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COLLISION REGULATION OF INTERNATIONAL MIXED TRANSPORTATION

The article is devoted to the study of certain aspects and features of collision regulation of contractual relations in the field of international mixed cargo transportation. The lack of a clear and unified approach in defining the conflict rules to be applied to contractual relations of mixed transport in international traffic creates uncertainty, instability of these relations, and, at the same time, in no way contribute to the development of multimodalism.

The main collision principles applied to the contracts of cargo transportation from one state to the territory of another, and the source of their consolidation, as well as the possibility of their application to the agreements of international mixed transportation. Collision factors have been identified, as well as grounds for limiting the application of such bindings as established by international treaties and conventions.

It is concluded that it is necessary to adopt a unified and binding international document that would determine the unified regime of collision settlement of international agreements of mixed carriage. It focuses on the peculiarities and rules of determination of the body authorized to resolve the dispute in this category, as well as the rights that this body should use in resolving the dispute, separately for the member states of the European Union and Ukraine, in particular.

The author concludes that for the studied legal relations the following 3 groups of conflict bindings can be distinguished: a) general conflict principles; b) the set of collision bindings is defined by unimodal transport conventions; c) binding formulas used depending on the transport used.

Key words: international private law, international mixed transportation, collision regulation, collision norm, applicable law.

Постнова Н. І. КОЛІЗІЙНЕ РЕГУЛЮВАННЯ МІЖНАРОДНИХ ЗМІШАНИХ ПЕРЕВЕЗЕНЬ

Представлена стаття присвячена дослідженню окремих аспектів та особливостей колізійного регулювання договірних відносини у сфері міжнародного змішаного перевезення вантажів. Відсутність чіткого та уніфікованого підходу у визначенні колізійних правил, що застосовуватимуться до договірних відносин змішаного перевезення у міжнародному сполученні, породжують невизначеність, нестабільність цих відносин та жодним чином не сприяють розвитку мультимодалізму.

Авторкою виокремлено основні колізійні принципи, що застосовуються до договорів перевезення вантажів із території однієї держави на територію іншої та джерела їх закріплення, а також констатовано можливість їх застосування до договорів міжнародного змішаного перевезення. Виділено колізійні прив'язки, а також підстави для обмеження у застосуванні таких прив'язок, які встановлені міжнародними договорами та конвенціями.

Зроблено висновок про необхідність затвердження уніфікованого та обов'язкового до застосування міжнародного документа, що б визначав єдиний режим колізійного врегулювання міжнародних договорів змішаного перевезення. Акцентовано увагу на особливостях та правилах визначення органу, вповноваженого на вирішення спору в справах цієї категорії, а також права, яким цей орган повинен послуговуватись під час вирішення спору, окремо для держав-учасниць Європейського Союзу та України зокрема.

Авторка доходить висновку, що для досліджуваних правовідносин можна виділити такі 3 групи колізійних прив'язок: а) загальні колізійні принципи; б) набір колізійних прив'язок, визначений унімодальними транспортними конвенціями; в) формули прив'язок, які використовуються залежно від використовуваного транспорту.

Ключові слова: міжнародне приватне право, міжнародні змішані перевезення, колізійне регулювання, колізійна норма, застосовне право.

Problem setting. Statement of the problem. Legal relations in the field of international mixed cargo transportation are, of course, complicated, due to the large number of processes that need to be carried out to deliver the goods from a place in one country, where the cargo is operated by a mixed carriage operator, to the agreed place of delivery in another country; a significant number of participants involved in these processes; their documenting etc.

In this regard, the problem of proper settlement of relations between international mixed cargo transportation is gaining more and more urgent importance. The absence of a single current regime that would regulate international mixed transportation, as well as the presence of independent transport conventions, the provisions of which can be imperatively applied to transportation by a particular type of transport, cause difficulties with the definition of the right to be applied to regulate the contractual relationship of mixed cargo transportation.

At that rate, the regulator of the investigated legal relations may act collision principles, through which the applicable law is determined. They are designed to ensure the certainty of contractual relations, as well as to help the courts in finding out the competence of him to resolve a dispute and the procedure for consideration of such a dispute. Nevertheless, such conflict principles are not a panacea, as their application in practice is difficult and requires compliance with certain rules.

The purpose of the article is to clarify the features and unified approaches to the collision regu-

lation of international mixed transportation and to identify problems of the use of collision factors.

