THE INSURANCE DISPUTES LAW REVIEW

Fifth Edition

Editors
Joanna Page and Russell Butland

THE LAWREVIEWS

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Editors
Joanna Page and Russell Butland

THE LAWREVIEWS

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CONTENTS

PREFACE

We are delighted that this is now the fifth edition of *The Insurance Disputes Law Review*. It is a privilege to be the editors of this excellent and succinct overview of recent developments in insurance disputes across 18 important insurance jurisdictions.

Insurance is a vital part of the world's economy and critical to risk management in both the commercial and the private spheres. The law that has developed to govern the rights and obligations of those using this essential product can often be complex and challenging, with the legal system of each jurisdiction seeking to strike the right balance between the interests of insurer and insured, and also the regulator who seeks to police the market. Perhaps more than any other area of law, insurance law can represent a fusion of traditional concepts (concepts almost unique to this area of law) together with constant entrepreneurial development, as insurers strive to create new products to adapt to our changing world. This makes for a fast-developing area, with many traps for the unwary. Further, as this indispensable book shows, even where the concepts are similar in most jurisdictions, they can be implemented and interpreted with very important differences in different jurisdictions.

To be as user-friendly as possible, each chapter follows the same format – first providing an overview of the key framework for dealing with disputes – and then giving an update of recent developments in disputes.

As editors, we have been impressed by the erudition of each author and the enthusiasm shown for this fascinating area. It has also been particularly interesting to note the trends that are developing in each jurisdiction.

An evolving theme in almost every jurisdiction is the increase in protections for policyholders. Much of the special nature of insurance law has developed from an imbalance in knowledge between the policyholder (who had historically been blessed with much greater knowledge of the risk to be insured) and the insurer (who knew less and, therefore, had to rely on the duties of disclosure of the policyholder). With the increasing use of artificial intelligence to assess data and more detailed scope for analysis across risk portfolios, the balance of knowledge has shifted; it will often now be the insurer who is better placed to assess the risk. This shift has manifested itself in tighter rules requiring insurers to be specific in the questions to be answered by policyholders when they place insurance, and in remedies more targeted at the insurer if full information is not provided. Coupled with these trends, however, is the increasing desire by some jurisdictions to set limits on the questions that can be asked so that, for example, in relation to healthcare insurance, policyholders are not denied insurance for historical matters. In light of the ongoing scourge of covid-19, and the complexity of its effects across the world's economies, this issue continues to be at the forefront of debate.

We can expect that this tussle between the commercial imperative for insurers to price risk realistically and the need to balance consumer protection, government policy and privacy will increasingly be at the heart of insurance disputes.

The past year has been tumultuous. The conflict under way in Ukraine, together with its impact on energy security and global supply chains, comes as a further shock on top of climate events and continued disruption from covid-19. This conflict is having a substantial effect on the aviation insurance market, particularly in relation to providing cover for war and contingency coverage. Business interruption issues, meanwhile, continue to be worked through across the affected legal systems; key areas of coverage have been addressed, but there are now more bespoke issues to deal with; for example, relating to application of policy limits.

There has in the past year been particular focus on directors' and officers' policies. These are under increasing pressure as directors are in the spotlight following strategic climate change litigation being conducted, particularly relating to greenwashing and transparency in the process of the transition to net zero. Similarly, cyber risks are ever increasing and again place directors and officers under scrutiny.

No matter how carefully formulated, no legal system functions without effective mechanisms to hear and resolve disputes. Each chapter, therefore, also usefully considers the mechanisms for dispute resolution in each jurisdiction. Courts appear to remain the principal mechanism, but arbitration and less formal mechanisms (such as the Financial Ombudsman in the United Kingdom) can be a significant force for efficiency and change when functioning properly. The increasing development of class action mechanisms, particularly among consumer bodies (e.g., in France and Germany) is likely to be an important factor.

We would like to express our gratitude to all the contributing practitioners represented in *The Insurance Disputes Law Review*. Their biographies are to be found in the first appendix and highlight the wealth of experience and learning that the contributors bring to this volume. On a personal note, we must also thank Lucia Craft-Marquez at our firm, who has done much of the hard work in this edition.

Finally, we would also like to thank the whole team at Law Business Research, who have excelled at bringing the project to fruition and in ensuring both a professional look and consistency in the contributions.

