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CONTRACT OF FREIGHT FORWARDING SERVICES: CIVIL NATURE AND ESSENCE

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The article investigates relationships freight forwarding services and control of contractual construction. The author comes from a position that the basis for the legal regulation of relations is a specific type of relationship. According to the author, as the subject of civil law in recent times introduced rightly, except property and personal non-property relations, organizational relationship, in determining the legal nature and essence of the contract freight forwarding services should pay attention to the last.

Contract of freight forwarding services is an independent civil contract (*sui generis*), fixed in a separate chapter of the Civil Code of Ukraine, because it has its own unique thing to him – execution or arranging certain legal services in it and / or the actual nature associated with shipping. In the transport process, it has an auxiliary character, since it contributes to the goal of a contract of carriage.

Key words: freight, forwarding, transport, transport forwarding, contract, legal relationship, obligations, commission, assignment.

Нетеса Е.Г. ДОГОВОР ТРАНСПОРТНОГО ЭКСПЕДИРОВАНИЯ: ГРАЖДАНСКО-ПРАВОВАЯ ПРИРОДА И СУЩНОСТЬ / Запорожский национальный университет, Украина

Статья посвящена исследованию правоотношений транспортного экспедирования и регулирующей их договорной конструкции. Автор исходит из позиции, что в основе правового регулирования правоотношений лежит определенный тип правоотношения.

По мнению автора, в основе транспортной экспедиции лежат организационно-представительские правоотношения, поскольку содержание правоотношений транспортного экспедирования составляют действия по выполнению или организации выполнения определенных в договоре услуг, связанных с перевозкой груза. Следовательно, исследуемые правоотношения урегулированы организационным договором, направленным на организацию возникновения и (или) выполнения другого обязательственного правоотношения.

Договор транспортного экспедирования является самостоятельным гражданским договором (*sui generis*), закрепленным отдельной главой ГК Украины, поскольку имеет свой, присущий только ему предмет – выполнение или организация выполнения определенных в нем услуг юридического и / или фактического характера, связанных с перевозкой груза. В транспортном процессе он имеет вспомогательный характер, поскольку способствует достижению цели договора перевозки груза.

Ключевые слова: груз, экспедирование, транспорт, транспортное экспедирование, договор, правоотношения, обязательства, комиссия, поручение.

Нетеса К.Г. ДОГОВІР ТРАНСПОРТНОГО ЕКСПЕДИРУВАННЯ: ЦИВІЛЬНО-ПРАВОВА ПРИРОДА ТА СУТНІСТЬ / Запорізький національний університет, Україна

Стаття присвячена дослідженню правовідносин транспортного експедирування та регулюючої їх договірної конструкції. Автор виходить з позиції, що в основі правового регулювання правовідносин лежить певний тип правовідношення. На думку автора, оскільки в предмет цивільного права останнім часом цілком обґрунтовано введено, окрім майнових та особистих немайнових правовідносин, організаційні правовідносини, при встановленні правової природи та сутності договору транспортного експедирування варто звернути на останні увагу.

Зміст правовідносин транспортного експедирування складають дії з виконання або організації виконання визначених у договорі послуг, пов'язаних із перевезенням вантажу. Зі змісту випливає, що досліджувані правовідносини не є особистими немайновими, оскільки вони не стосуються особистих немайнових прав (благ). Майновими вони теж є опосередковано і лише в частині розуміння споживчої вартості перевезення через цінність її для вантажовласника. Тому автор доходить висновку, що в основі транспортного експедирування, крім інших, лежать відносини організаційного характеру. Відтак, договір, який регулює цю групу правовідносин, теж варто визнати організаційним.

Автором підтримана позиція, що організаційні договори завжди направлені на організацію виникнення і (або) виконання іншого зобов'язального правовідношення. Організаційний договір может бути направлений як на організацію разових зобов'язань, так і договорів, які будуть повторюватися протягом тривалого часу. Він може організовувати як майнові, так і особисті немайнові правовідносини. Організаційні договори породжують самостійні зобов'язання з немайновим змістом.

