Insurance and Arbitration

Proposed questions, to be answered in the light of national legislation and personal experience.

BELGIUM

(Prof. M. Fontaine)

1. Is arbitration to be preferred as a method of insurance disputes resolution under

a) an insurance policy;

My personal answer would be affirmative, for the reasons indicated under question 2, mainly because insurance law is a very specialized field where chosen arbitrators may be more competent than generalist magistrates (more about this under question 2).

b) a commercial contract between the insured and a third party;

Arbitration clauses are frequent in the Belgian practice of commercial contracts, but they do not directly concern insurance disputes (unless the dispute concerns the performance of a contractual clause obliging a party to take insurance - and still, this is not properly an "insurance dispute"). Different matters are those dealt with below, under questions 4, 5 and 6.

c) a reinsurance contract?

Arbitration is the normal mode of dispute resolution of reinsurance disputes, which are in principle never submitted to national courts.

2. What are the reasons why arbitration is to be preferred for the resolution of insurance disputes:

a) choice of experienced arbitrators;

As already said above under question 1 a), this is in my view the main advantage of submitting insurance disputes to arbitration. Insurance law is a very specialized field where chosen arbitrators may be more competent than generalist magistrates.

This is mainly verified in very specific fields of insurance, such as construction, professional liability, business interruption, transport or credit insurance, and of course reinsurance, where regular judges seldom have the necessary expertise. It is less obvious for more common lines, such as homeowners', motor or life insurance, which are widely known and where some magistrates have acquired much knowledge and experience.

b) avoidance of conflict of national jurisdictions in case of transnational relations;

This can be an advantage in insurance matters as in all other transnational disputes.

c) confidentiality;

This, too, is a general advantage of arbitration which also applies in insurance matters, especially in insurance concerning business.

d) duration of the proceedings;

Same remark as under b) and c). Belgian courts are overloaded with cases in arrear and it often takes a very long time to get a ruling. Arbitration proceedings are not always as efficient as they could be, but in general, cases are decided in a shorter time, especially if an arbitral institution (such as CEPANI - see below under point 7) sees to it that deadlines are set and respected.

e) limited recourse against the award;

This can also be seen as an advantage of arbitration, in particular in relation to the issue of duration of the proceedings, which has just been covered. Under Belgian law, arbitration awards can be subject to appeal only if the parties have agreed to it in advance (art. 1703 par. 2 of the Judicial Code), which is extremely rare. Otherwise, grounds for annulment are limited (art. 1704 of the Judicial Code).

Of course, the scarcity of recourses against the award may not be seen as an advantage by the losing party …

f) better enforceability of the award;

I do not see the point. An arbitral award does not enjoy better enforceability than a decision by a domestic court, since it requires exequatur to be enforceable (if not spontaneously performed, as it is usually the case). However, if exequatur has to be requested in court, it can be refused only on very limited grounds (art. 1710 of the Judicial Code).

g) other.

…

What are the specific disadvantages of arbitration in insurance matters and the reasons why in certain cases national court procedures should be preferred?

The main disadvantage is the cost of arbitration, since not only the lawyers, but also the arbitrators have to be paid by the parties (while judges of ordinary courts are not paid by the pleaders). Usually, both parties will have to advance half of the arbitrators' fees, and the final allocation will depend either on what the arbitration clause may have provided, or on the arbitral tribunal's decision. For a party who may be in financial distress because of having incurred a loss, having to pay a share of the arbitrators' fees in advance may be a significant obstacle to access to justice. This is one of the main reasons where Belgian law has restricted the recourse to arbitration for certain types of risks (see below, under point 3).

Another disadvantage of arbitration has sometimes been alleged in Belgium, the fact that many arbitrators would be more favourable to insurers than court judges. From my experience, this does not reflect reality. Admittedly, some arbitrators may be more receptive to the insurers' points of views, but some others are more consumer oriented, and such differences, if they appear, tend to compensate each other. In the many arbitral deliberations in which I took part, I have generally found that independence and impartiality of arbitrators are highly respected values.

3. Are there (legal) limitations to the arbitrability of disputes in the field of insurance?

Yes. Article 36 § 1 of the Law of June 25, 1992, on terrestrial insurance contracts, provides for the nullity of *"... any clause by which parties to an insurance contract undertake in advance to submit to arbitrators disputes that arise from the contract"* (free translation).