Joanna Page and Russell Butland
Allen & Overy LLP
London
October 2022

Chapter 8

FRANCE

Erwan Poisson and Julie Metois[1]

I OVERVIEW

New legal developments have not resulted in major changes this year. Most of the changes provide clarifications about well-established rules of insurance disputes in substantive and procedural terms that are helpful for practitioners. Nonetheless, the evolution of the insurance market and recent trends within insurance litigation, including effects of the covid-19 pandemic, raise many thorny issues that remain unresolved.

II THE LEGAL FRAMEWORK

i Sources of insurance law and regulation

France has a specific code dedicated to insurance law. This code provides very precise rules that derogate from the law usually applicable in contractual matters. For instance, the limitation period is, as a matter of principle, two years for insurance claims, whereas it is five years for contractual claims.[2] In addition to the specific law applicable to the insurance contracts, different regimes are set out according to the nature of the insurance policy (car insurance, life insurance, liability insurance, etc.). As a result, numerous solutions under French law are specific to a particular kind of insurance and cannot be generalised to all insurance policies.

The French Civil Code also comes into play in insurance disputes. It applies in all matters related to the insurance policy that are not governed by a specific provision under the French Insurance Code. Other specific provisions may also come into play, such as the French Consumer Code when the dispute is between a professional and a consumer.

Finally, European directives on insurance hold considerable sway over insurance law. As noted below, the European influence was again demonstrated as it resulted in rendering ineffective some provisions of the Insurance Code related to car insurance.

ii Insurable risk

Under French law, the subscriber does not have to show any interest to conclude an insurance policy. As a result, the subscriber can issue an insurance policy not only on his or her own behalf but also on behalf of a third-party beneficiary.

---

1 Erwan Poisson is a partner and Julie Metois is a senior associate at Allen & Overy LLP.

2 Article L114-1 of the French Insurance Code, see new exception at Article L114-1 of the French Insurance Code implemented by Law No. 2021-1837 of 28 December 2021 setting out a five-year statute of limitations for natural disasters.

Under French law, insurability of the risk is determined with regard to the nature of the insurance contract. Insurance is considered a 'contingent contract' under the French classification of contracts.[3] It implies the risk must exist to be insurable. In this respect, the Court of Cassation recently quashed an appeal decision that did not assess the existence of a risk prior to ruling upon the parties' alternative claims.[4] Thus, an event that has already occurred cannot be covered. Moreover, if the event occurred as a result of the policyholder's intentional conduct, the insurer can reject the claim.[5]

In addition, a risk cannot be underwritten by an insurer if it contradicts public policy. Notably, criminal offences are not insurable. Therefore, a company cannot ask its insurer to pay a fine for which the company is liable.

Finally, some risks are excluded by law, such as the risk of riots or civil war.[6]

iii Fora and dispute resolution mechanisms

French law does not provide for a specific court to deal with insurance-related claims. Depending on the nature of the parties, the claim can be brought before the civil courts, the commercial courts and even the administrative courts when it involves public entities.

III RECENT CASES

i Significant cases in procedural terms

Bringing an action in insurance litigation

The special limitation period must be mentioned in some insurance policies pursuant to Article R112-1 of the Insurance Code.

In this respect, the Court of Cassation has held that an insurer who fails to fulfil this obligation cannot rely on either the special limitation period or the general limitation period (five years).[7] In addition, the burden of proof regarding the communication of the limitation period lies with the insurer.[8]

Practitioners must also be aware that certain actions arising from the insurance relationship are not subject to the two-year limitation period.[9]

Conducting insurance litigation

Under French law, the insurer can conduct proceedings on behalf of the policyholder against a third party. By doing so, the insurer waives raising certain defences accruing from the insurance relationship in any concurrent or subsequent claims against the policyholder

3 Article 1108 of the Civil Code.

4 Decision of the Court of Cassation (civ. 3rd), No. 20-16244, 12 January 2022.

5 Article L113-1 of the Insurance Code.

6 Article L121-8 of the Insurance Code.

7 Decision of the Court of Cassation (civ. 2nd), No. 17-28021, 21 March 2019.

8 Decision of the Court of Cassation (civ. 2nd), No. 18-13938, 18 April 2019.

9 For example: *Nielsen & Cie International v. AGIPI*, decision of the Court of Cassation (civ. 2nd), No. 16-17754, 18 May 2017.

(except when specifically otherwise provided by the insurer).[10] It is, however, well established under case law that the waived defences are only related to the guarantee and do not concern the 'nature of the risk covered, nor the amount of compensation'.[11]

This distinction can be very hard to make in practice and frequently needs clarification by the courts. For instance, in *Perron company and others v. Allianz IARD*,[12] it was ruled that the clause that limited the guarantee to certain circumstances in which a risk occurred did not concern the nature of the risk covered.

