THE DEFENSE OF CONSUMER INTERESTS, DUE TO THE F.S.A. DECISION NO. 1148/17.09.2021

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Abstract

The Romanian insurance market is an extremely complex area of legal regulation, which involves not only compliance with the principle of fair competition between professional competitors, competitors on the market, but especially compliance with high standards of consumer protection, which are clearly inferior , from a financial, informational and organizational point of view, compared to the compulsory civil insurance policyholders.

From this perspective, the withdrawal of the operating license and the initiation of bankruptcy proceedings against the Insurance-Reinsurance Company City Insurance - S.A. raises a number of major problems for the customers of this insurer, not only in terms of the contractual relations established by the insurance contract, but especially by the procedural way of action by these consumers, so that the protection of their rights is full, and that the effects of the opening of bankruptcy proceedings against City Insurance be mitigated, as far as possible, in relation to the already precarious situation of these clients.

Through this study, we intend to highlight a series of stringent legal issues and to propose a series of answers to legal, substantial or procedural issues arising from the withdrawal of the authorization of this important player on the Romanian insurance market.

Thus, those entitled to recover the expenses occasioned by the repair of the cars involved in road accidents caused by the clients of City Insurance - S.A. have the way open to a special and expedited procedure for recovering such damages, without waiting for the opening of bankruptcy proceedings against this insurer and registration in the credal mass, extremely laborious legal proceedings and time-consuming, which raises problems for consumers who are victims of traffic accidents, but also for the clients of the insurance company, which could be involved in legal actions meant to lead to the compensation of those injured in road accidents and which could endanger their personal patrimony, although they appear as contracting parties and beneficiaries of MTPL insurance policies perfectly valid on the date of causing the damage.

Keywords: *insurance, liability, consumers, Insured Guarantee Fund.*

1. Introduction

Insurance reports are not an innovation of the modern era, but have their origins in ancient times, when the need to guarantee certain activities or actions required, in incipient forms, the establishment of a series of preventive and predictive measures, which were materialized in real insurance agreements.

Therefore, the shaping of the idea of insurance is practically concomitant with the emergence of the monetary system, when in order to guarantee the liquidity and fluency of financial transactions, mankind has resorted to the system of insurance conventions.

As the saying goes, rightly so, "*The emergence of the first forms of insurance took place in close connection with the development of maritime powers. The Babylonians were the first to legislate and regulate the insurance status in the famous Hammurabi Code. Thus, merchants traveling on water had the opportunity to receive a loan to finance their transportation. In order to ensure their transport, they could pay an additional amount to the creditors, which assured them that, in case the freight transport had been stolen, the merchants would no longer have to repay the creditor's loan. It can therefore be stated that the first statutory insurance was the one against theft* "[1].

Therefore, right in the early days of mankind, the first forms of concretization of the legal relations of insurance were developed, a legal and financial instrument essential for the future becoming of mankind.

"Individual insurance policies, in their current form, first appeared in the 14th century in Genoa, in the form of insurance contracts, which included various risks in the case of maritime transport. The renaissance was a time of development of insurance, both in terms of their complexity and in terms of diversification of insurance systems and types of policies. The most important were the maritime ones, encouraged by the intensification of maritime trade and life insurance, which were popular among high-ranking people. "[2].

Regarding the insurance contract, taking into account the elements provided by art. 2199 of the Civil Code, this represents the convention *"by which a natural or legal person called insured, in exchange for*

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[1] https://www.baar.ro/utile/istoria-asigurarilor, in the form of 01.02.2022.

[2] *Ibidem.*

the obligation assumed by the insurer to bear the risks arising from the occurrence of future adverse events for the insured, that is of paying him or a third party a sum of money as insurance indemnity "[3].

Therefore, the insurance contract achieves the desire to share the risks between the insured and the insured, as well as the objective of guaranteeing third parties harmed by the risk of activity, introduced in civil legal relations through the activity of the insured, to be properly compensated, avoiding the insolvency of the debtor, author of prejudicial legal acts / facts.

2. The European regulatory framework

The abusive clauses Directive[4] stipulates that abusive clauses contained in a contract with a seller or supplier are not binding on the consumer. However, the assessment of the unfairness of the terms within the meaning of that directive does not concern either the definition of the main object of the contract or the appropriateness of the price or remuneration, on the one hand, in relation to the services or goods provided in exchange for them, and on the other hand, in so far as those clauses are clearly and intelligibly stated.

Regarding the terms of the insurance contract, in the light of its clarity and predictability, the Court of Justice of the European Union has ruled that *„Those clauses which concern the main object of an insurance contract may be considered to be drafted in a clear and comprehensible manner if, on the one hand, they are grammatically intelligible to the consumer and, on the other hand, they set out in a transparent manner the actual operation of the insurance mechanism, taking into account the contractual framework, so that the consumer is able to assess, on the basis of precise and intelligible criteria, the economic consequences which result from it for him."*[5].