Разом з тим, договір транспортного експедирування належить до представницьких правочинів, у якому представницький елемент характеризується створенням правових зв'язків між клієнтом і третіми особами за допомогою надання послуг юридичного та/або фактичного характеру представником (експедитором), який діє від свого імені чи від імені клієнта та за рахунок останнього.

На підставі наведеного, автор робить висновок щодо правової природи та сутності договору транспортного експедирування. Договір транспортного експедирування є самостійним цивільним договором (*sui generis*), закріпленим окремою главою ЦК України, оскільки має свій, властивий лише йому предмет – виконання або організація виконання визначених у ньому послуг, пов'язаних із перевезенням вантажу. У транспортному процесі він має допоміжний характер, оскільки сприяє досягненню мети договору перевезення вантажу.

В основі договору транспортного експедирування лежать організаційні правовідносини, змістом яких є організація та забезпечення виконання перевезення вантажу та представницькі, які створюють правові зв'язки між клієнтом і третіми особами за допомогою надання послуг юридичного та/або фактичного характеру. Тому досліджуваний договір варто визнати організаційним представницьким (чи посередницьким) договором.

Разом з тим, автор, ґрунтуючись на позиції Морозова С.Ю., доходить висновку, що не існує у відриві від майнових чи особистих немайнових «організаційних» правових інститутів «самих по собі», вони завжди є пов'язаними. Саме це підкреслює виражену раніше точку зору автора, що договір транспортного експедирування є допоміжним транспортним договором, пов'язаним з договором перевезення вантажу, без якого він не має сенсу.

Ключові слова: вантаж, експедирування, транспорт, транспортне експедирування, договір, правовідношення, зобов'язання, комісія, доручення.

The global economic crisis requires a new approach to solving the economic issues, and to rethink the specific direction of the global economy, to rethink national economy and regulation of relations in the sphere of economic activity.

Significant role in the transport arteries of the economy plays freight forwarding services. Unfortunately, the researchers did not pay enough attention to the research contract of freight forwarding, not for regulation relations. Establish an adequate mechanism for regulation of legal relations is directly dependent on understanding the essence the regulated relations.

Therefore, we will explore the legal nature and essence of the relationship freight forwarding of services and contract structures that they regulate.

To achieve the stated goal of the article delivered for the following tasks:

- To explore the nature of relationships freight forwarding services;
- To research the legal nature and essence of the contractual design freight forwarding services;
- To research the legal nature of the obligations arising under the contract of freight forwarding services;
- To analyze the positive law, this regulates freight forwarding services and makes proposals for the improvement of the regulation of freight forwarding.

Agreements and separate the contractual structures, including the contract of freight forwarding services in the legal literature are given some attention. Among scientists should be noted: O.S. Joffe, S.S. Alekseev, A.O. Sobchak, R.O. Halfina, O.O. Krasavchykov, E.V. Bogdanov, D.V. Bobrova, V.S. Borisova, M.I. Braginsky, S.M. Bratus, V.V. Vitryansky, O.V. DZera, V.M. Kossack, N.S. Kuznetsova, V.V. Lutz, R.A. Maidanyk, N.O. Saniahmetova, M.M. Sibilov, I.V. Spasibo-Fateeva, E.O. Haritonov, Y.M. Shevchenko, R.B. Shyshka, E.O. Michurin, L.K. Weretelnyk, S.V. Ryeznicenko et al.

In 2008 defended PhD thesis Kuzhko O.S. «The contract freight forwarding services», but it attention devoted exclusively contractual structures apart from the actual relationships that are not in favor of the formation of an effective mechanism of legal regulation freight forwarding services.

Therefore, among other tasks, we set the goal to explore the legal nature and essence of the contract of freight forwarding services as part of the mechanism of legal regulation of the relationship.

