Estonia at a Crossroad: are the Newly Emerging Rotterdam Rules Acceptable in Maritime Law?

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Estonians have been a sea-going nation for ages, and have their own Vikings similarly to other nations around the Baltic Sea. The oldest sea-going boat of Bronze Age with length of 7,5m, width of 2,5m and mighty bow, found at at Sõrve peninsula of Saaremaa (island Ösel) is 2700 years old.[1] Estonia with land territory of 45, 228km2 and population of 1,34 million has over thousand islands and overall coastline about 3793km (incl. mainland territory of 1242km). It has several good ports with annual turnover around 50mln tons (mainly transit cargo) and 7 mln passengers. Due to some reasons the Estonian Ship Registry is today not so popular for bigger vessels as the Registry of Bareboat Chartered Ships at the Estonian Maritime Administration.[2] There are no more state owned shipping companies left since privatization of 70% of shares of the Estonian Shipping Co Ltd. in summer 1997 (it had 82 vessels with deadweight over 500,000 tons, but has lost considerably its weight in economy today). The biggest private shipping company today is Tallink Ltd. engaged mainly in passenger and ferry traffic from Tallinn to Helsinki and Stockholm and after acquisition of Silja also between Finland and Sweden. Roughly speaking maritime related businesses generate about one fifth of Estonia`s GDP.

Estonia has ca 36 registered ports with total annual turnover around 50 mln tons of cargo. The biggest Port of Tallinn as a group comprising of 5 separately located ports had in 2009 turnover of 31,5 mln tons of cargo (transit cargo around 85%; 79% is shipped from Russia) and 7,26 mln passengers (417,000 cruise pax incl). There are more than 12,000 people engaged in cargo handling and service operations in the Port of Tallinn.[3] It`s main component – Port of Muuga with depth up to 18m is building up the biggest container terminal in Estonia capable to handle 1,0 mln TEU by the end of 2010 and 3,0 mln TEU after some years. There are good perspectives to become an excellent container HUB, negotiations are going on about co-operation with port of Ningbo in China.[4]

The importance of the Rotterdam Rules signed by 19 countries in September 23rd, 2009[5] for Estonia seems to be obvious from point of view of its geographical position as well as of transit cargo volumes and container handling capacity build up. Nevertheless we have followed the Scandinavian approach in maritime law up to now the most decisive for Estonia in order to become a Party to the Rotterdam Rules will be how well these rules of imperative nature in international carriage of cargo by sea, whether wholly or partly, with no reservations accepted will be received by the biggest container trading/transporting nations in the world. It is self understood that being a link in "door to door" service and maritime liner services Estonia has to be flexible and adapt well to new developments in international rules of transport and of maritime transport especially.

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1 See: Edgar V. Saks, *The Estonian Vikings.* 2nd edition, Boreas Publishing House: Cardiff, 1985, at 8-39.

2 Shipping business in Estonia has to borrow money in Western Europe because of good lending capacity and considerably lower margins but these banks are conservative ones and prefer in their commitment letters to request the primary registration of ships and mortgages elsewhere.

3 See: Ain Eidast. Meretranspordi kommertseksploatatsioon. Eesti Mereakadeemia. Tallinn, 2007, pp.12-13.

4 See: www.ts.ee.

5 The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea(designated as "Rotterdam Rules") received in 23rd of September 2010 in Rotterdam 19 signatures (Congo**, Denmark, France**, Gabon, Ghana, **Greece**, Guinea, **Netherlands**, Nigeria, **Norway, Poland**, Senegal, **Spain**, Switzerland, Togo, **United States**, Madagascar, Cameroon and Armenia). Next month Niger and Mali joined the signatories. 20 ratifications or accessions are needed for the Convention to enter into force.

In present article the author is reluctant to comment on the legal content of these Rotterdam Rules but rather emphasizes on the questions of applicability of this convention and necessary changes in law it will bring.

Carriage of cargo by sea regulated in Estonia

Shortly after the Republic of Estonia regained its independence in August 20th, 1991 the Merchant Shipping Code combining in a soviet way public and private law norms together and having extremely low limits of liability for a carrier was passed in early December. By 2002, fundamental changes in Estonian private law were carried out and there arose as obvious need to replace this Code with a modern law. The Merchant Shipping Act[6] (hereinafter –MSA) was adopted in June 5th, 2002 and entered into force in October 1st the same year.[7] It is worth of mentioning that Estonia has withheld accession to both international conventions establishing first the Hague/Visby/SDR rules[8] and secondly the Hamburg rules[9] in carriage of goods by sea which both should to be denounced according to the Rotterdam Rules. MSA has actually incorporated into Estonian private law the principles and norms of the Hague/Visby/SDR rules as well as added from Hamburg rules the liability of the carrier for the late delivery of goods.[10] MSA has to be implemented mandatorily in cabotage – in the event of carriage between ports in Estonia the contracting parties shall not agree to apply the law of another State. Generally speaking there is a freedom of contract in foreign trade - the contracting parties may upon agreement deviate from MSA unless it is expressly provided by law or it arises from the nature of a provision that deviation from this Act is prohibited.

