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GRANTING DIRECT CLAIM RIGHTS IN VOLUNTARY LIABILITY INSURANCE TO THE AGGRIEVED PERSON¹ IN ESTONIAN INSURANCE PRACTICE: VIA INSURANCE CONTRACT VS CLAIM ASSIGNMENT

Key words: *actio directa*, obligatory and voluntary liability insurance, claim assignment

Summary

In the Estonian Law of Obligations Act (LOA), the right of direct claim (*actio directa*) is guaranteed only if there is any obligatory liability insurance. In the case of voluntary liability insurance, the injured party has no direct claim against the insurer. In Estonian legal practice, the absence of a direct claim has been solved in two main ways: a) the policyholder and the insurer grant a direct claim to the injured party on the basis of an agreement between them, and b) by assignment of the claim. Both ways involve problems. Therefore, the article examines, *inter alia*, the pros and cons of a direct claim under the law.

Introduction

The need for liability insurance derives from two main factors. Firstly, it helps to make the strict liability more tolerable (in the case of strict liability, a person is held liable regardless of their fault), and secondly, the small errors in the performance of certain professional duties may lead to significant losses. Without liability insurance, no one would be willing to hold these positions.²

¹ In the article, the authors use the terms “aggrieved party” and “injured party” as synonyms.

² Lahe J. Kindlustusoigus [Insurance Law]. Tallinn: Juura, 2007, pp. 134.

Based on the above, liability insurance has two main purposes. The first is indemnification for damages caused to the injured party. The second purpose is to release the person who has caused the damage from liability. In the case of obligatory liability insurance, the primary purpose of the liability insurance – compensation for damages caused to the injured party – is of particular relevance.³ In the case of voluntary liability insurance, the focus is on releasing the party causing the damage from their personal obligation to indemnify for damages.

In Estonian law, the injured party's right to file a direct claim (the so-called *actio directa*⁴ principle) under liability insurance is guaranteed under the obligatory liability insurance.

In Estonian legal literature, it has been argued that the distinction between voluntary and obligatory liability insurance is important primarily due to two aspects: (a) in the case of voluntary liability insurance, the injured party has no direct claim against the insurer, while in the case of obligatory liability insurance, the injured party may also claim compensation from the insurer of the person who has caused the damage (LOA⁵ § 521(1)⁶ first sentence); (b) if the insurer is released from the duty to perform, then, in the case of voluntary liability insurance, this means full release, while in the case of obligatory liability insurance, the insurer may file a subsequent recourse action against the policyholder, because under obligatory liability insurance the injured party has to be compensated for the damage in any case (VÕS § 521(S))⁷.

³ Kull I., Kove V., Kaerdi M., Varul P. *Volaoigusseadus II. Kommenteeritud väljaanne* [Law of Obligations Act II. Commented edition]. Tallinn: Juura, 2007, p. 553.

⁴ The principle of *actio directa* in insurance refers to the right of an injured party in insurance to make a claim directly against the insurer of the party responsible for the damage. This principle has emerged as a response to the understanding that a direct claim against the insurer of the party at fault is not allowed, as it would not be in accordance with the principles of contractual relationships. Some of the early introducers of the *actio directa* principle into insurance law were Sweden, with its 1927 insurance law, and Norway, with its 1930 insurance law, where, for the first time, certain cases allowed the victim to have a direct legal claim against the insurer of the party at fault. At present, the *actio directa* principle is considered natural in most Continental European countries, especially in the case of compulsory liability insurance (particularly in motor insurance). This change in insurance theory reflects a shift in society's understanding, where the concept of compensation for damages, once considered subjective and individualistic, is evolving towards an objective and collective approach. Wahlgren P. *Tort liability and insurance*. Stockholm University Law Faculty, 2001.

⁵ Law of Obligations Act. Available: <https://www.riigiteataja.ee/en/eli/524032023004/consolide> [viewed 09.10.2023.].

