



Uniwersytet
Wrocławski



ISSN 1392–6195 (print)
ISSN 2029–2058 (online)
JURISPRUDENCIJA
JURISPRUDENCE
2011, 18(1), p. 161–176.

DETERMINATION OF INSURABLE INTEREST IN CARGO INSURANCE CONTRACTS

Edvardas Sinkevičius

Mykolas Romeris University, Faculty of Law,
Department of Business Law
Ateities 20, LT-08303, Vilnius, Lithuania
Telephone (+370 5) 2714 525
E-mail edvardas.sinkevicius@bsplegal.lt

Received 26 February, 2011; accepted 23 March, 2011

Abstract. *Within the context of the insurable interest in cargo insurance contracts, in this publication the writer analyses the theoretical aspects of the insurable interest and the relevant laws. Dealing with the problems of determining the insurable interest in cargo insurance contracts the writer has examined the possible options of insurance of the cargo in transit, and while analysing the law governing transport and the sale of goods he examines a person's insurable interest in the cargo insured and legal remedies to protect such an interest by concluding a cargo insurance contract. The writer believes that the legal regulation of the insurable interest in Lithuania, interpreting the insurable interest as a loss sustained by a policyholder, the insured or the beneficiary upon an event insured against, fails to guarantee the protection of proprietary and economic interests of persons engaged in the circulation of commodities.*

Laws governing cargo insurance contracts in Lithuania do not provide a flexible protection of interests of the participants in trade operations and impedes the development of trade and transit, therefore the legal regulation of cargo insurance, especially of the insurable interest should be improved.

Keywords: *insurance law, contract of carriage of goods, insurance of transport risks, cargo insurance contract.*

Introduction

Cargo insurance, and especially its legal regulation, is one of the factors that shows the ability of the state legal system to facilitate freight flows and possibilities of local trade representatives to ensure the interests of commercial operators, carriers, banks crediting the trade and other persons.

The seller in the international trade market is interested in insurance coverage until the moment the purchase price is paid or the moment when the risk of damage to or loss of the goods passes to the buyer. In some cases such an interest exists even longer, i.e. until the moment the seller is no longer able to use the right to dispose of the goods in transit, by stopping their delivery to the consignee or diverting them to another buyer. The buyer requires protection of insurance from the moment he pays the price or the risk of damage to or loss of the goods passes to him or her.

On the other hand, other trade servicing entities have an interest in the goods as well, e.g. insurance protection is important to the bank that has financed the sale and that often holds a security interest in the goods in transit. The interest of a carrier or a freight forwarder in the goods may occur in case of the retention of the goods or in using them as collateral in order to guarantee the receipt of payments, when by exercising one's right to retain the goods, the payments payable to the creditor may be recovered by selling the goods retained.

When insuring goods in transit, we encounter the main problem related to the question whose interests are protected by the cargo insurance contract and whether the legal regulation in Lithuania satisfies the expectations of all trade participants. The purpose of this study is to answer the questions – who according to Lithuanian law has an insurable interest in goods in transit and how the Lithuanian legal regulation can be used to ensure this type of protection.

1. Insurable Interest and Its Holder in Cargo Insurance Contracts

When creating and developing insurance law the Lithuanian legislature has specified in Article 79 of the Insurance Law that an insurable interest of the policyholder or the insured is a mandatory condition for indemnity insurance. It is obvious that the absence of an insurable interest makes indemnity insurance contracts void *ab initio*, since these contracts are contrary to the mandatory norms of Article 1.80 the law the Civil Code (hereinafter referred to as – the CC).

Several studies have been carried out into the insurable interest in Lithuania and the legal experts have explained this interest by recourse to the definition of the classic insurable interest that has been formed in England and Western Europe¹. On the other

1 Ambrasienė, D.; Sinkevičius, E. *Vežėjo civilinė atsakomybė pagal Ženevos tarptautinio krovinių vežimo ke-
liais sutarties konvenciją ir jos draudimas* [Carrier's liability under the Geneva Convention on the Contract
for the International Carriage of Goods by Road and it's insurance]. Vilnius: MRU leidybos centras, 2004,

hand, our legislature has decided to intervene into the sphere of the doctrine and the case law and presented its own legal concept of the insurable interest. It is stated in Article 2 para 15 of the Insurance Law that an insurable interest is a loss that the policyholder, the insured or the beneficiary may sustain upon the occurrence of the event insured against. Obviously, this step of the legislature related to this provision of the Insurance Law could not have been overlooked by the case law. The Supreme Court of Lithuania has passed a decision in which it was stated that an insurance contract signed by a tenant covered only the property belonging to the landlord and the tenant was not entitled to any insurance indemnity since he has no insurable interest². The Court maintained that only the landlord, and not the tenant is to suffer the loss in case the rented house burns down, therefore, he is the only one who has the insurable interest. This judgement established that the holder of the insurable interest is determined not on the basis of economic ties with the thing but rather on legal ones.

Dependence is another important feature of the insurable interest. Dependence of the insurable interest means that only an insurable interest belonging to someone can be insured. If such an interest belongs to nobody, it can not be an insurance subject-matter, as the feature of dependence is absent.

The risk of loss of a cargo at a certain stage of the cargo transportation passes to the buyer, at the same time changing the holder of the insurable interest. However, only the statutory regulation and insurance contract clauses determine whether his or her interest is protected by the insurance contract.

