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PECULIARITIES OF LEGAL REGULATION OF INTERNATIONAL MARITIME CARRIAGES OF PASSENGERS: COMPARATIVE ASPECT

ОСОБЛИВОСТІ ПРАВОВОГО РЕГУЛЮВАННЯ МІЖНАРОДНИХ МОРСЬКИХ ПЕРЕВЕЗЕНЬ ПАСАЖИРІВ: ПОРІВНЯЛЬНИЙ АСПЕКТ

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The article is devoted to the detailed consideration of the peculiarities of the legal regulation of international passenger and luggage carriage by sea. Currently, the carriage of passengers and their luggage occupies an important place in the activity of transport organizations. It should be born in mind that the comprehensive nature of the movement of passengers and their luggage requires detailed regulation of contracts and other secondary documentation of transport and clear regulation as the legal status of the parties of the contract; also the operative resolution of disputable situations arising between them during transportation. The research is devoted to the consideration of theoretical features of the legal regulation of the international carriage of passengers and luggage by sea under the Rome Regulation I, II (2008, 2009) and Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974. Europe needs a strong transport system, it provides a favorable basis for trade and economic growth, and also contributes to the creation of a huge number of new jobs. Transport networks are at the heart of the supply chain and are the foundation of any country's economy. They allow goods to be distributed efficiently and people to travel. They make places accessible, bring and bind us together and allow us a high quality of life. Transport is one of the key aspects for the development of European integration processes and is firmly connected with the formation of the domestic market. As one of the first common policy areas of today's European Union, it was seen as vital for fulfilling three of the four freedoms of a common market as established in the Treaty of Rome in 1957: the free movement of individuals, services and goods. That is why the EU transport policy has always been aimed at providing the most favorable basis for cooperation of member countries and creating a single European transport zone with fair competition conditions for the different forms of transport: road, rail, air and waterborne. Thus, the study of the regulatory field and the legal regime for carrying passengers by sea transport will provide a legal assessment of the effectiveness of their legal regulation.

Key words: international legal regulation, Rome Regulation I 2008, Rome Regulations II 2009, Athens Convention 1974, passenger and luggage carriage, maritime transport.

Стаття присвячена детальному розгляду особливостей правового регулювання міжнародних перевезень пасажирів та багажу морським транспортом. У роботі досліджується історична ґенеза розвитку міжнародно-правової нормотворчості у сфері морських перевезень пасажирів та багажу. Проведено структурний аналіз Римських Регламентів I, II (2008, 2009) і Афінської конвенції про перевезення морем пасажирів та їхнього багажу 1974 року.

Ключові слова: міжнародно-правове регулювання, Регламент Рим I, Регламент Рим II, Афінська конвенція 1974, перевезення пасажирів і багажу, морський транспорт.

Статья посвящена детальному рассмотрению особенностей правового регулирования международных перевозок пассажиров и багажа морским транспортом. В работе исследуется исторический генезис развития международно-правового нормотворчества в сфере морских перевозок пассажиров и багажа. Проведен структурный анализ Римских регламентов I, II (2008, 2009) и Афинской конвенции о перевозке морем пассажиров и их багажа 1974 года.

Ключевые слова: международно-правовое регулирование, Регламент Рим I 2008, Регламент Рим II 2009, Афинская конвенция 1974, перевозка пассажиров и багажа, морской транспорт.

So, today a significant number of passenger transport is carried by sea transport. Such transport is mediated by the international carriage of passengers and luggage by sea, in which priority issues concern the safety of passengers and their property preservation until the end of the contract. The globalization of migration processes and the ever-growing number of traveling people required competent regulation at the international level. The first steps towards such a settlement in the form of the adoption of the first unified international conventions were made only in the second half of the XX century. The emerging awareness of legal deficiencies in the system of national legislations and international legislation has led to the adoption of the 1961 Passenger Convention (herein cited as the "1961 Passenger Convention") [1] and the subsequent 1967 Luggage Convention (herein cited as the "1967 Luggage Convention") [2]. Bur none of the conventions mentioned was widely accepted and applied (1967 Luggage Convention never came into force). However, many of the rules contained in both conventions were eventually reenacted and unified, giving birth to the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (herein cited as the "The Convention").

Thus, the Convention adopted in Athens on 13 December 1974 entered into force on 28 April 1987 and was aimed to the consolidation and harmonization of the rules for the carriage of passengers and luggage by sea.

