Abstract

This article analyses the possible significance of arbitration in the insurance practice. It will assess the pros and cons of arbitration in the insurance practice. It follows from this assessment that arbitration as a dispute resolution mechanism offers opportunities for insurers, insured and injured parties (Chapter 2).

In Chapter 3 a model will be introduced by means of which it could be ensured that the three parties possibly involved in an insurance dispute (insurer, insured and injured person/claimant) have the legal relationships between them determined by arbitrators in a multi-party arbitration. This model will then be further assessed in the context of the pros and cons of arbitration discussed earlier (Chapter 4).

Key words: arbitration, insurance, third-parties, arbitration clause

1. ADR AND ARBITRATION IN THE INSURANCE PRACTICE

Relatively little has been published on arbitration in the insurance practice. A possible reason for this is that in such practice permanent arbitral tribunals are virtually non-existent. Arbitration in the sector primarily takes place on an ad hoc basis.

This article focuses on the possible significance of arbitration in the insurance practice. It is in this context that the pros and cons of arbitration in the insurance practice will be addressed. It follows from such assessment that arbitration as a dispute resolution mechanism offers opportunities for insurers, insured and injured parties (Chapter 2).

In Chapter 3 a model will be introduced by means of which it could be ensured that the three parties possibly involved in an insurance dispute (insurer, insured and injured person/claimant) have the legal relationships between them determined by arbitrators in a multi-party arbitration. This model will then be further assessed in the context of the pros and cons of arbitration discussed earlier (Chapter 4).

2. ARBITRATION IN THE INSURANCE PRACTICE: VARIOUS PROS AND CONS

The pros and/or cons of arbitration are often discussed in general terms. That generalist approach does not do justify the fact that the question whether arbitration is a suitable means of dispute resolution greatly depends on the circumstances of the case. Those circumstances may entail that arbitration will offer more pros (or cons) for one party than for the other. The question whether arbitration is a favourable or unfavourable means of dispute resolution for a party therefore depends on that party’s specific interest.

Although the pros of arbitration in a specific case therefore cannot be determined in a general sense, elements can be identified that (depending on the circumstances of the case) make arbitration suitable for the resolution of disputes on insurance law related matters. These elements are discussed below.

2.1. Expertise

The first issue that comes to mind in this respect is that of the expertise of the arbitrators involved. Disputes in the insurance practice often involve complex legal and factual relationships. That may apply to the legal...
relationship between the injured party and the insured injuring party (e.g. medical issues or other professional liability issues, building projects that have gone amiss), but also to the legal relationship between the insured and the insurer (coverage disputes, in which several insurers in several different jurisdictions may be involved). Coinsurance or excess programmes are often used in international programmes, for instance. This gives rise to potential conflicts between insurers.

Finally, there are situations in which the insurance policy provides that it must be interpreted in whole or in part on the basis of the national or international customs in the insurance practice. Also in that situation it should be considered advantageous if the arbitrators involved can be selected on the grounds of their specialist knowledge of the insurance practice in question. The latter may even be relevant in the absence of a specific clause to that effect in the insurance policy.

2.2. Speed and one-stop shop

Secondly, the expertise discussed in the above can accelerate the handling of the case. If the arbitral tribunal has pre- eminent expertise, there will be less need or desire to rely on third-party experts. That may result not only in an earlier (final) judgment, but also in lower costs.

The rendering of an award usually completes the arbitration process. Appeals in arbitration cases are exceptional. And although it is possible to litigate or to appeal in the context of the setting aside or the recognition and enforcement of arbitral awards, that is also unusual (The International Arbitration, 2008).

It is worthwhile to note that although the limited appeal possibilities in arbitration may be regarded as an advantage, it may of course also be a disadvantage. The merits of an unfavourable award generally cannot be (successfully) reassessed in appeal or setting aside proceedings.

