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Concept and legal nature of the contract of affreightment (charter) under the legislation of the Republic of Kazakhstan

The article analyses the theoretical problems of legal regulation of contract of affreightment (charter), its correlation to the contract of carriage and its types. The author studied the scientific views of civil scientists about the essence of contract of affreightment (charter) and the main indicators characterizing its legal nature: mutuality, non-gratuitous nature, consensual nature are identified. The essence of this contract lies in the fact that the contract of affreightment (charter) is a variation of the contract of goods carriage, is different from the contract of carriage and passenger carriage by features of subject. In Kazakhstan the contract of affreightment (charter) applies only on air and sea transport. The author also conducted comparative-legal analysis of the legal norms governing the contract of affreightment (charter) and on this ground proposals directed to improve the legislation are developed. Analysis of the theoretical problems of legal regulation of the contract of affreightment (charter) allowed the author to draw conclusions of theoretical character essential for the determination of the legal nature of the contract of affreightment (charter) highlighting its distinctive features of the motor vehicle rental agreement, a contract of carriage of passengers, goods by air and sea transport.

Keywords: the contract of affreightment, charter, contract of carriage, the Republic of Kazakhstan, transport legislation, civil legislation.

Introduction

The contract of affreightment (charter), which has a history of one and a half thousand years, has long been applied in the sphere of transportation of goods and is one of the traditional civil law contracts. With the adoption in 1999 of the Special Part of the Civil Code of the Republic of Kazakhstan, the named agreement is applied in the sphere of transportation of goods and passengers by sea and air transport.

According to Article 691 of the Civil Code of the Republic of Kazakhstan, under contract of affreightment (charter), one party (charter provider) undertakes to provide another party (freighter) for a fee with all or part of one or several vehicles for one or more flights (voyages) to transport passengers, baggage and goods [1].

By the legal nature the contract of affreightment (charter) is characterized as a mutual, non-gratuitous, consensual agreement.

Methods and Materials

When conducting research on the topic of this article, methods of comparative legal analysis of legal norms enshrined in the regulatory legal acts of the Republic of Kazakhstan were applied. Also private and scientific methods: descriptive, historical, logical, comparative legal, formal legal, method of system analysis were used.

Results

Kazakhstani civil law applies the concept of «contract of affreightment» only in point of the contract for the carriage of goods, passengers, and baggage by sea transport. In accordance with part 2 of Article 54 of the Law of the Republic of Kazakhstan on merchant shipping, a contract for the carriage of goods by sea can be concluded with the condition:

- providing for the carriage by sea of goods of the entire vessel, its part or certain ship facilities (charter);
- without such a condition.

Sign of the first type of transportation: a certain part or all of the ship's room is provided for the placement of goods. Such a contract under the Law is called a charter, since it is issued by a charter. This contract in practice is for the transport of bulk goods (timber, grain, oil, coal, etc.). The second type of carriage of goods by sea is carried out by the usual contract for the carriage of goods, without the condition

of providing the whole vessel, its part or certain ship facilities. Such an agreement is concluded by issuing a bill of lading. Therefore, it can be called the contract of carriage of goods on the bill of lading.

Other forms of use of the vessel are the lease agreement of the vessel as a vehicle. However, in legal literature there was no consensus on the legal nature of the contract of carriage of goods and contract of affreightment. If some authors recognize these contracts as types of one contract (that is, contract of carriage) [2; 419], then other authors argue about the legal nature of two separate contracts (that is, the contract of carriage and the lease contract) [3; 19]. These points of view are considered to be correct, since the contract for the carriage of goods on a bill of lading and contract of affreightment (charter) are independent contracts. If the contract of carriage of goods under the bill of lading is a traditional type of contract of carriage, then, in our opinion, the contract of affreightment (charter) is a special complex type of contract of carriage of goods, which combines elements of the contract of affreightment and the contract of carriage.

In foreign national legislation, the contract of affreightment (charter) is regulated differently, for example, in England there is no «statutory» legislation regulating the carriage by charter, therefore the owner's consent for the carriage of goods or the provision of a vessel for transportation is recognized as a contract of affreightment. Thus, a charter contract is recognized as a contract of carriage. The doctrine and judicial practice of the United States of America is not significantly different from English legislation. The legislation of the Scandinavian countries considers the conclusion of the contract of carriage of goods with the provision of all or part of the capacity of the vessel. Compared with the previous doctrines, the French legislation distinguishes between a contract of carriage and a contract of affreightment, regarding the latter as a special type of contract that is neither a contract of carriage nor a contract of hire [4; 103].