According to the traditional understanding of the structure of society and its structure, it has its economic base and superstructure. They are interconnected phenomena that are in dialectical relation. This connection is not stable.

As the S.S. Alekseev, the legal system as a social formation feel the impact of political, social and economic contradictions of objective and subjective. But the development of its own determined dialectical contradictions [1, 241].

Of course, in the regulation of civil legal dynamics are not as steep as the most economic relations. Contracting structures for the most part are established since Roman times. Those contracts that have found their formalization, called nominal. They are in one form or another had survived.

Scientific and technical progress requires them to apply to relations connected with things or technology previously unknown to mankind. These relationships require its adequate solution, resulting in either existing contractual structures used to the new relationship, or create new, can provide the necessary level of regulation.

A similar situation occurred and for relations, which is mediated by the activity of the cargo. This is of freight forwarding.

For example the Central Committee of the Ukrainian SSR in 1963 contained a chapter 30 – Transportation of which is not supposed to regulate freight forwarding services. It was not fixed and the other heads of the Central Committee. Only the Central Committee of the Ukraine in 2003 secured a separate chapter 65 obligations from the contract of freight forwarding.

Relationship freight forwarding services occurred and before the introduction of appropriate contractual structure to the Central Committee of Ukraine. However, without appropriate regulatory

consolidation it was mixed as containing elements of other contracts. In accordance with the applicable rules and apply the treaties, the elements of which it covers. A. Sobchak consider them intermediate stage for the emergence of new contracts that before you get legal recognition as a separate type of contract, go through the stage of mixed or complex contracts [2, 61]. At the same time O.S. Joffe linked the development of contractual forms with the historical process where certain contractual forms to seek immediate contractual content type, but when their regulation is optimal proportions, becoming an independent typological significance [3, 103].

The analysis of relationships and positive law suggests that the contract freight forwarding services contracts may contain elements of carriage, orders, commissions, contract, storage that are intertwined in a legal fact (contract) [4, 386].

What constitutes relationship of freight forwarding services and why legislators managed to make it stand out in a separate contractual subtype (within the type of service contracts)?

As the E.O. Kharitonov, in the case of episodic transportations all necessary operations associated with their implementation, perform the sender and receiver independently. In the case when flow of sending or receiving of cargo increases, independent operations are cumbersome and inefficient. More effective job turns specialists or special subjects. The latter are the intermediaries between carriers and the senders or recipients [4, 385].

These activities of the customer service transport organizations called forwarding (Latin – *Expeditio*; deutsch – *Spediteurin* – departure). It usually involves the additional and ancillary operations which are technically required for the transportation of freight – labeling, cargo operations, delivery to the port (station) or of the recipient and others.

To the forwarding services include: selection of appropriate transport for the transportation, utility and consulting services, custom services, assistance in passing quarantine and phytosanitary control, declaration of payments, preparation of the optimal scheme of delivery of cargo to its destination, a choice of types and methods of delivery, organization of insurance of cargoes, documents relating to transportation, information provision of transportation,, organization of storage of goods, works and other services (loading, unloading, sorting, cleaning, etc.) which are necessary for the client.

The relationship between customers (shippers) and forwarders governed by civil law contract, the obligation of which are disclosed in Chapter 65 of the Central Committee of Ukraine (freight forwarding), as contracts are a key tool in the mechanism of regulation of civil relations.

According to art.929 CC of Ukraine under the contract freight forwarding services, one party (freight forwarder) agrees for a fee at the expense of the other party (the client) to perform or organize implementation certain contract services related to the transportation of goods.

The provisions of Article also apply to cases where the duties performed by the freight forwarder carrier.

A similar definition contained in art.316 of the Commercial Code of Ukraine. The only difference in the provisions of the Civil and Commercial Codes is to place the contract of freight forwarding. In the Civil Code of Ukraine – a separate agreement (Chapter 65 freight forwarding) in the Civil Code of Ukraine – not (it is placed in Chapter 32 Rights of cargo, which identifies it as a form of transportation that is not true because it serves the transportation).

