

## РОЗДІЛ III. ЦИВІЛЬНЕ ПРАВО ТА ЦИВІЛЬНИЙ ПРОЦЕС; СІМЕЙНЕ ПРАВО

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### FEATURES OF REGULATORY AND CONTRACTUAL REGULATION OF LEGAL RELATIONS ON THE CARRIAGE OF PASSENGERS

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The topic of the article is devoted to the analysis of standard and contractual regulation of legal relationships of passenger's transportation, their ratio, role and importance in the mechanism of legal regulation of the studied relationships. The topicality of the article is conditioned on the low level of their standard regulation and the priority of the fulfillment of contract's freedom principle, and therefore the prevalence of contractual regulation of legal relationships of passenger's transportation.

By the author's opinion, the specificity of the studied legal relationships and their legal regulation makes a conflict that results into non-classical fulfillment of contract's freedom principles and equality of members of civil relationships. So, a passenger is a weak side with no possibility to influence the creation of contract's conditions in the transportation contract (which is a public contract about affiliation). It involves the necessity to use imperatives, contributing restrictions to fulfillment of subjective civil rights (as a rule, carrier's ones) and thereby balancing direct authorities of sides.

*Key words: contract, contract regulation, regulation, passenger carrier, limitations of subjective rights, the principle of freedom of contract, the principle of equality.*

Самойленко Г.В. ОСОБЕННОСТИ НОРМАТИВНОГО И ДОГОВОРНОГО РЕГУЛИРОВАНИЯ ПРАВООТНОШЕНИЙ ПО ПЕРЕВОЗКЕ ПАССАЖИРА / Запорожский национальный университет, Украина

Тема статьи посвящена анализу нормативного и договорного регулирования правоотношений по перевозке пассажира, их соотношения, роли и значения в механизме правового регулирования исследуемых отношений. Актуальность статьи обусловлена слабым уровнем их нормативного регулирования и приоритетностью реализации принципа свободы договора, а следовательно, преобладанием договорного регулирования правоотношений по перевозке пассажира.

По мнению автора, специфика исследуемых правоотношений и их правового регулирования приводит к определенной коллизии, в результате чего реализация принципов свободы договора и равенства участников гражданских отношений не являются классическими. Так, пассажир в договоре перевозки (который является публичным договором о присоединении) является слабой стороной, лишенной возможности влиять на формирование условий договора. Это влечет за собой необходимость применения императивов, вносящих ограничения в реализацию субъективных гражданских прав (как правило, перевозчика), и, тем самым, балансирующих правомочия сторон.

*Ключевые слова: договор, договорное регулирование, нормативное регулирование, пассажир, перевозчик, ограничения субъективных прав, принцип свободы договора, принцип равенства.*

Самойленко Г.В. ОСОБЛИВОСТІ НОРМАТИВНОГО І ДОГОВІРНОГО РЕГУЛЮВАННЯ ПРАВОВІДНОСИН З ПЕРЕВЕЗЕННЯ ПАСАЖИРА / Запорізький національний університет, Україна

Тема статті присвячена аналізу нормативного та договірної регулювання правовідносин з перевезення пасажирів, їх співвідношення, ролі і значення в механізмі правового регулювання досліджуваних відносин. Актуальність статті зумовлена слабким рівнем їх нормативного регулювання та пріоритетністю реалізації принципу свободи договору, а отже, переважанням договірної регулювання правовідносин з перевезення пасажирів.

Автор виходить з необхідності переосмислення цінності благ, пріоритетності особистих немайнових прав фізичної особи. Серед них – право людини на свободу пересування.

Характерним для перевезень пасажирів стало те, що вони виникають у зв'язку з реалізацією права людини на свободу пересування (ст.33 Конституції України, ст.313 ЦК України). Саме ця обставина лежить в основі розмежування договору перевезення пасажирів від договору перевезення вантажу, а, відповідно, і спрямованість правового регулювання відповідних правовідносин (критерій – охоронювані законом блага – об'єкти цивільних правовідносин).