Burden of proof in insurance litigation

During the past year, the Court of Cassation issued several interesting rulings with respect to the burden of proof. In a first case, the Court ruled that the insurer, who claims the guarantee should not apply given the policyholder's scope of business and specific terms applicable to that business, should demonstrate that it put the policyholder on notice of the specific terms and that the latter agreed to these terms.[13] In a second case, the Court recalled that if proceedings are initiated by the victim of the damage against the policyholder's insurer, the insurer has the burden to file as an exhibit a copy of the insurance policy, since the victim has no copy of such document.[14]

Settlements in insurance proceedings

In *National Military Security Found and Benoit X v. Crédit Mutuel and Guillaume Y*,[15] the Court of Cassation held that the waiver of future claims contained in a settlement agreement prevents the victim from claiming further damages even if they were not covered by the settlement.

In this case, the victim suffered various losses then signed a settlement agreement with the insurer of the wrongdoer. Afterwards, the victim sued the wrongdoer and his insurer for further damages that were not covered by the settlement. Under French law, there are two contradictory theories to resolve this issue. First, the 'theory of the scope of settlements' states that the settler may claim for some losses that are not pointed out in the settlement. In contrast, the 'theory of abandonment' states that the settler waives all his or her rights to claim for damages related to the dispute regardless of the fact that the settlement does not deal with them.[16] In the matter at hand, the Court decided that the abandonment theory should prevail because the settlement agreement stated that 'the victim declares himself to be satisfied of all of his rights'. However, this does not mean that the same rule will apply in every case. It mainly depends on the way the settlement agreement is drafted.

10 Article L113-17 of the Insurance Code; for instance, decision of the Court of Cassation (civ. 2nd), No. 20-20976, 21 April 2022.

11 Decision of the Court of Cassation (civ. 1st), No. 95-12817, 8 July 1997.

12 Decision of the Court of Cassation (civ. 3rd), No. 15-25241, 5 January 2017.

13 Decision of the Court of Cassation (civ. 3rd), No. 20-16771, 17 November 2021.

14 Decision of the Court of Cassation (civ. 2nd), No. 20-22486, 2 March 2022; decision of the Court of Cassation (civ. 2nd), No. 20-14684, 14 October 2021.

15 Decision of the Court of Cassation (crim.), No. 16-83545, 13 June 2017.

16 J Landel, The waiver contained in a settlement prevents the victim from claiming damages not included in the settlement, *General Insurance Law Review*, No. 9, p. 489, September 2017.

In *CRAMA v. Mr X*,[17] it was found that the insurer cannot raise a settlement agreement concluded with the victim of the wrongdoing against the co-perpetrator of the damage.

In this case, the damage was caused by two wrongdoers. The insurer of the first wrongdoer concluded a settlement with the victim and compensated her. Then, the insurer of the first wrongdoer sought to reclaim half of the settlement sum from the second wrongdoer. However, the Court of Cassation found that the second wrongdoer was not bound by the settlement agreement concluded by the first wrongdoer. The fact that the second wrongdoer was aware of the settlement did not mean that it could be enforced against him.

ii Significant cases in substantive terms

Pre-contractual stage

Insurers usually require policyholders to issue a risk of statement before the conclusion of the insurance policy. In practice, it means the policyholder has to fill out an application form before entering the insurance policy. When the policyholder has made a false statement, it is usually raised by the insurer as a defence to deny the insurance claim.[18]

However, the insurer can invoke a false statement made by the policyholder in the insurance form only if the questions asked by the insurer were sufficiently precise.[19] The insurer has to prove it had asked clear questions to raise any defence based on the policyholder's false statement. Consequently, if the question is slightly unclear or stated in overly general terms,[20] the insurer loses any defence based on the imprecise answer given. Accuracy is particularly important as an insurer cannot invoke an omission or a false statement from the policyholder if the questions asked within the application form did not involve the disclosure of the relevant information. In *Mrs H and Mr V v. Macif*, the insurer could not blame the policyholder for not disclosing that her son was a secondary or occasional driver of the insured vehicle because the insurer had not asked questions about secondary or occasional drivers.[21]

To the opposite, the Court of Cassation recently upheld an appeal decision that declared null and void an insurance contract because of the voluntary omission made by the policyholder, who, therefore, had to reimburse the payments received from the insurance company.[22]

Defences of the insurer against the policyholder

Legal exclusion of intentional breaches

A risk brought about by intentional or wilful misconduct by the policyholder is not insurable. French courts distinguish intentional misconduct, characterised by the insured's willingness to create the damage as it happened,[23] from wilful misconduct, characterised by the insured's awareness that his or her action has the effect of making the damage inevitable.[24]

