Newsletter

Insurance

Issue No 1

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EDITORIAL

We've got it! Welcome to DWF's first insurance law newsletter! All the members of our team, including our new Counsel Arnaud Attias, have joined forces to offer you a brief overview of the latest regulatory and case law developments in the various branches of insurance law.

In this first edition, you'll find the latest news from the ACPR on the uninsurability of financial penalties imposed by independent administrative authorities, new guidelines on intermediaries' duty to advise, and the results of the ACPR's study on exclusion clauses.

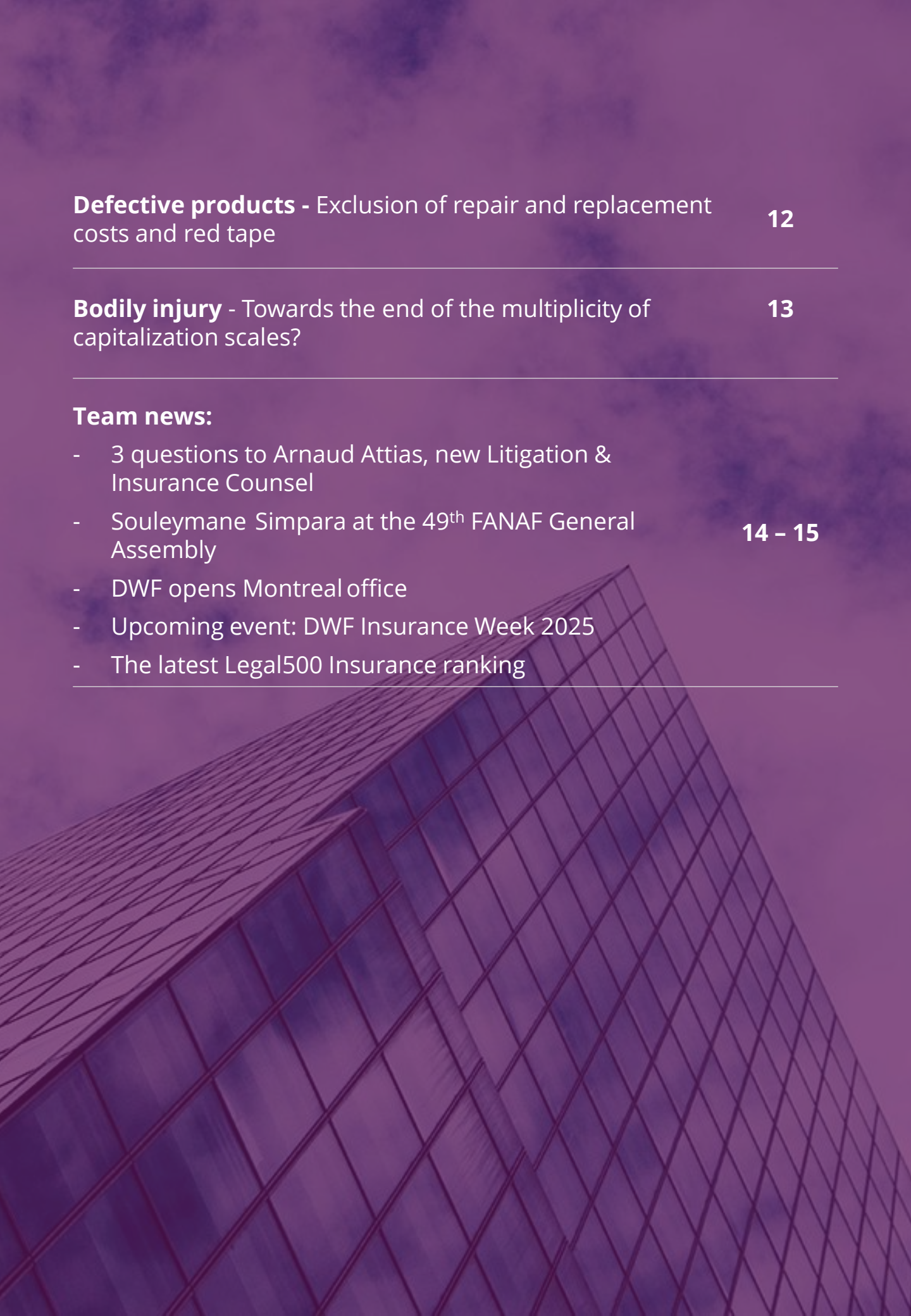
In recent weeks, the courts have also had to deal with a wide range of issues relating to insurance law and civil liability, from the admissibility of claims in a fire insurance, to the duty of IT service providers to advise, and once again, to assess the validity of various exclusion clauses.