Зазначене зумовлює різні підходи до встановлення правового режиму вказаних благ та механізмів їх правового регулювання. Приміром, при перевезенні пасажирів в основі правового регулювання

правовідносин лежить право фізичної особи на свободу пересування, її життя, здоров'я, безпека. При перевезенні вантажу – його цілісність. Цінність охоронюваних благ теж дає підстави стверджувати про пріоритетність особистих немайнових благ людини, оскільки останні є невідновлюваними (померла особа не оживає; здоров'я особи хоч і має здатність до певного відновлення, але не в повній мірі). Натомість майнове право однозначно має компенсаційно-відновлювальних характер.

В умовах технологічно трансформованого суспільства люди стали свого роду заручниками транспортної системи. Людина, яка входить до транспортного засобу загального користування, не має можливості впливати на хід транспортування, а отже, бути стовідсотково убезпечена від ризиків, що гіпотетично супроводжують процес транспортування, тим більше, що діяльність, пов'язана з управлінням транспорту, визнана законодавцем джерелом підвищеної безпеки.

Автор пропонує внести в дефініцію договору перевезення пасажирів категорію «безпеки», як категорію, яка, з одного боку, є посиленням обов'язком перевізника, з іншого – підкреслює специфіку договору.

На думку автора, специфіка досліджуваних правовідносин та їх правового регулювання, привносить певну колізію, у результаті чого реалізація принципу свободи договору та принципу рівності учасників цивільних відносин не є класичними, оскільки пасажир у договорі перевезення (який є публічним договором про приєднання) є слабкою стороною, позбавленою можливості впливати на формування умов договору. Це спричиняє необхідність застосування імперативів, що вносять обмеження в реалізацію суб'єктивних цивільних прав (як правило, перевізника), і тим самим, збалансовують правомочності сторін.

*Ключові слова: договір, договірне регулювання, нормативне регулювання, пасажир, перевізник, обмеження суб'єктивних прав, принцип свободи договору, принцип рівності.*

The statement of the problem. Transportation area in general and passenger transportation in particular is little explored in science and poorly regulated in positive law. Though life is dictating its terms. Transportation of passengers is fulfilled everywhere and at all times. They are massive. Infringements of passenger's rights are also massive. It requires analysis of the existing level of legal regulation of legal relationships of passenger's transportation and working out of scientific approaches to the mechanism of legal regulation of passenger's transportation. The purpose of the latter is to provide a high level of fulfillment of subjective civil rights mechanism, create guarantees of violations' prevention of passengers' rights, especially as the latter are recognized as carriers of secured private moral rights of physical individuals.

Working out an effective mechanism of legal regulation of legal relationships (and for passengers' transportation in particular) is impossible without their deep scientific understanding and analysis of legal and contractual regulation.

Of course, the researches in the passengers' transportation area were held, but currently there is no single concept focused on the legal regulation of passengers' transportation.

We should name some works of scientists-specialists in civil law, whose researches are concerned to the chosen topic.

In Ukraine there is A.M. Nechipurenko «Civil-law regulation of taxi transportations» (2008), A.A. Minchenko «Contract of passenger and luggage transportation by railway transport in Ukraine» (2011).

We should name such works in the Russian Federation as Ahundov Rasim Adil Oglu «Legal regulation of passengers' transportation by motor transport in the Russian Federation» (2005), L.V. Zarapina «Legal regulation of passengers' transportation by motor transport in the long-distance communications» (2005), M.A. Sergeeva «Civil-legal liability of the carrier according to a contract of passengers' sea transportation» (2007), S.Y. Gurzhiy «Legal regulation of transportation by city public passenger motor transport» (2007), S.E. Heygetova «Legal regulation of passengers' transportation by motor transport» (2007), A.S. Pozdnjakova «Realization of the right to entrepreneur business, which is connected with passengers' transportation by motor transport» (2008), A.A. Shchurova «Air carrier's liability for damage to life and health of the passenger during the international transportation» (2009), V.V. Mosashvili «Stipulation of international air transportation of passenger and luggage: concept, peculiarities, system of legal regulation» (2011), A.V. Vygodyansky «Civil-law contract regulation of air transportation of cargo and passengers» (2011), T.S. Kozlova «Legal regulation of liability for damage to life and health of the passenger during the international air transportation» (2011), V.V. Machina «Contract of passenger's air transportation» (2012), A.S. Kasatkina «Contract of passenger and luggage transportation in international private law» (2013).

