30. mars 2011
07:56

Subject	
From	Erik Røsæg
To	'nifs-rr@jus.uio.no'
Sent	30. mars 2011 07:55
Attachments	 2682eng

Dear Correspondents,

After the last round of correspondence in the group (http://folk.uio.no/erikro/WWW/RRcorr/), there has been a meeting between the Danish and Norwegian Maritime Law Commissions, hammering out the way forward in respect of the implementation of article 82 of the Rotterdam Rules. The result was a pragmatic compromise, which I have tried to express in the enclosed note. I would very my like to hear any comments or advice you may have.

Best regards,
Erik Røsæg

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Article 82 of the Rotterdam Rules

Draft comments to the implementation legislation
From: Erik Røsæg
To: The Norwegian Maritime Law Commission
Date: 29 March 2011

There is a long tradition that States enter into agreements – treaties – on how the transport legislation shall be. One of the more difficult issues in the RR is therefore the relation to existing conventions on transport law. It is always difficult to create clarity and avoid conflicts with older conventions in this area of law, and it does not become easier by the fact that the RR in principle covers door to door, independent of the mode of transport.
In national law, one resolves conflicts with older legislation by amending the older law, or even by just letting the newer legislation get precedence. This is not a possibility in relation to international conventions. There are no organizations, states or groups of states that have the competence to amend older conventions.

In principle, one could denounce older conventions. However, they have their value, and it would not be appropriate to remove them only to resolve a tiny conflict issue.

In practice, one therefore attempts to adapt newer conventions to the older, so that conflicts are avoided and clarity created. In the RR this frontier has been staked out in article 82. It reads:

> *Article 82 International conventions governing the carriage of goods by other modes of transport*
>
> Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:
>
> (a) Any 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;
>
> (b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;
>
> (c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or
>
> (d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

The provision with travaux préparatoires is capable of being read in several different ways, and must in all events be construed in light of the international development of the law when the convention enters in force (article 2 of the convention). The Danish and the Norwegian Maritime Law Commissions have, however, in close cooperation arrived at a an agreed reading that can cater for the necessary clarity at least until other sources of law eventually emerge, and that can provide the necessary certainty that ratification of the RR will not violate the obligation under older transport law conventions that are not denounced. The RR must presumably under all circumstances be construed in such a way that they do not contravene the obligations under older conventions, as long as one obviously has gone a long way to avoid such conflicts.

Immediately, it appears that the items a through d of article 82 implicitly refer to the explicit provisions of other conventions that they shall also apply within the scope of the RR, namely carriage by sea. These conventions (including amendment conventions, which are explicitly included by article 82) are the conventions that one could imagine could conflict with the RR. The table reflects the provisions of these conventions that are implicitly referred t in article 82:

RR art 82	**Other conventions**
(a) Any 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;	*Convention for the Unification of Certain Rules for International Carriage by Air, 1999* ***Article 38 Combined Carriage*** 1. 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. 2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air. ***Article 18 Damage to Cargo*** 1. The carrier is liable for 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 carriage by air. 2. --- 3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier. 4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the

	agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.
(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;	*Convention on the Contract for the International Carriage of Goods by Road (CMR), 1978* ***Article 2*** 1. 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. Provided that to the extent it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by act or omission of the carrier by road, but by some event which could only occurred in the course of and by reason of the carriage by that other means of transport, the liability of the carrier by road shall be determined not by this convention but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport. If, however, there are no such prescribed conditions, the liability of the carrier by road shall be determined by this convention. ***Article 14*** 1. If for any reason it is or becomes impossible to carry out the contract in accordance with the terms laid down in the consignment note before the goods reach the place designated for delivery, the carrier shall ask for instructions from the person entitled to dispose of the goods in accordance with the provisions of article 12. 2. Nevertheless, if circumstances are such as to allow the carriage to be carried out under conditions differing from those laid down in the consignment note and if the carrier has been unable to obtain instructions in reasonable time the person entitled to dispose of the goods in accordance with the provisions of article 12, he shall take such steps as seem to him to be in the best interests the person entitled to dispose of the goods
(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or	*Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM - Appendix B to the Convention), 1999* ***Article 1 Scope*** § 3 When international carriage being the subject of a single contract includes carriage by road or inland waterway in internal traffic of a Member State as a supplement to transfrontier carriage by rail, these Uniform Rules shall apply. § 4 When international carriage being the subject of a single contract of