This newsletter is also an opportunity to keep you up to date with the firm's latest news, in particular the recent opening of an office in Montreal to enhance our presence in Canada.

We hope you enjoy reading this brochure, and remain at your disposal should you need us.

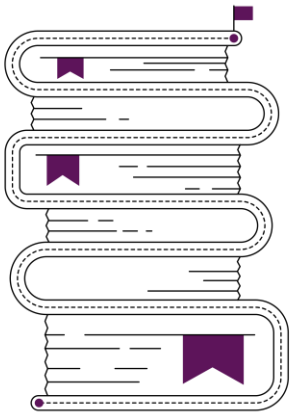
Romain Dupeyré

In this issue



FINANCIAL LINES

ACPR position on the uninsurability of administrative sanctions



On March 18, 2025, the ACPR issued a press release strongly opposed to the insurability of financial penalties imposed by an administrative authority.

As it has already done in the past, the regulator invokes public policy order as an obstacle to the coverage by an insurance policy of "fines, whatever their nature, or any other pecuniary sanction imposed by administrative authorities", and links this requirement with the constitutional principle of the individual nature of penalties. The ACPR concludes "that any contractual clause providing for this would be null and void, subject to the courts' assessment."

The clarity of the regulator's position is welcome, as it is a source of legal certainty. However, it is questionable whether the ACPR's uniform position will be appropriate for all the sanctions referred to in the press release. Legal authors' debates on the question, relating to the repressive nature of sanctions, the nature of the sanctioned fault, or the status of the person liable, could suggest a more nuanced solution. It remains for the courts to decide.

Arnaud Attias

INSURANCE DISTRIBUTION

ACPR updates its recommendations on the duty to advise

Recommendation No. 2014-R-02 of November 21, 2024

In a recommendation No 2014-R-02 dated November 21, 2024, the Autorité de contrôle prudentiel et de résolution (ACPR) issues recommendations to insurance product distributors on the collection of customer information for the exercise of their duty of advice and the provision of a personalized recommendation service. This recommendation follows, in particular, the entry into force of the law of October 23, 2023 relating to the green industry and the various controls carried out by the ACPR in relation to the duty to advise. The regulator sets out four series of requirements.

The first part relates to the duty to provide advice before subscribing to or taking out a contract. The ACPR recommends the use of "clear, precise and comprehensible questions", for example in the form of logical questioning, as well as drawing the policyholder's attention to any risk of accumulation of insurance. With regard to capitalization and life insurance products in particular, the supervisory authority recommends gathering a range of information covering not only the subscriber's family and professional situation, but also his or her financial situation, with precise subscription or membership objectives and investment horizon.

The ACPR also invites distributors to enquire about the prospect's interest in and preferences for sustainability. The use of the information gathered, for all insurance products, also requires distributors to identify answers that are manifestly inconsistent or incomplete.

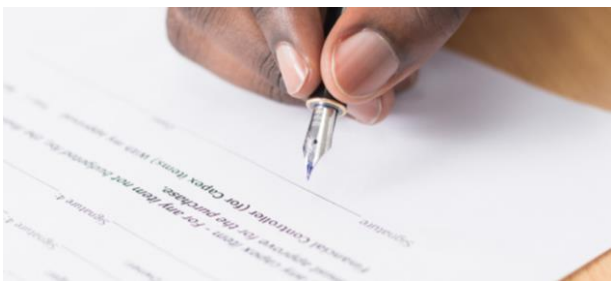
The wording of advice and information on non¬life insurance products presupposes that the distributor "clearly explains the scope of cover and any restrictions", which in turn presupposes **standardized numerical examples** of the amounts covered.