The previous Law of June 18, 1874 contained nothing of the sort. The resort to arbitration as a means to solving insurance disputes was for a long time totally free and widely practiced in Belgium, even in common lines such as homeowners' insurance or personal accident insurance. The first restrictions came in 1931, for life insurance. The change introduced in 1992 was justified in Parliament by the insured's alleged inexperience about insurance techniques and the concern that arbitration clauses would prevent the insured's interest to be adequately defended. The latter argument, to say the least, is very debatable. A better justification was given with reference to the cost of arbitral procedures (see above, point 2 g).

Article 31 § 3 only prohibits arbitration clauses agreed in advance, usually in the insurance policy. When a dispute arises, the provision does not prevent parties to decide to submit it to arbitration.

The prohibition of arbitration clauses in insurance contracts is not universal. Article 36 § 2 declares § 1 inapplicable to types of insurance contracts determined by the King. This has been done by Royal Decree of December 24, 1992, which contains a detailed list of lines of insurance where arbitration clauses are valid [1]. Without entering into details, the excepted

[1] *« …1° les dommages aux biens pour les risques autres que ceux visés à l'article 67, § 2, de la loi et pour autant que ces biens soient assurés contre l'un des périls suivants: incendie, explosion, tempête, grêle, gel, catastrophes naturelles, affaissements de terrain ou énergie nucléaire;*
2° les assurances des risques de responsabilité civile à l'exception du risque responsabilité civile en matière de véhicules automoteurs, du risque responsabilité civile extracontractuelle relative à la vie privée et du risque

risks roughly include all risks other that mass risks. Credit insurance is also specifically exempted from the prohibition by article 71 of the law.

The 1992 regulation has had the consequence that arbitration clauses have disappeared from the mass risk policies where they were still then very frequent. But in Belgium, arbitration continues to be a very common means of solving disputes in most lines of insurance concerning business, such as construction, professional liability, business interruption, transport or credit insurance or reinsurance (see above, point 2 b).

4. Under which conditions can a non-signatory of the arbitration agreement be a party to the arbitration?

An arbitration agreement, like any contract, is subject to the principle of privity of contracts (*"relativité des conventions"* - art. 1165 Civil Code). Non-signatories are not parties to the arbitration, and therefore may not in principle take part as parties in the proceedings.

However, the Judicial Code allows interested third parties to ask the Tribunal to intervene in the proceedings, and the parties themselves to call a third party to intervene. To be admitted, such interventions necessitate the conclusion of an arbitration agreement between the third party and the initial parties, as well as the unanimous agreement of the arbitral tribunal (art. 1696*bis*).

A special situation can be mentioned in this context : under the CEPANI Rules on arbitration, when two or more arbitration proceedings are initiated on closely related disputes, their consolidation can be organised under certain conditions (art. 12 of the 1995 Rules, art. 13 of the 2013 Rules)

Specifically, can the insurer join or be joined in a dispute arising out of a commercial contract between the insured and a third party, containing an arbitration clause?

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responsabilité civile en matière d'assurance incendie-risques simples, ainsi que des risques de même nature qui sont couverts à titre complémentaire ou accessoire dans un autre contrat d'assurance;
3° pertes pécuniaires diverses portant sur les biens visés au 1°;
4° tous risques chantiers dans la mesure où l'assurance porte sur un bien visé au 1°;
5° les risques couverts à titre complémentaire ou accessoire dans les contrats souscrits en exécution des lois du 3 juillet 1967 sur la réparation des dommages résultant des accidents du travail, des accidents survenus sur le chemin du travail et des maladies professionnelles dans le secteur public et du 10 avril 1971 sur les accidents du travail. »

The general rules that have just been described apply to insurers as to any other third party.

As a consequence, if arbitration proceedings have been initiated between the insured and a contractual partner concerning the event which could be covered by the insurance policy, the insurer may only join or be joined under the conditions of article 1696*bis* of the Judicial Code (see above).

However, this does not prevent the insurer, in its relationship with the insured, to see that the arbitral proceedings are properly conducted with regard to the insurer's interests. The insurer can give advice to the insured, or even intervene in choosing the counsel who will act in the arbitration in the name of the insured.