Therefore, provided that the clauses of the insurance contract are accessible and predictable to the consumer, the agreement of the parties being legally concluded, its legal effects are imposed on both contracting parties, mainly until the realization of all contractual rights and obligations.

This general rule results from the general provisions of art. 1321 of the Civil Code, according to which *"the contract terminates, in accordance with the law, by execution, the agreement of will of the parties, unilateral denunciation, expiration of the term, fulfillment, fortuitous impossibility of execution, as well as for any other causes provided by law "*.

Starting from the provisions of art. 1417 para. 1 of the Civil Code, according to which *"the debtor forfeits the benefit of the term if he is in a state of insolvency or, as the case may be, of insolvency declared under the law"*, we could conclude that the insurer's insolvency is a general cause of immediate exigibility of the insurer's obligations arising from the insurance contract.

However, art. 123 para. 1 of Law no. 85/2014 on insolvency prevention and insolvency procedures[6], derogating from the general norm of civil law, provides that *"ongoing contracts are considered maintained at the date of opening the procedure, art. 1417 of the Civil Code is not applicable. Any contractual clauses for the termination of contracts in progress, forfeiture of the benefit of the term or for the declaration of early payment for the reason of opening the procedure are null and void. "*.

Although the insurance contract is maintained, this does not mean, however, that the payment of the insurance indemnity by the insurers, in case of the insured risk, will be made according to the common law, but only according to the special insolvency law, being, in fact, suspended , according to art. 262 para. 4 of Law no. 85/2014, all *"judicial, extrajudicial actions or measures of forced execution for the realization of claims on the debtor's property"*.

However, according to art. 262 para. 3^2 of Law no. 85/2014, within 90 days from the date of pronouncing the decision to open the bankruptcy procedure, the insurance policies concluded by the insurance / reinsurance company cease by right; under the same conditions, reinsurance contracts will be terminated.

Moreover, art. 123 para. 1 of Law no. 85/2014 allows the judicial administrator / judicial liquidator to, within a limitation period of 3 months from the date of opening the procedure, to terminate any contract, unexpired rents, other long-term contracts, as long as these contracts have not been fully executed or substantially executed by all parties involved.

3. The situation of "City Insurance" clients

By FSA Decision no. 1148 of September 17, 2021 on the withdrawal of the operating license of the Insurance-Reinsurance Company City Insurance - S.A., ascertaining the state of insolvency and promoting the application regarding the opening of bankruptcy proceedings against it[7], The Financial

[3] https://legeaz.net/dictionar-juridic/contract-de-asigurare, in the form of 01.02.2022.
[4] Council Directive 93/13 / EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29, Special Edition, p. 273).
[5] Decision in Case C-96/14, Jean-Claude Van Hove v. CNP Assurances SA.
[6] Published in the Official Gazette of Romania, Part I no. 466 of June 25, 2014.
[7] Published in the Official Gazette of Romania no. 921 of September 27, 2021.

Supervisory Authority imposed the measure of withdrawal of the operating license of the Insurance-Reinsurance Company City Insurance - S.A., found the state of insolvency of the Insurance-Reinsurance Company City Insurance - S.A., Societatea Asigurare-Reasigurare City Insurance - S.A. having the obligation to take all necessary steps to notify the insured both regarding their possibility to terminate the insurance contracts concluded with the insurer, as well as their right to recover insurance premiums paid under contracts in proportion to the period between the time of termination and the expiry of the term of validity of the contracts.

From the perspective of the effects of the insured state of the mentioned insurer, we note that all insurance contracts concluded by City Insurance remain valid, and, consequently, they remain mandatory and effective, until their expiration, including insurance policies taken out by City Insurance, *"except in cases: where the holders denounce them, the 90-day period from the date of the decision to open the bankruptcy proceedings expires or the judicial liquidator in the bankruptcy proceedings denounces them "*[8].

In such a difficult situation, City Insurance policyholders (but especially those harmed as a result of road accidents caused by policyholders, who benefit from the insurance policies handed over to them) have two real possibilities to exercise their rights under the insurance contract:

- the first one results from the provisions of art. 102 para. 1 by reference to art. 162 para. 5 of Law no. 85/2014, according to which, with one exception (of the insurer's employees) all creditors, whose claims are prior to the opening date of the procedure, will submit the request for admission of the claims within the term set in the decision to open the procedure; applications for admission of claims will be recorded in a register, which will be kept at the court registry. Insurance claims, established by enforceable titles obtained after the moment of pronouncing the bankruptcy decision, are registered in court, under the sanction of forfeiture, within maximum 10 days from the date of obtaining the title. The judicial liquidator is obliged to verify and, if necessary, to register these claims in the table of claims, in compliance with the order of preference and / or their legal causes of preference. In all cases, the application for registration of these claims may not be submitted later than the date of preparation of the final consolidated table of claims, according to this law.