The second set of recommendations concerns the scope of the duty to provide advice once a non-life insurance policy has been taken out. In this respect, **the ACPR calls on distributors to contact policyholders at appropriate intervals, to check that the policy is still consistent with their needs and requirements** - which means, if it is not, that the distributor should offer to adapt the contract.

Thirdly, the regulator is issuing a series of recommendations concerning the duty to provide advice once a life insurance policy has been taken out or subscribed to. Among the measures recommended, the ACPR invites distributors, in the event of no transaction for 4 years - or 2 years if a personalized recommendation service has been provided - to contact the subscriber in order to update the information gathered and check that the contract meets his or her requirements and needs.

The final section aims to ensure that the staff responsible for selling insurance products have the knowledge and skills needed to offer a product that is consistent with the policyholder's requirements and needs. The recommendation will come into force on December 31, 2025.

Matthieu Lohr



INSURANCE

ACPR survey: beware of exclusion clauses! September 24, 2024

At the end of 2023, the ACPR launched a survey to examine the way in which the case law and doctrine of the Insurance Ombudsman were taken into account by insurance companies when drafting their contractual clauses. The ACPR questioned 17 insurers and analyzed over a hundred property and casualty insurance contracts.

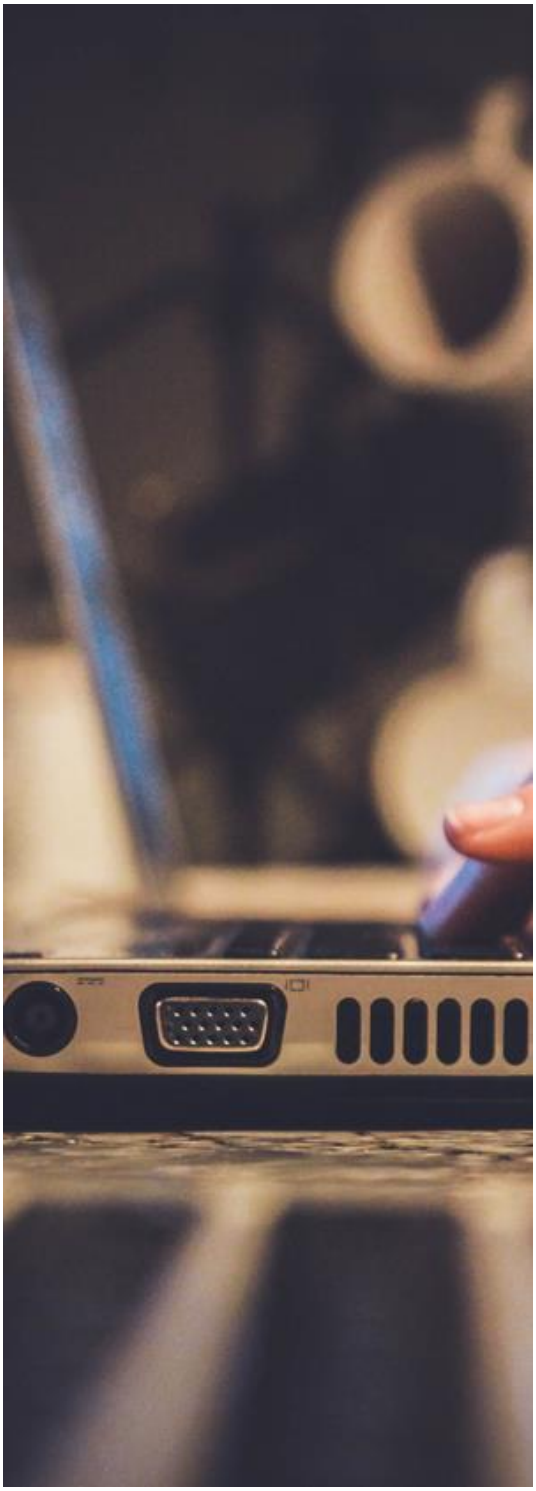
The results of the survey, published on September 24, 2024, offer several lessons. Firstly, the contracts examined still include exclusion clauses invalidated by the French Supreme Court.

In particular, these include "faulty maintenance", damage "caused or provoked" by the insured and failure to comply with "good engineering practice". Such clauses are in fact contrary to the case law handed down in application of Article L.113-1 of the Insurance Code: in particular, they must neither empty the warranty of its substance, nor refer to imprecise criteria or non-limited hypotheses.