⁶ LOA § 521(1) states: An injured party may demand the compensation of damage caused thereto by the policyholder from both the policyholder and the insurer. Compensation for damage may be requested from the insurer only in monetary form.

⁷ Lahe J., Luik O-J. 2018, pp. 160.

There are more than thirty obligatory liability insurances in force in Estonia⁸ and, as a rule, there are no problems with the right of direct action for these types of insurance in practice.

On the other hand, there are many situations in Estonian insurance practice, where one party to a basic contract (e.g., a construction contract⁹) requires the other party to have a liability insurance contract. By their nature, such insurance contracts are voluntary liability insurance contracts and are not subject to the right of direct action provided by LOA. At the same time, however, business partners who expect a liability insurance contract in such basic contracts expect that such a liability insurance contract will protect them. This formally contradicts the primary purpose of voluntary liability insurance, which is to protect the policyholder. In practice, this problem can be solved in two ways:

- a. The insurer extends the right of direct action under LOA to this voluntary liability insurance contract;
- b. The policyholder assigns its right of action arising from the insurance contract to its business partner (e.g., the general contractor of the construction) in connection with the main contract.

Unfortunately, both solutions bring problems in practice. Additionally, some insurers have begun to refuse to extend the direct claim rights to voluntary liability insurance contracts.

As noted before, there are no problems in Estonia with the right of direct action for obligatory liability insurance in practice. At the same time, a dilemma has arisen in the business and insurance practice in Estonia, namely whether the principle of *actio directa* could and should be extended to voluntary liability insurance as well? Said practical problem arises, above all, from the fact that there are many situations in Estonian insurance practice where one party to a basic contract (e.g., a construction contract) requires the other party to have a liability insurance contract and at the same time, however, business partners who expect a liability insurance contract in such basic contracts expect that such a liability insurance contract will protect them.

The article aims to examine whether an aggrieved person in Estonia should be granted direct claim rights in voluntary liability insurance. The authors examine first direct claims in voluntary insurance in general, then possibilities of direct

⁸ For example: bankruptcy trustees professional liability insurance, professional liability insurance of notaries, lawyers' professional liability insurance, professional liability insurance of bailiffs, insurance brokers professional liability insurance, professional liability insurance of patent attorneys, auditors' professional liability insurance, etc.

⁹ As an example, an extract from a construction contract between a contractor and a customer (original in the possession of the authors): "clause 14.3 [...] the contract shall identify the Customer, and the construction all-risk insurance contract shall also contain a provision under which the Customer has been assigned the right of submitting a direct claim against the insurer". The authors explain: since – in addition to the property insurance coverage – the construction all-risk insurance (CAR) policy also provides liability insurance coverage, the customer has requested the contractor to grant in the voluntary liability insurance contract the customer the right to submit a direct claim against the insurer.

claims in voluntary liability insurance under Estonian law and conclude the study with the pros and cons of a direct claim in voluntary insurance.

Analysis of the problem

1. Direct claim in voluntary insurance: general overview

From a legal philosophical point of view, one might also ask why is *legalis officium* (a legal obligation to enter into a liability insurance contract) given by virtue of law (LOA in the case of Estonia) *a priori* more/stronger protection in the context of the injured party than *contractum officium* (an obligation stemming from a contract to enter into a liability insurance contract)¹⁰? By their very nature, both contracts are binding on the obligor (the policyholder): the difference arises only from the basis of the obligation: either law or contract. It could be argued that in the case of an obligation arising from contract, the policyholder has voluntarily assumed such an obligation (obligation to enter into a liability insurance contract) – on the other hand, such an obligation often arises from, for example, public procurement¹¹ (the existence of a liability insurance contract is a prerequisite for the qualification of the bidder or their recognition as a successful bidder in a public procurement), which is essentially a “take-it-or-leave-it” situation. It could also be argued that in the case of both *legalis officium* and *contractum officium*, concluding a liability insurance contract is an interference with private autonomy¹², because the policyholder cannot (wholly) freely decide on the formation of their legal relationships. In a situation where interference with private autonomy is already taking place, it could also be in the interest of various participants involved in the legal relationships to find the legal balance through the harmonisation of the regulatory privileges of voluntary and obligatory liability insurance.

