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Insurance Litigation 2021

Belgium: Law & Practice
Hugo Keulers, Sandra Lodewijckx and Jo Willems
Lydian

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BELGIUM

Law and Practice

Contributed by:

*Hugo Keulers, Sandra Lodewijckx and Jo Willems
Lydian see p.9*



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1. RULES GOVERNING INSURER DISPUTES

1.1 Statutory and Procedural Regime

Insurance disputes in Belgium are resolved in accordance with the provisions of the Belgian Judicial Code. Belgium is a civil law jurisdiction. Therefore, the rule of precedent does not apply. In terms of substantive law, the 4 April 2014 Insurance Act (the “Insurance Act”) is extremely important and applies to all types of insurance contracts, with the exception of reinsurance contracts, marine insurance contracts and transport insurance.

Apart from the Insurance Act, some other specific Acts may also be applicable and important. The most relevant ones are (i) the 24 December 1992 Royal Decree on simple risks fire insurance, (ii) the 30 July 1979 Act on strict liability in case of fire and explosions, (iii) the Act of 21 November 1989 on third-party motor liability insurance, and (iv) the Royal Decree of 14 November 2003 on life insurance.

1.2 Litigation Process and Rules on Limitation

The litigation process is a contradictory process in which the rights of the defendant are fully observed. The defendant must be summoned in court by way of writ of summons and has the right to file defence by way of written pleadings and to be heard during oral pleadings. Examination and cross-examination of witnesses is very rare, but sometimes parties produce written witness statements in order to substantiate their (factual) arguments. Judges mostly take their decisions in insurance disputes on the basis of contemporaneous paper trail (including the insurance policy) and the final reports of court appointed experts after a contradictory investigation involving all parties and their experts. The general rules on limitation are laid down in the Civil Code and vary between five years to 20

years before a claim is time-barred, depending on whether the claim is based on contractual or non-contractual liability. In case of criminal prosecution, shorter limitation periods apply that vary depending on the type of crime that was committed. For insurance disputes, specific limitation periods are prescribed in an imperative manner in Article 88 and following of the Insurance Act. The limitation period in case of coverage disputes is three years, but particular rules on limitation apply in case of liability insurance.

In case of liability insurance, the statute of limitations of a coverage claim is also three years, but only starts to run on the date on which the injured party or victim has filed a legal claim against the insured (Article 88, §1, 3rd paragraph of the Insurance Act).

The direct action of the injured party against the liability insurer is time barred five years after the damage causing act, or a crime, if one has been committed (Article 88, §2, 1st paragraph of the Insurance Act), took place. However, if the injured party can prove he/she became aware of his/her direct action right against the liability insurer on a later date, the statute of limitations will start to run as from that later date (Article 88, §3, 2nd paragraph of the Insurance Act).

1.3 Alternative Dispute Resolution (ADR)

ADR in Belgium basically comes down to mediation. Belgian law does not (yet) know the concept of court ordered or imposed mediation. It largely depends on the judge sitting on the bench whether he or she will promote mediation to the parties at dispute. Overall, mediation is not (yet) very popular or used, probably because many disputes are settled without the assistance of a mediator.

2. JURISDICTION AND CHOICE OF LAW

2.1 Rules Governing Insurance Disputes

Jurisdiction disputes between Belgian policyholders/insurers and EU insurers/policyholders are governed by the Brussels I bis Regulation which contains specific provisions on insurance disputes, in essence leaving a large choice for policyholders and insureds to sue insurers before the courts of their own country (Article 11(1b) of the Brussels 1 bis Regulation) or in the courts of the place where the damage causing act was committed (in case of liability insurance) or where the loss occurred (in case of property insurance) (Article 12 of the Brussels I bis Regulation). However, these protective provisions do not apply in case of so-called “large insurance risks” (Article 15(5) and Article 16(5) of the Brussels 1 bis Regulation). In case of disputes with non-EU insurers, it must first be established whether an international treaty on this subject is in place or not. This is very seldom the case. If there is no relevant international treaty in place, the jurisdiction rules of the Belgian International Private Law Code will apply. As to the applicable law, the provisions of the Rome I Regulation on the law applicable to international contracts will apply. This Regulation also has particular provisions to protect the interests of policyholders and insureds laid down in its Article 7. These protective provisions in favour of the policyholder/insured, however, again do not apply in case of “large risks insurance contracts”, in which case the contractual freedom prevails (Article 7.2 of the Rome 1 Regulation).

