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# Contractual Freedom and Compulsory Insurance: An Imperative Compromise? A Comparative Study in Quebec and French Law - Part One

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Article abstract

This comparative paper analyses the disparity between Quebec and French Law with respect to compulsory insurance and highlights the importance attached to the principle of contractual freedom in Quebec. The steadfast development and protection of this principle in Quebec may be attributed to the influence of North-American capitalism and long-standing principles of both the Anglo-Saxon and Napoleonic legal traditions while, in France, an ever-growing trend towards the collective protection of the public has overshadowed any individual right to contractual freedom with respect to many activities. With 119 compulsory insurance stipulations forming an integral chapter of the French *Code des assurances*, one begins to wonder whether Insurance Law in Quebec will follow suit. Could this ever occur? Should it? The legal repercussions of such a development (such as the correlative obligation to insure necessarily imposed on private insurance companies) are examined, as well as the current state of Quebec and French Law pertaining to compulsory insurance and contractual freedom. This Part One of a two-part series deals entirely with French Law. Part Two, which deals with Quebec Law, will be published in the April 2006 issue.

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**by Jason Hadid**

**ABSTRACT**

This comparative paper analyses the disparity between Quebec and French Law with respect to compulsory insurance and highlights the importance attached to the principle of contractual freedom in Quebec. The steadfast development and protection of this principle in Quebec may be attributed to the influence of North-American capitalism and long-standing principles of both the Anglo-Saxon and Napoleonic legal traditions while, in France, an ever-growing trend towards the collective protection of the public has overshadowed any individual right to contractual freedom with respect to many activities. With 119 compulsory insurance stipulations forming an integral chapter of the French *Code des assurances*, one begins to wonder whether Insurance Law in Quebec will follow suit. Could this ever occur? Should it? The legal repercussions of such a development (such as the correlative obligation to insure necessarily imposed on private insurance companies) are examined, as well as the current state of Quebec and French Law pertaining to compulsory insurance and contractual freedom. This Part One of a two-part series deals entirely with French Law. Part Two, which deals with Quebec Law, will be published in the April 2006 issue.

**RÉSUMÉ**

Cette étude comparative est une analyse de la disparité entre les droits québécois et français face à l'assurance obligatoire et souligne l'importance attachée au principe de la liberté contractuelle au Québec. Le développement et la protection

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accrue de ce principe au Québec peuvent être attribués à l'influence du capitalisme nord-américain et de vieux principes communs aux traditions juridiques anglo-saxonne et napoléonienne. Pourtant, en France, le mouvement vers la protection collective du public a primé sur toute notion de droit individuel à la liberté contractuelle à l'égard de plusieurs activités. Avec 119 stipulations d'assurance obligatoire formant un chapitre entier du *Code des assurances* français, on se pose la question de savoir si le droit des assurances québécois adopterait la position française. Est-ce possible? Devrait-ce arriver? Les répercussions juridiques d'un tel développement (comme l'obligation corrélative d'assurer qu'il faudrait nécessairement imposer aux compagnies d'assurance) sont examinés, ainsi que l'état actuel du droit québécois et français par rapport à l'assurance obligatoire et à la liberté contractuelle. Cette partie 1 (série de deux parties) concerne le droit français. La partie 2, consacrée au droit québécois, sera publiée dans le numéro d'avril 2006.

# 1. IN FRANCE: THE PRINCIPLE OF CONTRACTUAL FREEDOM AND THE LIMITS IMPOSED ON IT

## 1.1. The modern-day Principle and its historical Development and Curtailment in French Law

### 1.1.1. *Civil Law* and The Need for insurance during the Industrial Revolution, an era of pure contractual freedom

Before contemplating the reasons for the coming about of compulsory insurance, one must observe and scrutinize the historical reasons for the birth and development of insurance as a whole.

In France and across the Western World, insurance was a response to the proliferation of civil liability disputes during the Industrial Revolution, beginning in the middle of the 19th century[1]. The need for insurance and the subsequent development of Insurance Law arose directly from the development of the Law of Civil Liability[2]. The rapid development of this legal sector during the Industrial Revolution is attributed by most to the sudden multiplication of accidents provoked by the utilization of new techniques that were still not entirely mastered by the industries that exploited them[3]. The situation of the victims, not having the means to prove the precise cause of their damages, then necessitated a rapid development of the Law of Civil Liability; with this development came the improvement of the Law of Bodily Injury and Material Damages[4]. This trend of juridical development continued throughout the 20th century, due to the constant evolution of industrial technology[5].

It was precisely during this era of the Industrial Revolution, the direct cause of a heightened need for insurance, that French Law favoured the principal of contractual freedom. In fact, French Civil Law (as well as British and North-American Common Law for that matter) was impregnated with the prioritization of total equality of all persons before the law, including moral persons[6]. The Napoleonic Code of 1804 was testament to this notion of absolute equality, codifying the very principle of contractual freedom and consensualism, its by-product, as it was peppered with examples of contractual equality.

Section 1101 of the French Civil Code reads as follows today:

> «**Art. 1101.** Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire, ou à ne pas faire quelque chose.»

It states that a contract is an agreement through which one or more persons bind themselves, towards one or more others, to give, to do, or not to do something. It sets out the principle of consensualism in the French Law of Contracts, requiring only the consent of two or more parties to form a binding agreement, without any necessary formalism. That being said, it is noteworthy that no difference between the persons is stipulated here; rather, equality of all contracting parties seems to be the guiding principle. As well, one can note that the sections regarding the vitiation of consent make no distinction between the parties bound to an agreement, as no privilege or advantage is given to one party over the other. However, as we will examine later on in this paper, such derogations from the principles of equality and consensualism exist and form an integral part of French Insurance Law. In some cases, as we will see with compulsory insurance, the said principles are completely put aside by French Insurance Law in the name of public protection. Still, similarly to the obligation to provide security in service contracts widely recognized today by the French Judiciary, exceptions to contractual freedom within Insurance Law did not exist in the early 20th century in France. Rather, and as will be exposed further, the *Loi du 13 juillet 1930* was the first act in France to breach the principle.