A significant number of nations have already ratified the Athens Convention. As at 11 October 2017, 28 Member States were a party to the 2002 Protocol including the United Kingdom, and major flag states Panama and the Marshall Islands. There are also a number of nations that are a party to the 1974 Convention but have not ratified the 2002 Protocol, for example Barbados, China and Poland [3, p. 216].

The key points of this convention were the following items:

– shipowner's fault-based liability towards the passenger;
– liability of the carrier and the burden of proof;
– limitation of liability for personal injury and death to loss.

The Convention, as originally enacted, sought to set out parameters within which carriers could limit their liability to passengers for loss or damage to luggage, as well as for personal injury, illness, or death.

For a deeper understanding of the subject of the study, we will examine in detail the ratio of norms of The Convention to the EU legislation.

The European Union, not being a member of IMO, takes a direct active part in the activities of this organization. During the negotiations on amending the Athens Convention during 1996–2002, relations between the EU and IMO was represented as undisguised struggle for supremacy. In this case, questions arise: which of these bodies should take the initiative on maritime law and should the Community organs or the Member States vote in the IMO? Thus, it would be rational to conduct the most detailed discussion of all actual issues at the

stage of preparation of any official document before the EU made its own rules.

During the entire negotiation process in the IMO, the Member States coordinated their views under the leadership of the presidency, but spoke individually. The EU has no seat of its own in the IMO, albeit the European Commission has observer status. However, in the areas also covered by the Brussels Regulation [4], the Commission spoke on behalf of the Community under the rules of external competence, and the chairman could let the European Commission speak at an earlier stage in the debate than observer.

During these negotiations, the attention was focused on the differences between the Brussels Regulation and Art. 17 and 117bis in the 2002 Athens Convention. In addition, a special clause was added that allowed the EU to ratify all amendments to these articles [5, Art. 19]. This provision indicates that in general the requirements for external competence in EU legislation with regard to mixed agreements have been met.

It should be noted that the process of comparing and correlating the norms of the Convention with the norms of the EU laws was simplified enough, so it allowed to avoid difficulties in discussing of the issues on the merits without delaying the process. However, if we pay more attention to the relationship between the Convention and Community law, we can find certain points of contact.

One such important issue is that while the Athens Convention provides that the limitation amount shall not be seized from the trustee in the bankruptcy of the liable person regardless of choice of law rules [5, 4bis (11)], the Insolvency Regulation leaves this to the law of the Member State of the bankruptcy [6]. The Convention would consequently overlap community law, and thus clearly fall within the external competence of the Community [7, p. 59].

In order to avoid regulatory collisions and not uniform enforcement after the adoption of the 2002 Protocol, the European Commission proposed the Athens Regulation [8]. The proposal for an Athens Regulation includes some extra features as well, such as rules on advance payment to passengers waiting for final settlement of their claims, a full range of information services for passengers, compensation for the loss or damage of special equipment for people with disabilities, etc.

Before looking for answers to the above questions, it seems appropriate to provide a brief description of how the new EU tool differs from its predecessor, the Rome Convention. On 15 December 2005, the European Commission submitted a draft proposal of the Regulation on the law applicable to contractual obligations.

Discussions on the project in the Council were held under the chairmanship of Finland (2006), Germany (2007) and Portugal (2007). And only by 2008, when Slovenia became the chairman, the issue was resolved. The Parliament considered the draft on first reading on November 29, 2007. The Council approved the draft at its meeting in June 2008, and a little later, on July 4, the project was published as Regulation (EC) No. 593/2008 on the law applicable to treaty obligations (Rome I).

Instead of creating an entirely new set of rules, the Commission transformed the existing Convention into an instrument of Union law. The draft and final version of the Rome I Regulation contained a whole list of amendments (it should be noted that some were radical enough) aimed at modernizing the content of existing conflict rules and coordinating their application along with other private law instruments of the European Union, especially with the regulations Rome II and Brussels I. The most significant changes and innovations can be divided into three main groups: exit from a situation where there is no choice of applicable law; the rights of the weak party under the contract; the problem of applying peremptory norms.

The conflict-law regulation relating to contracts for the carriage of passengers, which is given in Article 5(2), is new in comparison with the provisions of Article 4 of Rome Convention. The key connecting factor is the law of the country in which the passenger usually resides, if there is either a place of departure in this country or the destination is in this country. Otherwise, in resolving the conflict, the law of the country in which the carrier usually resides applies. Thus, for the carriage of passengers, two combined connecting elements are used. With the main connecting factor to the law of the country where the passenger has his habitual residence, paragraph 2 contains an element protecting the weaker party [9].