2.3. Flexibility

A third reason why arbitration may be more efficient in the cases described above is the flexibility of the proceedings. Arbitration allows the parties involved to organise the proceedings in the manner that they consider most desirable. If they fail to reach agreement in that regard, it is up to the arbitrators to determine an efficient procedure. It is not unusual that the applicable arbitration regulations expressly instruct the arbitrators to organise and conduct the proceedings in an efficient manner in terms of cost and time (ICC Rules of Arbitration, 2012, Art. 22(1)).

2.4. Easy enforcement

Simplified enforcement of arbitral awards (on the basis of the New York Convention of 1958) is an advantage in international situations, particularly if one of the parties is located outside the European Union. Within the European Union Regulation 2001/44 applies, under which the recognition and enforcement of intra-European judgments and awards is also relatively simple.

Since insurers are setting up offices as part of a financial group in jurisdictions in which that Regulation does not apply, the issue of simplified recognition and enforcement of foreign arbitral awards is becoming increasingly topical and relevant.

2.5. Confidentiality

The confidential nature of arbitral proceedings is often referred to as an advantage of dispute resolution by means of arbitration. It should be noted in that regard that the trend in (international) arbitration is that the confidentiality of arbitral proceedings is no longer a matter of course (Blackaby, Partasides et al. 2009, para. 2.15). On the other hand Article 30 of the Rules of the London Court of International Arbitration, for instance, regulates the confidentiality of arbitration proceedings. And there's a number of decision in investment arbitration cases in which confidentiality has been considered a matter of due process.

2.6. Suitable arbitrators

On a final note, a disadvantage must be mentioned. It is sometimes said that in case of extensive disputes in the insurance practice all potential arbitrators are conflicted. In other words: insufficient independent expert arbitrators are available. That is a problem that has manifested itself in several jurisdictions. Lawyers who are primarily involved in insurance law are not available in abundance. This problem can be partly solved by extending the search to include lawyers involved in liability law.

1 Convention on the recognition and enforcement of foreign arbitral awards, New York, 10 June 1958.

2 Regulation of 22 December 2000 on the recognition and enforcement of judgments in civil and commercial matters, OJEC L 12/1.

3 For instance the Hrvatska Elektroprivreda d.d. v The Republic of Slovenia, ICSID Case No. ARB/05/24 and Rompetrol Group N.V. v Romania ICSID Case No. ARB/06/3.

2.7. Interim conclusion

It can be concluded from the above that arbitration has possible advantages for all the parties involved in an insurance related dispute (the insurer, insured and injured party). The question is therefore why arbitration is not being used more extensively in the insurance practice.

This question seems difficult to answer. Since disputes are becoming increasingly complex, and the groups of insurers increasingly international, a (relatively) speedy procedure that does justice to international customs and developments is an attractive alternative to dispute resolution by national courts. A great deal of time (and therefore money) can be saved particularly by including an expert in the insurance market and its customs in the arbitral tribunal. Such an arbitrator need not first be instructed about market practices before being able to properly assess the merits of the dispute. It is precisely the market practices (and the significance that insurers and specialised insurance brokers give to certain policy conditions (that have often been drawn up in the USA or at Lloyds)) that are crucial in correctly interpreting the relationship between an insurer and an insured.

Finally, it may be asked whether the objection regularly raised by insurers that arbitration does not allow appeal is indeed all that serious. It may ultimately be more important to obtain a speedy final award from an expert arbitrator (even if that award is disadvantageous) than a positive outcome that requires many years of litigation before inexperienced – and therefore unpredictable – local courts.

However, that does not yet answer the question how arbitration in the insurance practice can be organised. Cases in the insurance practice in which arbitration plays a part are usually complaint proceedings and disputes between insured and insurers (including reinsurers). Disputes regarding the liability of the (alleged) injured party in relation to the insured do not regularly appear to be submitted to arbitration.

In this context arbitration could play a part in this tripartite relationship, particularly on the basis of an “offer of arbitration” in the policy. This option will be the subject of further inquiry in the following.

