

INSURANCE LITIGATION

Belgium



Insurance Litigation

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Quick reference guide enabling side-by-side comparison of local insights, including into preliminary and jurisdictional considerations; interpretation of insurance contracts; providing notice; duty to defend; standard commercial general liability policies; first-party property insurance; directors' and officers' insurance; cyber insurance; terrorism insurance; and recent trends.

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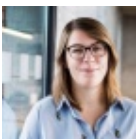
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PRELIMINARY AND JURISDICTIONAL CONSIDERATIONS IN INSURANCE LITIGATION

Fora

In what fora are insurance disputes litigated?

In the Belgian judicial system, insurance disputes are litigated in the civil courts.

The Belgian civil court system is organised at three levels.

Civil legal actions are first settled by district courts, meaning the Court of First Instance for general civil matters, the Labour Law Court for employment matters and the Commercial Court for disputes between companies. Insurance disputes in particular could be handled by both the Court of First Instance and by the Commercial Court. Insurance disputes related to motor vehicle liability insurance policies in cases of traffic accidents could also be handled by the Police Court.

Small claims with a value of less than €5,000 and certain specific legal matters (eg, civil and commercial leases) are handled by the Justice of the Peace. This court could handle insurance disputes as well.

First instance judgments by the district courts or the Justice of the Peace may, in most instances, be appealed.

Appeals against judgments rendered by the Justice of the Peace are handled by the district courts. Appeals against district courts judgments are handled by the Belgian courts of appeal.

Finally, courts of appeal decisions can be overturned by the Supreme Court, although the Supreme Court is not to be seen as a court of third instance: the Supreme Court shall limit itself to purely legal issues (eg, respect of procedural rules), thereby avoiding any interpretation of the facts of the case.

Insurance disputes could also be litigated through arbitration. Arbitration is often used in industrial risk and financial lines coverage disputes, where it is legally valid to provide for arbitration in the insurance contract.

Causes of action

When do insurance-related causes of action accrue?

Possible insurance causes of action include:

- disputes regarding the refusal of coverage by the insurer;
- the extent of coverage;
- non-payment of premiums by the insured;
- validity and enforcement of insurance policies;
- termination of the insurance agreement;
- interpretation of policy provisions;
- subrogation claims; and
- defence work of insured claims.

Preliminary considerations

What preliminary procedural and strategic considerations should be evaluated in insurance litigation?

Parties should consider the chances of success of their litigation based on their position, the applicable law, the competent forum and the available (written) evidence (on both sides). The procedural costs and lawyer fees relating to (court) proceedings should also be taken into account. In industrial risk and financial lines coverage disputes, commercial considerations are often also important and lead to settlement.

Damages

What remedies or damages may apply?

In contractual disputes – such as those regarding insurance policies – remedies or damages usually consist of the performance of the contractual obligations or a monetary equivalent thereto. Interest can be added to these monetary damages.

Under what circumstances can extracontractual or punitive damages be awarded?

Extracontractual damages – such as indirect or consequential damages – can be awarded on the condition that the claimant proves that it has suffered such damages and on the condition that the potential liability for such damages is not contractually excluded.

Belgian civil law does not award punitive damages. However, a court can condemn a party for the abuse of rights when the initiation of legal proceedings would be considered reckless. However, this is only very seldom allowed by Belgian courts.

INTERPRETATION OF INSURANCE CONTRACTS

Rules

What rules govern interpretation of insurance policies?

The interpretation of insurance policies is governed by the general interpretation rules in the Belgian Civil Code. Additionally, the Insurance Act of 4 April 2014 (IA) provides for a specific interpretation rule: in case of doubt on the meaning of a clause in a policy, the interpretation most favourable to the policyholder or insured party will prevail. This specific interpretation rule, however, does not apply to large risks as defined in article 13, paragraph 27 of the Solvency II Directive. In that case, the common intention of both parties will prevail under article 1156 of the Civil Code .

Ambiguities

When is an insurance policy provision ambiguous and how are such ambiguities resolved?

