АКТУАЛЬНІ ПИТАННЯ МІЖНАРОДНОГО ПРАВА ТА ПРАВА ЄС

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TO THE PROBLEMS OF CONTRACTUAL REGULATION OF INTERNATIONAL MIXED CARGO TRANSPORTATION

The article is devoted to the problems of contractual regulation of international mixed cargo transportation. Attention is paid to the lack of unification of international legislation, which would determine the main provisions and specifics of the conclusion, change, implementation and termination of contractual relations of international mixed cargo transportation. The author concludes that concluding the contract, the parties must determine the form of the contract, its terms, the order of interaction, as well as choose the pro forma of the document of mixed transportation of goods.

Keywords: international mixed cargo transportation, international mixed cargo transportation agreement, mixed cargo transportation document, contractual regulation.

Problem setting. Public relations arising from the carriage of goods in direct mixed service are quite common in practice. On the one hand, they are characterized by a clear system of obligations, while, on the other hand, they need clear and legally defined regulations, which must be provided by the relevant regulators of public relations.

It should be noted that the main regulators of the relationship of freight in a direct mixed connection is a contract. By agreeing to enter into an agreement, the parties regulate their relationship, define mutual rights and obligations and want to achieve the agreed result.

In addition, the proper functioning of the contractual regulation of mixed freight transport is possible due to proper legal regulation, which must be ensured by the state and the international community.

The contractual regulation of international mixed freight transport faces a number of problems, which has a negative impact on the development of direct freight transport in general.

The main problem is imperfect national legal regulation and its absence at the international level. The insecurity of the parties to the contract of international mixed transportation of goods and the uncertainty of their rights and legitimate interests leads to a decrease in the popularity of the contract of contractual transportation in direct mixed traffic.

Due to the lack of proper legal regulation, the procedure for concluding an international mixed cargo contract is extremely difficult and confusing, and issues related to determining the parties to the contract and the responsibility of the mixed transport operator for breach of contractual obligations by third parties (actual carriers) knitting, become especially relevant.

Analysis of recent researches and publications. Problems of contractual regulation of relations of mixed transportation were studied by such scientists as Kadala V.V., Popov V.A., Pavlyuk S.M., Morozov S.Yu., Kolyankovskaya T.O., Savicheva G.P., Yaichkovata K.K., Egiazarov V.A. and others.

The purpose of the article is to analyze the current state of contractual regulation of relations of mixed transportation of goods and highlight key issues that need to be addressed urgently.

Article's main body. The contract plays a key role in regulating the legal relationship for the carriage of goods in a direct mixed connection. As S. Yu. Morozov aptly points out, «currently legal relations in the carriage of goods in direct mixed traffic are formed mainly under the influence of contractual regulation, while legislative regulation lags behind at both the international and

national levels. In the absence of domestic law and an international act governing mixed transport, the contract remains the only basis and the only regulator of relations for the carriage of goods in mixed traffic»[1].

It is important to emphasize that in the absence of the necessary regulatory framework, the mixed transport contract alone is not able to fully provide the parties with the necessary legal guarantees and is not always able to resolve the liability of the parties, dispute resolution, body authorized to resolve them.

In addition, when concluding a contract, its parties, given the complexity and diversity of mixed transport relations, cannot cover the full range of issues that need to be resolved by mutual agreement, which necessitates relying on and / or relying on the rule of law.

This confirms the fact that when concluding civil contracts (including mixed transportation of goods) the last paragraph of the contract often provides that all issues not covered by this contract are resolved in the manner prescribed by law.

Thus, we can conclude that regulatory certainty in terms of contractual regulation of relations between the parties is a real need.

In this context, we note that the legal regulation of contractual relations of mixed freight in Ukraine is imperfect, and legal norms on the subject are limited to several articles of the Civil Code of Ukraine and the Commercial Code of Ukraine, as well as provisions of regulations, transport statutes, etc.).

It should be noted that the norms of the Civil Code of Ukraine define only the general principles of cargo transportation (Chapter 64 "Transportation"), and also provide that the carriage of goods, passengers, luggage, mail can be carried out by several modes of transport on a single transport document (direct mixed service) (article 913 of the Civil Code of Ukraine). The same article of the Civil Code of Ukraine stipulates that it is the agreement of the participants of transportation in a direct mixed connection (organizations, transport enterprises) that determines their relations [3].

Thus, detailed regulation of the peculiarities of concluding a contract of carriage of goods in a direct mixed connection is not provided by the norms of the Civil Code of Ukraine.

