Selected French insurance / reinsurance issues

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Topics

• French insurance and reinsurance markets 2
• Non-life business
  ▪ Trends in litigation and damages 4
  ▪ Claims-made clauses 7
  ▪ Insurability of intentional acts 8
  ▪ D&O developments 9
• Life business
  ▪ Rescission of insurance contracts 10
  ▪ Insurer’s duty to advise 11
  ▪ Modified tax burdens for life insurance products 12
• Regulatory matters
  ▪ ACP administrative sanctions 13
• Proposed legislation
  ▪ Class actions 14
  ▪ Expanded cancellation rights of insureds 15
French insurance and reinsurance markets

P/C business (2012): €49.4 billion

- Motor €19.0 B
- Commercial property €6.1 B
- General liability €3.4 B
- Construction; €2.3 B
- Homeowners; €8.4 B
- Other; €8.8 B

Life business (2012): €131.3 billion

- Accident, health & long-term care €18.4 B
- Endowment & capitalised products €112.9 B
- Other; €8.8 B
- Motor €1.4 B
- Nat cat €0.8 B
- Accident €1.8 B
- General liability €0.5 B
- Transportation €0.2 B
- Other €1.0 B
- Property €2.3 B
- Construction; €6.1 B
- Homeowners; €8.4 B
- Other; €8.8 B

Reinsurance

Non-life cessions (external, 2011): €8.5 billion

- Motor €19.0 B
- Commercial property €6.1 B
- General liability €3.4 B
- Construction; €2.3 B
- Homeowners; €8.4 B
- Other; €8.8 B

Life cessions (internal and external, 2011): €9.3 billion

Sources: FFSA, APREF
## French insurance and reinsurance markets

<table>
<thead>
<tr>
<th></th>
<th>Life/acc’t + mixed</th>
<th>P/C</th>
<th>Reins’rs</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>French companies</td>
<td>62 + 40 = 102</td>
<td>216</td>
<td></td>
<td>318</td>
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<tr>
<td>French branches of non-EEA companies</td>
<td>5</td>
<td></td>
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<tr>
<td>French branches of EEA companies</td>
<td>16 + 1 = 17</td>
<td>64</td>
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<td>81</td>
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<tr>
<td>Total insurers</td>
<td>78 + 41 = 119</td>
<td>285</td>
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<tr>
<td>Reinsurers (French reinsurers and French branches of other reinsurers)</td>
<td></td>
<td>49</td>
<td></td>
<td>49</td>
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<tr>
<td>EEA companies registered for FOS business in France</td>
<td>160 + 21 = 181</td>
<td>720</td>
<td></td>
<td>901</td>
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<tr>
<td>Total</td>
<td>300</td>
<td>1005</td>
<td>49</td>
<td>1354</td>
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</tbody>
</table>

NB – Does not include mutuals subject to the *Code de la Mutualité* (≈ 623), *institutions de prévoyance* (49) and *institutions de retraite supplémentaire* or reinsurers established outside France

Sources: Autorité de Contrôle Prudentiel, APREF
Trends – number of cases litigated

• Number of cases filed on selected subjects: few signs of increase

Source: Ministère de la Justice, Annuaires Statistiques de la Justice 2006-2012

• Medical malpractice: decreases in certain indicators of litigation activity
  - Decrease in criminal complaints: 249 in 1999, 108 in 2009
  - Increase in damage claims settlements: 14% in 2003, 54% in 2009
  - Increase in proportion of disputes handled by regional mediation committees: 14% in 2008, 28% in 2010

Source: RCA 2013 n° 5, p. 22
Trends – liability

• General principle re liability
  - a fault (faute, i.e. error) causing damage results in liability to repair it - C. civ. art. 1382: Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer

• No-fault liability for faults of employees, agents, equipment, livestock, etc.
  - C. civ. art. 1384: On est responsable non seulement du dommage que l’on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l’on a sous sa garde
  - Company held liable for damage from fuel entering a river due to opening of release valves by burglars (Civ. 2ème, 22.05.2003 n° 02-10367)