3. THE OPTIONAL OR OPEN ARBITRATION AGREEMENT IN THE INSURANCE PRACTICE

3.1. Introduction

The optional or open arbitration agreement has been developed in the investment arbitration practice. It works as follows. A country (the “host country”) gives the undertaking in a treaty to, briefly stated, treat investors from another contracting country (the “home country”) fairly and equitably. If a dispute arises between the investor and the host country, the investor can opt under most investment treaties to submit the dispute to independent arbitrators. In that case the investor does not need to litigate in the host country.

This model will be briefly explained below insofar it concerns aspects that are relevant to the insurance practice.

Before the International Center for the Settlement of Investment Disputes (ICSID) was set up under the Convention of Washington of 1965, foreign investors were dependent on diplomatic and/or military protection from the home country (Blackaby, Partasides et al. 2009, 465–466). The establishment of the ICSID put an end to that. The ICSID is an arbitration institute that has a neutral arbitration forum for the resolution of disputes between foreign investors and the country in which the investment was made (the host country).

It is particularly relevant to this discussion that bilateral or multilateral investment treaties (BITs or MITs) to which an investor’s home country and the host country are parties allow that investor to submit disputes with the host country regarding the investment made to arbitration under the auspices of the ICSID. The BITs or MITs provide that the contracting countries offer to have future disputes regarding investments settled by arbitrators. If a dispute arises, the investor from the home country can take up that offer by applying for arbitration.

Host countries have argued in the past that instituting ICSID arbitration proceedings cannot be regarded as acceptance of the optional offer of investment arbitration in the BIT or MIT. The arbitral in the Generation Ukraine/Ukraine case tribunal made short work of that argument, finding that:

“[…] it is firmly established that an investor can accept a State’s offer of ICSID arbitration contained in a bilateral investment treaty by instituting ICSID proceedings. There is nothing in the BIT to suggest that the investor must communicate its consent in a different form directly to the State.”

For the record: an investor is not obligated to accept an offer of arbitration. It may also opt not to accept the offer and to apply to the competent court in the host country. Blackaby and Partasides note that applying to the national
court in the host country “would clearly be a last resort since it raises serious questions of neutrality of forum and ultimate enforceability of the judgment elsewhere” (Blackaby, Partasides et al. 2009, footnote 12 at 467).

An arrangement similar to investment arbitration is sometimes used in mergers that have possibly restricting effects on competition. In the context of merger control the European Commission can allow a proposed merger subject to the condition, among others, that specific third parties be made an optional offer of arbitration. In that case that offer relates to disputes regarding compliance by the merging parties with the substantive (competition law) conditions that the European Commission attaches to the merger. Also in that case the third party (injured party) is not required to accept the offer of arbitration. The third party is free, for instance, to institute complaint proceedings before the European Commission or civil proceedings before the competent local (civil) court (Radicati di Brozolo, 2008).

3.2. Application

The arrangement of the optional arbitration agreement discussed above may offer means of resolving in single (arbitration) proceedings disputes between the insurer, the insured and the injured party that files a claim against the insured. The optional arbitration agreement could be included in the policy and could be offered to the injured party by the insured party when potential claims arise. The injured party can then opt to accept the offer arising from the policy to present the dispute to arbitrators.

An example would be a physician who is held liable on the grounds of an (alleged) professional error. The often very technical nature of medical disputes, a possible limitation of the insurer’s liability and, in light of the latter, the risk of insolvency may be reason for the patient to accept the offer of tripartite arbitration made by the physician pursuant to the policy conditions.

The idea of the model is that if the injured party accepts such an offer of optional arbitration, the main stakeholders (the insured party, insurer and injured person) have the legal relationships between them established by arbitrators in tripartite arbitration proceedings. Since in that approach the arbitration agreement is concluded (or rather: perfected on the acceptance of the offer by the injured person) after the dispute to be submitted to arbitrators arose, assuming that the parties voluntarily undertake to submit the dispute to arbitration and the arbitral tribunal observes the fundamental principles, Article 6 of the ECHR is unlikely to be violated in respect of the tripartite arbitration (Kuijer, 2004).