Despite the present mass of studies, concerning different areas of fulfillment of passenger's transportation by any means of transport, it should be noticed that nowadays there is no legal algorithm of legal regulation's generalization and without it all attempts to regulate relationships concerning peculiarities of passenger's transportation by some means of transport have no common civil approach, which is based on essence of legal relationships of passengers transportation and common approaches to regulation of studied legal relationships and creation of common providing mechanism of fulfillment of subjective moral person's right to freedom of travel.

So, as it was mentioned, topic of contractual regulation of passenger's transportation is relevant and poorly studied and is concerned to person's right to travel, government's taken upon itself obligation to provide it, neutralize or minimize the negative consequences of passengers' transportation, efficiently organize passenger flows. Quintessence is right to transportation and provision of his safety, convenience and comfort. Of course, the mentioned provision is a sphere of standard regulation. Therefore, the subject of research is standard and contractual regulation of legal relationships of passengers' transportation and their correlation, the place in the mechanism of legal regulation.

The topic of contractual regulation of passengers' transportation is important enough and that is conditioned by several factors. Among them are traditions of transport sector, which, ironically, came from the times of Tsarist Russia. Orientation of socialist Soviet Union on economy plans' implementation brought about its changes to the specifics of legal regulation of passengers' transportation. In 2003 the new Civil Code of Ukraine was adopted and it is focused on the regulation of social relationships on the principles of private law. Nevertheless, chapter 64 of the Civil Code of Ukraine provides a general definition of certain types of transportation and references to civil liability for any failure or breach of contract, which must be concretized in transport charters and codes. Unfortunately, the latter contains neither reason nor forms of liability.

Both in law and in doctrine there is no concept of orientation of legal regulation of passengers' transportation.

The result is obvious, there are frequent violations of the rights of passengers, lack of a mechanism of guardeness and protection of their rights. It is unacceptable in terms of building of a democratic legal state.

Lets also define some factors affecting the regulation of legal relationships of passengers' transportation.

Firstly, re-orientation of direction of legal regulation of civil relationships has taken place. With the adoption of the Civil Code of Ukraine in 2003 and the introduction of Book 2 of the Civil Code (the moral rights of the individual) the theory of orientation at person becomes dominant in the civil law. It is based on the precepts of the Constitution, according to which the individual and his rights are recognized as the highest social value.

In particular, it conditions the necessity of new private legal understanding of the essence of public relationships for passengers' transportation and creation of the mechanism, which is capable to ensure the implementation of person's rights, who wants to move in space.

Secondly, it is characteristic exactly for passengers' transportations that they appear towards the implementation of person's rights to travel (Article 33 of the Constitution, Art.313 of the Civil Code of Ukraine) [1]. This is the very thing by which the difference between the contract of passenger's transportation and the contract of cargo's transportation should be justified, and therefore, the direction of legal regulation of corresponding legal relationships (the criterion is legally protected goods).

It should be mentioned that we mean here the object of civil legal relationship that is material or private non-material good, which is the reason for legal relationship's origin [2, 103]. According to this criterion the division into two types of relationships – property and private moral – is done.

We have already studied the object of legal relationship of passenger's transportation – it is a personal moral good of physical person, which is expressed in its right to freedom of travel. It concludes that the essence of legal relationship of passenger's transportation is private moral, which implements the abovementioned right of physical person.

On the contrary, during cargo's transportation the need of a person (physical or legal) to transportation of property or other material values in area is satisfied and therefore legal relationships of cargo's transportation are proprietary.

The abovementioned leads to different approaches of establishing of legal regime of the indicated goods and mechanisms of their legal regulation. For example, during passenger's transportation

at the heart of the legal regulation of legal relationships is person's right to freedom of travel, its life, health and safety. And during cargo's transportation it is its integrity. The value of protected goods also allows to assert the priority of private moral goods of a person as the latter are non-renewable (the deceased can't come to life, person's health can renew only to a certain level). Instead, the property right has clearly compensatory renewable character.