• Inexcusable fault (faute inexcusable)
  - Workplace health and safety
    - employer has absolute liability for workplace safety & health hazards which are known or should have been known
    - employer held liable for asbestos exposure notwithstanding efforts made to protect employees (Soc. 12.12.2002 n° 01-20372)
    - employee can be denied benefits for exceptionally grave errors exposing him/her without valid reason to risks of which he/she knew or should have known (Civ. 2ème 27.01.2004 n° 02-30693); cf. Conseil Const. 18.06.2010 (re. damages available to the employee)
  - Transportation
    - liability for inexcusable errors are those committed intentionally with knowledge of probability of damage accepted recklessly without valid reason (Civ. 1ère 01.10.2007 n° 04-13003 – Allianz Marine et Aviation)
  - Motor-vehicle accidents
    - inexcusable error of the victim (i.e. exceptionnally grave intentional error creating without valid reason a risk of which the victim should have known) precludes indemnification of the victim (except if under 16 y.o. or over 70 y.o. or incapacitated), but not including e.g., alcohol consumption by the victim which was not proven to have caused the accident (Ass. plén. 06.04.2007 n° 05-81.350 & n° 05-15950)

• Liability for direct or indirect environmental damage – Crim. 25.09.2012 n° 10-82938 (Erika)
Trends – damages

• Recovery of compensatory damages only
  ▪ Damages for immediate and direct losses realised and lost profits - C. civ. art. 1151 (les dommages et intérêts ne doivent comprendre à l’égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est une suite immédiate et directe …) (applicable to contract liability and, by extension, to tort claims)
  ▪ No obligation to mitigate – Civ. 3ème 05.02.2013 n° 12-12124 (construction claim), Civ. 2ème 25.10.2012 n° 11-25511 (homecare), Civ. 2ème 29.03.2011 n° 11-14661 (delay in repairing flood damage)
  ▪ Distinction between damage (dommage, demonstrable pecuniary loss) and loss (préjudice, consequences for the victim)
  ▪ Low expectations regarding damages – Limoges 11.04.2013 (Butagaz) (in product liability action for personal injuries and “emotional shock” resulting from explosion of propane bottle connected by consumer to heating system designed for butane, claim for comparative negligence was rejected and the defendant held liable for inadequate written warnings and failure to provide connecting systems for propane different from those for butane; but damages were limited to €20,000 requested by the plaintiff including for “suffering”)

• Punitive damages
  ▪ New legislation proposed or endorsed (Catala 2005, Béteille 2010, Terré, 2011) but adoption seems likely only for torts profitable to the tortfeasor (e.g., intellectual property infringement, consumer actions and environmental torts)
  ▪ Punitive damages recognized as not contrary to mandatory principles of French law, if “proportionate” to the loss suffered and the fault of the defendant - Civ. 1ère, 01.12.2010, n° 09-13303 (Fountaine Pajot, enforcing a California judgment)
  ▪ Recognition of exemplary role of damages: rogue trader J. Kerviel held liable for €4.9 billion (but moral damages for other Société Générale employees were rejected) – Paris 24.10.2012 n° 11/00404 – but see Butagaz supra (account taken of widespread consumer use of butane and propane and danger to the public at large)

• Expanded grounds for damages
  ▪ “Emotional shock” – see Butagaz supra; Rennes 02.07.2009 (collapse of gangway to Queen Mary II, €50,000 per survivor/close relative of victim and €15,000 per deceased victim)
  ▪ Fear re. consequences of an incident – Civ. 2ème 24.09.2009 n° 08-049670 (transfusions of possibly HIV-infected blood); Paris 13.03.2009 RG n° 08/00627, Rouen 10.12.2008 n° 07/3546, Paris 22.05.2008 n° 07/07681 (exposure to asbestos), Colmar 14.03.2008 (spectators to a disaster)
  ▪ Fear of a potential incident – Paris 12.09.2008 n° 07/05802, Civ. 1ère 06.12.2006 n° 05-15719 (potentially defective heart sensors)
Claims-made clauses