This part of the article will focus on whether the pros and cons of arbitration addressed above in a general sense apply to tripartite arbitration in the insurance practice.

4.1. Expertise and availability of arbitrators

The expertise of specialised arbitrators is one of the advantages of an arbitration institute geared to the insurance practice. The national court does not always appear to be equipped in practice to settle complex insurance disputes, in which the policy provides that insurance law customs must be applied. A specialised arbitration institute geared to the insurance practice could offer a solution in that regard.

Specialisation is indeed an increasingly common trend in the arbitration practice – in both a substantive and a geographical sense. An example of the former are arbitration institutes focus on construction law
disputes,\textsuperscript{7} and the recently established P.R.I.M.E. Finance, which handles complex financial law arbitration cases.\textsuperscript{8} Examples of specialisation in a geographical sense are the relatively young arbitration institutes in Asia,\textsuperscript{9} but also the various local branches of more established arbitration institutes such as the ICC, which now also has offices in Hong Kong and New York.

Particularly in tripartite arbitration it can be an advantage to have one tribunal handle both the liability law question and the issue of coverage under the applicable policy.

An important qualification that should be made in this regard is Randall’s argument that, because of the relatively limited number of suitable arbitrators, insurance law arbitration can give rise to questions regarding the independence and impartiality of the arbitrators involved (Randall, 2004–2005). They will regularly represent (or litigate against) a specific insurer and may be inclined on that ground (with a view to future arbitration engagements) to argue in favour of their principal(s).

4.2. Flexibility

The issues of flexibility, speed and cost-efficiency in arbitration are partly related to the issue of expertise. Arbitrators with specific expertise will have less need for assistance from experts. That can result in a speedier handling of the case, because the involvement of (or need for) experts is often a delaying factor in proceedings before national courts.

Arbitration can also offer advantages regarding the organisation of the proceedings, since it gives the parties greater freedom of organisation than in proceedings before a national court, where fixed rules of procedure apply. Moreover, speedy (and cost-effective) settlement of the arbitration proceedings can be regarded under many arbitration regulations as expressly forming part of the assignment of the arbitrators (ICC Rules of Arbitration, 2012, Art. 22(1)).

The flexible nature of arbitration proceedings makes them pre-eminently suitable for speedy and cost-effective proceedings between the parties involved in the dispute. The need to conduct two actions (between the insured and the insurer on the one hand and between the insured and the insurer on the other hand) can thereby be avoided. That not only increases efficiency, but also avoids conflicting judgments.

These advantages are particularly relevant in cases in which the position of the insured in relation to the injured party depends on his position in relation to the insurer. A case in point is a lawyer who has made an error but whose insurance cover is contractually limited to the amount paid by the insurer under the policy in question. In that type of case the scope of the lawyer’s liability for damages towards his client (or usually former client) is dependent on the answer to the question up to what amount the loss incurred is covered under the policy. If that can be determined in one (possibly tripartite) legal action, that can give rise to efficiency gains.

4.3. Confidentiality

The benefit of confidentiality has an external and an internal aspect. The external aspect is that third parties who are not involved in the arbitration proceedings cannot (or in any event may not) become aware of the details of the proceedings and the (final) award(s) passed. That appears to be an obvious benefit, which may be particularly relevant in e.g. directors’ and officers’ liability or medical liability proceedings.

The internal aspect of confidentiality can be more problematic, for instance in a situation in which the insured is under an obligation towards the insurer to provide information that he does not wish to disclose to the injured party. However, the insured will be required under the policy to disclose all relevant information to his insurer.

