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Plenary Session: INSURANCE AND ARBITRATION

Chairman: Prof. Piero Bernardini

Report

1. In preparation of the Session on Insurance and Arbitration a Questionnaire was distributed worldwide to national institutions and private specialists of the field.
   The questions that have been proposed were as follows:
   1. **Is arbitration to be preferred as a method of insurance dispute resolution under: an insurance policy; a commercial contract between the insured and a third party; a reinsurance contract?**
   2. **What are the reasons why arbitration is to be preferred for the resolution of insurance disputes: a) choice of experienced arbitrators; b) avoidance of conflict of national jurisdictions in case of transnational relations; c) confidentiality; d) duration of the proceedings; e) limited recourse against the award; f) better enforceability of the award; g) others? Are there specific disadvantages of arbitration in matter of insurance so that in certain cases national courts should be preferred?**
   3. **Are there legal limitations to the arbitrability of disputes in the field of insurance?**
   4. **Under which conditions may a non-signatory of the arbitration agreement be a party to the arbitration? Specifically, can the insurer join or be joined in a dispute arising out of a commercial contract between the insured and a third party, containing the arbitration clause?**
   5. **Can the insurer that has indemnified his insured for a loss suffered under a commercial contract initiate, on the basis of his subrogation in the insured's rights, an arbitration procedure against the (third) person who entered into the said commercial contract with the insured, when this contract contains an arbitration clause?**
   6. **Can the award rendered against a party whose liability is covered by the insurance policy be opposed or enforced against the insurer who was not a party to the arbitration proceedings? Does it make a difference whether the insurer acted in the arbitration in lieu of the insured pursuant to the clause in the insurance policy granting him the right to take charge of legal proceedings (including arbitration)?**
   7. **Do you have in your country any arbitration organs with specific competence in insurance disputes or in reinsurance disputes? If so, what is their legal form (association,**

professional organization like an insurer association, etc.)? Are they linked with AIDA?

2. Thirty-three Answers were received, out of which thirty-one are based on domestic legislation and jurisprudence: Argentina, Australia, Belgium, Brazil, Chile, Colombia, Costa Rica, Denmark, France, Germany, Greece, Hong Kong, Hungary, Iran, Israel, Italy, Japan, Korea, Mexico, Netherlands, Poland, Portugal, Serbia, South Africa, Spain, Switzerland, Taiwan, Turkey, United Kingdom, Uruguay, United States. In addition, Answers were received from ARIAS Europe and CEFAREA (the Centre Français d'Arbitrage de Réassurance et d'Assurance). The Answers received may be considered as sufficiently representative of the status of the law and practice in areas of the world having different legal backgrounds and traditions. The attached table shows the contributor(s) for each Answer.

3. A review of the Answers permits to draw some conclusions as follows.

   (i) Regarding Question No. 1, the large majority of the Answers indicates that arbitration is not the preferred method for resolving disputes between the insurer and the insured, this for different reasons. One of the reasons given is that insurance disputes frequently involve a large number of parties and arbitration does not make the disposition of multiple parties disputes easy (France). Another reason given is the risk that arbitration agreements might be used by some insurers to deprive the insureds of their lawful judge and a fair trial (Germany). A third reason given is the fact that policy holders usually trust in state court system or the risk that the enforceability of arbitration clauses in General Terms and Conditions of consumer contracts could be challenged (Switzerland). In some countries the insurance law prohibits the inclusion of an arbitration clause in the policy (Argentina). By contrast, in some countries arbitration is the preferred method for resolving disputes between insurer and insured. In Belgium, this had long been the case until the law of 1992. Since then, in consumer contracts arbitration agreements are no longer admitted, except after the dispute has arisen but that law and the implementing regulation have left the door fully open for arbitration in large risks, where it still prospers. An exception is also made in marine insurance under the P&I Club (the mutual insurance organization covering liability of ship-owners and other operators), the Rules of the Club containing invariably an arbitration clause for resolution of disputes between the insured member and the Club. Arbitration appears to be widely used in commercial contracts between the insured and a third party , thus permitting the subrogation of the insurer to the insured to the extent of the indemnity paid, as well as to settle reinsurance disputes.

