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THE PROBLEMS OF CARRYING OUT CONTRACTUAL RELATIONS BETWEEN TRANSPORT SERVICE ENTREPRISES AND THE ENTERPRISES OF PORT ACTIVITY

The main problems, which occur in the process of signing contracts between the transport service companies and state enterprises, ports and private terminals, are considered in the article. The changes in the sphere of contractual relationships between the enterprises conducting port activity and the enterprises, which provide transport services, are regarded. The ways of improvement of the cooperation process between the mentioned subjects of the maritime economic complex are offered.

Keywords: *enterprises of port activity, transport service enterprises, ports, terminals, maritime agents, forwarding companies, contractual relationships, contracts.*

В статье рассмотрены основные проблемы, с которыми сталкиваются агентские и экспедиторские компании в процессе заключения договоров с государственными предприятиями, портами, частными терминалами. Отслежены изменения, которые происходят в сфере договорных отношений между предприятиями портовой деятельности и предприятиями транспортного сервиса. Предложены меры относительно дальнейшего усовершенствования процесса сотрудничества упомянутых субъектов морехозяйственного комплекса.

Ключевые слова: *предприятия портовой деятельности, предприятия транспортного сервиса, порты, терминалы, агентские компании, экспедиторские компании, договорные отношения, договора.*

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В статті розглянуто основні проблеми, з якими стикаються агентські та експедиторські компанії в процесі укладення договорів з державними підприємствами, портами, приватними терміналами. До них відносяться: занадто різноманітність проформ договорів, диктування власних умов портами та терміналами, небажання приватних терміналів укладати договори з усіма агентами, тобто «дискримінація» агентів, включення до умов договору пунктів, що суперечать законодавству, вимоги до завчасних виплат за лоцманські послуги, які неможливо чітко підрахувати завчасно тощо.

Відстежено зміни, що відбуваються у сфері договірних відносин між підприємствами портової діяльності та підприємствами транспортного сервісу. Зокрема, в сучасних умовах господарювання підприємства транспортного сервісу частіше звертаються до суду щодо з'ясування спірних питань з підприємствами портової діяльності. При цьому останні не повинні користуватися своїм домінантним положенням і відмовляти у підписанні договору через наявність позовних вимог. Також становище експедиторів, та особливо агентів ускладнюється через те, що порти не є єдиними підприємствами, з якими необхідно поновлювати договори. Так морським агентам необхідно також укладати угоди з ДП «Держгідрографія», «Дельта-Лоцман» та КП «Морська пошуково-рятувальна служба». Тільки у комплексі з такими угодами може бути підписаний договір з портом або терміналом.

Запропоновано заходи щодо подальшого вдосконалення процесу співпраці зазначених суб'єктів морегосподарського комплексу. Головним аспектом такої співпраці повинна стати відмова підприємств портової діяльності від зловживання своїм монопольним положенням та дискримінації експедиторів та агентів за різними критеріями. Навіть у ситуації коли державні підприємства бажають застерегти себе від несумлінних контрагентів та виникнення дебіторської заборгованості, експедиторські та агентські компанії з позитивною репутацію не повинні страждати через неплатників. Також велике значення

має дотримання законодавчих норм, тобто відсутність примусу у підписанні угод з небажаними, невигідними, суперечливими умовами, які погіршують положення сервісних підприємств у порівнянні з монополістами – портами та терміналами.

Ключові слова: *підприємства портової діяльності, підприємства транспортного сервісу, порти, термінали, агентські компанії, експедиторські компанії, договірні відносини, договори.*

Problem statement. In the activity service of companies, including forwarding companies and maritime agents, an essential element is the interaction with other participants of transport process. In the case of forwarding companies this is more about the interaction with carriers on different modes of transport, certification and survey companies than with ports and terminal. The interaction between forwarders and the enterprises of port activity lies mostly in performing of loading and unloading by the last ones, invoicing the forwarder and paying the invoice by the forwarding company. The interaction of the agents with sea transhipment terminals and especially ports is more intense. Agents act on behalf of the ship-owner when every vessel enters the port, so the range of their relationship with the port is broader: registration of the arrival and departure of the vessel, registration of the vessel for the loading and unloading operations, material supply (ship chandlering) and others. Thus, when new signing (re-signing, renewal) of contracts with the port or terminal is necessary the maritime agents may have more difficulties than the forwarders. However, no service company can perform its obligations to principals without such contracts. This weakens their position in the relationship with the enterprises of port activity.

