proposed. However, one or the other of the unimodal regimes must be used as gap-filling law. The parties are free to clarify which regime shall be used in this respect.

Under the proposed rules, parties wishing to avoid the mandatory provisions of the Rotterdam Rules could easily do so by agreeing on an unspecified contract of carriage rather than a contract of carriage by sea. As a consequence, the rationale for ratifying the Rotterdam Rules could hardly be said to be the need of protection of the cargo interests. However, uniformity and foreseeability still are good and valid reasons to adopt the rules.

Comments are most welcome.

Best regards and all the best for the Holidays,
Erik

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GENERAL STATEMENTS IN THE TRAVAUX PRÉPARATOIRES ON THE RELATIONSHIP BETWEEN THE RR AND OTHER TRANSPORT LAW CONVENTIONS

- developed at a meeting of the chairpersons and secretaries of the Danish and Norwegian Maritime Law Commissions 22 July 2011
- revised at the Danish-Norwegian Maritime Law Commission Meeting 22-23 November 2011

After the eventual ratification of the Rotterdam Rules, Norway [Denmark] will be bound by four major conventions regulating contracts of transport; the Rotterdam Rules (carriage by sea), CMR (carriage by road), COTIF-CIM (carriage by rail) and the Montreal Convention (carriage by air).

Each of these Conventions has its own scope, which is set out in the Conventions. Obviously, the intention of the implementation legislation is that the Conventions shall be applied within this scope.

The scope of the Rotterdam Rules is set out in [draft § 252]. The scope provisions are linked up with contracts to carry by sea, and not with how the transport actually is carried out.¹ The Commission finds this to be a good approach.

In some cases, the boundaries between the Conventions are not clear.² Thus an international transport of a container by road, sea and road again may be subject both to the CMR and the Rotterdam Rules. It is the view of the Commission that the Conventions must be construed in a way that do not make them contradicting, if necessary by restrictive interpretation. In European practice there is quite a few cases that construe the Conventions so that they do not contradict, e.g., so that the CMR does not apply to multimodal transports unless it is expressly stated, or that it does not apply to contracts of carriage not naming a mode of transport. It has also been submitted that one must consider the character of the transport obligation, so that, e.g., a multimodal contract which includes elements of road transport and sea transport should not be considered an agreement regulated by the CMR at all if the transport or the transport contract mainly have a character of being a sea transport.

Sometimes – even in current law – establishing in advance whether one or the other of the Conventions apply may be uncertain and difficult; e.g., if one does not know whether the goods will be unloaded from the truck during a ferry stretch, which pursuant to CMR Article 2 may be crucial for the application of that Convention. In such cases, one would not know whether to issue a CMR consignment note or a RR transport document. The parties should then act according to their best judgment, and issue documents on the basis of what the person issuing them knows about the transport and the boundaries between the different conventions at current law. If it appears in retrospect that the wrong transport document has been elected, the errors should not be considered to be of consequence.

There will be many situations in practice that at least not directly are covered of the scope of the Conventions, e.g. contracts in which the carrier is free to use whatever mode of transport he opts for.

¹ UNICITRAL Document A/63/17 (2008) para 21 et seq.

² After the November meeting referred to above, two participants have suggested that the agreed text should be amended by replacing this sentence with the following: “There may be situations in which the agreement of the parties is not clear (or where the scope of application of the above-mentioned transport Conventions is not clear).”

The Danish and Norwegian Maritime Law Commissions have discussed how such situations should be handled in international transports.

The main point of view in such situations should be that one or the other set of rules should apply. If there is a contract of transport, the contract should not be considered not to be regulated by legislation. The proposal is founded on this view. An exception may be international transport on fresh water, which however is unpractical [in Norway and Denmark] (and therefore not addressed in legislation). This point of view fits well with existing cases, but it is not clear whether it is the current law.

As one here, on the assumptions, is outside the scope of the international Conventions, there is no obligations to make the rules mandatory for the parties to the contract. In line with the general points of view on mandatory legislation which are explained above in section XXX, it is therefore proposed that the rules are made not mandatory.

At times it may be difficult to determine which set of rules shall be used to supplement the contract of carriage. It would be preferable if the parties clarified which kind of carriage agreement they have had in mind. The courts must respect such an agreement. If there is no clear agreement, other points can provide guidance. The parties may, e.g., have agreed or jointly presupposed that certain documentation should be used. The use of a bill of lading (konnossement) is – at least in Europe – a clear indication that the rules on carriage of goods by sea are applicable, at least if the bill is not a freight forwarder's bill in typical road haulage. Furthermore, the former practice between the parties can provide guidance, and also how this kind of transports usually is carried out and how this particular transport is planned and carried out. On the whole, there is a lot of circumstances that can be considered in a holistic evaluation of what the parties must be assumed to have agreed on which transportation regime shall be applicable as gap-filling law.

In the Rotterdam Rules, Article 82 applies where several Conventions with mandatory rules as a starting point govern the same transport. The Commission finds that Article 82 removes whatever there would have been of conflicts between the RR and other Conventions.

The technique in Article 82 is that it makes an exemption to the application of the RR in the cases in which the Conventions of carriage by road, rail and inland waterways explicitly address transports that also go by sea. The provisions of the Conventions are reproduced in a separate frame. [Not reproduced in this translation.]

If Article 82 gives one of the other Conventions precedence, this applies fully for the entire transport. An effect of this may be that quite similar transports may be governed by different sets of rules, e.g., dependent on whether the goods remain in a truck during a ferry stretch or not. This is an unavoidable consequence of the different Conventions being created at different times and under different circumstances.

If the RR after this are applicable, the other Conventions are still not entirely excluded. Thus, the RR incorporate some of the rules of these Conventions by its Article 26. E.g., the road leg of a transport could be subject to the liability rules of the CMR (pursuant to specific conditions).

See also the special remarks on §§ xxx and yyy.