On the other hand, the regulator points to criticized clauses that reverse the burden of proof or are insufficiently precise, such as compensation for "small supplies" in motor insurance.

In this context, while the ACPR notes that the annual review of insurance contracts is expanding within companies, it also points out that it is still too often limited to multi-risk home and motor contracts. Similarly, while the ACPR observes that contract modifications are being studied or planned within companies, it points out that certain monitoring mechanisms are not sufficiently adapted, and that contract review mechanisms are poorly formalized.

In light of all these findings, the ACPR is calling on insurers to review their contracts, with particular emphasis on exclusion clauses. The regulator has already announced that it will "*closely monitor the measures implemented by insurance organizations to deploy robust governance mechanisms and rapidly revise or remove from contracts any exclusion clauses that do not comply with the state of the law*".



Matthieu Lohr

PROPERTY DAMAGE INSURANCE

When the insurer denies coverage, the procedure set out in Article L.122-2 of the French Insurance Code goes up in smoke

Cass. civ. 2e, March 13, 2025, No 23-10.961, Published in the Bulletin

In a ruling handed down on March 13, 2025, the French Supreme Court, the Cour de cassation, recalled that when an insurer refuses to cover the damage suffered by its insured as a result of a fire, the latter is not required to comply with the procedure laid down in Article L.122-2 of the Insurance Code, which requires him to observe a time limit of 6 months after submitting a statement of losses before being able to bring a claim for compensation before a judge.

In this case, following a fire in his café-bar-restaurant, a policyholder made a claim against his insurer.

The insurer challenged the admissibility of the insured's claim on the grounds that, in accordance with article L.122-2 of the French Insurance Code, the insured could only take legal action after the expiry of a 6-month period from the date on which he had submitted his statement of loss to the insurer. The insurer also argued that this inadmissibility of the action brought by the insured before the expiry of the time limit could not be rectified during the course of the proceedings (the insured only submitted his statement of losses during the appeal proceedings). The Nancy Court of Appeal ruled that the policyholder's claim for compensation was admissible, and the Court of Cassation agreed.

According to the Cour de cassation, the parties are not entitled to bring an action before a court until 6 months after the insurer has received the statement of loss, unless the amicable expert appraisal has been completed before the expiry of this period. However, **once the insurer has made known its refusal of cover, the insured may appeal to the court to contest this decision, without having to follow the procedure laid down in article L.122-2 of the French Insurance Code.**

The public policy provisions of article L.122-2 of the French Insurance Code were introduced to prevent excessively long out-of-court expert appraisals. While they appear to be favourable to the insured, they also constitute a constraint for the latter, as any claim for compensation before the expiry of the 6-month time limit is inadmissible, even when it concerns a claim for provision in summary proceedings (Cass. com. Oct. 22, 1996, no. 93-18.929).

The present ruling, the importance of which is highlighted by its publication in the Bulletin, therefore authorizes such an action by the insured where the insurer has refused cover.

Souleymane Simpara

CONSTRUCTION

Sharing decennial liability between a property developer and an architect

Cass. civ. 3e, February 13, 2025, No 23-21.136

A property developer who sells a building to be constructed is automatically liable to the purchaser for ten-year civil liability if any defects appear within ten years of acceptance of the work, as defined in article 1792 of the French Civil Code (Cass. Civ. 3e, April 4, 2024, no. 22-12.132 and no. 22-20.107).

The developer's liability is automatically engaged, and he brings an action in warranty against the architect - the site's prime contractor. The Court of Appeal apportioned liability between the developer and the architect. The developer appealed, accusing the Court of Appeal of leaving him to bear part of the liability for repairs.

The Cour de cassation overturned the appeal decision, citing article 1792 of the Civil Code applicable in New Caledonia, and set out two conditions for the project owner's contribution:

- characterization of fault, interference or deliberate assumption of risk;
- in the case of interference by the client in the design or execution of the work, proof of the client's well-known competence. On this point, the Cour de cassation noted that the client had previously been described as a "*layman in the field*".

