



# **Legal 500 insurance webinar Belgium**

**Webinar 2 July 2020**

**HUGO KEULERS  
SANDRA LODEWIJCKX  
ALEXANDER HAMELS**

# Overview

1. Brexit and regulatory developments
2. Belgian claims landscape and COVID-19 disputes

# 1. Brexit and regulatory developments



- A. Principles of Belgian insurance regulation
- B. Impact and challenges of Brexit

## 1

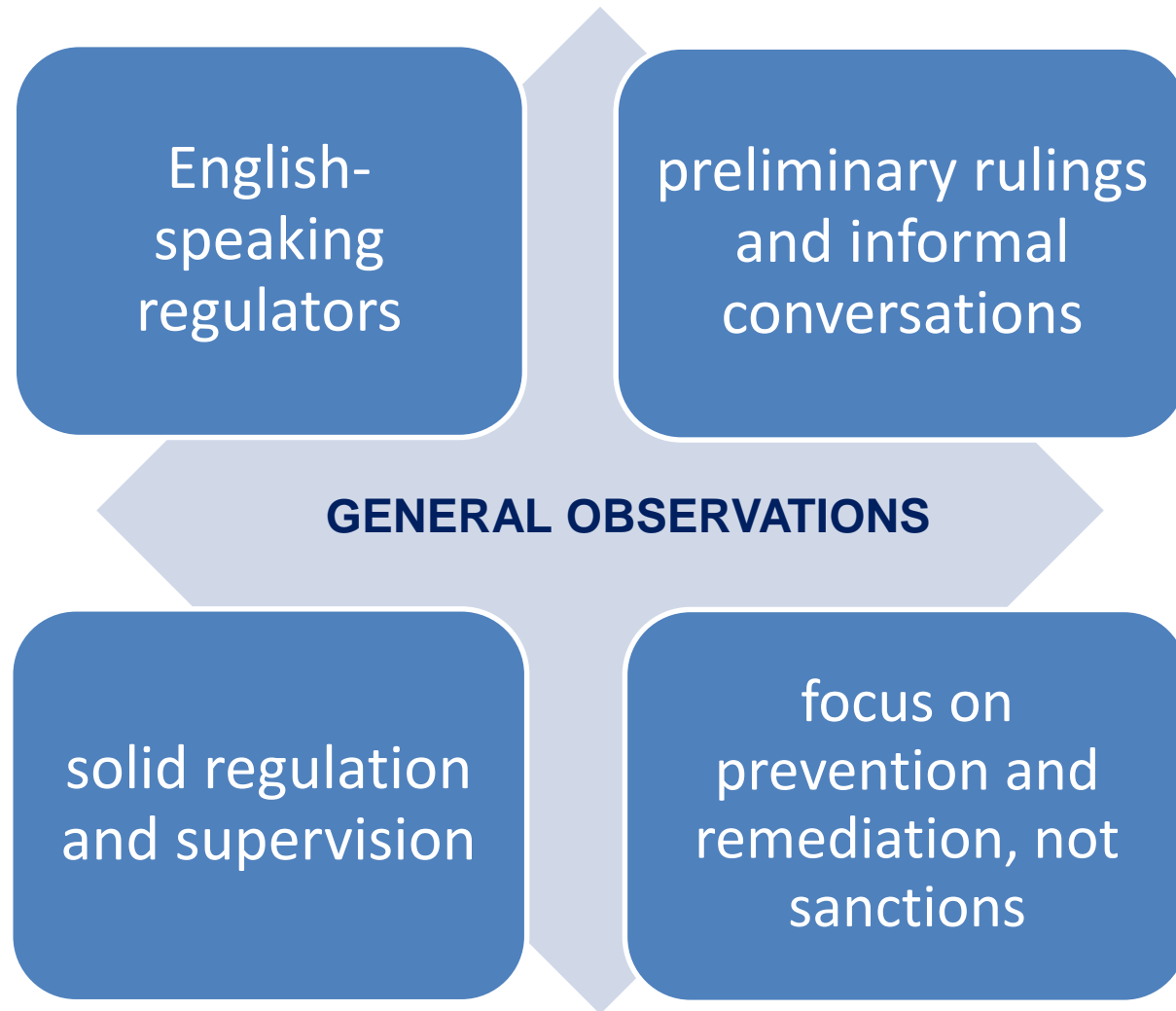
## A. Principles of Belgian insurance regulation

---

- implementation Solvency II Directive: Law of 13 March 2016 (**Solvency II Law**)
- implementation Insurance Distribution Directive (**IDD**): Law of 4 April 2014 (**Insurance Law**)
- implementing **Royal Decrees**
- ‘twin peaks’-model of insurance regulation and supervision:
  - prudential regulation and supervision: National Bank of Belgium (**NBB**)
  - rules of conduct and insurance distribution: Financial Services and Markets Authority (**FSMA**)

1

## A. Principles of Belgian insurance regulation



## A. Principles of Belgian insurance regulation

- authorisation requirements for insurance undertakings
  - **comprehensive rules** on the organisation and functioning of the insurance undertaking
  - **principle of proportionality** well-developed e.g.:
    - pillar I: capital requirements: simplified calculation for certain sub-modules and risk modules
    - pillar II: governance (outsourcing, fit & proper, internal policies and procedures, etc.)
    - pillar III: reporting (frequency RSR, content ORSA, etc.)



