THE ITALIAN COURTS UPON "*CLAIMS MADE*" CLAUSES – THE SUPREME COURT DECISION N. 5259/2021

The Italian insurance system is based upon the "*loss occurrence*" policy, which covers only the accidents occurred during the policy period, no matter when the claims are served by the insured upon the insurer.

In fact, according to Section 1917 of Italian Civil Code, in the tort law insurance "*the insurer shall hold harmless the insured for the sum to be paid to the third party, because of the accident occurred during the policy period*".

Nonetheless, the commercial praxis led to a new kind of policies, based upon "*claims made*" clauses, which cover the accidents served upon the insurer during the policy period. Actually, there are different types of claims made policies (*e.g.*, it may be agreed by the parties that the service may be done after the policy period or the accident may occur before the policy period), but the most common types are the following.

The first one is the "*pure*" claims made clause (it is so-called by the Italian Courts), which covers only the claims served upon the insurer during the policy period, no matter when the accident occurred. The second one is the "*impure*" claims made clause, which covers the claims served during the policy period, provided that also the accident occurred during the same period.

According to the Italian Supreme Court, the discipline provided for by our Civil Code, inspired by the "*loss occurrence"* model, can be derogated by the parties because the parties are free to determine the contents of their contract. In particular, the claims made clauses do not always affect the risk (aleatory) borne by the insurer, because usually it's a coverage against uncertain and still to come claims.

Furthermore, even if valid and applicable in general, the claims made clause must be submitted to a case-by-case investigation, especially if included in insurance contracts for professional activities and for medical (mal)practice to avoid gaps in coverage, not only in the interest of the insured but also to protect third parties damaged by the insured.

This means that in some cases such clauses may be considered null and void and the judge has to "amend" the contract in order to balance the rights and obligations deriving from the contract for both parties.

According to such principles, in a recent case (no. 5259/2021, dated 25 February 2021) the Italian Supreme Court declared the voidance of a claims made clause in an insurance contract for medical liability.

Actually, the claims made clause had been declared as void both by the first degree's judge and by the judge of appeal. In short terms, the reasons of such voidance, as stated by our Supreme Court, are (*i*) the one-year policy period was too short; (*ii*) the insured had to serve the claim upon the insurer within 12 months after the termination of the insurance contract; (*iii*) the insurer had the possibility to early terminate the contract without a grounded reason.

As a consequence, the Supreme Court deemed that there was not a balance between the interest of the parties and the insured had not the actual possibility to obtain the indemnification, while the insurer was earning the premium without assuming the risk of the contract.

Furthermore, the Italian Supreme Court reversed the first degree judge's decision to apply to the contract a loss occurrence clause, rather than the claims made clause deemed null and void. In particular, according to the above mentioned power of amendment of the contract, the first degree judge was held to investigate upon the real intention of the parties, which certainly should have led to a different type of claims made clause, other than the one deemed null and void but also other than a loss occurrence clause.