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**ABOUT SOME PROBLEMS OF STATE AND LEGAL IMPACT ON THE
SPHERE OF INSURANCE OF ENTREPRENEURIAL RISKS
(THE CASE OF UKRAINE)**

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Substantiates the necessity of state management in the sphere of insurance of entrepreneurial risks, aimed at stimulating the parties of business relationships – the genesis of entrepreneurial relations, as well as ensuring the balance between private and public interests in this area. Here are analyzed the conditions of manifestation of insurable interest in business and other economic activities: existence of a real commercial risk, which consists in having place actual economic and legal uncertainty in respect of the results and the prospects for a certain type of entrepreneurial activity. Are considered some issues of the insurance sphere related to entry of Ukraine to the WTO.

Keywords: insurance of entrepreneurial risks, State and legal impact on the insurance market, insurable interest, offences in the field of insurance.

Insurance as a form of economic relations is intended to protect the holders of property interests from the adverse events of personal, financial or another nature, performing, among other things, the role of the most important instrument for promoting entrepreneurial activity. Because, being at risk, entrepreneurial activity objectively needs compensatory mechanisms reducing the risking to the level of normal business planning and investment forecasting. That is exactly why the creation of conditions for the spread of business risks insurance should

be the necessary direction of state economic policy and of the legal measures that ensure it.

Addressing these issues is relevant to all countries of the former USSR, including Ukraine. Here is important to focus on attracting investment and increasing the profitability of business activity in the territory of countries that transform their economy to a path of market economy, not saying about the fact that attraction of financial resources in the form of insurance premiums from insurance companies leads to the formation of insurance funds, which are used for investment in the economy and expanding of its potential, works as a major contribution to fiscal revenues.

As correctly noted in the literature, due to the specifics of market relations business risk insurance becomes a means of protecting businessmen from adverse changes in economic conjuncture. In this case insurance helps to streamline financial and legal interrelations between various market participants [1, 3]. And therefore a proper ordering of these relations is an important task of a modern state.

The issues of business risks insurance have been discussed in a number of works of jurists, including D. I. Meyer, A. I. Khudyakov, V. Yu. Abramova, D. A. Barykina and others. But these issues were considered by them succinctly, mostly from private-law (civil-law) positions, which do not allow detecting the link between self-regulation and state regulation of this type of insurance.

The aim of this work is to study the basic objectives and tasks that face the government in the formation of state policy in the regulation of insurance of entrepreneurial risks.

According to many scientists, the problem of development of the economy today is based on the fact that business entities of all forms of property are in condition of "total risk conditioned by a conceptually irresponsible course of economic reform, loss of economic management with the transition from a state economy to a mixed one with the market mechanism of its self-organization in conjunction with the state regulation" [2, 133].

In this connection we cannot help but support the opinion of D. D. Samigullin, who notes that insurance "is an important legal guarantee of interests' protection of the insurance relations participants. However, the insurance as a way of accumulation and subsequent use of huge funds in itself is a kind of business activity in financial sector" [3, 185].

Thus, the first and immediate goal of legal regulation of relations on business risks insurance must be promotion of the parties of economic relations to

the conclusion of relevant agreements. This promotion can be done in different ways: through the formation of organizational and legal conditions enabling in a formally simple way quickly and easy in the context of economic burden to conclude insurance contracts by creating a favorable tax regime of insurance, through providing state control over timeliness and proportionality of the implementation of insurance indemnities and so on.

At the same time legal impact on relations of business risks insurance must take into account not only the need for the development of the insurance market in general, but also resolving specific tasks facing the state in this special, but necessary for the economic development insurance industry.

Tasks and objectives of the state-legal regulation of business risks insurance must take into account the real aspirations that set business entities – insurance companies and insured persons – at the provision and receiving services, on the one hand, and the state as the representative of public interest, on the other. Harmonization of these interests in economic regulation is called in the literature as the basis of economic and legal methodology and the main issue that has to be decided in the legal regulation of economic relations [4, 349].

Insurable interest is presented in this context as a main private-law insurance element.

Development of modern society necessarily associates with the genesis of business relations. In turn, the constructive support of the development dynamics requires stimulation those factors of entrepreneurial activities that increase the motivation of entrepreneurs, energize them to innovations, investments, development of market infrastructure. Corresponding motivation and interest of entrepreneurs certainly connected with the desire to secure and protect their assets from loss and other unexpected results of activity, misconducts of others that could prevent the implementation of business plans. Search for the sense of these aspirations certainly comes up against an insurable interest as a prerequisite for insurance.