• Courts rejected claims-made clauses ("CMCs")
  - Seven cases decided in 1990 (and several thereafter) held that if event causing liability (*fait générateur*) occurs during term of policy, absence of coverage is failure of consideration (*absence de cause*) and CMC unenforceable (Civ.1ère 19.12.1990)
  - Later cases allowed CMCs when specifically mandated by law but not otherwise
  - These rulings seemed incompatible with basic principles of contract law (e.g. C. civ. 1131)
• Legislation in 2003 (C. ass. L.124-5)
  - Requires coverage on occurrence basis – *fait générateur / dommageable* during policy period for non-professional liability coverage of individuals (optional for professional liability coverage)
    - Several causal events with the same technical cause considered one causal event (i.e. cancellation does not preclude coverage of later manifestation of damage; no continuous trigger) (CA L124-1-1)
    - Does not cover unknown past losses (but pays first when other coverage also applies)
  - Permits certain CMCs in non-marine professional liability policies
    - Coverage of undisclosed past losses is required (except for health professionals, see C. ass. L.251-2)
    - CMC coverage if not renewed (by the same insurer or another) applies to claims made during a subsequent guarantee period
      - Generally five years minimum
      - Ten years for construction, so-called “intellectual professions” (legal and accounting professions, property managers, auctioneers and insurance brokers) or in case of cessation of activity (CA R.124-2&3)
    - Coverage level during the subsequent guarantee period cannot be less than what it was during last year prior to termination of the coverage
  - Legislation not applicable to coverage issued prior to 2003 legislation, so CMCs therein are disregarded – Civ. 2ème 15.09.2011 n° 10-20970, 25.06.2009 n° 08-14060 & 08-16910
Insurability of intentional acts

- Basic principle: the insurer is not liable for losses or damages caused by an intentional or fraudulent error (faute) of the insured (C. ass. L.113-1)
  - “Intentional” error: must be intentional and undertaken with the intent of causing the resulting damage; variables include:
    - whether intent is evaluated based on what was actually in the mind of the insured (“subjective” intent) or on what should be inferred from the circumstances (“objective” intent);
    - the degree of certainty, in the mind of the insured, that a particular cause of action (or inaction) will result in damage.
  - “Fraudulent” error (faute dolosive): an error or act which by the sole will of the insured removes all fortuity and is the sole cause of the loss – Civ. 2ème 28.02.2013 (JTS) n° 12-12813.

- “Objective” approach
  - Fortuity results from uncertainty of damage award from exposure to asbestos, not existence of circumstances creating liability – Civ. 2ème 14.06. 2012 n° 11-16958 (Everite: fortuity results from uncertainty of damage award from exposure to asbestos, not existence of circumstances creating liability).
  - No fortuity when insured put itself into a position where a claim was inevitable and that its success was “certain” – Civ. 2ème 22.09.2005 n° 04-17232 (SAPN) (insured bidder on public-works contract liable for damages to an unsuccessful bidder when award was flagrantly contrary to the rules of the bid process)

- “Subjective” approach
  - Coverage denied when the insured knew that damage would result – Civ. 2ème 24.05.2006 n° 03-21024 (liability award against an attorney who delayed turning over client funds to the client’s creditor, thereby knowingly causing the client to risk late interest; subjective intent was deduced from the defendant’s own experience with the rules imposing late interest)
  - Defendant intended the damage to occur – Civ. 2ème 16.10.2008 n° 07-14373 (bankruptcy administrator intentionally and illicitly misrepresented to the bankruptcy court a bidder’s takeover proposal)
  - Misstatement of financial statements with actual intent to mislead investors – Civ. 2ème 14.06.2012 n° 11-17367 (Frydman/Chartis: a civil fine imposed by the AMF on a senior manager who intentionally released false information intending to mislead investors was not covered by a D&O policy, even though the coverage wording included “civil fines and penalties”; the insured acted as he did because he knew he was insured)
D&O developments

• Context
  ▪ Senior managers (dirigeants) of French companies have a status different from employees and are exposed to a plethora of criminal and regulatory sanctions (generally not insurable), as well as civil liability
  ▪ Indemnification is not allowed for damages awarded for any harm done to the company or any criminal or regulatory fine
  ▪ Shareholder representative actions on behalf of the company (action ut singulii) are allowed; expenses are borne by the suing shareholder(s), but damages if any are awarded to the company

• Multiplicity of exposures with different standards of liability

• Civil liability of senior managers
  ▪ “Separable” error (faute separable or détachable) is required for liability to third parties (e.g., creditors) in actions before the civil or commercial courts
    ▪ “Separable error” defined as an intentional error (faute) which is “particularly serious and incompatible with the normal exercise of corporate functions”
    ▪ Underlying reasoning: if an error was committed while carrying out the manager’s functions, the company for which he/she is acting is the only party potentially liable
    ▪ Query whether findings of a “separable” error are based on an objective standard
  ▪ “Separable” error is not a condition of liability to:
    ▪ third parties, in actions before the criminal courts (civil liability claimed in the context of a criminal action)
    ▪ the company (actions brought by or on behalf of the company)
    ▪ shareholders for damages they suffer individually (distinct from mere loss in value in the company’s securities)
    ▪ tax authorities for the company’s unpaid tax obligations
    ▪ the company’s bankruptcy administrator or juridical liquidator

