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Recent Developments in Maritime Law: a Multi-Jurisdictional Perspective – Poland

Regulations concerning the carriage of goods by sea in the Polish Maritime Code – de lege ferenda

Dear All – Colleagues and Friends.

The Polish Maritime Law, in a broad sense, comprises the whole body of legal norms governing relationships incidental to the use of the sea and to exploitation of its resources.

One of the most important parts of this legislation is the Polish Maritime Code of 1961 (in the recently amended uniform version of 2009, with its subsequent amendments).

In conformity with the tradition of the commercial codes of Continental Europe (such as in France or Germany) – the provisions of the Polish Maritime Code mainly govern the private–law relationship. In other words, the Maritime Code contains provisions concerning the various institutions which, at time of its enactment, were traditionally considered as belonging to the law of merchant shipping.

Similarly to the maritime legislation of other nations, the Maritime Code is subject to the same influences from the international maritime legislatures gathered around the system of the United Nation bodies (such as, the International Maritime Organization, the International Labour Organization, the United Nations Conference of Trade and Development, etc.) and, on the other hand, owing to Poland's geopolitical location, Polish legislation has been subject to more and more powerful and comprehensive influences from the European Union's law.

In 2007 the Polish Prime Minister appointed a twelve-member Maritime Law Codification Commission. The Commission, made up of the most prominent scientific representatives of the world of seamanship, is tasked with thoroughly remodelling the provisions of the Maritime Code, taking into account the most recent international legislative trends.

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The scope of the work undertaken by the Codification Commission goes far beyond the time frame of this address. In connection with the foregoing, I will limit myself to one aspect only of the ongoing legislative activities: a reform to the regulations concerning the carriage of goods by sea, including the aspect of multimodal transportation.

To put it as concisely as possible, the current regulations of the Maritime Code concerning the carriage of goods by sea are a legislative hybrid of two sources:

1) regulations under German law, which date back to the early 1900s. with consideration given to Polish law institutions; and

2) the Hague-Visby Rules along with the 1979 SDR Protocol.

Based on the influences of German legislation, a division of carriage contracts into a voyage charter and a booking contract was adopted.

The Hague-Visby Rules have given shape to the principles of carriage and liability with regard to the carriage of goods based on a bill of lading.

The Codification Commission was faced with the key problem of how broad the scope of amendments should be, given the substantial operational, documentary and legislative changes in the contemporary international sea trade.

It is to be remembered that in 2008, during the course of the Commission's work, the new UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea – referred to as the Rotterdam Rules, was adopted.

The Commission was then faced with a serious dilemma. That is, whether to base these new provisions concerning carriage of goods upon an international convention not yet in force (on the assumption it will come into force), or to continue to base the contents of the Maritime Code on the Hague-Visby Rules enriched with selected aspects of the new Rotterdam Rules.

A series of formal and material reasons called for a radical approach that envisaged a thorough replacement of the then provisions of the Maritime Code by new ones in order to implement, *in extenso*, the Rotterdam Rules.

Merely by way of example, those reasons include:

1) the fact that Poland was one of the twenty signatories to the Rotterdam Rules (and accordingly it would be highly probable that in the near future the Convention will be ratified);

2) if and when the Rotterdam Rules enter into force, pursuant to Art. 89 of the Rules, it would be necessary *ex lege* to denounce the Hague-Visby Rules

(which, in practice, would revoke a significant part of the Maritime Code then in effect);

3) the attraction of the new Rotterdam Rules containing, *inter alia*, solutions for e-documents and multimodal carriage of goods – both key areas for all modern maritime legislation relating to the carriage of goods.

The primary doubt undermining the legitimacy of the radical approach arose from whether the Rotterdam Rules would enter into force as an instrument of international law in a foreseeably short period of time and, as equally important, whether they would gain enough approval to take precedence over the Hague-Visby Rules in international sea trade.

The doubts raised above, in turn, suggested the abandonment of such a radical legislative adventure in favour of a smoother form of change to the Maritime Code, namely a hybrid form, incorporating preselected provisions of the Rotterdam Rules into the current Hague-Visby-based Maritime Code.

In the Codification Commission I was entrusted with the role of Leading Counsellor in charge of this part of the legislation project.

