Chapter 27

Russia


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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Federal Financial Markets Service (FFMS).

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Licences

A licence to transact insurance and/or reinsurance business is required from the FFMS.

Licences are issued for one or several classes of insurance, but insurers may write either personal (life and medical) insurance, or property and non-life insurance. Composite insurance is not allowed.

Regulatory capital requirements

Minimal Charter Capital of the insurer writing medical insurance only is RUR 60 million (approximately US$ 2 million).

Minimal Charter Capital of the insurers writing other insurance is RUR 120 million (approximately US$ 4 million) with the following multipliers applicable depending on the class of business:

1. medical insurance and/or property insurance;
2. life insurance and life and medical insurance; and
3. reinsurance and/or reinsurance combined with insurance.

Start-up

The federal law "On Organization of Insurance Business" (1992, as further amended) sets out the conditions that must be fulfilled before the FFMS can grant a licence to transact insurance business (FFMS licence).

An FFMS licence must be obtained first before the company is allowed to transact any insurance business.

Only legal entities registered in the Russian Federation can write insurance business within the territory of the Russian Federation.

As a general rule Russian insurers are allowed to reinsure their business with overseas reinsurers.

As a general rule, overseas insurers may set up insurance business in Russia in the form of subsidiaries, subject to the following conditions:

1. Being engaged in insurance business for at least 15 years in the country of its registration.
2. Being involved in activity of insurance companies set up in the Russian Federation for at least two years.
3. Obtaining prior authorisation from the FFMS to set up an insurance company in the Russian Federation.

Russian insurers which are subsidiaries of overseas insurers and/or which have more than 49 per cent of the share of overseas insurers are not allowed to write life insurance, compulsory insurance, compulsory state insurance, and property insurance involving state or municipal bodies/entities.

Acquisition

Overseas insurers may access the Russian market by acquiring an existing insurance company in Russia (or a share in such a company) subject to the following conditions:

1. Overall share of the overseas insurers in Russian insurance companies does not exceed 25 per cent.
2. Prior consent is obtained from FFMS.
3. The shares in existing Russian insurers must be paid by overseas insurers in monetary form in the currency of the Russian Federation.

An overseas insurer acquiring a share in a Russian insurer must have been engaged in the insurance business for at least 15 years in the country of its registration and involved in activity of insurance companies set up in the Russian Federation for at least two years.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

With one exception, foreign insurers cannot write business directly. Most write reinsurance of domestic insurance companies (via fronting policies).

The exception is the provision of trans-border insurance services in accordance with *The Partnership and Co-operation Agreement* (PCA), which the EU and Russia signed in Corfu in 1994 and which applies to the following risks:

1. Insurance of transportation risks (marine, commercial air transportation, space launches, etc.).
2. Insurance of goods transported by international through traffic.
3. Health and casualty insurance.
4. Liability insurance for trans-border transfer of privately owned vehicles.

This form of participation is applicable only to members of PCA – countries of the EU.

With the accession of Russia to the WTO it is anticipated that in due course foreign insurers will be able to write business directly.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Russian civil legislation is based on principles of permissive rules and freedom of contract and, in general, Russian insurance law is characterised by the same basic principles of free will, freedom of contract, equivalence and good faith, as the civil law. However, the overriding general rule of the Civil Code should be borne in mind, namely that, unless otherwise stipulated by law, a transaction which does not comply with the law is void.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Russian company law does not include express prohibitions against companies indemnifying a director. Russian law only provides for directors and not officers of a company.

Under various laws, directors' liability includes:

1. Property liability to the company: In accordance with Russian company law, the company cannot exclude or insure this type of liability.
2. Property liability to third parties: There is no prohibition from insuring this type of liability.
3. Delictual liability for criminal acts (under administrative, criminal, tax law): Such liability cannot be indemnified or insured by a company as the penalty arises from the personal guilt or wrongful act of the director.
4. Legal costs in connection with the consideration of claims against the director in courts and other bodies: There is no restriction on indemnifying a director for this type of liability.

1.6 Are there any forms of compulsory insurance?

There are two basic forms of compulsory insurance, namely:

1. personal (insurance of life, health and property of passengers, and insurance of life and health of military personnel and government employees); and
2. liability insurance (of owners of vehicles and owner/operators of hazardous objects/facilities).

