



SPLENDID ANNIVERSARY OF THE 30 YEARS OF VERY FRUITFUL ACTIVITY OF THE COMMISSION OF MARITIME LAW OF THE POLISH ACADEMY OF SCIENCES, GDAŃSK BRANCH

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RESUMEN: Durante los 30 años de actividad de la Comisión de Derecho Marítimo polaca se publicaron 30 volúmenes de su anuario científico "Prawo Morskie" (Derecho marítimo), única revista de ese ámbito en Polonia, que recogen más de 170 artículos de gran utilidad teórico-práctica para legislar. En el volumen 27 (2011) se han publicado estudios y artículos entre los que destacan algunas enmiendas del Código Marítimo polaco de 2001, el conflicto de legislación en el derecho internacional del transporte marítimo, la vigilancia marítima en la ley marítima integrada y la política pesquera de la Unión Europea, la protección del medio marítimo, etc. También sobre el Mar Báltico, que fue objeto de disputas de zonas y ámbitos tanto entre Polonia y Dinamarca como entre Polonia y Alemania en sus relaciones marítimas. Además vieron la luz trabajos sobre la co-dependencia entre los reglamentos náuticos y de navegación aeronáutica en el derecho y la política internacional o la controversia del pasaje del Ártico en las relaciones entre Canadá y Estados Unidos.

PALABRAS CLAVE: Derecho marítimo, Derecho del mar, Código marítimo de Polonia, Reglas de Rotterdam, Protección del medio ambiente marítimo, Supervisión marítima y la política pesquera de la UE, Mar Báltico, Co-dependencia entre la normativa náutica y de aviación, Controversia de pasaje ártico.

ABSTRACT: During the 30 years' activity the Polish academic Maritime Law Commission issued 30 volumes of its scientific yearbook "Prawo Morskie" (Maritime Law) as unique one in Poland collecting a set of more than 170 articles both of theoretical and practical utility also for state's legislate works. In the 27th volume (2011) have been published studies and articles i.a. on: some amendments of the Polish 2001 Maritime Code: the Hague-Visby Rules, Hamburg Rules and Rotterdam Rules; conflict of laws in international maritime transport law; the maritime supervision in integrated maritime law and fisheries policy of the European Union: maritime environment protection: the Baltic Sea disputed zones both in Polish-Denmark and Polish-Germany maritime relations: co-dependence between nautical and aviation regulations in international law and policy; the northwest Arctic passage controversy in Canada-USA relations.

KEY WORDS: Maritime law, Law of the sea, Polish maritime code, Hague-Visby Rules, Hamburg Rules, Rotterdam Rules, Maritime environment protection, Maritime supervision & fisheries policy of the EU, Baltic Sea disputed zones, Co-dependence between nautical and aviation (air law) regulations, Northwest Arctic passage controversy.

1. Introduction

This Commission is oldest one within this Gdansk Branch, as well as largest in number of its members and most merit in its regularity of scientific activity and publications, as special yearbook "Prawo Morskie" (Maritime Law), one and only and unique in Poland. Have been issued 27 volumes and supplementary 3 volumes with selected sources of maritime law.

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The Commission is headed by professor Mirosław H. Kozinski. As the first President of this Commission during many years acted Professor Janusz Gilas. The Commission gathers as its life members a lot of the Polish eminent scientists and experts in complementary assessment of topical issues both in maritime law and the public law of the sea. During a few dozen of the plenary sessions, conferences and other meetings of the members of the Commission have been presented and discussed more than 170 scientific papers both of theoretical and practical public utility also for legislative works. Commission's activity is a significant source of inspiration to the real creativity of many lawyers, also this from young generations in the maritime law research.

Professor Mirosław H. Kozinski is editor-in-chief also of the 27th volume of the yearbook "Prawo Morskie" (Gdańsk 2011, 454 pages) with inclusion of his occasional introduction and 19 articles, 8 informations and materials and 2 reviews in maritime law as well as the law of the sea. Because of this special occasion there is a need and reasonable to discuss topical issues of these articles.

2. The first part of the sample of articles in this yearbook is situated in the topical maritime law issues

On the principles for a new maritime code of Poland discusses Professor Jerzy Młynarczyk, a preeminent scholar in the field of maritime law. His approach stresses the need for co-ordination of efforts between Legislative Commission for Civil Law and Legislative Commission for Maritime Law. The notion of closeness between these two branches of law was contemplated among Polish scholars by Jan Łopuski in 1965. The new code should include now widespread comparative legal studies, and take into account the process of gradual merging between common law systems of maritime law and civil law (continental law) systems of maritime law, while US maritime legislation remaining distinct.

