

THE APPLICATION PROCESS OF HAMBURG RULES, GIVEN THE CONTEXT OF THE EMERGENCE AND ENTRY INTO FORCE OF THE NEW ROMANIAN CIVIL CODE

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Abstract

The paper aims to conduct a comparative analysis and tries to offer an objective point of view regarding a number of questions arisen in practice, related to the applicability of the 1978 Hamburg Rules and keeping public order of Romanian private international law, such as those that aim at: agreeing upon the applicability of the foreign law by the Romanian parties; applicability of the Hamburg Rules; public nuisance of the Romanian private international law; character of public policy rule of the Hamburg Rules. In the application process of the Hamburg Rules, given the context of the emergence and entry into force of the New Civil Code, obviously, the provisions of the Romanian Civil Code shall apply in addition, where the international convention lacks. Therefore, in order to apply the logic of the provisions of the Civil Code in full compliance with the international standards, though giving priority to the latter rules, a rigorous analysis is required, analysis which becomes more complex given the fact that, in accordance with Art. 230 of Law no. 71/2011 to implement Law no. 287/2009 on the Civil Code, Book II "About Maritime Trade and Sailing" of the Commercial Code, will be abolished upon the entry into force of the Maritime Code, as those provisions remain in force, being applied with priority to the rules of the Civil Code.

Keywords: *applicability of the 1978 Hamburg Rules, keeping public order, Romanian private international law.*

JEL Classification: *K33, K40*

I. Applicability Rules from Hamburg and keeping public order

The paper aims to conduct a comparative analysis and tries to offer an objective point of view regarding a number of questions arisen in practice, related to the applicability of the 1978 Hamburg Rules and keeping public order of Romanian private international law, such as those that aim at:

- agreeing upon the applicability of the foreign law by the Romanian parties;
- applicability of the Hamburg Rules;
- public nuisance of the Romanian private international law;
- character of public policy rule of the Hamburg Rules.

In the application process of the Hamburg Rules, given the context of the emergence and entry into force of the New Civil Code, obviously, the provisions of the Romanian Civil Code shall apply in addition, where the international convention lacks. Therefore, in order to apply the logic of the provisions of the Civil Code in full compliance with the international standards, though giving priority to the latter rules, a rigorous analysis is required, analysis which becomes more complex given the fact that, in accordance with Art. 230 of Law no. 71/2011 to implement Law no. 287/2009 on the Civil Code, Book II "About Maritime Trade and Sailing" of the Commercial Code, will be abolished upon the entry into force of the Maritime Code, as those provisions remain in force, being applied with priority to the rules of the Civil Code.

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2. Applicability Rules Hamburg Rules in relation to the Hague

Art.1.064 of the new Code of Civil Procedure provides the fact that the provisions of Book VII, "The International Civil Trial", will extend to private with foreign elements to the extent to which, by the international treaties to which Romania is a party, by the European Union Law, or by special laws, it is not stated otherwise.

Therefore, from a personal study in the field of the legal regime of the contract of carriage, I mainly wanted to analyze especially the applicability of the Hamburg Rules in relation to the Hague Rules, and also the special cases, the derogatory in this matter and the legal consequences produced.

The hierarchy or order of taking into account legal acts in the field is established specifically: international treaties, European Union Law, special laws.

Romania joined the United Nations Convention on the carriage of goods by sea, known as the 1978 Hamburg Rules, following the adoption of Decree no. 343 of 11/28/1981. In accordance with article 30 of the Convention, this entered into force on the first day of the month following the expiration period of one year, from the date of depositing the twentieth instrument of ratification, acceptance, approval or accession. For each state which becomes a contracting state of this international convention, after the date of depositing the twentieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the first day of the month following the expiration period of one year, from the date deposit of the appropriate instrument on behalf of the respective state.

In the sense that the applicability of this Convention is given by internationality shipping and carrying out alternative conditions contained in Article 2, it was stated according to the recent legal literature in the field².

After a more careful analysis of the Convention, **it follows that: in case of a litigation**, the claimant *may, at his option*, institute proceedings in any of the places listed in Article 21 of the Convention, or may bring the appeal in the place designated for this purpose, in the shipping contract, but he is not compelled. In case the seaport of loading or unloading would be a Romanian one, the appeal to the territorial jurisdiction court of the port of loading or unloading, under Art. 21, item 1, letter c) of the Convention "*the port of loading or the port of unloading*", and the provisions of Art. 149, section 6 of Law no.105/1992 (now Art. 1.080, section 4 of the New Civil Code): "*Romanian courts have jurisdiction if: the railway or road station, also the port or airport of loading or unloading passengers or cargo are in Romania*", we believe it is an appeal to the material competent court.

An agreement between parties regarding the jurisdiction will be effective **only if it occurred after the appearance of the claim**, but this agreement shall not be effective if it had been registered **prior to the occurrence of the complaint**.

Legal literature in the field³ which comments the respective provisions of the 1978 Hamburg Rules, believes that the plaintiff is the one who chooses the jurisdiction to which the litigation settlement will be deducted, which will necessarily stay in one of the places listed in Art. 21 of the Rules.