17 Decision of the Court of Cassation (civ. 2nd), No. 16-20951, 8 February 2018.

18 Articles L113-2 and L113-8 of the Insurance Code.

19 For example: *Quatrem v. Raymond X*, Decision of the Court of Cassation (civ. 2nd), No. 16-18975, 29 June 2017.

20 Article L112-3 of the Insurance Code.

21 Decision of the Court of Cassation (civ. 2nd), No. 17-28451, 28 March 2019.

22 Decision of the Court of Cassation (civ. 2nd), No. 20-20745, 16 June 2022.

23 Decision of the Court of Cassation (civ. 2nd), No. 12-12813, 28 February 2013.

24 Decision of the Court of Cassation (civ. 2nd), No. 19-11538, 20 May 2020.

On this basis, the Court of Cassation recently denied the insurability of a barn destroyed as a result of the owner's failure to repair it. The Court held that the owner could not be unaware of the risk of collapse. Thus, by making the risk certain, the insuree had committed wilful misconduct, thereby excluding the insurer's liability.[25]

As an example, in *Axa France IARD v. Generali IARD* it has been reaffirmed that damage resulting from intentional misconduct is excluded from insurance coverage whereas damage not resulting from such misconduct should be included.[26] In this case, the policyholder's son had committed arson by setting fire to furniture outside an establishment, but the fire had spread to the inside of the establishment as well. The Court of Cassation ruled that the policyholder's son, while he sought to cause damage to furniture outside the establishment (damage that was, therefore, excluded from insurance coverage), did not intend to cause damage inside the establishment. Consequently, insurance coverage was still due for the damage to the facility. In *Family'Immo v. Lloyd's*,[27] the Court of Cassation ruled that the serious negligence of the policyholder who knowingly put its clients at risk did not amount to the intentional misconduct required to exclude the risk's coverage by the insurer.

In this case, an estate agency, Family'Immo, knew that the property bought by its clients had several construction defects but made the sale anyway. Family'Immo was found liable for contractual breach and asked its insurer, Lloyd's, to compensate its client. The Court ruled that even if the negligence of Family'Immo was unacceptable for a professional since it acted in bad faith, it did not amount to an intentional breach within the meaning of the Insurance Code.

Contractual exclusion: recent application

In addition to the legal exclusions, insurers can exclude some risks from the insurance policy. Pursuant to Article L113-1 of the Insurance Code, those contractual exclusions have to be 'formal and limited'. The formal and limited criteria aim at providing the insured with certainty as to when and under what conditions he or she is not covered.[28] A significant part of the insurance litigation in France is related to this issue.

The exclusion clause is formal when it is clear and leaves no room for uncertainty as to the parties' intention to exclude coverage in a particular case. It is limited when its wording is sufficiently precise, not only to enable the insured to know exactly the area of the exclusion of coverage, but also to avoid emptying the coverage of its substance.[29]

In construction insurance, the activity declared to the insurer excludes risks from other undisclosed activities. In the important case of *M C v. Mutuelle du Mans IARD*, the insured builder had contracted an insurance policy hedging the risk concerning only its structural work.[30] The builder, Euroconstruction, entered into a contract for the entire construction of a single-family house. The Court of Cassation ruled that the damage caused on this site was not covered by the insurance as the activity of building a single-family house was not expressly included in the contract.

25 Decision of the Court of Cassation (civ. 2nd), No. 16-23103, 25 October 2018.
26 Decision of the Court of Cassation (civ. 2nd), No. 18-18909, 16 January 2020.
27 Decision of the Court of Cassation (civ. 2nd), No. 16-10042, 12 January 2017.
28 Decision of the Court of Cassation (civ. 2nd), No. 04-7872, 18 January 2006.
29 Decision of the Court of Cassation (civ. 2nd), No. 19-23977, 11 February 2021.
30 Decision of the Court of Cassation (civ. 3rd), No. 17-23741, 18 October 2018.