It should be noted that Lithuania has no relevant law governing marine insurance like, for instance, The English Marine Insurance Act of 1906³ or Section Ten of The German Trade Code *Versicherung gegen die Gefahren der Seeschiffahrt*⁴. We do not have any special legal norms on insurance that would regulate the specific insurance of transport risks either⁵. Moreover, the insurance of goods in transit, specified in Article 7, para. 3, subpara. 7 of the Insurance Law, by the will of the legislature may be called as marine, transport or even motor insurance, although this kind of distinction has no practical significance in the subsequent sections of the Insurance Law. The transport

p. 152–154; Zaveckas, K. Draudimo interesas – pagrindinis teisinių draudimo santykių elementas [Insurable Interest – the Key Element of Insurance]. *Jurisprudencija*. 2006, 5(83): 109–114; Kontautas, T. *Draudimo sutarčių teisė* [Insurance Contracts Law]. Vilnius, 2007, p. 60–65. It should be noted that in the previous edition devoted to insurance law no attention was paid to the insurable interest, for more information see: Čepinskis, J.; Raštikis, D.; Stankevičius, R.; Šernius, A. *Draudimas* [Insurance]. Kaunas, 1999.

- 2 Ruling of the Panel of Judges of the Civil Case Division of the Supreme Court of Lithuania of 2 February 2003 in civil case No. 3K-3-643/2003 *V. R. v. JSC DK „Baltic Polis“*, in doctrine this conception was supported by T. Kontautas (*ibid*, p. 65), this conception was criticized by E. Sinkevichus, E. Baranauskas (Sinkevichus, E.; Baranauskas, E. *Strakhovoj interes v strakhovaniji imushchestva* [Property, Encumbrances on Property: problems, solutions and opportunities]. Riga, 2006, p. 214).
- 3 English Marine Insurance Act 1906 - An Act to codify the Law relating to Marine Insurance [interactive]. [accessed 26-02-2010]. <<http://www.jus.uio.no/lm/england.marine.insurance.act.1906/doc.html#22>>.
- 4 Thume, K.-H.; De la Motte, H. *Transportversicherungrecht*. Muenchen, 2004, p. 107–147.
- 5 The writer means insurance contracts, when the cargo is insured „for whom it may concern“, in Lithuanian it worded as „tam, kam tai gali būti svarbu naudai“, in German - „wenn, es angeht“, in Russian – „за чьём кого следует“.

insurance in a broad sense⁶ and the fact that this type of insurance is singled out in the legislation should be determined by the creation of special legal norms. The aim of these legal norms is to regulate very specific aspects of economic activities related with insurance of goods in transit in such a way that it would be possible for trade entities and trade servicing businesses to protect their economic interests. Today cargo insurance in Lithuania is considered to be a type of so-called property insurance. The Insurance Law provides a few special legal norms that are completely incompatible with transport insurance. Due to these reasons a very specific situation has emerged – cargo insurance contracts are concluded and performed in practice, however, the sufficient national legal regulation does not exist. Incidentally, it should be noted that Lithuanian insurance companies engaged in insuring marine cargos very often in their policies refer to the *Institute Marine Cargo Clauses of 1982*⁷, paragraph 19 which refers to the application of English law and practice. However, since the mentioned cargo insurance clauses are not mandatory and are classified as *soft law*, the parties often agree to apply Lithuanian law as well. However, even the clauses of the standard marine cargo insurance contract, when interpreted in the light of the Lithuanian national context, provides a completely different meaning when interpreted within the context of English law.

As was mentioned earlier, when concluding and performing cargo insurance contracts, the first and the most important condition for a cargo insurance contract to be valid is the existence of the insurable interest and the identification of its holder. On the other hand, while the goods are in transit, depending on the means of transport used and on the terms and conditions of the contract, the right to dispose of the cargo in transit, the title in the goods, as well as the risk of loss of or damage to the goods are always passed from one person (the seller or shipper) to another (the buyer or consignee) at a certain moment of transportation. At the same time it also determines the transition of the insurable interest from one person to another. It is also possible that upon the transition of the insurable interest from one person to another, the person who has acquired the insurable interest will not acquire any insurance coverage in accordance with the terms and conditions of the cargo insurance contract.

1.1. Policyholder's – Shipper's (Seller's) Insurable Interest

One of the clauses that can be found in practice of cargo insurance contracts is as follows: the policyholder insures the goods in transit in favour of himself or herself. In such a case a bilateral agreement is concluded, the parties of which are the insurer and the policyholder, and upon the occurrence of an event insured against the insurer obliges to pay insurance indemnity to the policyholder for the damage to the cargo in transit. It should be reminded that the policyholder while carrying the cargo is also the shipper, and in the trade relations – the seller of the goods. According to the Article 4.50 para.

6 In Lithuania there is not marine insurance law, thus the concept of motor insurance, from this writer's point of view, covers marine insurance as well.

7 Institute Marine Cargo Clauses of 1982 [interactive]. [accessed 01-03-2010]. <<http://www.jus.uio.no/lm/institute.marine.cargo.clauses.a.1982/doc.html#75>>.

2 of the CC handing over the goods to a transport company without the duty to deliver them to the destination, is considered as accepted by the buyer, at the same time title in the goods is transferred from the seller to the buyer, if the law or the contract do not provide for otherwise. In cases when the goods are transported by sea and a bill of lading is issued, the moment of passing of the bill of lading to the acquirer is considered to be the moment when the goods are transferred to the acquirer, who obtains the right of ownership of the goods in transit.

