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Legal Regulation of the Agreement on Provision of Tourist Services during the Pandemic Covid-19

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Abstract:

The article is devoted to the content of legal instruments in terms of tourism business, namely the problems of legal regulation of the contract for the provision of tourist services. The analysis of the state of development of this problem shows that the issue of legal regulation of contractual relations in general and the contract in tourist services in general is insufficiently studied. This is due to various factors, including the fact that constant integration processes to the international community force Ukraine to adjust its domestic legislation in accordance with international requirements, but these measures are often inconsistent or incomplete, so there are many contradictions in modern Ukrainian civil law.

The author's vision of the content of the package of measures that can positively influence not only the development of the tourism industry in general, but primarily to help identify those legal segments that need improvement in the future.

Keywords: tourism; contract; tourism industry; legal act; service; transactions.

JEL Classification: Z30; K12; M54.

Introduction

The tourism business is one of the most difficult in terms of contractual regulation of the economy. Tourist sulfur occupies one of the leading positions in the legal and economic sectors of the country's development. This is

justified by the fact that the tourism industry plays a dual role of effect in the development of society. On the one hand, it is very important in the structure of sources that fill the budgets of different levels. The presence in the industry of many business entities (tour operators, travel agents, contractors), as well as tourists as consumers of tourism products and individual services, determines the variety of contracts - remunerative services, power of attorney, purchase and sale, commission, agency, power of attorney, commercial concession, sales of tourism products, etc. To determine the type of contract governing the legal relations of tour operators and / or travel agents and tourists, it is necessary to identify the legal nature of this contract, as its qualifications will depend on what rules apply to these relations. Clarification of the type of contract is necessary in order to correctly determine the parties to the contract, its essential conditions, grounds for unilateral refusal to perform the contract, the consequences of such refusal, the responsibility of the tourist organization for failure to comply with the contract. Determining the legal nature of the contract concluded between tour operators and / or travel agents and tourists, as well as its subject involves a study of the nature of the economic relations mediated by them. There is no such agreement not only the main legal means of achieving a certain result, but also serves as a civil law instrument to protect the rights of consumers when traveling, which necessitates its further detailed study.

1. Research Background

The first international convention, which aimed to establish the basic principles of activity and establish the essence of the legal relationship between a tourist and a travel organizer, was the "International Convention on Travel Contracts", adopted in Brussels (Belgium) on April 23, 1970. This Convention defines two types of contracts - a tourist with a tour operator (tour operator) and a tourist with an intermediary (travel agent).

Relations in the field of tourist services are insufficiently studied in the Ukrainian legal literature. Scientific publications set out the general characteristics of this agreement, which is included in the types of service agreements.

Theoretical analysis of the legal regulation of contractual relations is carried out by Ukrainian scholars only in fragments, mostly in the context of the study of a civil contract, in particular in the works of O.V. Dzeri, N.S. Kuznetsova, O.C. Ioffe, V.P. Mozolina, O.E. Kharitonova. Legal regulation of the contract for the provision of tourist services, considered by such scholars as M.B. Birzhakov, I.B. Zorin, M.P. Malska, G.A. Papiryan, V.S. Senin, T.I. Tkachenko, V.K. Fedorchenko, R.I. Yavorsky and others.

2. Methodology

In the field of tourism, contractual relations are governed by international law, which are enshrined in the following documents: International Convention on Travel Contracts - (adopted October 22, 1970 by the General Assembly of the World Federation of Associations of Travel Agencies); Regulations on travel contracts and exchanges, (adopted at the Vienna meeting of the member states of the Security Council of the Council of Europe in 1992); Geneva Convention relative to the International Carriage of Passengers and Luggage by Road (adopted in Brussels in 1967); Code of Relations between Hotels and Travel Agencies (adopted by the World Federation of Travel Agency Associations and the International Hotel Association in 1987); Athens Convention relating to the Carriage of Passengers and their Luggage by Sea; Agreement and standard contract between the hotel and the carrier (adopted by the International Hotel Association and the International Union of Road Transport Participants in 1994); Council of Europe Directive in the field of tourism organization; Intergovernmental Agreement "On Cooperation in the Field of Tourism" (adopted by the governments states on December 23, 1993) and other documents.

A contract (transaction) is a form of documenting partnerships (subject of the contract, mutual rights and obligations, consequences of breach of agreement), which mediates the relationship in the process of production and sale of products or provision of various services.

Roman lawyers also said: "A contract is a law for two." What did they mean? Is it just that contracts have to be strictly and necessarily enforced? It seems that this statement has another meaning: in the process of concluding a contract, rules of law are created, but the rules are individual, designed for specific individuals. What is the regulatory force of the contract? In the process of concluding the contract, the participants themselves develop its terms, model their own rights and responsibilities. At the stage of the emergence of a contractual relationship, these models are transformed into subjective rights and legal obligations. The law establishes a general normative model of rights and obligations, which in the presence of relevant legal facts is transformed into the rights and obligations of specific entities.

