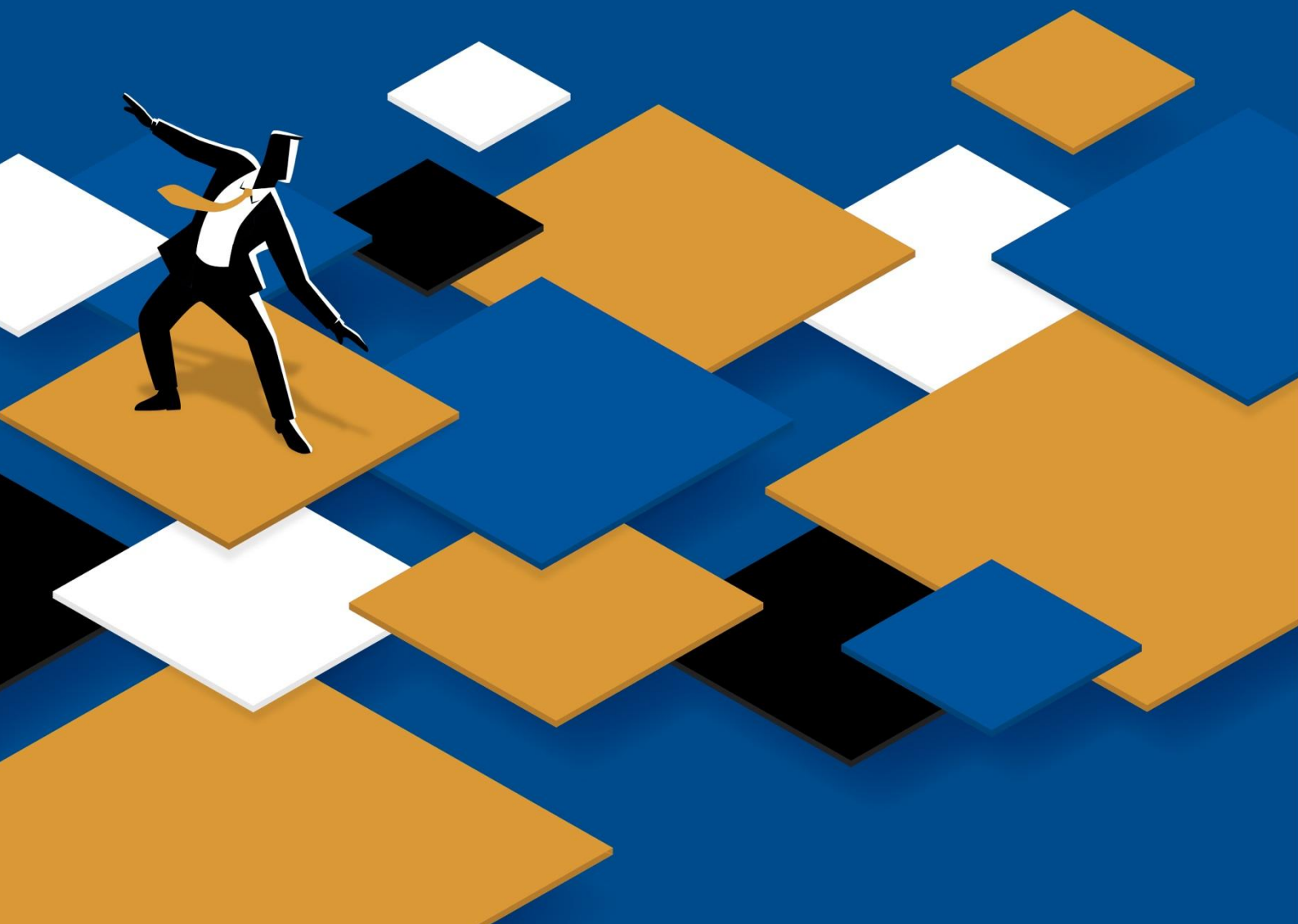
KLR

adjusting matters

INSURANCE AND REIMBURSEMENT

The trendsurfing digest



Dear colleagues!

We are pleased to welcome you on the pages of the first release of our digest!

What is our digest about? – It is all about corporate insurance and recovery of losses in Russia. Who are the authors? – Insurance market participants, leading insurance experts and lawyers.

Interviews, articles, existing Russian practices of the courts – we have been trying to make our digest diversified.

We look forward to your feedback that will help us determine whether our first release was interesting and genuinely useful for you.

We thank all our colleagues who have contributed to this digest! See page 16 with brief information on the authors.

