МЕЖДУНАРОДНОЕ ПРАВО

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INTERNATIONAL CARRIAGE OF GOODS BY SEA: SOME MATTERS OF REGULATION

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АНОТАЦІЯ

У статті розглядається питання щодо регулювання міжнародних морських перевезень вантажів, зокрема стосовно особливостей міжнародних морських перевезень вантажів, основних особливостей і видів договорів у цій сфері, а також способів регулювання відносин, що виникають у зв'язку з перевезеннями вантажів морем. Проаналізовано основні підходи до природи договору морського перевезення вантажів, визначено правове значення такого договору, проведено порівняння визначень договору перевезення вантажів морем із використанням коносаменту, які містяться в чинних міжнародних конвенціях, що регулюють відносини в цій галузі. На основі дослідження зроблено висновок про відсутність єдиного інструменту регулювання відносин у сфері міжнародного перевезення вантажів і зауваження щодо позитивної перспективи Роттердамських правил стати єдиним джерелом регулювання відносин у цій сфері.

Ключові слова: міжнародні морські перевезення вантажів морем, договір морського перевезення вантажів, Гаазько-Вісбійські правила, Гамбурзькі правила, Роттердамські правила.

SUMMARY

The article deals with the issue of regulation of international carriage of goods by sea, in particular, with regard to characteristics of international maritime carriage of goods, main features and types of the contracts in this sphere, as well as the ways of regulation of the relations arising out in connection with the carriage of goods by sea. There is held an overall analysis of the main approaches to the nature of the contract of carriage of goods by sea, the legal value of such contract, the comparison of the definitions of the contract of carriage of goods by sea using a bill of lading, which are contained in the existing international conventions in this field. Based on the foregoing, the author concludes that there has not yet existed a single unified tool for the regulation of the relations in the sphere of international carriage of goods by sea and claims the positive perspective of the Rotterdam rules to become the only source of regulation of relations in this area.

Key words: international carriage of goods by sea, the contract of international carriage of goods by sea, the Hague-Visby Rules, the Hamburg Rules, the Rotterdam Rules.

Introduction. The expansion and further development of international economic relations, as well as the formation of international markets for goods and services make a great effect on the increase of the role of private international law, which, in its turn, requires uniform rules to regulate such relations. It is worth mentioning that it is maritime transport in general and relations that arise out of the use of this industry, in particular international carriage of goods that play a vital role in the development of economic cooperation between different countries [1].

International carriage of goods leads to various legal issues, which arise out of a contract of carriage, such as: rights and obligation of parties to a contract and also other persons involved into a carriage process.

Permanent increase in number and volumes of the international cargo transportation requires a detailed study of legal regulation of such carriages, identifying the features of their regulation and prognosis for the further development of the regulation in this sphere.

Despite the increasing volume of international carriages of goods under a bill of lading, the national doctrine does not contain any fundamental research on theoretical and practical aspects of the regulation of international carriage of goods, in particular with the use of a bill of lading. That's why further study of the issue seems to be necessary.

Analysis of recent research and publications concerning the problem in question. Issues connected with various aspects of carriage of goods by sea have traditionally become the object of attention by foreign and domestic scholars. Scientists of the Soviet period, such as M. Boguslavskyi [2], G. Ivanov [3], S. Lebedev [4], A. Makovskyi [3], and K. Iegorov [5] devoted their works to general issues of carriages by maritime transport. Fundamental works on the legal regulation of carriages by sea during the recent decades have been prepared by such lawyers as G. Ancelevych [6], N. Charceva [1], V. Kosovskaya [7], T. Kumalagova [8], A. Shemyakin [9], E. Streltsova [10] and others. Foreign specialists have also done their researches in the field of carriages of goods by sea, particularly in the area dealt with the regulation of the relations by international conventions. Such prominent specialists as Francesco Berlinzheri [11], Gertjan Van Der Ziel [12], Andrew Bardot [13] and others are among them.