In the opinion of Lesage, a Doctor of the Faculty of Law of Montpellier I, and as was put forth in his doctoral thesis[7], the expansion of insurance throughout history is intimately linked to the principle of contractual freedom, an essential principle of the French Civil Law of Contracts. Consequently, he maintains that the legal regime of all insurance contracts relates to this principle. He argues that, although compulsory insurance negates the principle of contractual

freedom, the Civil Law of Contracts and Insurance Law still form an integral part of compulsory insurance. To this end, he invokes that both the Legislator and Judiciary in France have left room for these two strata of law to play a significant and essential role in compulsory insurance.

Before the advent of the notion of adhesion contracts and the advantages to insureds that logically followed, insurers benefited from a regime of contractual equality in the French Civil Law of Contracts. As a result of the principle of contractual freedom, insurers were free to stipulate whatever they wanted, and the insured was equally free not to enter in agreement with the insurer. Eventually, faced with a rapid growth and correlative need for insurance, insurers began to prepare pre-determined insurance contracts and offer them to the public at large[8]. They began to derogate from certain long-established rules of the French Civil Law of Contracts, such as those regarding prescription periods[9]. Thus, without compromising the principle of contractual freedom, as insureds remained free to refuse, insurers were able to dictate the content of insurance contracts. As a result of the power imbalance that ensued, the juridical notion of an 'adhesion contract' was born and the relationship was regulated by the State. Government intervention was regarded as necessary in order to rectify this power imbalance[10].

### 1.1.2. *Insurance Law* and *La loi du 13 juillet 1930*: an act adopted in order to limit the freedom of insurers in favour of insureds

The primary objective in enacting the *Loi du 13 juillet 1930* was to limit and regulate the unilateral practices of insurers[11]. In essence, to limit their freedom in favour of insureds. The Act derogates from Civil Law in that most of its sections are of public order, in the spirit of protecting insureds. However, according to Lesage, the rules contained in this act derogate from the Civil Law of Contracts for a second reason as well: simply because the French Legislator had to adapt it to the rules and techniques specific to Insurance Law[12]. Insurance Law in itself derogates from Civil Law with respect to many rules, both procedural[13] and substantive[14]; thus, the *Loi du 13 juillet 1930* had to conform to these important distinctions[15]. In fact, as Dr. Lesage submits and as will be examined supra, the *Loi du 13 juillet 1930* (said to be the backbone of Insurance Law in France, now codified into Book II of the French *Code des assurances*[16]) created a second stratum of rules applicable to Insurance Contracts, in addition to the Civil Law of Contracts[17].

At this point, it is noteworthy that the progression leading up to the birth of compulsory insurance in France is ancient and is by no means contemporary to the enactment of the *Loi du 13 juillet 1930*[18], the seminal act in French Insurance Law. In the opinion of F. Ewald, the societal function of insurance, patrimonial security, is the primary root from which compulsory insurance was born[19]. J. Bigot adds a few more possible reasons: the French tendency to regulate everything under the auspices of the State, the need to protect the victims (the majority of compulsory insurance being related to civil liability), the medieval and canonical concept of the individual within society and modern French corporatism (as opposed to Anglo-Saxon liberalism), and specific reactions of people and government to specific catastrophes which resulted in tragic situations for their victims[20]. The history of compulsory insurance is step-wise. In fact, three consecutive initiatives in the early history of compulsory insurance can be summarized as follows[21]:

**a) Compulsory insurance of persons (mid-19th century):** In the 19th century, the very idea of compulsory insurance was sparked by social considerations, such as poverty and worker's security. Prior to 1848, it was argued that insurance should become nationalized. The 1848 French Revolution then sparked the creation of national health and retirement insurance regimes, leading up to the enactment of the *Lois de 1850 sur les sociétés de secours mutuel*. Thus, by the end of the 19th century, with the birth of the first national insurance regimes for work-related accidents, worker's retirement and farmer's retirement, we begin to see the notion of compulsory insurance enter into the debate pertaining to the latter retirement insurance regimes. It is important to emphasize here that compulsory liability insurance is still a non-topic; rather, it is certain types of insurance of ***persons*** that become nationalized and compulsory.

**b) Compulsory liability insurance (mid-20th century):** During the second half of the 20th century, compulsory insurance takes on unprecedented growth, as the instances of compulsory insurance rapidly multiply. A debate arises as to which insurance technique should be used. Prior to 1945, two alternative solutions existed to the problem of guaranteeing indemnification for victims : the institution of state-run indemnification funds or a compulsory insurance regime. After 1945, these two solutions are deemed to complement each other. For example, in automobile insurance, a clear separation is drawn between liability disputes and indemnification. Thus, a state-run indemnification fund, the *Fonds de Garantie Automobile*, is set up in 1951. Seven years later, with the enactment of the *Loi*

*du 2 janvier 1958*, compulsory automobile insurance is instituted in order to act as a financial guarantee with respect to ***liability***.