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DIALOGUES

Corporate Insurance on a Global Scale

You can learn what's going on with a certain market from reading news and publications in relevant media. But it is always better to talk about this with a professional who represents a company being the world leader and key player in a specific sector of the economy. **Sergey Bukreyev**, KLR CEO, discussed the latest trends and major ongoing developments in the corporate insurance market, both in Russia and globally, with **Giorgio Callegari**, Chairman of the Management Board and CEO at Generali Russia & CIS, Member of the Board of Directors at Ingosstrakh, Chairman of the Board of Directors at Enel Russia, Member of the Audit Commission at Association of European Businesses, Member of the Board of Directors at Skolkovo Ventures, Member of the Board of Directors at Volga-Dnepr Logistics B.V, Honorary Consul of the Italian Republic in the city of Kaliningrad.

Thank you, Giorgio, for taking the time to answer our questions. We would definitely like to start with the COVID-19 pandemic and its impact on corporate insurance. Could you please tell us if COVID-19 has had a negative impact on Generali activities worldwide?

The COVID-19 pandemic continues to have a negative impact on the global economy, notwithstanding the insurance market is wresting relatively well with the challenges posed by the pandemic (in comparison with other sectors of the economy).

Generali Group is also no exception - according to the results of 12 months gross written premiums increased by 0.5% in comparison with 2019 and reached 70.7 bln euro. This result confirms that during difficult times for people and for businesses, insurance companies are an excellent assistant to get through them, and the demand for insurance products is growing

Russian market: Has the pandemic made any adjustments to the Group's planned activity in Russia?

Unfortunately, due to the pandemic, we had to suspend the development of the brokerage platform, which was carried out by our subcompany - Generali Insurance Brokers. Despite this, Generali does not plan to leave Russia and still considers the Russian insurance market very attractive.

Abstracting from COVID-19, could you tell us about your vision of corporate insurance in 10 – 15 years?

Due to the rapid digitalization, especially in 2020, we expect an expansion of corporate insurance of cyber risks. Cybersecurity is a huge part of companies' expenses. Despite this, business exposed to constant cyber-attacks and suffer huge losses. Of course, during the next 10-15 years, all types of corporate insurance that are widespread today will remain in demand. So, we do not see a downward trend in its volume. The pandemic has shown that company employees need support, and we, on our part, give them maximum support.

In your opinion, what lines of corporate insurance are currently underestimated and which of them have a promising future?

As I mentioned above, cyber insurance has a huge potential for development. Losses from fraudsters and cyber-attacks amount to millions of dollars every year. This coverage reimburses forensic costs, legal, business interruptions and downtime costs, PR and post-breach reputation management costs — as cybercriminals often steal customer data.

Cyber insurance is already actively developing all over the world and the demand for this protection is constantly growing. Unfortunately, in Russia as there is no cyber risk insurance market yet - according to the experts, there are about 30 contracts concluded in total. However, this type of insurance has enormous potential, and according to experts, by 2025 the market capacity is expected to be about 10 billion rubles.

How do you imagine the claims handling in 10 – 15 years?

Definitely the main vectors in claims handling will be the convenience of the application and the timing of payments. For today a lot of insurance companies develop their services both for online sale of policies and for the settlement of losses.

In many types of insurance for individuals, claims are paid very quickly, even within a few hours of an application. For example, if you take a CMTPL insurance in Russia (OSAGO), there is already an application from the Russian Association of Motor Insurers, which helps to report an accident without the departure of traffic police officers to the accident location (if the damage amount is below 100,000 rubles). Also, many insurers under hull insurance (CASCO) policies, when an accident occurs, immediately refer car to the service.

We can see that inshurtech projects and startups are gaining in popularity, not only for underwriting, but also for prompt loss settlement. And insurance companies are very willing to cooperate with them, and even buy them.

THOUGHTS

Specifics of conducting international business and challenges posed by the pandemic

The Russian insurance, like many other spheres of the economy, is intrinsically linked to the international insurance business. Virtually every major insurance company cooperates with foreign insurers or serves as a partner for them, providing insurance services to large global firms having affiliates or branches in Russia.

HDI Global, being a Russian insurance company, is part of the German insurance group HDI Global SE. Our clients are mainly large German, English, European and American industrial companies having affiliates or branches also in Russia.

Besides providing the highest level of services to our clients, our work has a very important function - we give our European colleagues a deeper understanding of the Russian market as well as share the specifics involved in regulation aspects and discuss the application of European standards within the bounds of Russian law with them.