In the article have been reviewed the 2001 Maritime Code amendments, including General Provisions and Title II (Vessel). The Author promotes new regulation of maritime lien as a distinct *ius ad rem*, specific to the maritime code. In his opinion the Rotterdam Rules are an unsuccessful attempt to replace the Hague-Visby Rules and their nearly one hundred year old tradition.

Selected problems of new regulation on carriage of goods in Polish maritime law have been discussed by Professor Mirosław H. Kozinski in the article which concerns law on maritime carriage of goods, and incorporation of international standards into the new Polish maritime code. The Author discusses development of those common standards, including the Hague-Visby rules (1924/1968), Hamburg Rules and Rotterdam Rules (2009). The focus however is on a unique feature of Polish domestic law, often referred to as hybrid approach, due to its character of legal norms originating from different conventions.

The Author proposes an introduction of a dedicated chapter on carriage of goods into the new code. The proposal merges existing regulation, based on the Hague-Visby model, with new solutions derived from the Hamburg Rules and, the Rotterdam Rules. Particular emphasis is being put on a common but unregulated practice regarding volume contracts. The Author argues for

incorporation of volume contract into the new code. In this article have been examined Rotterdam Rules' provisions regarding jurisdiction and arbitration.

The issue: "Lex Americana and the Rotterdam Rules" presents Marek Czernis as an expert on United States' maritime (admiralty) law and on "American legislative process". The Rotterdam Rules, or the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partially by the Sea, drafted by the UN General Assembly on 11 December 2008 (Resolution 63/122), create a new legal order on affreightment and thus aim at replacing the Hague Rules, the Hague-Visby Rules and the Hamburg Rules.

The Author argues that the dominant legislative contribution to this is draft is American. The United States have amended their own maritime law and, internationalized some of its content. If the US ratification process is completed within the next 2 years, the USA, representing 25% of the world's overall tonnage, shall be the game-changer in international law on carriage of goods by the sea.

Professor Maria Dragun-Gertner discusses the issue of transport documents in Rotterdam Rules. The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partially by the Sea (the Rotterdam Rules, 2009) as intended to make exclusive use of electronic transport documents. Transport documents, as the Author points out, are negotiable.

Drafting of the Convention was set in motion 1996 in the Committee Maritime International (CMI), and from 2002 its development continued under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). The Rules may advance application of electronic negotiable instruments in present day trade – according to the Author's opinion.

"Nautical fault defense deletion from the Rotterdam rules and the Tasman pioneer case" is the subject of article by Rafał Malujda.

An exemption from damage arising from an act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of a ship, commonly referred to as the nautical fault defense, was included in the Polish Maritime Code 1961 and continues to be valid under the new Maritime Code 2001. The Author argues that this concept is outdated and should be give up. His analysis of Polish and overseas case law – most notably the *Tasman Orient Line CV v NZ China Clays Ltd & Others* (2009) NZCA 135 (the Tasman Pioneer case) – lead him to opinion that the deletion of the nautical fault defense from the Rotterdam Rules is a positive development, thus making the Rules a modern piece of legislation, well adapted to the present international law on international carriage of goods.

Krzysztof Kochanowski discusses issue: "Arrest of vessel and judgment execution against vessel. Remarks *de lege ferenda*". The Author of is article analysis of regulation on arrest of vessel and related issues of execution of judgments against vessel. The Author discusses Polish Code of Civil Procedure 1964, International Convention Relating to Arrest of Sea-Going Ships (the Brussels Convention 1952), to – which Poland is party, and International Convention on the Arrest of Ships (the Geneva Convention 1999), not yet in force. He criticizes Polish judicial authorities' conduct regarding arrest of vessel and calls for incorporation of its regulation into the Polish

maritime Code. His 9-point proposal is far-reaching and may prove valuable for future legislation.

Zuzanna Peplowska-Dąbrowska presents: “International regime of liability for oil pollution damage and the oil pollution act”. There are two separate regimes of liability for oil pollution damage: the international regime, which is based on multilateral conventions, and the autonomous United States regime. After the US Administration’s decision to withdraw from the international system (1989), the US Congress enacted the 1990 Oil Pollution Act (OPA), as a public demand for stringent regulation of oil pollution damage to marine environment. The OPA allows states to enact laws that would furnish greater protection to the injured parties than federal law.