In case of cargo insurance, the person who can suffer direct damage from the exposure to risks has to be determined, since only that person according to Lithuanian law has an insurable interest. A person who sustains direct damage from the exposure to risks to the cargo in transit may be determined from the clauses of the contract of carriage of goods. Such a person is a party to the contract of carriage of goods, who has a right to dispose of the cargo and as a result, bears the risk of a loss. Normally, such legal circumstances are determined depending on who has the right of claim for compensation from the carrier in case of loss of or damage to the cargo. On the other hand, the right of claim may be determined depending on who bears the risk of an accidental loss of or damage to the cargo according to the contract of sale of goods that is usually established using the *Incoterms* clauses. In such a case, when deciding who has incurred the damage, certain competition of the legal norms regulating contracts of sale and contracts of carriage of goods occurs. This problem is of great practical importance, when upon the loss of or damage to the cargo, a particular person, who has suffered damage, has to be identified and following the provisions of the cargo insurance contract it has to be decided whether his or her interests were insured, and finally whether he or her has a right to insurance indemnity under the insurance contract.

Example:

A Lithuanian company “A” under the Incoterms 2000 term DDU⁸ Belgrade sold some goods to a Serbian company “B”. The contract of sale contained a provision that title in the goods shall pass to the buyer at the moment the goods are handed over to the carrier. The goods were transported by train and in the first stage of transportation to the Ukrainian-Romanian border the provisions of Agreement on International Goods Transport by Train (SMGS) of 1951 (hereinafter – SMGS rules) were applied and from the Romanian border to the destination in Belgrade – the Uniform Rules Concerning the Contracts for International Carriage of Goods by Rail of 1999 (CIM. – Appendix B) (hereinafter– CIM rules) were applied. The consignee accepted the waybill and the cargo; at the same time some damage to the cargo was recorded pursuant to Article 42, para 2 of CIM rules. The consignee, who under the contract of sale also acted as the buyer, refused to pay the rest of the price to the seller due to the unsatisfactory quality of the goods. It was ascertained that the goods were damaged in Romania.

8 DDU – “Delivery Duty Unpaid”. According to the clauses of Incoterms DDU Belgrade 2000 – the Seller shall organise and pay for the transportation, as well as hand over the goods unloaded with no customs clearing in the place of destination, i.e. in Belgrade. The moment of risk transfer – the presentation of the goods unloaded in the vehicle at the place of destination.

When selling the goods the seller insured the goods only for the benefit of himself, i.e. the consignee was not indicated as the beneficiary under the cargo insurance contract. The seller, having not received the rest of the payment for the goods sold, turned upon the cargo insurer with a claim to pay him the insurance indemnity.

The policyholder's reasoning that he sustain the loss as the owner of the goods, would contradict the terms of the contract for the sale of goods and Article 4.50 para 2 of the CC, because having agreed in the contract on transfer of title in the goods the said non-binding provision of Article 4.50 para 2 of the CC and the terms of the contract of sale, under which the buyer of the goods becomes the owner of the goods from the moment the goods are taken over by the carrier, shall be applied.

The policyholder maintained that having agreed in the contract of sale to apply the *DDU Belgrade clause*, the policyholder bears the risk of loss of or damage to the goods and as a result he is to be treated as the person who has suffered the loss. However, this position contradicts legal provisions governing cargo transportation. The thing is that in the last stage of the said transportation, where the CIM rules were applicable, following Article 44, para 2 of the CIM rules, the consignee shall obtain the right of claim for compensation from the moment he has taken possession of the consignment note and accepted the cargo. In this writer's view that the right of claim for compensation constitutes a valid argument that a particular person at the same time is the person to have suffered a direct loss from the damaged goods.

Let us go back to the insurable interest that – as outlined earlier – is understood in a narrow sense of the word in Lithuania – as a loss sustained by the policyholder or the beneficiary. In the example above the beneficiary was not indicated in the insurance contract, therefore, only the loss that could be suffered by the policyholder due to the exposure to insured risk is worth being discussed. It is obvious that upon insuring the cargo against the risk of loss of or damage to the cargo, this risk has no link with the buyer's failure to pay for the goods, thus it is unlikely that the policyholder can reason that as the cargo was damaged he suffered a loss. From this writer's point of view such argumentation is not possible for two reasons: firstly, the law on carriage of goods by rail provides that a consignee is a person who is considered to have sustained the loss is, to whom in the protection of his rights the right to claim damages is granted (as has been seen, such a right by the will of the legislature has been granted only to the consignee (the buyer of the goods)). Secondly, following the general insurance rule, causation⁹ must be established between the effect of the risk, as the danger to the insurance object, and individual damage. That is it has to be established that the effect of the risk (the adverse effects that were under the coverage of insurance) to the subject matter of the insurance was the immediate cause of the damage. The effect of the insurance risk, i.e. the damage to the cargo is obvious, and the loss in this particular case occurred as a form of damage to the person's property (Article 6.249 para 1 of the CC). Thus, the person who bore the risk at the moment of the damage of the cargo in transit or was the owner of the

9 Clarke, M. *Policies and Perceptions of Insurance Law in the Twenty – First Century*. Oxford, 2007, p. 184.

cargo suffered the direct damage. In our case the policyholder (the seller of the goods) was neither the owner of the goods at the time they were damaged under the provisions of the contract of sale (Article 4.50 para 2 of the CC), nor he shall be considered to be the injured party pursuant to the law on carriage of goods by rail, since the legislature fails to grant the right to claim damages to the shipper, if the consignee has taken possession of the consignment note and accepted the cargo. However, if we prioritize the contract of sale, the policyholder (the seller) could be considered to have incurred the damage as, according to *Incoterms 2000* DDU Belgrade clause, the cargo was damaged when the policyholder bore the risk of the accidental loss of or damage to the cargo. On the other hand, if the goods sold are not in the possession of the policyholder, this type of damage can not be called “damage to person’s property”. This writer is of the opinion that it would be more accurate to define such damage as the policyholder’s loss of revenue that he or she would have received, if the unlawful actions had not occurred. In the end the problem remains unsolved, as analysing the cargo insurance contract, the focus was set: a) in one case on the rules of property law – when discussing the transfer of title in the goods (Article 4.50 para 2 of the CC); b) in the second case – on the contract of carriage of goods by rail and on the rights within the context of this contract; c) in the third case – on the provisions of the contract for the sale of goods governing the moment when the risk passes from the seller to the buyer (*2000 Incoterms* DDU Belgrade).