**c) Compulsory property insurance (late 20th century):** The first pillar of compulsory property insurance, in fact the first to exist in France, was that of compulsory construction insurance for damage to ***property*** being constructed. The victims' insurer would then be subrogated in the victim's rights and could therefore turn against the insurers of the parties responsible after indemnification. This resulted from the 1978 Construction Insurance Reform and is commonly referred to in France as *l'assurance dommage-ouvrage*, examined infra. The *Loi du 13 juillet 1982 sur la garantie des catastrophes naturelles* is a similar example, although its compulsory insurance regime runs on an entirely original mechanism: administered by the French State, this is a government indemnification fund meant to compensate damage caused exclusively by natural disasters, and is forcefully financed through a part of the premium of every damage insurance policy signed and delivered in France.

Finally, it is noteworthy that the protection of third-party victims, i.e. the public at large, is at the forefront of the Legislator's decision to institute any compulsory insurance. At first, the primary objective of the *Loi du 13 juillet 1930* was to protect insureds. In the years following, with the advent of compulsory insurance, a significant shift in legislative intention is apparent: the objective becomes the protection of third-party victims, i.e. of the public at large[22]. The *de facto* landscape for insurance changed in consequence: today, although the victim has no influence on the content of the insurance contract, he or she is most often the only person having any real relations with the Insurer[23]. In her book on Civil Liability, French author G. Viney writes:

> «On mesure ainsi à quel point, dans la mise en oeuvre du droit à la réparation, le rôle du responsable est devenu théorique et presque postiche... tout se passe en réalité entre la victime et l'assureur»[24].

### 1.1.3. *Compulsory Insurance Law* or "forced" Insurance Contracts: From Automobiles to Non-federated Amateur Boxing

As stated earlier, the first compulsory insurance to exist in France was automotive insurance for liability regarding material damage to third parties, instituted in 1958. As discussed earlier, the first compulsory property insurance was the *Assurance dommage-ouvrage* in 1978, a compulsory construction insurance regime for damage to

property being constructed. Since 1958, and more so in recent years, we have witnessed a rapid multiplication[25] of compulsory insurance stipulations, now codified into Book VIII of the French *Code des assurances*. Today, the list numbers 119 and spans from automobiles to non-federated amateur boxing.

## 1.2. The Duty to be insured

### 1.2.1. Compulsory Insurance, a third stratum of laws

Although forms of compulsory insurance of persons existed well before its enactment, the *Loi du 13 juillet 1930* is considered to be the backbone of the Law of Compulsory Insurance in France. According to Lesage, the Law of Compulsory Insurance constitutes a third stratum of rules applicable to insurance contracts, the two other strata being [Conventional] Insurance Law and the Civil Law of Contracts. In fact, compulsory insurance constitutes a double derogation to the law, justified by the protection of the public[26]:

1. Firstly, Compulsory Insurance derogates from Insurance Law, itself written in favour of insureds but without having lost sight of the technical constraints of the Insurer-Insured relationship (see the *Loi du 13 juillet 1930*, examined supra). On the contrary, compulsory insurance is geared only towards protecting third-party victims.

2. Secondly, Compulsory Insurance derogates from the Civil Law of Contracts. In the hierarchy of norms, the Civil Law of Contracts and its underlying principles are situated higher than Insurance Law, which is itself an exception to the Civil Law of Contracts. Its underlying principles include that of contractual equality, which dictates that no inequality exist between parties to a contract and that no party be deemed responsible until proven so. Another principle, a corollary perhaps, is contractual freedom, which dictates that the parties are free to contract or not to contract and, in the former scenario, that the conditions of their agreement be respected as law. Compulsory insurance and Insurance Law expressly derogate from these two pillars, by giving the Insured more rights than the Insurer and by forcing them to enter into agreement and, in some cases, by dictating the very content of their agreement.

It can therefore be said that, in the hierarchy of norms, three distinct strata of rules complement and confront each other at once, in the following order of legislative superiority: (1) The Civil Law of Contracts, (2) Insurance Law and (3) The Law of Compulsory Insurance[27]. According to Lesage[28] and J-J. Dupeyroux[29], we are now confronted with two important questions of legal interpretation:

1. Firstly, how is the judge to interpret the Law of Compulsory Insurance, i.e. must he or she refer to the rules and principles of Insurance Law and the Civil Law of Contracts in order to fill any gaps left by the Legislator?

2. Secondly, was the Legislator himself influenced by the said Laws at the time of his writing the Law of Compulsory Insurance, i.e. did he intend for judges to refer to the said Laws in order to fill gaps that he left, intentionally or unknowingly?

Lesage is of the opinion that the only way for these two questions to be answered in the negative would be for the Law of Compulsory Insurance to be autonomous[30]. And, in turn, the only two possibilities for which it could be autonomous are as follows:

1) If, at the time of its creation, the Legislator concocted it with such specific rules such that it can be considered a whole body of laws, complete in and by itself.

2) If, in its practical application, it takes on an importance so great that it acquires an autonomy sufficient to be considered no longer an exception to Civil Law, but rather the Civil Law itself in its legal domain.

Lesage concludes that the Law of Compulsory Insurance does not constitute an autonomous body of laws. Rather, it forms but a third stratum of rules that were written, and that must therefore be interpreted, while taking the first two strata into account. Thus, at Lesage submits, one must not be fooled: The Law of Compulsory Insurance may at times actually offend the rights of insureds, protected by Insurance Law, or those of insurers, protected by the Civil Law of Contracts[31]. The latter two bodies of law must therefore be used by the judge to fill gaps left by the Legislator and, where possible, to protect the rights of insureds and insurers where the protection of third-party victims has become excessive or unwarranted by the text of the Law. J. Bigot concurs and states:

> «Compte tenu de leur diversité, voire leur disparité, il n'existe pas à proprement parler de droit spécial cohérent et construit des assurances obligatoires. Elles relèvent du droit commun, sauf dans la mesure où les règles spéciales qui les régissent y dérogent... Le droit commun de l'assurance s'applique donc aux assurances obligatoires chaque fois qu'il n'y est pas explicitement ou implicitement dérogé.»[32]