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Although Russian law presumes equal status of market participants and non-interference of the state in private activities of parties, in general court practice leans towards protection of the insured's interest. However, the cases are principally concerned with unreasonable delayed payment or refusal to pay by the insurers. This bias in favour of the insured has been strengthened by a recent decision of the Russian Supreme Court which designated insurance relations as a consumer relationship with the result that the mechanisms and guarantees of consumer protection are applied to insurance relations, particularly in the form of substantial punitive sanctions.

Also see the last paragraph of the answer to question 2.5.

2.2 Can a third party bring a direct action against an insurer?

Yes, if the third party is a beneficiary under the insurance contract or a party in favour of which the insurance contract is made. For example, a contract for insurance of liability of damage is, under Russian law, deemed concluded in favour of the parties against which damage may be inflicted (i.e., victims), even if the contract is made in favour of an insured or another person responsible for damage.

2.3 Can an insured bring a direct action against a reinsurer?

No. Generally, the insured risk under the reinsurance contract is the risk of payment of insurance indemnification by the insurer to the original insured and a reinsurance contract usually is considered a contract to "insure the insurer".

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

In cases where the information communicated by the insured to the insurer was deliberately false, the insurer may apply to the court for a declaration that the contract is invalid. The insurer is not entitled to a declaration of invalidity if the non-disclosed circumstances no longer exist.

The Civil Code provides that if the insurer does not provide answers to questions asked by the insurer, but the contract is concluded anyway, the insurer cannot rely on such non-response to seek invalidation or termination of the insurance contract.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

It is the responsibility of the insured to provide the insurer with all the material information necessary for an assessment of the probability and value of a potential loss. The circumstances specified by the insurer in its policy or questionnaire shall be considered material.

The insured is also responsible for informing the insurer of any material changes in circumstances that may increase the insured risk. In such cases the insurer has the right either to amend the terms of the insurance contract, or to demand payment of an additional premium by the insured. If the insured refuses to amend the contract or to pay an additional premium, the insurer may demand termination of the contact. Non-compliance by the insured with the obligation to notify the insurer of material changes in circumstances may also give the insurer the right to demand termination of the contract.

On this subject current court practice appears to favour the insured. Recent rulings suggest that an insured is not obliged to provide additional data about the risk if an insurer did not ask about its existence in insurance documents.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The Civil Code provides that unless otherwise provided by the insurance contract, the insurer who paid the insurance indemnification is subrogated in the rights and actions of the assured up to the amounts indemnified by the insurer. This right is automatic and applies by operation of law, except in cases where otherwise expressly provided by the insurance contract.

The insured is obliged by law to provide the insurer with all documents and evidence and communicate other information necessary for the insurer to exercise its rights of claim.

Exclusion of subrogation is possible by the agreement of the parties.

3 Litigation - Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The Arbitrazh (commercial) Courts have jurisdiction for insurance cases and the value of the dispute is not relevant.

At first instance, a party can apply to have a matter determined by an Arbitrazh Court Approved Assessor. Such Assessor is a person knowledgeable in the field of economics, finance, and management. An Assessor may be involved because of the complexity of the case and the need for particular knowledge. The procedural status of an Arbitrazh Court Assessor is that of a judge.

3.2 How long does a commercial case commonly take to bring to court once it has been initiated?

Consideration of a case at first instance is usually not less than six months, due to extensions by the court of procedural time limits. Invariably rulings are appealed up to cassation and, if permitted, to review by the Supreme Arbitrazh Court. A case can take between one and a half to two years before all rights of appeal/review are exhausted.

4 Litigation - Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action and (b) non-parties to the action?

A court has the power to order production of evidence from parties and non-parties to the action, including individuals, companies and government bodies, on the application of a party or upon its own initiative.

A party who fails to comply with a court ruling may be subject to punitive sanctions.

If a party to the action does not provide the evidence requested by the court, the risk is that the fact to be proved by the requested evidence will be deemed proved.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers or (b) prepared in contemplation of litigation or (c) produced in the course of settlement negotiations/attempts?

A party is not obliged to disclose all documents relevant to the issue or to provide documents, the content of which relates to advice given by lawyers, or prepared in contemplation of litigation, or produced in the course of settlement negotiations/attempts. The parties decide which evidence they want to provide to the court.