We especially note that when working with the clients representing multinational companies of different countries, consideration must be given to the specificities of the country in which their parent company is headquartered, because this has a strong influence on the approach to conducting all business processes when signing and executing insurance contracts or interpreting specific policy wordings that take into account both the policyholder's interests and the Russian insurance practice.

Our policyholders have regularly sought a "second opinion" on the issues relating to insurance cover, so these days we are increasingly observing that, despite the active development of various standards in our industry, insurers still have different approaches to resolving the same problem or interpreting the same insurance provision. The main challenge is to communicate to all parties concerned, as accurate and clear as possible, how exactly the above insurance provisions will be applied in Russia, and what would need to be clarified to make these provisions transparent, understandable and satisfactory for all parties concerned.

In general, the insurance industry's views and principles in Russia and Europe are similar, but often our European colleagues do not have a clear understanding that the basic conventions with regard to insurance programs for large European groups need major adaptations to realities in Russia given the existing features of insurance practice and legal regulation. Our main goal is to make the offered insurance coverage really workable and fully applicable to our clients' business.

In 2020, the challenges posed by the pandemic were a severe endurance test for many companies and industries. The insurance industry, in its quite a large part, would require a significant correction of multiple business processes and interfaces with clients and partners, involving the possibilities of modern technologies and distant work.

Those companies, which succeeded in doing so without undue delay, could find good things in the situation at hand. And our company had managed to complete the year of 2020 with the significant development of new business thanks to a rapid and qualitative adaptation of all our structures to new conditions. I note that we had never been before so close to our colleagues from different countries as in 2020.

Owing to the pandemic, on-line communication and frequent phone calls, it became clear that it is possible to reap a lot of secondary benefits from a seemingly deplorable situation with the lockdown. In spring, we supported each other through conference and telephone calls discussing working issues and sharing ideas and information on how we lived through the home confinement. In general, we became way more involved in the life of the company. It seems to me that we began to better understand each other and became acquainted closer, despite the on-line communication. We became familiar with the pets, kids and, in some cases, even with spouses of our colleagues from foreign offices that has positively influenced the cooperation with each other to this day.

Olga Grokhovskaya
Deputy General Director of LLC HDI Global

BI-19

A year after the pandemic declaration and the imposition of certain restrictive measures in many countries, including Russia, it is apparent that the pandemic has led to significant and, in some cases, fatal to business losses due to decreases in activities.

Much has been said about whether the BI losses due to COVID-19 are in principle covered by insurance or not. Much less emphasis in professional circles is put on the issues directly connected with the calculation of BI losses in the context of the lockdown. There are two schools of thought about that: *the pandemic has added nothing new to the BI loss calculation* and *the pandemic declaration and the imposition of certain restrictive measures have changed the reality and left their imprint directly on the BI calculation*.

On the one hand, when calculating a BI loss in terms of the pandemic, the main loss adjuster's task, being a key element of routine calculation, is to separate the influence of an insured peril from the pandemic effect, in other words, to segregate the loss directly associated with the incident in question from any impact irrelevant to the incident or excluded from cover. On the other hand, namely the said segregation gives rise to the complexity of the BI loss calculation.

So, when it comes to calculation of the expected performance indicators, the regular planned values shall be adjusted for both the historical trends and the trends existing during the period of restrictions posed by the pandemic. For example, if an insured's activity exhibited strong growth prior to the imposition of restrictions, it should continue to be expected with such trends in normal conditions. However, if a company's sales decreased with the start of self-imposed isolation but remained stable, what should be taken as expected values?

Obviously, the trend, which has emerged under new conditions, should be taken as expected values. But, first, if the restrictions were posed just recently, such trend data may not yet be available. Second, even if some statistical data on the activity in the pandemic period have been already accumulated it does not mean that such data can be used for trend analysis and that the revealed trends will have high predictive power.

Difficulties may also arise in the analysis of an insured's costs. So, if the product cost remained the same for a long time for a distribution network, except the delivery cost which varied with the sales volume, the distribution network would expect the product cost to be maintained at the planned level in normal conditions. However, if, for instance, the cost to deliver goods has increased under / due to quarantine, it has apparently occurred regardless of the loss and, there-

fore, such an increase shall be excluded from indemnity. And if, say, the carriage of goods between retail stores and the respective costs have significantly increased due to collapse of the central warehouse, it represents an insured event and shall be indemnified accordingly.

Therefore, it is safe to say that the situation surrounding the pandemic has obvious effects on the loss calculation, but how and to what extent depends on each specific case.

