

# Effects of the winding-up by decision of a court of an insurer abroad on an insurance compensation claim in France: clarification of the notion of pending lawsuits within the meaning of Article 292 of the Solvency II Directive (ruling n° 525 – 19-12.048 )

25/05/2022



Ruling No. 525 FS-B

**Quashing**

**Public hearing of 25 May 2022**

**Quashing**

**Mr PIREYRE, President**

**Ruling No. 525 FS-B**

**Appeals Nos.**

**and**

**P 19-12.048**

**D 19-15.052 Joinder**

FRENCH REPUBLIC ON BEHALF OF THE FRENCH PEOPLE

**RULING OF THE SECOND CIVIL CHAMBER OF THE *COUR DE CASSATION* (COURT OF CASSATION) OF 25 JUNE 2022**

I. The company Paget Approbois, a simplified joint stock company, with registered office at [Address 2], lodged Appeal No. P 19-12.048 against the ruling of 20 November 2018 of the *cour d'appel* (Court of Appeal) of Besançon (First Civil and Commercial Chamber), in the dispute between:

1) Depeyre Enterprises, a limited liability company, with registered office at [Address 1],

2) Alpha Insurance A/S, a company incorporated under Danish law, with registered office at [Address 3] (Denmark), represented by Mr [O] [W], acting as receiver, respondents at the quashings.

II. Alpha Insurance A/S, a company incorporated under Danish law, represented by Mr [O] [W], acting as bankruptcy receiver, lodged Appeal No. D 19-15.052 against the same ruling in the dispute between:

1) Paget Approbois, a simplified joint stock company,

2) Depeyre Enterprises, a limited liability company,

respondents at the quashings.

Paget Approbois, claimant in appeal No. P 19-12.048, relies, in support of its action, on the two pleas of quashing appended to this ruling.

Alpha Insurance A/S, claimant in appeal No. D 19-15.052, relies, in support of its action, on the three pleas of quashing appended to this ruling.

The case files have been sent to the Prosecutor-General.

On the report of Ms Guého, judge referee, the observations of SARL Cabinet Munier-Apaire, lawyer of the company Paget Approbois, of SCP Rocheteau, Uzan-Sarano and Goulet, lawyer of the company Alpha Insurance A/S, of SCP Nicolay, of Lannouvelle, lawyer of the company Depeyre Enterprises, and the opinion of Mr Gaillardot, first advocate-general, after debates in the public hearing of 5 April 2022, attended by Mr Pireyre, President, Ms Guého, judge referee - rapporteur, Ms Leroy-Gissinger, elder judge, Mr Besson, Ms Bouvier, Mr Martin, Ms Chauve, judges, Messrs Talabardon, Ittah, Pradel, Brouzes, judges referee, Mr Gaillardot, first advocate-general, and Mr Carrasco, Chamber Registrar,

the Second Civil Chamber of the *Cour de cassation* (Court of cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the abovementioned President and judges, after having deliberated in accordance with the law, has delivered the present ruling.

## Facts and procedure

1. According to the ruling under appeal (Besançon, 20 November 2018) and the content of the case file, the company Paget Approbois (the company Paget) subscribed, with effect from 1 July 2011 and through the company Depeyre enterprises (the company Depeyre), an insurance broker, an "industrial multi-risk" insurance policy bearing the words "Company: Alpha insurance".

2. On 20 May 2012, a hail disaster damaged two sites operated by Paget, which sent a claim to Depeyre the following day.

3. An amicable expertise was made to assess the material damage caused by the disaster.

4. However, Paget did not receive any insurance compensation, as Depeyre finally informed it by letter dated 7 January 2013 that it had been insured through a company incorporated under Belgian law, Albic, that its insurers had been, from 1 January 2012, the British Company United and the Romanian company Euroins, and that it had had no insurer since 1 January 2013, since those companies had withdrawn their authorization from Albic.

5. Paget then initiated legal proceedings against Depeyre for liability and compensation for damages, and the latter brought proceedings against Alpha Insurance, a company incorporated under Danish law, which it had designated as the actual insurer at the time of the accident.

6. Paget sought, on appeal, an order in solidum from Depeyre and Alpha Insurance for the payment of EUR 335,080.79 as compensation for material damage and an appraisal to assess non-material damage.

