

Insurance and Arbitration

Proposed questions, to be answered in the light of national legislation and personal experience.

1. Is arbitration to be preferred as a method of insurance disputes resolution under a) an insurance policy; b) a commercial contract between the insured and a third party; c) a reinsurance contract?

Comment: answers may consist in identifying problems related to the use of arbitration in view of the interrelationship among these various contractual arrangements and possible solutions (this question relates to suggested question a) under AIDA's letter of 19 July 2012).

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) other. What are the specific disadvantages of arbitration in insurance matters and the reasons why in certain cases national court procedures should be preferred?

Comment: answers may consist in identifying the critical aspects of arbitration in the field of insurance and in explaining how problems may be overcome or mitigated (the reference to the choice of experienced arbitrators relates to the suggested questions c) and d) under AIDA's letter of 19 July 2012).

3. Are there (legal) limitations to the arbitrability of disputes in the field of insurance?

Comment: under certain legal systems not all insurance disputes are arbitrable. Under French law, for example, article 2061 of the civil code, in its 2001 formulation, permits arbitration only when the contract is concluded in the performance of a professional activity (subject in any case to specific legal prohibitions): this excludes the validity of clauses when the insured does not act within the framework of a professional activity or when the insurer is a "mutual insurance association".

4. Under which conditions can 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 an arbitration clause?

Comment: some national legislations on arbitration permit third party's intervention under specified conditions. This may be the case of an insurer who, being bound to the insured under the insurance policy, is a third party in a dispute between the insured and the latter's commercial counterparty. In the same line, the question also arises whether by virtue of a clause in the insurance contract, a third party like the reinsurer or the broker can be obliged to join the arbitration procedure.

It is suggested that an answer to the question may e.g. consist in underlining the importance of the choice of the place of arbitration (since third party's intervention depends on the procedural rules of this place). It is also suggested that it is worth to examine at this point the importance of the arbitration place as a way to achieve a satisfactory procedural framework.

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 ?

Comment: although subrogation is generally considered to extend to the arbitration agreement as being one of the rights of the insured against a third person, some national courts have denied the insurer's right to compel this third person into arbitration on the basis of the insured's arbitration agreement with the subcontractor: *Valley Casework Inc. v. Confort Constr. Inc.*, 76 California App. 4th 1013, 1024 (1999): "*contractual arbitration agreement cannot be stretched so far*".

6. Can the award rendered against a party whose liability is covered by the insurance policy, be opposed ("*opposable*", in the French terminology) 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)?

Comment: while the answer to the first question may likely be in the negative, the second question raises an issue worth being examined.

7. Do you have in your country any arbitration organs with specific competence in insurance disputes ? In reinsurance disputes? If so, what is their legal form (association, professional organisation like an insurers association, etc.) ?
Are they linked with AIDA ?