International
Comparative
Legal Guides

Practical cross-border insights into insurance and reinsurance law

Insurance & Reinsurance

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Industry Chapter

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

Belgium adopted a "twin peaks" model with two government bodies supervising (re)insurance companies:

- The National Bank of Belgium (NBB) is entrusted with the microprudential supervision (oversight of individual financial institutions) and macroprudential supervision (the proper functioning of the financial system as a whole). The supervision relates, *i.a.*, to the company's form and object, its organisation and governance and financial aspects (solvency, own funds, etc.).
- The Financial Services and Markets Authority (FSMA) is responsible for the protection of clients as well as the proper functioning and transparency of the financial markets. It also ensures that insurance companies correctly apply the applicable rules, including the Insurance Act of 4 April 2014 (Insurance Act). The FSMA is competent with respect to the control of, *i.a.*, the rules of conduct, insurance products, brokers and other service providers, etc.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Subject to a few exceptions, Belgian companies wishing to exercise the activities of an insurance or reinsurance company must be authorised by the NBB before commencing operations. Authorisation is granted per insurance class or per reinsurance activity (life or non-life). The formalities to be fulfilled and conditions to be met are laid down in:

- the Law of 13 March 2016 on the status and supervision of insurance and reinsurance undertakings (the implementation of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance; Solvency II Directive); and
- the Royal Decree of 22 February 1991 containing the general regulation on the supervision of insurance undertakings.

Further guidance on the authorisation process can be found in the "Memorandum on application for authorisation by an insurance or reinsurance company under Belgian law", which can be found on the website of the NBB.

The authorisation procedure typically consists of two phases. Phase 1 is optional and is meant to enable the NBB to make a preliminary analysis of the dossier submitted in support of the application for authorisation. In this context, the applicant will have to share information with respect to its company form, the business it will be doing (the classes of insurance/the reinsurance activities), its governance and organisation, and its financials (e.g. minimal capital requirements). At the end of this phase, the NBB will notify the applicant on whether there are difficulties hindering the successful outcome of the project. Phase 2 is the implementation of the project during which the applicant will, *i.a.*, incorporate the company and have to comply with a number of formalities (providing the NBB with a number of documents necessary for the authorisation to be granted).

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

According to the EU single passport regime, EEA insurers are entitled to write business in Belgium either under their right of establishment (via the opening of a Belgian branch) or under the freedom to provide cross-border services, without having to obtain any specific authorisation from the NBB. In general, non-EEA insurers wishing to write business in Belgium will be required to open a branch in Belgium for which they will need authorisation from the NBB.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Part 3 of the Insurance Act contains various provisions regarding the offering and conclusion of insurance contracts (in general). These are mandatory and supersede conflicting terms and conditions, agreements and specific clauses. In addition to this, the government may, after consulting the FSMA, adopt certain rules with regard to the conclusion of specific insurance agreements (this has, *i.a.*, been done with respect to household insurance, fire insurance and life insurance).

Part 4 of the Insurance Act contains numerous provisions for land insurance that govern the relationship between the insurer and the insured/policyholder. These provisions are mandatory unless they specify that the parties can deviate from them. Some of these aim at protecting the insured/policyholder, whereas others protect the insurer.

In addition to this, for contracts entered into as from 1 January 2023, parties may also rely on a new general rule provided for in Book V (Obligations) of the new civil code. It provides that any clause that cannot be negotiated and creates a manifest imbalance between the rights and duties of parties is unfair and must be deemed unwritten.

In addition to this, policyholders/consumers can also rely on extensive market practice and consumer protection legislation. These include provisions with regard to unfair contract terms.

1.5 Are companies permitted to indemnify directors and officers under local company law?

The new Code on Companies and Associations prohibits companies, their affiliates or entities under its control undertaking in advance to indemnify directors and officers for their liability *vis-à-vis* the company or third parties. Any provision to the contrary in the by-laws, an agreement or any unilateral commitment shall be deemed unwritten.

1.6 Are there any forms of compulsory insurance?

There are a number of compulsory insurances in Belgium. A list can be found on the website of the FSMA – https://www.fsma.be/fr/liste-des-assurances-obligatoires.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

In general terms, the substantive law on land insurance is more favourable to insureds than the law on non-land insurance. The Insurance Act also contains an "*in dubio contra assicuratorem*" provision (on the basis of which unclear stipulations must be interpreted against the insurer), but it does not apply to certain large risks.