2.2 Enforcement of Foreign Judgments

If a judgment is rendered by a foreign court of a country that is a member of the EU, the issue of enforcement is again regulated by the Brussels I bis Regulation and is rather straightforward. If it is rendered by another court and there is no

international treaty that applies (which is usually the case) then enforcement will have to be conducted on the basis of the provisions of the Belgian Judicial Code (“*exequatur*” requested from the President of the Court of First Instance) and will be far less straightforward to obtain.

Particular attention will then be given by the Belgian court to the observance of the rights of defence of all parties by the foreign court whose judgment is sought to be enforced in Belgium.

2.3 Unique Features of Litigation Procedure

International insurers must be aware that Belgian courts only very seldom allow witness evidence. Evidence is based on either contemporaneous paper trail (including the insurance policy) and final reports submitted by court appointed experts following a contradictory investigation which in complex cases may easily take more than one year (like in France). Therefore, the evidence value of reports drafted by party appointed experts and adjusters is very limited. Finally, court proceedings in Belgium will always be conducted in either French or Dutch. Depending on the court that rules on the matter, it may even be the case that evidence drafted in another language (including English, which is often the case for industrial risk or financial lines insurance contracts) must be translated by the parties into the language of the court proceedings (either French or Dutch). Sometimes, the court will oblige the parties to have such translation carried out by a “sworn” translator. This obviously increases the cost of litigation in Belgium.

3. ARBITRATION AND INSURANCE DISPUTES

3.1 Enforcement of Arbitration Provisions in Commercial Contracts

The arbitration provisions in commercial contracts of insurance and reinsurance are enforced by the courts because arbitration is a dispute resolution mechanism that is recognised and regulated by the Belgian Judicial Code, including the issue of enforcement of arbitral awards. Courts must declare themselves without jurisdiction if a valid arbitration clause is invoked by one of the parties before any substantive argument on the merits is raised (Article 1679, §1 of the Judicial Code).

3.2 The New York Convention

Belgium is a party to the New York Convention. Parties must file an enforcement request with the court of first instance of the place where the arbitration proceedings were conducted and the test applied by the court will be fairly limited. In essence, the court will check whether (i) the parties agreed to arbitration, (ii) whether the rights of defence of any of the parties were not violated, and (iii) whether the arbitration award does not violate any provisions of public order in Belgium. The party that was convicted may also apply to the same court to obtain a ruling setting aside or annulling the arbitral award (Article 1704 of the Judicial Code).

3.3 The Use of Arbitration for Insurance Dispute Resolution

Arbitration is not allowed in case of private insurance disputes on the basis of Article 90 § 1 of the Insurance Act, unless agreed after the dispute arose (which, in practice, never happens). It is allowed and often used in case of industrial risk insurance, financial lines, professional indemnity, casualty and reinsurance disputes. Both ad hoc arbitration and institutional arbitration (mostly Cepani, the Belgian arbitration and mediation

centre) are chosen by the parties in their policy conditions. In reinsurance contracts, Bermuda arbitration or the London Court of International Arbitration (LCIA) arbitration are often applied, usually in combination with Bermuda or UK law. These clauses are valid and enforceable in the context of a reinsurance agreement.

4. COVERAGE DISPUTES

4.1 Implied Terms

The mandatory provisions of the Insurance Act always apply, even in case of contradictory provisions in the insurance policy. Apart from that, good faith (Article 1134 of the Belgian Civil Code) may add further obligations upon policyholders, insureds and insurers. However, good faith is a rather limited source of additional obligations in insurance contracts governed by Belgian law.

4.2 Rights of Insurers

Insurers' rights are set out in great detail in Articles 57 to 62 of the Insurance Act. Depending on the importance of the non-disclosed, or falsely disclosed, information, the insurer may either obtain the nullity of the insurance contract or its payment obligation will be reduced to only reimbursement of the received insurance premium, but nothing more. In addition, the Insurance Act sets out in detail what rights the insurers further have in case of continuation of the insurance policy (increase of premium, modifications to the policy conditions, etc).

4.3 Significant Trends in Policy Coverage Disputes

The significant trend in the last 12 months is that in a number of matters where the Insurance Act was not really clear the Belgian Court of Cassation (the highest court for insurance disputes) decided in favour of the insured.

Furthermore, it seems that the insurance market is hardening, offering less possibility and less potential for commercial settlements in industrial risk/financial lines coverage disputes.

4.4 Resolution of Insurance Coverage Disputes

Many insurance coverage disputes get settled after negotiations between the policyholder, the broker and the insurer. The same is true for reinsurance disputes. This is because of commercial reasons, but also because the law is often unclear and the outcome of the dispute is therefore unpredictable. A further reason is the fact that litigation in Belgium may often take five years or more before a judgment (on appeal) will be rendered. Cases that need dispute resolution are either handled through the court system or through arbitration, but seldom via mediation.

