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CURRENT STATE OF THE REGULATION OF CARRIAGE OF GOODS BY SEA THROUGH INTERNATIONAL TREATIES

Summary. The article deals with the issue of the current state of international unification of rules on the carriage of goods by sea through treaties, and namely — of the multiplicity of the existing regimes that regulate the given relations in different national jurisdictions, including Ukraine. The analysis is mainly focused on the provisions and views on the Rotterdam Rules as a new international law regime in the field of the carriage of goods by sea.

Keywords: the Rotterdam Rules, international convention, carriage of goods by sea, «hybrid» carriage regimes, maritime carrier's liability.

Statement of the problem. As it is known the unity in the regulation of relations in the sphere of international carriage of goods by sea has not been reached for today: the issue of the international transportation of goods by sea with the use of bills of lading is regulated by several current conventions and domestic laws of individual states that have not joined any of the conventions.

The mentioned state of the legal regulation of carriage of goods by sea is certainly not satisfactory and slows the worldwide development of carriage of goods by sea, causing legal collisions and, consequently, losses to the participants of carriage.

In many respects for this reason a study of the current state of the international regulation of carriage of goods by sea through international treaties is considered as timely and important.

Analysis of recent research and publications. Issues connected with the current international conventions in the field of carriage of goods by sea, especially concerning the Rotterdam Rules, are researched mainly by foreign scholars. Thus, a prominent American Professor Michael F. Sturley in his research [1] describes his view on the Rotterdam Rules as the instrument to change the current law in the mentioned sphere. Associate Professor Paul Myburgh is an author of the work, which is devoted to the modern problems of the variety of the regimes of carriage of goods by sea [2]. The famous French Professor Philippe Delebecque, analyzing advantages and disadvantages of the Rotterdam Rules for different parties of the carriage comes to a conclusion that for now in this sphere a better solution is hardly reachable [3]. Chinese Professor Zhang Yongjian, pointing out different views on the Rotterdam Rules,

tends to believe that the Rules are too complicated and may be taken only as a step towards the unification in their field, clearly not the most successful and not final [4]. The raised issue is also a subject of attention of such scholars as Knud Pontoppidan [5], Jan Ramberg [6], Alexander Von Ziegler [7], Hannu Honka [8], Si Yuzhuo [9], Zhang Jinleian [9] and others.

Statement of the purpose. The main purpose of the study is to identify the main features of the current state of the regulation of carriage of goods by sea by the international treaties in some countries, including Ukraine, as well as to clarify the possible effect of the Rotterdam Rules in case they will enter into force.

To achieve this objective it is necessary to:

— deliver a general analysis of the state of legislations in different maritime countries regarding the matter of carriage of goods by sea nowadays;

— study different points of view about the effectiveness of the Rotterdam Rules as the latest convention in its sphere and their possible impact on the relations between the parties of carriage;

— explore the law in force in Ukraine in the mentioned area and to elaborate the recommendations for its improvement to enhance the status of Ukraine as a maritime country at the global level .

Paper's main body. Nowadays most of the world trade applies the Hague-Visby Rules, but this mode is only a part of the existing law in this area. More than a quarter of the world trade is still governed by the old Hague Rules, and more than thirty countries (although they are mainly countries that cover a small portion of the world trade) are parties to the Hamburg Rules. Taking into account that not every country follows one of the mentioned three modes, the situation is even more complicated. China, for example, being one of the biggest world's trading nations, has enacted the national maritime code, which includes elements of both the Hague-Visby Rules and the Hamburg Rules (together with the unique domestic elements of the Chinese law). Even the Nordic countries, which have long been major partners in international efforts to achieve the unity in this area, have included significant elements of the Hamburg Rules in their internal versions of the Hague-Visby Rules [1, p. 256].

Over the last decades or so the uniformity of law of the international carriage of goods by sea is increasingly undermined by the unilateral adoption of «hybrid carriage regimes» by maritime jurisdictions that deviate from accepted uniform international rules.

Currently there are several «hybrid carriage regimes». For example, in Japan, Korea and Vietnam there were adopted similar rules in the field of the carriage of goods by sea. Germany has peculiar sort of «double» regime. As a country that has signed the Hague Rules, it applies the Hague Rules for the trade with their other participants, but uses national rules based on the Hague-Visby Rules in the trade with the participants of these rules. The Nordic countries, including Denmark, Finland, Norway and Sweden in 1994 have adopted, on the basis of the Rules, the Northern Sea codes, Australia in 1998 introduced its «hybrid mode» through the adoption of the Carriage of Goods by Sea Regulations. In it the USA there was suggested in 1999 to adopt the Carriage of Goods by Sea Act (COGSA «99») to replace the existing Carriage of Goods by Sea Act of 1936 [10].