	carriage includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, these Uniform Rules shall apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in Article 24 § 1 of the Convention. *Convention concerning International Carriage by Rail (COTIF), 1999* ***Article 24 Lists of lines or services*** § 1 The maritime and inland waterway services referred to in Article 1 of the CIV Uniform Rules and of the CIM Uniform Rules, on which carriage is performed in addition to carriage by rail subject to a single contract of carriage, shall be included in two lists : a) the CIV list of maritime and inland waterway services, b) the CIM list of maritime and inland waterway services. § 2 The railway lines of a Member State which has lodged a reservation in accordance with Article 1 § 6 of the CIV Uniform Rules or in accordance with Article 1 § 6 of the CIM Uniform Rules shall be included in two lists in accordance with that reservation : a) the CIV list of railway lines, b) the CIM list of railway lines. § 3 Member States shall send to the Secretary General their notifications concerning the inclusion or deletion of lines or services referred to in §§ 1 and 2. In so far as they link Member States, the maritime and inland waterway services referred to in § 1 shall only be included in the lists with the agreement of those States; for the deletion of such a service, notification by one of those States shall suffice.
(*d*) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.	*Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI), 2001*[1] ***Article 2 Scope of application*** 2. This Convention is applicable if the purpose of the contract of carriage is the carriage of goods, without transshipment, both on inland waterways and in waters to which maritime regulations apply, under the conditions set out in paragraph 1, unless: (a) A marine bill of lading has been issued in accordance with the maritime law applicable, or (b) The distance to be travelled in waters to which maritime regulations apply is the greater.

The main rule pursuant to article 86 is that when the other conventions pursuant to these provisions are applicable to carriage by sea, they have precedence. They apply to the entire transport. Thus, there is no conflict of conventions.

[1] Norway has not ratified this convention.

The provision only apples when the older conventions pursuant to their own provisions regulate the particular transport. The decisive factor should be which rules the court handling the issue will apply.

The Maritime Law Commission holds that the better view is that when the older conventions have precedence, the RR shall not apply at all. Therefore, one does not have to consider every single provision of the RR in relation to the other convention.

Practically speaking, the need to consider whether the RR are applicable arises firstly during a transport when the transport documents are to be issued. If, e.g., the CMR is applicable, the documents should not be negotiable (CMR article 1(5)) and they should explicitly refer to the CMR (CMR article 6), while the opposite is true when the RR are applicable. It would however not be easy for the personnel issuing the transport documents to apply the provisions referred to above. If the transport at this time is not planned in detail, is it also likely that it is impossible to answer the questions asked by the provisions, e.g., whether the goods will remain on a truck during the sea leg (CMR article 2). I such cases, one should issue transport documents to the best of one's knowledge, but so that one in retrospect should determine which rules apply and apply them regardless of which documentation is issued and regardless of whether the this documentation include a reference to a specific set of rules.

The question is then which conflicts are not resolved by article 82. Is it possible that the ambitions of the older conventions are to regulate transports which include carriage by sea even in cases they to not include specific provisions on this (those rules listed in the table above)?

One example could be the transport of a container from Norway to Italy by ferry across the Oresund. If the container remains on the truck all the way, the CMR takes precedence pursuant to RR article 82 letter b. But what if the container is unloaded at the ferry? The there are at least three possibilities:

1 One can regard this as something different from a carriage by road, namely a multimodal transport, which is not comprised by the CMR.
2 One can consider that only the leg before and after Oresund is comprised by the CMR, but so that the CMR consignment note and the liability for unlocalized damage still apply for the entire transport.
3 One can consider that the entire transport is comprised by the CMR, even if the special liability rule in CMR article 2 does not apply.