Analysis of recent research and publications. The research on the subject of collision regulation of international transportation was carried out by such representatives of the scientific community as A.V. Yanovytska, I.A. Dikovska, O.P. Radchuk, I.R. Mykyta, G.M. Borovikov, T.V. Averochkina, O.I. Vygovsky, K.V. Manuilova and others. However, the use of collision factors in the regulation of international mixed transportation was not given special attention.

Introduction. In the context of globalization and rapid development of the transport industry, increasingly positive effect in the form of profit is achieved through the rapid and prompt delivery of goods from the destination in one country to the place of arrival in another. International cargo transportation is often carried out on the basis of a contract through the simultaneous use of several modes of transport, which is mixed transportation. Participation in such legal relations can take persons of different citizenship, which requires determining the legal status of the parties to the treaty, the procedure for resolving disputes between them and the body authorized to resolve them, through a specific legal regime.

Article's main body. First of all, note that by its legal nature the legal relationship of international mixed cargo transportation is always complicated by the presence of a foreign element. According to clause 2 of part 1 of Article 1 of the Law of Ukraine "On Private International Law", a foreign element is a feature that characterizes private legal relations regulated by this Law and is found in one or more of the following forms: at least one participant of legal relations is a citizen of Ukraine living outside Ukraine, a foreigner, a stateless person or a foreign legal entity; the object of legal relations is located on the territory of a foreign state; legal fact that creates, changes or terminates legal relations, had or takes place on the territory of a foreign state [1]. The presence of a foreign element indicates the private legal nature of the legal relations of international mixed cargo transportation and encourages the election of applicable law.

Given the absence of a unified act in the field of legal relations studied by us, the burden of choosing applicable law relies on the parties to the agreement of international mixed transportation. Thus, when entering into contractual relations, the parties must reach an agreement on the order and method of interaction, as well as the terms of the contract, one of which is the applicable law.

The definition of applicable law is a right, not a duty of the parties that they can exercise when concluding a contract or in the process of its implementation by amending such a contract. In case of determination by the parties of the applicable law, the certainty of contractual relations and the guarantees of protection of rights, freedoms and legitimate interests are ensured to the parties. Otherwise, the applicable law will be determined on the basis of a collision norm.

In accordance with the definition provided in para. 3 of Part 1 of Article 1 of the Law of Ukraine "On Private International Law", a collision norm is a norm that determines the law of which state is subject to application to legal relations with a foreign element [1]. Collision norms in the field of international transportation are enshrined in the national legislation of states, in international universal conventions, as well as in bilateral (regional) treaties.

Collision norms of international nature in the field of cargo, baggage, passengers are provided by the relevant transport conventions. It should be noted that such transport conventions, as a rule, provide for combined regulation, that is, at the level with material norms, they have fixed collision principles for the settlement of certain provisions.

For example, at the 1956 Geneva Convention on Contract for International Carriage of Goods by Road (CMR Convention) mainly contains material norms. At the same time, some issues are solved by formulating special conflict principles. Given that not all issues in the field of international transportation have received material regulation, it is necessary to highlight those collision principles that fill the relevant material "gaps".

The most commonly used collision links in international transportation include: a) the law of the place of departure of cargo (baggage, passengers); b) the law of the road direction; c) the law of destination; d) the law of the flag (usually used for sea transportation); g) the right of the state of transit.

In the field of international transportation, in addition to the above "transport" binding formulas, there are such classical collision principles as the law of the place of conclusion of the contract (lex loci contractus), the law of the court (lex fori), the law of the state, in the territory of which the main place of activity (place of residence, place of registration) the carrier.

In the implementation of international transportation, the principle of the parties' autonomous will (lex voluntatis) is also applied. This is due to the fact that the agreement of international mixed transportation is one of the types of foreign economic agreements, which in the laws of many states (including in Ukraine) can be regulated by the right chosen by the parties. At the same time, the collision factor lex voluntatis will not be applied if its application contradicts the so-called public order warning. It serves here as an objective limiter of the autonomy of will and the choice by the parties of applicable law [2].

According to V.M. Lototskaya and A.M. Bitkin, the peculiarity of international transportation, which relates to mixed transportation, is that when sending cargo, as a rule, are guided by the legislation of the country of departure, and when issuing it at the final point – by the law of the country of destination [3]. It should be noted that certain types of transportation apply their formula of bindings. For example, the law of railway transportation of goods is applied: it determines the procedure for receiving and transferring goods, the duties of the carrier, the conditions of settlements between the parties. In the implementation of maritime transportation, the law of the flag is often applied: in the distribution of losses in the event of an accident, the issue of material liability of the shipper and the ship-owner.

