Does marine insurance cover the lack of payment and the incorrect delivery?

Based on the ruling of 3 November 2010

1) Risks covered by the marine insurance “sur facultés” *(cargo insurance)*
2) Seller’s interest clause
3) The behaviour of the subscriber

Marine insurance « sur facultés » *(cargo insurance):* This type of marine insurance is aimed to guarantee the risks to which are exposed the goods during their transport by water, land or air. French marine insurances are governed by the provisions of Title VII of Book I of the Insurance Code.

- They cover damages caused to the goods and does not apply, unless specific provision, to commercial risk *(indirect commercial or financial damages).*

- Regarding conditions to claim compensation: The subscriber of a marine insurance is able to require the execution of the insurance contract. Moreover the interest to act is a necessary condition laid down in Article L. 171-3, paragraph 2 of the French Insurance Code which provides that *"No one can claim the benefit of insurance if he has not proven damage".* It is a rule regularly recalled in the “polices françaises d’assurance maritimes sur facultés”.

1) Risks covered by the marine insurance “sur facultés” *(cargo insurance)*

a) <u>The failure to pay the sale price of the goods</u>

Marine insurance does not cover the risk of non-payment of the sale price of the goods because it is a pecuniary risk and not a “damage caused to insured objects" *(according to article L. 172-11 of the French Insurance Code).*

In the reported judgment, goods were delivered to the recipient in good condition and there were no “damages caused to the insured objects” in the sense of the foregoing Article. Moreover there were no “loss or damages caused to the insured objects” in the sense of Article 5 of the « imprimé » of 16 February 1990 which was applicable to that case. Thus the loss was not covered by the marine insurance.

b) <u>The incorrect delivery</u>

An irregular delivery does constitute neither a loss nor a disappearance and could not be assimilated to the losses of weight or quantities of Article 5 of the French insurance policy. Moreover the theft of the good would be covered only if there are traces of break-in or breakages.

In conclusion, unless a specific provision, the incorrect delivery is not a risk covered by the marine insurance “sur facultés” *(cargo insurance)* even if sometimes judges held the opposite solution under Article 5 of the French insurance policy.

However in the ruling of November 3th, 2010, trial judges held the incorrect delivery could, in the meaning of the risk insured *(subject to interpretation)* be equivalent to a material loss for the

subscriber. The Court of Cassation confirmed this point affirming that trial judges did not refuse to give effect to the foregoing traditional rule *(the damages caused to the commercial exploitation of the subscriber are not insured)*

2) « Seller's interest » clause

Others different risks can be guaranteed by particular agreements as the "seller's interest" clause or the "contingency" one. We find comparable conditions in most of these clauses which often require the existence of a physical loss or damage but can provide a larger scope.

In the ruling of November 3rd, 2010, there was a "seller's interest" clause which specifies *"when the subscriber sells a good without the obligation to insure it, the good is automatically guaranteed against damages and losses the seller could suffered from"*. As the meaning of "damages and losses" is not specified, pecuniary losses are covered by virtue of his sale contract.

3) The behaviour of the subscriber

a) The gross negligence or intentional misconduct

These faults cannot be insured[1]and no derogation is possible by the parties to a marine insurance contract governed by French law.

Regarding the definition of the gross negligence in the field of marine insurance, judgments giving precisions are rare. According to case law relative to others disputes, the gross negligence is the boldly fault committed with consciousness it would result the realization of a risk, whereas the intentional misconduct would be the fault committed with the intention to cause a risk.

The ruling, basis of our report, asserts that the risk of fraudulent use of bills of lading cannot be assimilated to a gross negligence or intentional misconduct of the insured party if the latter neither intend to cause a risk nor had the consciousness it could result a risk.

b) The lack of reasonable care

Insured risks are covered, even if the insurant is at fault *(except above "a)") "unless the insurer establishes that the damage is due to a lack of reasonable care on behalf of the insured person to avoid the risks"*.

Here, we consider the behavior of the insured person and contrary to the previous hypothesis; derogations are permitted under Article L. 171-2 of the French Insurance Code.

Finally, it is important to know that article 15 of the French insurance policy obliges the insured person to take all provisional measures in order to prevent or limit possible damages and losses. In the ruling of November 3rd, 2010, a company was accused for not having interrupted the current shipping while it had received information on possible diversion of containers. This omission engendered an aggravated damage. However, the Court of Cassation held there was no significant lateness in the delivery permitting to confirm the existence of a fraud.