The possibility of following this legal insolvency procedure is also confirmed by art. 17 of Law no. 213/2015, which establishes an alternative action available to interested parties for the recovery of their claims from the assets of the bankrupt insurer, including for the amount due that exceeds the guarantee ceiling of 500,000 lei, up to which the Insured Guarantee Fund may make payments.

- the second one results from the FSA Decision no. 1.148 of 17 September 2021, namely any person who invokes a claim against the Insurance-Reinsurance Company City Insurance - SA, as a result of the occurrence of risks covered by a valid insurance policy, will be able to request the opening of the claim file to the Insured Guarantee Fund between the date of withdrawal of the operating license and the date of termination of insurance contracts.

According to art. 32 para. 1 of the Law no. 32/2000 on the activity and supervision of insurance and reinsurance intermediaries, in the situation where according to a court decision, an insurer enters the liquidation procedure, its insured have priority over the insurer's assets and have priority over by all other creditors of the insurer, immediately after the payment of the liquidation expenses.

Also, according to art. 12 para. 1 of Law no. 213/2015, any person who invokes a claim against the City Insurance insurer as a result of the occurrence of risks covered by a valid insurance policy, between the publication date in The Official Gazette of Romania of the decision of the Financial Supervisory Authority to withdraw the operating license and establish the existence of indications of insurer insolvency and date of termination of insurance contracts, but not later than 90 days from the date of the decision to open bankruptcy proceedings , may request the opening of the damage file through a request addressed to the Fund.

According to art. 14 para. 2 of Law no. 213/2015, the payment request shall be made in writing by the potential creditor and communicated to the Fund, directly or through its agents, at headquarters or by post, e-mail or other means ensuring the transmission of the text of the deed, with the attachment of supporting documents, in certified copy. from which to result exactly the amount requested.

If the payment request concerns several claim files and / or insurance contracts, the potential insurance creditor shall attach a record containing the identification data and the amounts related to each claim file / insurance contract, as well as any relevant documents, if any.

According to art. 12^2 para. 4 of Law no. 213/2015, The Fund draws up the list of potential insurance creditors based on the records and documents taken from the insurer and ensures its publication on its website.

[8] https://blog.ilegis.ro/9-actualitate/472-ai-asigurare-la-city-insurance-afla-cum-trebuie-sa-procedezi, in the form of 02.02.2022.

According to art. 13 para. 3, art. 3^1 and art. 4 from the same normative act, in order to pay the amounts due to the insurance creditors, the Guarantee Fund shall verify the damage files and insurance claims recorded in its records, taking into account the applicable rules and general and specific insurance conditions provided in the insurance contracts with the insurer against whom the state of insolvency has been established. In case of injury to bodily integrity or health or in case of death resulting from a vehicle accident, the determination of compensation representing moral damages is made in compliance with the principle of fairness, by reference to the negative consequences suffered physically and mentally, taking into account objective and reasonable criteria.

The approval or rejection of the amounts claimed by the petitioners is the responsibility of the special commission, consisting of seven members of the Fund.

Following the registration and analysis of the applicants' payment claims, together with the attached documents, the list of insurance creditors whose certain, liquid and due receivables are to be paid from the Fund's funds is drawn up, as well as the list of payment claims, which are to be partially or totally rejected.

The lists are submitted to the special commission, with the proposal of approval or rejection of the payment, and after the approval of these lists by the Special Commission, the payments of the insurance claims are made to the insurance creditors.

According to art. 16 of Law no. 213/2015, depending on the circumstances, the Special Commission may request the petitioners to complete the documentation and / or specify or provide additional information regarding their request for payment. The requested information shall be transmitted to the Commission, subject to the sanction of rejection of the request, within a maximum of 30 days from the receipt of its request.

The payment of the insurance claims established as certain, liquid and due is made by the Fund within the limit of a guarantee ceiling of 500,000 lei, as provided in art. 15 para. 2 of this normative act.

From the above considerations, it follows that the right to choose between the two legal proceedings belongs exclusively to the interested party, who will start the procedure that best represents his interest, but the choice of the payment method of compensation is much easier and faster, assuming a level of knowledge and following a formal approach much less laborious than that required by enrolling in the creditors of the City Insurance insurer.

4. Conclusions

From all the incidental regulations in this case, it results that the request to open the insolvency procedure initiated by ASF against City Insurance created not only an undesirable turmoil on the Romanian insurance market, with undesirable effects, materializing in endangering the reliability of the insurance system and distortion of the compulsory motor insurance market, including by the general increase of the price of the compulsory civil insurance policies, but also the premises of a situation of vulnerability of the beneficiaries of MTPL insurance policies issued by City Insurance.

They are forced to go through a series of legal procedural paths, characterized by a certain specificity and laborious action, difficult to access by legally uneducated people and requiring the loss of time and money from these consumers.

On the other hand, we note that the Romanian legislator has made available to policyholders a series of extremely useful and reliable guarantee measures, likely to lead, effectively and directly, to the desire to protect the interests of consumers, beneficiaries of MTPL insurance policies , but also of those harmed as a result of road accidents caused by the insured.

References

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