The US criticizes the international regime due to its low liability limits and exclusion of environmental damage. There are differences between the US regime and the international one. The OPA has a wider scope as it covers also oil spilled from facilities and bunker oil spills. The US legislation offers superior protection to the injured as it adopts a wider definition of oil pollution damage. The Author argues, the OPA embodies the polluter pays principle (PPP) to a greater extent than the international system.

Zużewicz-Wiewiórowska discusses issue: “Conflict of laws in international maritime transport law”. Unification of laws on carriage of goods by sea on the international plane is likely the most sensible way to avoid conflict of laws and conflict of jurisdiction. Application of conflict-of-law rules may still be inevitable.

Since 17 December 2009 the primary source of conflict-of-law rules has been Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). This Regulation prompted a major reform of Polish private international law; the new law was enacted on 4 February 2011 and entered into force on 16 May 2011. The flag of the vessel is no longer relevant as a potential connecting factor in shipping contracts.

Topics of Paweł Krażel – article is “Unification of European transport law and the Rotterdam rules”. The Commission of the European Union has endeavored in recent years to create a regional European system of transport law, that would not affect unimodal transport contracts and their respective conventions. The key issue is relationship between such system and those conventions and, also the Rotterdam Rules. In Resolution of 5 May 2010 on strategic goals and recommendations for the EU’s maritime transport policy until 2018 (2009/2095 (INI)), The European Parliament calls for speedy signing, ratification and implementation of the Rotterdam Rules by the EU member states.

The opponents of the Rotterdam Rules point to their conflict with unimodal transport conventions. The new system devised in that Convention allows for co-existence of unimodal systems while providing a sound replacement of outdated maritime regulations.

3. The second part of the sample of articles published in 27th Volume of the yearbook “Prawo Morskie” contains selected but of most contemporary significance issues on the law of the sea and policy, from the global, European and Poland’s perspective

As the first one is discussed by Justyna Nawrot issue of the maritime supervision in integrated maritime law and policy of the European Union. The

key role for maritime supervision envisaged in the new integrated maritime policy of the European Union is safety at sea and maritime border control of the continent. The member states' authorities responsible for maritime supervision work within several policies, including i.a. fisheries control, pollution response, maritime safety and security, border control. Effectiveness of those actions often suffers from differences between their respective legal systems and administrative control structures. Intensive efforts go into setting up legal and technical frameworks of cooperation between authorities. Integrated maritime policy is of significance in the maritime sector of the economic panorama of the European Union as a whole.

Dorota Pyć presents problems of risk management on introduction of invasive species into the marine environment. The International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM 2004) is a new frontier in the field of marine environment protection. The Convention's aim is to reduce the risk of spreading of harmful aquatic organisms and pathogens into alien marine environments by ships' ballast water and sediments.

A list of non-indigenous species in the Baltic Sea has been compiled in accordance with The Convention on the Protection of the Marine Environment of the Baltic Sea Area (HELCOM 1992). As ships carry thousands of species in their ballast water, the danger to the marine and coastal environment is substantial. Sweden and Norway ratified the BWM Convention, but other the HELCOM signatories have agreed to ratify this Convention by 2013.

"Ocean iron fertilization" is a subject of Konrad Marciniak article. The oceans are the second largest natural absorber of the carbon dioxide emissions. One of the methods to enhance the process is fertilization of seawater with iron. This method stimulates the growth of phytoplankton, the main biological agent responsible for the carbon dioxide sequestration processes by seawater. As phytoplankton absorbs the gas it transports it toward the seabed, thus making the ocean a natural carbon sink. Significance of this issue is reflected by the number of parties to the Kyoto Protocol (1997) to the United Nations Framework Convention for the Climate Change (UNFCCC 1992). The signatories include 194 states and the European Union to the UNFCCC and 192 states and the European Union to the Kyoto Protocol.

The Author includes legal analysis on ocean iron fertilization. The issue brings considerable controversy from the standpoint of law, science and environmental protection. Since iron fertilization has been developed only recently, no thorough evaluation is possible. Cautious approach and recommends limiting its use to scientific endeavors is as the Author's view.

Małgorzata A. Nesterowicz presents issues of the Third Maritime Safety Package, of the EU also known as Erica III, consists of 7 acts made by the European Union Parliament and the Council in 2009. The EU member states shall to implement them by law and regulations.