Alexey Osipov
Director of Financial Expertise Department at KLR

The role of an insurance broker in settling an insurance dispute

When a dispute between an insured and an insurer is brought to court, as we know, the procedure of loss handling by the court *shifts from* considering the issues of characterization of the case in dispute as an insured event and determination of a fair amount of indemnity *towards* the assessment of compliance with the formal contract provisions and the procedural rules of pretrial settlement by the parties.

When professional market players familiarize themselves with court decisions regarding their cases or the disputes involving their industry colleagues, it is no surprise that they oftentimes discover sudden senses and meanings of the wording of the contracts they signed. Indeed, the parties are not quite often satisfied with the results of court settlement of such disputes. What is the way out, if the case has been already brought to court? How to make the process not only competitive but also as close as possible to a customary handling procedure, even if in court, by shifting the main focus from formal to substantive issues?

In our opinion, the solution of this problem is to engage in the process professional experts who specialize in insurance products. Depending on the issues raised in the dispute, they could be either good old loss adjusters, or specialized technical experts, or forensic accountants, or also insurance brokers.

Whilst the role and tasks of the above-listed experts are well known, I think it is worth describing the capabilities of an insurance broker in this process in more details. The broker can appear as a witness in the case both on behalf of an insured or insurer and at the request of the court, providing information on the facts preceding the occurrence of an insured event, namely: intention of the parties when signing an insurance contract, information on the risk provided by an insured, an insurer's requests and an insured's feedbacks in preparation of insurance provisions, negotiation of the text of an insurance contract, interaction between the parties at the pre-trial stage of loss settlement and other details being of great interest to ascertain the truth.

At the request of the court, the broker can issue an expert opinion in compliance with his license on the matters related to interpretation of provisions of an insurance contract based on domestic and international settlement practice. In particular, I would like to emphasize that if a case is brought to court, it means that the broker, provided that he assisted in insuring a risk, has failed to coordinate the process of pre-trial settlement so that an insurer and an insured would have come to agreement on indemnity payment or recognition of a loss as an insured event.

A professional broker arranges the process so as an insured and an insurer trust and accept expert opinions and calculations issued by invited experts. For this purpose, he agrees upon the candidates with the parties concerned and provides a constant liaison between the participants

to keep all the parties equally informed about the progress and status of expert examinations and to make a decision-making process as transparent as possible.

Rashid Sakhapov

Vice President, Head of Claims Handling at JSC Marsh-Insurance Brokers

Interpretation of the 'Intentional Breach of Obligation' Concept in the Judicial Practice

The reservation clause releasing the insurer from its liability for an occurrence that resulted from intent of the policyholder, beneficiary, or insured is commonly found in insurance contracts and implements Article 963 (1) paragraph 1 of the Civil Code of the Russian Federation (Russian Civil Code). Now what is the standard of proof as to whether the person's conduct was intentional, and is it applicable to legal relations in the field of insurance?

The approach to fault in civil law is in stark contrast to its criminal-law understanding as a person's subjective mental attitude to such person's conduct and its implications. Civil liability is compensatory and restorative in its nature and may be imposed on individuals, legal entities, and state bodies. Therefore, civil law disregards internal, subjective feelings of a person and regards fault from the external, objective perspective of the person's conduct by comparing the actual conduct of participants to property relations against a certain extent of their proper conduct[1].

Thus, in civil law, fault is (by a reversal of Article 401 (1) paragraph 2 of the Russian Civil Code) the person's failure to take every possible measure to prevent adverse implications of such person's conduct that are necessary given the degree of care and diligence, which was required from such person considering the nature of the obligation and the business environment.

However, in certain instances, including those specified in Russian Civil Code Articles 401 and 963, civil laws still use the concepts, such as intent and negligence, which are sometimes hard to distinguish between in practice. Therefore, in 2016, in Item 7 of Resolution of the Plenary Meeting of the Supreme Court of the Russian Federation No. 7 dated 24 March 2016 "On the Application by Courts of Certain Provisions of the Civil Code of the Russian Federation Concerning Liability for Breach of Obligations", the Supreme Court of the Russian Federation explained that intent meant the lack of the minimum degree of care and diligence in the performance of an obligation.

> *"No previous agreement to eliminate or limit liability shall release a person from the liability for intentional breach of obligation (Article 401 of the Russian Civil Code). The non-availability of intent shall be proven by the person that committed such breach of obligation (Article 401(1, 2) of the Russian Civil Code). For instance, to justify the non-availability of intent, a debtor, whose liability has been established or limited by an agreement between the parties, may provide evidence of the fact that such debtor exercised at least the minimum degree of care and diligence in the performance of the obligation".*

[1] Russian Civil Law: Textbook in 2 Volumes / Editor-in-Chief Ye.A. Sukhanov. 2nd edition., stereotype M., 2011. Vol. 1 § 2 Chapter 11. Chapter author Ye.A. Sukhanov.