Monopoly position of the enterprises of port activity in relation to the transport service enterprises causes difficulties in signing agreements on cooperation between them. This in turn interferes with normal and continuous activity of the last ones, leading to delays and violations of cargo transportation and economic relations in the economic system.

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Analysis of recent research and publications. We agree that the problems that occur annually in the activity of transport service enterprises while signing (renewal) of the contracts with ports and other organizations to ensure the immediate implementation of their practice is not the primary problem of the transport industry. Because of this, they are not regarded in so many publications, most of which are authored by the practitioners of forwarding and agency activities [1-3]. Also, the norms regulating contractual relations are given in the legal framework [4-8]. The above calls for a scientific examination of this problem, which, along with other, more global problems, hinders the effective functioning of the enterprises of marine economy.

Tasks of research. The purpose of this paper is to develop the measures of improving the cooperation process between transport service enterprises and the enterprises of port activity.

The main material of the research. Typically, at the beginning of each calendar year, almost all freight forwarding and agency companies face the need of re-signing the agreements with ports, terminals and other businesses. At first glance, this mechanism should be simple and well-aligned. Yet transport service companies are increasingly faced with obstacles of various kinds.

All organizations that transport service companies are to sign contracts with can be divided into two groups:

1) those without which no transport service companies can operate (ports, transhipment terminals, public enterprise "Maritime Search and Rescue Service ", state enterprises "Dezhrhidrohrafiya" and "Delta-Lotsman" – for maritime agent, representatives of carriers, shipping lines agents, insurers – for freight forwarders);

2) those from which the companies can choose the most competitive ones and collaborate on the most favourable terms (ship chandlers, bunker firms, maintenance crews, automotive carriers, firms that carry out expertise, etc.).

The procedure for contracting with the second group does not cause any complications. However, enterprises representing the second group act in a situation of natural monopoly. Therefore, not

every eager subject of the transport service sphere is able to promptly conclude a new or extend an existing contract.

According to the legislation of Ukraine, the parties who conclude a contract do not have a right to impose conditions contradicting the law [4]. When contracting, parties must also comply with the Law of Ukraine "On Protection of Competition" [5], "On the Protection from Unfair competition" [6], "On Sea Ports of Ukraine" [7], as well as art. 73 of the Merchant Shipping Code of Ukraine [8], according to which on the port's territory can operate businesses and organizations of all forms of property, the purpose and activities of which are the service of vessels, cargoes and passengers. Seaports have no right to interfere with the activities of these companies and organizations on their territory, as well as interfere in their business activities. Unfortunately, in practice these strict rules are not always carried out.

It should be noted that the process of contracting with the enterprises of port activity was not always so complicated. Difficulties with the signing of contracts began to appear when private terminals refused to sign contracts with the agents that were not included in the list of their partners, the so-called "not their" agents. This negative example was adopted by the ports, which also complicated the signing of contracts. In addition, for the agency companies further process of concluding agreements with other companies that were listed in the first group is not possible without a signed agreement with the port.

The main obstacle to facilitate the conclusion of agreements between these contractors is that of all the active ports and private terminals the majority offer completely different pro forma contracts to be signed. This is due to the fact that each port and each terminal has its own specifics, policies and practices that are appropriately reflected in the forms of contracts. In addition, with changes in legislation and practice the requirements for the enterprises of transport service can be reviewed annually in respect of the procedures for operational, financial and administrative relationships.

