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THE ENFORCEMENT OF EXECUTION OF THE OBLIGATIONS ARISING OUT OF GENERAL AVERAGE

***P**roblem statement in a general view and its relationship to important scientific or practical problems:* The timely reception by the aggrieved party of the losses in many respects depends on how the payments on general average will be provided. The assumption of delay or the slightest oversight in this case will not only cause a long delay in receiving compensation and in some cases even can prevent damages.

The purposes of the article (problem statement). The main objective of the research is to:

- find out the characteristics of performance of obligations arising out of general average and find out problems which arise in this case in civil law.

The analysis of the latest developments and publications. The presentation of research material with justification of scientific results: General average is the losses incurred as result of intentional and reasonably extreme expenses or donations for the common safety for the purpose of protection from danger of property, involved in the common maritime enterprise, the freight and cargo transported by a vessel [3].

General average is a consequence of any maritime accident creating a danger of destruction of a vessel, cargo and the freight: the collisions of a vessel, a fire on vessel, the loss of the vessel stability, ship disasters etc. To prevent the destruction of a vessel it is the necessary measures entailing certain expenses or donations. These losses in the form of expenditures, donations, losses that are recognized as general average [5].

As a general average is both institute of the international private marine law, and the civil-law institute existing within the limits of the national law, the relations arising from the general average are regulated as international practices (York-Antwerp rules), as well as the national legislation (Merchant Shipping Code of Ukraine).

Exemplary, not exhaustive character has the list of kinds of the general average, contained in Art 279 Merchant Shipping Code of Ukraine. It begins with the words «in particular», and other losses, not named directly in this article, but possessing all the

features of general average and falling thereby under its general definition (Art 277 Merchant Shipping Code), should also be recognized as general average.

As an of exception in some cases, specially provided by York-Antwerp rules, as well as by Art 280 Merchant Shipping Code of Ukraine, the general average losses are which do not possess fully all the necessary attributes for this.

The Code contains the definition of the concept of general average, the list of its kinds, provides an order of distribution of general average, and also provides guidance on the definition of the principle of law which is subject to application.

So, Art 277 Merchant Shipping Code provides the definition of the concept of general average, specifying that general average are the losses incurred as a result of intentionally and reasonably made extreme contributions in order to rescue the vessel, the freight and cargo transported on board the vessel. Merchant Shipping Code establishes that general average is spread between the vessel, the freight and cargo in proportion to their value.

As many scientists consider, it follows from this definition that for the recognition of the losses incurred during transportation general average four conditions are required simultaneously thus the expenses and losses should be:

- intentional;
- reasonable;
- extreme;
- incurred in order to save the vessel, cargo and the freight from the common danger which thus should be real and serious enough [3].

Perhaps, the most extensive list of the fetures of general average has been offered by professor V. F. Mesheroj who considered that a subject of the separate analysis should be almost each word in its definition and offered such their interpretation:

1) «owing to» – the general are the losses which were a direct result of the act falling under the signs of the given definition. Hence, the causal link between this act and the losses is necessary. Otherwise losses will be not the general, and private,

with all the ensuing consequences for the persons concerned;

2) «emergency» – the expenses included in the structure of the general losses are not among the planned ones before the departure. They are not ordinary expenses of operation of the vessel engaged in the carriage and arise due to force majeure;

3) «produced» – vigorous activity which has entailed losses, not to abstain from actions refers to that can lead to losses in navigation, but in the latter case losses will not be shared;

4) «intended» – the thought of expenses and donations, and the intention to produce them is inherent only to people. Hence, the direct cause of the total loss may be just the actions of the people who foresaw and were waiting for the occurrence of certain damages, but not some accident;

5) «in order to save» – the intention of the people is to pursue certain purposes which to rescue the vessel, the freight and cargo carried on board the vessel. Hence, the loss – is not the aim in itself, but the a way of prevention of the total losses;

6) «from the common danger» – the threat of losses should be shared for the vessel, the freight and cargo transported on board the vessel. Thus, in the absence of cargo on the vessel there will be no conditions for the total losses;

7) «reasonable» – people's actions to on rescue the vessel, the freight and cargo from their common danger should be such that the losses caused by these actions, were as low as possible and at the same time the most efficient in terms [5].

However it is should be noted, that even such a complete characteristic of making parts (elements) of the concept of general average is not exhaustive widely accepted.

It is necessary to pay attention on the fact that providing payments for general average must be performed before the corresponding papers on the basis of the party can prove the size of the losses incurred because of it, as will be shown further depends the choice of method of enforcement of obligations of general average [1].