In 2017, the above-mentioned definition of intent was supported by the Review of Judicial Practice Regarding Disputes Associated with Freight Carriage and Forwarding Agreements approved by the Presidium of the Supreme Court of the Russian Federation on 20 December 2017.

> *"By implication of the legal stance contained in Clause 7 of Resolution of the Plenary Meeting of the Supreme Court of the Russian Federation No. 7 dated 24 March 2016, the debtor's failure to exercise at least the minimum degree of care and diligence in the performance of the obligation shall be recognised as intentional breach of obligation".*

In the judicial practice, the standard of the minimum degree of care and diligence exercised as an indication of the non-availability of intentional breach of obligation is quite common. However, its application remains hardly predictable (as with any other evaluation category).

For instance, in the *Rusmiko case* [2], the court declared the contractor's failure to perform the work on manufacturing equipment fully paid by the customer in advance to be intentional breach of obligation, and the contractual conditions that limit the contractor's liability for intentional breach of obligation were declared void (Article 401(4) of the Russian Civil Code). In the aforesaid case, the contractor provided evidence of neither the disbursement of the advance payment, nor the existence of any force majeure event, nor the availability of customer's fault in the delay in performance of the work. Therefore, no evidence demonstrating that the contractor had exercised at least the minimum degree of care and diligence in the performance of the contract was provided.

In the *Kosmos-Neft-Gas case* [3], the supplier committed a delay in the delivery of goods and the delivery itself was incomplete (the pipe cutter was lacking). The claimant filed a lawsuit seeking the recover the penalty for the delay in the pipe cutter delivery. Given that the supplier (Kosmos-Neft-Gas Financial and Industrial Company LLC) failed to specify any circumstances that prevented it from delivering the pipe cutter to the claimant, the court considered the incomplete delivery to be intentional breach of obligation.

In the *AsiaVneshTranzit case* [4], a lawsuit seeking to recover the cost of undelivered wood was considered. AsiaVneshTranzit LLC (claimant) won the wood sale auction and effected a 100% advance payment. The goods were delivered to the buyer in the amount less than specified in the agreement. To justify its position, the seller (Irkutsk Region Territorial Department of the Federal Agency for State Property Management) stated that, by signing a bid, the buyer had agreed that the seller should not be liable for any damage that might be inflicted on the buyer due to a decrease in the amount (quantity) of the goods. The court declared the condition of the sale and purchase agreement limiting the seller's liability void (Article 401(4) of the Russian Civil Code), as no evidence demonstrating that the seller had exercised the minimum degree of care and diligence in the performance of its obligation to deliver the goods were provided by the latter. The prosecutor's investigation found that no actual control over the amount of cut wood had been

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[2] Resolution of the Commercial Court of the Moscow Circuit dated 12 April 2018 in case No. A40-144697/2017.

[3] Resolution of the Ninth Commercial Court of Appeal dated 24 January 2019 No. 09AP-58232/2018 in case No. A40-126318/2017 upheld by Resolution of the Commercial Court of the Moscow Circuit dated 7 May 2019 No. F05-2945/2018. Ruling of the Supreme Court of the Russian Federation dated 23 August 2019 No. 305-ES18-11872 denied sending case No. A40-126318/2017 to the Commercial Cases Division of the Supreme Court of the Russian Federation for re-trial under the cassation procedure.

[4] Resolution of the Fourth Commercial Court of Appeal dated 14 September 2017 No. 04AP-3808/2017 in case No. A19-21553/2016 upheld by Resolution of the Commercial Court of the Eastern Siberia Circuit dated 20 December 2017 No. F05-7014/2017. Ruling of the Supreme Court of the Russian Federation dated 10 April 2018 No. 302-ES18-3014 denied sending case No. A19-21553/2016 to the Commercial Cases Division of the Supreme Court of the Russian Federation for re-trial under the cassation procedure.

exercised, and no security at its storage locations had been provided. Furthermore, no evidence was provided as to the fair existence of the wood sold to the claimant and its potential preparedness for receipt by the buyer. Therefore, the court considered the delivery of wood in the smaller amount in that case to be intentional breach of obligation.

Therefore, to prove that the breach of obligation was not intentional, evidence of exercising at least the minimum degree of care and diligence in the performance of the obligation must be provided. The application of this general civil-law standard of proof as to whether the person's conduct was intentional in the field of insurance appears to be possible, notwithstanding the somewhat 'delphic' nature of the category of 'minimum degree' of care and diligence suggested by the Supreme Court of the Russian Federation.