In the process of international transportation, relations may arise that are not directly related to the transportation of passengers or cargo, but which are directly related to them. We are talking about situations in which during transportation damage is caused to the health of the passenger or his property, as a result of which delicate obligations arise. In such cases, collision regulation can be differentiated: some collision norms will be applied to international transportation, and others will be applied to delicate legal relations. The relevant issues are subject to the regulation of special international conventions, which include, in particular, the Convention on Civil Liability for the Damage Caused in the Transportation of Dangerous Goods by Road, Rail and Inland Water Transport (CCDC) 1990.

A common application in the field of international transportation was the conflict principle lex fori, which acts as a kind of “rescue circle” in the settlement of any legal relations. The application of lex fori is determined not only by national legislation or law enforcement practice of states, but also by its consolidation in the relevant international conventions.

The most used lex fori was in the regulation of air transportation. According to Article 21 of the Warsaw Convention 1929 to unify certain rules relating to international air transportation (Hamburg rules), the court may restrict or even exempt the carrier from liability if the latter proves the victim's guilt in causing harm. At the same time, the same article formulates a collision norm that refers to the legal system of the law of the court to resolve the following issues: determining the amount of periodic payments to be reimbursed; procedure for calculating the term of appeal with liability claim (Art. 22, 28 of the Convention) [4].

When choosing an appropriate conflict norm, a certain "hierarchy" should be observed: international collision norms are mainly applied before national norms. In the case of a conflict between an international universal norm and an international regional norm, regional norms tend to be preferred. However, note that this is not an imperative, and therefore a number of factors should be taken into account when resolving the issue: competition of the general and special norm, the date of ratification and entry into force of the international treaty. Recently, there has been a trend of consolidation in universal international treaties of conflicting norms similar to the conflicting norms of bilateral treaties. This resolves the conflict between universal and regional norms.

The above-mentioned conflict principles are applicable to the legal relations of mixed transportation, but clearly defined binding rules on the possibility of their use in this area at the international level, as of today, have not been established. The only example of reflecting these conflicting principles in the field of mixed transportation is the United Nations Convention on International Mixed Cargo Transportation 1980, which, unfortunately, is not valid. After all, the analysis of its provisions still confirms our conclusions about the applicability, for example, of the collision principle of the country of departure of cargo. Clause 3 of Article 5 of the United Nations Convention refers to compliance, submitted by the Convention to the signature of the operator of mixed carriage or the authorized person on the document, to which this transportation is made, made by hand, printed in the form of a facsimile, stamped with a stamp, in the form of symbols or using any other mechanical or electronic means, the requirements specified in the law of the country of issuance of mixed carriage document [5].

In addition, Article 27 of the UN Convention applies the collision principle of the law of the court. The article stipulates that the arbitration proceedings shall be conducted on the choice of the person claiming the claim in one of the following places: 1) in any place of the state in the territory of which there is: a) the location of the defendant's main commercial enterprise or, in the absence of such, the usual place of residence of the defendant; b) the place of conclusion of the contract of mixed carriage, provided that the defendant has a commercial enterprise, branch or agency there, through which the contract was concluded; c) the place in which the cargo is accepted for international mixed transportation, or the place of its issuance; 2) any other place specified for this purpose in the arbitration agreement or agreement [5].

We do not ignore the law of the country of occurrence of violation of the provisions defining the requirements for the conditions of transportation, to which the right of that state applies, on the territory of the respective violation was allowed. It is stipulated by Article 19 of the United Nations Convention [5], which provides for a legal solution to the situation where the loss or damage of cargo occurred at a certain stage of mixed transportation, in which

the imperative norm of national law provides for a higher limit of liability compared to the limit established by the Convention. In this case, the limit of liability of the operator of mixed carriage is determined by the imperative norm of national law, that is, the right of the country where the loss or damage of the cargo occurred.

In the context of this study, it is advisable to pay special attention to the problem of determining the court authorized to consider and resolve cases in disputes arising from the contract of international mixed transportation. The clarification of the authorized body that will protect the rights and interests of the affected party is an important, but complicated process, since during transportation there is a movement of goods across several borders with at least one vehicle, and therefore the right on the basis of which the relevant body will be determined may change several times.

It should be stated that there is no global convention governing the issue of jurisdiction. At the moment, the EU Regulation № 1215/2012 12.12.2012 on the jurisdiction, recognition and enforcement of judgments in civil and commercial cases (hereinafter referred to as the Regulation) is in force on the territory of the European Union. The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters Done at Lugano on 16 September 1988 (88/592/EEC) [6], which acts in relations between the EU and Denmark, Iceland, Norway and Switzerland, and the Brussels Convention on International Jurisdiction in 1968, are also subject to partial application.

