Trubor
LAW FIRM

RECOVERY OF PURE ECONOMIC LOSS AND OTHER DAMAGES IN RUSSIAN COURTS

TRENDS AND DEVELOPMENTS
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1. A CLAIM FOR DAMAGES UNDER RUSSIAN LAW IN A NUTSHELL

Recovery of damages is Russian courts have always been a challenge for a claimant seeking redress in Russian courts. The Russian judges historically tended to look at the claims for damages with scrutiny and with an element of skepticism, imposing (sometimes unreasonably) quite high standard of proof for every element of the claim.

Development of the court practice on damages in Russian courts came in dribs and drabs. The cases on recovery of damages have been mostly confined to contractual damages. Tort (delict) damages in commercial context were mostly confined to cases of property damage.

The relevant rule in the Russian Civil Code (the "Civil Code") on delict liability is succinct. The prevailing view is that Russian law is based on the principle of “general delict (tort)”, which means that any damage (harm) caused shall be compensated for.

This principle is enshrined in Article 1064 of the Civil Code, which provides that:

"Harm caused to the person or property of a citizen and also harm caused to the property of a legal person shall be subject to compensation in full by the person who has caused harm".

In order to establish liability in tort under Russian law the following four elements must be proved:
(i) harm suffered by the claimant;
(ii) the defendant has committed an unlawful act or omission;
(iii) a causal link between the unlawful conduct of the defendant and the harm suffered by the claimant (the casual link must be immediate (direct)); and
(iv) the defendant is at fault.

The first and the third elements shall be proved by the claimant. The second and fourth elements are presumed (but the defendant can prove that he was lawfully permitted to cause harm to the claimant and absence of fault).

2. CLAIMS IN DELICT (TORT): BENCHMARK CASES

In recent years a number of cases came before the Supreme Court in Russia, which marked the development of the court practice on recovery of delict (tort) damages, including pure economic loss. These cases were newsworthy and have been reported in a number of published articles. At least the first two of these cases have been discussed at length at various conferences among legal practitioners.

Bomarshe case [1] (2017)

Bomarshe company was a residential property developer. *Bomarshe* sold one of the properties twice to different companies. The latter, subsequently, sold the same property (entered into relevant sale-purchase contracts) to different third parties. Obviously, one of the ultimate purchasers of the property (natural person) has not become the legal owner, which meant that the contract for purchase of the property he entered into was breached by the seller.

The buyer (ultimate purchaser) sued the seller under the contract and obtained a monetary judgment in his favour, but to no avail. The judgment had gone unsatisfied. The ultimate purchaser brought a *claim in delict (tort)* against *Bomarshe* company. The lower courts refused the claim. However, the Supreme Court overturned lower court judgments and allowed the claim. The Supreme Court found that the actions of *Bomarshe* company, which effectively *sold the property twice* to two different companies, were unlawful (the latter fact was not challenged in lower courts) and **amounted to the cause (source) of the situation, in which the claimant suffered loss.** The Supreme Court has also established that the Claimant was not barred from seeking recovery of damages in tort from *Bomarshe* company by the fact that the claimant had previously obtained a judgment for the amount of debt in contract against its counterparty in the same amount, because the latter judgment went unsatisfied and had been nothing but paper worth.

[1] Supreme Court Ruling of 22.05.2017 No. 303-ES16-19319.

***Magadan-Test* case [2] (2018)**

In this case the claimant was the owner of the vehicle, which was purchased from a third party (a leasing company). The leasing company has imported the vehicle into Russia and sold it to the claimant. One day the authorities have notified the owner that the *conformity certificate* with respect to the vehicle had been *annulled* by the authorities with the effect that the *owner could no longer operate the vehicle in Russia*. The conformity certificate was revoked because the company, who performed the certification procedure (the defendant), has breached certain technical regulations and procedures, when issuing the certificate. By that time the seller (the leasing company) has already been liquidated, so that no contractual claim was available to the claimant in practical terms.

Magadan-Test, the defendant, was a company, who was contracted by the leasing company to issue a conformity certificate. The Supreme Court upheld the first instance court judgement, which allowed a claim in delict (tort) for damages against *Magadan-Test* company (damages have been calculated as a contract price of the vehicle). The Supreme Court ruled that it should have been obvious *(foreseeable)* for the defendant that the vehicle had been imported into Russia for the purposes of selling it to the market, and that the defects in certification procedure, performed by the defendant, could result in a situation, wherein the owner of the vehicle would not be able to operate (use) the vehicle in the territory of Russia.