Essentially, the three strata function in hierarchy such that Insurance Law will apply where Compulsory Insurance Law does not explicitly derogate, as per the Latin maxim *omni specialibus non*

*derogant* (where the law derogates from the usual principle and stipulates a special rule, the special rule must be followed). The Legislator will often refer to Civil Law in legislation containing compulsory insurance, using varied methods[33] (examples are provided in footnote):

1. Direct Reference: The law refers directly to a Civil Law or Insurance Law notion[34].

2. Indirect Reference: The law refers indirectly to a Civil Law or Insurance Law notion[35].

3. Selective Reference: The law selectively sets aside a Civil Law rule or principle that proves to be an obstacle to protection of third parties[36].

4. Reference via splitting: The law splits a Civil Law or Insurance Law notion into two distinct elements in order to subject them to different legal regimes[37] (for example, Insurance Law and Compulsory Insurance Law).

Also, seeing as compulsory insurance constitutes an exception to the rule, compulsory insurance stipulations must be interpreted restrictively, in accordance with the usual rules of legal interpretation[38].

In addition, it is noteworthy that while certain compulsory insurance stipulations require mandatory content (as is the case with mandatory clauses or minimum ceilings imposed by the Legislator), others are completely unregulated with respect to their content[39]. In the latter case, the Civil Law principle of contractual freedom must prevail in matters concerning the content of an insurance contract[40]. As such, an exclusion or forfeiture clause imposed by a mandatory clause stipulation or by a regulation could be declared in violation of Civil Law principles where applied to non-compulsory insurance[41].

In his book, *Le droit des assurances*[42], Jean Bigot cites a series of interesting examples of cases where, pursuant to its ultimate objective in protecting vulnerable third-parties, the French judiciary gave precedence to either [Conventional] Insurance Law or the Civil Law of Contracts in compulsory insurance disputes.

***Examples where Insurance Law was used:***

With respect to Contractor's Guarantee Insurance, in order to afford contractors enough time to bring their insurers in warranty via direct action, the *Cour de cassation* added the two years afforded under the common bi-annual prescription governing Insurance Law to the ten years afforded under the compulsory Contractor's Guarantee

Insurance[43]. Concerning the same type of compulsory insurance, the *Cour de cassation* applied the proportional premium reduction rule as well as the rule limiting coverage to the activities declared by the Insured, both being rules derived from [Conventional] Insurance Law[44].

Finally, with respect to the victim's right to indemnification under compulsory Automotive Insurance, the *Cour de cassation* transformed the notion of "inexcusable fault" (which, if proven, would deprive the victim of any right to indemnification) into the Insurance Law notion of intentional fault (which is very difficult to prove, more than ever in France)[45]. The same reference to [Conventional] Insurance Law is seen in *Cour de cassation* case law regarding the expiration date of provisional coverage preceding adherence to a compulsory «*dommage-ouvrage*» insurance policy; similarly, regarding cancellation of compulsory Contractor's Guarantee Insurance due to default on payment of premiums, the Court turned to [Conventional] Insurance Law[46].

***Examples where the Civil Law of Contracts was used:***

By virtue of the Civil Law concept of necessary causation, the *Cour de cassation* rendered null all clauses limiting the duration of insurers' obligations[47]. The *Conseil d'État* ratified this decision, leading to the repeal of certain compulsory insurance provisions that limited the duration of the insurer's obligations[48]. This decision goes against the principle of contractual freedom governing Insurance Law and, more specifically, the general principle of Liability Insurance Law that coverage is triggered by an event and, necessarily, a claim made with respect to that event[49].

The Civil Law of Contracts was used by the *Cour de cassation* to extend subrogation in Insurance Law to include legal subrogation and conventional subrogation provided in Civil Law[50].

Civil Law rules regarding evidence were used by the *Cour de cassation* in dividing the burdens of proof relating to insuring agreement and exclusion clauses contained in an insurance policy, even when that policy is governed by compulsory insurance legislation[51].

In applying the general Civil Law principle of the "accessory" to compulsory Contractor's Guarantee Insurance, the *Cour de cassation* ruled that coverage should extend to property that existed prior to construction[52].

Nonetheless, Compulsory Insurance Law has proven to be undeterred in most case law due to the fact that judges generally

feel bound by the terms of compulsory insurance legislation. For example, it was decided that subcontractors are not subject to the compulsory Construction Insurance imposed on contractors, simply due to their absence from the list of persons legally bound by the obligation[53].

### 1.2.2. The Application of Compulsory Insurance Legislation to the private Insurance Contract

***a) To the Elements of the Contract:***

The conclusion of the compulsory insurance contract is governed by the Civil Law of Contracts[54]. As for all bilateral contracts, the consent of both parties (insurer and insured) is required for insurance contracts. One should note, however, that the consent of the Insurer in a compulsory insurance contract can be forcefully obtained through the *Bureau central de tarification (B.C.T.)*, an administrative tribunal with the power to withdraw an insurance company permit from any insurer that refuses to comply with a ruling. This will be further examined infra[55].

The duration period and conditions of cessation of a compulsory insurance policy are equally governed by Civil Law[56]. Matters relating to evidence and the validity of exclusion clauses are governed by Civil Law as well, exception made to certain exclusion clauses that may be authorized or prohibited by the legislation imposing compulsory insurance[57].