In other words, the value of the protected rights leads to the need to work out guarantees for them, increased requirements, including those expressed in subjective mutual legal obligations set out in the regulations and contracts.

Thirdly, during passengers' transportations there are some risks (for their health and life, we don't consider business risks in this aspect), which aren't thoroughly studied in civil law, hence risks and safety of civil rights' fulfillment require research, understanding and regulations.

Author proposes to add the category of 'safety' into the definition of passenger's transportation contract, this category on one hand states the carrier's liability to organize safe transportation of passenger in space, and on the other hand it emphasizes the peculiarity of this contract as the one that fulfills private moral person's right and, therefore, requires special measures from the carrier – the obligated side of the contract. Such measures are to minimize risks to life and health of a passenger, as well as to provide comfortable fulfillment of person's right to travel.

Fourthly, there is a transformation of society. People have become a sort of hostages of the transport system. A person entering a public transport vehicle, can't influence the course of transportation, which is fulfillment of passengers' transportation contract, entrusting with his and sometimes his children's lives and health, categories which are recognized as the most valuable ones, to the transport system – the carrier. Examples are more than convincing – passenger bus accident happened because of the driver watching a movie on a laptop, which was on the next seat [3].

Fifthly, the abovementioned arguments give reasons to new approaches to the analysis of the legal status of the passenger. It is already not just a person having a set of rights and obligations on the contract, it is a person who uses passengers' transportation contract as a tool of fulfillment of person's right to travel.

Sixthly, legal status of juveniles and minors as passengers is not clearly defined (as well as their parents one, who sign contracts within legal representation of their children).

Seventhly, the essence of passengers' transportation contract isn't finally defined. Very often passengers buy several tickets or all seats in the compartment (for railway transportations). The question is: is there a spaciousness rent of transport vehicle part, as during charter (affreightment) or delivery of passengers to the destination? Is there a passengers' transportation contract (sui generis), or does it consist of several other independent contracts (rent, storage etc.), presenting by itself a mixed or complex contract?

The answer to these questions has a scientifically applied nature, as a proper understanding of the essence of a regulated legal relationships ensures the correct application of all contractual constructions, funds of standard regulations of legal relationships.

Eighthly, limited liability of the carrier needs studies and argumentation. Formally, art.922 of the Civil Code of Ukraine provides carrier's liability for delay of passenger's departure and violation of his delivery term to destination. Penalty is determined in the amount established by agreement of sides, transport codes (statutes). Unfortunately, the latter contain neither the amount of such penalties, nor the mechanism of their calculation and penalty. This indication is established in favor of carriers and caused supposedly by programmed lack of carrier's funds, and their penalty can negatively influence the stability of the transport system. Civil liability insurance solves this problem successfully.

Today's exception is passengers' air transportation, where the limits of carrier's liability for flight cancellation or passenger's delivery delay are standardly stipulated.

Author puts forward position on the need to establish civil liability on passengers' transportation contract relatively to the carrier by law, that will help to regulate studied legal relationships and provide fulfillment of civil rights compensatory principle, protection of passengers' rights.

Ninthly, the mentioned factors give dialectical idea of the essence of legal relationships of passengers' transportation and some peculiarities of their legal regulation.

Let us return to the direct subject of our study, which is the ratio of standard and contractual regulation of legal relationships of passengers' transportation.

The researches of the given question witness different approaches to its solution in different historical periods. Thus, Khalfina R.O. notes that since pre-war years to the mid 50s the norms of administrative law dominated. During a long period of time relationships between sides were regulated mainly by individual administrative acts. Decision of the Council of Ministers on 21th April 1949 established the obligation of contracts' signing and showed important drawbacks of production and distribution, which were connected to disdain of civil-law means of influence. Further development strengthened civil-law methods to regulate these relationships. However, overly detailed regulation of relationships by means of administrative law prevented the usage of means of civil-law regulation. Over detailed stipulation of basic conditions in administrative acts, defining rights and obligations of sides, prevented the effective usage of contractual forms of relationships.