2.2 Can a third party bring a direct action against an insurer?

A third party can bring a direct action against a liability insurer.

2.3 Can an insured bring a direct action against a reinsurer?

In principle, no.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

At the conclusion of a land insurance policy:

- in case of *wilful* misrepresentation or non-disclosure that leads to an incorrect assessment of the risk by the insurer: the contract is null and void. The premiums due until the time when the insurer became aware of the wilful misrepresentation or non-disclosure remain payable to it; and
- in case of *unintentional* misrepresentation or non-disclosure: the insurer may, within one month of becoming aware of the misrepresentation or non-disclosure (i) cancel the policy if it proves that it would not have insured the risk, or (ii) propose a modification to the policy. If the insured does not accept the proposed modification within one month, the insurer may cancel the policy within 15 days.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

At the time of the conclusion of the contract, the insured must declare all circumstances known to it that should reasonably be considered relevant to the insurer for assessing the risk. It does not have to declare the circumstances that the insurer knows or ought to know.

During the period of insurance, the insured must declare new or changed circumstances that are likely to significantly and lastingly increase the risk of the insured event occurring.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

With respect to indemnity insurance, the insurer is legally subrogated in the rights and actions of the insurer or beneficiary – up to the indemnity paid – against third parties liable for the damage.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The competent court is determined based on, *i.a.*, the amount at stake (the "*Vrederechter*"/"*Juge de Paix*" rules on claims not exceeding EUR 5,000) and the identity of the parties. The "*Ondernemingsrechtbank*"/"*Tribunal de l'entreprise*" takes cognisance of lawsuits between undertakings, whereas lawsuits between non-undertakings or between a non-undertaking and an undertaking are settled by the "*Rechtbank van eerste aanleg*"/"*Tribunal de première instance*" (a non-undertaking may, however, decide to bring its claim against an undertaking before the "*Ondernemingsrechtbank*"/"*Tribunal de l'entreprise*").

There is no right to a hearing before a jury.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

Apart from a contribution to the budget fund for second-line legal aid – EUR 24 – no court fees are payable in order to commence proceedings.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The duration depends largely on the court seized and other factors (such as the number of parties, whether an expert investigation has been ordered, etc.). Commonly, court proceedings (at the level of first instance) can last between one and three years.

3.4 Does COVID-19 have, or continue to have, a significant effect on the operation of the courts, or litigation in general?

No, COVID-19 currently does not have a significant effect on the operation of the courts, or litigation in general.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Under Belgian law, any court has the power to order a party or a third party to produce a document if there are serious, precise and concordant presumptions that this party holds a document containing the proof of a fact relevant to the case.

A fact is relevant to the case if it is useful to the outcome of the case. It is for the court to determine whether the production of the document is useful to make its decision.

Belgian law recognises that a party may have a "legitimate reason" to oppose the production of a document it is holding (trade secret, professional secrecy, etc.). Eventually, it is up to the courts to balance the right to evidence of the party seeking the production, with the fundamental rights of the party holding the document.

There is not procedure of discovery under Belgian law.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

In principle, everything (advice and documents relating thereto, documents prepared in contemplation of a litigation or negotiations, etc.) which is shared between a Belgian lawyer and its client is protected by professional secrecy and can be withheld from production. Communications between Belgian counsels are, in principle (and subject to a limited number of exceptions), confidential which means that they cannot be disclosed. It is therefore often advisable to conduct settlement negotiations/attempts via Belgian counsel.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

The courts can, upon request of a party or on its own motion, require witnesses to provide evidence on relevant and precise facts. A witness can refuse to give evidence based on a "legitimate reason" such as professional secrecy. If he/she fails to appear and has no legitimate reason, the witness may be sanctioned by a fine and, as the case may be, be ordered to pay damages.

The witness is heard in the judges' chamber. Questions are only put to the witness by the courts. There is therefore no formal cross-examination of the witness. However, the parties' counsels can suggest that the judge ask specific questions to the witness.

In theory, the witness examination can take place at the final hearing. However, more often than not, the parties will request to submit written briefs incorporating the witness evidence and the final hearing will take place afterwards.

It must be noted that witness evidence is seldom requested or ordered by the courts.