***b) To the Execution of the contract:***

The obligations of the parties and the modalities surrounding the execution of these obligations are governed by Civil Law; these obligations may include the declaring of risk, making claims, paying the premiums or the Insurer's duty to indemnify[58]. However, certain obligations pertaining to compulsory insurance differ from those pertaining to non-compulsory insurance: In Automotive Insurance and Contractor's Guarantee Insurance, the Insurer is confronted with a number of restrictions concerning expertise and indemnification procedures[59].

***c) To the Content of certain clauses:***

This is where compulsory insurance differs significantly from non-compulsory insurance. In light of the fact that, as stated earlier, Compulsory Insurance Law can render the content of a contract com-

pulsory as well as its conclusion, certain clauses can become mandatory; others can become ineffective against third-parties. We will examine guarantee minimums (i) and ceilings (ii), deductibles (iii), the ineffectivity of certain legal exceptions against third-parties (iv), and clauses limiting the duration of coverage by the Insurer (v).

**(i) Guarantee minimums:** Certain compulsory insurance stipulations impose a minimum amount of coverage. Stipulations imposing unlimited coverage are prevalent in compulsory insurance provisions pertaining to bodily injury, where the protection of third-parties is considered by the French Legislator to be of the utmost importance[60]. With respect to compulsory insurance for non-corporal damage, a specific amount is decreed[61]. In some cases, as is the case with Notary's Liability Insurance, the minimum guarantee imposed is established as a function of the volume of professional activity of the Insured[62]. Construction Insurance follows an exceptional rule: the insurance must cover the cost to repair the damage for which the Insured is deemed liable[63]. In other cases, where the Law is silent on the matter or where it explicitly allows for the parties to decide, the parties may agree to a sum of their choice[64].

**(ii) Ceilings:** It has been argued and accepted that, where the compulsory insurance stipulation does not prohibit a guarantee ceiling, Civil Law should prevail and allow the parties to impose a ceiling by virtue of the principle of contractual freedom, codified at section 1134(1) of the French Civil Code[65]. Evidently, in cases of unlimited compulsory insurance (as is the case with insurance covering bodily injury), a ceiling would be null and void[66]. However, some have put forth that, in the presence of a compulsory insurance stipulation, a ceiling with respect to that type of insurance can only be imposed by the stipulation itself[67]. With regards to Contractor's Guarantee Insurance, the *Cour de cassation* declared ceiling clauses inoperative, basing itself on such an interpretation[68].

It is noteworthy that section L.112-4 *Code des assurances* requires that the policy stipulate a ceiling; however, if no ceiling amount is indicated, coverage must be considered unlimited, regardless of whether or not a minimum is imposed[69].

**(iii) Deductibles:** The regimes governing deductibles vary significantly from one type of compulsory insurance to another. Generally, the deductible amount in a given insurance policy is governed by contractual freedom; thus, the parties may agree to whatever amount they wish. In some cases, however, the Law imposes a maximum amount when it comes to indemnity to third-parties[70]; this can prevent insolvent professionals from self-insuring themselves[71].

Contractor's Guarantee Insurance functions in a unique fashion: deductibles are governed by contractual freedom and thus they may be set at whatever amount agreed upon by the parties, but are considered void against the project owner[72]. General damage insurance cannot contain a deductible[73]. However, the *Bureau central de tarification (B.C.T.)* can impose a deductible in cases where the risk is particularly high and where deductibles are void against injured third-parties[74].

**(iv) Ineffectivity of certain legal exceptions and contractual exclusions against third-parties:** In Civil Law, legal exceptions and policy exclusions are effective against injured third-parties in a direct suit against the Insurer[75], exception made to forfeiture caused by omissions of the Insured after the event triggering the claim[76]. However, the rules differ significantly when dealing with compulsory insurance. Depending on the type of compulsory insurance, the said ineffectivity (legally or conventionally sanctioned) can apply to deductibles (see infra), proportional reduction of indemnity, and even policy exclusions. The following six categories of compulsory insurance are noteworthy:

– Automotive Insurance: forfeiture, deductibles, proportional reduction of premium[77] and certain exclusions[78].

– Hunting Insurance: Legal and contractual forfeitures are never effective against third-party victims (for example, forfeiture due to absence of a valid hunting permit[79]). In fact, the only effective exclusions are those provided by the legislation conferring compulsory hunting insurance.

– Sporting Event Insurance and Mechanical Lifting Gear Insurance: Deductibles and proportional reduction of premium are void against injured third-parties[80].

– Insurance pertaining to Centers for the Elderly and Indigent: Deductibles, forfeiture and proportional reduction clauses are void against injured third-parties[81].

– Biomedical Research Insurance: Forfeiture and proportional reduction clauses are void against injured third-parties[82].

– Contractor's Guarantee Insurance: Forfeiture due to the Insured's failure to comply with standards of professional practice is void against third-parties[83].

**(v) Clauses limiting the duration of coverage by the Insurer:** Compulsory insurance (mandatory clauses, etc.) regarding Civil and Professional Liability often limits the period of coverage where the

policy is cancelled; however, the *Conseil d'État* put a stop to this by virtue of principles of the French Civil Code regarding the validity of the cause of an obligation[84]. The said limits on duration were subsequently repealed and, consequently, this aspect is now governed by Civil Law[85]. In this regard, the *Cour de cassation* has decreed that the period of insurance coverage must always coincide with the correlative period of liability[86]. Still, certain types of Professional Liability Insurance, such as that regarding Notaries, are not subject to this rule; in such cases, the period of coverage is linked with the event triggering the damage[87].