4.5 Position if Insured Party Is Viewed as a Consumer

Insureds-consumers enjoy larger statutory protection under the Insurance Act but also under particular laws that apply to B2C contracts. In case of an insured-consumer, the competent court will not be the enterprise court, but the court of first instance.

4.6 Third-Party Enforcement of Insurance Contracts

Beneficiaries under life insurance contracts can sue insurers directly, as can insureds under collective insurance contracts. They have the required standing to act as plaintiff towards the insurer. Further, third parties have a direct claims right against casualty insurers on the basis of Article 150 of the Insurance Act. This applies in case of product liability insurance, public liability insurance, professional indemnity or D&O liability insurance. However, this does not apply in case of marine or transport (casualty) insurance contracts.

4.7 The Concept of Bad Faith

Good faith is presumed under Belgian law. That means that when a party wants to rely on bad faith, it will have the burden of proof. Unlike Anglo Saxon jurisdictions, most insurance disputes do not deal with the issue of whether a party acted in good or in bad faith. That is because there are detailed statutory provisions with specific sanctions in case of non-compliance in the Insurance Act.

More often, the Belgian courts and arbitration panels apply the test of whether an insured/insurer has behaved in a particular situation like any other “diligent and reasonable” insured would have behaved in the same or similar circumstances.

4.8 Penalties for Late Payment of Claims

There is only a specific penalty in case of third-party motor liability insurance contracts. Apart from that, insurers will only have to pay statutory interest on the principal amount. Only if an insured can prove that an insurer deliberately postponed payment in order to inflict specific damages on the insured, the insured will be able to obtain additional damages from the insurer.

4.9 Representations Made by Brokers

The broker is considered to act on behalf of the insured. Therefore, the insured will be bound by the representations made by its broker. If these representations later appear to be false or incorrect, the broker may face a professional indemnity claim from the insured. The situation is different in case of an (underwriting) agent, who typically is considered to act on behalf of the insurer.

4.10 Delegated Underwriting or Claims Handling Authority Arrangements

Underwriting delegation and claims handling authority arrangements apply, especially in case

of marine insurance and third-party motor liability insurance. The existence of these arrangements does not in itself lead to any specific or particular litigated issues.

5. CLAIMS AGAINST INSUREDS

5.1 Main Areas of Claims where Insurers Fund the Defence of Insureds

In property subrogation claims, property insurers often pay the lawyers and expert fees, even if deductibles are rather high. A second example of insurers funding the defence of insureds are covered claims under casualty insurance. Article 146 of the Insurance Act obliges casualty insurers to pay for the defence costs of their insured, which includes lawyers' and experts' fees, and also judicial costs.

Also, in case of an insured liability, the liability insurer has a statutory obligation to take the lead at its own expense in the defence against the claim initiated against its insured (Article 143 of the Insurance Act).

5.2 Likely Changes in the Future

For many years there have been rumours of making litigation aid insurance contracts mandatory for all Belgians, but so far this has not been implemented. Apart from that, there are not many changes that are expected to take place in this system.

5.3 Trends in the Cost or Complexity of Litigation

Litigation funding products and offerors appear to become more active, but do not yet seem to have found their way into insurance (coverage) disputes. That aside, the court rules on reimbursement of lawyers' fees in large commercial disputes are not expected to (significantly) change in the next few years.

5.4 Protection against Costs Risks

Protection against costs risk insurance products are not yet widely known or established in the Belgian market. It will have to be seen to what extent they may become more popular or in demand in the future. So-called litigation aid insurance has existed for many years, usually in connection with other insurance products (third-party motor liability insurance, fire insurance, etc).

6. INSURERS' RECOVERY RIGHTS

6.1 Right of Action to Recover Sums from Third Parties

Article 95 of the Insurance Act confers statutory subrogation claims to insurers.

6.2 Legal Provisions Setting Out Insurers' Rights to Pursue Third Parties

Insurers have a right of recourse against third parties liable for an insured loss, or liable towards the insured. Insurers can exercise such claim either in the name of the insured or in their own name, depending on whether they already made payments at the time they filed such a claim against the third party.

7. IMPACT OF COVID-19

7.1 Type and Amount of Litigation

The pandemic does not appear to have had any impact on the type of amount of litigation and insurance-related litigation. Neither has there been an important portion of COVID-19 coverage disputes in Belgium, mainly because there were not many business interruption policies entered into which provided cover for business interruption losses without any evidence of physical loss being required. Also, the Belgian legislator has not obliged insurers to pay pan-

demographic losses which normally under the policy conditions were not insured.