Besides the procedure of witness examination, witness evidence can also take the form of written statements (see question 4.4).

4.4 Is evidence from witnesses allowed even if they are not present?

A third party may submit a written statement on facts of which he/she has personal knowledge. Such written statement can be submitted by the parties or ordered by the courts.

The witness does not need to be present, unless the court decides to hear him/her.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

In Belgium, parties are free to submit reports drafted by unilaterally appointed experts, the evidentiary value of which is freely assessed by the court (the court will, *i.a.*, verify whether the investigation is carried out with due diligence and care, and whether the party-appointed expert offers guarantees of objectivity). There is, however, no specific procedure allowing them to call these experts as "expert witnesses" in order to provide evidence before these courts.

Experts are often appointed by the courts at the request of the parties or on their own motion. The courts can only appoint an expert if there is no other measure that is faster and more efficient. The mission of an expert is limited to making factual observations or issuing technical advice. He/she cannot be asked to provide an opinion on a legal question.

The court-appointed expert must be impartial and independent from both the parties and the court. In the conduct of his/her investigation, the expert must comply with the principle of due process. The courts freely assess the evidentiary value of the expert report: they can follow the expert's opinion (in full or in part); or reject it entirely.

4.6 What sort of interim remedies are available from the courts?

A motion to obtain interim measures can be filed either before the court ruling on the merits, or, by separate summary proceedings, before the president of the court (the applicant must then evidence an urgent need to obtain those). Broadly speaking, there are two types of interim measures: measures aimed at investigating the pending claim; and measures purported to resolve the situation of the parties temporarily. The appointment of an expert in order to determine the technical cause of an accident, assess its consequences and/or advise on the measures to be taken in order to limit further losses, and an order to produce documents relevant to the case are examples of the first type of measures. An order to pay out a provisional compensation to the insured/harmed parties and an order addressed to a credit risk insurer to further perform a (fixed-term) insurance contract until the court, ruling on the merits, has assessed the lawfulness of its early termination are examples of the second type of measure.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Any unsuccessful party can lodge an appeal against the decision of a court ruling in the first instance on the merits (subject to a few exceptions, such as low-value cases or certain types of decisions). The appellate judges decide *de novo* both in facts and in law. They can have regard to the decision of the lower court, but also to any new arguments and exhibits submitted by the parties at the appeal stage.

The decision in appeal can be appealed before the Supreme Court (*Cour de cassation/Hof van Cassatie*) but only on the ground of an incorrect application of the law.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

In liability insurance policies, the insured will on top of the compensation, in principle, owe "compensatory interests" to the harmed party in order to make good the delay in compensation. These interests start running without any need to send out a notice of default, are freely determined by the court and must be borne by the liability insurer even above the coverage limits (such coverage above the limits can however, to some extent, be limited contractually for any liability risks other than those covered by motor vehicle liability insurance). In property insurance policies and personal accident insurance policies (of a compensatory nature), where the insurer is obliged to pay a compensation upon occurrence of a loss/an injury, the insured can claim for late payment interests as from the moment that (i) he/she has put the insurer under notice, and (ii) his/her claim for compensation is payable (i.e. the insurer disposes of the necessary documents to assess it). Late payment interest is determined on the basis of the statutory interest for late payment, which is annually fixed by the government in accordance with article 2§1 of the Act of 5 May 1865 on Interest-Bearing Loans (it amounted to 1.5% *p.a.* for the year 2022).

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The successful party is not entitled to recover its actual costs but is entitled to an indemnity fixed by law. The amount of the indemnity depends on the amount at stake and the tribunal seized. The law specifies a base minimum and maximum amount. The courts can decrease or increase the base amount within the range, taking into account the financial capacity of the losing party, the complexity of the case, any contractual indemnity and whether the situation is manifestly unreasonable.

Making an offer to settle prior to trial does not entail specific advantages and will, normally, not be taken into account by the courts. Moreover, such offer will often be exchanged through counsels and as such will not be disclosable to the courts (see question 4.2 above).

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

If the courts consider that an amicable settlement is possible, it can compel the parties to mediate unless all parties object to it. The courts exercise this power frequently .

