

## **Legal news: The enforceability of the arbitration clause contained in an insurance contract vis-à-vis third parties that bring a direct action against the insurer – 1st Civil Chamber, 19 December 2018, no. 17-28.951**

In a judgment handed down last December, the First Civil Chamber of the Court of Cassation stated its position on the enforceability of an arbitration clause contained in an insurance contract against a victim bringing a direct action.

The position of the Court of Cassation will most likely give rise to a number of comments in the months to come as it stirs up a large part of the doctrine.

Indeed, in its judgment of 19 December 2018, the First Civil Chamber of the Court of Cassation decided:

*"But given that, according to the principle of jurisdiction to decide jurisdiction ("le principe compétence – compétence"), it is up to the arbitrator to rule on his own jurisdiction, unless the arbitration clause is manifestly void or inapplicable; that, having found that the contract concluded by SC Navi SRL stipulated that the disputes concerned by the insurance contract should, with the exception of the ordinary courts, be brought before an arbitration court in Hamburg and settled in accordance with the rules of the German Maritime Arbitrators Association, the Court of Appeal, which held that the arbitration clause was not manifestly inapplicable where accessory to the right of action, was however, effective against the victims bringing the direct action against the insurers, decided that the Nancy Commercial Court had no jurisdiction".*

It is established case law that arbitration clauses are transmitted as an accessory to the action in contract chains that transfer ownership.

The decision of the Court of Cassation, although recent, has already provoked much criticism in particular due to the fact that, unlike the situation encountered in a contract chain that transfers ownership, the victim who brings a direct action against the insurer, relies upon its very own action which does not result from a transfer of action or right from the insured.

However, the Court of Cassation simply upheld the principle of jurisdiction to decide jurisdiction provided for in Article 1448 of the Code of Civil Procedure and rightly so. Indeed, it should be recalled that the rule decreed by Article 1448 does in no way prejudice the decision of the arbitrator on his potential jurisdiction. In our case, there is no evidence to suggest that the arbitrator, who might hear the case, would declare himself competent to rule on the claims made by the victim under its direct action.

However, where a valid arbitration clause exists, the principle of jurisdiction to decide jurisdiction must prevail. This is very clearly stated by the Court of Cassation. It will be up to the victim to demonstrate that the arbitration court must decline its jurisdiction in favor of the State courts for its direct action.

This judgment sheds an interesting light on the mechanisms of direct action, insofar as the introduction of an arbitration clause in the insurance policy could hinder or at least delay the victim's direct action against the insurer of the liable party.

Given the recent nature of this judgment, attention should be paid to the decisions of the courts of appeal or to any clarifications that the Court of Cassation may provide through other decisions.