The gradual increase of the role of civil rights norms, regulating given relationships, had a great positive meaning as it promoted more than full taking into account of society's needs in the process of production planning and distribution, rational usage of resources, development of the initiative of sides [4, 267].

In the 90 s in civil law the position towards a great role of contract in regulations of public relationships began to dominate and the principle of freedom of contract has been included in the basic provisions of the Civil Code of Ukraine on the regulation of civil relationships.

The regulatory role of contract brings it to the law and statutory acts. Contract terms as formal rules are different from the formal disposition of the law by two fundamental peculiarities. The first deals with the origin of behaviour rules: contract expresses the individualized will of sides, and the legal act expresses the will of the body that issued it. The second defines the action limits of any behaviour rule.

Contract is directly designed to regulate the personified behaviour of its sides only, for those who are not its sides, it can create rights, but not obligations [5, 49]. Legal or any other statutory act creates a general for all rule (it also determines any restriction of will expression of people's circle, who are engaged with this legal deed). These peculiarities distinguish civil-legal contract. Contract shows peculiarities (public contracts), and there is no distinction that separates it from statutory act, it is erased, and the main role is given to sides' will [6, 183].

On the basis of the abovementioned K.I. Zaboyev identified the contract as a universal category of social life and economic relationships, it is a free regulator, at that contractual regulation is a so called natural self-regulator of society and economy [7, 21]. Contract serves as an ideal way of formalization, modeling shape of permissive activity of civil circulation's members.

Yarotskiy V.L., studying the role of contract in the mechanism of legal regulation of civil relationships, drew attention to the following. Public-legal impact on social relationships is conditioned by properties of law, providing the fulfillment of state's functions. The structure of private-law sphere is characterized by a combination, in the context of unified regulatory system, of normative organization of civil relationships and their self-organization (self-regulation) [8, 119].

As we have already mentioned, the position of priority of dispositional regulation of civil legal relationships dominate in civil law. So, Pogribnoy S.A. expresses the position that state legal regulation of contractual relationships is possible and necessary only in that case when contract's sides don't want or can't regulate their relationships by themselves or when their independent regulation of their relationships contradicts interests, which must be protected by public power [9, 27].

However, A. Oleinik expresses a position on the priority of legal standard that secures model of person's possible behaviour (its subjective rights). The fulfillment of legal standards is provided by

legal relationships [10, 150]. He also mentioned that fulfillment of subjective rights and freedoms is a form of their being and its function is to shift social goods, which are fixed by norms of objective law as their possible and actual usage by a certain person to satisfy his goods. Moreover, he mentioned the difference between the mechanism of legal regulation of legal relationships and the fulfillment mechanism of the subjective rights by the criterion of their functional purpose [10, 151].

Article 11 of the Civil Code of Ukraine stipulates that the basis of civil rights' and obligations' origin are contracts and other deals. In this case it is about the basis of legal relationships' origin, which structural element is subjects' rights and obligations.

In other words, the basis of the legal relationships' origin is the contract (except laws, deals, etc.).

As the R.O. Khalfina mentioned, in 1948 M.M. Agarkov classified legal actions as legal facts (legal relationships' origin), which put in action a legal norm. He refers contracts to them [4, 290].

At the same time, she points out that during the lifetime of the contract relationship, the contract is the criterion of the legality of the sides' behaviour in legal relationship and its model should correspond to sides behaviour. Thus, contract doesn't only provide a basis for the application of any law's standard to this legal relationship, for its origin and development, but also directly regulates the sides' behaviour, defines rights and obligations of participants of legal relationship, which is made by them. This follows from the nature of contract as sides' agreement, as an act of their will. By their agreement the members, in accordance to standards of objective law take on responsibilities and acquire rights. Contract has a direct impact on the formation of the model of legal relationship right up to its stopping [4, 302].

It should be noted that legal relationships of passengers' transportation have their peculiarities. Firstly, they fulfill person's right to freedom of travel. Secondly, the contract of passengers' transportation is a permissive formalizator of legal relationships, and passengers' transportation by public transport is their bigger part. This very specificity of relationships conditions the specificity of the contract, it is a public agreement of joining, that restricts the rights of passengers and maximizes freedom of contract for the carrier, which violates the principle of equality of the sides in the civil law.