4.11 If a party refuses a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

There are no specific consequences.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The courts have limited powers to intervene in the conduct of an arbitration. Their intervention is limited to instances where the arbitral tribunal needs support from the courts or where the arbitral tribunal cannot or fails to act. The role of the courts is therefore to ensure the effectiveness of the arbitration.

Thus, the courts have certain powers in relation to: the appointment, challenge and replacement of arbitrators; the enforcement of interim measures ordered by an arbitral tribunal; interim and conservatory measures; measures for the gathering evidence requested by a party with the agreement of the arbitral tribunal; the determination of a deadline for issuing the award; and the correction, interpretation or supplementation of the award when the arbitrators can no longer be brought together.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

No specific form of words is required for an arbitration clause to be enforceable. Belgian law does not even require that the arbitration agreement be in writing or be signed by the parties. However, the parties' agreement to arbitrate must be certain. This agreement can be proven by any means.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

In principle, parties to a land insurance contract cannot agree to arbitrate prior to the dispute arising. By exception, an arbitration clause can be included in the following land insurance policies: (i) property insurance (other than in relation to simple risks) covering perils such as fire, explosions, storms, hail, frosts, natural disasters, landslides or nuclear energy; (ii) civil liability insurance, except those relating to motor vehicles, household insurance and fire (simple risks); (iii) financial losses relating to property referred to in (i); (iv) CAR insurance relating to property referred to in (i); and (v) risks covered on a supplementary or ancillary basis in work accident policies. When an arbitration clause is included in land insurance policies not included in this list, the courts will refuse to enforce it.

Parties can still validly include an arbitration clause in non-land insurance, i.e. transport insurance and reinsurance policies.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The courts may grant interim or conservatory measures before or during arbitral proceedings. The judge in summary proceedings has the same power of issuing such measures in relation to arbitration proceedings as it has in relation to proceedings in courts (see question 4.6 above). However, some consider that the judge in summary proceedings may only intervene if the arbitral tribunal is unable to order the requested measure efficiently and in a timely manner.

The forms of relief that can be obtained include, for instance, measures for preserving assets or evidence, the payment of a provision, the appointment of an expert, etc.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

When the seat of the arbitration is in Belgium, the arbitral

tribunal is required to give reasons for its award. This is the case even when the arbitral tribunal acts as *amiable compositeur*.

In order to comply with this requirement, the arbitral tribunal should give the reasons that determined its decision and respond to the grounds raised by the parties (without being required to address all the arguments in detail). It is, in principle, irrelevant whether the tribunal's reasons are legally correct.

When the arbitral tribunal fails to give reasons, its award may be set aside. The Belgian courts can also refuse to enforce foreign awards if the tribunal failed to give reasons while it was required to do so pursuant to the applicable procedural rules.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

The only judicial recourse available against an arbitral award is the setting-aside procedure. Such procedure does not lead to a review of the merits of the case and can thus not be equated to an appeal.

The grounds on which an arbitral award can be set aside are exhaustively listed in article 1717 of the Belgian Judicial Code, and are as follows:

- A party to the arbitration agreement was under some incapacity or the said agreement is invalid.
- The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case.
- The award deals with a dispute not provided for in, or not falling within, the terms of the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement.
- The award does not include reasons.
- The composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the applicable rules.
- The arbitral tribunal exceeded its powers.
- The subject-matter of the dispute is not arbitrable.
- The award is contrary to public policy.
- The award was obtained by fraud.

Some of these grounds will only lead to the setting aside of the award if (i) it is established that the irregularity had an impact on the award, or (ii) the party raised the issue during the course of the arbitration if it learnt about it then.

The parties may exclude the setting-aside procedure if none of them has: Belgian nationality; its domicile or residence in Belgium (natural persons); or its registered office or main place of business or a branch office in Belgium.

Oliver Stevens has a solid track-record representing financial institutions, public authorities, infrastructure operators and other large corporations before courts and arbitral tribunals. He advises and assists these clients in the fields of contracts and torts, banking and finance, insurance, corporate and insolvency law.
Over the years, Oliver has also acquired extensive experience defending investor mass claims and follow-on competition damages claims. He leads the insurance and reinsurance litigation team, which gained substantial market recognition in its handling of important insurance claims in various fields (terrorism, property, professional indemnity, credit insurance, financial lines, etc.). He has a registration as a Collaborative Lawyer, which entitles him to conduct collaborative negotiations.
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