As for the norms of the Commercial Code of Ukraine, they to some extent supplement the provisions of the Civil Code of Ukraine, in particular Part 1 of Art. 312 provides a legal definition of the contract of carriage of goods in a direct mixed service, according to which the carriage is carried out from the consignor to the consignee by two or more carriers of different modes of transport on a single transport document; in Part 2 of Art. 312 contains a reference to Art. 307 of the Commercial Code of Ukraine, the rules of which apply to contracts of carriage of goods in direct mixed service, and in Part 3 of Art. 312 refers to such an economic and legal agreement in the field of mixed transportation as a nodal agreement, which will regulate the relations of carriers and the conditions of operation of transshipment points. The procedure for concluding nodal agreements is established by transport codes and statutes [4].

However, even this is clearly not enough to settle the contractual relationship of international transport in a direct mixed connection.

A few of domestic norms on mixed freight are also contained in bylaws, for example, in the Charter of Railways of Ukraine, approved by the Cabinet of Ministers of Ukraine from 06.04.1998, the Rules of freight in direct mixed rail-water transport (Articles 79-99 Of the Charter) approved by the order of the Ministry of Transport of Ukraine dated 28.05.2002 № 334, Rules of cargo transportation by road in Ukraine, approved by the order of the Ministry of Transport of Ukraine dated 14.10.1997 № 363, Rules of air transportation of goods approved by the order of the State Service of Ukraine aviation safety dated March 14, 2006 № 186, etc.

The Rules of Air Carriage give more attention to the contractual aspects of mixed transport than to the above codified acts, in particular the definition of mixed transport, mixed transport contract, mixed transport operator, and a reference to the Convention, the provisions of which apply by air and partly by any other mode of transport, unless the mandatory rules of national law provide otherwise, and partially regulates the liability of the carrier [5].

It can be stated that the current legal regulation of contractual aspects of mixed transport in Ukraine is quite limited and disorderly, which negatively affects the applicability of the contractual design of mixed transport in practice. It is seen that the solution of the outlined problem is possible due to the development of new and systematization of existing legal norms in a single legal act - the Law of Ukraine «On Mixed Transportation».

In fairness, it should be noted that, despite the existence of the United Nations Convention on International Mixed Freight in 1980 (hereinafter - the Convention), there is also no adequate legal regulation of contractual relations for mixed freight. In fact, contractual relations are governed by so-called "soft law", in particular the Uniform Rules for the Combined Transport Document issued by the ICC in 1975, the Rules on Multimodal Transport Documents issued by UNCTAD / ICC in 1995 and others.

The 1995 UNCTAD / ICC rules apply only to part of a mixed transport contract, are optional and apply only where the parties have referred to them.

As regards the Convention, although its provisions provide that: "If a mixed transport contract which is covered by Article 2 of this Convention is concluded, the provisions of this Convention shall be binding on such

a contract", however, as of today, it has not entered into force and is therefore not widely used in practice.

In view of the above, we argue that since national and international law are not without flaws, the parties may have difficulties in entering into a contractual relationship. First, the parties do not fully understand the mechanism and procedure for interaction with each other, as there are no legal norms that can be used in these processes. Secondly, there is a situation in which the parties must take a certain risk, for example, in cases where the contract does not stipulate the applicable law or does not specify the responsibility of the party for improper performance or non-performance of the contract, which will always lead to abuse of the counterparty. That is, there are no full guarantees of proper protection and defense of their rights and legitimate interests, which should be provided by legal norms.

As a result, we can talk about the conditional, but still existing, unreliability of the contractual design of international mixed transport, which is caused by the current legal regulation. In such circumstances, regulatory changes and changes in the study area are essential.

Carrying out further research, we note that under the contract of international mixed transportation of one party, the operator of mixed transportation, undertakes to deliver the cargo provided to him by the other party, the shipper, from a place in one state to a destination in another state by two or more modes of transport. the only transport document in the manner and terms established by the contract and transfer it to the person authorized to receive the goods - the consignee, and the consignor undertakes to pay for the carriage of goods under the contract fee.

Among the legal features of the contract of mixed transportation of goods Kadala V.V. identifies the following: a) is one of the types of business contracts; b) is a property agreement that has a specific economic purpose - the movement of goods by more than one mode of transport; c) is part of the system of contracts of transport activities; d) the parties to the contract are the shipper and the carrier; e) the contract defines the property and economic obligations that arise in the implementation of one of the types of economic activity - transportation of goods; f) payment for the contract is explained by the fact that this type of transport service is provided for a fee, i.e a fee for the carriage of goods; g) by the method of concluding the specified contract is real, because the moment of its conclusion coincides with the moment of acceptance of cargo for transportation; h) it is a fixed-term economic contract, as it is related to the fulfillment of obligations of its parties within the period established by law or contract [6].