Ensuring the receipt of damages with the affected party. So, for example, if the general average is the expenses has incurred by the ship-owner in the form of fee of the rescuers, the ship-owner is interested in receiving an appropriate of the expenses from cargo owners. Hence, the ship-owner or his representatives (the captain, the agent) should take care of ensuring a payment of general average.

Yet ting to the question how to ensure the fulfillment obligations arising out of general average, it is necessary to consider two aspects relevant to general average legal relationships.

The specific character in the fact that on the one hand the obligations arising out of general average are inherently civil-law none contractual obligations. Therefore almost any legal means provided by general provisions of the Civil Code about obligations can be applied to ensure their implementation (Book Five. Section I. Civil Code of Ukraine).

On the other hand, the general average is the institute of the international private law and subject to a number of special norms that provide some special ways of ensuring securing general average payments (York – Antwerp rules, item 163, 164 Merchant Shipping Code).

Thereof some «classical» ways of providing get a specific character, and some in practice are not applied in general. At the same time, other civil-law ways of ensuring get a different title, interpretation and etc.

Considering these specifics of the given relations, further we will consider briefly the standard provisions as to ensuring of civil-law obligations, and then compare them with the specific approach to ensuring the payment of the general average, current and generally accepted in Maritime Law.

According to the widely accepted civil concept for securing of property interests of the creditor, for reception of guarantees of its appropriate performance by the debtor, the obligation in Civil Law are special measures of influence on the debtor's property which are established by the contract or the law.

These measures consist in providing the possibility of on the debtor putting of additional burdens in the case of non-performance or inadequate performance of the obligation, or involvement in the performance near to the debtor of the third parties (the underwriter), or the allocation of certain assents? The expenses of which can be achieved by compliance with the obligation [2].

There are five such means specifically regulated by the civil legislation of Ukraine. They are the pledge, the bail, the guarantee, the penalty and the deposit (Chapter 49 of Civil Code of Ukraine). Besides, the Civil code of Ukraine provides one more, except named above, the form of ensuring of obligations – retention (Paragraph 7 of chapter 49 of Civil Code).

Recognizing that the parties of the obligations arising out of general average, above all, are interested in the actual performance by the debtor of his duties, and when they are violated infringement – protection of interests of the creditor, it is necessary to come to a conclusion that the most important means of securing here are pledge and deduction.

In this regard here it is expedient to give only a short characteristic of pledge. The essence of pledge as additional obligations, is that the creditor-

pawnbroker gets the right in case of default by the debtor of the obligation secured by pledge to get satisfaction at the expense of a mortgaged property.

One of features of pledge as compared with other forms of ensuring of obligations is the association of the properties of liability and proprietary character with the accent on the fact that the pledge of the property is provided by the time of its safety of the performance obligation by the debtor. The given circumstance is considerable advantage – the cost of this property, in most cases, does not decrease, and is transformed proportionally to the rate of inflation. Besides, the pledge in particular valuable property, as a rule, both the vessel, and cargo transported on board the vessel stimulates the debtor to take all possible measures on repayment of debts without being subjected to the possibility of the pledged property.

Another important feature and advantage of pledge is its most typical feature of it as real right based on the property right, – the right passage of. It means that the ownership of the property from the creditor (pawnbroker) as if «flows» for the property, that is where and in whose property there was no pledge subject, it will be a subject of pledge relations by the time of the termination of the basic obligation [3].

Thus, anyway (sale, exchange, transfer or transition by right of succession) the forced property (rights) is pledge till the moment of the termination of duties of the debtor under the basic obligation.

All these advantages make pledge a rather attractive form of ensuring of the obligations arising out of general average.

Retention of the property of the debtor as a means of securing the obligations is referred to in paragraph 7 of chapter 49 Civil Code of Ukraine. Its essence is that the creditor who has a property which can be transferred to the debtor, in case of default by the debtor of the obligation on payment of this property or compensation to the creditor of the expenses connected with it, can keep it until the obligation is executed. If the debtor fails to perform the obligation, the creditor has the right to meet the requirements from cost of the withheld property. (In Merchant Shipping Code of Ukraine the right to retain the goods under Art 163).

In addition, it should be noted that to secure of execution of obligations in other legal systems, such tools are widely used as the reservation of ownership, the letter of credit, insurance agreement, currency clause.

Despite of the fact that the national right does not apply them to means of ensuring of obligations,

they are of great importance for securing of execution of the agreement on general average distribution.