The level of commitment by Commission of the EU to the issues of implementation of the safety packages is measured by the amount of actions brought before the Court of Justice in case of states' failures to comply with them. The Commission has delivered a reasoned opinion under the Article 258 of the Treaty concerning failure to implement Directive 2009/16/EC of 23 April 2009 on port State control by Belgium, Cyprus, Estonia, Poland, Portugal and the United Kingdom.

The European Commission issued in 2009 a Green Paper entitled Reform of the Common Fisheries Policy. It includes references to the current and intended legislation on the subject, both of domestic and community level. This Green Paper encourages a thorough review of relevant law. Zbigniew Godecki the Author of the article on this issue formulates conclusions *de lege ferenda*.

The article by Marcin Makowski concerns legal aspects of localization of wind turbines at the sea under Polish jurisdiction, i.e. on internal waters, territorial waters and within the exclusive economic zone. The Author discusses on applicable Polish law, including Maritime Areas Act 1991 and Spatial Planning Act 2003 in the context of domestic and international law on maritime environment protection.

Professor Andrzej Makowski discusses the implications for Poland's national security of the United Nations Convention on the law of the sea (UNCLOS 1982). So this article is a first endeavor into Polish defense policy matters by the Polish academic Commission of Maritime Law. Nine bordering the Baltic Sea states are signatories of UNCLOS and presently the friendly relations between those nations render Baltic naval cooperation as peaceful operations less important than far seas operations. This is also true with the Polish Navy.

The issue of delimitation of maritime borders and establishment of contiguous zone is of utmost importance to Polish national security. Since 1972 there are ongoing negotiations between Republic of Poland and the Kingdom of Denmark regarding disputed zones. It is the longest running unresolved border dispute in the Baltic Sea area. There is also a controversy on surrounding roadstead of Świnoujście and Szczecin ports located in the Bay of Pomerania.

The Author of this article formulates five conclusions of both general and detailed nature regarding the UNCLOS significance for Poland's national security.

Dariusz R. Bugajski in his article presents the dispute between Poland and Germany over the northern parts of roadstead adjacent to Świnoujście and Szczecin sea ports casts as a shadow on good relations between those nations. This dispute concerns the anchorage and the port approach route. On 25 November 1994 Germany have unilaterally declared those areas as a part of their exclusive economic zone. The Author recommends for solutions envisaged in international agreement on maritime border delimitation between the former People Republic of Poland and the former German Democratic Republic. (The agreement was signed in 1989).

Professor Leonard Łukaszuk provides legal analysis on co-dependence between nautical and aviation regulations in international law and practice. He focuses on over flight rights with respect to civil and military aviation across distinct types of waters as defined upon the UNCLOS 1982. The Author differentiates the common legal standard from particular legal regulations giving rise to divergent practices of some countries. He touches also a number of issues relating to maritime security (including the threat of piracy) and to environmental protection in the context of regulation and practice of airborne activities carried out by states' authorities and services.

Professor's Krzysztof Kubiak study on "The northwest passage controversy" is nowadays one of crucial problems in international law and policy. The Northwest Passage is a sea route – or as a collected name for four routes – that connect Europe and East Asia. Despite its considerable length (circa 5780 kilometers) and notorious nautical difficulties it provides a decent alternative to

the route through the Panama Canal due to being roughly 4000 kilometers shorter. The route is seasonal and is predominately operated by Canadian entities. It has seen also as increased interest due to climate change.

While Canada claims the waters of the Northwest Passage to be their internal waters, notwithstanding its historical grounds, may be deemed an abuse of sovereignty. Canada exercises creeping jurisdiction there, with Article 234 of the UNCLOS 1982 as its sole justification. The United States, on the other hand, believes the Passage is in fact a strait connecting two areas of open sea and thus should remain part of international waters. In 1988 USA and Canada have signed an agreement on cooperation in the Arctic. The Author predicts more disputes over the Northwest Passage in the coming years.

In 2011 passed away two very merit members of the Commission: Professor Jan Tomasz Hołowiński (1924-2011) and Professor Józef Andrzej Straburzyński (1940–2011) – co-organizer and former Deputy – President of the Commission of Maritime Law. Short remembrances of this Professors' scholar activity have been also published in Volume 27 of the "Maritime Law". Such as similar publication is also expected in this Journal.

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