Magadan-Test case marked the trend to allow recovery of pure economic loss.

[2] Supreme Court Ruling of 11.05.2018 No. 306-ES17-18368.

Bank TRUST case [3] (2019)

In this case the bank filed a claim against two former CEOs of a company (the borrower), who defaulted under a facility agreement and went bankrupt. The bank sought recovery of the amounts outstanding under the facility agreement entered into between the bank (the lender) and the borrower. The bank pleaded its case as a claim for subsidiary liability of controlling persons of a company. The bank has proved at trial that the balance sheet, which was provided to the bank by the two former CEOs, contained material flaws. The claim has been dismissed by the lower courts, which found that the bankruptcy of the borrower was not caused by the defendants.

The Supreme Court overturned the lower courts' judgments on the basis that, although the claim for bringing the natural persons to subsidiary liability failed, the courts should have allowed a claim for liability in delict (tort). The Supreme Court established that *'unlawful conduct (in particular, wilful deceit of the counterparty) of a person, who is performing functions of a CEO or other representative, which caused loss to third parties, may be viewed as a stand-alone delict'* and, therefore, such conduct is actionable.

[3] Supreme Court Ruling of 5.03.2019 No. 305-ES18-15540.

3. BENCHMARK CASES AFTERMATH

The Russian courts are yet to test (a) the *ambit of wrongful* acts in business context which are actionable (and give raise to a claim for damages *in practical terms*) and (b) the types of loss, including pure economic loss, which are recoverable. But on any view, the practical upshot of the recent Supreme Court judgments is the possibility to claim delict (tort) damages under Russian law in scenarios, wherein only recently the Russian lawyers saw no prospect for a claim. Naturally, various legal requirements for each type of loss (requirements of intent or negligence, foreseeability, proximity, etc.) are yet to be tuned by the Russian judges.

In practical terms, given the reasoning of the Supreme Court in the aforesaid cases and the general trend of the Russian court practice (which is, so far, in *widening the scope* of the scenarios, wherein a claim for damages in delict (tort) may succeed), **the claimants in delict (tort) cases under Russian law now have a reasonably good prospects of success in the following quite common scenarios** (the scenarios are labelled, but for the ease of reference only, as torts under English law):

1) Inducing breach of contract

In order for delict liability to arise in this scenario the defendant's actions should be characterised as bad-faith behavior (which would violate the provisions of article 10 of the Civil Code establishing the rule that abuse of civil rights is unlawful). This is likely to be the case in a situation, when the defendant *knew* about the contract, but *deliberately induced* (by promising better terms or by providing false information or by some other means) one of the contracting parties to breach the contract with the claimant. The underlying contract should be breached, and losses should be sustained as a result of wrongful conduct of the defendant for the claim to succeed.

2) Unlawful means conspiracy.

A combination between two or more persons to harm another, which is actionable as conspiracy claim under English law, should also be actionable under Russian general delict (tort) principles in view of the foregoing authorities and current trend of the Russian court practice. For the claim to succeed there shall be an *unlawful* act as causative of loss. There must be an *intent* to cause harm to the claimant. The conspirators will be jointly and severally liable to the claimant (art. 1080 of the Civil Code).

3) Cases of misrepresentation (liability of auditor/accountant/technical surveyor etc. for their reports)

The auditor/accountant/technical surveyor of the like who misrepresented certain facts in his/her report may be liable to the firm's creditors for the consequences of the misrepresentation. This conclusion necessarily follows from the Supreme Court reasoning in Magadan-Test case. The liability is quite straightforward if the claim would be based on the willful misconduct of the defendant.

The requirements for such claim to succeed may be derived from the Civil Code provisions related to deceit and relevant court practice. Thus, the misrepresentation in order to be actionable must be false. Further, the misrepresentation itself shall be one of an existing fact. A false misrepresentation shall be made *knowingly*, i.e. there must an *intention to deceive*.

In fact, *Magadan-Test* case goes further than this and provides a right to claim pure economic loss in a situation of *negligence*. Indeed, the defendant acted only negligently in that case. The Supreme Court has specifically stressed in its reasoning that the potential damage for its wrongful (negligent) actions had been *foreseeable* to the defendant. Hence, the foreseeability test is a hurdle to be overcome by the claimant in such type of cases. Most likely in other more complicated cases, such as liability of auditor for its negligent report, the court practice is yet to tune further thresholds to be reached by the claimant in order for the claim to succeed.

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