Before MSA has been adopted the legislator passed in September 26th, 2001 the Law of Obligations Act (hereinafter – LOA; as amended and with the latest version valid since 26.02.2010) containing 1068 paragraphs and which applies as the general legal act to all contracts regulated by law, other contracts which are not in conflict with the content and spirit of the law as well as for obligations which do not arise from a contract Liability in tort). The Chapter 42 of LOA is devoted to the contracts of carriage by any means of transport and its Division 1 (§§ 774-823) to the carriage of goods and Division 2 of this chapter regulates contracts for the carriage of passengers (§§ 824-853). Interest of this paper goes to Division 1 which is divided into 3 Subdivisions as follows: 1) General provisions for contract of carriage of goods; 2) special provisions for removals and 3) special provisions for multimodal transport.

While in carriage of passengers this Division 2 has residual importance to binding international conventions and special laws like MSA[11] then for carriage of goods the first paragraph of Division 1, § 774 (3) makes MSA and binding maritime conventions completely *lex specialis* as it is prescribed that "the provisions of this Division do not apply to the carriage of goods by sea." But this is actually true for maritime transport if it is the sole mode of transportation.

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6 § 2 of the Merchant Shipping Act of 2002 states: „*For the purpose of this Act, merchant shipping is deemed to be an activity which is related to the use of ships for the carriage of cargo, passengers, luggage and mail, for the survey and extraction of the living and other resources of the sea and the mineral resources below the seabed, for ice breaking, towage and salvage operations and for other lawful* purposes."

7 The Merchant Shipping Act as amended and with the latest version in force since January 1st, 2009 see in: *Riigi Teataja* (RT) I 2002, 55, 345.

8 The International Convention on Unification of Certain Rules of Law relating to Bills of Lading, done in Brussels , 25 August 1924, amended by Protocols in 1968 and 1979 (SDR) – see: M.Bundock. Shipping Law Handbook. Lloyds of London Press 1995, pp. D-1 – D-16.

9 The United Nations Convention on the Carriage of Goods by Sea, done at Hamburg, 31 March 1978, see: ibid., pp. D-16 – D-28.

10 See in § 30 (3) of MSA. Actually this liability of the carrier for exceeding the contracted time of delivery of goods and causing damage was first set up to the limit of 3 times of the freight. This was later argued and lobbied by shipping industry and changed by the legislator in 2003 to the limit of single freight only.

11 § 824 (3) of LOA prescribes that "the provisions of this Division apply to the carriage of passengers by air or sea only in so far as this area is not regulated otherwise by law or an international convention binding on Estonia."

However there is completely different picture in cases of multimodal transport of goods which could also include a sea link and is especially prescribed for in Subdivision 3 "Carriage Using Various Modes of Transport" (§§ 818-823) of Division 1, Chapter 42 of LOA and called as "combined carriage". A uniform legal framework governing the multimodal transport of goods in Estonia, together with Germany and Netherlands, according to Dr.iur. Urmas Volens is one of the few exceptional countries that have managed to create a uniform set of rules dealing with the multimodal transport contract in the law. If at all, in most countries usually only few fragmentary and divergent provisions are found.

According to § 818 of the LOA the contract of combined carriage of goods is a contract of carriage of goods whereby the carrier (combined carrier) binds himself towards the consignor, in one single contract, to the effect that carriage will take place in part by sea, air or land and using different vehicles. This means that two features are characterizing a contract of combined carriage in Estonian law: (a) carriage of goods is performed under one single contract and (b) different means of transport are used.

The provisions of §§ 818-823 of LOA are applicable only when according to the private international law rules the Estonian law shall be governing the whole contract of combined carriage. That is determined by the regulations of § 809 subsection (3)[12], § 865 subsection (3) LOA and §§-s 32-33 of Private International Law Act.[13] If according to the above described provisions Estonian law is applicable, the §§-s 818-823 LOA only apply to a contract, when there is no conflict with a special regulation of an international convention that Estonia has become a Party. As the United Nations Convention on International Multimodal Transport of Goods is neither acceded nor ratified by the Republic of Estonia, only regulations of the conventions applicable to the unimodal transportation can come under the question. Those regulations are Art. 2 section 1 of Convention on the Contract for the International Carriage of Goods by Road[14], Art. 2 § 2 of Convention concerning International Transport by Rail[15] and Art. 1 § 3, 4 of the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, forming Appendix B to the last mentioned Convention[16] and Art 18, § 3 and Art 31 of Convention for the Unification of Certain Rules Relating to International Carriage by Air.[17]

The choice between the "uniform" or "network" system of liability has been the key issue also in the context of establishing the liability of the multimodal transport operator in the LOA. Estonian legislator, similarly to German and Netherlands, has made the principal decision in favour of the "network" system. Thus, making the general provisions of the 1st Subdivision of the Division 1, Chapter 42 of LOA on the contract of carriage applicable to cases of non-localized damage where the place of the occurrence of the loss or damage is not known, while in cases of localized damage the

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[12] § 809 (1) and (2) of LOA are listing several provisions related to the liability of mandatory nature which according to (3) shall still apply if both the place where the carrier accepts the goods and the place of delivery of the goods are in Estonia nevertheless a law of a foreign State applies to the contract of carriage.