In the first alternative the RR can apply unaffected by the CMR, and no conflict arises. In the latter two alternatives both the RR and he CMR will regulate the same transport in a different way, and a conflict arises. This conflict will not be fully resolved by RR article 26. Similar examples can be made in relation to other conventions.

In Germany, the first alternative is preferred.[2] This alternative has not got express support in Scandinavian jurisprudence. On the contrary, here the courts have made use of the older conventions even in multimodal transports, though it is rather unclear whether they have felt that they were bound by conventions when doing so.

[2] NJW 2008, 2782.

RR article 82 is intentionally worded narrowly, so that the conflict alternatives 2 and 3 above are not resolved.[3] It is therefore possible to submit that the convention presupposes that the German view in alternative 1 above is accepted.

The Maritime Law Commission has still not found sufficiently strong reasons to propose an enactment in favor of this kind of reading of the older transport law conventions. It has been pointed out that one, alternatively, can avoid conflicts between conventions by construing the scope of the conventions so that there will be no overlap. When, e.g., the CMR pursuant to article 1 applies to ”every contract for the carriage of goods by road”, this can in some cases be construed so that a multimodal transport with a major element of carriage by sea lose its character of a contract for the carriage of goods by road, so that the CMR will not apply. Conversely, the concept of contract of carriage in the RR could be construed so that it does not include transports where there is a dominant element of carriage by road, see the definition in article 1(1), cf. the scope provision in article 6:

> ’“Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.’

The point must be to construe the conventions so that a contract of carriage either is of one kind or the other, so that conflicts of conventions are avoided.

This kind of resolving conflicts is a possibility. However, it does not harmonize well with statements in the travaux préparatoires of the RR that they may apply even if the sea leg should be relatively insignificant.[4]

The classification of a contract of carriage as a contract of carriage by road, sea etc should be based on an assessment of multiple factors. Important elements in the assessment would be which modes of transport are agreed and which are actually used, and the relative distance of the transport legs of each mode. If the parties in collaboration have clarified what kind of contract they think they have, e.g., by an intentional choice of transport document, this would be relevant. When choosing among different mandatory transport regimes, it s hardly important to prevent circumvention.

One effect of this model of resolving conflicts would be that the scope in which Norway would consider itself bound by the conventions would be far greater than, e.g, pursuant to the German model. One effect of the German model would be that the RR would get the widest possible scope of application; other conventions would only to a small extent conflict with it.

Altogether it seems like one can avoid conflicts with other, older transport law conventions by means of article 82 and harmonizing techniques of construction. Which techniques of construction to be used is a matter for the courts, which must consider the international development of the law in relation to the RR (article 2 of the Rules) as well as in relation to the other conventions. If the German model is preferred, it should be preferred for all the conventions, and not only for some of them.

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3 UNCITRAL document A/CN.9/642 para 230.

4 UNCITRAL document A/CN.9/526 para 244 og A/CN.9/WG.III/WP.32 footnote 29.

From a practical point of view the state of the law would not be ideal, as quite complicated issues would arise even in day to day freight forwarding. The Maritime Law Commission does however find this acceptable in light of the point made above that one, e.g., when issuing documents should be allowed act to the best of one's knowledge without this having the effect of altering the legal situation that would follow from a correct application of the conventions.

From a policy point of view, the attempts to harmonize conventions have caused that quite similar transports would be subject to different sets of rules. A carriage by road from Norway via the Oresund ferry to Italy would thus be subject to the CMR if the goods remain on the truck at the Oresund ferry, but it could be subject to the RR if it is unloaded. There can be no doubts that this is unfortunate; however, it seems to be an unavoidable consequence of the conventions in place.