Mathilde Mevel

EXCLUSION CLAUSE

"When" the exclusion clause is still ambiguous

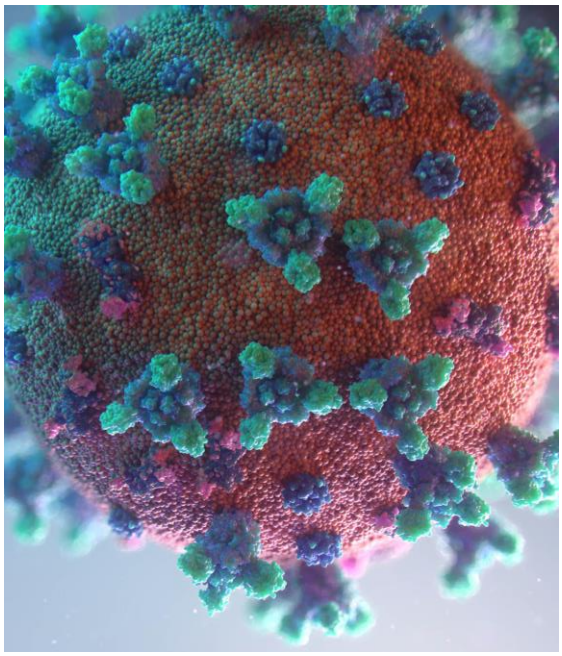
Cass. civ. 2e, January 23, 2025, No. 23-14.482

The French Supreme Court continues to rule on business interruption claims arising from the Covid-19 pandemic. In this ruling, it reiterates its solution of censoring an exclusion clause containing the subordinating conjunction "when".

In this case, a company operating a restaurant had taken out a comprehensive professional liability insurance policy including business interruption cover. Following the ban on public access imposed in 2020 as part of the Covid-19 pandemic, the insured made a claim, which was rejected by the insurer on the basis of the following exclusion clause:

"*However, the following are excluded*:

- closure following a collective closure of establishments in the same region or nationwide,
- when the closure is the result of a wilful violation of regulations, ethics or professional practices".



The Court of Appeal, in ruling that the exclusion was formal and limited, considered that the clause referred to two distinct types of event, due to the use of two hyphens, the existence of a comma between the two cases, and the use of the terms "consecutive" and "consequence". Similarly, the phrase "*demeure toutefois exclue*", in the singular, implied the absence of two cumulative conditions. In this respect, the Court of Appeal had stressed that the two cases were distinct and alternative, the first relating to the insured's external situation and the second consecutive to a closure resulting from his fault.

The Cour de cassation censured the appellant's decision, pointing out, under the terms of article L.113-1 of the Insurance Code, that "an exclusion clause is not formal when it does not refer to precise criteria and requires interpretation". The 2nd Civil Division held that the disputed clause had been rendered "ambiguous by the use of the subordinating conjunction 'when'", which "*required interpretation, so that it was not formal".*

The Cour de cassation here reaffirms a solution already adopted last year concerning the use of the conjunction "when" in an exclusion (Civ. 2e, January 25, 2024, n°22-14.739; Civ. 2e, March 14, 2024, n°22-16.305; Civ. 2e, June 20, 2024, n°22-20.854), thus confirming a now established case law - which insurers are advised to take into account when drafting their clauses.

Matthieu Lohr

MARITIME

The "pay to be paid" clause governed by English law cannot be invoked against a victim bringing a direct action in France

Cass. civ 1ère, Dec. 18, 2024, No 21-23.252, Published in the Bulletin

This decision by the French Supreme Court, published in the Bulletin, answers a novel question: the effectiveness of "pay to be paid clauses in French law. These clauses stipulate that the insurer is only obliged to pay the insurance indemnity to its liable insured, once the latter has compensated the third-party victim. The effect of these clauses is to prevent any direct action by the victim against the insurer. They are valid under English law and well known in the marine insurance world, as they are often stipulated in policies underwritten by P&I clubs.

In this decision, the Cour de cassation ruled that these clauses were ineffective under French law, as they were unenforceable against a victim taking direct action against the insurer of the liable party.

In this case, a ship collided with the gangway at the base of the helipad in the port of Cannes. The Commune sued its damage insurer, the shipowner (subsequently placed in liquidation) and the latter's liability insurers (the "**Insurers**").