## A. Principles of Belgian insurance regulation

---

- registration requirements for insurance intermediaries
  - **comprehensive rules** on the organisation and functioning of the insurance intermediary
  - **no principle of proportionality**
  - **informal review** of Brexit-related applications
  - prohibition of **empty shells**
  - **categories**: (sub-)agents, brokers, ancillary insurance intermediaries and mandated underwriters

## 1. Corporate form

### insurance undertakings

- public limited company (NV/SA)
- (European) cooperative limited company (CV/ECV)
- mutual insurance undertaking
- european company

### insurance intermediaries

- all corporate forms
- self-employed persons



# A. Principles of Belgian insurance regulation

## 2. Directors and senior management

- insurance undertakings & intermediaries:
  - fit & proper requirements
  - Belgian nationality or languages not required
  - FSMA notification <-> NBB approval
  - specific requirements for:
    - persons in contact with the public
    - persons responsible for distribution
    - independent control functions (insurance undertakings)



# A. Principles of Belgian insurance regulation

## 3. Substance requirements

- insurance undertakings: prohibition on **empty shells**
  - **central administration** in Belgium
  - active **risk** management
  - effective and prudent management (**excessive outsourcing?**)
  - effective use of **license**
- Intermediaries: prohibition on **empty shells**



# 1. Brexit and regulatory developments



- A. Principles of Belgian insurance regulation
- B. Impact and challenges of Brexit**

# 1 B. Impact and challenges of Brexit

---

- general observations
  - regulated entities lose EEA **passporting rights**
  - in principle: establishment of **new regulated entities** required
  - Brexit negotiations:
    - Withdrawal Agreement does **not include passporting right** for financial services
    - possible UK equivalence?  
but: low impact

# 1 B. Impact and challenges of Brexit

---

## Belgian response to Brexit

- regulator's attitude (language, flexible, firm)
- Law of 4 April 2019 on the withdrawal of the UK from the EU
  - introduction of a new category of insurance intermediary: **mandated underwriter**
  - temporary framework for **run-off business?**
- welcoming of **new insurers in Brussels**

LLOYD'S



**ENSTAR**

**MS Amlin**

# 1 B. Impact and challenges of Brexit

---

## Common challenges (1/2)

- **administrative burden:**
  - e.g. recognition of foreign degrees
- no European-wide assessment of **fit & proper** requirements
- language of trainings for **continuing training**, but:
  - professional trainers adapt
  - other solutions (e.g. in-house training or tailored training)

# 1 B. Impact and challenges of Brexit

---

## Common challenges

- **outsourcing**
  - revision of Overarching Governance Circular
  - insurance distribution
  - prohibition on empty shells
- aligning UK **business models** with continental laws
  - outsourced service providers / business process outsourcing
  - discretionary indemnity arrangements

## 2. Belgian claims landscape and COVID-19 disputes





## 2 The Belgian insurance claims landscape

---

### 1. Are insurers free in the wording of insurance policies?

→ No

#### a) Many mandatory provisions in 4 April 2014 Insurance Act:

Examples:

- Gross negligence exclusion
- Salvage costs
- Mandatory cover interests + costs above limit in casualty insurance

#### b) Specific insurance laws:

- Third party motor liability
  - Strict liability fire
  - Fire insurance
- 
- Language: English only for industrial risk and financial lines insurance policies.
  - Interpretation usually in favour of insured/policyholder, especially small risks (article 23 Insurance Act).

## 2 The Belgian insurance claims landscape

---

2. Are insurance claims usually dealt with by mediation, arbitration or litigation?
  - a) Mediation promoted but not often used for insurance disputes
    - Ombudsman
  - b) Arbitration: only allowed in insurance policies for specific risks
    - Examples: industrial risk, D&O, product liability, professional indemnity, marine, transport
    - Very often ad hoc arbitration, otherwise Cepani-arbitration
  - c) State court litigation
    - Court of First Instance or Enterprise Court
    - Litigation in French, Dutch or German
    - Long delays (1,5-2 years: first instance and 2-5 years: appeal)