If the owner’s proprietary rights are applied to all other persons, then the contractual clauses concluded and performed by the parties in legal contractual relations and persons’ rights and obligations arising from these contracts are legally binding only to the parties to the contract. This legal situation determines that the performance dynamics of both the contract of carriage of goods by rail and the contract of sale shall not affect the provisions of a cargo insurance contract and the dynamics of its execution, because an insurance contract is a separate and independent contract, its terms are established and are valid regardless of other contracts. In the example above the important issue is the definition of the insurable interest pursuant to the law on insurance contracts, and we should also pay our attention to the fact that in determining the injured party only the injured party’s relation with the subject matter in the insurance policy is important in Lithuanian practice; moreover, this legal relationship is usually associated with the rules of the property law and especially holding of title¹⁰. Another important thing is the

10 It should be noted that the insurable interest in England is perceived totally differently, where the insurable interest is held by only by those who have economic interest in this property and who in fact bear risks for loss or expenses, in case the subject-matter insured against is damaged or lost (Merkin, R. *Colinvaux’s Insurance Law*. Seventh Edition. London, 1997, p. 62); The insurable interest in Germany is also perceived not so much as a legal but rather an economic interest, where it is defined as relations of all types between the persons in terms of legal or economic interests at risk (Thume, K.-H.; De la Motte, H., *supra* note 4, p. 4); In Russia everyone has an insurable interest in cargo contracts, who under the law or the contract is interested in preserving the property (Braginskij, M.; Vitrianskij, V. *Dogovornoje pravo. Kniga tretja. Dogovory o vypolnenii rabot i okazanii uslug* [Contract Law. Third book. Agreements on the implementation of works and rendering services]. Moskva, 2002, s. 617); In Scandinavia in general, there is a statutory rule that if the insurable insurance is not specified in the property insurance contract, then in the light of the statutory exceptions or special circumstances, it must be considered that the insurance applies for the benefit of persons who are the owners, security holders, bailees or have other rights to the goods or who bear the risk of

definition of the property insurance, specified in Article 2 part 59 of the Insurance Law stating that property insurance is a type of insurance where the amount of insurance indemnity depends on the amount of the loss incurred *by that person*. Following this idea it means that in our case the insurance indemnity may be paid to the policyholder only if he or she personally suffered the loss due to the damage to the cargo. It could thus be concluded that the policyholder incurred the loss, if the policyholder was the owner of the cargo when the event insured against occurred and the cargo was damaged. However if it was agreed in the contract for the sale of goods that title would pass to the seller the moment the goods were submitted to the carrier, then applying Article 4.50 para 2 of the CC we will come to the conclusion that the shipper (the seller of the goods) did not incur the loss and thus he is not entitled to the insurance indemnity. The consignee, who received the damaged cargo from the place of delivery, at the same time became the person who sustained the loss following the definition of the insurable interest specified under Article 2 part 15 of the Insurance Law. Namely he is entitled to the insurance indemnity. This conclusion is also underpinned, at least indirectly, by the fact that the consignee (the buyer of the goods) has a right to claim damages from the rail carrier and such a right by of subrogation (Art. 6.1015 of the CC) shall be passed to the insurer, who has paid the insurance indemnity, and if the latter exercises the said right, the carrier will have an obligation to reimburse the loss and thus an unjust enrichment by the carrier will be prevented.

The example above shows that if the policyholder (the seller of the goods) sells the goods under the conditions specified in the example and sends them by train to the consignee (the buyer of the goods), the insurance contract concluded by the policyholder for the benefit of himself or herself will protect the seller's interests only till the moment the cargo is handed over to the carrier. When the cargo is taken over by the carrier title in the goods shall pass to the consignee (the buyer of the goods) at the same time, as a result, if the cargo carried by train is damaged, the real loss will be suffered by the consignee (the buyer of the goods), who has accepted the cargo. However, the consignee's interest in the goods has not been insured, therefore, if the cargo is insured only for the benefit of the shipper, the consignee is not entitled to the insurance indemnity.

After the cargo insurance contract was concluded under the conditions specified in the example, the insurance protection of both trade partners' interests could have been achieved, only if the consignee had made one more additional cargo insurance contract under his name and for his own benefit. There is no doubt that two cargo insurance contracts in relation to one cargo is neither convenient nor acceptable for trade (partners) in terms of both time and money required, although, in fact, it is possible to conclude two cargo insurance contracts concerning the protection of separate insurable interests, and this sometimes happens in practice¹¹. By concluding several cargo insurance contracts the shipper's interest is insured by one contract and the consignee's – by another. On the other hand, even two cargo insurance contracts fail to provide insurance protection for

damage/ loss of this property (Selvig, E. Cargo insurance and the position of third parties. In Groenfors, K. *Cargo Insurance and Modern Transport*. Goeteborg, 1970, p. 79).

11 Thume, K.-H.; De la Motte, H., *supra* note 4, p. 152–153.

the persons who have financed the trade operation or for third parties, whose interests may be injured upon the loss of or damage to the cargo. Due to these reasons the insurance interest of the above-mentioned persons, if it exists, may become an object of the insurance contract as well.

In conclusion, the writer takes the view that a cargo insurance contract concluded by the shipper (the seller of the goods) only for the benefit of himself or herself provides a limited insurance protection for the policyholder, since at a certain moment of transportation the risk passes to the consignee (the buyer of the goods). The definition of the insurable interest established in the law limits the possibility to provide insurance protection to other persons participating in the trade operation. The absence of relevant laws governing cargo insurance contracts concluded following the principle “to whom it may concern” and the failure to entrench these contracts in practice, as well as the strict limits of the definition of insurable interest set in the law is regarded as a rather serious impediment to the service and development of trade.