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The process of signing an agreement with Ukrainian ports begins with an appeal to the Port with a request to sign a cooperation agreement. However, before sending the draft agreement in force in this port, its administration requires to provide a list of documents without which it is impossible to conclude an agreement. The shortest list includes the statute of the company, an extract from the Common State Register of Enterprises and Organizations, a reference on bank account opening [1]. Nevertheless, more and more ports and private terminals require detailed information which is not stipulated by law and creates a significant obstacle to the conclusion of the contract.

Such information as the list of vessels that the company intends to agent, the schedule of arrivals of these vessels, the agreement with the ship-owner, is confidential in the activity of maritime agents and is not subject of notification for port authorities. In theory, this information can be provided at rendering agency services for linear vessels, but legally such a condition for signing the contract does not exist, and the agent is not obliged to do it.

In the past decade among transport service companies of all sizes there was a tendency to conclude contracts with the port and terminals to prove the seriousness of their operations and their own ability to principals [2]. Nonetheless, at the end of the reporting period, it appeared that in reality large amounts of services under these contracts were rendered only to a small number of subjects. However, this does not indicate a need for the enterprises of port activity to create limitations in order to select agents and freight forwarders to cooperate with, as this would be a form of economic discrimination prohibited by law.

There are other reasons for the refusal of signing the contract. For example, concluding the contract not for a year, but for each of the next months, with a possible extension of it, if the agent or freight forwarder will be loyal to the port at the expense of its obligations to the principal (the ship-owner or cargo-owner). Also, ports often require the inclusion into the contract of conditions of the possibility of early unilateral termination by the port, despite the fact that the right

to appoint an agent, that is his work in the port, is a part of the exclusive competence of the ship-owner.

Along with this a situation when the port and agent are in litigation is possible. Such disputes often arise from the still controversial current Tax Code of Ukraine, whilst the application of certain of its provisions is being disputed by the transport service companies in court. Thus, if the agent and the port are in the process of resolving a dispute, claims of the port at times turn into blackmail, the port could require the agent to abandon the protection of the interests of the ship-owner in court. It cannot be a barrier to continued relations, while the dispute is being solved in court, and at the same time the agent in his turn should not lose his right to work in the port.

In general, the modern trend of freight forwarders and agents representing third parties go to court ceased to be a sign of worsening relations with partners, namely the enterprises of port activity. On the contrary, it contributes to the improvement of the legal framework and legal practice, and is normally seen in European ports management.

In addition, agents and forwarders may have concerns regarding pro forma contracts offered by ports. As completely equal partners, agents and forwarders make up a Protocol to the treaty. Though, the fact of its appearance itself is often perceived with hostility and meets resistance.

As mentioned, each port developed its own version of the contract, although there is a condition common to all agents – a demand of payment of port dues before the departure, which is consistent with the law. Special attention is required to the description of its enforcement protocol in agreement. This condition is not always well aligned. There are ports that have simplified this mechanism for their domestic services, and are effectively cooperating with agents on this account.

It happens so that the artificial complexity and bureaucratic approach hinder the process. The ports require prepayment of all their services before the time of their provision and delivery of the invoice to the agent or freight forwarder.

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In the practice of maritime agents other conditions of the agreements with ports can be met: fee for providing information services and other fees for "flimsy" works, without which the ship-owner and the agent can do and which are already paid by the target port charges (Order of the Ministry of Transport of Ukraine № 783) [2]. However, not every maritime agent will dare to enter into a discussion upon them.

An example may be a condition included into the contract of a private port, which imposes liability on an agent to a fine of $100 thousand for the lack of documents proving his credentials to the agency, and if these documents do not correspond to reality. This condition is put forward regardless of the fact that the captain of the vessel, guided by international maritime law and practice, showing a conventional document (General Declaration) upon the arrival to the port, where his signature certifies the existence of such powers with a particular agent, thus confirming the fact of serving this vessel by this rather than another agent. This prevents rendering agent's services to the vessel by the outsider.