Statement of the objective. The main purpose of the study is to identify the features of the international transportation of goods, in particular maritime, to identify the main characteristics and types of contracts of carriage of goods by sea, as well as to clarify the ways of regulation of international sea carriage of goods, including the instruments of the domestic and international law.

To achieve this objective it is necessary to:

- explore the features of international carriage obligations, the definition of the international carriage contract, and detect its main features;
- study the nature of the contract of the carriage of goods by sea, including analysis of its historical roots;
- analyze existing ways of regulation of the relations arising out of transportation of goods by sea, including regulation by international conventions on international carriages of goods by sea with the use of bill of lading.

Statement of the basic provisions. Legal relations between a carrier and a shipper of goods or a carrier and passengers are basis for obligations, arising out of transportation of goods, passengers and baggage [7].

However, not every territorial movement of goods or persons by means of vehicles leads to transport obligations. There are some features, which characterize transport obligations. Firstly, there should be the commodity obligation, which is made on the compensatory basis. Secondly, the way of movement of goods should involve spatial movement of goods and passengers on the vehicles themselves or in the vehicles, not moving the object by push or traction, which is true in the case of towage [7].

It is commonly believed in the doctrine that movement of goods and passengers is considered international if a place of departure and a place of destination are in different states or the movement itself is made through the territory of a foreign state [7].

In summary, the international carriage is defined as the movement of goods or passengers by any kind of transport, if the place of departure and place of destination are situated on the territory of different states or the movement itself is made on the territory of a foreign state [7].

International carriages differ by modes of transportation (rail, road, air and sea).Carriage by sea takes a leading position in the transportation industry and, like carriage by any mode of transportation, have its own characteristics, which are reflected in the legal regulation of the related obligations [7].

The main instrument governing relations in the sphere of international carriages by sea is a contract signed by the participants of such carriage.

The contract of carriage of goods by sea is characterized by common features that are inherent to all contracts of carriage in general. First of all, this is a commodity nature of carriages and their equivalent-reimbursable basement, as well as the spatial movement of passengers and goods "on" and "inside" the vehicle, and the importance of transport as a vital way of communication [14].

The contract of carriage of goods by sea is a special mechanism of regulation of interaction between parties to a contract, and is the guarantee of realization of their legitimate interests. The main legal value of the contract of carriage by sea is as follows. Firstly, the contract is the legal basis for the emergence of any obligations between shippers and transport organization. Secondly, the contract of carriage by sea may concretize the rules provided by the domestic and international law in relation to such contracts. Thirdly, the contract of carriage by sea is the basis for the emergence of property liability in the case of violation of its obligations by one of the parties [8].

Due to the fact that the contract of carriage has different historical roots in the Anglo-Saxon and continental law system, in the modern world there are two fundamentally different views on the concept of the contract of carriage by sea.

In the first group of countries a contract of carriage came out as a result of the institute of bailment [15, p. 255]. Gorton Lars defines this institution as the transfer of items from one person to another by a special subject for carriage and the proper issuance of these items to the consignee. At the same time the scholar points out that a carrier belongs to a group of bailees.

In the states with the continental law system, which had developed under a strong influence of Roman law, a contract of carriage did not stand out as a separate and autonomic. Contracts of carriage of goods were defined as the renting contracts, contracts of personal service or contracts of bailment, etc [8].

Thus, at the beginning of the XIX century, in these countries the major place was given to the concept of charter contract as a contract of rent. Under provisions of the French Commercial code loads, which were carried by the vessel were carried only because the vessel itself was in rent. This concept was modified by theory, which provided that the charter contract was a contract of a special kind. Both theories had prevailed for a long time. Only in the thirties of the 20th century they got criticized [16, p. 6].

However, in the countries of continental system, for example, Belgium, Luxembourg, Norway, Germany, Switzerland, in contrary to the states of the Anglo-Saxon system of law, the idea of recognition of contract of carriage as an independent kind of a contract still has not globally accepted [8].