As it could be expected from a unilateral national law, conceptual structure and details of the mentioned Northern Sea codes, the Australian Regulations COGSA «99» are completely different. The Australian reform appeared to be the most conservative of this three, in the sense that the law largely retains the provisions of the Hague Rules, relatively fragmentarily including the ideas of the Hamburg Rules. The Northern regimes have such structure and style that is much closer to the Hamburg Rules. COGSA «99» is perhaps the most radical of this three, as it includes significantly recycled items of the Hague-Visby Rules and the Hamburg Rules as well as new definitions and ideas [2, p. 369].

Obviously, the states that have adopted «hybrid regimes», still having remained the parties to the international convention, breached their international legal obligation to diligently support the conventions, which inevitably leads to the conflicts of laws. States that apply «hybrid regimes» also restrict the application of provisions on the international arbitration and jurisdiction in the bills of lading and other transport documents to protect the use of these regimes, which is contrary to the principle of autonomy of the parties and further encourages the use of improper court [2, pp. 375-377].

Considering the above, it is undisputed that there is a need for the modernization, especially when a law drawn up over 90 years ago, still regulate the sphere that has changed markedly over the same period. The Visby Amendments also are more than 40 years old and they have made only a few changes to the initial Hague Rules. Even the Hamburg Rules were adopted more than 30 years. The initiators of the project in early 1920 years could not predict the container revolution, and the developers of the Visby and the Hamburg Rules, naturally, could not foreseen the consequences that container revolution would have on the modern commercial practices, including the incredible growth of multimodal carriage, a more prominent role of transport intermediaries and the potential for new technologies, such as electronic commerce [1, p. 256].

The text of the new regime of the international carriage of goods by sea — the Rotterdam Rules — is the result of long termed and extensive discussions. The Rules contain many compromising provisions. This fact was fairly predictable considering that the project team included about thirty members of national delegations — members of the UNCITRAL, except that there were representatives of professional organizations. Despite these difficulties, the project developers without hesitations identified some guidelines at the first session in order to ensure the fundamental balance:

— between traditions and modernity;

— between the interests of shipowners and the shippers, that is, the distribution of their duties;

— between different legal systems and more specifically — between common law and civil law, taking into account that the project team consisted of experts of both systems of law. However the common law «spirit» prevailed because of the use of the English language in international maritime matters [3, p. 264].

It is obvious that legal certainty and predictability in the sphere of carriage of goods by sea, where there is no generally accepted international convention, which entered into force for today is highly desired. This was the first reason why there was felt urgent need

in a single common modern convention covering all carriages by sea, including carriages of goods by different means of transportation. The second reason is related to the tendency to regionalism. As noted above, in recent years, a number of draft texts, which offer multimodal regional transport modes, were elaborated. Such regionalism would impede the regulation of international shipments and international trade by preventing States, which are parties to regional systems contrary to the Rotterdam Rules, to accede to this international agreement [5, pp. 284-285].

The core issue of the Rotterdam Rules is the responsibility of the carrier. It would be fair to say that in fact here the compromise has been achieved. However, the form in which it was made became a subject of some criticism. In fact, different approaches to common and civil law explain this criticism. Typically, lawyers accustomed to civil law do not understand, why a long list of exclusions and moving «up and down» the burden of proof is needed when the matter relates to the presumed guilt of the carrier for the loss or damage if it is proved that this occurred during the period of his responsibility [6, p. 277].

On the 22nd of October 2010 a group of outstanding lawyers-experts in the field of maritime law have prepared and published the Montevideo Declaration — recommendations to governments and parliaments not to accept the Rotterdam Rules- led by the anxiety concerning low limits of carrier's liability and more favorable position of carriers compare to shippers.

Upon the consideration of Montevideo Declaration a qualified group of members of the CMI, which took part in the elaboration of the Rules, have argued that with the limits established in the Rotterdam Rules, all but the most precious cargo will be eligible for a full refund, so that the small number of shippers transporting cargo, which is more valuable than the level of limitations may decide whether to declare the full value (actually to buy extra insurance from the carrier) or to purchase insurance elsewhere, knowing that the carrier is not liable above the limit levels. Regarding the limitation of shippers' liability the CMI stated that attempts to reach an acceptable solution on this issue have failed. Besides, it was also noted that no convention on the carriage of goods by any means of transportation provides for the limitation of the shipper's liability and that the Montevideo Declaration does not present a proposal on this issue [11, pp. 174-175].

With regard to the complaint as to the «complexity» of the Rotterdam Rules their creators did agree on this point, but set forth an argument that this was very much determined by the search of ways of achieving unity on issues not covered by the previous conventions, and, on the other hand, due to the necessity to create new legal rules that would more efficiently regulate those areas already governed by the old rules (e.g. shippers' obligations and responsibility) [12].