Contract of freight forwarding services can be set duty forwarder to arrange transportation of freight transport and the route selected by the forwarder or the client forwarder enter into commitments on their own behalf or on behalf of a client contract of carriage of goods, secure sending and receiving of goods and other liabilities associated with transportation.

Terms of the contract of freight forwarding services determined by agreement of the parties, unless otherwise provided by law or other legislative acts.

From the text of a CC of Ukraine appears that legislators allocated among the responsibilities of a freight forwarder «fulfill» or «organize implementation» certain contract services, which together have significant differences.

There is a mediation based on the «authorization» or «commission» where the freight forwarder may act on their own behalf or on behalf of the customer (shipper). In carrying freight forwarder directly

involved in its implementation and in the organization – only contributes to the organization of its implementation. The scientific literature is dominated position to refer the contract to forwarding service.

The legal nature of the contract of freight forwarding services define in concise form is difficult due to the complexity of the design.

As rightly pointed R.B. Shyshka usually characteristic of the contract is an integral feature of that part already incorporated in the definition of the contract indicating the mode of execution (real or consensual, the distribution of rights and obligations of the parties equivalence). However, these properties are evident every contract are not limited to mounting them in the definition of the contract.

The main problem comes down to crossing the categories of «type of contract» and «description of the contract» as its general property. Currently in error types are called contract specifications, which are then used to characterize the contracts.

In our opinion, based on the classification of contracts proposed by L.K. Weretelyk (the economic orientation or direction of interests of the parties), it is the object of the contract is a factor that determines its nature determines the independence of a particular type of contract [5, 7].

Also expresses the view that species characteristic of the contract has come out with a three sectional treaty system proposed by S.M. Berveno. Its hierarchy: type (focus and purpose of the treaty), view (grouping contracts on personal grounds, but within a common standard features) subspecies (includes features that are not essential to define the legal nature in general) [6, 274].

The characterization of the contract should be a double criterion – first as a the right powerful (one-way, two-way, real – consensual, compensated – free), and secondly, as a contract for a hierarchy of contracts – type, species, subspecies, where the type is defined according to the economic component (objective sought by the parties) contract.

E.O. Kharitonov has determined that the legal grounds for the contract of freight forwarding services bilateral, compensation, and can be either consensual (as freight forwarder organizes the performance of forwarding services) and real (when the freight forwarder providing shipping services from trusted him to load) [4, 386].

To determine the characteristics of the species of the contract of freight forwarding services, that is essential for a proper understanding of the legal nature and essence of the contract, at the next stop.

The type of contract of freight forwarding services is attributed to service contracts [7, 84]. This position adheres and legislator who posted the obligation of the contract of freight forwarding services in the CC after commitments to carriage. (Services).

It is necessary to accept that the role of freight forwarding services on the contract of carriage of goods is adjacent or supporting.

This is confirmed by NACE DK 009:2010, acting on 01.01.2012 [8]. Thus, the class 52.29 (Other support activities in the field of transport) include: freight forwarding, transport by rail, road, water or air transport, group or individual items organization of cargo (including removal and delivery of goods, as well as the layout of parties), issuing and obtaining transport documents and invoices, customs broker, the activity of shipbrokers and agents of the affreightment of places for air transportation, mediation of freight cargo space on a vessel or aircraft, handling, temporary packaging, repackaging, selective control and weighing of cargo, etc.

The literature states that the contract of freight forwarding services is conditionally independent. This convention is due to the dependence of the contract of carriage of goods, without which there is no forwarding. At least that should be the goal of making such carriage. Therefore, in the special literature the contract of freight forwarding recognized auxiliary transport contract.