Before the revolution of the 1917 Russian civil legislation had considered a contract of carriage as a separate work contract. At the same time, the doctrine of the time inclined to understanding of the independent nature of the contract of carriage and the need for its detailed regulation [8].

In the Soviet period the contract of carriage by sea was clearly recognized as an independent by the majority of the scientists, and it was regulated by provisions of the Merchant Shipping Code of the USSR, 1968 [8].

The Merchant Shipping Code of the USSR was aimed at protecting interests of the socialistic society. In particular, issues of carriage of goods by sea were regulated in terms of interests of shipowners, on the basis of the planned economy in the field of maritime carriages. In connection with the changes in the recent couple of decades, which have affected the international legal bases of activity in the field of merchant shipping, and due to the global changes in political, social and economic life of our country, the Merchant Shipping Code of the USSR had not satisfied the needs of the participants of international carriage by sea as it ceased to reflect the contemporary conditions of the regulation of relations arising out of merchant shipping, and consequently was replaced by the new Merchant Shipping Code in 1995 [7].

Thereby currently in Ukraine the legal regulation of the contract of carriage of goods has been held as a part of the regulation of contractual obligations based on the provisions of the Civil Code of Ukraine with the further differentiation in special legislation according to the characteristics of a particular type of transport: air, road, rail, river and sea. Following this approach the rules of the Civil Code have the same legal value for all transport modes and are used only in the case when the special legislation is inadequate for regulation of the specific relationship. Therefore, it is the Merchant Shipping Code of Ukraine that acts as the basis for regulation of carriages by sea. Accordingly its chapters V "Carriages by Sea" and VI "Chartering of Vessels" are dedicated exactly to these relations [14].

According to the clause 909 of the Civil Code of Ukraine [17] a contract of carriage is defined as an agreement under which one party (the carrier) undertakes to deliver the goods, entrusted to him by the other party (the shipper), to the point of destination and to hand it over to the person who is entitled to receive the goods (the receiver), and the shipper, in his turn, undertakes to pay a fixed fee for the carriage.

Under a contract of carriage of goods by sea, provided for in clause 133 of the Shipping Code of Ukraine [18], the carrier or the charterer is obliged to carry the goods entrusted to him by the shipper from the port of departure to the port of destination and to deliver the goods to the authorized person (the receiver), and the consignor or the owner of cargo is to pay a fixed fee for the carriage (the freight).

The contract of carriage by sea can be described as a mutual obligation, since each party to it has certain rights and obligations. Famous soviet scholar O. Joffe characterized the contract of carriage as being of a compensation nature, since the payment for carriage takes place, and mutual, since the carrier is obliged to transfer the goods, but has the right to get the fee, and the shipper (consignor) is obliged to pay this fee, but has the right to get the given cargo transported [19, p. 560].

Many scholars argue that the contract of carriage is a real contract [20]. However, the vast majority of authors came to the conclusion that the contract of carriage may be both real and consensual [21].

The contract of carriage of goods by sea may be concluded in two forms, the existence of which is predetermined by two methods of exploitation of ships: irregular shipping (tramp shipping) and liner shipping.

An agreement with the condition to submit the entire vessel, its parts or certain ship spaces is used for transportation in the tramp shipping. The agreement without such a condition is used in liner transportation. Such type of transportation has no special name in the legislation, but in the legal doctrine and practice it is generally called a contract of carriage under a bill of lading [8].

The practice of transportation of cargo via liner and tramp shipping predetermined the differences in the sources of legal regulation of the corresponding relations.

The use of a charter party is connected with the tramp shipping, where ships carry goods in any directions without adhering to certain routes. The charter is a document that meets interests of both parties and specifies conditions of carriage, rights and obligations of the parties [7].

Sea transportation, carried out under the voyage charter contract, is regulated by dispositive rules of the domestic law and numerous standard form contracts. To date, there are no international conventions, regulating this type of contracts [7].