1.2. Consignee’s (Buyer’s) Insurable Interest

In practise cargo insurance contracts are usually concluded not for the benefit of the policyholder, who ships the goods, but for the benefit of the consignee (the buyer of the goods). In the example provided in Section 2.1 of this study, if the cargo insurance contract was concluded in favour of the consignee, following the arguments set forth in Section 2.1, he, as the person for whose benefit the insurance contract was concluded, would have a right to claim for the insurance indemnity. This right could be easily exercised and the cargo insurer, upon paying the insurance indemnity, would obtain the right to claim for compensation from the carrier by rail by subrogation. On the other hand, this does not mean that by insuring the cargo in favour of the consignee the cargo insurance contract will in all cases protect the interests of all trade partners. By insuring the cargo only in favour of the consignee, the insurance will not cover the policyholder’s interests (the shipper and/or seller’s) and the interests of the third parties. However, the protection will not be in effect in respect of the consignee himself or herself at the time of loading, at the initial stage of the transportation, until the cargo is delivered to the rail carrier. Moreover, if the consignee refused to accept the cargo delivered at the destination, he or she would also lose the insurance coverage, since by refusing the benefit negotiated for him or her by the cargo insurance contract, he or she would show that he has no insurable interest in respect of the cargo. By refusing to accept the delivered cargo the consignee would also lose a right to claim for compensation from the rail carrier for the cargo damage. Thirdly, the shipper exercising the right to dispose of the cargo in transit¹² and indicating to the carrier to deliver the cargo to the consignee or to return to the place of loading, may leave the policyholder without the insurance coverage, since in that case the consignee would neither obtain any rights to the cargo nor bear any risk

12 More about the right to dispose of the cargo in transit see: Sinkevičius, E. *Disponavimo gabenamų krovinių mechanizmas ir disponavimo krovinių teisės perdavimo probleminiai aspektai* [The mechanism of the right to dispose of the transported goods and problems of transferring of this right]. *Socialinių mokslų studijos*. 2009, 2(2): 263–282.

of loss of or damage to the cargo under the contract of carriage of goods. The exception from this rule would be possible only if the consignee was able to prove persuasively and very clearly his ownership of the cargo that was returned to the shipper or re-forwarded to another consignee.

As we can see, upon concluding the insurance contract of the cargo in transit on behalf of the consignee, the contract does not fully protect the consignee's interests, since there is always a risk that the damage done to the cargo in transit will not be incurred by the consignee and according to the provisions of the cargo insurance contract the insurer will not be obliged to pay the insurance indemnity to anybody else.

1.3. Insurable Interest of the Bank that Has Financed the Trade Operation and Has a Security Interest in the Cargo

As was mentioned earlier, under Lithuanian Insurance Law and the established case law insurance contracts concluded for the benefit of the policyholder or the consignee provides limited insurance protection to these persons. Besides, we should not forget that others may also have an insurable interest in the cargo. Thus, the question arises whether it is possible to provide insurance protection to those persons by a cargo insurance contract.

The bank that has financed the trade operation and thus, in most of the cases, has a security interest in the cargo in transit according to the crediting agreement is the first and, perhaps, the most important person that requires insurance coverage. In order to protect its interests, the bank could conclude a cargo insurance contract itself or demand that the buyer credited by the bank conclude such a contract for the benefit of the bank acting as a pledgee in this situation. However, in this case we would encounter several legal problems. Firstly, the bank, being the pledgee, has a clear insurable interest in respect of the goods. Secondly, in case of loss of or damage to the goods the bank incurs the damage and is entitled to demand the insurance indemnity to compensate the said damage. As it will be explained later, the bank's legal options to get insurance protection by concluding a cargo insurance contract are very limited. We shall start from the exception. When transporting goods by sea and using a bill of lading, the shipper, having handed over the goods to the sea carrier, receives several original copies of the bill of lading from the carrier, and one of them, involved in the system of payments appears in the payer's bank¹³. This bank, as the holder of the original copy of the bill of lading, following the provisions of Article 1.106 of the CC and Article 4.50 para 3 of the CC, may prove its proprietary right in the goods in transit on the grounds of the bill of lading. At the same time the bank proves that it also has an insurable interest in the goods and the rights arising thereof to insure the goods in transit in favour of itself or receive the benefit from the cargo insurance contract concluded by another person in favour of the bank, as well as the right according to the cargo insurance contract to receive insurance indemnity to reimburse the loss suffered.

13 More about payments by letters of credit see: Chuah, J. *International Trade Law*. Second Edition. London – Sydney, 1999, p. 111–140.