In studies carried out are quite often characteristics of the studied contract as a contract for services through a comparative analysis of the agreements subordinate type. For example, O.S. Kuzhko determined that in contrast to «work» «services» are characterized by the absence of materialized result synchronicity provision and consumption of services, their intangibility, the inability or the severity of the outcome of the source separation [9, 149]. It features «services» peculiar relationship with freight forwarding, what we definitely agree.

In his dissertation O.S. Kuzhko concluded that the contract of freight forwarding services refers to the representation of transactions in which a representative element characterized by the creation of legal relations between the customer and third parties through the provision of services to legal and / or factual representative (forwarding agent), acting on its own behalf or on behalf of a client and at the expense of the latter. No single legislative approach to regulating intermediary and representative relations in national law leads to confusion in practice independent of contractual structures – the agency contract and the contract of freight forwarding [10, 17].

Compare the agency contract and the contract of freight forwarding. According to art.295 of the Commercial Code of Ukraine commercial intermediary (agency work) is a business activity that is to provide a commercial service agent entities in carrying out their economic activities through mediation on behalf of, for the benefit of, and controlled by the entity he represents.

Compare the agency contract and the contract of freight forwarding services. According to art.295 of the Commercial Code of Ukraine commercial intermediary (agency work) is a business activity that is to provide a commercial service agent entities in carrying out their economic activities through mediation on behalf of, for the benefit of, and controlled by the entity he represents.

As you can see, it laid the structure of commission. The contract of freight forwarding services at the option of the parties may have a design of commission or committee. Civil Code of Ukraine does not have the design agency contract. Instead, p. 1005 of the Civil Code RF stipulates that the agency agreement by one party (the agent) undertakes for reward to carry out on behalf of another party (the principal) and other legal action on their own behalf, but at the expense of the principal, or on behalf of and at the expense of the principal. That is, there are a construction contract orders and commissions.

The above approach the agency agreement (under the laws of Russia) of the contract of freight forwarding services under the laws of Ukraine.

According Kharitonov E.A., if the carrier is not entitled to enter into a contract of carriage on its behalf, it can act as a sales representative [4, 386]. This position is based on the provisions of art.297 of the Civil Code of Ukraine (agency activities – commercial mediation) and art.243 CC of Ukraine (concerning commercial representation), the contents of which, in essence, the same.

It appears that all the same, the difference of the agency contract and the contract of freight forwarding services is not to formalize their structure (as of commission or commission), and the economic goal, which we have repeatedly noted in the objects or data contracts. In the agency agreement it wider – action to forwarding service may form part of his subject. The main goal of the agency contract is expanding scope of representation by the principal agent of his interest in a particular area. In the contract of freight forwarding services another goal – to perform or arrange for services related to the delivery of the goods (Article 929 CC of Ukraine). Its scope is transport services.

In terms of the legal outcome (legal or economic) contract to carry freight forwarding contracts that combine features of agreements on legal and / or factual [11, 490].

Since the subject of the contract of freight forwarding services are to work to provide services related to carriage of goods or performance of the organization of these services, we believe that investigated the legal relations and agreement that governs them is organizational.

This position is supported by many scientists. O.O. Krasavchykov concluded that civil organizational legal relationship – a legal relationship that is based on the principles of equality of the participants expressing the activities undertaken by citizens and organizations within the law of the ordering of their relationships and coordination in the implementation of the state or its own motion [12].

The basis for the allocation of institutional agreements not only transport but also in other areas, the inclusion of the subject [13, 14] civil low organizational relationships [14, 51], which are not characterized by a direct or indirect connection with the person.

A.I. Hasnutdynov is a supporter of the idea that organizational agreements do not regulate property relations and, therefore, the subject civil law «replenished» by the inclusion of organizational relationships, built on the principles of equality and coordination [15, 28].

If other authors only prove the presence of a part of the subject civil law legal organization, S.Y. Morozov in dissertation research «System of the transport organizational agreements» to substantiate their nature and given the author's definition. He noted that institutional agreements have always focused on the organization of occurrence and (or) perform other binding relationship. Organizational contracts give rise to independent obligation to non-property maintenance. Object of obligations organizational relationship represents independent interest for its members [16, 11].