Considering the regulations of other European Union countries, the direct claim in voluntary insurance is not unusual. For instance, it has been pointed

¹⁰ For example, an extract from the insurance broker’s order to the insurer in connection with the designer’s liability insurance contract (the respective claim resulted from the contract for services concluded between the customer and the designer): clause 10 The insurance protection shall include the customer’s right of direct claim (original in the possession of the authors).

¹¹ For example, clause 6.1.5.1 of the general terms and conditions of the design-build contract, presented in the procurement for the designing and construction of the Kaarepere platform and tunnel, provides for the submission of a liability insurance contract within 5 days of the entry into the construction contract. Available: <https://riigihanked.riik.ee/rhr-web/#/procurement/6361744/documents/source-document?group=B&documentOldId=16525792> [viewed 09.10.2023.].

¹² From a traditional point of view, direct claims against the liability insurance company should not be allowed, since this would be contrary to the principle of privity of contract. Ulfbeck V. Modern Tort Law and Direct Claims Under the Scandinavian Insurance Acts. *Scandinavian Studies in Law*, 2001, No. 41, p. 524.

out in the legal literature¹³ that it took some time until *actio directa* procedure became established in the Polish legislation, having been initially accepted only for compulsory insurances and introduced much later for the voluntary civil liability insurance¹⁴. A similar right of direct claim in voluntary liability insurance exists, for example, in Lithuania¹⁵, Belgium¹⁶ and Spain¹⁷. Moreover, such approach also exists outside the European Union: for instance, in the legal literature on the right of direct claim in Turkey¹⁸ it is explained that this right is granted not only for compulsory liability insurance but also for optional liability insurance. As a result, under Turkish Commercial Code regime, it will now be possible for parties suffering loss to sue the liability insurer directly. A right of direct claim that is broader than what is afforded by obligatory liability insurance is also affirmed by the Principles of European Insurance Contract Law, Art. 15:101 1(d)¹⁹, which always gives the right of direct claim to the injured party suffering personal injury²⁰.

¹³ Serwach M. Civil liability insurance – evolution and directions of changes. *Prawo Asekuracyjne*, 2018, Vol. 1, No. 94, p. 31.

¹⁴ Kodeks cywilny [Polish Civil Code] Article 822(4) states: The party entitled to indemnity in connection with the event covered by the contract of civil liability insurance may pursue a claim directly against the insurer. Available: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19640160093/U/D19640093Lj.pdf> [viewed 11.10.2023.].

¹⁵ Republic of Lithuania Law amending the law on Insurance article 111 states: The injured third party shall have the right to request directly that the insurer, who has covered civil liability of the person liable for the damage, pays out the benefit. Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/a9f083803c7911e68f278e2f1841c088?fwid=rivwzvpvg> [viewed 11.11.2023.].

¹⁶ Loi relative aux assurances [Belgian Insurance Law], Art. 150. Available: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2014040423&table_name=loi [viewed 11.10.2023.]. Also: Fenyves A., Kissling C., Perner S., Rubin D. Compulsory liability insurance from a European Perspective. *Tort and Insurance Law*, Vol. 35, De Gruyter, 2016, pp. 66–67.

¹⁷ Ley 50/1980, de 8 de octubre, de Contrato de Seguro [Spain Law 50/1980, of 8 October 1980, on Insurance Contracts] Art. 76. Available: <https://www.boe.es/buscar/act.php?id=BOE-A-1980-22501> [viewed 11.10.2023.]. Also: IBA Insurance Committee Substantive Project 2012. *Direct Third-Party Access To Liability Insurance*, pp. 105.

¹⁸ Bilgin B. C. Right of Direct Action Against Liability Insurers under the New Turkish Commercial Code. *Turkish Commercial Law Review*, October 2015, Vol. I, No. 3, p. 266.