• Independent basis of liability in the insolvency/reorganization context for:
  ▪ management errors which contribute to the shortfall of the assets of a debtor in liquidation (C. com. art. L651-2)
  ▪ management errors contributing to cash-flow insolvency leading to reorganization proceedings. (C. com. art. L631-10-1)
Rescission of insurance contracts

- Right of insured to rescind contract during cooling-off period
  - Calculation of cooling-off period
    - Life/investment contracts: 30 days after insured has received contract documentation (including a note d’information or the equivalent, see C. ass. Art. A132-4) and being informed that the contract has been concluded (C. ass. art. L.132-5-1 et seq.)
    - For non-life contracts, generally 14 days (if contract has a term of more that two months, C. ass. art. L.112-2-1)
  - The cooling-off period begins to run upon communication of the general and special conditions which serve as the note d’information along with a subscription form setting out in a separate document the conditions or rescission
    - Com. 2ème 27.11.2012 n° 11-22425 (BNP Paribas, Natio Vie – general conditions serving as note d’information included distinct document setting out required information)
    - TGI Paris 17.12.2012 n° 16644 (contract taken out in 2005, rescission attempted in 2009 but refused and action against insurer brought more than two years later; statute of limitations not applied; contract rescinded)
  - Impact on insurers was held not to raise an issue of unconstitutionality or violation of ECHR (Civ. 2ème, 13.01.2011 n° 10-16184; Paris 17.01.2003 n° 10-24490)
Insurer’s duty to advise

- Duty to advise
  - Insurer must show that proper advice was given, even if the insured understood the risks – Civ. 2ème 07.07.2011 n° 10-16267 (Aviva)
  - The “absence of clear written information which deprives the insured of the possibility of himself making” an informed choice, placing him in a dependent situation” vis-à-vis the insurer does not constitute fraud justifying the contract being voided – Com. 11.10.2011 n° 10-21698 (Ecureuil Vie)
  - Bank did not violate its duty to inform and advise when it gave its client documents containing “complete and accurate information” mentioning market risks of insurance products, when “the proposed product was not inappropriate” for the client – Com. 2ème 27.11.2012 n° 11-22425 (BNP Paribas, Natio-Vie)
  - A warning that values could increase or decrease was sufficient notice of possible decrease of values – Civ. 2ème 18.04.2013 n° 12-17090 (AXA Vie)
  - Despite allegations that multiple proposals combining life contracts and investment contracts increased the risks of the client adopting a falsely idyllic view of the proposed operations”, when the insured was given “sufficient explanations for a normally attentive consumer ” – stating that the contract was subject to “market risks” the operations were not speculative and the bank did not have a duty to warn – Com. 22.05.2013 n° 12-17661 (Crédit du Nord)
  - No liability of the bank making a loan guaranteed by unit-based insurance contracts when the insured was informed of the “characteristics and risks of the investment and that the value can increase or decrease as a function of market variations” so that “the information on the financial product and the appropriateness of possible risks” was furnished to the insured by the insurance agent – Com. 18.06.2013 n° 12-19505 (AXA Banque, AXA Vie)
Modified tax burdens for life insurance products

- Income earned on amounts invested in endowment policies are generally exempt from income tax until pay-out of policy benefits (see CGI art. 125-0 A et seq.).

- At pay-out, accumulated income is subject to normal social contributions (currently 15.5%) and income tax treatment is as follows:
  - For policies written as from 26.09.1997, the following tax advantages are available if the policy is held at least eight years (or a shorter period, in case of certain events such as unemployment, early retirement, certain incapacity or professional bankruptcy):
    - Income is exempt from income tax if assets include minimum levels of equity investments (policies written before 2005: 30% in certain European equities, of which 10% in certain so-called “risk” investments, including at least 5% in non-listed equities; policies written thereafter: 50% in certain European equities of which 5% in non-listed and other so-called “risk” investments).
    - For policies not meeting the foregoing equity-ratio test, the income earned is subject (on election of the beneficiary) to income tax at the flat rate of 7.5%, after application of an exemption of €4,600 per person (€9,200 for a couple).
  - Income tax on pay-outs, if the policy is held less than eight years but more than four years, can be assessed at a flat rate of 15%, or 35% if held four years or less.
  - Income earned via the policy prior to 31.12.1997 is exempt from income tax; and policies written between 1997 and 1983 are subject to intermediate regimes.