(ii) Regarding Question No. 2, a variety of reasons are given to explain the preference for choosing arbitration in insurance matters:
- limited recourse against arbitral award (Australia, Belgium, France, Italy, South Africa);
- an easy path to enforcement (Australia, France, Germany, Poland);
- the free choice of arbitrators (Australia, France, Germany, Poland);
- confidentiality of the proceedings (Belgium, Brazil, Germany, Korea, Switzerland, Taiwan, United Kingdom, United States);
- expertise of the arbitrators (Belgium, France, Germany, Hong Kong, Korea, Taiwan, Turkey, United States);
- shorter duration (Brazil, Poland, Germany, Honk Kong, Turkey, Taiwan);
- more limited cost (Turkey);
- power to decide *ex aequo et bono* (Switzerland, Taiwan);
- avoidance of conflict of jurisdictions (Italy, Korea, Poland, Switzerland, Taiwan, United States)

Disadvantages are so indicated:
- cost (Belgium, France, Hong Kong, Poland, South Africa)
- binding force of the award limited to the parties (Australia, Hong Kong, South Africa, United Kingdom).

(iii) Regarding Question No. 3, the following legal limitations to arbitrability of insurance disputes have been indicated:
- arbitration may be agreed only once the dispute has arisen (Belgium and Denmark in consumer contracts);
- arbitration may not be provided in domestic consumers contracts, life insurance and home insurance contracts (France), in State provided welfare, labour accidents or pension insurance policy (Italy);
- if the parties cannot freely dispose of the rights subject to an insurance dispute (Serbia);
- as the only means to resolve a dispute in a short-term insurance policy (South Africa);
- for insurance disputes if the relevant matter cannot be arbitrated, as in case of divorce, criminal matters, issues of status or company liquidation (South Africa);
- for disputes concerning real rights or immovable property (Turkey);
- in certain States under personal life insurance policies or against statutory liquidators of insurance companies under State insurance insolvency statutes (United States);
- access to arbitration process is allowed in certain cases only against qualified respondents (Taiwan against “banking”, “securities”, “futures” and “insurance” enterprises under the FOI dispute resolution mechanism).

(iv) Regarding Question No. 4, the generally accepted rule is that arbitration is based on the parties' consent and the principle of privity of contracts. The insurer as a third party may not be joined in the dispute unless there is agreement of the insurer itself, of all parties in dispute and of the arbitral tribunal. There are limited exceptions applicable also to insurance cases, as follows:
- France, in case a non-signatory party has actively participated in the negotiation and performance of the contract containing the arbitration clause;
- Hong Kong, regarding non-signatories that are intended third party beneficiaries, regarding a third party with the right of subrogation (such as insurance companies) or a controlling company when there is clear evidence of agency relationship or an intent to be bound by the assumed or assigned arbitration agreement;
- Italy, in case of third party's intervention *ad adiuvandum* of one of the parties without advancing any new cause of action or any claim or in case of necessary joinder in the presence of an indivisible cause of action (art. 816-quinquies code of civil procedure); in case of payment by the insurer with ensuing subrogation in the insured's position in a pending arbitration;
- South Africa, in case of third party's intervention *ad adiuvandum* of one of the parties if there is a legal interest and upon application to the arbitral tribunal.
- United States, under the Federal Arbitration Act a non-signatory can be joined in an arbitration: (i) where through its conduct it has assumed the obligation to arbitrate; or (ii) has taken advantage of the arbitration clause and is estopped from denying its obligation to arbitrate; or (iii) is the *alter ego* or the principal of the signatory.

(v) Regarding Question No. 5, except in a limited number of cases, as mentioned below, the insurer that has paid is subrogated to the insured's position in the arbitration agreement between the latter and the third party to the extent of the amount paid to the insured. However: in Argentina and Portugal subrogation is inapplicable regarding personal insurance; in Brazil, no subrogation is allowed unless expressly and voluntarily agreed with the third party; in Switzerland, subrogation into the insured's claim against the third party occurs only if the third party is liable in tort, the question of subrogation in the arbitration clause therefore does not arise in case of contractual claims.

(vi) Regarding Question No. 6, the position of national procedural and arbitration laws may be summarized by distinguishing two cases as follows:
a) the case in which the insurer has not been a party to the arbitration proceedings by subrogation or otherwise or has not conducted the same in the name of the insured, in which case

it is not bound by the award which cannot be enforced against it or opposed ("*opposable*") to it by the insured (except apparently in France, Mexico, Switzerland and some States of the United States);

b) the case in which the insurer has conducted the arbitration proceedings in the name of the insured as permitted or directed by the insurance policy, therefore not by virtue of subrogation or otherwise, in which case it will not become a party to those proceedings entitled as such to enforce or oppose the award but the award, although not directly enforceable against it, is "*opposable*" to the insurer (Belgium, Chile, Germany for general liability insurance, Mexico, South Africa, Taiwan and United Kingdom under a liability insurance policy).