All these features of the contract of mixed transportation of goods at the domestic level are inherent in the contract of international mixed transportation.

In addition, indeed, both in the case of ordinary mixed transport contracts and international mixed transport, the movement of goods is carried out by two or more modes of transport, and if the relevant contract provides for the carriage of only one mode of transport, such transport will not be considered mixed.

However, it should be noted that, unlike ordinary agreements, under international mixed transport agreements, the movement of goods must be carried out from the territory of one state to the territory of another, thus transforming the economic contract into a foreign trade contract.

It should be noted that the mentioned Convention does not pay attention to the contract under study, does not establish the procedure and features of its conclusion, implementation, amendment and termination, does not provide for its standard form and does not specify the conditions to be agreed by the parties. Its provisions provide only a basis for invalidating any terms of the contract in cases of direct or indirect conflict with the provisions of the Convention (Part 1 of Article 28).

In practice, when concluding a contract of international mixed carriage, the parties themselves agree on the terms of the contract and also determine (usually by a separate clause in the contract) whether the provisions of the Convention will apply to the contractual relationship.

As a rule, the agreement, in addition to the usual details, reflects the agreement of the parties on the subject; cost and order of calculations; terms of transportation; mutual rights and obligations; responsibility; the procedure for resolving claims and disputes; rules of law to be applied, etc.

An appropriate transport document is issued to confirm the conclusion of the contract. According to the Convention, such a document is called a mixed transport document; it certifies the contract of mixed transport, acceptance of the cargo by the operator of mixed transport, as well as its obligation to deliver the goods in accordance with the terms of this contract [7].

Thus, we can say that the document of mixed transportation performs several important functions: 1) certifies the fact of the contract, 2) is evidence of prima facie acceptance of the operator of mixed transportation in its management of goods and 3) confirms the obligation of the mixed transportation operator to deliver cargo .

Articles 5-13 of the Convention describe in detail the peculiarities of a mixed transport document, highlight its varieties, characterize the procedure for issuing such a document, list the information that must be specified in it, define the shipper's guarantees, probative value of a mixed transport document, settle reservations in a mixed transport document. and liability for intentionally entering incorrect data and for not entering data into the document.

It is impossible to avoid the fact that the only established and mandatory form of such a document has not been developed, which to some extent complicates the formalization of contractual relations between the parties.

In this regard, the participants of international transport relations develop their own standard forms (proforma) of the document of mixed transportation. To date, the most common proforma is the bill of lading FIATA FBL (Negotiable FIATA Multimodal Transport Bill of Landing) - Forwarding bill of lading for mixed cargo [8].

The FIATA FBL bill of lading complies with the UNCTAD / ICC Rules on Multimodal Transport Documents published by the ICC in its publication № 481 and complies with the Unified Rules and Customs for Documentary Credits (UCP 600).

It is issued by the operator of mixed transportation, has the characteristics of a negotiable document (along with this, it can be issued as a non-negotiable document) and is a through bill of lading. When using it, the place of receipt of the goods is the place of origin of the goods, and the services of the actual carrier are used to deliver the goods to the destination.

In Ukraine adopted and approved by the decision of the Association of International Freight Forwarders of Ukraine from 08.10.2009, protocol № 2, Rules and recommendations for the use of documents and forms of FIATA, in particular FIATA FBL [9].

Along with the FIATA FBL bill of lading, the Multidoc 95 proforma, developed by the Baltic and International Maritime Council (BIMCO), is also used; Combidoc, developed by FIATA / INSA and others.

Attention should be paid to the issue of separation of the parties to the contract of international mixed transport, which plays an important role in determining the person responsible for breach of contract.

There is no single position on this issue, and the provisions of the Convention do not provide a clear and unambiguous answer. The reason is that in the relationship of mixed transportation of goods involved many participants, among which the main are the operator of mixed transportation, shipper and consignee.

In addition, third parties may take part in the carriage - the actual carriers, ie the persons on whom the operator of the mixed carriage is obliged to fulfill the condition of carriage and transfer of goods to the consignee.

In connection with the participation in the relationship of transportation of the latter, there are scientific discussions. Some scholars are convinced that the first of the carriers in the relationship with the shipper is a representative of other carriers, each of which must enter into a contract to perform the rights and obligations of the previous carrier. Under such conditions, the first carrier is responsible for the next carrier, while the final carrier is responsible for the actions of the previous ones.