In the insurance literature has long been recognized that there is no insurance without interest [5, 371].

Due to the limited scope of this work and the lack in Ukraine of a normative definition of the concept of “insurable interest”, should be indicated only the individual opinions of scientists on this concept, which affect the particularity of the state authoritative impact on the field of business risks insurance.

The concept of interest in the economic and legal literature in general is debatable. As noted by O. M. Winnick, under the interest should be understood a due to the public nature need to use a specific social boon [6, 3].

There are many opinions in respect of insurable interest, the central one of which can be considered the opinion of Yu. M. Zhuravlev, who under the insurable interest understands “the measure of a material interest in insurance” [7, 130]. In this case, an insurable interest is not a detached from the diversity of economic relations phenomenon. Because, for example, in the absence of insurance companies providing related insurance services, that is, without insurance offer, insurable interest is an abstract, non-legal phenomenon, bordering with wish or hope.

D. O. Barykin notes that the most important conditions for the existence of an insurable interest in insurance of entrepreneur risks include:

- the existence of an insurable interest is associated with a particular person, namely, an entrepreneur;
- insurable interest is related to specific circumstances, in which the employer is, namely, to implementing business activities;
- insurable interest can exist only when in the course of business activities emerges the possibility of occurrence of events that inflict damage to the entrepreneur [1, 6].

We cannot completely agree with this characteristic of insurable interest in insurance of business risks, because it does not account for the variety of business activities as a form of economic activity, as well as just partially reproduces the event in the appropriate interest.

First, business risk can exist not only among entrepreneurs. It arises for a business entity that performs a non-profit economic activity as a major, but resorts to certain activities with signs of business activity. In particular, non-profit organizations may resort to certain revenue transactions, such as lease of personal property, and to that part of activity are applied the provisions relating in general to business activity. Not by chance article 86 of the Civil Code of Ukraine states that non-profit organization (consumer cooperatives, associations of citizens, etc.) and institutions can, along with its main activity, carry out a business activity, unless otherwise is provided by law, and if this activity meets the goal for which they were created and contributes to its achievement. Similar provisions are also enshrined in the tax legislation.

So, it would be more correct to associate insurable interest in business risk insurance not with the identity of an entrepreneur, but an entity carrying out business activities.

Second, insurable interest exists not only when in the course of business activity emerges the possibility of occurrence of events that are harmful to an entrepreneur.

In legal sense it directs to the aspect of an offence and obviously reduces the amount of negative threats faced by an entrepreneur in the exercise of business activities, in particular stock market and inflationary fluctuations, the risk of conclusion of a contract or non-receipt of specific permissions, etc.

In the economic literature, the idea of insurance is completely based on the interest with respect to any real object (or life), and this interest must have money equivalent. Such a material interest makes a person to treat things and health more carefully and attentively, and causes it to look for ways to protect the things or persons close to him from accidental adverse events. The power of the interest depends on how profitable is the material aspect of the subject; if the subject does not have a particular benefit, it does not pose any interest [8, 12-13]. It follows that an insurable interest in the activities of the entrepreneur goes to the achievement of economic performance, what ensures the profitability and prospects of its development. Such an interest has a material nature by definition. At this the risk and the interest in this case coincide as ever. Because, entrepreneurship is a risky activity by definition.

Therefore, a special condition for an insurable interest in business and other economic activities is the presence of a real business risk that lies in the presence of actual economic and legal uncertainty in respect to the results and the prospects for a certain type of entrepreneurial activity.

In turn, this means that an insurable interest in entrepreneurial activity is an objectively inherent in its nature desire to eliminate fluctuations in profitability of business and to prevent unexpected economic losses, on the basis of the nature of business as initiative and risky activity.

At the same time, insurable interest of an entrepreneur decreases with a decrease in the riskiness of any entrepreneurial operations, under certain conditions, can lead to the disappearance of the insurable interest. These findings, among others, must be taken into account in the tax accounting of a company, for preventing sham transactions. In particular, the approach of the legislator to determination regular prices in the Tax Code of Ukraine should be so developed regarding the notion of common insurable interest as a basis for attributing to the cost of production of a particular insurance product. This will serve as the basis for the elimination of fictitious transactions in the insurance market and prevent tax evasion, through linking insurance with the real needs of an economic entity to use insurance services in accordance with normal business practice and comparable business environment.

But the interest of business entities as an orienting point for state incentives does not end there. Economic factors urging entities to apply the insurance

instruments should be taken into account. In particular, state compensation of the part of insurance payments in the priority areas of economy should be recognized positive.