Article 5 covers contracts for the carriage of goods (paragraph 1) as well as for the carriage of passengers (paragraph 2) on all kinds of transport routes (sea, air and land, including rail and road) and with any transport vehicles (e.g., ship, aircraft, helicopter, bus, train) [10, p.129].

Thus, we note some features of this regulation, which relate directly to the carriage of passengers. So firstly, the Regulation does not define the notion of "Contract for the Carriage of Passengers" and doesn't give any particular guidance to its interpretation. This contract falls under the broad definition of service contracts and is therefore governed by Article 5(1) (b) of the Rules of Procedure of Brussels I. Thus, in accordance with the Rome I Rules (unlike under the Rome Convention), it is necessary to apply the uniform meaning of the concept of "contract for the carriage of passengers" in all Member States [11].

Secondly, there are no legal concepts for definitions "a passenger" and "a carrier". Only a natural person can sensibly be classified as "a passenger". The purpose of a passenger's travel is irrelevant, so there is no distinction drawn between private and business travel. Questions may arise if the passenger in question is not a person who entered into the contract of carriage with the carrier. This may happen where a person is travelling as part of a group and one of the group purchased the tickets and entered into the contract; or where the passenger is an employee or agent for a company who contracted with the carrier. So, we can emphasize the following two ways of resolving this issue.

Thirdly, we must decide on selecting law for the passenger contracts. Article 5(2) makes provision for three ways for selecting law for govern a contract for the carriage of passenger, which seeks to establish the balance between the interests of a carrier and those of passenger by adopting a three-stage approach to determining the applicable law of passenger contracts. It is important, that if no, or no permitted, choice of law has been made then the second, default rule in Article 5(2) is that the law of the country where the passenger has his permitted place of habitual residence shall apply, provided that either the place of departure or the place of destination is situated in that country.

In a single contract, the fact that travel involves using, for example, a hub sea port in a different country, does not alter the position. A passenger from Spain who is sailing to Italy to board another ship and to get to port of Greece, still had a place of departure in Spain and a place of destination in Greece. Other difficulties arise in relation to 'hop-on/hop-off' travel arrangements, whether round the world tickets or more local variations which pose greater problems with carriers drafting standard terms. Those problems were mentioned in Rome I Committee discussions on 25 of April 2007 but there is no record of any firm conclusions being reached at any stage as to what to do if permitted choice has not been made. In "round trip" tickets, it must be the best solution to treat the point of departure and the point of return (which are the same country) as providing the applicable law [12].

Thus, we can emphasize that Article 5(2) specifies restrictions on the choice of the applicable law in respect of contracts for the carriage of passengers. To preserve the flexibility of legal regulation, a clause is also applied to these treaties.

In July 2007, a significant event occurred in the history of the development of European private international law: the final version of the Regulation containing the conflict-of-laws rules applicable to non-contractual obligations, the so-called

"Rome II" [13], was developed. The development of this document took more than 30 years. After all, the issue of unification of conflict-of-laws rules on non-contractual obligations was raised during the work on the draft of the Rome Convention. Rome II was adopted on 11 July 2007 and is applicable from 11 January 2009, with the exception of Article 29, which has been applied since 11 July 2008.

To determine the scope of the Rome II Regulation, it is first and foremost necessary to consider the very nature of the tort. Undoubtedly, it would be more accurate to use the term "non-contractual obligation", which is used in the Regulations. In the legal science of the commitment to divide into contractual and extra-contractual, depending on the grounds for occurrence. Contractual obligations arise mainly from contracts, i.e. by agreement of the parties, and non-contractual obligations arise from the grounds provided for by law. In practice, there is often a question about delimitation of the scope of contractual and tort obligations and, accordingly, the delineation of tort and contractual liability. This is due to the fact that the legal norms governing both types of responsibility vary significantly.

For example, non-contractual liability is established by law, it should be emphasized – by mandatory norms. Contractual responsibility is established both by law and by agreement of the parties – by an agreement. If one and the same thing is considered first according to the rules on contractual liability, and then on the norms of tort liability – the results will be different. The issue of delineation of types of liability is resolved as follows: if harm arises as a result of non-fulfillment or improper performance of the contract, the rules on liability for tort are not applied. In this case, the damage is compensated in accordance with the rules on liability for non-fulfillment of the contractual obligation or in accordance with the terms of the contract.