In its turn the carriage of goods on liner vessels is certified by the issuance of a special document – a bill of lading [7].

Carriages of goods by sea with the use of bills of lading are governed either by uniformed rules in the form of international conventions or by domestic legislations.

Nowadays the situation is such that there have been created conditions for the use of many regimes for international carriage of goods by sea. There have been adopted international conventions that deal mainly with matters of responsibility of parties to a carriage contract. At the moment the basis of the sources of the international regulation of the carriage of goods by sea consists of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924 (better known as "the Hague Rules"), the Hague-Visby rules, 1968 with the Protocol of 1979, the United Nations Convention on the Carriage of Goods by Sea, 1978 (commonly referred to as "Hamburg Rules") and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (hereinafter – the Rotterdam rules), which at the moment has not yet come into force.

While some countries have denounced the Hague Rules and entered the Hamburg Rules, there are some that are still members of the Hague-Visby Rules and those that are participants only of the Hague Rules. Some countries denounced the Hague rules, but at the same time have ratified the Hamburg Rules [22, pp. 599–606, 706]. There are a number of other countries, which have implemented various provisions of international conventions into their national legislation. Therefore, at present there have acted a mixture of international rules on the carriage of goods by sea, which create a lot of confusion and uncertainty.

Turning back to the definition of the contract of carriage by sea it is worth to notice that usually a contract is defined on the basis of the obligations of the parties. There is no any such in the Hague-Visby Rules, but there is the notion, which has a direct connection of contract of carriage to the document issued there under, the bill of lading. For that reason it has been said that the Hague-Visby Rules have adopted a documentary approach.

The Hamburg Rules and the Rotterdam Rules include instead a definition of a contract of carriage. According to the Hamburg Rules (p. 6 cl. 1) a contract of carriage by sea means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea.

The Rotterdam Rules provide the following definition: "contract of carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage (p. 1 cl. 1).

As Francesco Berlingieri underlines the main difference between these definitions is in respect of the description of the obligation of the carrier, which is merely the carriage of goods by sea from one port to another in the Hamburg Rules and the carriage of goods from one place to another in the Rotterdam Rules. The Hamburg Rules expressly exclude their application to the carriage by modes other than sea in case the contract involves the carriage by other modes, while the Rotterdam Rules extend their application to the carriage by other modes if the parties have so agreed [11].

This new provision in the convention had to cover inland transport that is ancillary to carriage by sea, because the modern maritime transport contract in the liner trade is, to a substantial level, a multimodal transport contract [12].

Along with the international regulation the domestic legislation nevertheless plays a significant role in the regulation of the sea transportation of goods. The rules of national maritime law of the most countries with a great fleet are usually found in the relevant sections of the commercial codes or special maritime codes (laws) of these countries [7]. They, as a rule, are acts of codification and cover the most important institutions of maritime law, as it is in the Shipping Code of Ukraine mentioned above.

Conclusion. Considering all the foregoing, it is necessary to conclude that due to many reasons, in the world's practice, there is not the only one instrument of regulation of relations in the sphere of international carriage of goods by sea. The maritime society has been trying to develop uniform international rules that would regulate matters of responsibility of carriers and shippers in the field of carriage with the use of bills of lading.

But because of the inability of the Hamburg Rules to become a new basis for the international legal regime of carriage of goods, and a contradictory character of the Hague-Visby Rules' provisions that do not fully correspond with the modern trends,

as well as the existence of double legal regime regulating the sphere of maritime transportations, there was arisen a need to develop up-to-date international set of rules in this area. The Rotterdam Rules have been planned to become a tool, which would resolve the problem of scattered regulation of relations in the area of international carriage of goods by sea with the issuance of a bill of lading. Notwithstanding that the Rotterdam Rules has not come into legal force yet, it could be asserted unequivocally that for the very moment they are the most "perfect", full and effective international treaty to govern carriage of goods.

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