Upon the occurrence of the damage, the insured must put in a claim accurately and faithfully. The insurer may exclude coverage because of a false statement of claim. To benefit from this exclusion, it was held that it must be provided for in the insurance policy by the insurance company, which must demonstrate the insured's bad faith.[31]

Conditions of guarantee: the hard hurdle of policyholders

To limit the coverage, an insurer may also protect itself by setting out conditions precedent in the insurance policy. Usually, the policy imposes certain duties on the policyholder, especially the obligation to take preventive measures. If the policyholder does not comply, the risk is not covered. Contrary to exclusions of guarantee that are easier to defeat, recent insurance litigation has shown that the conditions are very difficult to override, as illustrated in *La Riviera v. Alpha Insurance*.[32]

In this case, a nightclub owned and operated by La Riviera was ravaged by a fire. It appeared that La Riviera, which had entered into a property and casualty insurance contract with Alpha Insurance, did not comply with precautionary measures listed in the contract. La Riviera raised plenty of defences to override the conditions precedent of the insurance policy. All of them failed.

First, La Riviera argued that the conditions were so numerous that they contradicted each other. According to La Riviera, the guarantee was, therefore, illusory. This head of claim referred to *Chronopost*,[33] in which the Court of Cassation decided that a contractor cannot limit his or her essential obligation to the point that the obligation is no longer effective. Nevertheless, the Court rejected the claim by stating merely that the guarantee was not illusory.

La Riviera also questioned the appropriateness of the conditions. According to La Riviera, the breached preventive measures would not have enabled it to avoid the fire even if they had been taken. The Court rejected the argument, standing by a strict application of the clause.

Finally, La Riviera discussed the nature of the conditions. It argued that the condition precedent in fact amounted to an indirect exclusion of guarantee that was to be treated under the aforesaid Article L113-1 of the Insurance Code. The claim was rejected on procedural grounds. Meanwhile, the substantive issue of qualification is left unresolved. As observed by some authors, it could be a valuable defence in future cases.[34]

In a recent decision, the Court of Cassation brought some clarifications on the nature of exclusion clauses. While a court of appeal had considered that lack of maintenance and repair could not be construed as an exclusion clause but as a type of event that was not insured under the insurance policy, the Court of Cassation overturned this reasoning by stating that such clause deprives the policyholder from the benefit of a guarantee under specific circumstances and is, therefore, an exclusion clause.[35]

31 Decision of the Court of Cassation (civ. 2nd), No. 17-20491, 5 July 2018.

32 Decision of the Court of Cassation (civ. 2nd), No. 16-22869, 18 January 2018.

33 Decision of the Court of Cassation (com.), No. 93-18632, 22 October 1996.

34 J Bigot, J Kullman and L Mayaud, *Traité de droit des assurances*, LGDJ, t.5, No. 394, 2017.

35 Decision of the Court of Cassation (2nd), No. 20-14094, 14 October 2021.

Scope of the insurance policy: the Poly Implant Prostheses case

Another ongoing legal saga, the Poly Implant Prostheses (PIP) breast prostheses scandal, has lasted over 12 years in France. In 2010, PIP placed breast prostheses on the market that were produced without regard to certain public health regulations. The hazardous prostheses were implanted in thousands of patients, leading to disputes in several countries. In *Electromedics Ltd and others v. Allianz IARD*,[36] the Court of Cassation made a ruling in an action brought by the foreign distributors of the defective prostheses against the insurer of PIP.

In the case at hand, distributors from Brazil, Italy and Bulgaria asked for compensation from Allianz IARD on the basis of a liability insurance policy that Allianz had entered into with PIP. The distributors raised multiple losses that were covered under the policy (e.g., losses of turnover, stocks, margins and provision made for the compensation of customers). However, the insurance policy defined its territorial scope as limited to the 'harmful events' that occurred in France. Thus, the issue was whether the damage had occurred in France. According to the foreign distributors, the harmful event occurred during the manufacturing of the prostheses by PIP (i.e., the harmful event would allegedly have occurred in PIP factories in France). The Court of Cassation rejected the argument and held that the harmful event was the breaking of the prostheses, which occurred outside France. Thus, the losses suffered did not fall within the material coverage of the insurance policy.

The ECJ stated that Article 18 of the Treaty on the Functioning of the European Union providing for the prohibition of discrimination on grounds of nationality was not applicable to the insurance policy clause limiting the territorial scope of the coverage to one Member State.[37]

Last year, developments regarding the *PIP* case mainly focused on the liability of the French state. Whereas the Besançon Administrative Court considered that the French Agency for Health Safety of Health Products had failed to act with due diligence in the *PIP* case, the Council of State, the highest French administrative court, annulled this decision considering that there was no demonstration of the Agency's failure.[38]

Remedies: the situation of the insurer during natural disasters

Natural disasters have become a growing cause for concern in the insurance sector, especially because case law tends to deprive insurance companies of any recourse against third parties that could have contributed to the damage on the grounds of *force majeure*. This trend was illustrated in *Swisslife Insurance v. SNCF and the State*.[39]