[13] RT I 2002, 35, 217; 2004, 37, 255; For the text in English see: http://www.legaltext.ee/text/en/X30075.htm

[14] RT II 1995, 3, 12; For the text in English see: http://www.unece.org/trans/conventn/cmr_e.pdf .

[15] RTII 2004, 13, 52; For the text in English see: http://www.unece.org/trade/cotif/cotif02.htm#I3.

[16] RTII 2004, 13, 52; For the text in English see: http://www.unece.org/trade/cotif/cotif09.htm#Appendix%20B.

[17] RTII 1998, 2-4, 7. For the text in English see: Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929. http://www.jus.uio.no/lm/air.carriage.warsaw.convention.1929/doc.html. Within the European Union, the Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents (*OJ L 140 , 30/05/2002 P. 0002 – 0005;* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002R0889:EN:HTML*)*, which incorporates the Montreal Convention to the acquis, applies.

liability of the carrier is to be governed by the legal provisions applicable to the specific mode of transport during which the damage occurred.

In Maritime business Estonia has by 1 May 2010 acceded to or ratified 39 IMO conventions or Protocols to them as well as some of the CMI conventions and made those as part of its national law.[18] Among those conventions are the following:

- *The International Convention on Salvage*, signed in London, 28 April 1989;
- *The International Convention on Arrest of Ships*, signed in Geneva, 12 March 1999;
- *The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea*, known as PAL 1974, signed at Athens, 13 December 1974 together with the Protocol of 1976;
- *The Convention on Limitation of Liability for Maritime Claims*, known as the LLMC 1976, signed in London, 19 November 1976;
- *The International Convention of Civil Liability for Oil Pollution Damage*, known as the CLC 1969, signed in Brussels, on 29 November 1969 and amended by the IMO Protocol of 1992, which has been done in London, on 27 November 1992;
- *The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, known as Fund Convention 1971, signed in Brussels, 18 December 1971 and amended by the IMO Protocol of 1992, which has been done in London, on 27 November 1992;
- *The International Convention on Maritime Liens and Mortgages*, signed in Geneva, 6 May 1993;
- *International Convention on Civil Liability for Bunker Oil Pollution Damage*, done in London, 23 March 2001.

Estonia has not acceded to the maritime conventions (called usually) neither to the *Hague*, the *Hague-Visby/SDR* nor to the *Hamburg* Rules preferring to leave in the regulation of carriage of goods by sea maximum freedom of contract to the parties, except some imperative legal norms in MSA which are mainly related to the prohibition of adding any other than prescribed causes of damage releasing the carrier from liability or lowering the prescribed limits of liability of the carrier and mandatory application of the MSA in cabotage carriage. York-Antwerp Rules have been incorporated into MSA by reference in § 122 (2 and 3) without citing any year of adoption. Therefore one could conclude that the latest version adopted by CMI in 2004 at the conference in Vancouver is valid in Estonia today. Application of York-Antwerp Rules is not obligatory and there is provided that the contract of carriage or P&I cover of the carrier could stipulate otherwise.

The *Rotterdam Rules* as a comprehensive and not so easy to read 17,000 words[19] peace of legal art aiming at promoting uniformity in its application and the observance of good faith in international trade have not yet been considered by the Government in Estonia. Keeping in mind the imperative nature for international carriage of goods by sea, whether wholly or partly, and scope of application of the Rotterdam Rules that any kind of charter parties and other contracts for the use of a ship[20] or of any

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[18] See IMO webpage www.imo.org under „Status of Conventions by country".

[19] Compare to 3200 words of the Hague/Visby or 8400 words of the Hamburg rules.

[20] The Law on Maritime Property Act of 2002 (LMPA), §§ 3 and 69-71 provides also for usufruct as a right and security on a ship which has to be registered on basis of a notarized contract like maritime mortgage. The ranking between an usufruct and a maritime mortgage is determined by the date the entries are made. A right entered on earlier date has a preferential right, and rights entered on the same date have equal ranking. If there is different ranking determined this has to be entered in the register of ships. Actually § 71 of LMPA sets restrictions on usufructuary of a sea-going vessel – he, she or it shall comply at least with one of the requirements prescribed in §§ 1 and 2 of LSFRSA (be entitled to fly the Estonian flag). This right – usufruct – has practically not been implemented thus shipping community is using the chartering of the vessel.

space thereon are out of application as well as multimodal carriage of goods without any sea link, the Rotterdam Rules could not claim to be the only set of rules applicable in Estonia. However it will be surely in the economic interests of Estonia to have the possibility of implementation of the Rotterdam Rules and respective presence in our civil law. Maritime community in Estonia welcomes these situations where either place of receipt, port of loading, place of delivery or port of discharge as precondition for the Rotterdam Rules to apply will be contracted within our country.

In conclusion, these, the MSA and LOA are the two pieces of law which have to be properly revised in order to adapt to the application of the Rotterdam Rules in Estonia. Of course in case while these Rotterdam Rules becomes *de lege lata* for the international trade of the world.