There is no hard-and-fast rule in Belgian jurisprudence to decide when an insurance provision is ambiguous. The courts will decide on a case-by-case basis. Additionally, the IA requires the general and special terms and conditions of insurance policies to have clear and precise wording. The terms and conditions cannot contain a clause that would breach the equality between the insurer and the policyholder. Finally, the wording must also be in conformity with the many mandatory law provisions on insurance contract law contained within the IA. The solution will be in the interpretation of the ambiguous provision, either in favour of the insured party for small risks or according to both parties' intentions for large risks.

NOTICE TO INSURANCE COMPANIES

Provision of notice

What are the mechanics of providing notice?

Providing notice of a claim can, in principle, be done by any means of communication (email, letter, registered letter, telephone), but a written notification is advisable for evidence purposes. In accordance with article 74 of the Insurance Act of 4 April 2014 (IA), the insured party must provide notice of a claim as soon as possible and in accordance with the time limits stipulated in the policy.

Obligations

What are a policyholder's notice obligations for a claims-made policy?

Notice of a claim must be done as soon as possible and in accordance with the time limits stipulated in the policy. In principle, the receipt of a claim from the third party by the insured party or policyholder, or by the insurer (Belgian insurance law grants the third party direct action against the liability insurer, so that the third party can send a claim directly to the insurer) is the trigger under a claims-made policy.

Timeliness

When is notice untimely?

A notice will be untimely when it is done outside the time limits stipulated in the policy (eg, 10 days after the occurrence of damage or after receipt of a claim from a third party).

However, article 74 of the IA states that the insurer cannot rely on an untimely notice (eg, later than 10 days) when the notice has been made as soon as reasonably possible.

What are the consequences of late notice?

Sanctions for late notice are governed by article 76 of the IA.

If the insured party fails to comply with one of the obligations imposed on him or her by article 74 (notification in due time) and the insurer suffers a loss as a result, the insurer may claim a reduction in its benefits up to the amount of the damage suffered. However, we note that – depending on the circumstances – it can be difficult for the insurer to prove actual damage following a late notice.

The insurer may refuse cover if the insured party has failed to comply with his or her obligations with fraudulent intent. We note that the burden of proof for fraudulent intent is very high in practice.

INSURER'S DUTY TO DEFEND

Scope

What is the scope of an insurer's duty to defend?

For liability insurance policies, article 143 of the Insurance Act of 4 April 2014 (IA) imposes a duty on the insurer to take the lead in the dispute or litigation from the moment the insurer is obliged to provide cover and to the extent that it is

invoked. Taking the direction of the dispute or litigation means that the insurer is obligated to 'stand behind' the insured party within the limits of the cover and that the insurer is entitled – to the extent that the interests of the insurer and the insured party align – to contest the claim of the third party in the place of the insured party. The insurer also has the right to decide to settle the third party's claim outside of court litigation.

Article 146 of the IA imposes a duty on the insurer to pay the defence costs and expert fees, even above the insured limit, but only to the extent that those costs were incurred by the insurer or with its consent or, in the event of a conflict of interest not attributable to the insured, to the extent that those costs were not unreasonably incurred. Depending on the type of policy, the insurer can include a cap on the payment of defence costs and expert fees in the insurance policy. Such a cap is, for example, not allowed in motor vehicle liability insurance policies. It is important to stress that, when allowed, the cap must be expressly written into the policy conditions to be valid and enforceable.

Failure to defend

What are the consequences of an insurer's failure to defend?

The IA does not provide for an explicit sanction in cases in which the insurer would breach his or her duty to defend. Relying on general civil law principles, the insured party or policyholder could claim compensation from the insurer if the insurer's failure to comply with articles 143 and 146 of the IA is unlawful and to the extent that the insured party or policyholder has suffered damages.

STANDARD COMMERCIAL GENERAL LIABILITY POLICIES

Bodily injury

What constitutes bodily injury under a standard CGL policy?

In general, the definition of bodily injury is rather broad in general liability policies: it refers to any impairment of the physical integrity of a person or of a body, of which the cause or one of the causes is sudden and not related to the injured party itself (ie, excluding pre-existing conditions).

Property damage

What constitutes property damage under a standard CGL policy?

In general, property damage refers to any kind of direct material or physical damage to goods.

Occurrences

What constitutes an occurrence under a standard CGL policy?

The terms 'loss occurrence' or 'occurrence' are not defined in the Insurance Act of 4 April 2014 (IA). In general, an occurrence of loss requires that the loss or damage has manifested itself or has become obvious to the victim who has suffered the damage.