¹⁹ To the extent that the policyholder or the insured, as the case may be, is liable, the victim shall be entitled to a direct claim for compensation against the insurer under the insurance contract provided that the victim has suffered personal injury. Available: <https://www.uibk.ac.at/zivilrecht/forschung/evip/restatement/sprachfassungen/peicl-en.pdf> [viewed 11.10.2023.].

²⁰ This is substantiated, as follows: This case is based on equitable considerations and provides for strong social dimension in liability insurance, The victim suffering personal injury should not be compelled to first bring a claim against the tortfeasor who might be unable to satisfy the victim. This aspect is of particular importance in the case of personal injuries. Basedow J. et al. (eds). *Principles of European Contract Law (PEICL)*. 2nd expanded edition, 2016, p. 303.

2. Possibilities of direct claims in voluntary liability insurance under Estonian law

In liability insurance, the beneficiary cannot be designated. The purpose of liability insurance is to indemnify for loss caused to a third party, and generally, this third party cannot be identified in advance. However, in voluntary liability insurance, the injured party may be granted the right to file the claim directly against the insurer by a specific provision. Granting the right of direct claim to the injured party in voluntary liability insurance is reasonable in situations where the other party to the contract is required to have a liability insurance policy (for example, it is customary to require the construction contractor to have a liability insurance policy, however, without the right of submitting a direct claim this would not protect the customer's rights)²¹.

From the legal point of view, there are two ways of granting such right of direct claim: since the LOA does not prohibit extending the provisions of obligatory liability insurance to voluntary liability insurance, the policyholder and the insurer may subject the voluntary liability insurance contract in part or fully to the legal regime of obligatory liability insurance, and thus the injured party would obtain the right of direct claim against the insurer on the basis of LOA § 521(1).

Another option is to stipulate in the voluntary liability insurance contract that it constitutes a contract for the benefit of a third party under LOA § 80(1) and that the obligation is to be performed for the benefit of a third party in lieu of the obligee²².

The substantive difference between these two options is the release of the insurer from the performance obligation in an internal relationship in a situation where the policyholder causes the insured event intentionally or the policyholder violates other obligations, which release the insurer from the obligation to perform. Namely, the regulation of obligatory liability insurance (LOA § 521(5)) ensures that the insurer may not refuse to satisfy the claim of an injured party on the grounds that the insurer has been released from its liability to the policyholder in part or in full. Therefore: if the obligatory liability insurance regime is extended to a voluntary liability insurance contract, the insurer would not be released from the obligation to perform in the external relationship (injured party vs insurer); in a similar situation, where the contract is for the benefit of a third party under § 80(1) of LOA and the obligation is to be performed for the benefit of a third party in lieu of the obligee, the injured party would not have such a prerogative. It is specifically the privileged position of the injured party stemming from the regulation of obligatory liability insurance – (i) the right of direct claim of the injured party (who is not a party to the insurance legal relationship) against the insurer; and (ii) affirming the injured party's claim for performance in an external relationship

²¹ Lahe J, Luik O-J. 2018, pp. 161.

²² Namely, LOA § 80(4) stipulates that a third party for whose benefit a contract is entered into need not be personally identifiable at the time of entry into the contract.

(injured party vs insurer), in a situation where in an internal relationship (insurer vs policyholder) the insurer is released from the obligation to perform (due to a breach by the policyholder) – that ensures maximum protection for the injured party.

However, both these approaches require the consent of the insurer to subject itself to the corresponding regime in obligatory liability insurance. In practice, however, insurers might not be motivated to give such consent.

An alternative solution is that the policyholder assigns its right of action arising from the insurance contract to its business partner (e.g., the general contractor of the construction or designer) in connection with the main contract. Generally, in their standard terms and conditions, Estonian insurance companies do not restrict the assignment of claims arising from contract²³. Such assignment of claim may be concluded (i) as assignment of a contingent and future claim (LOA § 165) immediately after concluding a voluntary liability insurance contract; or (ii) after the occurrence of an insured event (LOA § 164(1)). As an example of assignment of claims after the occurrence of an insured event, the authors point to a legal dispute HMK²⁴, No. 2-11-45374²⁵.