## 2 The Belgian insurance claims landscape

---

3. Which party has the burden of proof in liability and coverage disputes?
  - a) Liability claims
    - Plaintiff has burden of proof (article 1315 Civil Code)
    - Defendant must proof contractual defences and act of God/force majeure
    - Technical cases: often court expert
  - b) Coverage disputes
    - Insured must proof that claim falls within scope of cover
    - Most case law now holds that insurer must proof exclusion or forfeiture (not limited to all-risk)
    - Insurer must also proof claim is time-barred (specific laws on interruption/suspension statute of limitations)

## 2 The Belgian insurance claims landscape

---

4. Is Belgian (case) law generally favourable to insurers or insureds?
  - a) First instance and appeal: fair system
  - b) Supreme Court:
    - Number of important judgments in favour of insureds:
      - Burden of proof malicious intent exclusion (article 62 §1 Insurance Act)
      - Interpretation of “loss occurrence” in liability insurance (article 142 §1 Insurance Act)
      - Interpretation of sunset-cover conditions in liability insurance (article 142 §2 Insurance Act)

Ground: Mandatory laws to protect the interests of the insured.

## 2 The Belgian insurance claims landscape

---

5. What are the most troublesome statutory provisions for insurers in the Insurance Act?
  - a) Procedure for payment of insurance premium
  - b) Gross negligence exclusions (article 62 §2 Insurance Act)
  - c) Salvage costs insured above limit, with cap possibility
  - d) Procedure in case of aggravation of risk
  - e) Interests and costs in liability insurance insured above limit, with possibility to cap
  - f) Complex system in case of insurances falling together

## 2 The Belgian insurance claims landscape

---

6. Can victims file direct claims against liability insurers?
  - a) Not in case of marine and/or transport insurance
  - b) Yes in case of all other liability insurance policies (article 150 Insurance Act)
    - Statute of limitations: 5 years
    - Only “victims” may file direct claims
    - Condition: either the policy and/or the underlying liability dispute victim vs insured must be governed by Belgian law

## 2 The Belgian insurance claims landscape

---

7. Is there any specific law or case-law on coverage for pandemics/ Sars-Cov-2/ Covid-19?

(So far): No

Foreign (case) law: No precedent value in Belgium

- Coverage for pandemic losses legally valid under Belgian law, but very unusual (sub-limits)
- Exclusions for pandemic losses legally valid and market practice in event cancellation and property insurance

## 2 The Belgian insurance claims landscape

---

### 8. Are Covid-19 losses/liabilities insured?

#### a) Check policy wording

- Scope of cover: If pandemics insured, all pandemics or only expressly named viruses/diseases (e.g. Mers, Sars, Mexican flu)? Insured has burden of proof.
- Exclusions: Are pandemics/epidemics in general excluded or only expressly named viruses/diseases? Insurer has burden of proof.

#### b) Is property/physical damage a condition to claim BI-losses?

Most cases: Yes, unless coverage extension notifiable/  
communicable diseases (sub-limits)

Question: How can the insured succeed in its burden of proof of  
property/physical damage?

#### c) Check contractual liability clauses and possibility of a force majeure defence

Note: No intervention yet of Belgian legislator/regulator (expected).



## 2 The Belgian insurance claims landscape

---

9. What foreign insurers must know?
  - a) Beware of mandatory insurance contract law with peculiar/bizarre implications (e.g. cover for interests/costs above insured limits)
  - b) If you desire to litigate in English, you must choose arbitration in the policy, if legally allowed!
  - c) Don't count (too much...) on mediation and be prepared for lengthy and expensive court expert proceedings
  - d) For some products not much sophistication: no published case-law on D&O insurance
  - e) Powerful brokers push for (often) expensive settlements

# Contact details

## Q&A



### **Hugo Keulers**

Partner

Insurance and Reinsurance

T. + 32 2 787 91 40

[hugo.keulers@lydian.be](mailto:hugo.keulers@lydian.be)



### **Sandra Lodewijckx**

Partner

Insurance and Reinsurance

T. + 32 2 787 90 33

[sandra.lodewijckx@lydian.be](mailto:sandra.lodewijckx@lydian.be)



### **Alexander Hamels**

Associate

Insurance and Reinsurance

T. + 32 2 787 90 22

[alexander.hamels@lydian.be](mailto:alexander.hamels@lydian.be)



# Onze kantoren



## Antwerpen

Arenbergstraat 23  
2000 Antwerpen  
T +32 3 304 90 00  
F +32 3 304 90 19



## Brussel

Tour & Taxis  
Havenlaan 86C/b113  
1000 Brussel  
T +32 2 787 90 00  
F +32 2 787 90 99



## Hasselt

Thonissenlaan 75  
3500 Hasselt  
T +32 11 260 050  
F +32 11 260 059

# LYDIAN



Stay in touch and join us at LinkedIn



[info@lydian.be](mailto:info@lydian.be)

[www.lydian.be](http://www.lydian.be)

**LEGAL INSIGHT. BUSINESS INSTINCT.**