- Taxation by reason of death
  - Pay-outs attributable to premiums exceeding €30,500 paid by an insured 70 years old or more are subject to succession taxes (CGI art. 757B).
  - Pay-outs attributable to premiums paid by an insured less than 70 years old exceeding €152,500 per beneficiary are subject to a tax of 20% up to €902,838 and 25% above that amount.

- French forced heirship rules do not apply to death benefits or premiums paid (for the death benefit portion of a policy) except to the extent the premiums paid are manifestly exaggerated taking into account the subscriber's resources.
ACP administrative sanctions

• Sanctions commission of the Autorité de Contrôle Prudentiel (“ACP”) established in 2011
  ▪ Composed of three magistrates and three outside professionals
  ▪ Staff independent of ACP legal department

• Sanctions can include warning, reprimand, restrictions on activities, suspension or removal of senior managers and partial or total revocation of license

• Decisions published to date:
  ▪ SARL Universal Assurance (28.02.2011): a senior manager of an insurance broker, previously barred from working as an insurance intermediary, but who established a new company apparently operated by nominees with falsified credentials, was sanctioned with a €10,000 fine and a new 10 year prohibition from working as an insurance intermediary
  ▪ Groupement Français de Caution (15.07.2011): a mutual insurance company issuing guarantees of deposits held in bank accounts of managing agents of property owners associations (syndics de copropriété) was sanctioned with a warning and a fine of €20,000 for allowing deposits to be set off against debts of other managing agents at the relevant bank
  ▪ SARL Innocent Assurance (12.12.2012): an insurance broker among others things failed to register with the financial services registry ORIAS, and procured coverage based on inaccurate information regarding the insureds, resulting in sanctions of 10-year prohibition on insurance intermediary activity by the company and its senior managers and fines of €20,000 and €5,000 against the senior managers
Proposed legislation: class actions

- To date 14 EU member states allow class actions (8 opt-in, 5 opt-out), not including France.

- Proposed class action can be brought only
  - on behalf of co-insurers (individuals, not businesses) who “opt-in” to the process
  - by registered national associations of co-insurers
  - before specialized courts of first instance
  - based on breach of contractual or statutory obligations for damages consisting of:
    - contractual damages (excluding bodily harm and moral damages)
    - damages for violations of French or EU competition law subject of a final ruling of EU competition authorities
  - in two steps: first a determination of liability and then a ruling on quantum
  - mediation and global settlements are encouraged.

- Stated purpose of these restrictions is to avoid the “perverse effects” of U.S.-style class actions.

- Legislation expected to be enacted by during autumn 2013

- Impact on liability coverage for businesses is unknown but suggested by government officials not to be significant

- Potentially applicable to insurance for consumer lines (e.g., homeowners and motor vehicle)
Proposed legislation: expanded cancellation rights for insureds

- Proposed new measures
  - 14-day cancellation period for duplicate coverage
  - for product-defect or travel insurance, during a 14-day cancellation period the insured can, within 14 days of taking out the coverage, cancel it when it duplicates other coverage in whole or in part
  - pre-contractual notification of this cancellation right is required, by means of a prescribed form

- Unrestricted cancellation right after first year of coverage
  - for non-professional coverage of individuals (e.g., homeowners and motor vehicle insurance) subject to tacit renewal, the insured will be allowed to cancel coverage at any time after the first year
  - types of coverage subject to the new rules and other details will be set out in an implementing decree
  - the proposal would liberalize the existing rules, under which the insured can cancel by notice prior to each renewal date and must be informed of that right by the insurer (and if not so informed can cancel at any time after tacit renewal)

- Measures would marginally increase documentation requirements for insurance contracts
  - For example, for investment/life insurance, the insured must be provided with an information note (separate from the insurance contract) and a form letter cancelling coverage, after which the cancellation period begins to run – and failure to provide those documents (even if the insured acknowledged receipt thereof) allows the insured to cancel retroactively at any time
QUESTIONS?