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EXPORT CREDIT INSURANCE IN THE EUROPEAN UNION AND OUR COUNTRY

The article is focused on export credit insurance in Serbia, and in the European Union in particular. It has become necessary to harmonize the regulations and practice of export credit insurance. In addition, it was necessary to prevent disloyal competition among the insurers and provide better protection to the insureds.

Key words: *political risks, commercial risks, credit insurance, fidelity insurance.*

1. Introduction

Credit insurance includes all credit insurance lines. The term *credit insurance* includes insurance lines that do not cover credit as in case of fidelity insurance. The purpose of the credit insurance is not to cover all losses of the insured person, but to provide the insured person a certain protection in case of occurrence of unusual credit losses. In the event of export credit insurance, the insurance cover refers to losses that may arise during export of goods and services.

Providers of export credit insurance can be divided into those that can successfully underwrite insurance of all export businesses and those that cannot. Insurance against risks that cannot cause catastrophic damages can be concluded by all insurers. Such¹ is the case of commercial risks connected to credits related to business of an exporter. Therefore, such risks are covered

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on commercial markets of insurance and reinsurance. That is not the case with non-commercial risks. Capacity of a debtor, whether a debtor is a non-public legal entity or a public legal entity, influences the readiness of the commercial insurance market to accept receivables into insurance cover. Due to the fact that a regular enforcement procedure cannot be brought against a public legal entity, this type of debtors was excluded from insurance of export credit against commercial risks and included in non-commercial, i.e. political risks.

2. The European Union

In period of increasing demand for export credit insurance, the European Union is taking steps to establish the order on that market. Insurers today are doing everything to increase their business success among merciless competitors. Premium rates decrease in such conditions. Incorrect behaviour of insurers on the market is becoming more common.² Unhealthy state of the export credit insurance market is contributed by the countries that provide assistance in various ways to their institutions (agencies) which deal with this insurance line. Apart from establishing the order among insurers, and especially among export credit insurers, the European Union is working on providing the legal protection to users of insurance services, trying to regulate such protection as much as possible.³ On one hand it can be achieved by preventing disloyal competition among insurers, and on the other hand, by improving protection of insured persons. These two tasks cannot be separated.

The Council of the European Union decided to conduct the necessary harmonisation of regulations in order to provide functioning of the EU market, including insurance services.⁴

2.1. Sources of Law

Sources of law, regarding regulation of insurance, mean types in which legal rules may occur that determine mutual rights and obligations of parties in insurance contract.⁵

² Graham McKean, "Some observations on the Insurance Industry", *Tokovi osiguranja*, Beograd, br. 1/2005.

³ Jasna Pak, "Pravna zaštita korisnika usluga osiguranja", *Zbornik radova Privreda i pravo u tranziciji*, Palić, 2004.

⁴ Art. 93. EU consolidated version of the Treaty establishing the European Community, *Official Journal C325*, 24. 12. 2002.

⁵ Branko Jakaša, *Pravo osiguranja*, 1972, Zagreb, str. 35.

For the purpose of our presentation, the following EU sources of law are relevant:

- Communication of the Commission to the Member States referring to short-term export credit insurance no. 97/C 281/03, 2001/C 217/02 and 2004/C 307/04.
- Council Directives 93/13/EEC from 1994 on unfair clauses in consumer contracts, 93/13/EEC from 1993 on restriction of contracting provisions that are harmful for weaker contracting parties, 2002/65 from 2002 according to which every service supplier is obliged to send to their user a draft of a contract before its execution, and the directives referring to insurance mediation 77/92 and 2002/92.

Limited space for presentation does not allow consideration of sources of law in certain EU member states.

2.2. Subject Matter of Regulation

Each claim that appears as a legally regulated and protected claim of one participant in obligation relation requiring the other participant to fulfil a certain obligation may be subject matter of insurance.⁶

Subject matter of the EU regulations are short-term export credit insurances, primarily in order to prevent „state“ institutions dealing with this insurance line to disrupt business of insurers that run business under market conditions and do not have support of the state, i.e. to ensure free competition. The state supports agencies that can be established as government departments, companies owned by the state, and in case of private companies they are under control of the state. In this manner, everything that can disturb market conditions is eliminated.