Regulation Rome II, as well as the Regulations Rome I, is based on the principle of party autonomy. It should be noted that this is not typical for conflicting norms in the field of tort legal relations and testifies to the strong influence of recent trends in European private law [14, p. 121–132]. The law chosen by the parties is a priority rule, subject to application both to delicts and to quasi-delicts. At the same time, the parties choose the law that is applicable to the non-contractual obligation in two ways: ex post or ex ante. In other words, the choice is made either by means of an agreement concluded by them after a legal fact occurs that involves the occurrence of harm, or, when all parties are engaged in commercial activities, also by means of an agreement freely concluded by them before a legal fact occurs that entails the onset of harm. Moreover, in comparison with the Rome I Regulation, it is very important that such a choice be expressly expressed or definitely follows from the circumstances of the case and does not infringe upon the rights of third parties.

Liability of carriers of persons and some other aspects of civil liability of those concerned with international maritime transportation (e.g. limitation of shipowner's liability [15]) are regulated by Athens Convention 1974, to which EC Member States are party and which in order to ensure its efficacy, will normally require to be giving overriding (mandatory) effect by a state party, whether or not the law applicable to the obligation in question under Rome I Regime or the Rome II Regulation (as applicable) in the law of other state party. "The law applicable under the Rome II Regulation will continue to apply to non-contractual obligations in situations not regulated in the forum Member State by international convention, or in which any relevant convention only partially harmonizes the civil liability rules" – wrights Andrew Dickinson [16, p. 321].

In order to understand how the two new Regulations fit together, contradict each other or not, it is necessary to take into account some initial data:

– Firstly, the content of paragraph 7 of the Preamble of Rome I, where its main objective is clearly expressed. Proceeding from this, it is easy to conclude that the priority objective of all EU legal acts in the field of European private law is a consistent, logical connection of their fields of activity and individual provisions. The ultimate goal is to achieve maximum legal certainty and predictability;

– Secondly, both Regulations are aimed at regulating legal relations in the civil and commercial spheres. However, in this case, only obligations are of interest, regardless of the nature of their origin. The question of the nature of the obligation (contractual or non-contractual) is the problem of its so-called qualification, and recently it has been greatly underestimated. In countries of the general system of law, this phenomenon was called "characterization of the problem in the conflict of laws" [17, p. 749]. A significant role in the process of qualification of obligations and their subsequent interpretation is played by the Court of the EU, which has already established a case-law on this issue.

To differentiate the contractual and non-contractual nature of the obligation it is necessary to take into account the source of its origin. In the case of a contract, the source is usually an offer and an acceptance, as a result of which the obligation is classified as contractual. After differentiating the nature of obligations, it is necessary to concretize one more question: is it possible to apply simultaneously Rome I and Rome II Regulations and how do they relate to the Athens Convention 1974? To answer this question, it is worthwhile to carefully compare the scope of both Regulations and the Convention.

Thus, the scope of the Rome I Regulation is as follows. The law applicable to the contract governs:

– its interpretation;

– execution of obligations arising on its basis;

– within the limits of the powers conferred upon the proceeding court in its procedural law, the consequences of full or partial non-fulfillment of these obligations, including the assessment of damages to the extent to which this is regulated by legal norms;

– various ways of termination of obligations, limitation of actions and loss of rights on the basis of the expiry of the term;

– consequences of the invalidity of the contract.

Unlike Rome I, Rome II regulates:

– conditions and scope of liability, including the identification of persons who may be held accountable for their actions;

– grounds for exemption from liability, limitation of liability and distribution of liability;

– existence, nature and assessment of harm or requisite compensation;

– within the powers granted to the court by the procedural law of its state, measures that this court may take to ensure the prevention, cessation or reparation of harm;

– the permissibility of transferring the right to compensation for harm, including by inheritance;

– the situation of persons entitled to compensation for personal injury caused to them;

– responsibility for actions of other persons;

– the procedure for termination of obligations, as well as rules regarding limitation of actions and loss of rights based on the expiration of the term, including rules on the commencement of the flow, termination and suspension of the limitation period or loss of rights.

