THE TRANSFER OF INSURANCE RENEWAL RIGHTS

1. Possible or impossible?

The question of whether or not it is possible under Spanish law for an insurer ("**Insurer A**") to transfer the renewal rights to another insurer ("**Insurer B**") is a recurring issue.

This type of transfer is neither expressly provided for nor prohibited by the insurance sector's organisation, supervision and solvency regulations, which only provide for the portfolio transfer, in the same manner as the European regulations under Solvency II and reflecting centuries-old customs in the sector's tradition concerning the sharing and transferring of risks. In other words, it is expressly permitted to transfer portfolios between insurers, but the regulations are silent on the possibility of providing an insurer who is not a party to a current contractual relationship with data and elements that make it a valid intermediary of the policyholder in the subsequent window of renewal of the contract.

However, this possibility is not expressly prohibited under Spanish law and is recognised under comparative law: for example, in the Anglo-Saxon and US markets, it is included in so-called policy replacement transactions and, to the extent that it is relevant to Spanish law, renewal rights agreements. In fact, it was widely used to transfer insurance portfolios in order to provide cover for certain industrial risks as a result of Brexit, a practice which led to those risks being covered by insurers based in the European Union in the next round of renewals.

2. Requirements to assess its viability

The key to the transfer of renewal rights is the term of the policies: in annual renewable insurance portfolios, the transaction is structured as a simple renewal of contracts under the umbrella of another insurer and assumes that the following requirements are met:

(i) That sufficient information can be transferred from Insurer A to Insurer B to not only assess the quality of the portfolio and to determine a price for the transfer of data, but, above all, so that the legitimately transferable information contains the data that will be necessary to approach the insured persons individually.

In practice, this means that it must be data that is transferable, both from the perspective of the data protection regulations and from any other point of view that protects Insurer A, in order to make legitimate use of it. We should remember that while taking out a policy means that the insurer can enter into agreements of coinsurance, reinsurance, etc., it is not

necessarily true that it can transfer certain contractual information to make future coverage possible since Insurer B is unconnected to the existing insurance relationship.

In practice, the transfer of renewal rights is infinitely simpler when the insured persons are not individuals and the risks are non-life insurance, making it even easier to have a broker who can simplify communications between insurers and insured persons. This is why this type of agreement has often been seen in the area of business risks and has been limited to cases of insurance of groups of people relating to complementary social welfare in the area of life insurance.

(ii) That the transaction is structured at the expiry of the policies so that the alternatives presented to the insured person are (i) to remain without coverage by Insurer A; or (ii) to consider other options, either those presented by Insurer B or any other insurers. One of the risks of the agreement is that Insurer B acquires a position as a privileged intermediary (being aware of the nature of the risk, its quote and coverage/exclusions), but has no certainty of the outcome, as the insured person may very well decide to continue the coverage of the risk with a third-party insurer or to cease to insure it.

By structuring the transaction at its expiry, any doubt that we are dealing with a portfolio transfer is also removed, since Insurer A states its intention not to renew, taking advantage of the rights established in the contract or under the Law of Insurance Contracts, and completely retains all the responsibilities that it had as an insurer of that portfolio. Therefore, it does not transfer responsibilities or assets for the risks that it has had in the portfolio (except for collateral agreements of reinsurance that can be established with Insurer B to free it of risks, for example): thus, any legitimate claim of an insured person under the policies that it had in force, should be attended to by Insurer A, since for all intents and purposes, for the insured person, Insurer B is totally unconnected to the insurance contract and has entered into an autonomous and independent insurance relationship.

3. Other practical problems

Leaving aside the contractual architecture and the problems related to the fact that Insurer A can provide the data to Insurer B, the main obstacle to this type of transaction under Spanish law is, as we have said, the fact that it is *praeter legem*, i.e. it is not expressly provided for by Spanish regulations.

This absence of regulation means that the regulator may have a natural tendency (i) to equate these transactions with portfolio transfers, with the consequent problems - it is thought that the regulation of the portfolio transfer does not contain exceptions or specific details because the insurance policies of which it is composed may or may not be close to maturity and (ii) to see problems regarding the rights of the insured persons and the information that they receive. For

this reason, it is easier to undertake it, as has been said, in the area of business insurance than in cases of private individuals, and, of course, at all times observing the rights of information to the utmost degree, including providing more advance notice to the insured persons than is legally and contractually necessary regarding Insurer A's intention to cease to cover the risk.

4. Conclusions

In the current environment, where transferring risks to more capable operators, due to their specialisation or synergies, is positive in terms of solvency and even in terms of protecting the final interest of the insured (having the best offer on the market, or at least the best possible), no artificial obstacles should be placed in the way of a legal business that is not, and does not want to be, a portfolio transfer.

Other insurance practices, such as the replacement of outdated product categories with products more suited to customer needs and more standardised for the insurer offering them (decommissioning) are also unusual and yet accepted. Therefore, a regulatory stance that establishes clear rules and guarantees and moves the transfer of renewal rights into the realm of what can be anticipated would be very welcome.

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