However, if a party reasonably justifies the necessity of provision of such documents, the court can request them.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

A court has the power to call witnesses upon a party's application or of its own initiative. Such a witness is obliged to attend the court, provide the court with information on the merits of the case of which he/she may be aware, and answer the questions of the court and the parties to the case. A witness is criminally responsible for perjury and refusal to give evidence.

Witnesses' evidence may be given orally at the hearing or can be drawn up in written form at a court hearing.

4.4 Is evidence from witnesses allowed even if they are not present?

The general rule is that evidence should be received from witnesses at a court hearing. However, the court can accept evidence of a witness recorded by a notary, such evidence is taken into account by the court on its consideration of the merits as written evidence.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Where a party objects to the production of expert evidence, the court will determine whether it is necessary. If the parties provide expert reports with substantial contradictions or defects, the court can, at its own discretion, schedule a forensic examination. The court is also entitled to schedule a forensic examination if it is required by law or is necessary in order to assess a claim of falsification of evidence. As a matter of practice the courts, due to organisational and financial difficulties, more often recommend the parties to appoint experts.

4.6 What sort of interim remedies are available from the courts?

The current interim remedies under the Arbitrazh Procedural Code include:

1. seizure of funds or other property;
2. prohibition against performing certain actions concerning the subject of the dispute;
3. transfer of disputable property to the custody of the claimant/other person; and
4. suspension of sale of property.

An Arbitrazh Court may provide other forms of interim relief, and may order several forms of interim relief.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Yes. Grounds for appeal include:

1. incomplete establishment of circumstances important to the case;
2. absence of proof of circumstances important to the case which the court considered to be established;
3. contradiction of the court's conclusions with the circumstances of the case; and
4. violation or misuse of rules of substantive law (non-application of applicable law; application of non-applicable law; misinterpretation of law) or rules of procedural law (if it resulted in the wrong decision).

There are two stages of appeal – Appeal Court and Court of Cassation.

The ruling of the court of cassation can be reviewed by the Presidium of the Supreme Arbitrazh Court but such review first requires the permission of three judges of the Supreme Arbitrazh Court. The grounds for such review are limited to violations of the:

1. uniformity in the interpretation and application of the norms of law;
2. rights and freedoms of the individual and citizen according to the generally accepted principles and norms of international law and international treaties of the Russian Federation; and
3. rights and the lawful interests of an indefinite group of persons, or other public interests.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Generally, interest is recoverable in monetary claims. The rate applied is the official bank rate set by the central bank of the Russian Federation. The current bank rate (January 2013) is 8.25 per cent.

Unless otherwise stipulated by law or contract, the court can award interest at the official bank rate applicable on the date of payment of the monetary obligation, or the date of the filing of the action or the date of issuance of the ruling.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The general rule is that costs are recoverable from the losing party, in full or *pro rata* with satisfied claims. A court can also order costs against a party who has abused the court process if it resulted in disruption of a hearing, or from a party which violated an agreed pre-trial dispute resolution procedure.

However, the court has discretion as to how much costs should be paid and in practice whilst the courts generally allow recovery of all expenses (expert fees/court duty/translation costs), actual costs recoverable are relatively low. There are no potential costs advantages in making an offer to settle prior to trial.

4.10 Can the courts compel the parties to mediate disputes? If so, do they exercise such powers?

The court cannot compel parties to mediate. However, the court is obliged to take measures to encourage the parties to mediate disputes. In this regard, the court explains to the parties their right to settle the claim, to refer the dispute to an arbitration tribunal or a mediator, and also the essence and advantages of mediation procedures and their legal effect.

4.11 If a party refuses to a request to mediate, what consequences may follow?

Mediation is an innovation in Russia (the law "On Alternative Dispute Resolution Procedure with Participation of Intermediary (Mediation Procedure)") only came into force on 1 January 2011) and is considered a voluntary alternative means of dispute resolution. If a party refuses to mediate, it does not imply any adverse consequences. The existence of a pre-action dispute resolution agreement by mediation or otherwise does not prevent a party from filing a court action, although a court can stay an action pending the exercise of the pre-action dispute resolution process.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

A court cannot commence proceedings on a claim if there is an arbitration clause, unless it is established that the agreement is invalid, ceased to be in force, cannot be fulfilled, or the parties accepted the jurisdiction of the court to determine the dispute. A court may leave a claim without consideration if it is established that the dispute between the same parties, with the same subject matter and the same grounds is the subject of arbitration proceedings.