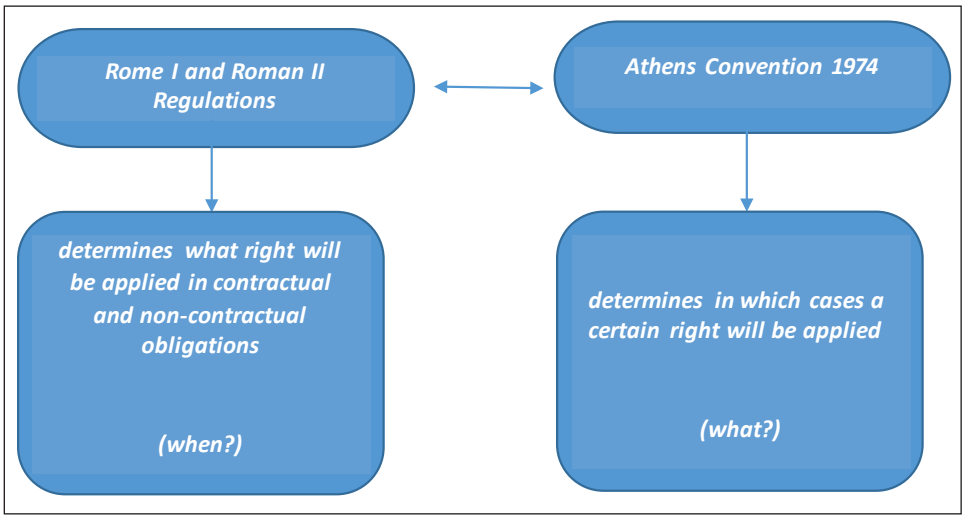
Key points that the Athens Convention 1974 fixes in this context:

– statute of limitations is precisely defined: claimants have a two year time limit to make a claim for death, personal injury or damage to luggage, this time limit can be extended to a maximum of five years under certain circumstances;

– limitation of liability: parties to the Convention are able to provide a higher limitation of liability limit (including unlimited liability) for claims involving the death of or personal injury to a passenger when implementing the Athens Convention in domestic legislation.

– certain jurisdiction: claimants are offered a choice of jurisdiction in which to bring their claim – provided the court is located in a jurisdiction that is a party to the Athens Convention, which is either the permanent residence or principal place of business of the defendant; the claimant's state of domicile or permanent residence; the place of departure or destination; or the place where the contract of carriage was made.

To visualize briefly this distinction we can in this way:



REFERENCES

1. International Convention for the Unification of certain Rules Relating to the Carriage of Passengers by Sea, adopted at Brussels, 29 April 1961 and entered in force June 4, 1965 (herein cited as the "1961 Passenger Convention").

2. International Convention for the Unification of certain Rules Relating to the Carriage of Passengers' Luggage by Sea, adopted at Brussels, 27 May 1967, but never entered in force.

3. Francesco Berlingieri. International Maritime Conventions (Volume 1): The Carriage of Goods and Passengers by Sea. CRC Press, 9 may 2014. 440 p.

4. Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2001 L 12/1.

5. Athens Convention relating to the Carriage of Passengers and their Luggage by Sea adopted on 13 December 1974 in the Adoption of 1990 Protocol. URL: www.imo.org

6. Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, O.J. 2000 L 160/1, Art. 4(2) (b).

7. Erik Rosaeg. The Athens Convention on Passenger Liability and the EU. The Hamburg Lectures on Maritime Affairs 2007 & 2008 (Hamburg Studies on Maritime Affairs), Springer; 2010 edition. 196 p.

8. Proposal for a Regulation of the European Parliament and of the Council on the liability of carriers of passengers by sea and inland waterways in the event of accidents, COM (2005) 592 final. URL: http://ec.europa.eu/transport/maritime/ safety/doc/package3/en/athenes_en.pdf

9. Nielsen, Rome I Regulation and Contracts of Carriage, in Rome I Regulation – The Law Applicable to Contractual Obligations in Europe (Ferrari and Leible eds, 2009), 99, 106.

10. Knorre/Demuth/Schmid. Handbuch des Transportrechts. Auflage 2015. Buch. XXIX, Hardcover (In Leinen). 747 p.

11. R. Plender and M. Wilderspin, European Private International Law of Obligations (London, Sweet & Maxwell, 3rd edn, 2009), paras 4-016–019

12. Dicey, Morris and Collins. On the Conflict of Laws (15th edn, Sweet & Maxwell, 2012), (33-077).

13. Parliament and Council Regulation 864/2007, Law Applicable to Non-contractual Obligations (Rome II), 2007 O.J. (L 199/40).

14. Patrikeev, E. Development of Private International Law of the Member States of the European Union (on the example of conflict of laws). Jurisprudence. 2006. № 5. 232 p.

15. Convention on Limitation of Liability for Maritime Claims (LLMC), adopted at Brussels, 19 November 1976 and entered in force December 1, 1986).

16. The Rome II Regulation: The Law Applicable To Non-Contractual Obligations. By Andrew Dickinson. Oxford: Oxford University Press. 2008. Lxx. 797 p.

17. Lorenzen E. The Qualification, Classification, or Characterization Problem in the Conflict of Laws. Yale Law Journal 1941, 1103 P.