The Insurers contested the direct action brought by the Commune against them, invoking the "Pay to be paid" clause stipulated in their insurance contract, subject to English law. The Aix-en-Provence Court of Appeal, endorsed by the French Supreme Court, rejected their arguments.

To this end, the Cour de cassation qualifies the "Pay to be paid" clause as a provision relating to the possibility of direct action, at least in terms of its effects. The Court then ruled that the question of the possibility of direct action is determined by the law designated by the conflict rule of the court seized. In French private international law, a direct action is possible if it is permitted either by the law of the principal obligation (in this case, French law, as the law of the place of the damage and therefore of the ship's tortious liability), or by the law of the insurance contract. In other words, if the law of the main obligation authorizes it, the law of the insurance contract cannot stand in the way. In French law, Articles L.124-3 (for land insurance) and L.173-23 (for marine insurance) of the Insurance Code provide for the possibility of direct action.

This decision is also an opportunity for the Cour de cassation to reiterate the unenforceability of jurisdiction clauses stipulated in insurance contracts against third-party victims. Such clauses can only produce effects between contracting parties. As a further consequence of this unenforceability, the judgment handed down by the London High Court in the denial action brought by the Insurers against the liable insured and the third-party victim is not recognized in France. In fact, the High Court's jurisdiction was based on the clause that was unenforceable against the third-party victim.

Arnaud Attias

CYBER

IT service provider's duty to advise and liability in the event of a cyber attack

Rennes Court of Appeal, 3e ch. com. Nov. 19, 2024, No. 23/04627

The Rennes Court of Appeal has held an IT service provider liable for a ransomware attack on its customer's premises. The decision has been hailed as one of the first in France to extend the duty to inform and advise to the prevention of cyber-attacks.

In this case, a portal manufacturer hired an IT service provider to renew its IT infrastructure. Eight months after the equipment was installed, the company fell victim to a ransomware cyberattack, which resulted in the complete encryption of its information system, including its backup systems. The incident led to a complete shutdown of its business for a week, before a gradual resumption over three months.

It was undisputed that the service provider had fulfilled his contractual obligations, but the customer sought to hold him liable on the basis of the obligation to provide information and advice.

The court upheld the customer's request, holding that it was the service provider's responsibility to inform the customer of the need to adapt the backup system so that the customer's data could always be backed up and restored in the event of a disaster affecting the server.

The Court analyzed both the specifications drawn up by the customer, demonstrating a need to modernize its backup system, and the service provider's commercial proposal, which mentioned the lack of security of the system to be renewed and the objectives of enhanced security. As a result, the service provider was obliged to advise the customer on the architecture required to secure its data, and to point out that its work did not include the installation of disconnected backups.

The service provider was ordered to compensate for the lost opportunity to avoid the loss, i.e. a fraction of the various types of loss suffered by the victim: external costs of restoration and damage to image. However, the Court refused to award compensation for internal costs relating to the time spent by the company's employees managing the loss and its consequences. The Court ruled that this claim was unjustified, in the absence of any evidence of overtime paid or recruitment dedicated to the extra workload.

Arnaud Attias

D&O

Mismanagement by the Chairman of a simplified joint stock company (SAS) and insurance premium for personal vehicle

Cass. com., Nov. 6, 2024, No. 23-13.815

In a ruling handed down on November 6, 2024, the French Supreme Court confirmed that a corporate officer does not commit a mismanagement offence by having the company pay the insurance premium for a vehicle that the company has subsequently transferred to him.

In this case, following the sale of all the shares making up the company's capital by its chairman, the company sought the chairman's personal liability on the grounds of a number of management errors. One of the alleged acts of mismanagement was the payment of a car insurance premium by the company, even though this insurance related to a vehicle which was subsequently sold to the Chairman. The company argued that the Chairman should bear the share of the premium relating to the period after the vehicle was sold. The Paris Court of Appeal upheld this claim and found against the Chairman.

The French Supreme Court censured the appeal decision on this point, citing articles L225-251 and L.227-8 of the French Commercial Code, concerning the liability of the Chairman of an SAS for mismanagement. The Court held that the premium was due in full by the Company at the time of the premium call, regardless of whether the Chairman subsequently became the owner of the vehicle.