Therefore further it is expediently at least shortly to characterize these means in terms of their importance, as an incentive to decision (agreement) on general average distribution in the international maritime practice.

Property right reservation is now used seldom enough though in the international commercial practice this means is well-known, and in the legislation of many countries (England, France, Japan, and the Latin American countries) it is permitted and is used as security for the payment. The essence of reservation of the property right is that at goods sale on credit if the delivery and transfer of the goods (cargo) to the buyer is carried out before its payments, the agreement makes the reservation on the preservation of property right by the seller to the goods sold until the buyer makes on it last payment.

Thus, the buyer, receiving the goods (cargo), knows that it not his property; he cannot freely dispose of it until he pays its cost. The given way of securing obligations is attractive because the seller can demand the return of the goods in case of insolvency and bankruptcy of the buyer, as well as a property title on the goods which is in illegal possession [4].

Letter of credit is one of the forms of non-cash payments when the bank which opens the letter of credit (bank – the emitter), undertakes on behalf of the payer (as a rule,) be buyer to pay money recipient (the seller) or another bank to make a payment when all conditions provided in the letter of credit are met [5].

The formula of the letter of credit is “money against documents”. Its versatility is that the payment of the buyer is actually already conducted, the money from his account is going, but on the account of the seller it has not arrived yet. To the seller the immediate reimbursement of the shipped goods or the given services is guaranteed, and he is insured from insolvency or from refusal of payment of the goods (services) by the buyer; to the buyer, in turn, it is guaranteed that the money paid to it will not disappear not known where and will be in disposal of the counterpart only after he carries out his obligations. As to their essence, the letter of credit is in fact a safe mode of payment [4].

The currency reservation (currency warning) is applied as a means of prevention of such a situation, if the supply with the subsequent payment the increasing inflation can depreciate the purchase price established at the conclusion of the contract. In this case a method of the price under the contract which is widely used in the foreign trade transactions can

be applied and is called as the currency reservation or currency caution [4].

In the application of this method in the condition about the price in the contract concluded in Ukraine, there are two currencies – hryvna and currency of the coordinated country (US dollar, Euro, etc.) act. The hryvna in the contract is put in dependence on other stable currency, and thus the price of final settlements (in hryvnas) is defined according to a course change of base currency (for example, US dollar, Euro, etc.) concerning hryvna.

The essence of insurance of transactions is that under the contract of insurance the insurer policy holder (the insurance company) agrees for a fee (insurance payments) upon the accuracy of events (insured event) specified in the contract to compensate to the insurer the incurred damages entirely or partially (to pay insurance compensation within conditional contract sum insured).

Taking into account these general provisions concerning the means of enforcement of civil-law obligations, we will consider now the features of use of special means of the securing applied in relations, connected with general average distribution between the participants of the maritime enterprise.

In the publications on maritime law «provisions of general average» is defined as «money, securities and other property which is a guarantee of obligations of performance» as in the case of obligation default to compensate a corresponding part of losses they become the property of the creditor.

The way to ensure the proof is considered to be provided by the norms of the civil law the measure of prompting of the debtor to execution of a duty lying on him by joining on the force of the law or contracts to the basic obligation the additional one. The basic obligation is reimbursement of the loses, one is provision of appropriate security [5].

The ways to ensure can be established by instructions of statutory acts or be based on the contracts. Each of the method has the specificity and therefore they have different impact on the debtor and protect the interests of the creditor.

To ensure the obligation in the general average is the responsibility of the Captain of the vessel.

In particular Art 163 Merchant Shipping Code of Ukraine sets that «... The receiver is obliged in case of general average to bring an emergency payment or to give appropriate securing». In this case the requirement to provide by the consignee of payment securing of the share of the general average which is due to it, is a duty of the Captain of the vessel. He has no right to give out cargo before securing recep-

tion. The implementation by the Captain of the vessel of the mortgaging right to the cargo is in this case the means of compulsion of the consignee to give securing in this or that form.

In the field of merchant shipping as the form of securing of performance of obligations an emergency subscription, an emergency payment, the deposit, a bank guarantee, a guarantee of an insurance society, a guarantee of Club of a mutual insurance are applied.

The emergency subscription is a written obligation of the consignee to pay a share of general average which will be due according to the consignee of the average adjustment, and provide to average adjuster required for drawing up average adjustment documents, materials, data, to declare the cost of the cargo [5].

The deposit is applied in cases when it is impossible to collect from the consignee a cash security in the preparation of the general average subscription [4].