We also agree with a view that the complexity of a convention should not be assessed by simply counting the number of articles or length of each provision. For example, provisions on contracts excluded from the scope of the Rotterdam Rules are much more «difficult» compared with those of the Hague and Hague-Visby Rules. However, the situation would unlikely be improved if a provision would just declared that «this Convention does not apply to charter». This simplified text leaves many possibilities for national courts to decide whether to apply the

Convention, which mainly leads to a much smaller degree of harmonization. A balance between «long and complex» and precision and predictability must be found [12].

The developers of the Montevideo Declaration claim that the Rotterdam Rules introduce «a maritime neo-language that invalidates a great amount of international case law, created since 1924 and which, due to its deficient legislative technique leads to very different interpretations». The developers of the Rotterdam Rules respond that the significant part of the terminology used in the Hague, Hague-Visby and Hamburg Rules is preserved to preserve as much of the existing case law and doctrine as possible [12].

As to the arguments that the Rotterdam Rules are directed on regulating mainly maritime and connected terrestrial carriage, so that they do not cover enough the multimodal transport, the developers note that the Rules were not created as an instrument to replace the United Nations Convention on International Multimodal Transport of Goods or UNCTAD/ICC Rules for Multimodal Transport Documents. Instead, the Rules were designed to replace the Hague, the Hague-Visby and the Hamburg Rules, and should be considered as a convention regulating «marine plus carriage» and in this terms they are definitely not a step back [12].

Compared to other conventions in the field of carriage of goods by sea the Rotterdam Rules made quite major adjustments in the scope of application and duties and responsibilities of carriers. In addition, some innovative breakthroughs and provisions have been made in other areas. Speaking about the main problems of the Rotterdam Rules, it must be noticed about their idealization: they are too extensive, comprehensive and strict. Defining so many interested parties, the Rules try to cover the entire process and all links of international multimodal transport that make them impractical. «Innovations», introduced in this Convention, add uncertainty and potential risks to its implementation [4, p. 292].

Opponents of the Rotterdam Rules point out that it is difficult to imagine an international convention which covers everything and is accepted by international society for a very long period of time. All conventions are some kind of compromise of the international community on the specific issues at some time, that is, in any case, a temporary solution. Another obstacle to unity is the fact that the unconditional consent or unconditional acceptance is impossible for Conventions, during the elaboration of which only limited compromise has been achieved. In addition, conditions of the same convention can be interpreted in different ways, which is the reason of different legal practice in different countries. Proponents of this approach point out that the path to a unified international transport law will be long, difficult and gradual, so the Rotterdam Rules will not be the last effort to unify international maritime transport law [4, pp. 296-299].

At the same time the supporters of the international unification emphasize that the Rotterdam Rules are the result of the ten years hard work of the international community, and is the most modern and advanced international convention, and that unification of the legal regime of international multimodal transport of goods by means of such convention would undoubtedly considered as a result that is worth waiting for all the international community. None of the international conventions, of course, could reach the highest point of

perfection, and the progressiveness of the Rules cannot be denied because of their drawbacks or defects [9, p. 309].

In any case, the Rotterdam Rules should be understood as a compromise. There are always other ideas on what should be the best solution, but the embodiment of someone's thoughts on the world stage with real effect and consensus is much easier to say than to do. The Rotterdam Rules, of course, is a complex piece of legislation, but they are the only modern international approach to the problem for now and for years to come. If the Rotterdam Rules fail the question of what comes instead will arise. The famous Scandinavian scholar Hannu Honka notes that the hope for the new global convention for now is absolutely unreal and highlights that just regional solution or national decisions of the problem are undesirable. Therefore, he considers, the Rotterdam Rules should be regarded as a serious macroeconomic perspective [8, p. 270].

The prominent Swiss professor, a representative of the Government of Switzerland in UNCITRAL on the work on the Rotterdam Rules Alexander von Ziegler marks that the issue of impact of the Rotterdam Rules on the international trade should be considered from two perspectives: first, in terms of the industry, and, secondly, through the analysis of the role of the market players in the mechanism of the international trade and the way in which they must adapt in order to meet the requirements of the Convention [7, p. 285-286].

The time of the examination of the Rotterdam Rules will come when twenty Contracting States, as required by the Convention, ratify this. The world will see how the Rules work and if they offer a really upgraded system. According to experts' view, it is seen to be utopian to achieve a better solution than Rotterdam Rules over the next century [7, p. 285-286].

Unlike the situation with ground transportation, where decisions on the regional level are real, maritime carriages on the scheme «door to door» are inherently international and global, and it is very hard to find some kind of regional or national standalone solutions [7, p. 285-286].