Until 2009, when the resolutions of the Cabinet of Ministers of Ukraine on the procedure for the use of funds provided for in the state budget to reduce the costs of insurance premiums (payments) actually paid by subjects of agrarian market were in force, all interested agricultural producers at the conclusion contracts of insurance of agricultural risks could benefit from the Law of Ukraine No. 1877-IV from 24.06.2004 "On State Support of Agriculture of Ukraine" for further receiving from the state compensation of insurance payment equal to 50% of the insurance rate, but not more than 5%. Besides, the list of risks set forth above was required under article 10.2.1. of the Law of Ukraine "On State Support of Agriculture of Ukraine". Without such incentives is difficult to reckon upon the prevalence of insurance in the agricultural sector.

Among the primary objectives here also should be considered forming of a sustainable mechanism of interrelations between entrepreneurial entities to repay payments in general, and to repay insurance compensations subject to payment, in particular.

Today, non-payments by individual insurance companies are common. The State, in fact, pulled away from these problems. It is no accident the information society is full of tips on how to make an insurance company to pay, appear the informal lists of companies delaying payments, and so on. [9] This is unacceptable.

In particular, in the case of misconduct on the part of insurance companies their clients: enterprises and citizens – non-economic units may apply to the relevant authorities of National Financial Service of Ukraine, or in the case of compulsory insurance of civil-law liability of owners of vehicles – to the Motor Transport Insurance Bureau of Ukraine. Unfortunately, the laws of Ukraine "On Insurance" and "On Financial Services and State Regulation of Financial Services" do not enshrine such an offense as systematic non-payment of insurance indemnity, do not define administrative penalty for the violation. As a result, at the presence of such facts, to unscrupulous insurance companies can be applied sanctions on the basis of general criteria, mainly in the presence of corruption and legal ambiguity, leading to the withdrawal of insurance companies from responsibility. In addition, National Financial Service should conduct appropriate checks of insurance companies, but it is a time delay and additional questions concerning the subjective discretion of the inspectors. The use the decisions of courts on disputes between business entities and insurance companies as a prejudicing fact would be effective.

Therefore, the state represented by National Financial Service should be vested with the right to suspend the license of a relevant insurance company if in court has been proven the fact of repeated late payment of funds on insurance contracts on the part of insurance companies, exact from an insurance company administrative penalty in the amount of 20% from the amount of each late payment confirmed by a court's judgment, enter insurance companies that delay payment of compensations in a special register, which is open to the public access.

Introduction of compulsory types of insurance, which have been mentioned above, corresponds to the objectives of state insurance incentive. In essence, there are applied the means of coercion, but not of incentive for the development of relevant relations, in this case. But it is so say a secondary goal. The main purpose of the relevant regulation: to create the conditions for a stable functioning of the business entities, the risky nature of activity of which can harm the stability of the social and economic relations.

Unfortunately, it is quite difficult to talk about the consistency of relevant provisions of article 7 of the Law of Ukraine "On Insurance". First, goals and criteria for determination compulsory insurance types remained unexplained until the end. At the same time, the motives of the relevant implementation should be based on the general goal of the state regulation of insurance, and provide for a balance between private and public interests in this area.

Additional tasks on the normalization of relations in the field of business risks insurance (for more than the rest of the insurance system) arising from the liberalization of the insurance market after Ukraine accession to WTO. Despite the obvious need to spread freedom in the field of insurance related processes, still, do not have to worsen the state of the national economy.

Ukrainian insurance market since May 16, 2008 - from the moment of assigning Ukraine a full membership in the World Trade Organization (WTO) - is subjected to drastic changes that could change the balance of the whole infrastructure of the Ukraine economy. It can be concluded after summarizing the changes in insurance sphere, which were issued due to Ukraine's accession to the specified organization.

In particular, for a long time - up to April 2011 Ukrainian insurance companies could not enter into reinsurance contracts with Russian insurance and reinsurance companies as well as with companies registered in countries that are not members of the WTO.

According to the Law of Ukraine "On Amendments to the Law "On Insurance" adopted May 31, 2007 and the order of National Financial Service No. 8197

from November 01, 2007, Ukrainian insurers were able to reinsure risks only in companies registered in countries-participants of the WTO.

This is despite the fact that in 2007, Russia ranked 2nd place on reinsurance risks of Ukrainian companies. It accounted for 20% of all reinsured risks of non-residents. Besides, this innovation meant higher insurance prices for business entities, because “depending on a risk portfolio the cost of reinsurance in Russia may be 20-80% lower than in Germany or Italy” [10].