In order to avoid abuse from ship-owners those sums which can be received in the form of deposits from the cargo owners, York-Antwerp (a rule XXII) rules provide that similar preliminary deposits should be brought into the special account opened in the name of the two co-trustees – one will be appointed by the ship-owner, and another by the person, introducing deposits, or the insurer of cargoes. The sum deposited this way together with the percent should serve as securing of payment for those parties who have the right on general average. The trustees have the right to make payments or return on deposits in the written certifications of average adjuster who settles an invoice on general average [3].

The guarantee is applied very often. Instead of reception the money or the deposit the ship-owner in securing of payments on general average accepts a bank guarantee. In this case the ship-owner specifies the guarantee of which bank to accept [1].

Conclusions and prospect of the further work in the given direction. Thus, it is possible to draw a conclusion that to secure the obligations of general average distribution such means provided by Civil Law are applied (a pledge, a guarantee), and the means established by the special legislation on Maritime Law, the international agreements, etc. by certificates (an emergency subscription, retention, the deposit, insurance agreement).

In this regard, it is appropriate to supplement Merchant Shipping Code of Ukraine indicating that to the relations of general average can be applied the norms of the Civil Law and, in particular, those that regulate securing of execution of obligations.

LITERATURE

1. Алиев С. Б. Способы обеспечения исполнения обязательств / С. Б. Алиев // Юрид. газ. — Алматы. — 1999. — № 21. — С. 3.
2. Бороденко С. Застава як форма забезпечення банківських кредитів / С. Бороденко // Економіка, фінанси, право. — 2001. — № 4. — С. 16.
3. Виноградов П. П. Страхование морских судов и оформление аварии на море / П. П. Виноградов, К. К. Гун. — М. : Госфиниздат, 1937. — 127 с.
4. Гражданское право: определения, понятия, законодательство / под ред. Е. О. Харитонова. — Х. : Одиссей, 1998. — 383 с.
5. Про типові платіжні умови зовнішньоекономічних договорів (контрактів) і типові форми захисних застережень до зовнішньоекономічних договорів (контрактів), які передбачають розрахунки в іноземній валюті : Додаток № 2 до Постанови Кабінету Міністрів України і Національного банку України № 444 від 21 червня 1995 р.

SUMMARY

Shemonayev V.Yu. Providing of execution obligations, arising out of gross average. – Article.

The article is devoted consideration of question in relation to establishment of features of providing of execution of obligations, arising out of gross average, and also to finding out of problems which arise up here in a civil law. The different points of view in relation to determination of signs of gross average are investigational. The methods of providing of execution of obligations, arising out of gross average are studied. Comparison of the generally accepted positions is conducted about providing of civil legal obligations with the specific going near providing of payments on a gross average, existing and generally accepted in a naval law.

Keywords: obligations, gross average, reimbursement of losses, civil law, naval law, relations, international law, shipowners, representatives, debtors, guarantee, defence, creditor.

АННОТАЦІЯ

Шемонаєв В.Ю. Обеспечение исполнения обязательств, возникающих из общей аварии. – Статья.

Статья посвящена рассмотрению вопроса относительно установления особенностей обеспечения исполнения обязательств, возникающих из общей аварии, а также выяснению проблем, которые возникают при этом в гражданском праве. Исследованы различные точки зрения относительно определения признаков общей аварии. Изучены способы обеспечения исполнения обязательств, возникающих из общей аварии. Проведено сравнение общепринятых положений об обеспечении гражданско-правовых обязательств со специфическим подходом к обеспечению платежей по общей аварии, существующим и общепринятым в морском праве.

Ключевые слова: обязательства, общая авария, возмещение убытков, гражданское право, морское право, отношения, международное право, судовладельцы, представители, должники, поручительство, защита, кредитор.

АНОТАЦІЯ

Шемонаєв В.Ю. Забезпечення виконання зобов'язань, що виникають із загальної аварії. – Стаття.

Стаття присвячена розгляду питання щодо встановлення особливостей забезпечення виконання зобов'язань, що виникають із загальної аварії, а також з'ясуванню проблем, які виникають при цьому в цивільному праві. Досліджено різні точки зору щодо визначення ознак загальної аварії. Вивчено способи забезпечення виконання зобов'язань, що виникають із загальної аварії. Проведено порівняння загальноприйнятих положень про забезпечення цивільно-правових зобов'язань зі специфічним підходом до забезпечення платежів по загальній аварії, існуючим і загальноприйнятим в морському праві.

Ключові слова: зобов'язання, загальна аварія, відшкодування збитків, цивільне право, морське право, відносини, міжнародне право, судновласники, представники, боржники, поручительство, захист, кредитор.