After a thorough and comprehensive analysis, many studies and consultations, I have recommended that the Commission adopt the more radical approach. I have concluded that there are reasons for the Rotterdam Rules to be, sooner or later, a worthy successor to the Hague-Visby Rules, and that this will come about not only through the fact of their direct coming into force and being adopted by numerous countries, but indirectly by the impact of those new Rules on national legislations of many countries as well.

The Codification Commission has been kind to share my view in this respect and has granted its authorisation to prepare relevant draft provisions.

The Polish system of maritime law, embedded in a broader context of the continental civilness prevents one, in principle, from adopting the legislative technique, which is employed in the U.K. or the U.S.A., consisting of the incorporation of the full text of a given international convention / regulation as an appendix to an enactment of a local law as done with USA COGSA 1936 or UK COGSA 1971.

Although the topic exceeds the scope of this speech – I will outline two, significant, examples of the principal incompatibility between the Polish legal system and the legal order under the Rotterdam Rules.

The Rules build their entire structure (in the area of rights and obligations of a party to a contract of carriage) on the three types of shipping documents:

1) non-negotiable transport documents (e.g. – sea waybills);

2) non-negotiable transport documents requiring surrender (e.g. – straight B/Ls); and finally

3) negotiable transport documents (classical B/Ls).

The Polish legal system distinguishes between two types of shipping documents only:

1) negotiable transport documents (which includes classical B/Ls and straight B/Ls); and

2) non-negotiable transport documents (which cover any other transport document whatsoever).

For the needs of Polish law this principal difference alone requires much remodelling of, *inter alia*, essential parts of the Rotterdam Rules such as "Delivery of the goods", "Rights of the controlling party", or "Transfer of rights".

Even more problematic is the issue of regulating the rights and obligations of the "consignee" (or "holder" in the case of a Bill of Lading contract) and therefore the legal issue of a third party to the contract of carriage.

Fundamental to the English legal system is the doctrine of "privity of contract", in accordance with which a third party (a consignee or holder) cannot be subject to contractual provisions to which it did not agree. There have been exceptions to this doctrine in the form of, *inter alia*, statutory intervention (e.g. The Bills of Lading Act 1855 or Carriage of Goods by Sea Act 1992) etc.

The Rotterdam Rules follow a similar principle (e.g. Art. 58 – "Liability of holder" or Art. 41 – "Evidentiary effect of the contract particulars" or "rights of the controlling party" etc.).

The problem is that the Polish system of law provides an entirely different remedy to the "privity of contract" problems. That is, a civil law institution which is very well known elsewhere, such as Germany, named "*pactum in favorem tertii*". In accordance with an Article 393 of Polish Civil Code:

> *§ 1. If it has been reserved in a contract that the debtor would render performance for the benefit of a third party, this party, unless contract provides otherwise, may demand directly from the debtor that the performance be rendered.*
> *§ 2. A reservation as to the duty to render performance for the benefit of a third party may not be revoked or changed, if the third party has declared to either of the parties that he would like to make use of the reservation.*
> *§ 3. The debtor may raise defences arising from the contract against a third party as well.*

This institutional difference between the so called common law approach and the continental approach to third parties' rights in contracts of carriage has significant implications in the case of regulations relating to, for example, delivery of the goods – exercise and extent of right of control, variations to the contract of carriage etc.

Once again, we are forced into the process of preparation of this part of the Polish Maritime Code, to depart from the strict terms and wordings of the Rotterdam Rules, applying instead the formal solution binding in Poland's Civil Law. On the other hand we also have to be very careful not to cross the thin border between strict adherence to the Polish legal system and the merits of the Rotterdam Rules.

Despite the aforesaid, and a number of other problems, the legislation work is progressing vigorously. A full draft of the new part of the Maritime Code, concerning the carriage of goods wholly or partly by sea, closely based on the Rotterdam Rules, has been completed and is currently undergoing thorough consideration and scrutiny.

I expect that it will a major revolutionary effect on the Polish system of maritime law, so much braver that it not only significantly differs from the actual legislative shape of the Maritime Code, but as equally important, it will be based on regulation that has not yet become a binding instrument of international law.

Everybody who has gone to sea is not unfamiliar with the feeling of an adventure and a challenge that are inherent to shipping. The Polish legislative thought has just set off on such a new voyage, full of intellectual threats and completely new doctrinal and jurisdictional areas.

By way of a metaphor to the popular saying "Navigare necesse est" we would say: "Leges est necesse" – to sail is necessary for life as well as is codification of the relevant law.

Thank you for your kind attention.

Marek Czernis