² Gheorghe Piperea, Dreptul Transporturilor, All Beck Publishing House, Bucharest, 2003, p.191;

³ Dragos-Alexandru Sitaru, Serban-Alexandru Stanescu, Contractul de Transport International de Marfuri, Lumina Lex Publishing House, Bucharest, 2007, p.181;

Foreign legal literature⁴ is categorical when considering that an exclusive jurisdiction clause which limits the option of the applicant's right, will not cause legal consequences⁵.

In our opinion, this rule is not necessarily a rule established in favour of the goods recipient, it is a rule that all participants in the shipping benefit of, including the charger and the goods carrier, where there are plaintiffs in a claim against another participant in shipping.

We will try in this study to bend over the wrong tendency in the Romanian courts of not giving effect to mandatory provisions of the international convention, given the fact that there is a bill of lading with a pre-printed clause of applicable law and jurisdiction, the recipient of goods (plaintiff in the application for summons) obviously requiring the delivery of goods by the carrier, based on the bill of lading in question.

Therefore, it is wrongly estimated that the recipient is bound by all the pre-printed provisions of the bill of lading, including the jurisdiction clause and applicable law, thus rejecting the application as not being in the competence of the Romanian courts and giving effect to the provisions of Art. 154 of Law no.105/1992 on the regulation of private international law (now Art. 1.070 of the New Code of Civil Procedure), refusing to apply the provisions of the 1978 Hamburg Rules.

Foreign jurisprudence is largely favorable to the idea of unenforceability of lading preprinted clauses given the fact that there is no explicit evidence of their acceptance by the recipient⁶. Even being proven the express acceptance of all terms preprinted by the recipient, 1978 Hamburg Rules, having a mandatory character, are to be applied with priority in the relations between the carrier and the consignee.

Romanian legal practice⁷ found that, compared to the legal position of the recipient in the shipping contract, to be enforceable against either the charger or the recipient, a clause conferring jurisdiction must have been accepted at the latest by the first one, at the date of signing the carriage contract, and by the second one at the date at which, receiving merchandise, joined the contract. The court distinguishes between acceptance of the goods by the consignee and acceptance of the clause, believing that a jurisdiction clause must be expressly accepted by an autonomously and independently act.

European Union regulations are applicable only between states of the European Union, having no application in relation with countries that are not part of this union. In most of the situations encountered in practice, international shipping do not directly occur between states that (both) are part of the European Union.

3. The findings

Therefore, the rule established by the European Regulation is that the international conventions to which member states are parties, shall always have priority in relation to the provisions of the Regulation. We consider the provisions are natural given the fact that it is normal

⁴ Christof Luddeke and contributors, *Marine Claims, A guide for the handling and prevention of Marine Claims*, Lloyd's of London Press, 1996, p. 57; Christof Luddeke, *The Hamburg Rules: From Hague to Hamburg via Visby*, Lloyd's of London Press, 1995.

⁵ Baatz, Debattista, Lorenzon, Serdy, Staniland, Tsimplis, *The Rotterdam Rules, A Practical Annotation*, Informa London 2009, p. 213;

⁶ Wuhan Maritime Court China, 02.02.2011, decision commented in section Shipping and Transport China 02.02.2011, International Law Office, by Shanghai Kai-Rong Law Firm;

⁷ The Constanta Court, Sea and River Section, the Interlocutory Order of 30.09.1999, published in the DMR 2/2000, p. 90-91;

for the international obligations assumed by the EU member states to be accomplished in relations with third countries, in order to ensure legal security of international relations.

The more recent⁸ Romanian judicial practice correctly ruled in the sense of rejecting the exception of general jurisdiction of the Romanian courts and the applicability of the 1978 Hamburg Rules, in case the unloading services had been held in a Romanian port, thus making the applicability of Article 2 and Article 21 of the Convention. Constanta Court finds, in the grounds of a case, on the one hand that, as the 1924 Hague Rules are not in force neither in the loading port, nor in the unloading port (Constanta), they will not be applicable. Constanta Court also finds, on the other hand, that the 1924 Hague Rules do not contain rules on jurisdiction. The bill of lading issued contained the same clause on jurisdiction and applicable law.

Art.10 of Law no.105/1992 on the regulation of private international law provided, prior the repeal by the new Civil Code, that "the provisions of this law are applicable to the extent to which international conventions to which Romania is a party, do not establish another regulation".

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5. Baatz, Debattista, Lorenzon, Serdy, Staniland, Tsimplis, *The Rotterdam Rules, A Practical Annotation*, Informa London 2009;
6. New Civil Code (Law 287/2009, as amended).

⁸ The Constanta Court, Sea and River Section, the Interlocutory Order of 15.02.2011 pronounced in case no. 8442/118/20101-unpublished; The Constanta Court, Sea and River Section, the Interlocutory Order of 15.02.2011 pronounced in case no. 8786/118/2010 - unpublished.