In 2003, major abnormal rainfalls occurred in the south east of France. This resulted in floods that particularly hit the town of Arles. Swisslife Insurance compensated a large number of inhabitants who suffered damage to their properties. The final bill amounted to more than €5 million, yet the town was surrounded by flood barriers connected to the railway line used by SNCF, the French national rail operator. These protections having been ineffective, Swisslife Insurance exercised recourse against SNCF and the state. However, the Council of State, which heard the claim, found no breaches by the defendants. The Court pointed out

36 Decision of the Court of Cassation (civ. 2nd), No. 16-14951, 8 June 2017.

37 Decision of the Court of Justice of the European Union [C-581/18], 11 June 2020.

38 Administrative Court of Besançon, No. 1701712, 12 November 2019; French State of Council, No. 437600, 16 November 2020.

39 Decision of the Council of State (div. 7th), No. 403367, 15 November 2017.

that the floods were provoked by one of strongest rainfalls on record. The Court concluded that the state and SNCF could not be held liable since their alleged breaches would be excused on the grounds of *force majeure*.

IV THE INTERNATIONAL ARENA

i International jurisdiction: the measures of inquiry in futurum

The Regulation Brussels 1 *bis*[40] provides rules of jurisdiction applicable to insurance matters within the European Union.

In *Ergo Versicherung AG v. EPMD*,[41] it was ruled that French courts could order measures of inquiry *in futurum* in France within an insurance dispute even if foreign courts had substantive jurisdiction to handle the case. This is because Article 35 of Regulation Brussels I bis provides that a party may apply for 'protective measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter'.

In this case, the policyholder applied for measures of inquiry *in futurum*. Under French law, measures of inquiry *in futurum* can be granted by the president of the court to allow a party to collect evidence before any legal proceedings.[42] Therefore, the issue was whether those measures of inquiry *in futurum* are protective measures within the meaning of Regulation Brussels I *bis*. The Court of Cassation found measures of inquiry *in futurum* consisted in protective measures and fell within the scope of Article 35 of Regulation Brussels I *bis*.

In two recent requests for a preliminary ruling, the ECJ outlined that Articles 10 to 16 of Regulation Brussels I *bis* for jurisdiction in relation to insurance matters must be strictly interpreted and cannot apply to a dispute implying a business that had acquired a claim originally held by an injured party.[43]

ii Applicable law: recent developments within transport insurance

The Court of Cassation had to interpret an exclusion clause raised by an insurer against a transporter under an insurance policy that covered the international carriage of goods in *AIG Europe the Netherlands v. Miedzynarowy Transport Drogowy*.[44]

The dispute was about an exclusion of guarantee provided by a transport insurance policy. In this case, two conflicting sets of rules were potentially applicable: the UN Convention on the Contract for the International Carriage of Goods by Road (CMR)[45] and the conflict rules applicable for insurance matters. The Court stated that the CMR is a special convention

40 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

41 Decision of the Court of Cassation (civ. 1st), No. 16-19731, 14 March 2018.

42 Article 145 of the Civil Procedure Code.

43 ECJ, case C-913/19, 20 May 2021; ECJ, case C-393/20, 21 October 2021.

44 Decisions of the Court of Cassation (com.), Nos. 15-13384, 15-13386, 15-14272, 8 March 2017.

45 Convention on the Contract for the International Carriage of Goods by Road (CMR) Geneva, 19 May 1956.

applicable to transport that could not govern the law applicable to the insurance contract but only determine the insurable risk. Thus, the Court applied the rules of conflict applicable to insurance matters.

V TRENDS AND OUTLOOK

i Prospective outcomes of recent legal developments

Class actions

French law has developed to allow class actions in limited circumstances. Consumer class actions may only be brought by an association of consumers. The action must also be related to sales contracts or provision of services contracts concluded by consumers placed under the same or similar situations.[46]

The *National Confederation of Housing v. 3F Real estate company* case[47] did not concern an insurance dispute but may have an impact on class actions that could be brought against an insurer.

In this case, the Court of Cassation confirmed that the action of an association of consumers seeking remedies for a breach committed by a professional lessor under several similar rent contracts was inadmissible. According to the ruling, the rent contracts were not 'provision of services' contracts within the meaning of the Consumer Code. We can imagine that this reasoning could be transposed to class actions against an insurer, which could be declared inadmissible since those actions are found in the Insurance Code and not the Consumer Code.