7. In the hearing of 16 October 2018, counsel for Alpha Insurance informed the Court of Appeal that the Copenhagen Maritime and Commercial Court had declared the company insolvent as from 8 May 2018 and justified said circumstance during the deliberation by producing the judgment designating Mr [W] as bankruptcy receiver.

8. The Court of Appeal of Besançon, by ruling of 20 November 2018, decided that there was no need to revoke the closure order and ruled on the merits.

9. Alpha Insurance, represented by Mr [W], acting as receiver, and Paget, appealed against that ruling.

10. By ruling of 17 December 2020, the *Cour de cassation* (Court of cassation) referred to the Court of Justice of the European Union (CJEU) requests for preliminary ruling on the interpretation of Article 292 of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

11. By ruling of 13 January 2022 (C-724/20), the CJEU answered the questions referred to the Court.

## Reviewing pleas

### On the first plea No. D 19-15.052 of Alpha Insurance, in its first two parts

#### Statement of plea

12. Alpha Insurance complains that the ruling should declare that there is no need to revoke the closure order and set aside the judgment, except insofar as it dismissed Paget's request for an appraisal, and order Alpha Insurance to pay Paget the sum of EUR 335,080.79 as compensation for material damage resulting from the accident that occurred on 20 May 2012, when:

"(1) the opening of collective proceedings interrupts the proceedings ipso jure if it occurs before the hearing and involves assistance or divestment of the debtor; whereas, in this case, the Court of Appeal itself found that it had been justified that bankruptcy proceedings had been initiated against Alpha Insurance by judgment of the Copenhagen Maritime and Commercial Court of 8 May 2018, i.e. before the hearing of 16 October 2018; whereas, by failing to find that the proceedings had been interrupted ipso jure by the opening of the collective proceedings, the Court of Appeal failed to draw the legal consequences of its findings, in breach of Articles 369, 371 and 372 of the Civil Procedure Code;

(2) the opening of collective proceedings interrupts any legal proceedings brought by creditors prior to the judgment that opened the proceedings, where such proceedings seek to order the debtor to pay a sum of money; whereas, in this case, it is common and established by the courts that, by document of 10 June 2015, Alpha Insurance was sued for payment and guaranteed an insurance indemnity, and it was subsequently subject to bankruptcy proceedings by judgment of the Copenhagen Maritime and Commercial Court of 8 May 2018; by failing to find that the proceedings had been interrupted ipso jure by the opening of those collective proceedings, the Court of Appeal infringed Articles L. 622-22, R. 622-20, L. 641-3 and L. 641-9 of the Commercial Code."

#### Court's response

Having examined Articles L. 326-20 and L. 326-28 of the Insurance Code, Articles L. 622-22 and L. 641-3 of the Commercial Code and Articles 369 and 371 of the Civil Procedure Code:

13. Under the first of these texts, issued by Order 2015-378 of 2 April 2015 transposing Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II), decisions concerning the opening of winding-up proceedings taken by the competent authorities of a Member State of the European Union other than France in respect of an insurance company with head offices in the territory of that State shall produce all their effects within the territory of the French Republic without any further formality, including in respect of third parties, as soon as they produce their effects in that State.

14. According to the second text, resulting from the same Order, transposing Article 292 of the Solvency II Directive, the effects of the reorganization measure or of the opening of winding-up proceedings on an action pending in France concerning an asset or right of which the insurance company is divested are governed exclusively by the Civil Procedure Code.

15. It follows from the above-mentioned Civil Procedure Code that the proceedings are interrupted by the effect of the judgment pronouncing the winding-up by decision of the court in cases in which the debtor is assisted or divested, provided that this event occurs before the commencement of the proceedings.

16. It follows from the abovementioned provisions of the Commercial Code that, by virtue of the judgment initiating the winding-up by decision of the court, the proceedings in progress are interrupted until the claimant has declared his claim; they are then taken up ipso jure, the judicial representative and, where applicable, the administrator, duly summoned, but only for the purpose of establishing the claims and setting their amount.