This example is an excellent illustration that there are ways to protect one's interests, however, these options are possible only when the cargo is carried by sea and only when a bill of lading is issued. It is worth bearing in mind that only a bill of lading, as a security, allows the bank, that has an original copy of the bill of lading and is able to legitimate itself as the entity entitled to receive the goods in transit by showing the bill of lading to the sea carrier, to exercise its rights as a "quasi-owner of the goods" and insure its interest in the cargo. On the other hand, the bank, as the holder of the bill of lading, must establish a legal relationship with the sea carrier, before exercising its rights as a "quasi-owner of the goods", particularly in the case of partial loss of or damage to the cargo. The bank also has to refer to the carrier in order to take possession of the goods and/or recovery of the damage, because otherwise, if the bank does not refer to the carrier or the consignee, who also has the original copy of the bill of lading, refers to the carrier, the consignee will exercise his rights, and the bill of lading obtained by the bank will lose its legal power (Article 1.106 para 2 of the CC). In all other cases, when carrying the cargo by other means of transport or by sea, just using a sea waybill, the bank (even being the pledgee of the goods) will not be able to protect its interests by the cargo insurance contract. This is prevented by the concept of the insurable interest set forth in Article 2 para 15 of the Insurance Law, and when analysing the possibilities of the shipper or consignee to insure their interests in the cargo the writer points out that only the person, who will suffer a direct loss from the loss of or damage to the cargo in transit, is the one to have a clearly defined insurable interest in the goods. The pledgee does not bear the risk of loss of or damage to the goods in transit – he or she is not the owner of the goods and exposure to the insured risks to the subject-matter of the insurance will never be the immediate damage caused to the pledgee. The immediate cause for the damage will be the buyer's (the consignee's) failure to repay the loan received from the bank. These conclusions are underpinned by the position of the Lithuania legislature that established in Article 4.205 para 3 of the CC the creditor's (the pledgee's) priority right to satisfy his claims from the amount of the insurance indemnity. These provisions clearly indicate that a security holder does not obtain the right to the insurance indemnity, i.e. on the basis of the provision above upon the occurrence of the event insured against the bank does not become the insurer's creditor with a right to claim for the insurance indemnity. The pledgee obtains only a right to satisfy his claims from the money the insurer paid as the insurance indemnity, and these are two different things.

As previously described, Lithuanian law provides very limited legal instruments that could be used when insuring a cargo in transit in order to protect the interests of the bank that has financed the sale and has a security interest in the goods.

1.4. The Carrier's and the Freight Forwarder's Insurable Interests

According to the generally accepted rule a cargo insurance concluded for the benefit of a carrier or freight forwarder is not allowed, since such a contract shall be considered null and void (Article 1.80 para 1 of the CC). Upon the loss of or damage to the cargo in transit neither the carrier nor the freight forwarder can sustain any direct damage and thus they do not have an insurable interest in the cargo (Article 79 of the Insurance

Law). The carrier or the freight forwarder may insure the cargo only for the benefit of a third party, i.e. for the benefit of the shipper or consignee; however, any contractual conditions enabling the carrier or the freight forwarder to receive any benefit from the cargo insurance contract shall be contrary to the imperative rules of law. This imperative is specified in the provisions governing international carriage of goods by road¹⁴. However, the invalidity of the insurance contract is most often reasoned by the absence of an insurable interest in the cargo¹⁵.

In the writer's view, the carrier or the freight forwarder could protect their interest in the cargo by means of the cargo insurance contract only in one case - when the carrier or the freight forwarder exercises the right of retention of the cargo belonging to the shipper as a result of the shipper's failure to pay the debts to him or her. The carrier's (or the freight forwarder's) insurable interest in the cargo will then be evidenced as the cargo, as a thing, becomes "a pledge" in the economic sense, of which the carrier's (or the freight forwarder's) requirements could be satisfied. However, even after the cargo has been retained, there is still no insurable interest in the cargo, as the purpose of the cargo retention institute is, first of all, to encourage the shipper to pay the debt. The right to retain the cargo and the mechanism of its execution is not particularly developed in Lithuania, there is only one related provision in Article 6.813 Part 4 of CC, which says that the carrier shall be entitled to retain goods and luggage entrusted with him until carriage charges and other amounts due to him have been paid, unless otherwise provided for by the law or the contract of carriage. In the contrary to the German¹⁶ legal regulation, the right of retention in Lithuania, as a real right fails to provide any privileges to its holder, and following the provisions of Article 748 of the Code of Civil Procedure, the right to retain an item shall expire, when any of the creditors exacts the debt from the item retained. Regardless of the unfavourable legal regulation, nonetheless when the cargo is retained the carrier (or the freight forwarder) is the one to bear the risk of the loss of

-
- 14 Article 41 para 2 of the CMR Convention, Basedow, J. *Muenchener Kommentar zum Handelsgesetzbuch*. Band 7. Viertes Buch. Handelsgeschaeft para. 407–457 Transportrecht. Muenchen, 1997, s. 654; Lithuanian case law: in one case the Court ruled that „in case of the property (cargo) insurance the proprietary interest belongs exclusively to the owner of the property (cargo), meanwhile the plaintiff is only the carrier of the cargo. His property insurance is related to losses, which he is obliged to compensation upon failure to perform the cargo transportation contract properly. The Panel of Judges held that the plaintiff's interest is not the object of the insurance contract (*cargo insurance contract concluded by the carrier for its own benefit*), on the grounds of which the claim is made. Thus, the plaintiff, being not the owner of the cargo, but only the carrier thereof did not suffer the direct loss because of the damage to the property transported (Ruling of the Vilnius Regional Court of 23 December 2008 in civil case No. 2A-931-516/2008, JSC „Jontransa“ v. JSC „If draudimas“), in another case that the Court rejected a claim of the plaintiff for insurance indemnity under the cargo insurance contract, and indicated that „the plaintiff (*the freight forwarder, who had insured the cargo carried by train in favour of himself*) failed to prove that he sustained the real loss due to the disappearance of the cargo carried by train“ (Ruling of the Vilnius Regional Court of 10-04-2009 in civil case No. 2-1086-232/2009, „Ex Trade“ L.L.C. v. JSC DK „PZU Lietuva“).
- 15 In countries, where the insurable interest is construed in a broader sense than in Lithuania, the restrictions of the validity of the cargo insurance contract concluded for the carrier's benefit, are set forth in standard clauses of generally accepted cargo insurance contracts, for example, in the above-mentioned 15.2 clause of *Institute Marine Cargo Clauses* of 1982 or Norwegian Marine Insurance Plan 1996, version 2010, paragraphs 2-1 [interactive]. [accessed 18-03-2010]. <<http://www.norwegianplan.no/eng/index.htm>>.
- 16 Basedow, J., *supra* note 14, s. 80–81.