Insurers may also intervene in class actions as the guarantor of the victims or the wrongdoer. The Healthcare System Modernisation Act[48] extended class actions to damages claims arising from healthcare products, which is a growing concern for insurers.

On 25 November 2020, the Directive on representative actions for the protection of the collective interests of consumers was adopted. France has until 25 December 2022 to implement this Directive into its domestic legislation.[49]

Information due to the policyholder

The Insurance Distribution Act[50] has significantly developed the insurer's duty of information. The text provides some vague standards. For instance, it requires that 'distributors of insurance products act in an honest, impartial and professional way'. The insurer is also required to provide 'objective information about the offered insurance product in an understandable form'. Ever-growing litigation may arise from this text, which offers great leverage to policyholders to obtain remedies for breach of pre-contractual information.[51]

46 Article L623-1 of the Consumer Code.

47 Appeal (Paris), div. 4, ch. 3, 9 November 2017, No. 16/05321. Upheld by decision of the Court of Cassation (com.), No. 18-10424, 19 June 2019.

48 Healthcare System Modernisation Act No. 2016-41 of 26 January 2016.

49 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

50 Insurance Distribution Act No. 2018-361 of 16 May 2018.

51 Decision of the Court of Cassation (com.), No. 19-18704, 2 February 2022.

ii Evolving sectors of insurance litigation

The regulator of the banking and insurance sectors in France, the Prudential Supervision and Resolution Authority (ACPR), made, in its annual report, a number of findings on the evolving sectors of insurance.

Climate change

In the course of 2020–2021, the ACPR conducted a climate pilot group aiming at assessing the risks associated with climate change for financial institutions, thus showing the growing role of the French authorities in the fight against climate change. Similarly, a law was enacted on 2 March 2022 allowing the government to sharpen the framework of climate insurance for farmers. This law aims at implementing a universal system, although not a compulsory regime, for climate multi-risk insurance that farmers can subscribe in the event of climate damage (drought periods, floods, etc.).

Terrorism

In France, damages arising from terrorism are submitted to two different regimes with regard to the nature of the damage. Corporal damages are covered by the Compensation Fund for Terrorist Acts (CFTA),[52] which is financed by a contribution on insurance premiums.[53] Material damages are left to the insurance sector. Certain insurance policies must mandatorily cover material damages arising from terrorism.[54] Thus, insurance disputes related to terrorism mainly concern material damages. However, indemnification disputes with the CFTA in relation to corporal damages tend to develop in France as illustrated by Mrs Y *v. CFTA*,[55] in which the CFTA successfully challenged the status of victim of the claimant and denied indemnification.

Cyber risk

According to Europol, ransomware is now the predominant threat in relation to cybercriminality. This consists of hacking into an IT system, disabling it and then demanding a ransom to restore the system to its normal state. To tackle this and other cyberattack-related issues, insurers have issued customised insurance policies covering this kind of risk. However, the high complexity of cyberattacks makes it difficult to know what kinds of risk fall under the insurance coverage. This may lead to some highly technical debates about the scope of coverage in the future. Moreover, the insurability of the cyberattack risk is also under discussion. Notably, it remains unclear whether the ransom paid to restore a system is insurable.

In its 2021 annual report, the ACPR outlined the efforts put in place to ensure that insurance companies manage their own cyber activities, incidents and attacks and concluded that some of the insurance companies' security systems could still be improved.

52 Articles L126-1 and L422-1 of the Insurance Code.

53 Article L422-1 of the Insurance Code.

54 Article L126-2 of the Insurance Code.

55 Decision of the Court of Cassation, No. 17-10456, 8 February 2018.

Political risk

The same goes for political risk. Mirroring global trends, employees of French multinational companies face an increasing risk of kidnapping around the world.[56] Specific insurance policies cover all the losses incurred by the company in the event of an attack against its employees on foreign territory: care of the victims, medical care, loss of profits, ransom paid and even the fees of a professional negotiator. The same issues may arise as those discussed above in relation to cyberattack risks regarding the validity of these guarantees: the insurability of the risk and the scope of the coverage.

Covid-19 pandemic

In reaction to the covid-19 pandemic, the government imposed three national lockdowns in turn, starting in mid-March 2020. Many businesses were forced to close to the public and have incurred significant operating losses as a result. Many of these businesses now hope to recover some of their losses under their insurance policy.