Daryana Epikhina

Senior Associate at Petrol Chilikov Law Firm

About some economic aspects of challenging a penalty

The issue of reducing a penalty amount is often raised during court proceedings relating to failure to properly fulfill contracts. Article 333 of the Civil Code of the Russian Federation says that if a penalty is obviously out of proportion to the consequences of violation of the obligation, a court shall have the right to reduce the penalty. Accordingly, the proportionality of the penalty becomes the subject of, inter alia, economic justification.

At that, a significant economic argument is primarily that the assessment shall be given to the actual amount of the creditor's loss rather than the potential one. However, in this case the claimant (creditor) shall not support the actual occurrence of losses by documents, while the defendant (debtor) shall prove that the penalty is incommensurate to the losses and / or that the creditor can be unjustly enriched at the defendant's expense.

The creditor's losses, associated with the defendant's failure to fulfill his obligations, may result from both loss of profit and additional expenses incurred by the creditor. At that, additional expenses may arise from both an increase in costs of maintaining readiness to undertake business activity and an increase in some unit costs.

In its turn, the lost profit may arise from both the debtor's failure to fulfill his obligations (for instance, the supply of poor quality goods or the undersupply of oil volumes to be transported through pipelines, and etc.) and the creditor's refusal to use available alternative options.

Quite often, the available local information shows that the creditor has no possibility to compensate for the effect of the debtor's failure to fulfill his obligations by using alternative sources (for instance, in case of underutilization of the oil pipeline section, which is meant to transport the oil volume not supplied by the debtor). In this situation, we need to make a comprehensive analysis to show whether the creditor has successfully made up for the shortage of resources, which were undersupplied by the debtor (for instance, in case of oil transport, by transporting additional volumes via the other pipeline sections) thereby compensating for his losses, fully or partially.

Data available from open sources may be of great assistance in this regard – first of all, the debtor can use official information, such as the creditor's profit and loss reports, to successfully defend his position.

This also applies to insurance, because there are provisions, for instance, in liability insurance, which do not exclude the reimbursement of penalties and other fine sanctions. In this case, when assessing the adequacy and commensurability of the penalty submitted to the insurer for reimbursement, one can use, in particular, the above-described economic instruments.

Alexey Osipov
Director of Financial Expertise Department at KLR
Marina Veselova
Deputy Director of Financial Expertise Department at KLR

What's wrong with the squid?

In summer 2020, a Russian vessel delivered to a Chinese port various fish products (squid, herring, pollock, and etc.)

Despite the fact that the cargo was accompanied with all the necessary certificates and specifications, duly executed immediately before the vessel left a Russian port, the PRC customs officers decided to make a random check of the goods and test them for the presence of foreign and harmful substances.

The tests of the delivered fish samples revealed the presence of the causative agents of COVID-19 in some fish products. It was immediately decided to detain this parcel of the cargo at the port warehouses pending clarification of the circumstances surrounding the above contamination.

Such a situation is not frequent in the practice of freight forwarding. However, the standard practice suggests certain step-by-step procedures for a detailed investigation into the circumstances of the incident in question without influencing or affecting the other freight forwarding operations. But the later events made us look at the situation differently.

A month later, another Russian vessel containing a cargo of fish products arrived at the same Chinese port. Once again, the cargo tested positive for contamination with the causative agents of COVID-19.

At that moment, the PRC customs authorities took a decision on the temporary suspension of import of fish products from Russian suppliers and duly informed Rosselkhoznadzor on the above incidents. Following negotiations, the Chinese customs authorities decided to detain the cargo at the cold storage warehouse to avoid spoilage. And in November 2020, the authorities decided to close Chinese ports for import of fish and seafood from Russia before the situation returned to normal.

For the time being, the insurer is awaiting the outcome of investigation into the circumstances of cargo contamination to take a decision whether or not to recognize these incidents as insured events.

Nikolay Morozov
International Business Management Specialist at LLC HDI Global

Key insurance cases of 2020 in Russia: overview and trends

The economic impact of the COVID-19 pandemic and the restrictive measures implemented by Russian authorities (notably the lockdown) have exposed the shortage of insurance products covering the loss of income and have prompted policyholders to search for new, more creative ways to defend their rights before the court.

At the same time the Supreme Court of Russia set forth a new approach towards the interpretation of article 963 of the Civil Code of Russia aimed at protecting the beneficiary (the bankrupt company) that suffered losses due to the willful misconduct of its insolvency administrator (the policyholder).