It is gratifying that the Law of Ukraine “On Amendments to the Article 2 of the Law of Ukraine “On Insurance” dated 15.03.2011 has canceled the relevant restriction for countries – not members of the WTO, but the experience of the relevant introduction should be taken into account in the future.

Namely, despite the declared consequences of WTO accession – reducing trade and economic barriers, in fact the opposite is happening. This fact shows that the Western governments, forcing Ukraine such restrictions, actually care about their own monopoly in the insurance market, trying to prevent a more flexible relations with the elements of the economy of regional insurance services.

The second, and not the last, manifestation of the negative consequences for the insurance market of Ukraine in connection with the entry into the WTO is the liberalization of the insurance market, when foreign insurance companies got a chance to provide such services on the territory of Ukraine.

In fact, given that insurance is implemented through the formation of funds of available resources received from insured persons that can work on the state economy, and foreign insurance companies, of course, will not keep these funds in such an unstable country as Ukraine, it turns out that available resources of funds of insurance companies will support the economy of foreign countries.

It should also be noted that in case of an uncontrollable by National Financial Service circumstances of insolvency of foreign insurers in the processes of insolvency will be also drawn domestic insurers.

Thus, today we have to raise the question of the adjustment the provisions of the legislation on insurance, which allow uncontrolled by the state rendering services by non-residents. Including, we need to enter full responsibility for the results of non-resident companies’ activities, and not just on the territory of the state-recipient of their insurance services. By additional measure should be recognized the obligation of such companies to keep available resources of insurance funds only in authorized banks of the state-recipient.

Only in this case, it is possible to bring order in rendering insurance services by foreign companies, through eliminating discrimination of domestic insurers,

providing economic security of the state and guarantees of protection the property rights of business entities.

References:

1. Barykin D. A. *Insurance Entrepreneurial Risks: Legal Aspect*: thesis of a candidate of legal sciences: 12.00.03 [Strahovanie predprinimatel'skikh riskov: pravovoj aspekt: diss. ... kand. jurid. nauk : 12.00.03]. St. Petersburg: 2002, 177 p.
2. Arkhangel'skii V. N., Gorlanov G. V., Gurtov V. K. and etc. *Market Management and Risks* [Rynochnoe khozyaistvovanie i riski]. St. Petersburg: Nauka, 2000, 430 p.
3. Samigullin D. D. *Legal Aspects of Insurance in Entrepreneurial Activity*: thesis of a candidate of legal sciences: 12.00.03 [Pravovye aspekty strakhovaniya v predprinimatel'skoi deyatel'nosti: diss. ... kand. jurid nauk. 12.00.03]. Samara, 2004, 209 p.
4. Belyanovich O. A. *Economic Conventional Law (theoretical aspects): Monograph* [Gospodars'ke dogovirne pravo (teoretichni aspekti): Monografiya]. Kiev: Jurinkom Inter, 2006, 592 p.
5. Serebrovskii V. I. *Selected Works on Inheritance and Insurance Law* [Izbrannye trudy po nasledstvennomu i strakhovomu pravu]. Moscow: Statut, 1997, 563 p.
6. Vitsyn A. *The Contract of Marine Insurance in Russian Law* [Dogovor morskogo strakhovaniya po russkomu pravu]. St. Petersburg: printing house of N. Tiblena and Co., 1865, 128 p.
7. Zhuravlev Yu. M. *Dictionary of Terms on Insurance and Reinsurance* [Slovar'-spravochnik terminov po strakhovaniyu i perestrakhovaniyu]. Moscow: Ankil, 1994, 180 p.
8. Birman G. *Investment. Economic Analysis of Investment Projects* [Kapitalovlozheniya. Ekonomicheskii analiz investitsionnykh proektov]. Moscow: Juniti, 2003, 632 p.
9. Kharlamov P. *Insurance Companies: List of those who are Reluctant to Pay* [Strakhovye kompanii: spisok tekhn, kto platit neokhotno]. Available at: http://cripo.com.ua/index.php?sect_id=7&aid=27397 (accessed: 12.10.2012).
10. "Russia, Goodbye" – the Ukrainian government said to Russian Reinsurers: Internet-edition "Forinsher" [«Rasha, gudbai!» – skazalo ukrainskoe pravitel'stvo rossiiskim perestrakhovshchikam: Internet-izdanie «Forinsher»]. Available at: <http://forinsurer.com/news/08/05/16/15473> (accessed: 12.10.2012).