According to the rules of the Regulation, participants of certain legal relations can freely determine which court will be jurisdictional in case of a dispute from these relations. If there are no clear provisions in the contract regarding the choice of the court, the main principle is that the jurisdiction must be granted to the court in the state in which the defendant has a place of residence, regardless of whether the defendant is a citizen of that state. If the respondent does not have a permanent residence in one of the contracting states and the contract does not provide for the choice of jurisdiction, it must be determined by the national legislation of the member state, where the claim is filed [7].

However, there are international conventions that exclude the possibility of applying the Regulation, in particular in cases where the latter contradicts the rules of jurisdiction set forth in these international conventions. For example, when a claim is covered by the Convention on Contract for International Carriage of Goods by Road (CRM Convention), 1956, and the Regulation contradicts the rules on jurisdiction stipulated in the CRM Convention, the CRM Convention has the advantage. Therefore, for the right choice of the court, the jurisdiction of which will include a potential dispute between the parties to the international carriage agreement, the priority should be to check whether there is a relevant convention on transportation, which contains special imperative norms regarding jurisdiction.

The procedure of attribution of a dispute to the scope of a certain convention is not applicable to the treaties of international mixed transportation, since there is no single current international mixed transportation convention, and disputes from such treaties do not fall under the regimes of unimodal conventions, which are used only if the scope of their application corresponds to a dispute.

In view of this, it seems correct that the provisions of the EU Regulation № 1215/2012 12.12.2012 will be applied when deciding the issue of jurisdiction. At the same time, since the Regulation extends its effect only to its parties of the EU participants, for Ukraine the issue of jurisdiction in disputes arising from agreements of international mixed carriage will be determined by the provisions of bilateral international treaties. For example, part 2 of Article 33 of the Agreement between Ukraine and the Republic of Poland on legal assistance and legal relations in civil and criminal cases № 3941-XII dated 04.02.1994, which establishes the rules for determining the court in disputes arising from contractual relations, stipulates that the court of the Contracting Party, in the territory of which the respondent has a residence or legal address, is competent. The court of the Contracting Party shall also be competent in the territory of which the plaintiff has a place of residence or legal address, if the subject of the dispute or the property of the defendant is located in this territory [8].

Applicable to dispute resolution, the law is determined by a competent court on the basis of the Rules (EU) № 593/2008 the European Parliament and the Council "On the Right Applicable to Contractual Obligations" (Rome "I") of 17.06.2008. (hereinafter referred to as the Rome 1 Regulation), which also operates on the territory of the EU member states. The only exception is Denmark, which did not participate in the adoption of the Rome 1 Regulation, does not comply with its action and is not bound by its provisions (p. 46 of the Preamble) [9].

Regulation Rome 1 solves collision problems in private legal relations, which arise on the basis of civil law or trade (commercial) contracts, in particular contracts for the transportation of goods. This type of contract is granted autonomous importance, since the regulation separately provides that in the absence of a choice made in accordance with Article 3, the right to be applied to the contract of carriage of goods is the right of the country in which the carrier has its usual place of residence, provided that the place of load, place of delivery or the usual place of residence of the sender is also in this country. In case

of failure to comply with this condition, the right of the country in which the place of delivery is agreed by the parties applies (Part 1 of Article 5) [9]. This conflict principle is applied along with the general principle of lex voluntatis.

Thus, we can affirmatively say that the conflict principles contained in the Rome 1 Regulation are governing for the respective national courts in resolving disputes from agreements of international mixed transportation. As for Ukraine, the determination by the competent court of applicable law is carried out by collision factors of the Law of Ukraine "On Private International Law", and if the international treaty of Ukraine provides for other rules than established by this Law, then the rules of such an international treaty.

Conclusions. Thus, the collision regulation of international mixed transportation is currently an actual topic and is widely used in practice. The lack of a clear and unified approach in determining the collision rules applied to the contractual relations of mixed carriage in international communication generates uncertainty, instability of these relations, and, at the same time, in no way contribute to the development of multimodalism.

For the investigated legal relations, the following 3 groups of collision ties can be distinguished: a) general collision principles: lex volunteatis, the principle of close communication, the law of the country of occurrence of the violation; b) a set of collision ties is defined by unimodal transport conventions, including: lex fori, lex voluntatis, the law of the country of departure of cargo and others; c) binding formulas used depending on the transport used, in particular: flag law (usually used for sea transportation), the law of the railway road of departure of cargo.

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