In this article we would like to raise the curtain on the most significant insurance coverage cases of 2020 and highlight possible trends in Russian insurance law.

Kudesnica firm, LLC v. RESO Garantia Insurance Company, IJSC

There is no doubt that the COVID-19 restrictions have caused a sharp increase in non-damage business interruption claims all over the world. In Russia, however, the situation is slightly different. While the businesses are obviously facing the same challenges and are actively searching for a way to cover their loss of income, the business interruption insurance product itself is not widely used in Russia. As a result, the 2020 saw a very peculiar case wherein a policyholder attempted to use a property insurance product for a non-damage business interruption claim.

In 2019 Kudesnica firm (the insured) signed a property and casualty insurance contract with RESO Garantia Insurance Company (the insurer) providing protection against most risks to property, including, *inter alia*, fire, natural disasters and unlawful acts by third parties.

As in 2020 a commission comprising representatives of the insured and the landlord decided on closing down the Kudesnica enterprise until the coronavirus containment measures were lift, the policyholder notified the insurance company of the insured event – the loss of the rental property due to the COVID-19 restrictions.

Since RESO Garantia Insurance Company refused to compensate the losses incurred by the Kudesnica firm, the insured filed a claim with the court seeking insurance payment 2.5 million rubles (roughly 24 thousand US dollars).

The court of first instance rejected the claim, stating that the risk of *losing* the rental property due to the COVID-19 restrictions was not covered by the insurance contract (case No A40-119472/2020). The court of appeal upheld the judgment.

It should be noted that the negative outcome of the case is largely due to the type of the insurance contract signed by the parties (property and casualty insurance contract). It is hard to predict now what the result would have been had the case involved a business interruption contract. For instance, in *Social Life Magazine, Inc. v. Sentinel Ins. Co.* case the judge denied the plaintiff's motion for preliminary injunction, stating that under the New York law "this kind of business interruption needs some damage to the property to prohibit you from going" and that the virus "damages lungs", but "doesn't damage printing presses".

On the contrary, in *North State Deli, LLC v. The Cincinnati Insurance Co.* case the judge granted summary judgment in favor of policyholders (a group of restaurants), seeking insurance coverage for non-damage business interruption due to COVID-19 restrictions. The court indicated that direct physical loss "includes the inability to utilize or possess something in the real, material, or bodily world" and that is "precisely the loss caused by the Government Orders".

Going back to the Russian case, we note that despite this attempt of the insured being unsuccessful, the case may become an important milestone for the development of the non-damage business interruption in Russia.

Service Oil Company, CJSC v. Insurance Company Arsenal, LLC

Under article 963 of the Civil Code of Russia the insurer is not liable for damages resulting from willful misconduct of the policyholder or beneficiary.

In line with this provision Russian courts tended to dismiss the lawsuits filed by bankrupt companies that incurred damages due to the willful misconduct of their insolvency administrator (e.g. when the insolvency administrator squanders the bankruptcy estate).

In case No A40-292151/2018 the court of first instance dismissed the claims of Service Oil Company, indicating that its former insolvency administrator was liable for intentional unlawful use of funds. The court of appeals and the court of cassation upheld the judgement, stating that the insured event was not random and did not meet the criterion of probability.

However, the Supreme Court of Russia reversed the judgement and ruled in favor of the beneficiary without sending the case for retrial, stating that the willful misconduct by the insolvency administrator (the policyholder) could not preclude the beneficiary from getting insurance recoveries. The court emphasized that the nature of the insured event was not of relevance, as the plaintiff should not have had to bear the negative consequences of its insolvency administrator's unlawful actions.

The case is likely to become of a landmark nature as it sets forth a new approach towards the interpretation of article 963 of the Civil Code of Russia with regard to insurance disputes involving insolvency administrator's willful misconduct.

Victor Petrov

Head of Litigation Practice at VEGAS LEX Law Firm, к.ю.н.

REVIEWS: reimbursement

Review of case-law of arbitrazh courts on proving damages in arbitrazh courts

All facts to be proven for a claim on damages should be duly established in any case, despite the contract terms may provide for automatic reimbursement of third parties for damages by a general contractor in case the claims are satisfied by the customer *(Ruling of the Supreme Court of Russia dated 30.11.2017 No. 307-ЭС17-9329 in case A13-4150/2015).*

Even if a contract provision establishes that a general contractor shall pay damages in the amount of total property (monetary) claims of third parties that were satisfied by the customer, that occurrence of harm, wrongfulness of the injurer's actions, causal relationship between such action and the occurrence of harm, or guilt of the injurer should need to be proven by the claimant for a claim on damages.