17. By its abovementioned judgement of 13 January 2022 (C-724/20), the CJEU ruled that Article 292 of the Solvency II Directive must be interpreted as meaning that:

- on the one hand, "the concept of pending lawsuit concerning an asset or a right of which the insurance undertaking has been divested", referred to in that article, includes a pending lawsuit concerning an insurance compensation claim brought by a policyholder in respect of losses sustained in one Member State against an insurance undertaking subject to winding-up proceedings in another Member State.";

- on the other, "the purpose of the law of the Member State in whose territory the proceedings are pending, as defined in this Article, is to govern all the effects of the winding-up proceedings on said proceedings" and, in particular, "the provisions of the law of that Member State which, firstly, provide that the opening of such proceedings shall result in the interruption of the proceedings in progress; secondly, make the resumption of the proceedings subject to the declaration of the creditor's claim for insurance compensation on the liabilities of the insurance undertaking and to summoning the bodies responsible for carrying out the winding-up proceedings to the appeal; and thirdly, prohibit any order for payment of compensation, since such compensation may be determined only by establishing its existence and setting its amount, provided that, in principle, such provisions do not encroach on the jurisdiction reserved for the law of the Member State of origin, pursuant to Article 274(2) of that Directive."

18. It follows that, pursuant to Article L. 326-28 of the Insurance Code, as interpreted in the light of the Solvency II Directive, Articles 369 and 371 of the Civil Procedure Code and Article L. 622-22 of the Commercial Code are applicable to proceedings pending concerning an insurance claim brought by a policyholder in respect of losses sustained in France from an insurance company subject to winding-up by decision of court proceedings in another Member State.

19. In order to declare that there is no need to revoke the closure order, dismiss Paget's request for an appraisal and order Alpha Insurance to pay Paget the sum of EUR 335,080.79 as compensation for material damage resulting from the accident that occurred on 20 May 2012, the ruling notes that, despite the objection raised by Depeyre, Alpha Insurance has not established that the Danish bankruptcy proceedings had the same effects as under French law on the continuation of the proceedings and on the admissibility of the claims directed against it.

20. It concludes that, unbeknown to the parties before the closure and not appearing to be of such gravity as to warrant the revocation of the closure order, the existence of that bankruptcy procedure will remain irrelevant to the proceedings.

21. In so ruling, even though the judgment of the Maritime and Commercial Court of Copenhagen, which declared the bankruptcy of Alpha Insurance and appointed a bankruptcy trustee—delivered before the opening of the proceedings—, had led to the interruption of the proceedings in progress, the Court of Appeal violated the above-mentioned provisions.

## **Scope and consequences of the quashing**

22. Pursuant to Article 624 of the Civil Procedure Code, the quashing of the provisions of the judgment ruling that there is no need to revoke the closing order, dismissing Paget's request for an appraisal and ordering Alpha Insurance to pay Paget the sum of 335,080.79 as compensation for material damage entails the annulment of the operative paragraphs dismissing Paget's claim for an order whereby Depeyre would compensate it for its losses resulting from the loss that occurred on 20 May 2012 and its claim for an order for Alpha Insurance to compensate it for non-material damage, which are connected to it by a necessary dependency link.

**ON THESE GROUNDS, and without having to rule on the other objections of the appeals, the Court:**

QUASHES AND SETS ASIDE all provisions of the ruling handed down on 20 November 2018 between the parties by the Court of Appeal of Besançon.

Returns the case and the parties to the status existing prior to the said ruling and refers them to the Court of Appeal of Lyon;

Orders Depeyre Enterprises to pay the costs;

Pursuant to Article 700 of the Civil Procedure Code, dismisses the claims;

at the request of the Prosecutor-General of the *Cour de cassation* (Court of cassation), orders that this ruling be transcribed in the margin or following the quashed ruling.

Thus decided by the Second Civil Chamber of the *Cour de cassation* (Court of cassation) and pronounced by the President at the public hearing on the twenty-fifth of May, two thousand and twenty-two.

**President : Mr Pireyre**

**Judge referee : Ms Guého**

**Elder judge : Ms Leroy-Gissinger**

**First Advocate-General : Mr Gaillardot**

**Lawyer(s) : SARL Cabinet Munier-Apaire, SCP Rocheteau, Uzan-Sarano and Goulet, SCP Nicolay**

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