

THE FRENCH SUPREME COURT RULES THAT FRENCH LAW PROVISIONS ON EXCLUSION CLAUSES APPLY TO FOREIGN LAW INSURANCE CONTRACTS

On 15 June 2023, the French Supreme Court decided that the provisions of the French Insurance Code which govern the validity of exclusion clauses are mandatory provisions which apply regardless of the law applicable to the insurance contract¹. This ruling has a significant impact on foreign (non-French) liability insurers.

Under French law, exclusion clauses in insurance contracts must comply with particularly strict legal requirements.

Art. L. 113-1 of the French insurance Code provides that an exclusion must be "formal and limited", whereas according to art. L. 112-4 of the same Code, exclusions must be mentioned in a "very apparent" manner. In other words, exclusions must be "mentioned in very prominent characters" (i.e. drafted in a way to attract the reader's attention), drafted in clear language to avoid any interpretation, and should not annihilate the substance of the cover. Multiple Court rulings have defined when an exclusion complies with those criteria, some of them contradicting each other.

The sanction is harsh: exclusion clauses which do not comply with these standards are null and void.

French insurers are familiar with these provisions but foreign insurers which intend to cover risks located in France or adapt their policies to French law must be particularly careful when drafting exclusion clauses.

Even more, the French Supreme Court has now applied these French law provisions to an insurance contract between a Dutch insurer and a Dutch policyholder, which was governed by Dutch law.

A farmer purchased solar panels which were installed on a building housing a rabbit farm. Having noticed the presence of smoke, the owner took the installation out of service. It appeared that the junction boxes of the installation were affected by a serial defect. The Dutch manufacturer of the panels carried out a product recall in 2012. The French farmer claimed for the replacement cost of the panels and the consequential production loss and commenced proceedings before a French Court against the manufacturer of the panels, the manufacturer of the junction boxes and their insurers. The manufacturers of the panels and the junction boxes, as well as their insurers, were all established in the Netherlands and the insurance policies governed by Dutch law.

The Dutch insurers denied coverage on the basis that their policy excluded claims for damage to products delivered by the insured, as well as recall, improvement, replacement or repair costs of those products. The Poitiers Court of appeal applied the exclusions and ruled that the Dutch insurer could deny coverage for the claim. An appeal was lodged with the French Supreme Court (*Cour de cassation*).

In its 15 June 2023 decision, the 2nd Chamber of the French Supreme Court – which is specialised in insurance - ruled that articles L. 112-4 and L. 113-1 of the French insurance Code are mandatory provisions (*dispositions d'ordre public*) and that the Court of appeal failed to check whether the exclusion (of the Dutch law insurance contract) complied with the requirements of these provisions.

The grounds of the decision refer to art. L. 111-2 and L. 181-3 of the French Insurance Code. The latter² provides that the choice of a foreign law governing the insurance contract may not contradict French law public policy provisions

¹ Civ. 2^e, 15 June 2023, n° 21-20.538.

² L 181-3 implements article 7.2 of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance, according to which "Nothing in this Article shall restrict the application of the rules of the law of the forum in a situation where they are mandatory, irrespective of the law otherwise applicable to the contract."

("ordre public"), whereas the first one sets a list of domestic mandatory provisions applicable to insurance contracts in general which are binding on the parties.

The Court refers to these domestic provisions - and not to the Rome I Regulation (n°593/2008)³ - and considers that these provisions override the law applicable to the contract.

Based on few past cases⁴, some scholars had considered that art. L. 113-1 and L. 112-4 are overriding mandatory provisions (lois de police) as per art. 9 of the Rome I Regulation⁵. Authors are unanimous in that the Supreme Court's decision of 15 June 2023 implicitly qualifies the French law provisions on exclusion clauses as overriding mandatory provisions.

This would have required that those provisions are "*crucial*" to France "*for safeguarding its public interests, such as its political, social or economic organisation*", as defined by the Rome I Regulation. However, at no point does the French Supreme Court explain why this would be the case. The purpose of those rules is to protect the insured. This is not necessarily equivalent to safeguarding France's public interests, in particular in circumstances where the insured itself is a foreign party and the dispute is based on a direct action from a third-party victim.

Furthermore the Court does not explain why those provisions, which are indeed mandatory provisions in French domestic law, should qualify as "*dispositions d'ordre public international*", i.e. provisions whose importance could lead to discard the application of a foreign law when the latter leads to an unfair and shocking result, which might have been an alternative approach.

Notably, the 1st Civil Chamber of the French Supreme Court which is specialised in private international law, had already come to the same solution in another dispute related to the same serial loss (and the same Dutch law policy)⁶.

This 15 June 2023 ruling is published in the "bulletin" of the French Supreme Court which confirms that it is intended to be widely known and of particular importance.

It has a direct impact on all cases in which a French victim can sue a foreign liability insurer before a French Court. This is the case if either the law applicable to the insurance contract, or the law applicable to the legal relationship between the victim and the insured (which can be based on a contract or product liability or tort) is governed by French law⁷. In simple terms, this will generally be the case when the damage or injury occurred in France⁸.

If such direct action is brought before a French Court, there is now a risk that any exclusion clause in the insurance contract, be it governed by Dutch, German or English law for example, is considered to be valid only if it complies with French law standards. This is even the case if both the insurer and the policyholder have their seat in the same (foreign) country.

This decision amounts to an excessive extra-territorial application of French law which is highly questionable. It creates legal uncertainty in a situation where a unique approach, at least between European Member States, should prevail⁹.

The Supreme Court has overturned the decision of the Poitiers Court of appeal and referred the case back before the Paris Court of appeal which will have to reconsider the merits of the case. It is however unlikely that the Paris Court of appeal will resist and refuse to apply the 15 June 2023 ruling.

Given the impact and fundamental questions that are raised by this ruling, and unless the Supreme Court nuances its position in the near future, it will represent a challenge for foreign insurers defending a claim before French courts.

³ The insurance contract was concluded before the Rome I Regulation became effective on 17 December 2009.

⁴ Com., 11 March 1997, n°95-13.926 ; Com., 8 March 2017, 15-13.384 ; Civ.1e, 29 January 2020, 18-26.146

⁵ S. Clavel, F. Jault-Seseke, Panorama droit international, D. 2020, p. 951 ; L. d'Avout, S. Bollée, E. Farnoux, Panorama de droit du commerce international, D. 2020, p. 1970

⁶ Civ. 1^{re}, 29 janvier 2020, n° 18-26.146

⁷ ECJ, 9 September 2015, aff. C-240/14 ; Civ. 1e, 18 December 2019, n°18-14.827 ; Civ. 1e, 9 September 2015, n°14-22.794 ; Civ.1, 12 juillet 2023, 21-22.843, Publié au bulletin.

⁸ French Courts will have jurisdiction either on the basis of the Recast Brussels Regulation (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 (recast)), if the foreign insurer is based in EU Member State, or on the basis of the applicable Conventions (Lugano Convention notably) and rules applicable in relation to non-EU Member States.

⁹ V.Heuzé, RGDA juillet 2023, p. 53.

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