A contract is an agreement between two or more parties aimed at establishing, changing or terminating civil rights and obligations. The contract is a legal fact. The difference between the contract and other legal facts

is that: 1) the contract - the result of concerted action of persons involved in its conclusion; 2) establishes in accordance with the requirements of the legislation the content of civil legal relations arising on its basis; 3) determines the liability of the parties in case of non-performance or improper performance of duties.

The contract for the provision of travel services is no different from the relationship, for example, with the audit firm of the person applying for the relevant services. In both cases, the essence of the contract is the emergence of one person (tourist, client of the audit firm) the right in relation to the counterparty to require the latter to provide certain services.

In the literature, the opinion was expressed about the possibility of using such a structure as "purchase and sale" for contracts for the purchase of tourist services.

By virtue of paragraph 2 of Art. 656 of the Civil Code allows the possibility of selling not only things but also rights. However, in such cases, two independent legal relationships are clearly distinguished. One of them is a sale and a cession, in which the seller - cement, and the buyer - the assignee. Another legal relationship - one in which as a result of the sale enters the buyer, replacing it with a seller-creditor. An example of such agreements is the purchase of lease rights, as a result of which the buyer becomes a party to a legal relationship that previously linked the seller with a third party to the contract of sale (landlord). Under the contract in the field of tourist services, the relevant right of the tourist (buyer) is not transferred, and for the first time in his person arises; in this case, the obligated person becomes a contractor - a travel agency.

The definition of tourist services is one of the most controversial in the scientific literature. There is no unity among practitioners regarding the concept and characteristics of tourist services. After all, clarifying the subject of this agreement will determine the contractual structure, liability of the parties, the legal status of the parties to the contract, their guarantees and performance of the contract.

In order to better understand the concept of "tourist service", in our opinion, it is necessary to refer to the definition of the concept of service to highlight its characteristics as an object of civil rights.

The views of leading Ukrainian and foreign scientists on the nature and characteristics of the service as an object of civil rights are different.

Researchers A.P. Sergeev and Y.K. Tolstoy define services as actions of the executor (service provider), the result of which has no tangible result and cannot be guaranteed, carried out in favor of the customer, who is obliged to pay for the services provided. In their opinion, services are understood as those actions that do not have an objective result but contain a useful result in themselves (Grazhevskaya and Mostepaniuk 2020).

O. Yu. Kabalkina (1994) believes that each paid contractual relationship presupposes the availability of the provided service. Any service, in turn, is impossible without performing certain work. O.B. Borisov (1997) considers works as a kind of services and points out that works should usually be understood as such services, the end result of which is the manufacture of any material object (thing) or other material result.

The definition of a service as an activity that has no materialized result has received the greatest support in the literature. Thus, O.S. Ioffe (1978) pointed out that the contract for the provision of services refers to the activities of such species, which do not receive or do not necessarily have to be embodied in the materialized, and even more so in the material result.

In particular, V.A. Vasilieva believes that the service is a kind of public good, through which the needs are met by the subject of actions, the useful properties of which is the interest of the person. Relationships regarding the provision of services lead to the establishment of legal rights and obligations and, therefore, fall into the field of view of the private law result.

When the participants in such legal relations act as special subjects of civil law (special V.A. Vasilieva calls business entities), we are dealing with a commercial binding legal relationship for the provision of services (commercial service), by providing which satisfies the interest of sub. 'object.

Based on the above V.A. Vasiliev identifies the characteristics of the concept of "service", which distinguish it from property (things):

- transformative, useful role of activity that has property value;
- the achievement of the result cannot be guaranteed;
- inseparability of the process of providing the service from the service provider, and the beneficial effect - from the service recipient;
- irrevocability;
- uniqueness;
- exclusivity;
- length in time (Vasilieva 2006).

Professor O.V. Dzera, supporting the features identified by V.A. Vasilieva, as the intangible nature and inseparability of the service with the identity of the service provider (Civil law of Ukraine. Special part: textbook 2010).

I.V. Venediktov (2009) highlights the following general features: 1) are provided, as a rule, in direct contact; 2) have an intangible nature; 3) inseparable from the subjects of service provision; 4) inability to accumulate and redistribute; 5) inseparable actions on its execution and consumption which are carried out simultaneously in one act are carried out; 6) due to the complex content are characterized by inconsistent quality; 7) have a long character; 8) is characterized by a clear focus.

Service - the activity of the executor to provide (transfer) to the consumer a certain defined by the contract tangible or intangible goods, which is carried out on the individual order of the consumer to meet his personal needs (On consumer protection: Law of Ukraine of May 12, 1991 № 1023-XII. 1991).