It is understandable that the assignment of a contingent and future claim is a safer solution for the party to the primary contract (e.g., the general contractor

²³ For instance, ERGO Insurance SE, General terms and conditions of ERGO Insurance services. Available: https://www.ergo.ee/fs-files/0000/0000/0002/files/ERGO_teenuse_uldtingimused_06.06.2022_ENG_.pdf [viewed 11.10.2023.], or IfP&C Insurance AS, General insurance conditions TG-20131. Available: <https://tingimused.if.ee/ViewPDF.aspx?ID=f66803b1-7d9b-4659-8a89-c5367bf004b8> [viewed 09.10.2023.].

²⁴ Harju County Court (HMK) decision No. 2-11-45374. Available in Estonian <https://www.riigiteataja.ee/kohtulahendid/detailid.html?id=110609097> [viewed 02.11.2023.].

²⁵ The insurer A and the policyholder B had entered into an architect's voluntary insurance contract and an engineer's professional liability insurance contract. Such insurance contract was entered into for the reason that in the public contract for the reconstruction of the quay of the port, concluded in the simple procurement procedure, the contracting authority C and the contractor B had agreed that the contractor B shall enter into a liability insurance contract. Due to faults in the design documentation, the port quay reconstruction work carried out with these designs did not comply with the requirements, and the contracting authority C submitted the contractor/policy holder B a compensation claim. The contractor/policyholder B was a small business whose damage was expected to exceed its assets. At the same time, the contracting authority C did not have the right of direct claim against the insurer A. In this case, the contractor/policyholder B transferred the right of claim arising from the voluntary liability insurance contract (against the insurer A) to the contracting authority C. Thereafter, the contracting authority C was able to file a claim for damages against insurer A in court. Had such an assignment of claim not taken place, the requirement of the contracting authority C relating to the liability insurance contract in the simple procurement procedure would have been devoid of economic substance, as the injured party would not have been able to realise its claim against the insurer (absence of the right of direct claim) while the policyholder B did not have sufficient financial resources to litigate the case with the insurer A in court. A similar dispute concerning the insurance obligation arising from the construction contract awarded under a public procurement and the loss caused by the contractor, as well as the subsequent assignment of the right of claim arising from the insurance contract by the contractor/policyholder to the contracting authority, was litigated in Harju County Court (HMK) decision No. 2-09-42553. Available in Estonian: <https://www.riigiteataja.ee/kohtulahendid/detailid.html?id=109223818> [viewed 02.11.2023.].

of the construction), as it reduces the risks that the policyholder's claim will not be assigned after the occurrence of the insured event, and the injured party will essentially have no "access" to the insurance contract concluded in a public procurement. On the other hand, such assignment of claims creates ambiguity for the insurer in insurance legal relations, and in the opinion of the authors, mass assignment of claims could lead to insurers starting to restrict the assignment of claims in their insurance contracts.

3. Pros and cons of a direct claim in voluntary insurance

On the one hand, it could be said that the conclusion of a voluntary liability insurance contract is a matter between the policyholder and the insurer, but in legal practice the need for an injured party's right of direct claim is also becoming increasingly apparent in the case of voluntary liability insurance. In particular, the parties to the basic contract who contract a service from the policyholder need protection. On the other hand, in the case of voluntary liability insurance, the granting of a direct claim to the injured party changes the purpose of the voluntary liability insurance contract: the protection of the injured party (and not the protection of the policyholder, as is the primary purpose of voluntary liability insurance) becomes paramount.

Understandably, from the perspective of the insurer, it would be possible to make a counter-argument to the direct claim that such an approach could render the respective insurance services more expensive (for example, due to the fact that the insurer has to take into account the risk that while it is released from the performance obligation in an internal relationship, in an external relationship, after having indemnified for the loss, it has to take recourse against the policyholder).