or damage to the cargo, however they do not have any insurable interest in the cargo, as they do not own the cargo, and their risk is identical to the risk they bear while carrying the cargo. This risk is the risk of civil liability and it cannot be covered by the cargo insurance contract. The carrier and the freight forwarder may obtain a real insurable interest in the cargo that would be covered by the cargo insurance contract only if they start the procedure of selling the cargo in order to recover the shipper's debts. Unfortunately, it should be noted, that in Lithuanian law such a procedure is not provided for¹⁷. As this procedure is not established, involuntary selling of the cargo retained would be against the law and the provision governing title in the goods would be grossly violated. The carrier (or the freight forwarder) could have an insurable interest in the cargo¹⁸ only if their debtor agreed that the cargo belonging to him would be sold in order to repay the debts. This situation could scarcely be found in practice and it would last for a very short period of time, thus theoretically the carrier or the freight forwarder could be protected by a cargo insurance contract in that case, but practically, this is hardly possible. Due to these reasons it could be said that neither the carrier's nor the freight forwarder's interests can be protected by a cargo insurance contract.

Conclusions

To conclude, the writer of this study would like to draw attention to the fact that the laws governing cargo insurance contracts in Lithuania fails to fully ensure the interests of all parties participating in a trade operation, if a cargo in transit is lost or damaged.

Insurance coverage in respect of both the shipper, who insures his interest in the cargo, and of the consignee, for whose benefit a cargo insurance contract is effected, is rather limited and there is always the risk that the damage resulting from the loss or injury of the cargo in transit may fall upon the party, i.e. upon the shipper or consignee, whose interest are not covered by a certain insurance contract.

The interests of the bank that has financed the trade operation and has a security interest in the cargo according to Lithuanian law may be protected by a cargo insurance contract only in cases when the cargo is transported by sea issuing a bill of lading. The bill of lading, as trade security, may be used for the purpose of enabling the bank to act as the one "who holds the quasi ownership right to the cargo insured", when the bank using its bill of lading that enables it to demand from the marine carrier to take possession of the cargo, at the same time, being the holder of the bill of lading, may claim for the insurance indemnity for the lost or damaged cargo. When the cargo is lost or dama-

17 This writer's note – Article 6.843 para 2 of the CC establishes the bailee's right to sell the goods, in case of failure by the bailor to withdraw the goods during the time limit agreed, however, this provision shall not be applied in the same way to the cargo seized by the carrier as to secure the shipper's debts, since there is only one condition applying the said provision of the CC, i.e. If the cargo delivered for custody is not withdrawn, and this provision could not be interpreted in a broader sense, this means that Article 6.843 para 2 of the CC shall not be applied in recovery of the debts by the carrier from the sender.

18 This writer's note – following Article 6.988 para 4 of the CC only interests protected by law are subject to insurance.

ged while being carried by other means of transport or by sea, but taking out a waybill, the bank can not be identified as the injured party; therefore in such cases it is impossible to protect the interests of the bank by a cargo insurance contract.

The protection of the carrier's (and/or the freight forwarder's) interests in cargo by means of a cargo insurance contract is impossible, since according to the Lithuanian law they have no interest in the cargo. The exception from this rule is as follows: if the carrier (and/or the freight forwarder) sells the cargo that was retained by using the right of retention at the shipper's consent for the purposes of repayment of the latter's debt. The carrier's (and/or the freighter's) interests can be protected by the cargo insurance contract during this selling process, when the cargo acts as a pledge.

A failure to ensure a complete protection of interests of all participants in trade operations in case of loss of or damage to the cargo in transit is a factor that impedes the development of trade and transit through Lithuania, which can be eliminated by forming a new concept of the insurable interest in conformity with the demands of growing trade volumes.

References

- Ambrasienė, D.; Sinkevičius, E. Vežėjo civilinė atsakomybė pagal Ženevos tarptautinio krovinių vežimo keliais sutarties konvenciją ir jos draudimas [Carrier's liability under the Geneva Convention on the Contract for the International Carriage of Goods by Road and its insurance]. Vilnius: MRU leidybos centras, 2004.
- Basedow, J. *Muenchener Kommentar zum Handelsgesetzbuch*. Band 7. Viertes Buch. Handelsgeschäfte para. 407–457 Transportrecht. Muenchen, 1997.
- Braginskij, M.; Vitrianskij, V. Dogovornoje pravo. Kniga tretja. Dogovory o vypolnenii rabot i okazanii uslug [Contract Law. Third book. Agreements on the implementation of works and rendering services]. Moskva, 2002.
- Chuah, J. *International Trade Law*. Second Edition. London – Sydney, 1999.
- Clarke, M. *Policies and Perceptions of Insurance Law in the Twenty – First Century*. Oxford, 2007.
- Čepinskis, J.; Raštikis, D.; Stankevičius, R.; Šernius, A. *Draudimas* [Insurance]. Kaunas, 1999.
- Kontautas, T. *Draudimo sutarčių teisė* [Insurance Contracts Law]. Vilnius, 2007.
- Merkin, R. *Colinvaux's Law Insurance*. Seventh Edition. London, 1997.
- Selvig, E. Cargo insurance and the position of third parties. In Groenfors, K. *Cargo Insurance and Modern Transport*. Goeteborg, 1970.
- Sinkevičius, E. Disponavimo gabenamu kroviniu mechanizmas ir disponavimo kroviniu teisės perėjimo probleminiai aspektai [The mechanism of the right to dispose of the transported goods and problems of transferring of this right]. *Socialinių mokslų studijos*. 2009, 2(2): 263–282.
- Sinkevichus, E.; Baranauskas, E. *Strakhavoj interes v strakhovaniji imushchestva* [Property, Encumbrances on Property: problems, solutions and opportunities]. Riga, 2006.
- Thume, K.-H.; De la Motte, H. *Transportversicherungrecht*. Muenchen, 2004.
- Zaveckas, K. Draudimo interesas – pagrindinis teisinių draudimo santykių elementas [Insurable Interest – the Key Element of Insurance]. *Jurisprudencija*. 2006, 5(83): 109–114.