For beginners of agent or forwarding activity important is the fact of signing the contract. Therefore, these companies do not have comments and complaints about the conditions of the contract. However, experienced agents and freight forwarders know that their requirements for changing the conditions of the contract will result in delaying its signing, complicating the operational work and will cause reprimands from the principals. Thus, considering all the "pros" and "cons" the entitled agents and freight forwarders also often sign contracts that contain unfavourable conditions. As a result, the enterprises of transport service themselves allow ports to show all the negative aspects of monopoly.

Ports make good use of this situation to their advantage and force all agents to sign their pro forma contracts, citing the fact that other maritime agents also sign it. Although with the contracts for freight forwarding the ports express flexibility and willingness to give up something, as in this case they are able to obtain additional income.

Earlier the ports issued invoices upon all port charges and services rendered to vessels. Today to get started in any Ukrainian port in addition to the main contract, an agent or a forwarder has to sign contracts with state enterprises "Dezhrhidrohrafiya" and "Maritime Search and Rescue Service " and "Delta-Lotsman" [1]. In the first case we have a document that has long been used and does not cause problems, which can vary with changes in legislation, signing procedure of which seems specifically designed to make life easier for the agents (and for the ship-owners).

Communal enterprise "Maritime Search and Rescue Service" is a newly formed organization that took into account all the difficulties of the transition period, which were met by the SE "Dezhrhidrohrafiya" and "Delta-Lotsman", and during a short period established mutual payment system with the agents.

Traditionally it is more difficult to conclude a contract for the provision of pilotage services. This is due to the fact that you need to design not only the draft of the contract , but also to take into account the large number of details, each of which may be important in the event of a disputed situation [3]. Requirements for an agent as a representative of the ship-owner in this case take on a special meaning. We are talking about the safety of navigation (especially in case of emergencies). That is why experienced agents do not deny any requirements for the application form for pilotage or other articles included in the pro forma contract to create ideal conditions for the safety of navigation and work of pilots.

However, there are requirements that directly conflict the law, experience and the obligations of agents to ship owners. This is prepaid pilot services rather than canal dues. The agent is obliged to pay canal fee before the departure, and the other services value can be calculated before their provision only approximately. Therefore, with high probability this calculation will not be final.

Thus, "Delta-Lotsman" is trying to protect itself from unscrupulous agents and ship-owners that cannot pay for the service rendered properly after the departure of the vessel and thereby create debts. The period when this was not uncommon is long over, but the

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risk is always there. However, this does not mean that the contract should include conditions that contradict the law, and the presence of which frowns the customers. Maritime agents with positive reputation should not suffer because agents-debtors. In such cases it is necessary to use other methods of influence. As mentioned, not everyone is able to sign the contract. Those who signed it gave "Delta-Lotsman" sufficient information so it could sort things out in court.

Conclusion. Modern methods of influence on transport service enterprises from the side of the enterprises of port activity are quite aggressive. Ports and terminals are in a monopoly position in relation to agents and freight forwarders. Accordingly, they insist that if at least one subject of the sphere of transport services signed a contract with unfavourable terms, it is subject to be signed by all the others. However, every year there comes a new understanding of competition and freedom of choice for ship-owners and cargo-owners, it becomes easier to build relationships with private terminals that are more willing to cooperate with all agents and forwarders, not just a select number of selected agents in their own territory.

Today the main emphasis in the relationship with contractors should be made not on harsh conditions and requirements, but on the freedom of choice, thus bringing cargo flows, ship-owners and revenues.

In place of the old rules of contractual policy may come new, which in any case should not restrict the rights of companies serving the ports, the vessels and the cargoes. In the wake of the reform which is now happening in the maritime economy, such practical, at first glance, question of the contractual relationship between the entities is getting more and more actual. It is essential that along with changes in the industry there comes and stays there for long a civilized, modern approach to bilateral cooperation, which main principle is the equality of the parties.

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