There are other features in the legislation of some countries: they stipulate that if the goods are transported on a tramp vessel, then the legal relations between the participants of the sea transportation can be regulated by two contracts — the contract of affreightment and the goods transportation agreement. In this case, the relationship of the charter provider (shipowner) and the freighter are governed by the contract of affreightment (charter), and the relationship of the carrier with the recipient of goods are the terms of the contract of carriage by sea, which are provided for in the bill of lading [5; 17].

Discussion

In the scientific literature, civil scientists agree that the contract of affreightment (charter) is a consensual agreement. In particular, the Kazakhstan civil scientist G.I. Tulegaliyev underlined: «Charter is a consensual version of the contract of carriage. The charter does not characterize the receipt of goods for transportation, this action is issued by a bill of lading or invoice. The charter and the contract of carriage of goods are combined by the goal to which the parties are striving is the delivery of goods to the stipulated point» [6; 193].

The parties of the contract are the charter provider and freighter. A charter provider is a person who, for a fee, transfers the entire capacity or part of the capacity of one or several vehicles to one or more flights and carries passengers, baggage and goods. The freighter can be both the owner of the vessel, and another person operating it on his own behalf (shipowner). A charter provider is a person who pays freight for using the entire capacity or part of his capacity of one or several vehicles for one or several flights for the carriage of passengers, baggage and goods.

The contract of affreightment (charter) defines the conditions of carriage: the charter provider undertakes to transport passengers, baggage and goods by providing all or part of the capacity of one or several vehicles for one or more flights, the freighter is obliged to pay the fee. These conditions are issued by a bill of lading. The charter is different from the contract of carriage of goods and the contract of carriage of passengers, baggage in its subject. In the contract of affreightment (charter), the goods are transported by placing in the entire vessel or in part of it, and under the contract for the carriage of goods; the carrier places the goods on the transport at his own discretion. «When chartering, the carrier (charter provider) does not accept from the sender a certain number of goods items for carriage and does not undertake to provide the passenger with a definite place in the vehicle according to the last ticket purchased. The subject of the carrier's (freighter's) obligation during chartering is to provide all or part of the vehicle's capacity for one or more flights» [2; 419].

The Contract of affreightment (charter) must be distinguished from the manned motor vehicle rental contract (Article 585 of the Civil Code of the Republic of Kazakhstan) and the lease agreement of the vehicle without the crew (Article 594–1 of the Civil Code of the Republic of Kazakhstan). Concerning this problem in legal literature there are opposing opinions. For example, according to G.I. Tulegaliyev, in the contract of

affreightment (charter), the goods owner does not pay the rent for the use of the vessel, but the payment for transportation for the entire vessel provided to him, or part of it, or for certain ship facilities [6; 193].

V.A. Kosovskaya argues that the charter is a combination of the elements of the contract of affreightment and the contract for the carriage of goods by sea. On the basis of this, the author came to the conclusion that the existence of a rental relationship makes it possible to recognize a contract of affreightment (charter) as a type of lease agreement [3; 16]. The same opinion, but only regarding the air charter, is held by A.Yu. Pidzhakov and O.I. Aksamentov. According to the authors, if the transport legislation considers the obligation of the freighter to provide one or more aircrafts for transportation, then there is an aircraft lease agreement? [7]. S.Yu. Morozov refutes this opinion and argues that the charter agreement is a transportation agreement and cannot be considered as a lease agreement. Further he notes that under the lease agreement, the owner undertakes to provide the renter of the property for a fee for temporary possession or use or for temporary use. The charter provider in no way acquires the right of ownership or use of the vessel [8; 219].

Ye.V. Vavilin argues that given the logic of the structural arrangement of the norms in considered in the Civil Code of the Russian Federation, the contract of affreightment (charter) should be uniquely attributed to a special form of transportation and distinguish it from the contract of affreightment for a time [9; 20].

The same opinion is shared by A.G. Kalpin and pointed out the specifics of the charter as a type of contract for the carriage of goods by sea [10; 24].

According to T.Yu. Tihenko: «The contract of affreightment can be attributed to the contract of carriage on the following grounds: in both cases, one of the parties to the legal relationship is the transport organization (carrier, freighter is either the shipowner or the owner of vessel); legal relations are formed about the operation of the vessel; the subject of them is the activity of providing services for the transportation of goods (carrier, charter provider transport the goods and deliver them to its destination); the economic goal of one and another is the movement of goods by sea from one port to another. In both contracts, there is a third party — the recipient. The recipient does not participate in the conclusion of the contract of carriage, but acquires certain rights under this contract» [4; 107].