Risks included in short-term export credit insurance are changed compared to the usual division of such risks to commercial and political risks. New division of risks covered by insurance is made primarily because the level of exposure of insurers to these risks has changed. Idea that capacity of a debtor, whether a debtor is a non-public legal entity or a public legal entity, influences on readiness of the commercial insurance market to accept receivables into insurance cover, is abandoned today. At one time, due to the fact that a regular enforcement procedure cannot be brought against a public legal entity, this type of debtors was excluded from insurance of export credit against commercial risks and included in non-commercial, i.e. political risks. On the market of short-term export credit insurances, up to two years,

⁶ Zoran Radović, „Osiguranje izvoznih poslova protiv političkih rizika“, *Jugoslovenska revija za međunarodno pravo*, Beograd, br. 1-2/1987, str. 230.

a new term was introduced "marketable risks"⁷. These risks are defined as commercial and political risks of public and non-public debtors in the states which the EU accepted for those purposes (List of marketable risk countries). First of all, those are the EU member states, but also some other countries such as Switzerland (2001/C 217/02). However, later communication (97/C 281/03) defined marketable risks as commercial risks of non-public debtors in the stated countries. Other risks such as political risks (war, revolution, natural disaster and nuclear accident) and commercial risks of public buyers or risks of buyers originating from the states that are not included in OECD are not considered marketable. The latest communication defined commercial risks: wilful refusal of a non-public debtor to fulfil own contractual obligation without legitimate grounds; wilful refusal of a debtor to accept the goods without legitimate grounds; insolvency of a debtor or its guarantor; protracted default. The communication explained that the stated risks are only provided for the purpose of this communication, which in application limits its scope.

Subject matter of regulating export credits, in part of our research, is not medium-term and long-term receivables for which conditions have not been met in order to be regulated in the EU.

2.3. Insurance Terms and Conditions

We noticed that terms and conditions for export credit insurances are not equalised, unlike other insurance lines, such as marine insurance that exists for centuries. On one hand, given situation may make their reinsurance difficult, and on the other hand, it may have negative influence on competitiveness on the insurance market.

Difference in insurance terms and conditions exists not only among insurers in the EU states, but also among insurers from the EU and insurers outside the EU. Differences in terminology are present regarding covered and excluded risks.

ECGD (*The Export Credits Guarantee Department*) classifies risks as risks of buyers and political risks (Export Insurance Policy /EXIP/), while "Euler Hermes" does not envisage this division. In material aspect, there are differences in interpretation of occurrence of the insured event. For ECGD, this event – when a buyer fails to pay for purchased goods – occurs if a buyer fails to pay within six months from due date (EXIP), while "Euler Hermes" defines that deadline to be 90 days (EH cover for bad debt losses for small and medium sized companies). On the other hand, general insurance terms and conditions outside the EU do not envisage always that deadline.

⁷ Bliže, Bojan Pecher, „Nemarketabilna zavarovanja“, 11. dnevi slovenskega zavarovalništva, Portorož, 2004.

General insurance terms and conditions for export credit insurance no longer create a strict division to commercial and political risks. While export credit insurances in one case exclude public legal entities as buyers (EH General Conditions of Commercial Credit Insurance-S), in other cases such difference is not present (EXIP).

In the USA, export credit insurance is more flexible. There is a possibility to insure at the same time receivables from public legal entities and non-public legal entities (comprehensive cover) through insurance brokers "International Risks Consultants". Apart from already known and usual risks such as confiscation, expropriation and nationalisation, there are some specific risks, e.g. deprivation of collateral, which is broader than insolvency of the guarantor (EXIP).

General insurance terms and conditions by their nature do not lead to disloyal behaviour of their issuer. However, that cannot be claimed for special terms and conditions to which general insurance terms and conditions refer. Special terms and conditions in insurance policy are not public and vary from case to case, within defined policy of each insurer.⁸ Contracting special insurance terms and conditions, depending on a specific insured person, and circumstances of the event open a possibility for misuse. There are borderline cases when standard of insurer's behaviour and burden of proof become an issue.

2.4. Supervision

When it comes to the institution for supervision, supervision of the insurance market in the EU is entrusted to the Commission, with support of the European Court.

Entrepreneurs that are dominant in the EU market are obliged not to disrupt market conditions. The Commission determines incorrect behaviour of entrepreneurs by applying objective criteria (judgement of the European Court Case T-65/89 European Court reports 1993 p. II-0001).

According to the judgement of the European Court (Case 730, European Court reports 1980, p. 02671), the Commission is authorised to ensure observance of market conditions. The court did not accept the claim submitted by the government of the Netherlands to annul the decision made by the Commission according to which the government of the Netherlands was prevented to provide financial aid to the company "Philip Morris"

⁸ These are not special insurance terms and conditions which serve to cover specific cases, e.g. special terms and conditions for insurance of receivables regarding production of goods for export.

Holland B.V. The Commission made the decision because they believed that market conditions within the EU could be disturbed due to the intervention of the Netherlands. Regarding that judgement, the Commission, in the cited communication below, took a position according to which Article 92(1) of the EU Treaty refers to all short-term credit insurances that arise from public funds and that provide for some entity a financial or material support. Pursuant to the decision by the same court (Case 142/87 &., European Court reports 1987 p. 02589) such financial aid has negative impact on market conditions outside the EU. The court entrusted the Commission to order the Belgian government to recover the financial aid given to the steel manufacturer "Steel-tube undertaking".

