Erik Røsæg

From: G.J.van der Ziel [gvanderz@xs4all.nl]
Sent: 5. mars 2011 21:34
To: nifs-rr@jus.uio.no
Subject: RE: Correspondence group on the implementation of the Rotterdam Rules

Dear Erik,

If I understand your question well, it is your assumption that there is no guidance in the article 26 and 82 RR in the case that you set out in your example.
Frankly, if your assumption is right (and my understanding of your assumption is right), the drafters of the RR would have done something terribly wrong. Why? Because your example sets out a standard case that the UNCITRAL Working Group had in mind when they drafted article 82 as it stands now. And art 82 should be read that in your example (any of the provisions of the) RR give way to (any of the conflicting provisions of) the CMR for the whole carriage. Let me further explain the intention of art 82 and its application to your example.

(1) The first step is to establish whether there is a conflict of conventions. Both the RR and the CMR apply to certain type of contracts and don't apply (directly) to a certain mode of transport. Therefore, the contract of carriage in question must qualify to fall under the scope rules of the RR (art 1.1, 6 and 7) as well as of the CMR (art 1 and 2). Let us assume that the contract of carriage in your example is so qualified and, as a result, there is such a conflict.

(2) Then, the second step brings art 82 in.

(2.1) First, we have to look at the chapeau. Is the conflicting convention "an international convention ... that regulates the liability of the carrier for loss or damage to the goods"? The answer is yes, the CMR clearly does. It is not a convention relating to, for example, technical vehicle matters or relating to customs matters, but it covers liability matters.

(2.2) Second, and in relation herewith, is the CMR "any of the following international conventions ..."? Again, the answer is yes because under (b) "any convention governing the carriage of goods by road ..." is mentioned and CMR (indirectly) applies to such carriage.

(2.3) Third, we have to look at the restriction that art 82(b) includes, namely the phrase "to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle on board of a ship". This means that the area of conflict of conventions must be in art 2 CMR cases, because the above phrase refers to these cases. Your example is such a case and, therefore, art 82 applies in your example.

(3) The third step, in my view, should look at the effect of the conflict provision. More specifically, the application of art 82 means that "nothing in this convention (*i.e. the RR*) affects the application of any of the following conventions ... (*i.e. the CMR*). This language is the standard language used in UN conventions to express that in case of conflict of conventions the one convention has priority over the other one. The effect hereof is that any of the provisions of the one convention has priority over any of the provisions of the other one. Now it has been established, on the basis of the above, that the CMR applies to the contract of carriage in your example and that the RR do not, also the CMR provisions relating to documents and rights of disposal of the goods of the CMR apply instead of those of the RR.

Going back to your specific questions, because in your example the CMR applies as the only convention (the RR may apply to the subcontract between the carrier and the ferry operator, but that is another matter) the documentary provisions of the CMR will apply to the carriage from Norway to Denmark and not those of the RR.

I do not share your view that this conclusion would mean that the scope of art 82 is so wide that it would the confinement of art 26 to liability matters make rather

meaningless. The priority rule of art 82 is, as far as road haulage is concerned, restricted to art 2 CMR cases only.
In order to illustrate the consequences hereof, let us change your example a bit and assume that the goods are unloaded in Sweden from the road haulage vehicle, carried by sea to Denmark and again loaded onto a truck in Denmark for on-carriage. Now, the carriage is no longer an art 2 CMR carriage but has become a RR carriage in accordance with the RR scope provisions. Under English law, based on the Quantum decision, CMR, ex proprio vigore, might apply to the stretch Norway – Sweden. As a result, if English law applies to the Norway – Denmark contract, a conflict of conventions might arise for the stretch Norway – Sweden. However, this potential conflict is not solved by art 82, because the application of art 82 is restricted to conflicts resulting from art 2 CMR situations. So, under art 82 this potential conflict of conventions would remain. Fortunately, if the case at hand relates to damage to the goods occurred solely on the Norway – Sweden stretch, art 26 will solve the potential conflict in practice. However, if the dispute in question is related to, for example, jurisdictional matters, art 26 will not provide a solution to such potential conflict under English law and neither art 82 does.

Let me finish with two general remarks:

First, the immediate above paragraph may explain why particularly English lawyers have difficulty in understanding art 82. In their perception, the Quantum decision reflects the law and they, in good faith, try to find a solution in art 82 for the resulting conflict between this law and the RR, which article 82, as explained above, does not provide.

Second, the drafters of the RR have not overlooked this English law problem. To the contrary, it was extensively discussed at several occasions. (In fact the Quantum decision was one of the main reasons why, at a rather late stage of the process, the draft of art 26 made the switch to the hypothetical contract system.) The problem, however, is that a convention can’t provide solutions for any problem. In the whole process of making the RR, as many national laws and cases as possible have been looked at and the art of consensus building is always to find common denominators that are legally and politically acceptable for as many countries as possible. As to cases, the yardsticks to take them into account were i.a. whether the decided case was related to typical or to atypical facts and whether the consequences of a decided case were acceptable. The Quantum case felt in the latter category. As explained in my previous email (and in my Uniform Law Review article p. 984/5) the consequences of the Quantum decision are unworkable in sea-road combinations and therefore unsuitable for (practical) incorporation in an international convention relating to maritime (plus) carriage. As a result, the solution for this English law problem is a future adjustment of English law to the RR or, in other words, a reversion of Quantum by an English judge.

I hope that the above responds your question,

Best regards,

Gertjan

-----Oorspronkelijk bericht-----
Van: Erik Røsæg [mailto:erik.rosag@jus.uio.no]
Verzonden: vrijdag 4 maart 2011 9:15
Aan: Erik Røsæg
Onderwerp: Correspondence group on the implementation of the Rotterdam Rules

Dear Colleague,

1 This is the first submission of the correspondence group on the relationship between the Rotterdam Rules and unimodal conventions, such as the CMR. The group is the result of the initiative of the Norwegian Ministry of Justice. My task – as the chairman of the Norwegian Maritime Law Commission – is to draft implementation legislation for the Rotterdam Rules. I hope that the exchanges in the correspondence group can provide some

clarity in respect of issues that now seem rather obscure to me, and that the correspondence group can be of similar help to others.

2 The relationship between the Rotterdam Rules and unimodal conventions, such as the CMR, is dealt with in articles 26 and 82 of the Rotterdam Rules. For my part, I see no noteworthy problem with these provisions as far as they go. On certain conditions, article 26 allows provisions of other international instruments in respect of carrier's liability, limitation of liability and time for suit to prevail except on the sea leg of the transport. And if the unimodal convention applies on the sea leg by virtue of rules such as article 2 of the CMR, then article 82 of the Rotterdam Rules will still to some extent let the unimodal convention prevail. The unimodal convention may, however, refer back to the Rotterdam Rules. This is to some extent the case with article 2 of the CMR.

3 The texts of these conventions can be found, inter alia, at <http://folk.uio.no/erikro/WWW/cog/cog.html>.

4 The problem I experience when drafting implementation legislation concerns the relationship between the Rotterdam Rules and unimodal conventions, such as the CMR, when there is no guidance in articles 26 and 82 of the Rotterdam Rules. How should such situations be dealt with?

5 One example is the following:

6 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.

7 I would be very grateful if someone please could explain to me how the Rotterdam Rules deal with this issue.

Yours sincerely,
Erik Røsæg

--

++
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

++