On one hand, it indicates the inability to regulate legal relationships of passengers' transportation by permissive basis only (contractual regulation, which seems to be autonomous is executed in the limits regulated by the state power [11, 107]), and on the other hand, it requires standard restrictions, including the limitations of the principles of contract freedom, which are directed at the provision of public interests and also the interests of the weaker side of the joining public contract, that is the passenger. These restrictions create additional guarantees to fulfill his private moral rights of the passenger, in particular, these rights are the right to life, health, freedom of travel.

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## LEGAL GROUNDS CIVIL LIABILITY OF THE CARRIER UNDER THE CONTRACT OF TRANSPORTATION OF THE PASSENGER

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The topic of the article is devoted to topical issues of civil liability of the carrier under the contract of the carriage of passengers. The urgency is due to several factors, including irresponsible violations passengers rights on the part of carriers that caused deficiencies and gaps of positive law and special traditions of transport, which contain a limited civil liability carriers.

Despite the existence of fundamental research Kanzafarova I.S. "Theoretical foundations of civil liability in Ukraine" theory of civil law continue discussion about essence of civil liability as such (contract and tort) essentially contractual liability as a consequence of an obligation or a separate accessory obligation which has perform the debtor. Its requires careful, researches of civil liability of carriers for breach of contract of the carriage the passenger in the context of transportation the different types of transport, as the latter has its own characteristics, due to the technological specifics of different types of transport and the level of regulatory carriage of passengers by different types of transport.

*Key words: contract, passenger transportation, civil liability, illegal behavior, blame, necessary causation, compensation, damages, moral damages.*

Абрикосов Д.С. ПРАВОВЫЕ ОСНОВАНИЯ ГРАЖДАНСКО-ПРАВОВОЙ ОТВЕТСТВЕННОСТИ ПЕРЕВОЗЧИКА ПО ДОГОВОРУ ПЕРЕВОЗКИ ПАССАЖИРА / Запорожский национальный университет, Украина

Тема статьи посвящена актуальным вопросам гражданско-правовой ответственности перевозчика по договору перевозки пассажира. Актуальность обусловлена рядом факторов, среди которых безответственные со стороны перевозчиков нарушения прав пассажиров, что, в свою очередь, обусловлено недостатками и пробелами позитивного права и особыми традициями транспортной сферы, содержащими ограничение гражданско-правовой ответственности перевозчиков.

Несмотря на наличие фундаментального исследования Канзафарова И.С. «Теоретические основы гражданско-правовой ответственности в Украине», в теории гражданского права продолжают дискуссии относительно сущности гражданско-правовой ответственности как таковой (договорной и деликтной), сущности договорной ответственности как следствия невыполнения обязательства или отдельного акцессорного обязательства, которое должен выполнить должник. Требуется тщательного исследования гражданско-правовой ответственности перевозчиков за нарушение условий договора перевозки пассажира в разрезе перевозки отдельными видами транспорта, поскольку последняя имеет свои особенности, обусловленные технологической спецификой различных видов транспорта и уровнем нормативного регулирования перевозок пассажиров различными видами транспорта.

*Ключевые слова: договор, перевозки пассажира, гражданско-правовая ответственность, противоправное поведение, вина, необходимая причинная связь, компенсация, возмещение, ущерб, моральный вред.*

Абрикосов Д.С. ПРАВОВІ ПІДСТАВИ ЦИВІЛЬНО-ПРАВОВОЇ ВІДПОВІДАЛЬНОСТІ ПЕРЕВІЗНИКА ЗА ДОГОВОРОМ ПЕРЕВЕЗЕННЯ ПАСАЖИРА / Запорізький національний університет, Україна

Тема статті присвячена актуальним питанням цивільно-правової відповідальності перевізника за договором перевезення пасажирів. Актуальність зумовлена рядом факторів, серед яких безвідповідальне з боку перевізників порушення прав пасажирів, що зумовлене недоліками та