DRAUDIMO INTERESO NUSTATYMAS KROVINIŲ DRAUDIMO SUTARTYSE

Edvardas Sinkevičius

Mykolo Romerio universitetas, Lietuva

Santrauka. Straipsnyje, nagrinėdamas draudimo interesą krovinių draudimo sutartyse, autorius nagrinėja draudimo intereso teorinius aspektus ir draudimo interesą reglamentuojančias teisės normas.

Tyrinėdamas draudimo intereso nustatymo krovinių draudimo sutartyse problemas, autorius išnagrinėjo galimus tranzite esančių krovinių draudimo variantus ir, analizuodamas transporto bei prekių pirkimą-pardavimą reglamentuojančias teisės normas, sprendė apie konkretaus asmens draudimo intereso turėjimą apdraustojo krovinių atžvilgiu ir apie teisiškas galimybes tokią interesą apsaugoti, sudarant krovinių draudimo sutartį.

Autoriaus nuomone, Lietuvoje galiojantis draudimo intereso teisinis reglamentavimas, kai šis interesas įstatyme buvo prilygintas nuostoliui, kurį įvykus draudžiamajam įvykiui gali patirti draudėjas, apdraustasis arba naudos gavėjas, neužtikrina prekių apyvartoję dalyvaujančių asmenų turtinių ir ekonominių interesų apsaugos.

Krovinių siuntėjui (prekių pardavėjui) apdraudus išsiunčiamas prekes, kai krovinių draudimo sutartis sudaroma krovinių siuntėjo naudai, yra apsaugomas tik krovinių siuntėjo interesas, tačiau visiškai neapsaugomas krovinių gavėjo (prekių pirkėjo) interesas. Atsiradus žalai, o prekių sugadinimo ir/ar praradimo rizikai jau perėjus krovinių gavėjui, krovinių siuntėjas negauna jokios draudimo apsaugos.

Jei krovinių siuntėjas (prekių pardavėjas) sudaro krovinių draudimo sutartį krovinių gavėjo (prekių pirkėjo) naudai, tokia sutartis visiškai nesaugo paties krovinių siuntėjo interesų. Sugadinus arba praradus tranzite esančių krovinių, jei prekių praradimo ar sugadinimo rizika nebuvo perėjusi krovinių gavėjui, krovinių siuntėjas, neturintis draudimo apsaugos, faktiškai patirs žalą.

Lietuvoje galiojantis teisinis draudimo intereso reglamentavimas suteikia labai ribotas galimybes sudarius krovinių draudimo sutartį apsaugoti banko, finansavusio prekybos operaciją ir turinčio įkeitimo teisę į krovinių, interesus. Bankas dėl esančio tranzite krovinių sugadinimo arba praradimo gali patirti tiesioginę žalą tik tuomet, jei yra jūra gabenamo krovinių konosamento turėtojas ir pasinaudodamas konosamento, kaip vertybinio popieriaus, savybėmis, save legitimuoja krovinių savininku. Taigi, draudžiant tranzite esančių krovinių banko naudai, gali būti užtikrinta banko interesų apsauga. Kitais krovinių vežimo atvejais bankas, nebūdamas nei krovinių siuntėjas, nei jo gavėjas, dėl tranzite esančio krovinių praradimo arba sugadinimo tiesiogiai nepatirs žalos ir dėl krovinių neturės jokio draudimo intereso. Dėl šių priežasčių banko interesų apsauga, sudarant be konosamentų arba kitų vertybinių popierių gabenamo krovinių draudimo sutartį, Lietuvoje yra negalima.

Vežėjo arba ekspeditoriaus, gabenančių krovinių, interesas krovinių draudimo sutartimi praktiškai negali būti apsaugotas, išskyrus vienintelę išimtį, kai minėtų subjektų reikalavimams patenkinti yra vykdoma priverstinė krovinių pardavimo procedūra. Visais kitais

atvejais nei vežėjas, nei ekspeditorius krovinio draudimo sutartyje neturi jokio draudimo intereso, todėl, sudarant krovinių draudimo sutartis, minėtų subjektų interesai negali būti saugomi.

Lietuvoje galiojantis krovinio draudimo sutarčių teisinis reglamentavimas ir dėl to susiformavusi krovinio draudimo sutarčių sudarymo bei vykdymo praktika lanksčiai ne-užtikrina prekybinių operacijų dalyvių interesų, stabdo prekybos ir tranzito plėtrą, todėl krovinių draudimo teisinių santykių, ypač draudimo intereso, teisinis reglamentavimas turi būti koreguojamas.

Reikšminiai žodžiai: *draudimo teisė, krovinio vežimo sutartis, transporto rizikų draudimas, krovinio draudimo sutartis.*

Edvardas Sinkevičius, Mykolo Romerio universiteto Teisės fakulteto Verslo teisės katedros docentas. Mokslinių tyrimų kryptys: transporto teisė, draudimo teisė.

Edvardas Sinkevičius, Mykolas Romeris University, Faculty of Law, Department of Business Law, associate professor. Research interests: transport law, insurance law.