### 1.2.3. 119 stipulations in the French *Code des assurances*

As discussed earlier, there are currently 119 compulsory insurance stipulations in the French *Code des assurances*. As put forth by J. Bigot[88], compulsory insurance stipulations can be classified according to their legal source (those imposed by Law or Regulation versus those imposed by private or public contracts, governed exclusively by Insurance Law) and, furthermore, according to their nature (those whose adherence is obligatory versus those whose adherence is optional but, once adhered to, must contain a certain type or amount of guarantee; this last category is commonly referred to as Compulsory Guarantees[89]). This paper will be limited in scope to compulsory insurance stipulations imposed by Law or Regulation and will not include the aforementioned Compulsory Guarantees. In addition, this paper will not attempt to address Government Indemnification Funds or Systems; rather, the only thing that will be analyzed and compared is the obligation for physical or moral persons to enter into private contracts with insurers.

### 1.2.4. The Sources of Compulsory Insurance and their legitimacy

The French *Conseil d'État* published a directive on February 24th, 1994 regarding the constitutional question of what constitutes a valid legal source for fundamental principles of law and their limitation or curtailment, a central question with respect to validity of compulsory insurance stipulations. The *Conseil d'État* stated the following:

> «Aux termes de l'article 34 de la Constitution, la loi détermine les principes fondamentaux des obligations civiles et commerciales.»[90]

This Directive confirms that, as per Section 34 of the French Constitution, the Law determines the fundamental principles per-

taining to civil and commercial obligations. As elaborated earlier, by virtue of its very nature, compulsory insurance directly negates a fundamental principle of civil obligations: contractual freedom[91]. Thus, as a result of this Directive and Section 34 of the French Constitution, a compulsory insurance stipulation can only be legally valid if contained in an act of law adopted by the French Parliament. The consequences are two-fold: Firstly, if such an act gives an administrative authority the right to set conditions pertaining to professions or activities under its control, the organism can legally include a compulsory insurance stipulation as one of the conditions that it sets[92]; secondly, compulsory insurance stipulations resulting from acts adopted prior to the enactment of the French Constitution in 1958 can be declared invalid by the Courts if they are deemed not in conformity with the above-stated conditions of validity[93]. Also, as a result of Section 34 of the French Constitution, the modalities surrounding a compulsory insurance stipulation (for example: persons affected, activities affected, minimum guarantee required, choice of insurer or insurance fund[94]) can therefore only be dictated by the Legislator or, in cases of delegated authority, by the competent administrative organism. However, in the latter case, the administrative organism cannot set the modalities surrounding a compulsory insurance stipulation that was imposed by virtue of legislation (for example, the *Code des assurances*), unless such a power is provided for in the act[95]. Similarly, an administrative organism cannot use its power to impose the use of mandatory clauses[96] (*clauses types,* in French) in order to impose compulsory insurance; its role is limited, in such a scenario, to the setting of its modalities[97]. This follows from the fact that regulations and mandatory clauses contained therein cannot offend fundamental principles of the Civil Law of Contracts, as per Section 34 of the French Constitution, unless specifically authorized by virtue of a legislative act of Parliament[98].

## 1.3. Applicable Legal Sanctions for non-compliance

### 1.3.1. The Legal Duty to be insured and correlative Sanctions imposed

The obligation to insure oneself can be derived from two types of provisions: legal and contractual. A physical or moral person may be obliged to procure coverage in accordance with one or more clauses contained in a private contract signed with another physical or moral person. This paper examines the negation of contractual freedom by the State through legal provisions forcing private parties to conclude insurance contracts. The contractual provision of com-

pulsory insurance is perfectly consistent with contractual freedom since the obligation resulted from contractual agreement; as such, the paper will be limited in scope to compulsory insurance imposed by legislation. It should be known, however, that contractual provisions imposing compulsory insurance, as well as the correlative penalties agreed upon, are sanctioned and upheld by the Civil Law of Contracts. Remedies provided for by Civil Law[99] could also be sought where such a contract is violated.

While failure to comply with a contractual compulsory insurance clause can only provoke civil sanctions (see infra), the failure to conform to compulsory insurance legislation can be subject to civil, administrative and penal sanctions provided by Law.

***a) Civil Sanctions:***

Failure to comply with a compulsory insurance provision can be considered negligence and therefore constitute a civil fault with respect to anyone who suffered damage as a result[100]. According to authors Rochex and Courtieu[101], failure to buy compulsory insurance can open the doors to several different recourses, such as the cancellation of a residential lease, the most frequent one being civil or contractual liability:

> «Que le fait de ne pas souscrire une assurance obligatoire constitue une faute est incontestable. Le manquement ouvre au tiers ou au contractant diverses actions. Ainsi, le fait pour un locataire de ne pas avoir été garanti en incendie et dégâts des eaux constitue une grave inexécution du bail justifiant la résiliation de ce dernier. Mais c'est essentiellement la responsabilité civile, qu'elle soit contractuelle ou délictuelle, qui sera invoquée à l'encontre du contrevenant. Le non-respect d'une obligation d'assurance constitue une faute génératrice de responsabilité.»

However, in order to trigger liability, proof of financial or other damage caused by the fault must evidently be offered[102]. To this effect, Rochex and Courtieu[103] state the following:

> «Il importe toutefois de noter que le défaut d'assurance n'est pas, par lui-même, suffisant à engager la responsabilité de son auteur. Encore faut-il qu'il ait été préjudiciable. Si la victime à été remplie de ses droits – bon gré, mal gré – par l'auteur de son dommage, sur transaction ou en exécution d'une condamnation, l'absence d'assurance est sans conséquence et ne saurait donc donner lieu à une allocation de dommages-intérêts à ce titre.»

Thus, for example, the *Cour de cassation*[104] ruled that a contractor cannot be ordered to suffer a price reduction on his works corresponding to the insurance premium paid by the Project Owner, unless some damage was directly caused to the Project Owner as a result of the Contractor's failure to buy insurance.