It seems to us that such a solution must be approved in the field of mismanagement. While mismanagement does not require overcoming the obstacle of misconduct detachable from one's duties, which third parties are confronted with, it does require an assessment of the conduct required of a prudent and diligent manager in the light of the factual circumstances at the time of the act in question. In accordance with these principles, the Cour de cassation ruled that, at the time the premium was called, its payment could not be qualified as a mismanagement.

Souleymane Simpara

DEFECTIVE PRODUCTS

Repair and replacement costs and "red tape" excluded

Cass. 3e civ., 6 mars 2025, No 23-15.921

The decision published in the Bulletin on March 6, 2025 gave the Third Civil Chamber of the French Supreme Court the opportunity to rule on the application of warranty exclusion clauses to costs incurred by the insured to "repair, complete or redo the work" or to "replace all or part of the product".

In this case, relating to a contract for the installation of refrigeration equipment, the Court of Appeal ordered the contractor's professional liability insurer to compensate the client for the defective nature of the work delivered and the resulting damage.

With regard to compensable losses, the latter had in particular retained :

- costs of safeguarding goods, administrative hassles and personnel management;
- and the cost of emergency interventions, fluid top-ups, new refrigeration systems and replacement of major system components.

The insurer criticized its order to compensate the victim for these losses on two grounds.

In a first plea, he criticized the ruling for holding that the costs of safeguarding goods, administrative hassles and personnel management did not fall within the scope of the aforementioned exclusion clauses.

The High Court upheld this interpretation by the lower courts, ruling that the said costs consisted of "damage resulting from the defective operation of the equipment delivered".

On the other hand, the Civil Chamber was persuaded by the second argument that costs incurred for emergency interventions, fluid additions, new refrigeration systems and replacement of major components of the system should be excluded, since these costs are precisely those incurred "to repair, complete or redo the work and to replace all or part of the product".

Amira Aidel

BODILY INJURY

Towards the end of the multiplicity of capitalization scales?

Cass. crim., Nov. 5, 2024, No. 23-83.020

Calculating a future financial loss requires the use of a capitalization schedule, combining a mortality table and an interest rate. At present, several capitalization scale models, based on different parameters, coexist.

Among these scales is the one issued by the ministerial order of December 27, 2011, resulting from articles L. 376-1 and R. 376-1 of the French Social Security Code, under which expenses to be reimbursed to social security funds may be subject to a lump-sum valuation , in accordance with the conditions set out in this order.

However, the Cour de cassation has regularly reiterated that the terms and conditions set out in the decree of December 27, 2011 are not binding on the judge, who remains free to refer to the scale he deems most appropriate (Cass. Civ. 2e, Nov. 26, 2020, no. 19-16.016), provided however that, when he decides to apply this decree, he complies with its provisions (Cass. Civ. 2e, Nov. 30, 2023, 22-16.850; Cass. Civ. 2e, Feb. 15, 2024, 22-21.354).

However, in the present ruling, the Cour de cassation seems to indicate that the regulatory provisions applicable to social security funds for calculating their claims are imperative, so that it would no longer be possible for the judge to derogate from them by choosing, for example, the Gazette du Palais scale.

In this case, following a traffic accident, a Court of Appeal had set the amount of compensation due under the PGPF at a certain sum, after deducting the disability pension paid to the victim by the CPAM. Although the CPAM's final statement of disbursements showed a capitalized disability pension of €224,000, the Court of Appeal updated this to €510,000. To arrive at this result, the Court of Appeal did not take into account the capitalization scale issued by the ministerial decree of December 27, 2011, but rather the scale published by the Gazette du Palais, which it considered to be more relevant.

The French Supreme Court overturned this decision, noting that the Court of Appeal had chosen "a different scale from that resulting from the applicable mandatory regulatory provisions".

This solution raises questions, as it seems to indicate that the regulatory provisions applicable to social security funds for calculating their claims are imperative, which would constitute a reversal of case law. It will therefore be interesting to observe the position of the referring court on this point.