However, without a direct right of claim, such protection is incomplete, because the person requesting such voluntary liability insurance is not guaranteed with a direct right of claim against the insurer providing liability insurance. Neither the possibility of agreeing on the application of obligatory liability insurance provisions, nor the possibility of contracting for the benefit of a third party is an ideal solution. More so because, in principle, the parties may subsequently amend the contract without the consent of the third party. For the same reason, the possibility for the policyholder to assign its claim is not a complete solution either.

The authors find that a situation, where the public contract provides for the existence of a liability insurance contract, is primarily in the interests of a third party (the contracting authority), which leads to the conclusion that the contract is intended for the benefit of the third party. In this context, in the same way as in the case of the obligatory liability insurance, the voluntary liability insurance contract should therefore be treated in Estonia as a contract for the protection of a third party, and thus ensure the direct right of claim also under a voluntary liability insurance contract.

Based on the above, the authors find it reasonable to consider amending the LOA in such way that the right of direct claim (*actio directa*) would also be ensured in Estonia in the case of voluntary liability insurance. It is debatable whether this should be an imperative or dispositive principle. In the case of a dispositive provision, insurers might not have an incentive to provide such protection in voluntary liability insurance. It could be therefore assumed that the interests of the aggrieved parties would be better protected by an imperative provision. The said approach would, on the one hand, satisfy the purpose of protecting the aggrieved parties, and on the other hand, not harm the person causing the damage.

Moreover, granting the right of direct claim in voluntary liability insurance as well, is procedurally reasonable and economical²⁶. In this case, the aggrieved party would not have to seek compensation from the policyholder, nor would the parties have to re-draft the voluntary liability insurance contract to include a direct claim or later assign the claim.

Conclusions

1. In light of the foregoing analysis, a question could be asked whether a legislative amendment, by which the voluntary liability insurance in Estonia as set forth in LOA is made subject to regulation similar to that applied to obligatory liability insurance, would be in the best interest of the policyholders, and in particular – the aggrieved parties? As the authors have noted above, such legal practice exists in some European countries.
2. It could be pointed out that in Estonian business practice it is customary in cases of public procurements, construction contracts, lease contracts, etc. that contracting authorities or entities /lessors often require the contracting partner to take out voluntary liability insurance. However, in a situation where the regulation of voluntary liability insurance in the LOA does not give the injured party the right of direct claim and does not oblige the insurer to indemnify for loss in an external relationship, where it is released from the performance obligation in the internal relationship, such voluntary liability insurance contract does not serve the purpose of protecting the aggrieved party.

²⁶ It has been pointed out in legal literature that “Notwithstanding that the liability is that of the insured, if the insurer is the ultimate payor, it appears to be procedurally sensible, efficient, secure and cost effective to facilitate the recovery of compensation directly from the insurer. The alternative is cumbersome. It involves the third party suing the insured to establish liability, and thereafter the insured claiming an indemnity against the insurer under the policy, with the insurance monies or their equivalent value thereafter passing through the insured to the third party claimant”. Rhidian T. Third Party Direct Rights of Action against Insurers under UK Law and International Maritime Liability Conventions. In: Basu A. et al. Regulation of Risk. Transport, Trade and Environment in Perspective, 2023, p. 685.

3. Therefore, today the requirement for such a voluntary liability insurance contract (in public contracts or in contracts in general), without the right of direct claim and the performance obligation in external relationships (in the event that a party is also released from the performance obligation in the internal relationship), essentially constitutes a quasi-solution in terms of construction contracts, lease contracts, etc., where the customer (the potentially aggrieved party) is deceived into believing that the voluntary liability insurance contract that the customer has required its contracting party to have, provides it adequate protection. In essence, it could also be argued that the matter of granting the direct right of claim in voluntary liability insurance lies in whether the issue of liability and insurance should be considered together or separately.
4. Over the past 70 years, the boundaries between tort law and insurance law have become blurred, and the two have increasingly intertwined over time. The question of whether this might be the time to extend the direct claim rights at the legislative level to voluntary liability insurance, is a matter of legal policy, but is driven by real business practice.

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