However, the *Cour de cassation*'s Criminal Chamber has held that financial damage can result simply from the loss of chance of being indemnified sooner[105]. In its judgment dated February 4th, 1998, the Court ruled that a lower court failed to consider that, by not procuring the financial security offered by insurance, the accused contractor caused the Project Owner a serious loss of chance of being indemnified[106].

Nonetheless, Rochex et Courtieu[107] claim that it all depends on the nature and the object of the compulsory insurance in question, seeing as damage can only be caused if the claimant is deprived of something that he or she could legally expect:

> «En réalité, le dommage résultant d'un défaut d'assurance n'est réalisé que si le tiers ou le cocontractant est privé de ce qu'il était en droit d'attendre de l'assurance. Tout dépend donc de la nature et de l'objet de l'assurance défaillante.»

Effectively, the victim of a failure to purchase compulsory insurance suffers more than just a mere loss of chance; rather, in many cases, the victim suffers a loss of financial security or even a loss of a guarantee. To this effect, Rochex and Courtieu state the following[108]:

> «...[I]l a perdu le bénéfice du droit de l'assurance de responsabilité et, spécialement, celui de l'action directe. Plus qu'une «perte de chance», il s'agit là d'une perte de sécurité dont souffre la victime. On est très près d'une perte de sûreté.»

***b) Administrative (or «disciplinary») Sanctions:***

Where access to or the execution of an activity is conditional upon the purchase of compulsory insurance, the lack of such insurance can be indirectly sanctioned by the prohibition of participating in the activity. For example, most professional orders in France impose compulsory membership to a collective insurance fund which covers their professional liability; thus, failure to contribute to the fund, either initially (i.e. upon joining the order) or upon notice of renewal, can result in a non-issuance (in the case of an applicant to the order), suspension or revocation of a professional license. The following other examples are noteworthy[109]:

– Hunting: A hunting permit cannot be issued before proof of insurance is presented.

– Real Estate and Travel Agents: A professional license cannot be issued or renewed unless an attestation of insurance coverage is produced.

– Communal Agents: Personnel cannot use their personal vehicles to serve the commune unless an attestation of their liability insurance is produced[110].

– Driving School Permits: Issuance of a permit is conditional upon presentation of an attestation of insurance[111].

– Possession of certain "dangerous" domestic animals: Proof of insurance is required in order for a permit to be issued by the Mayor's Office for possession of certain dogs[112].

– Insurance Brokers: Being added to or kept on the official state list of recognized insurance brokers is conditional upon proof of insurance.

***c) Penal sanctions:***

In virtue of fundamental principles of Criminal Law, no penal sanction can be imposed unless clearly stipulated in the Law[113]. The Latin maxim *nullem crimen, nullem poenem sine lege* is a testament to this rule: There can be neither crime nor sentence without legislation to that effect. Only those compulsory insurance stipulations considered to be essential for the financial and physical protection of the public are subject to penal sanctions. Automotive Insurance, Construction Insurance and certain compulsory professional insurance regimes are sanctioned by penal consequences for failure to comply. In cases of dispute concerning the interpretation or application of these sanctions, section 111-5 of the New French Criminal Code states that criminal jurisdictions have the competence required to interpret penal sanctions imposed by administrative organisms:

> «Les juridictions pénales sont compétentes pour interpréter les actes administratifs réglementaires ou individuels et pour en apprécier la légalité lorsque, de cet examen, dépend la solution du procès pénal qui leur est soumis.»

Thus, according to Rochex and Courtieu, the preconditions to the application of such sanctions are two-fold: First, the validity of the legal source of the obligation must be examined; then, the validity of the exception conferring illegality must be examined. After these steps are completed, the Criminal Judge then possesses the judicial

competence required to declare the sanction valid or inoperative and, consequently, apply it or not.

### 1.3.2. Parallel protection for third-parties

In order to further guarantee compensation for injured third-parties in cases of non-compliance with compulsory insurance legislation, the French Legislature decided to supplement the existing system of compulsory insurance with three parallel systems of protection: State-run indemnification funds (a), safeguard insurance (b) and substituted liability (c)[114].

*a) State-run Collective Indemnification Funds:*

In addition to those serving as a supplemental guarantee to third-parties in cases of non-compliance with compulsory insurance legislation, certain state-run indemnification funds exist in order to guarantee risks that would otherwise be uninsurable[115]. In France, several state-run indemnification funds offer guaranteed indemnification for material and corporal damage resulting from a plethora of events: Automobile accidents, hunting accidents, terrorist[116] and assorted criminal acts[117], and HIV contaminations due to blood transfusions or concerning hemophiliacs[118]. Seeing as this paper is limited in scope to the Law regarding private insurance contracts, I will not attempt to delve into the laborious study of these funds.

*(b) Safeguard Insurance :*

In some cases, compulsory insurance legislation provides a supplementary safeguard for situations of lack of insurance. For example, certain professional orders will cover a member where his or her insurance is either non-existent or temporarily inoperative for whatever reason[119]. Others will use the "insurance to whom it may concern" technique for adherence to their insurance funds in order to govern their own operations[120].

*(c) Substituted liability:*

This type of parallel protection for third-parties was created as a result of the ineffectiveness of the other sanctions imposed; the sanctioning of compulsory insurance delinquents with civil damages was less effective than first predicted by the French Legislator[121]. The thinking behind substitute liability was that non-insurance and insolvency could be circumvented by passing the responsibility for

damage to someone else, a sort of guarantor. This guarantor would logically have to be an organism or person vested with the capacity and authority to verify that the person subject to the obligation fulfilled it and purchased insurance[122].