This gave rise to a number of disputes between businesses and their lessors or insurers, or both. In a recent landmark ruling, the Court of Cassation considered that closing to the public during lockdowns does not entail the loss of the thing rented and, therefore, does not constitute a non-performance, by the lessor, of its undertakings. A tenant cannot, therefore, rely on this event to refuse to pay the rents owed during lockdowns.[57]

As to disputes with their insurers, businesses requested compensation for their operating losses during lockdowns. Several French summary judges ordered insurers to make payments, as an interim measure pending proceedings on the merits or expertise proceedings, to provide for operating losses resulting from the business interruption to the extent that the insurance policy clearly stipulated that such losses should be compensated.[58] Conversely, when an insurance policy was unclear or less precise on this point, the summary judges refused to grant this interim measure as they lacked jurisdiction to construe the insurance policy and only the judge could rule on these claims on the merits.[59]

Since then, case law on claims for compensation brought by businesses against their insurers is unsettled. While some courts ordered insurers to compensate policyholders for operating losses on the grounds that excluding covid-19 from the scope of business interruption would deprive the insurance policy of its purpose,[60] other courts considered the

56 'Risk management: the kidnapping insurance', *Le Nouvel Economiste*, 15 June 2011.

57 Decision of the Court of Cassation, No. 21-19.889 – No. 21-20.127 – No. 21-20.190, 30 June 2022.

58 Paris Commercial Court, No. 2020017022, 22 May 2020; .Marseille Commercial Court, No. 2020F893, 15 October 2020; confirmed by the decision of the Aix-en-Provence Court of Appeal, No. 20/10357, 25 February 2021. See also, Paris Commercial Court, No. 2020022823, 17 September 2020, and Lille Commercial Court, No. 2020022185, 11 February 2021.

59 Lyon Commercial Court, No. 2020R00303, 10 June 2020, no appeal decision found.

60 Tarascon Commercial Court, No. 2020001786, 24 August 2020; confirmed on its principle but the amount of compensation was reduced by decision of the Aix-en-Provence Court of Appeal, No. 20/08317, 20 May 2021.

covid-19 pandemic to be validly excluded from the scope of the guarantee of operating losses, and rejected policyholders' claims.[61]

The ACPR and legal commentators explain this situation by the variety of policies concluded between insurers and policyholders (some clauses cover certain consequences of the covid-19 pandemic, whereas others do not). According to the ACPR, as at 31 March 2020, 4.1 per cent of the insurance policies were ambiguous or unclear, and resulting strained relations between insurers and policyholders have led to a stream of litigation in France.

Given these diverging decisions, several major French insurance companies sent amendments to their policyholders and concluded settlements with respect to complaints for operating losses during the covid-19 lockdowns.

61 Lyon Commercial Court, No. 2020J00525, 4 November 2020, no appeal decision found; Vienne Commercial Court, No. 2020J163, 27 May 2021, no appeal decision found; Toulouse Commercial Court, No. 2020J00294, 18 August 2020; overruled by the decision of the Toulouse Court of Appeal, No. 20/02301, 29 June 2021; Poitiers Court of Appeal, No 22/00233, 12 July 2022; Versailles Court of Appeal, No 21/05985, 12 May 2022.

Appendix 1

ABOUT THE AUTHORS

JULIE METOIS

Allen & Overy LLP

Julie Metois is a senior associate in the litigation department at Allen & Overy Paris. Her practice focuses primarily on civil, commercial and regulatory litigation. Her experience includes advising and assisting major companies, including insurance companies, before French civil and commercial courts, and in the course of regulatory investigations. She also has experience of advising clients with respect to recognition and enforcement of foreign judgments and international attachment and seizure proceedings.

ERWAN POISSON

Allen & Overy LLP

Erwan Poisson is a partner in the litigation department at Allen & Overy Paris. He advises international and domestic companies in complex commercial, civil and criminal disputes, from the pre-litigation stages of a matter, including alternative dispute resolution methods, to court trials. Erwan also handles contractual and distribution disputes, as well as product liability matters and insurance disputes, with a focus on the aviation sector. As a general litigator, Erwan notably advises in the areas of banking and finance litigation, where his experience includes liability claims against banks, financial services and investment funds; and corporate litigation, including disputes between majority and minority shareholders and disputes related to shareholding agreements, as well as representations and warranties.

He has also developed specific expertise in conflicts of laws and jurisdictional issues (a subject he teaches at university), international judicial assistance, asset-tracing and recovery, and the enforcement of foreign judgments and arbitral awards on assets located in France.

ALLEN & OVERY LLP

52 avenue Hoche
75008 Paris
France
Tel: +33 1 40 06 54 00
Fax: +33 1 40 06 54 54
erwan.poisson@allenovery.com
julie.metois@allenovery.com
www.allenovery.com

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