Having clarified the legal category "service", it is necessary to dwell on the definition of the legal category "tourist service".

I.V. Zorin and V.A. Kvartalnov (1999), under tourist services understand the basic, necessary for the organization and conduct of the trip (accommodation, meals, transportation, excursion services, services of guides-translators, other services depending on the purpose of the trip) and additional tourist services not included in the tour, and are provided at the place of rest as the need arises (trade services, postal and communication services, theatrical performances, shows, bar services, taxis, etc.); complex tourist services - a set of tourist services guaranteed by the permit" (Zorin and Kvartalnov 1999).

Along with the term "tourist service" use the term "tourist product".

According to Art. 1 of the Law "On Tourism": "Tourist product - a pre-developed set of tourist services, which combines at least two such services that are sold or offered for sale at a certain price, which includes transportation services, accommodation services and other travel services, not related to transportation and accommodation (services for organizing visits to cultural facilities, recreation and entertainment, sale of souvenirs, etc.)".

Thus, T.T. Sunarchina (2005) believes that it is necessary to distinguish between the concept of tourist service in a broad sense (complex tourist service) and in a narrow sense (services for transportation, accommodation, food, etc., which is part of a comprehensive tourist service). However, we consider this position controversial, as the services of transportation, accommodation, food, etc. is a component of tourist services as a complex phenomenon (Linnik *et al.* 2021).

As a general rule, the subject of this agreement is a tourist product as a commodity, or the right to services sold by other firms that do not have a direct contractual relationship with the tourist (Iasechko *et al.* 2020 a; Iasechko *et al.* 2020b; Iasechko *et al.* 2020c; Iasechko *et al.* 2020d; Iasechko *et al.* 2020e). Other authors argue that the essence of the contract aimed at providing tourist services is the emergence of one person (tourist) the right in relation to the counterparty to require the latter to provide tourist services, thereby considering the subject of the contract tourist service and, accordingly [20], it is inadmissible to define the subject of the contract for the provision of tourist services as a paid transfer of goods (or property rights), because it not only does not correspond to the essence of the contract but also the tourist activity itself, which actually distorts the ratio of these categories (Hudyma 2010).

Thus, it is possible to define a tourist service - a set of services developed by a tour operator, which combines at least two services offered at a single price, which includes transportation services, accommodation and other services not related to transportation and accommodation in any -which combination and are provided for a period of 24 hours to one year and are sold outside the place of permanent residence of the tourist.

One of the main features of the tourist service is instability, because quality is something that cannot be calculated or objectively assessed (Tkachenko 2004).

Analyzing the practice of concluding contracts and tourist services offered for consumption to tourists, we can conclude that the components of the tourist service as the subject of the contract for the provision of tourist services are the most characteristic tourist services (Yavorsky 2015).

Conclusion

Thus, the contract for the provision of tourist services is a transaction by virtue of which one party (a person engaged in tourist activities) undertakes to provide the other party (tourist) a comprehensive tourist service in accordance with the purpose of travel by its own means or third parties, and the other party undertakes to pay for these services.

From the above definition follow its main features:

1. A contract for the provision of tourist services is a type of contract for the provision of services for consideration. This agreement creates an obligation for the travel organizer to provide a range of tourist services and the obligation of the tourist to pay the fee stipulated in the contract.

2. The contract for the provision of tourist services is consensual, which follows from the very nature of tourist services. The provision of services is preceded by the agreement between the parties on the type of tourist services, their quality, the procedure and terms of provision, i.e. the time of the contract does not coincide with its implementation.

3. The presence of interdependent subjective rights and obligations of both parties to the contract for the provision of tourist services allows to characterize it as mutual (sinallagmatic). This feature is of great importance in making the travel organizer liable for non-compliance with contractual obligations.

4. Both parties undertake to obtain counter-performance from the counterparty. Thus, the contract for the provision of tourist services is FREE.

5. The contract for the provision of tourist services is a public contract. The tourist organization must enter into contractual relations with any natural and legal persons who apply to it, has no right to give preference to one person over another. The price of tourist services is set the same for all consumers, except when the law or other legal acts allow the provision of benefits for certain categories of consumers. Refusal of the tourist organization from the conclusion of the contract is possible only if it has no possibilities to render tourist services.

Thus, there are a number of features of the conclusion of a contract for the provision of tourist services. Definition of such features and their proper reflection in the conclusion of relevant agreements helps to most fully and correctly protect the interests of the consumer, which is a tourist. One of the main features of the appropriate professional level of the travel company is made in accordance with the requirements of legal technique agreement on the provision of travel services, which the company offers to conclude with the tourist, and the ability of the travel company to take into account when concluding the proposal of the tourist, if certain provisions of the contract do not suit the tourist international prestige of the country.

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