4. In view of Plenary Session the following Panel Members have been designated:
   - Prof. Osvaldo Contreras Strauch, Professor of Commercial Law, Diego Portales University, Santiago, Chile;
   - Prof. Marcel Fontaine, Professor Emeritus Catholic University of Louvain, Belgium;
   - Professor Sir Bernard Rix, Retired Lord Justice of Appeal and Professor of International Commercial law at Queen Mary University of London, United Kingdom;
   - Victoria H. Roberts, President Federation of Defense and Corporate Counsel; Vice President and Counsel Meadowbrook Insurance Group USA.

5. In light of the Answers that have been given to the Questionnaire, the following topics have been selected for this Session as reflecting issues that have received greater attention:
   a) Advantages and disadvantages of arbitration for the settlement of insurance disputes with respect to litigation before national courts;
   b) The involvement of the insurer in the arbitration proceedings in which he/she is not a party and the effect on him/her of the arbitration award.

   These topics shall be addressed first briefly by Panel Members then through questions from the Audience, separately for each topic. A short introduction by the chairperson shall indicate the relevance of these topics in the arbitration experience along the following lines.

6. Regarding the first topic, except in a limited number of cases, the reasons why arbitration is the preferred means of resolving commercial disputes, including disputes in the field of insurance, are widely shared.

   To put it simply, businesses perceive arbitration as providing a neutral, speedy and expert dispute resolution process, largely subject

to the parties control in a single, centralized forum, with enforceable dispute resolution agreements and decisions.

Many of these perceived advantages are common to domestic and international arbitration. First among them is the parties' ability to appoint as arbitrators persons that are best suited to settle that particular dispute which , being already arisen, is known in its main characteristics. Considering that insurance disputes are more than often characterized by technical problems, nothing would prevent the parties to select as arbitrators experts in the field or add technical experts to a panel composed of legal experts.

Advantages are even greater when the arbitration is international in view of the parties' different nationalities. What matters in this case is the selection of the most appropriate seat for the arbitration, such being one where the national law promotes finality, speed and reasonable cost, avoiding wasteful post-award litigation before national courts. Overcoming problems that arise in transnational litigation for determining which national court is competent for that particular dispute and ensuring the enforceability of the award under the New York Convention (presently ratified by over 150 States) are recognized advantages of international arbitration.

The majority of commentators tend to emphasize the advantages of arbitration giving less attention to its disadvantages. The latter exist and have a bearing on arbitration in insurance matters. The fact that arbitration is founded on the parties' will and exists within the limits of their arbitration agreement prevents the joinder of third parties, such as the insurer, to the arbitration proceedings between the insured and its contractual partner or the consolidation of proceedings having different parties, unless all parties and the arbitral tribunal give their consent to such joinder or consolidation. Another limitation is represented by the non-arbitrability in some countries of insurance disputes in certain fields. Thus, in France an arbitration agreement may only be concluded in the context of a professional activity and the insured not always act in that capacity (art. 2061 civil code). In Belgium, arbitration agreements, while freely permitted for large risks, may not be agreed in advance in consumer contracts, this to protect the consumer as the weaker party. Likewise in Denmark. In South Africa, a clause in a short-term insurance policy providing for arbitration as the sole means to solve the dispute is void. Certain states of the United States prohibit arbitration in personal life insurance policy.

7. Regarding the second topic, as previously mentioned there is a wide consensus by commentators as to the principle according to which since arbitration is based on the parties' consent it may only bind those that have signed the contract containing the arbitration clause or the separate arbitration agreement referring to such contract (so-called principle of "privity of contracts"). It is generally accepted that the insurer that has paid the insured may be a party to the arbitration proceedings with the third party to the contract with the insured by

virtue of its subrogation to the insured's position to the extent of the amount of indemnity paid by it to the insured.

There are two exceptions to the principle of privity of contracts mentioned above.

The first exception is made by those legal systems that rely on the third party's conduct regarding the negotiation or performance of the disputed contract to infer an implied consent by such party to be involved as a party in the arbitration proceedings related to such contract. This is the case of France following the well-known *Dow Chemical v. Isover-Saint Gobain* decision of the Court of Appeal of 1983, but also of Switzerland and the United States.

The second, more limited, exception is the case where the arbitration award, although not directly enforceable against the insurer that was not a party to the arbitration proceedings, may however be "opposed" to it ("*opposable*" in the French terminology). This is accepted by some jurisdictions in a general way (France, Mexico, Switzerland and some states of the Unites States) or limited either to cases where the insurer has conducted the arbitration proceedings in the name of the insured (as may be provided by the insurance policy) or to certain types of insurance (as in Belgium, Chile, Germany, South Africa, Taiwan and United Kingdom). I will not dwell more on this particular aspect which will be specifically addressed by a member of the Panel.