Some scholars are convinced that the transport organization of the point of departure, which has concluded the contract of carriage, relies on the intermediate transport organizations, as well as on the organization of the destination in parts. That is, the party to the contract is the first carrier, and the other carriers are third parties.

In this case, we support the position of V.V. Vitryansky, who believes that the first carrier is a party to the contract, and in the future he only involves in the performance of its obligations under the contract of third parties - other transport organizations. For non-fulfillment or improper fulfillment of the terms of the contract by third parties, all responsibility rests with the first carrier [10].

Thus, the parties to an international mixed transport contract include the mixed transport operator and the shipper, and the responsibility for non-compliance with the terms of the contract should lie entirely with the operator, even if the breach is the fault of the actual carrier.

Conclusions. Thus, in the absence of proper legal regulation both at the national level and at the international mixed transport, the contract remains the main regulator of relations concerning the international transport of goods in mixed traffic. However, the conclusion of an international mixed contract of carriage of goods provides the cargo owner with a number of advantages, in particular, the cargo owner is exempted from the need to enter into separate agreements with different carriers and directly participate in the transport process at different stages.

The process of concluding an international mixed freight agreement is complex. As this agreement is a foreign trade agreement for the international carriage of goods, which is complicated by the peculiarities of the mixed connection, the risks associated with inaccurate or ambiguous presentation of its content are borne solely by the parties.

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К ПРОБЛЕМАМ ДОГОВОРНОГО РЕГУЛИРОВАНИЯ МЕЖДУНАРОДНЫХ СМЕШАННЫХ ПЕРЕВОЗОК ГРУЗОВ

Статья посвящена проблемам договорного регулирования международных смешанных перевозок грузов. Обращено внимание на отсутствие унификации международного законодательства, которое определяло бы основные положения и особенности заключения, изменения, реализации и прекращения договорных отношений международных смешанных перевозок грузов. Автор приходит к выводу, что при заключении договора стороны должны определить форму договора, его условия, порядок взаимодействия, а также выбрать форму документа смешанной перевозки грузов.

Ключевые слова: международные смешанные перевозки грузов, договор международной смешанной перевозки грузов, документ смешанной перевозки грузов в прямом сообщении, договорное регулирование.

ПОСТНОВА НАТАЛЯ

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ДО ПРОБЛЕМ ДОГОВІРНОГО РЕГУЛЮВАННЯ МІЖНАРОДНИХ ЗМІШАНИХ ПЕРЕВЕЗЕНЬ ВАНТАЖІВ

Постановка проблеми. Стаття присвячена проблемам договірного регулювання міжнародних змішаних перевезень вантажів.

Аналіз останніх досліджень і публікацій. Проблематика договірного регулювання відносин змішаного перевезення досліджувалась такими вченими як Кадала В.В., Попов В.А., Павлюк С.М., Морозов С.Ю., Колянковська Т.О., Брагінський М.І., Вітрянський В.В., Йоффе О.С., Савічева Г.П., Яїчковата К.К., Єгіазаров В.А. та іншими.

Метою статті є аналіз сучасного стану договірного регулювання відносин змішаного перевезення вантажів та виділення ключових проблем, які потребують нагального вирішення.

Виклад основного матеріалу. Звернуто увагу на відсутність уніфікації міжнародного законодавства, яке визначало б основні положення та особливості укладення, зміни, реалізації і припинення договірних відносин міжнародних змішаних перевезень вантажів. Автор приходить до висновку, що при укладанні договору сторони повинні визначити форму договору, його умови, порядок взаємодії, а також вибрати форму документа змішаного перевезення вантажів.

Висновки. За відсутності належного правового регулювання як на національному рівні, так і на міжнародному змішаному транспорті, контракт залишається основним регулятором відносин щодо міжнародних перевезень вантажів у змішаних перевезеннях. Однак укладення міжнародного змішаного договору перевезення вантажу надає власнику вантажу ряд переваг, зокрема, власник вантажу звільняється від необхідності укладати окремі угоди з різними перевізниками та безпосередньо брати участь у транспортному процесі на різні етапи.

Договір міжнародної змішаного перевезення вантажів є зовнішньоторговельною угодою перевезень вантажів, що ускладнюється особливостями змішаного сполучення, ризики, пов'язані з неточним або неоднозначним викладом його змісту, несуть виключно сторони.

Ключові слова: міжнародні змішані перевезення вантажів, договір міжнародної змішаного перевезення вантажів, документ змішаного перевезення вантажів у прямому сполученні, договірне регулювання.

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