The delimitation of the contract of affreightment (charter) and the vehicle lease agreement is further complicated by the fact that transport legislation mixes these agreements and goes beyond their legal regulation in the Civil Code of the Republic of Kazakhstan. For example, in the Law of the Republic of Kazakhstan on merchant shipping, a charter agreement is regulated as a type of contract for the sea carriage of passengers, baggage, goods, in which the sender is provided with the whole ship, its part or certain ship facilities (clause 59 Article 1), at the same time the Law provides two types of charter agreement: contract of affreightment by vessel with a crew for a period of time (time charter) and contract of affreightment by vessel with a crewless (bareboat charter), which are a type of rental vehicle.

On air transport, the freight of airplane is charged in accordance with the contract of affreightment (charter). The Law of the Republic of Kazakhstan on the use of the airspace of the Republic of Kazakhstan and aviation activities specifically states: «A contract of affreightment (charter) is a contract of carriage (freight) under which the owner (charter provider) is obliged to provide the renter (freighter) with the entire capacity or part of the capacity of one aircraft (or several vessels) for payment for temporary possession and use on one or several flights for the carriage of passengers, baggage, goods, mail or other purposes and to provide management services on their own forces and its technical operation» (paragraph 1 of Article 53–1) [11]. Therefore, it is necessary to distinguish between the motor vehicle rental agreement and the contract of affreightment (charter). These contracts are separate types of civil contracts and differ in the subject matter of the contract. The subject of the motor vehicle rental agreement is the provision of certain property (vehicle) for temporary possession and use of the tenant. The subject of the contract of affreightment (charter), as in the contract of carriage, is the delivery of passengers, goods and baggage to the destination.

According to the contract of affreightment (charter), unlike the motor vehicle rental agreement, the vehicle is not transferred to the charter provider; he is given only the vehicle's full capacity or part of it for transportation. Thus, a space for passengers, goods and baggage in the premises of the vehicle is reserved for the freighter.

In contrast to the motor vehicle rental agreement under a contract of affreightment, the charter provider does not provide the freighter with vehicle management and technical maintenance services. Since the management of the vehicle and its technical operation is the responsibility of the carrier for the delivery of passengers, goods, baggage to the destination. Thus, the duty of the charter provider to provide the freighter with all or

part of the capacity of the vehicle for the carriage of goods, passengers, baggage is a qualifying feature of the contract of affreightment (charter), allowing it to be distinguished as a separate type of contract of carriage.

Contract of affreightment (charter) applies only to air and sea transport. The analysis of the norms of the Civil Code of the Republic of Kazakhstan and transport legislation showed a discrepancy and ambiguity in the legal regulation of the charter agreement. Such ambiguities lead to the emergence of certain difficulties in the law enforcement practice of the provision of transport services, create obstacles in the implementation of the legislation. For example, enshrined in Article 691 of the Civil Code of the Republic of Kazakhstan definition of the concept of contract of affreightment (charter) in the Law of the Republic of Kazakhstan on merchant shipping is not repeated exactly. In sub-section 59 of Article 1 of the Law, the following definition is given: «Charter is a type of contract for the carriage of passengers, baggage, and goods by sea, in which the sender is provided with the whole vessel, its part or certain ship facilities». Thus, the legislator recognizes the contract of charter as a kind of contract of carriage. However, in contrast to the provisions of Article 691 of the Civil Code of the Republic of Kazakhstan, the term «freightage» is not used and the carrier is not referred to as «charter provider» [12; 89].

In accordance with part 2 of Article 54 of the Law of the Republic of Kazakhstan on merchant shipping, a contract for the carriage of goods by sea may be concluded with the provision for the carriage of goods by sea for the entire vessel, its part or certain ship facilities (charter), and without such a condition. Consequently, Kazakhstani legislation on sea transport does not recognize the independence of the charter contract, indicating two types of contract of carriage by sea: the carriage of goods by bill of lading and by charter. Thus, we can assume that the concept of a charter contract, statutory in the Civil Code of the Republic of Kazakhstan, has lost its essence in the legislation on marine transport.

The Law of the Republic of Kazakhstan on merchant shipping, apart from the charter agreement, considers time charter and bareboat charter, which are a type of motor vehicle rental agreement. According to the time charter contract, the vessel with the crew is provided for use for a fixed period of time (clause 47, article 1), and under the contract of bareboat charter, a vessel or several vessels not equipped with and not manned are provided for possession and use for a specified period (sub-section 4, Article 1).