5. Can the insurer that has indemnified his insured for a loss suffered under a commercial contract, initiate on the basis of his subrogation in the insured's rights, an arbitration procedure against the (third) person who entered into the said commercial contract with the insured, when this contract contains an arbitration clause ?

In indemnitary types of insurance, the insurer who has paid the indemnity is subrogated in the insured's rights against third parties liable for the loss, up to the amount of the payment (art. 41 of the Law of June 25, 1992 on terrestrial insurance contracts).

The mechanism of subrogation transfers the insured's rights to the insurer. When the insurer acts in this context against the liable third party, the insurer has taken the insured's legal position. Consequently, the insurer acts on the basis of the commercial contract which contains the arbitration clause - to which the insurer has become a party. It follows that the insurer is bound by the arbitration clause, and can avail itself of it [2].

6. Can the award rendered against a party whose liability is covered by the insurance policy, be opposed ("*opposable*", in the French terminology) or enforced against the insurer who was not a party to the arbitration proceedings ?

[2] See CEPANI Arbitral award No. 1026, *Recueil de sentences arbitrales du CEPANI*, Brussels, 2005, 48, with a note by O. CAPRASSE.

Arbitral awards, like judgments from ordinary courts, only bind parties to the procedure. If an award related to the insured loss is rendered in proceedings to which the insurer was not a party, this award is not *"opposable"* to the insurer, who may refuse to indemnify on the basis of the award should the insured invoke it against the insurer.

In liability insurance, the Law of June 25, 1992 on terrestrial insurance contracts confirms that in principle, *"no judgment can be opposed to the insurer, the insured or the aggrieved party if they have not been present or called to the proceedings"* (art. 89 § 1 par. 1).

The solution would obviously be different if the insurer had joined the arbitral proceedings (see above, point 4).

It must also be pointed out that Belgian law provides, as a general rule, that the aggrieved party has a *"direct action*" against the liability insurer (art. 86 of the Law of June 25, 1992 on terrestrial insurance contracts). Most of the time, the aggrieved party will not wait until the end of an arbitration procedure against the liable party to address a claim against the insurer.

Does it make a difference whether the insurer acted in the arbitration in lieu of the insured pursuant to the clause in the insurance policy granting him the right to take charge of legal proceedings (including arbitration)?

It does make a difference. In liability insurance, *"direction du litige*" by the insurer is the rule under Belgian law (art. 79 of the Law of June 25, 1992 on terrestrial insurance contracts). If the insured is sued for its alleged liability before an arbitral tribunal, the liability insurer will normally conduct the proceedings in the name of the insured.

Such type of intervention does not make the insurer a party to the arbitral proceedings (as opposed to the situation where the insurer in person has joined the proceedings, see above, point 4), but it affects the *"opposabilité"* of the decision to the insurer. After stating the principle of *"inopposabilité"* in its § 1 (see above), article 89 § 1 par. 2 of the Law provides that *"However, the judgment rendered in a procedure between the aggrieved party and the insured is* "opposable" *to the insurer, if it is established that in fact, the insurer has conducted the proceedings*".

7. Do you have in your country any arbitration organs with specific competence in insurance disputes ? In reinsurance disputes?

In general, no. When the parties have agreed to resort to arbitration, insurance disputes are most often submitted to *ad hoc* arbitral tribunals. When institutional arbitration is envisaged, the main Belgian organ is CEPANI, the Belgian Center for Arbitration and Mediation located in Brussels; even though insurance disputes are often arbitrated under its Rules, CEPANI is a generalist arbitral institution, with no special dedication to insurance matters.

As to reinsurance disputes, to our knowledge and experience, they are usually submitted to *ad hoc* tribunals; no organ seems to exist in Belgium with dedicated competence in the field.

A specific institution can also be mentioned. An *"ASBL arbitrage"* has been created in 2000 to install speedy procedures for solving disputes on property damage in motor insurance.

If so, what is their legal form (association, professional organisation like an insurers association, etc.) ?

"Arbitrage" is a non-profit association (ASBL) created by members of the bar, the insurers' association (UPEA, now Assuralia) and an association of brokers (Feprabel).

Are they linked with AIDA ?

"ASBL Arbitrage" is not linked with AIDA.

More generally, there is so far no ARIAS Chapter in Belgium.

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