THE CONCEPT OF CLAIM UNDER CIVIL LIABILITY INSURANCE: CONCEPTUAL AND INTERPRETATIVE DOUBTS

1. Some notes on the role of the claim in the liability insurance contract

The claim ("reclamación", in Spanish) is a key element of any civil liability insurance contract, to the extent that, in order to consider an indemnifiable loss, a claim is required. Indeed, if the injured third party does not make a claim, there is no threat against the insured person's assets and, therefore, there is no loss to speak of.

This brings us to the question of what is meant by "claim", and whether it is a concept that has been defined in our legal system.

To answer these questions, as a starting point it is important to distinguish the claim from three concepts that also appear in the insurance process: (i) the declaration of the risk or disclosure; (ii) the aggravation of the risk; and (iii) the loss notice, concepts in relation to which the claim may play a significant role. Although it seems that there should be no doubt that the claim of a third party is not related to these three concepts that are part of the relationship between the insured (or applicant for insurance) and the insurer, there is frequently some confusion in this respect. They have therefore been analysed below, along with the role they could play in relation to the claim:

(i) Declaration of risk or disclosure: This is a pre-contractual duty set out in article 10 of Law 50/1980, of 8 October, on Insurance Contract ("**LCS**"), which is understood to be an obligation to respond unreservedly to a questionnaire - or a series of questions -, which may or may not be posed by the insurer to the applicant for insurance (either in the initial underwriting process or at subsequent renewals).

The definition and declaration of risk made in such a questionnaire can, and often does, lead to only certain aspects of the risk being insured, whether this is due to financial considerations (the higher the insurable risk, the higher the premium to be paid) or opportunities (an insurer might not have to agree to cover all the risk presented to it, as it may lack experience, capacity or reinsurance support, for example).

During the underwriting process, the questionnaire may ask the applicant to declare claims that have been made before processing their application. This means that the applicant must have a thorough understanding of what does and what does not constitute a claim. In any case, a mention in the

application/disclosure cannot be considered, per se, as a claim from a third party that is subject to cover, as it precedes the completion of the insurance contract.

(ii) The aggravation of the risk: This concept is considered in article 11 of the LCS, referring to the case in which, having completed the contract after the presentation of a declaration of risk questionnaire, an "alteration of the factors and circumstances declared" (in the questionnaire) arises that could have led the insurer not to have agreed to the insurance or to present the insurance under "more burdensome" conditions (in terms of coverage, exclusions or premium to be paid).

An aggravation should not be considered on the basis of a claim that may give rise to a loss, since factors, circumstances and claims of a possible injured third party are quite different concepts. For example, a company engaging in a line of business or market unknown to the insurer at the time of underwriting is undoubtedly a factor or circumstance that may aggravate the risk, without it being linked to any claim.

(iii) The loss notice: This notice is the means by which the insured party or their broker notifies the insurer that an incident has occurred that could be covered by the policy. On many occasions, the notice is almost simultaneous to the claim, but that is not always the case. This lack of simultaneity can occur for many reasons: for example, the insured party might not remember that they have taken out an insurance policy that could cover them for this claim, they might prefer not to involve a third party -the insurer-, trusting that the matter can be resolved without any displacement of assets in favour of the claimant, or also the insured party might decide to "self-process" the loss -an unfortunate route which risks the scope of the coverage and even, potentially, the coverage itself in cases of deceit or serious fault on the part of the insured party-.

But in addition to these possible situations, another situation exists where there is great uncertainty for the insurer and insured party: that the insured party does not realise or ignores that a notification or information received by them is actually a claim.

2. The concept of a claim in the Spanish legal system

The LCS does not define "claim" even though it uses the term ten times, and at least three times when referring to the civil liability insurance contract, where it mentions the "claim by the injured party". What is not clear is what constitutes a claim by the injured party and what does not.

The Spanish legal system has dealt with the concept of a claim in relation to the interruption of the limitation period, as "extrajudicial claim" is mentioned in articles 1973 and 1975 of the Civil Code.

In fact, under civil liability insurance a claim can be judicial or extrajudicial, the latter being the one that raises more doubts as to the case law interpretation that certain acts deserve as true acts of vindication of a right against a third party. Thus, the most problematic aspects in relation to extrajudicial claims are the following: (i) who should submit the claim; (ii) its content; and (iii) what form the claim should take, coupled with extensive scenarios pertaining to the types of possible claims to be considered[1]:

(i) Who should submit the claim: Looking at the most recent case law, there are still some problems with who is who in extrajudicial claims. For example, the Supreme Court considered, in its Ruling of 24 February 2015, that both the claimant and the respondent may act through proxies or representatives.

(ii) Content of the claim: It is another interesting field on which case law dwells, reiterating the perspectives it held previously. It has been pointed out that "the mere external manifestation of the existence of a right" is not sufficient, and that the externalisation of "a volitional act truly claiming against the obliged person" is necessary (following the path of the case law established by the Supreme Court's Rulings of 6 December 1968 and 10 March 1983). Thus, the payment of a sum of money, the acknowledgement of a debt, the notification of a defect requiring a solution or of a shortcoming in the provision of a service are clear examples of the content of possible extrajudicial claims or, in the words of the Supreme Court in its ruling of 22 June 2020, of what constitutes "a genuine extrajudicial claim".

(iii) The form of the claim and the scenario it generates: This is probably the most controversial issue. In this regard, the High Court had the opportunity to recall in its ruling of 2 March 2020 that "no instrumental formula whatsoever is required for the extrajudicial claim to be a means of interrupting the limitation period", as long as it is a communication "addressed to and received by the obligor" (although taking effect from the time of sending, not receipt). The Civil Chamber of the Supreme Court has also repeatedly pointed out that the exchange of correspondence by letter is sufficient to justify an extra-procedural interruption of the limitation period, and despite the almost ordinary and common recourse to Burofax for commercial matters, a registered letter is an "operational means whose regularity there is no reason to question" (Supreme Court ruling of 5 February 2019).

The element of receipt itself gives rise to disputes, with minor case law mentioning that "it is sufficient that receipt has taken place in such conditions that the addressee should, using normal diligence, have been aware of the communication addressed to them, that is to say, that it reached their sphere of control, it being sufficient that they could have been aware of it" (Ruling of the Court of Appeal of Pontevedra of 14 October 2020).

[1] See https://www.linkedin.com/pulse/el-concepto-de-reclamaci%C3%B3n-extrajudicial-en-derecho-le-ruiz-echauri/

In short, whenever it can be rationally inferred that we are dealing with a manifestation of will intended to formulate a claim against the insured party -which possibly implies a displacement of assets in the form of compensation or redress for the claimant-, and which has been sent in conditions that normally guarantee the claimant being made aware of the content of the claim, any expression, in practice, can be a claim.

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