Unlike the norms of the Civil Code of the Republic of Kazakhstan and the Law of the Republic of Kazakhstan on merchant shipping, the Law of the Republic of Kazakhstan «On the airspace management of the Republic of Kazakhstan and aviation activities» contract of affreightment (charter) specifies the rental agreement (freight) of aircraft with the crew and the parties are called the landlord (charter provider) and tenant (freighter) (sub-section 42, Article 1).

Conclusions

The analysis of the theoretical problems of the legal regulation of the contract of affreightment (charter) carried out by the author allows the following conclusions:

1. Contract of affreightment (charter) is a contract of carriage, different from the contract of carriage of goods and a passenger by the particulars of the object: the duty of charter provider to provide all or part of the vehicle's capacity means the placement of goods in transport.
2. The contract of affreightment (charter) is different from the motor vehicle rental agreement. Under the contract of affreightment (charter), the freighter is not entitled by right of possession or use the transport.
3. If an agreement is made for the provision of a tenant (freighter) for the entire capacity or part of the vehicle capacity with the crew for temporary possession and use for one or more flights (voyages) for transportation, then this motor vehicle rental agreement.

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Ұ.Қ. Құмарова

Қазақстан Республикасының заңнамасы бойынша жалдау (чартер) шартының ұғымы мен құқықтық табиғаты

Мақалада кеме жалдау (чартер) шартын құқықтық реттеу, оның тасымалдау шартымен арақатынасы туралы теоретикалық мәселелерге және оның түрлеріне талдау жүргізілді. Автормен кеме жалдау (чартер) шартының мәнісі туралы ғалым-цивилисттердің ғылыми көзқарастары талданады және оның құқықтық табиғатын сипаттайтын негізгі белгілері айқындалды: өзара, өтеулі, консенсуалдық. Аталмыш шарттың мәнісі сол, кеме жалдау (чартер) шарты тасымалдау шартының бір түрі болып табылады, жүкті және жолаушыны тасымалдау шартынан пәні бойынша ерекшеленеді. Қазақстанда кеме жалдау (чартер) шарты тек қана әуе және теңіз көліктерімен тасымалдау салаларында қолданылады. Сондай-ақ автормен кеме жалдау (чартер) шартын реттейтін құқықтық нормаларға салыстырмалы-құқықтық талдау жүргізіліп, соның негізінде заңнаманы жетілдіруге бағытталған ұсыныстар әзірленді. Кеме жалдау (чартер) шартын құқықтық реттеудің теоретикалық мәселелеріне жүргізілген талдау авторға кеме жалдау (чартер) шартының құқықтық табиғатын анықтау үшін маңызды теоретикалық сипаттағы қорытындылар жасауға мүмкіндік беріп, аталмыш шартты көлік құралдарын жалдау шартынан, жолаушылар мен жүктерді әуе, теңіз көлігімен тасымалдау шартынан ажырататын белгілерін бөліп көрсетеді.

Кілт сөздер: көліктік міндеттемелер, көліктік міндеттемелердің құқықтық табиғаты, көліктік шарттар, көліктік қызмет көрсетулер, азаматтық құқық.

У.К. Кумарова

Понятие и правовая природа договора фрахтования (чартера) по законодательству Республики Казахстан

В статье проведен анализ теоретических проблем правового регулирования договора фрахтования (чартера), о его соотношении с договором перевозки и его видах. Автором изучены научные взгляды ученых-цивилистов о сущности договора фрахтования (чартера) и выявлены основные признаки, характеризующие его правовую природу: взаимность, возмездность, консенсуальность. Сущность настоящего договора заключается в том, что договор фрахтования (чартера) является разновидностью договора перевозки, отличается от договора перевозки груза и пассажира особенностями предмета. В Казахстане договор фрахтования (чартера) применяется только на воздушном и морском транспорте. Также автором проведен сравнительно-правовой анализ правовых норм, регулирующих договор фрахтования (чартера) и на этом основании разработаны предложения, направленные на совершенствование законодательства. Анализ теоретических проблем правового регулирования договора фрахтования (чартера) позволил автору сделать выводы теоретического характера, имеющие важное значение для определения правовой природы договора фрахтования (чартера), выделив его отличительные черты от договора аренды транспортного средства, договора перевозки пассажиров, грузов воздушным и морским транспортом.

Ключевые слова: договор фрахтования, чартер, договор перевозки, Республика Казахстан, транспортное законодательство, гражданское законодательство.

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