Thus, the above gives a reasonable basis for conclusion on the legal nature and essence of the contract of freight forwarding.

The contract of freight forwarding services is a separate civil agreement (*sui generis*), assigned a separate head of the CC of Ukraine, as has its inherent only to her subject is the execution or performance of the organization referred to in the services related to the transportation of goods. In the transport process, he has a subsidiary character, as it helps achieve the goal of the contract of carriage of goods.

The contract of freight forwarding services belongs to the representative legal actions in which a representative element characterized by the creation of legal relations between the customer and third parties through the provision of legal services and / or factual representative (freight forwarder) to act on their own behalf or on behalf of a client and at the expense of the latter.

The basis of the contract of freight forwarding services are organizational low relationship, the meaning of which is to organize and enforcement shipping. Therefore, the study contract is to recognize organizational representative (or intermediary) agreement.

However, we should recognize and accept the position Morozov S.Y., that do not exist in isolation from the property or moral «organizational» legal institutions «in themselves», they are always connected [16, 22]. Agree with this opinion and express the view that the contract of freight forwarding services is a subsidiary of transportation contracts associated with the contract of carriage of goods, without which it is useless.

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MECHANISM OF LEGAL REGULATION OF PASSENGER TRANSPORTATION: CIVIL ASPECTS

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The problem of providing adequate social adjustment, and including civil relations are quite complicated. The problem is compounded by the tendency for the isolation of some areas of sectoral differences. As a result, young researchers, jurists, mainly focus on its contractual regulation of legal structures. Undoubtedly, an agreement in the field of self-discretionary public relations is the basis of relationships, the way they formalize and control the rights and obligations of participants.

Background of our study is due to the specifics of a particular contract of carriage of passengers (passenger transportation contract is a public treaty of accession) and the need to ensure the implementation of the principle of equality of arms. This creates a situation in which a passenger is unable to influence the terms of the contract, he is entitled to, or enter into a contract on the terms offered by the carrier or refuse their installation. In the absence of legal guarantees, the carrier forms a relationship with his passenger, limiting the amount of the duties and establishing limited liability of a company, or even excludes it not in favor of either passengers or stability of civil relations.

The author supports the view that in situations where the parties of the contract can not or do not want to self-regulate their relationship, or when self-regulation is at odds with those who the public authorities must protect, possible and necessary to the legal regulation of contractual relations with the state.

Key words: the mechanism of legal regulation, normative regulation, contractual regulation, contract, agreement, contract of passenger transportation, an individual's right to freedom of movement.

Сумкин С.А. МЕХАНИЗМ ПРАВОВОГО РЕГУЛИРОВАНИЯ ПЕРЕВОЗКИ ПАССАЖИРА: ГРАЖДАНСКО-ПРАВОВОЙ АСПЕКТ / Запорожский национальный университет, Украина

Проблема обеспечения адекватного регулирования общественных, и в том числе гражданских отношений, является достаточно сложной. Проблема усугубляется тенденцией выделения отдельных сфер по отраслевым различиям. Как следствие, молодые исследователи-цивилисты в основном свое внимание уделяют договорным конструкциям правового регулирования правоотношений. Бесспорно, именно договор в сфере диспозитивного саморегулирования общественных отношений является основанием возникновения правоотношений, способом их формализации и регулятором прав и обязанностей участников.

Актуальность темы исследования обусловлена особой спецификой договора перевозки пассажира (договор перевозки пассажира является публичным договором о присоединении) и необходимостью обеспечить реализацию принципа равенства сторон. Это порождает ситуацию, в которой пассажир не имеет возможности влиять на формирование условий договора, он вправе либо заключить договор на условиях, предложенных перевозчиком, или отказаться от их заключения. При отсутствии нормативных гарантий, перевозчик формирует свои взаимоотношения с пассажиром, ограничивая