3. Our Country

The Yugoslav Bank for International Economic Cooperation (JUBMES bank) was the only bank in the SFRY that until 1992 dealt with insurance of export credits against commercial and political risks.⁹ Insurance coverage included political events in the country of a debtor or war of the country whose citizen is a debtor, general payment moratorium and other political risks and natural disasters. In Serbia and Montenegro, the SMECA (Serbia and Montenegro Export Credit Agency) dealt with this insurance line (the Official Gazette of the Federal Republic of Yugoslavia no. 40/2002). The law stated cases in which it was impossible to collect foreign receivables due to occurrence of non-commercial risks. Decisions adopted in the law regarding insurance against non-commercial, i.e. political risks, were taken from the law based on which JUBMES bank was established (the Official Gazette of the SFRY no. 77/88).

Owing to its powers, JUBMES bank accepted into coinsurance and reinsurance commercial risks from other insurers in our country, which was not the case with the SMECA. It cannot be said that the market of export credit insurance exists in our country. Extremely small number of insurers deals with this insurance line, e.g. Dunav Insurance Company¹⁰ SMECA should have greater financial means in order to provide insurance against political risks.

In the meantime, the Ministry of Finance of the Republic of Serbia established the Export Credit and Insurance Agency for short-term and long-term credit financing and export insurance. The agency includes commercial and non-commercial risks.¹¹

⁹ Predrag Kapor, *Međunarodno finansiranje infrastrukturnih projekata*, Beograd, 2004, str. 274.

¹⁰ Margerita Ibrahimpašić Bošković, „Kreditna osiguranja“, *Tokovi osiguranja*, Beograd, br. 2/2004, str. 10.

¹¹ Sl. glasnik RS, br. 61/2005 i 88/2010.

4. Incorrect Behaviour of the Insurer toward the Insured Person

We shall state examples that point to incorrect behaviour of insurers:

- a) Contracting of an initial loss that, in case of occurrence of the insured event, should be borne by the insured person. Or, contracting the sum of losses that are debited to the insured person (aggregate first loss). Such solution is beyond the scope of insurance industry.
- b) Contracting of the deductible. Common understanding is that the insured person should bear "usual losses" since such losses cannot be subject matter of insurance, due to which the insured person should bear them (up to the absolute amount of deductible). Theory of a "usual loss" is unsustainable. Debtor's behaviour cannot be predicted with certainty just like the level of loss at certain goods in transit cannot be predicted.
- c) Contracting of insured person's self-retention. Contracting of insured person's self-retention at the level exceeding the insured person's income is not permitted, since such solution is contrary to purpose of insurance industry.
- d) Limiting the amount of the insured person's costs, to which he is entitled to out of insurance indemnity, because he presented evidence of such costs in order to reduce loss that has already occurred and that is covered by insurance. Such costs are entirely covered and cannot be placed in proportion to the occurred loss, e.g. 50 percent of costs of the loss approved to the insured person. This solution is also contrary to purpose of insurance industry.

Cases of obvious incorrect behaviour of insurers were omitted, e.g. when an insurer provides false high insurance proposal by fulfilling the request from insurance broker.¹²

5. Conclusion

We concluded that the European Union, through the Commission and with significant assistance from the European Court, greatly contributed to establishment of order among insurers of export credit. Disloyal competition is completely prevented. It is especially important that insurers of short-term export credits with financial support from the state shall no longer be allowed, in this field, to jeopardize insurers that run their businesses at market conditions. However, as the EU Commission pointed out, this job is not completed, especially regarding categorisation of covered risks.

¹² Članak „Just how rotten?“, *The Economist*, 23. 10. 2004

General terms and conditions of export credits are not standardised as the Institute Marine Cargo Clauses. This circumstance has its advantages and disadvantages. First of all, greater creativity in concluding insurance contracts is enabled, but also it created conditions which put the insured person, as a weaker contracting party, into unfavourable position.

The European Court, by its decisions, confirmed authority of the EU Commission in establishing order on the entire EU market.

Financial means of the SMECA are insufficient. Under such conditions, the legal aim, based on which the SMECA is established, cannot be realised, and the aim is to stimulate and promote export and development of other relations with foreign countries. The state should provide greater financial support to the SMECA that would enable greater capacity for bearing of political risks.

Before the accession of our country into the EU, it will be necessary to separate insurance against commercial risks and insurance against political risks. Insurers that provide insurance against commercial and political risks, with the support from the state, will not be allowed to compete with insurers that do not have state support on the export credit insurance market.

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