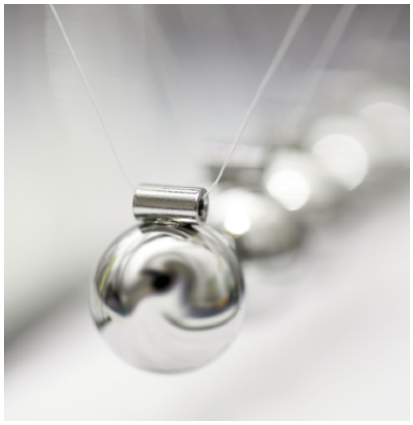

French insurance update

May 2010

This is a selection of recent interesting rulings and decisions in the field of non-marine insurance in France.

Nullity of policy for lack of fortuity

Cass. Civ. 2, 15 avr. 2010, n° 08-20.378, F.D.

Pursuant to article 1964 of the French Civil Code, all contracts of insurance must have a fortuitous character ("caractère aléatoire"). Indeed, if a contract lacks fortuity, it will be found null and void.

This was what happened in the instant dispute where a policy was taken out by the Bar Association of Bastia (Corsica) for its liability in relation to the management of client accounts. A client sued the Bar Association for misappropriation of his funds by a member of the Bastia Bar. The insurance policy was held to lack fortuity since the Bar Association knew, well before the policy had been taken out, that this Bar member was not properly operating the sub-accounts of his clients.

Need for stipulation on time-limitation in direct insurance

Cass. Civ. 2, 14 janv. 2010, n° 09-12.590, D

Under French law, the limitation period applicable to non-marine insurance is two years (article L.114-1 French Insurance Code) which is shorter than the general limitation period of five years for contractual claims. The French Insurance Code requires the insurer to insert a clause reminding the insured of this two-year period and of the ways of interrupting it (article R.112-1). In this case, the insurer was deprived of its right to invoke a limitation defence since it had failed to insert such a clause.

Conditions of liability of an insurer for the acts of a broker

Cass. Civ. 2, 14 janv. 2010, n° 09-10.220, F –D, Sté MMA vie assurances mutuelles et a. v. Epx M.

The insured under a life insurance contract had asked its broker to obtain a minimum rate of 6%, whereas the insurer applied a rate of 4.25% and then 4.1%. In fact, the broker had negligently failed to properly inform the insured on the rate that would effectively apply. The insured brought a claim in liability against the broker and the insurer. The Court of Appeal had found the insurer liable and the French Supreme Court quashed the appeal on the ground that there was no proof that the broker was acting under a power of attorney given by the insurer.

Subrogation in credit insurance

Cass. Com., 1er déc. 2009, n° 08-20.656, FS-P+B+R, SA Direct Océan v. SARL L'espadon et a.

In credit insurance, subrogation is governed by a separate provision, namely article 22 of statute No. 72-650 of 11th July 1972. The French Supreme Court confirmed that once the insured has received compensation from the insurer, subrogation occurs and, subsequently, the insured cannot bring a claim against a third party unless there is an agreement specifically authorising otherwise. In other words, the rule is the same as for ordinary subrogation under the Insurance Code.

Criteria for fraudulent misrepresentation

Cass. Civ. 2, 10 déc. 2009, n° 09-10.053, F-D, SARL Omnimets c/. Sté AXA IARD.

In this case, the insured shopkeeper had represented its activity as selling sandwiches and salads but had failed to indicate that it was also selling hot meals. A fire broke out in the shop and the insurer argued that the policy should be annulled for fraudulent misrepresentation. The Court of Appeal upheld the arguments of the insurer. However, the French Supreme Court quashed the appeal on the ground that the Court of Appeal failed to examine **whether, or not, the misrepresentation was made in bad faith with an intent to mislead the insurer on the nature of the risk**. The case was then sent to a new Court of Appeal to answer this question of fact.

Waiver of time-limitation

Cass. Civ. 3, 1er déc. 2009, n° 08-20.993, F-D, Mutuelle des architectes français c/. OPAC de l'Oise et a.

The mere fact of participating to court survey proceedings and of joining other parties to these proceedings was not sufficient to constitute an unequivocal waiver by the insurer of its right to invoke a limitation defence against the insured.

The limitation period of two years applicable to direct insurance contracts is very short and insureds often try to argue that the insurer has waived its right by conduct. However, waiver by conduct requires a high standard of proof and the French Supreme Court considered that it was not satisfied in this case.

Non-payment of premium and insolvency of insured

Cass. Com., 17 nov. 2009, F-P+B, SA MMA IARD c/ Rafoni

The insured failed to pay its premiums. Insolvency proceedings had commenced when the insurer sent a formal notice for the payment of outstanding premiums (being the first step to take in case of default). The liquidator paid the amounts owed after the commencement of insolvency proceedings and rejected the formal notice for the amounts owed before the insolvency proceedings. The Supreme Court confirmed that the formal notification was ineffective for the amounts owed before the commencement of insolvency proceedings. In other words, the premium payable before that date had to be declared as any other unsecured debts, in accordance with the formalities and time limits applicable thereto.

Notion of "claim" in liability insurance

Cass. Civ. 2, 10 nov. 2009, n° 08-20.311, F-D, Llahi c/. SMABTP et a.

The policy applied to claims made against the insured and which had been notified to the insurer between inception and termination of the policy. A third party had started proceedings to obtain the appointment of a court surveyor in a dispute against the insured on 4 June 2003. The policy expired on 30 June 2003 and the insurer was notified after expiry.

The third party brought a direct claim against the insurer. The insurer argued that the claim was not covered by the policy which had expired on 30 June 2003.

The French Supreme Court held that (i) proceedings for the appointment of a court surveyor to assess the existence and the extent of a damage constitute a claim and that (ii) the requirement of the date of notification to the insurer should be disregarded. In other words, for the purpose of the policy, the claim was made on 4 June 2003.

Interestingly, claims-made clauses were illegal at that time (this was reformed in 2003) but the Supreme Court solved the case without addressing this issue.

Unenforceable exclusion clause

Cass. Civ. 2, 8 oct. 2009, n° 08-19.646, F-P+B, SARL Le Cercle c/. Les souscripteurs du Lloyd's de Londres

After two unsuccessful attempts, a dancing club had been eventually destroyed by arson. Underwriters denied coverage on the basis of the following exclusion clause: "This policy always excludes damages resulting from insufficient repairs or modifications on the premises or installations owned or occupied by the insured or more generally on belongings of the insured which repairs or modifications became necessary notably following a prior occurrence, save in case of force majeure". Underwriters argued that additional safety measures should have been taken following the two attempts.

The Supreme Court held that the exclusion clause was invalid and unenforceable since its application required an interpretation contrary to the rule according to which exclusions should be "formal and limited" (article L.113-1 French Insurance Code).

Further information

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