Mathilde Mevel

3 questions to Arnaud Attias, new Litigation & Insurance Counsel

Arnaud Attias joined our department in March 2025 as Counsel to strengthen the practice in marine and transportation, reinsurance and cyber. This appointment completes the firm's 14-member Insurance practice (6 lawyers and 8 claims handlers), headed by Romain Dupeyré, partner in charge of the practice in Paris.

1. What was your background before joining DWF?

I graduated from the Master 214 - Business Law from Université Paris Dauphine - PSL (2015) and from an LL.M from Duke University School of Law (2016). Before joining DWF, I had been practicing with Kennedys since my swearing-in in 2017.

2. What are your areas of expertise?

I am involved in all types of insurance cases, both in France and internationally, in coordination with the various DWF offices. For over 7 years, I have represented insurance companies and their policyholders in complex international litigation before State courts and arbitral tribunals (ad hoc or under the aegis of institutions such as the ICC, the Chambre Arbitrale Maritime de Paris or ARIAS France). In particular, I am involved in maritime insurance claims (hull and cargo) and liability disputes involving sea, road and air carriers and other players in the transport chain. I also have strong expertise in reinsurance and cyber (both insurance and data breach incident management).

3. What motivated you to join DWF?

Joining DWF was an obvious next step for me, both because of the prospect of joining a team I knew and appreciated, and because of the project I was offered. The firm's strong ambition to establish itself as a key player in marine insurance, particularly on an international scale, motivated my decision to commit myself fully to this dynamic, working alongside an expert team determined to meet the sector's current and future challenges!

Souleymane Simpara at the 49th FANAF General Assembly

Our team, represented by Souleymane Simpara, took part in the 49th General Assembly of the Fédération des Sociétés d'Assurances de Droit National Africaines (FANAF), held in Marrakech from February 22 to 26, 2025, under the theme ***"What levers for an inclusive and sustainable development of insurance in Africa?"***.

This key event for the African insurance and reinsurance industry, attended by over 1,500 professionals, was an opportunity to highlight the importance of innovation and digitalization in broadening access to financial services and promoting financial inclusion.

The studies presented highlighted the digitization of motor insurance certificates, the use of mobile money as a means of payment and digital platforms to increase access to insurance, as well as the role of brokers in meeting market needs.

Our team keeps a close eye on the main regulatory developments, including the regulation on the distribution and management of insurance contracts by digital/electronic means of January 16, 2024, which illustrates the need to adjust the regulatory framework to the new needs of the insurance sector.

DWF opens Montreal office

Already boasting three Canadian offices (in Vancouver, Calgary and Toronto) since its merger with Whitelaw Twining in 2022, DWF recently opened an office in Montreal.

28 representatives of Bélanger Sauvé specializing in insurance law joined the DWF teams on this occasion, bringing their expertise in the various branches of insurance law and making DWF one of the largest firms dedicated to insurance law in the various Canadian provinces.

Upcoming event: DWF Insurance Week 2025

From May 12 to 15, 2025, DWF will be holding its now traditional **"Insurance Week"**. Representatives of the insurance law teams from our various offices will gather in London to visit our clients and friends, and to set our plans for the year ahead.

- The DWF Claims teams will be holding their summer cocktail party on the roof of the Wagtail on Wednesday May 14, 2025, from 5:30 to 9:30 pm.
- DWF will be presenting a team at the Lloyd's Rugby and Netball Tournament and will be delighted to welcome customers and friends to our stand.

Don't hesitate to let us know if you'd like to take part in any of these events!

The latest Legal500 Insurance ranking

We are very grateful to our customers, peers and friends for Legal500's recent insurance rankings.

On this occasion, the guide sheds the following light on our activities:

"Acting for an array of major insurance and reinsurance companies, DWF (France) AARPI is adept at handling high-value insurance litigation, with strengths in claims relating to business interruption, product liability and property liability (particularly in the industrial sector)."

"Benefiting from its position as part of a full-service firm, the team is also able to assist with the insurance aspects of M&A and with reviews of insurance schemes and policies. Romain Dupeyré, whose practice has a strong emphasis on insurance disputes, leads the team."

Testimonials

"Collated independently by Legal 500 research team."

"Technical skill, responsiveness and availability."

Thank you all for your confidence!

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