7.2 Forecast for the Next 12 Months

No immediate changes in relation to litigation amounts are expected in the next 12 months. However, following the July 2021 floods, especially in the Walloon region, property insurers had to make a deal with the Walloon region to pay out higher damages than provided as a limit in their policy conditions.

7.3 Coverage Issues and Test Cases

A limited number of coverage disputes on COVID-19 losses are currently pending before various Belgian courts, but have not yet led to any (published) case law. Because most, if not all, business interruption policies only provide cover in case of a physical damage, there has not been a great number of cases before Belgian courts. We are only aware of one case in relation to an event cancellation policy and one case in relation to a limited property and business interruption cover in an environmental liability insurance policy. No judgments, however, have yet been rendered in these cases.

7.4 Scope of Insurance Cover and Appetite for Risk

In certain policies (for instance event cancellation or property), insurers are careful to stipulate an exclusion for pandemic losses in general and COVID-19 losses in particular. Particular orders by the regulator prohibit such clauses in health-care insurance policies.

8. CLIMATE CHANGE

8.1 Impact on Underwriting and Litigating Insurance Risks

Belgium has devised a specific statutory contribution regime in case of natural disasters, which does not appear to have properly functioned in the case of the extreme floods in Wallonia in July 2021. Insurers will pay losses even in excess of their insured limits upon political pressure, which may have an impact on future underwriting appetite or policy conditions (in particular, insurance premiums), as well as on reinsurance.

9. SIGNIFICANT LEGISLATIVE AND REGULATORY DEVELOPMENTS

9.1 Developments Affecting Insurance Coverage and Insurance Litigation

To date, no significant legislative or regulatory developments that may affect insurance coverage, insurance litigation or claims have been identified. However, it is not excluded that they will be enacted in the near future, in particular in relation to climate change and perhaps also in relation to certain pandemic coverages.

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through excellent legal insight and strong business instinct. The firm is committed to exceeding expectations, delivering consistent results and forging long-term relationships with industry leaders. Every year, Lydian is recognised by major legal directories for its achievements and performances, both departmental and as a full-service law firm.

AUTHORS



Hugo Keulers is a partner in the commercial and dispute resolution practices and heads the insurance and reinsurance team. Hugo has a particular focus on large, complex liability

and insurance claims; commercial law; and commercial litigation/arbitration. Hugo is the trusted adviser of a large number of international and Belgian insurers and reinsurers, brokers and specialist firms and has been involved in most of the largest and high-value insurance disputes in Belgium in the last 25 years. With over 25 years of experience in commercial law and commercial litigation, he regularly advises on liability and insurance claims in such areas as all risk property, construction all risk insurance, ALOP insurance, D&O, professional indemnity and product liability insurance. He is one of the few Belgian lawyers with experience in handling complex insurance and reinsurance disputes, in all lines of insurance, before Belgian courts and arbitration panels. As he often represents international clients, he is very well aware of the cultural and legal differences in commercial contracts between Belgian and non-Belgian companies. Hugo also handles arbitration and mediation cases. He has acted as counsel, arbitrator and mediator.



Sandra Lodewijckx is a partner in the commercial and dispute resolution practices and heads the insurance and reinsurance team. Sandra has a particular focus on insurance law, liability

issues, pensions law, and litigation. With six years' experience with ING Insurance (now Vivium), Sandra combines direct sector experience with a legal perspective, giving her a unique view and understanding of the issues confronting her clients. Her clients include Belgian and international insurance and reinsurance companies, professional organisations, mutual societies and insurance intermediaries. She advises and litigates in the fields of life and non-life insurance, distribution of insurance products, including new distribution forms, regulatory, compliance and corporate governance, reinsurance, corporate insurance and transfer of portfolios, the development of new insurance products and review of policy wording and premium insurance tax. She has in-depth knowledge of the Insurance Distribution Directive (IDD) and maintains excellent contact with insurers, actuaries, academics, insurers' associations and control authorities.



Jo Willems is counsel in the commercial and litigation practice. Jo has a particular focus on dispute resolution, drafting (inter)national commercial contracts, and corporate/insurance litigation. Jo works with clients to prevent and resolve commercial disputes, by drafting effective agreements or enforcing those agreements by litigation. Jo specialises in commercial law and litigation and has extensive experience of acting for clients in strategically important disputes. He assists clients in litigation as well as matters of distribution, product liability, consumer protection and professional indemnity.

Lydian

Havenlaan 86c b113 - Avenue du Port
1000 Brussels
Belgium

Tel: +32 3 304 90 08
Fax: +32 2 787 90 99
Email: info@lydian.be
Web: www.lydian.be