Arbitration tribunals can consider disputes arising from civil matters, except for those in the exclusive jurisdiction of state courts (such as disputes on rights to immovable property, bankruptcy, certain corporate issues), as well as labour disputes.

The court does not intervene in the conduct of arbitration and activities of arbitral tribunals.

5.2 Is it necessary for a form of words to be put into contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

It is necessary for the agreement to arbitrate to be in writing and signed by the parties. It can either be included in the insurance or reinsurance contract or as an additional agreement to such contracts, or it can be a document signed by the parties, (e.g., exchange of letters/messages with the use of communication means), or by means of exchange of stated claim which indicates the existence of the agreement to arbitrate and its existence is not disputed by the respondent.

The clause should be explicit and definite. The document should not include an optional clause in favour of one party (e.g., the insurer/reinsurer has the option to arbitrate or litigate its claim). Where the parties agree to use a particular arbitration entity (e.g., ICC) it should set out its name in full, that the rules of the arbitration entity shall apply, and specify the venue, seat and language of the arbitration entity. If the arbitral tribunal is to consist of three arbitrators, unless the rules specify, the clause should state that the third arbitration shall not have the same nationality as the parties.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

The court can refuse to enforce an arbitration agreement, where it is established that the arbitration agreement is deemed invalid, ceased to be in force or unenforceable.

Further, if notwithstanding the existence of an arbitration agreement, one of the parties files an action in court and the other party files a statement of its position on the merits of the dispute, then the court will deem the parties to have accepted the jurisdiction of the court to determine the dispute.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

A party in arbitration proceedings can apply to a court for the interim reliefs available under the Arbitrazh Procedural Code (see the answer to question 4.6 above).

Further, the arbitral tribunal can order interim relief in relation to the subject matter of the dispute. The arbitral tribunal can require security in connection with such interim measures.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Yes. It is mandatorily required by the law that the award must state the reasons upon which it is based. The award should also record the established circumstances of the case, the evidence on which the tribunal's conclusions are based, and the laws to which the arbitral tribunal was referred.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

The only recourse against a decision/award of an arbitral tribunal is to apply to set aside the decision/award. Such application may only be made in established circumstances of:

1. incapacity of party/unenforceable under governing law or law of the Russian Federation; or
2. non-notification of appointment of an arbitrator/arbitral proceedings/inability to present the case; or
3. the arbitration clause is legally invalid; or
4. the composition of the tribunal or arbitral procedures was not in accordance with the agreement of the parties or in accordance with the law; or
5. the award is in conflict with public policy.

Such motion must be filed within three months from the date the applicant receives the arbitration decision/award.

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Máire joined Clyde & Co, London office, in 1988 as a commercial litigator. She relocated to the Moscow office in May 2008.
In London her work involved all aspects of insurance and reinsurance disputes, trade, finance, international and domestic transport and logistics, with a growing practice in mediation. She represented clients in international arbitration, litigation and mediation, involving multiple parties and multi-jurisdictional issues.
Since moving to Moscow she represents international clients, including insurers and reinsurers as well as international contractors involved in offshore and onshore construction projects. Her insurance/reinsurance- related work includes advising/representing all risk insurers of goods in transit/under open cover, and reinsurers, Russian regulatory matters relating to insurance/reinsurance of various types of risks and broker and agency issues.
Máire also continues her litigation practice representing Russian clients with claims adjudicated by the English Courts/English and international arbitration.

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Polina is an advocate with Clyde & Co (CIS) LLP Advocates. She was enrolled in 2010 with the Advocates' Chamber of the City of Moscow and is a member of the Russian Insurance Lawyers' Society.
She joined Clyde & Co in 2011 as a member of Clyde & Co's insurance team in Moscow. Her work involves all aspects of insurance and reinsurance, contentious, non-contentious and regulatory. She advises on policy wording, interpretation, and coverage and represents insurers and reinsurers in coverage disputes and subrogation claims, before all stages of the Russian courts and in arbitration. Her particular expertise is in construction and erection insurance, transportation, marine and professional liability.
Polina is the author of number of articles in many aspects of the insurance sector, a number of which can be found on Clyde & Co's website, and has spoken at insurance-related seminars and conferences.

CLYDE&CO

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