Global perspectives on arbitrating insurances disputes

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Introduction

- The insurance industry is subject to a high level of case load and has always been open to out-of-court resolution of disputes, including:
  - Negotiation;
  - Mediation; and
  - Arbitration (specially *ad hoc* arbitration)

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Introduction

- The current hot topics in the resolution of insurances disputes are:

  I. Whether the business losses suffered as a result of the Covid-19 pandemic are covered by the loss of profits insurances;

  II. Whether it would be advisable for insurance arbitrations to be referred to arbitration institutions more often (rather than to *ad hoc* arbitration); and

  III. Whether it is positive that arbitrators are required to be specialized in insurance matters.

I. The covid-19 pandemic in the framework of loss of profit insurances

- With the outbreak of the pandemic, many businesses brought claims against insurers to seek compensation for the loss of profit suffered in this context.
  - Is the shutdown of activity due to the Covid-19 pandemic a risk covered by the loss of profit insurances?

- Spanish regional courts have ruled in favour of the insurers in approximately 75% of the at least 30 cases raised before them.
  - The reason for this rests mainly on the fact that, in Spain, the loss of profit coverage is generally concluded not as a stand-alone pact, but linked to other property damage guarantees.

I. The covid-19 pandemic in the framework of loss of profit insurances

- This means that these policies do not cover any loss of profits of the insured business, but rather those that occur as a consequence of a "*material damage*" which is indeed covered by the policy (which is not the case of pandemics and the governmental measures adopted to reduce their impact).

- This solution was recently adopted, for instance, in the:
  - Ruling n.º 15/2023, of 24 January, of the Provincial Court of Valladolid.
  - Ruling n.º 2/2023, of 9 January, of the Provincial Court of Salamanca.
  - Ruling n.º 327/2022, of 23 November, of the Provincial Court of La Rioja.
  - Ruling n.º 1251/2022, of 20 July, of the Provincial Court of Barcelona.

I. The covid-19 pandemic in the framework of loss of profit insurances

- Likewise, these decisions assert that these clauses are "risk delimiting clauses" (i.e., *cláusula delimitadora del riesgo asegurado*), which means that they do not need to comply with the requirements foreseen in Spanish Insurance Contract Law for the "clauses limiting the policyholder's rights" (i.e., *cláusulas limitativas de los derechos del tomador*).

- Still, several Provincial Courts have ruled in favour of the policyholder (e.g. in cases where the policy had not been signed or the general conditions had not been delivered to the policyholder).

I. The covid-19 pandemic in the framework of loss of profit insurances

- No decision has been issued to date by the Supreme Court.
- These rulings have led to the emergence of new policies and to the renegotiation of existing ones.
- Some courts have left the door opened to the application of the *rebus sic stantibus* clause (e. g., judgement n.º 170/2021 of the Court of First Instance No. 5 of Alcalá de Henares, dated 23 September 2021).
- Another issue: *should these risks be compensated by the Insurance Compensation Consortium?*

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II. The institutionalization of insurance arbitration

- Traditionally, in the insurance industry, *ad hoc* arbitration has been more widespread than institutional arbitration.

- Although it is not possible to know exactly the number of *ad hoc* arbitrations, insurance disputes are not common in arbitral institutions:
  - ICC: In 2020, only 5-7% of the new cases were insurance disputes.
  - LCIA: in 2021, only 2% of the cases were insurance disputes.
  - HKIAC: in 2022, only 0,9% of the cases were insurance disputes.
  - MIAC: during its three years of life, only 5% of the cases were insurance disputes.

- This could be explained by the desire of the parties to preserve confidentiality or the custom and the use of standard contracts.

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II. The institutionalization of insurance arbitration

Does *ad hoc* arbitration really add value in these cases or, on the contrary, could it be useful to institutionalize insurance arbitration?

- First, the fact that an arbitration is admitted by an institution doesn't mean that the proceedings will not be confidential.
  - The Spanish Arbitration Act imposes the obligation to preserve confidentiality to both *ad hoc* and institutional arbitration (art. 24.2).
  - This obligation is also foreseen in the Rules of Procedure of many arbitral institutions, such as MIAC (art. 54), CAM (art. 50) and LCIA (art. 30).

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II. The institutionalization of insurance arbitration

- Second, *ad hoc* arbitrations require parties to collaborate and be interested in resolving the dispute. Its absence can result in significant delays, specially when:
  - There is an "absent" respondent or a non-participating party.
  - A party refuses to cover the provision for funds.
  - A party refuses to appoint an arbitrator.

- Third, *ad hoc* arbitration may be problematic if the seat of the arbitration does not have a well-developed set of arbitration rules, nor a judicial system capable of enforcing compliance with such rules.

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II. The institutionalization of insurance arbitration

- Fourth, *ad hoc* arbitration may end up being more expensive, as there are no guidelines to fix the fees of the arbitrators. In contrast, arbitral institutions have guidelines to this end, taking into consideration the monetary value and the complexity of the dispute (or the absence thereof).

- Fifth, institutional arbitration offers comfort to the parties in several ways:
  - Scrutiny reduces the risk of an award having inconsistencies and arithmetic errors.
  - In Spain, if the arbitrator incurs in civil liability resulting from bad faith or recklessness, the damaged can seek liability against both the arbitrator and arbitral institution.
  - There are mechanisms to replace an arbitrator that is not sufficiently independent and impartial, or who is prevented *de facto* or *de jure* from fulfilling its functions.

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III. The specialization of arbitrators in insurance matters

- In insurance arbitration, there is an increasing tendency of the Parties to demand that arbitrators be specialized in insurance matters.
  - Agreement between the European Arbitration Association and the Association of Lawyers Specializing in Civil Liability and Insurance (2011).
- **Do these requirements add value to the resolution of the dispute or, in contrast, limit too much the pool of eligible arbitrators?**
- As a general rule, the fact that the arbitrator has prior experience and knowledge of the law applicable to the merits is positive.

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III. The specialization of arbitrators in insurance matters

- It has always been argued in favour of arbitration that the capability of choosing who will resolve the dispute guarantees that it will be handled by a person with experience in the matter.
  - This is especially true when the dispute involves particularly specific and complex matters, such as maritime law, sports law, intellectual property or insurance matters.

- Demanding a very specific specialization to be met by an arbitrator requires caution given that it inevitably limits the pool of arbitrators, at the risk of conflict of interest situations arising more easily.

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III. The specialization of arbitrators in insurance matters

- According to IBA rules on the conflict of interest, an arbitrator must disclose if:
  - It has, within the past three years, been appointed on 2 or more occasions by one of the parties;
  - It currently serves, or has served within the past 3 years in another arbitration on a related issue involving one of the parties;
  - It has, within the past three years, been appointed on more than 3 occasions by the same counsel, or the same law firm.

- The ICC Rules demand arbitrators to disclose if the arbitrator *"has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel's law firm".*

III. The specialization of arbitrators in insurance matters (iv)

- The tension between an increased specialization and an increase in conflicts of interest is not new:
  - *"It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice."*

    (Footnote n.º 5 of the IBA rules on conflicts of interest)

- An assessment must be conducted on whether if it weights more for the parties that the case is handled by *(i)* an arbitrator very specialized in the matter, or *(ii)* an arbitrator who does not routinely intervene in cases involving the same parties or lawyers.

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