How is the number of covered occurrences determined?

The number of covered occurrences must be determined in the general or special conditions of the policy. This is

linked to whether the maximum insured limit applies per occurrence or per year (annual aggregate), or a combination of both. A specific point of attention is the definition of what constitutes a serial loss, and which insured limit and own risk applies to such a serial loss. None of these concepts are defined in Belgian legislation, nor is there any published case law that gives a more extensive definition to these concepts.

Coverage

What event or events trigger insurance coverage?

Article 142 of the IA allows for two types of liability coverage: loss occurrence coverage and claims made coverage.

Under loss occurrence coverage, there is cover for loss that has occurred during the existence of the policy, including claims that were launched after the termination of the policy.

Claims made coverage is only allowed for certain types of liability policies. It must provide cover for claims that have been made to the insured party or the insurer during the existence of the policy for loss that has occurred during the existence of the policy. In such a claims-made coverage, there is mandatory cover for sunset clauses, which are defined as:

- claims made against the insured party or insurer within 36 months following the termination of the policy, when these claims are related to loss that has occurred during the policy and this risk is not covered by the consecutive liability policy; and
- claims made against the insured party or insurer within 36 months following the termination of the policy, when they concern acts or facts that have occurred during the existence of the policy and of which the insurer was notified.

In the case of property insurance, the policy is triggered when a covered event has occurred and has caused insured property damage or business interruption loss to the insured party, or both.

How is insurance coverage allocated across multiple insurance policies?

Article 142 of the IA provides for a regime of sunset clauses where a liability insurer can be, under certain circumstances, obliged to provide cover for claims made against the insured party or the insurer after the termination of the policy, when these claims are related to loss that occurred during the policy and this risk is not covered by the following liability policy.

More generally, article 99 of the IA contains a regime for the coexistence of insurance policies that allows the insured party to claim compensation (up to the amount of damage actually suffered and up to the insured limit) from the insurer of his or her choice. In such a case, the insurers will then divide the compensation among themselves based on either the allocation key provided in article 99, section 2 of the IA or based on other (sector) agreements between them.

FIRST-PARTY PROPERTY INSURANCE

Scope

What is the general scope of first-party property coverage?

In general, first-party property coverage will seek to cover the losses suffered by the insured party or the policyholder and will compensate the insured or policyholder according to the indemnity principle. This means that the insured party

or policyholder cannot claim more compensation than the losses he or she has suffered. First-party property coverage will in most cases include cover for direct physical and material damages, and can also include cover for business interruption losses.

Valuation

How is property valued under first-party insurance policies?

In principle, parties are free to determine how they value property under first-party insurance policies: they can opt for a reinstatement value, a repair value or a replacement value, even without deducting depreciation for age (article 107 of the Insurance Act of 4 April 2014 (IA)).

There are, however, specific rules on the valuation of property and the determination of the insurance payment for insurance policies against fire covering simple risks. The qualification as a 'simple risk' is related to the valuation of the property that is insured. In general, industrial or commercial risks do not qualify as simple risks.

Natural disasters

Is insurance available in your jurisdiction for natural disasters and, if so, how does it generally operate?

Under Belgian law, insurers of property insurance policies against fire covering simple risks are under the obligation to provide cover for the following natural disasters, in accordance with articles 123–132 of the IA:

- earthquakes;
- flooding;
- overflowing or the backfilling of public sewers; and
- landslides or subsidence (including drought damage).

The regime on the insurance of natural disasters includes mandatory rules on the exclusions that are allowed, the temporal and material scope of the cover, the own risk, and the insured amounts.

DIRECTORS' AND OFFICERS' INSURANCE

Scope

What is the scope of D&O coverage?

A directors and officers (D&O) insurance policy generally covers directors and supervisory directors of a company – and possibly the company itself (side B cover) – against the costs of claims for compensation for damage caused by the actions or omissions of the aforementioned persons.

Litigation

What issues are commonly litigated in the context of D&O policies?

In recent years, we have seen an increase in claims and litigation against directors and officers. As Belgian insurance law grants injured third parties direct action against the liability insurer, this also results in increased claims against

D&O insurers. Often D&O claims are based on fraud, embezzlement and market manipulation by directors and officers, which are the subject matter of criminal investigations.