That duty of disclose can relate to documents and circumstances that are unfavourable for the insured, e.g. in the context of setting aside an exoneration clause in which the liability of the insured party is limited to the insurance cover. In such cases arbitration proceedings in which “all is disclosed” may have unfavourable consequences for both the insured and the insurer. In that case insurers are well advised to carefully establish per sector whether the benefits of tripartite arbitration outweigh the disadvantages.

4.4. Enforcement and arbitration as one-stop shop

On a final note: appeals in arbitration proceedings are unusual. However, the same applies to protracted setting aside and enforcement proceedings. Research has shown that 76% of international arbitral awards are voluntarily complied with (Price waterhouse Coopers, 2008, 8). That same research has also shown that

\textsuperscript{7} For instance the Dubai International Arbitration Centre, which focuses on construction disputes: \texttt{http://www.dubaichamber.com/}.

\textsuperscript{8} See \texttt{http://www.primefinancedisputes.org/}.

\textsuperscript{9} Such as the Singapore International Arbitration Centre (\texttt{http://www.siac.org.sg/}), the Hong Kong International Arbitration Centre (\texttt{http://www.hkiac.org/}) or the Kuala Lumpur Regional Centre for Arbitration (\texttt{www.klrca.org.my}).
requests to set aside arbitral award are unusual (less than 25% of cases). Arbitration therefore lives up to its name as a one-stop shop for dispute resolution. In light of the willingness of insurers to fulfil their obligations once their liability has been established, those percentages will probably be even more favourable in the insurance practice.

In light of the above the benefit of easy recognition and enforcement of arbitral awards compared with judgments passed by national courts must be put into perspective, since it follows from the above that enforcement of arbitral awards takes place in only a limited number of cases.

It is already customary in the insurance practice to comply with judicial decisions; enforced compliance with decisions is uncommon in that sector in our experience. Awards issued by expert arbitrators are therefore likely to be voluntarily complied with in a very large number of cases, if not all. That is also of interest to an injured party: if the insurer is involved in the resolution of the dispute between the injured party and the insured, he will have less difficulty going after the insured if it is ordered to pay. That is another advantage of arbitration as (usually) the first and only resort, which immediately and decisively clarifies the parties' legal position.

5. CONCLUSION

Arbitration could be put to more frequent use in the insurance practice. In light of the various characteristics of arbitration (including expertise, speed, ease of enforcement and confidentiality), the resolution of insurance law disputes by means of arbitration should be considered more often, particularly in an international context.

In the above the outlines were presented of a model for ensuring by means of a provision in the policy that the parties involved in a dispute (insurer, insured and injured person) can have the legal relationships between them established by arbitrators in “tripartite arbitration”. This model was submitted to an initial theoretical analysis. That analysis has been reason to conclude that tripartite arbitration offers (commercial and practical) opportunities for the insurance practice, but may also have disadvantages. Further research and practical experience are required in order to better interpret those opportunities and threats.

SUMMARY

Relatively little has been published on arbitration in the insurance practice. A possible reason for this is that in such practice permanent arbitral tribunals are virtually non-existent. Arbitration in the sector primarily takes place on an ad hoc basis.

This article inquires how arbitration can be used to settle disputes in the insurance practice. It is in this context that the pros and cons of arbitration in the insurance practice will be addressed. It follows from such assessment that arbitration as a dispute resolution mechanism offers opportunities for insurers, insured and injured parties.

On the basis of this analysis a model is introduced by means of which it could be ensured that the three parties possibly involved in an insurance dispute (insurer, insured and injured person/claimant) have the legal relationships between them determined by arbitrators in a multi-party arbitration. This model will than be further assessed in the context of the pros and cons of arbitration discussed earlier.

It is submitted that arbitration could be put to more frequent use in the insurance practice. In light of the various characteristics of arbitration (including expertise, speed, ease of enforcement and confidentiality), the resolution of insurance law disputes by means of arbitration should be considered more often, particularly in an international context.

Key words: arbitration, insurance, third-parties, arbitration clause

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