When recovering damages incurred because of entering into a substitute transaction, courts estimate to what extent such a transaction was reasonable in case the value of property involved in it was higher than according to the initial transaction terms *(Ruling of the Supreme Court of Russia dated 17.09.2019 No. 305-ЭС19-7159).*

The claimant stated that, as there were no market offers of pre-owned freight cars, it entered into a supply agreement for purchase of new freight cars of similar technical specifications that could be efficiently used for carriage of 12-meter flat steel. However, the price of new freight cars significantly exceeded the price of pre-owned cars as established by the initial transaction that was cancelled due to the fault of the respondent. The courts failed to examine the issue whether the claimant was able to purchase comparable cars at a cheaper price, thereby lowering its damages; as the result, the case was sent back for re-examination.

Article 15(2)(2) of the Russian Civil Code provides the damages in a form of lost profit shall be proven through getting income by the claimant, but in practice, the courts nevertheless demand showing the actual possibility of getting of income by the claimant as if the defendant did not commit illegal actions *(Ruling of the Supreme Court of Russia dated 12.02.2021 No. 309-ЭС17-15659 in case No. A34-5796/2016).*

An owner of the right to a utility model brought a claim for damages against a manufacturer of counterfeit goods in the amount of profit received by the respondent from realization of the counterfeit goods. The Intellectual Property Rights Court found the claim well-grounded, noted that realization of counterfeit goods obviously entails decrease of the right owner's income, and, therefore, the right owner's loss of profit is natural consequence that need not be proved.

Nevertheless, the Supreme Court of Russia referred the case to the Panel as the respondents claimed that the actual possibility of receipt of income by the claimant was not shown: and, most probably, this may result in reversal of the Intellectual Property Rights Court judgment.

Lost profit is considered proved only in case it is proved that specific arrangements were made, and the amount of income not received by the claimant is shown in detail *(Ruling of the Supreme Court of Russia dated 16.05.2018 No. 307-ЭС17-22975).*

The appeal court found that the lost profit has been proved, as the claimant performed all necessary measures that, in absence of breach by the supplier, would have ensured gain of profit. i.e.: scheduling manufacturing of products with the defendant's raw materials, finding a prospective buyer for the products, entering into a products supply agreement. The lost profit amount was found well-grounded basing on written explanations of the jewelry factory.

However, the Supreme Court considered that the fact of making specific arrangements for manufacturing the jewelry was not proved, and pointed that economic justification of the amount of income not received from realization of jewelry was not provided. Thus, the Supreme Court demonstrated its consistent approach: the standard of proving the lost profit is so high, that the chance to actually collect it is very low.

In order to establish the causal relationship between the actions and the damages, the courts must find the legally important cause of the damages, instead of dismissing the case on formal ground of absence of causal relationship *(Ruling of the Judicial chamber for civil cases of the Supreme Court of Russia dated 30.01.2018 No. 20-КГ17-21)*

Lower courts dismissed the claim for reimbursement for losses incurred as the result of damage to a residential building (as the result of construction works at the building cracks had been appeared), stating that the causal relationship was not proved: the courts pointed that the claimant's house did not comply with seismic resistance requirements applicable within the respective area.

The Supreme Court of Russia sent back the case for re-examination noting that the non-compliance of the claimant's house with requirements regarding construction in seismic regions by itself does not prove absence of causal relationship between the respondent's actions and the damage to the claimant's property, nor does it mean that it was such non-compliance that entailed damage to the house. Thus, the Supreme Court emphasized that, in case there were several events that could entail damages, a legally important cause of such damages must be identified and substantiated in the court act.

The evidentiary effect of an opinion given by a person possessing special knowledge must not depend on the form of such opinion, or the procedure whereby it was obtained *(Resolution of the Arbitrazh Court of West Siberian district dated 24.12.2020 in case No. A45-17318/2019).*

The court of cassation appeal pointed that the specialist's opinions were groundlessly dismissed by the lower courts. As the court stated, the specialist's opinion though not being an expert's opinion within the meaning of Art. 86 of the Arbitrazh Procedure Code of Russia, nevertheless, possesses evidentiary effect on an equal basis with other documents (as well as the expert's opinion obtained upon performance of forensic assessment ordered in another case). Thus, the law does not stipulate that the evidentiary effect of an opinion given by a person possessing special knowledge dependent on the form of such opinion or the procedure whereby it was obtained. The court must evaluate reliability of each such opinion.

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