In the immediate future, we expect more D&O claims, taking into account the losses related to several specific and complex issues that directly impact companies, directors and officers, such as the covid-19 pandemic, cyber risks, and developments in legislation on environmental, social and governance (ESG) practices.

Losses related to such issues (eg, business interruption, data breaches or compliance issues) have resulted in coverage disputes and litigation under D&O policies. These issues continue to develop, and create additional risks and potential exposure for directors and officers, as they are expected to follow up and implement new legislation and policies on the pandemic, cyber risks and ESG practices. However, none of this had led until today to any published case law on D&O coverage disputes.

CYBER INSURANCE

Coverage

What type of risks may be covered in cyber insurance policies?

There are many cyber insurance policies available on the Belgian market, which differ greatly in coverage, scope and premium. An important point of attention is the general scope of the policy and the question of whether or not the policy is limited to covering the insured party's or policyholder's own damage in the case of a cyber risk, or whether the policy includes a liability cover, providing coverage for third party damages or losses arising from data breaches and other cybersecurity issues (such as ransomware, Trojan Horse, etc). Most policies provide cover for ransomware and penalties, but not for criminal penalties.

Litigation

What cyber insurance issues have been litigated?

Litigation on cyber insurance policies and cyber coverage disputes are very often related to the interpretation of the policy wording. This is linked to the fact that a cyber insurance policy is a very technical policy that requires the assistance of technical experts during the underwriting process, as well as during claims handling.

We also note that technology is currently evolving at such a rapid pace that it will be necessary to review and assess the wording of cyber insurance policies more frequently to ensure that the wording is up to date and sufficiently clear. Also, this market is becoming more and more of a hard insurance market because of the many losses caused by hacking in the last few years, where finding sufficient insurance capacity is not a straightforward matter.

TERRORISM INSURANCE

Availability

Is insurance available in your jurisdiction for injury or damage caused by acts of terrorism and, if so, how does it generally operate?

Insurance cover for acts of terrorism is governed by the Law of 1 April 2007 . The basic premise is that insurance policies can exclude terrorism from cover if they use precise and clear wording, except for those risks listed in article 10, section 2 of the Law of 1 April 2007 for which terrorism cover is mandatory.

The risks on this list of mandatory cover include insurance cover for simple risks, mandatory motor vehicle liability

insurance, occupational accident insurance and risks in classes 1 (accidents), 2 (sickness) and 21–22 (life insurance).

UPDATE AND TRENDS

Key developments of the past year

Are there any emerging trends or hot topics in insurance law in your jurisdiction?

There are currently a few topics in the pipeline of the Belgian legislator related to insurance law.

There are two legislative proposals pending in the Chamber of Representatives related to the modification of the rules regarding the termination notice of insurance contracts (article 85 of the Insurance Act of 4 April 2014).

The first proposal dates from 2019 and aims to make it possible for consumers to terminate their insurance contracts after a period of one year without any costs or penalties, without having to take into account the expiry date of their insurance contracts. In 2021, amendments were submitted in the Chamber of Representatives to revive this legislative proposal.

The second proposal dates from December 2021 and concerns car insurance. It aims to foresee a 'uniform notice service', according to which the future insurer can take care of the notice on behalf of the insured party who has decided that it would like to switch from one insurer to another. The new insurer would also have to guarantee the continuity of the insurance coverage for the insured party.

Another topic that is at the forefront of regulatory attention concerns sustainable financing in the insurance industry: the European Insurance and Occupational Pensions Authority, the independent advisory body to the European Commission, published its points of interest on 7 December 2021 (eg, integration of sustainability risks in the prudential framework of insurers). The focus on sustainability will most definitely have an impact on the conduct of Belgian insurers. However, this concerns almost exclusively regulatory aspects, which might have no direct impact on insurance litigation.

Jurisdictions

	Belgium	Lydian
	Brazil	Pinheiro Neto Advogados
	Chile	Jorquiera & Rozas Abogados
	China	AnJie Law Firm
	Egypt	Shalakany Law Office
	France	Kennedys Law LLP
	India	Tuli & Co
	Indonesia	Nurjadin Sumono Mulyadi & Partners
	Italy	DWF LLP
	South Korea	Cho & Lee
	Sweden	Wistrand
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