Ukraine is not currently a party to any convention in the field of the carriage of goods by sea, which is certainly a negative factor in deciding by foreign participants of the maritime industry an issue of cooperation with Ukrainian counterparts.

Instead, the main legal act that regulates relations in the field of the merchant shipping is the Merchant Shipping Code of Ukraine, 1995. Thus, article 14 of the Merchant Shipping Code of Ukraine stipulates that in the absence of the consent of the parties on the applicable law, the contract will be governed by the law of the State where the party, which is the carrier under the contract of carriage, was registered, has a principal place of business or permanent residence. The result of this provision, in particular, is that the domestic participants of the international carriage suffer since a contract they enter into are often governed by the unknown foreign law, and that usually leads to their incurring losses.

Generally, the provisions of the Merchant Shipping Code of Ukraine on carriage of goods by sea, including a carrier's liability, are similar to the provisions of the Hague-Visby Rules and in many respects are affected by the Rules.

Therefore, to raise the status of Ukraine as a reliable maritime state in the eyes of foreign shippers and carriers

it is deemed necessary to join to one of the modes of international regulation of the international carriage of goods by sea. It is clear that the ratification of the Hague-Visby Rules by Ukraine for now is the most «simple» step towards joining the international community in the issue. The ratification of this convention would entail minimal changes in the current legislation of Ukraine in the part of regulating the relations in the sphere of transportation of goods using a bill of lading.

However, it also must be kept in mind that the ratification by Ukraine of one of the previous conventions (the Hague, the Hague-Visby or the Hamburg Rules) will not globally change the situation on the unity of the provisions in merchant shipping. By joining one of these international agreements, Ukraine will become a party to the diversity of the existing legal regimes regulating the outlined relations, that will hardly help avoiding legal conflicts with participants of the carriage, guided by another regime.

Due to the above, it can be concluded that accession of the Ukraine to the international treaty in this area, which is currently in force (such as the Hague-Visby Rules), is necessary and highly desirable in order to improve Ukraine's reputation on the world stage in the field of international shipping. However, in the long run perspective if the Rotterdam Rules come into force and are applied in the most of the maritime countries, their ratification for Ukraine would be a huge step forward and achievement to provide the participants of carriage with the maximum comfort and legal certainty.

Conclusion. Considering all the foregoing, it is necessary to conclude that the logical consequence of the absence of the only one instrument of regulation of relations in the sphere of international carriage of goods by sea is the existence of many different regimes of regulation of such relations varying from country to country. In the light of such legal uncertainty the necessity in the uniform international convention, which will at least partly decide the problem of the variety of regimes and will lead to the unity in the sphere of carriage of goods by sea within the states is apparent and doubtless. Despite completely opposite reviews on possible effect of the Rotterdam Rules on the international relations governing maritime transport of goods, they, being the latest attempt of the international maritime community to solve the raised issue, are probably the best compromise in the international carriage of goods by sea that can provide so wishful unity to the world. To support such unity it is highly desirable for Ukraine as a part of a maritime community to join to one of the existing international regimes in the sphere of carriage of goods by sea.

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Покора І.Є.

Сучасний стан правового регулювання морського перевезення вантажу за допомогою міжнародних конвенцій.

Анотація. Стаття присвячена розгляду питання щодо сучасного стану міжнародно-договірної уніфікації у сфері морського перевезення вантажів, а саме — множинності існуючих режимів регулювання відносин в зазначеній сфері в окремих державах, в тому числі в Україні. Проаналізовано погляди провідних фахівців галузі морського права, представників

широкої спільноти, діяльність яких звязана з торговельним мореплавством, стосовно спірних питань, які викликано прийняттям Роттердамських правил як нового міжнародно-правового режиму перевезень вантажів морем.

Ключові слова: Роттердамські правила, міжнародна конвенція, морські перевезення вантажів, «гібридні» правові режими, відповідальність морського перевізника.

Покора И.Е.

Современное состояние правового регулирования морской перевозки груза при помощи международных конвенций.

Аннотация. Статья посвящена рассмотрению вопроса о современном состоянии международно-договорной унификации в сфере морской перевозки грузов, а именно — множественности существующих международно-правовых режимов регулирования отношений в указанной сфере в отдельных государствах, в том числе в Украине. Проанализированы взгляды ведущих специалистов морского права, представителей широкого морского сообщества, которые связаны с деятельностью в сфере торгового мореплавания, в отношении спорных вопросов, вызванных принятием Роттердамских правил в качестве нового международно-правового режима перевозок грузов морем.

Ключевые слова: Роттердамские правила, международная конвенция, морские перевозки грузов, «гибридные» правовые режимы, ответственность морского перевозчика.