The *Conseil d'État* did just this. In its judgment dated December 6th, 1995, the *Conseil d'État* ruled that the Regional Councils of the French Order of Architects were to be held liable for the lack of insurance of any member of the Order, by virtue of the fact that the Order has the legal duty to ensure that its members abide by compulsory insurance legislation pertaining to the practice of their profession[123]. Thus, the Order's insurance becomes a sort of supplementary guarantee for injured third-parties. This ruling applies to any professional order vested by virtue of legislation with the power to verify that its members comply with Compulsory Insurance Law pertaining to their profession[124].

In addition to professional orders, administrative organisms vested with the legal duty to deny access to a certain activity without proof of insurance are burdened with the same substituted liability in cases of damage caused by uninsured permit-holders. The *Conseil d'État* held that the French School and University Athletic Association, a state-run administrative organism, triggered the State's liability by issuing a student license at a public school without prior proof of insurance[125].

Substituted liability could also result from a violation of certain professionals' advisory duty, where that duty includes the task of verifying the existence of insurance. The Notary is a prime example: Before finalizing the sale of immovable property covered by Contractor's Guarantee Insurance, a notary must verify the existence and effectiveness of insurance coverage for that property[126].

### 1.4. The Duty to insure imposed on Insurance Companies, and the *Bureau central de tarification* (B.C.T.)

To say that all insurance companies operating in France must agree to insure any and all risks presented to them would be an overstatement and a falsity. An insurance company's right to refuse a risk that is subject to compulsory insurance cannot be put into question where the company's articles of association do not permit it to insure such risk or where it does not have the government accreditation required to be able to legally insure such risk[127]. Also, an insurer may decide to modify its product line and abandon an insurance market or a specific type of insurance that it no longer deems profitable for the company, or for whatever other reason; in any case, an insurer cannot

be forced to offer a type of insurance to one person when it no longer offers it to the public whatsoever. Once an insurer offers a certain type of insurance, however, it can be forced to do so.

In addition, it is crucial to note that compulsory insurance legislation cannot prevent an insurer from refusing to enter into agreement with an applicant; the initial decision remains the Insurer's prerogative in virtue of the principle of contractual freedom. The following two reasons for denial of coverage have been invoked by insurers[128]:

- The acquisition of the risk would not be consistent with its general policy for business development.
- The risk is exceedingly high; insurers will usually qualify the risk as such where the probability of a claim is vastly superior, statistically speaking, to that of comparable risks and, therefore, the uncertainty is insufficient to the point that insuring it would be unprofitable. To this effect, factors such as a driver's past (multiple accidents[129], criminal antecedents) can be determining for the Insurer.

As opposed to outright refusal to insure, certain insurers may use dissuasive tactics, such as inflated premiums, in order to avoid having to assume unprofitable risk; such behavior constitutes refusal to insure[130]. On the other hand, outright refusal will permit insurers to avoid assuming unprofitable risks without "losing face" in the public eye, which could harm their marketing image for favorable candidates or other insurance products. To this effect, Rochex and Courtieu state the following[131]:

> «Le refus de l'assureur pourra se cacher derrière des tarifications dissuasives, appliqués à ces risques indésirables, éloignant les demandeurs d'assurance... Un tel comportement vaut refus de contracter... Pour mieux défendre son image l'assureur pourra, dans ces hypothèses, invoquant sa politique de souscription, préférer un refus pur et simple d'assurer...»

The end result for the French citizen is a serious difficulty, or in some cases the impossibility, of complying with the Law and purchasing insurance. Evidently, due to the massive number of compulsory insurance stipulations in effect in France, a solution was needed. That solution was the creation of the *Bureau central de tarification* (*B.C.T.*, for short), a tribunal that could ensure access to insurance by forcing companies to insure unprofitable risks.

## 1.5. The *B.C.T.*: A Powerful Tribunal with Coercive Powers

### *a) Competence and jurisdiction*

The *B.C.T.* has jurisdiction concerning all insurance companies operating under French license (i.e. all insurance companies operating in France). Its competence spans a multitude of areas of risk[132]:

– Insurance pertaining to natural catastrophes[133]:

> **«Art. L. 125-6.** ....Le bureau central de tarification fixe des abattements spéciaux dont les montants maxima sont déterminés par arrêté, par catégorie de contrat.
>
> *(Loi no. 2003-699 du 30 juill. 2003, art. 72)* «Lorsqu'un assuré s'est vu refuser par une entreprise d'assurance l'application des dispositions du présent chapitre, il peut saisir le bureau central de tarification, qui impose à l'entreprise d'assurance concernée de le garantir contre les effets des catastrophes naturelles. Lorsque le risque présente une importance ou des caractéristiques particulières, le bureau central de tarification peut demander à l'assuré de lui présenter, dans les mêmes conditions, un ou plusieurs autres assureurs afin de répartir le risque entre eux.»....»

This section states that the *B.C.T.* can award special reductions up to a maximum set by decree for each category of policies. It then goes on to state that, after being refused coverage for natural catastrophes, an insured can seize the *B.C.T.* in order to force that insurer to cover the risk. Finally, where the risk is very high, the *B.C.T.* may ask the Insured to present it with several other insurers who will then be forced to share the risk.

– Compulsory insurance regarding automobiles[134]:

> **«Art. L. 212-1.** *(L. no. 91-716 du 26 juill. 1991)* «Toute personne assujettie à l'obligation d'assurance ayant sollicité la souscription d'un contrat auprès d'une entreprise d'assurance *(L. no. 94-5 du 4 janv. 1994)* «couvrant en France» les risques de responsabilité civile résultant de l'emploi de véhicules terrestres à moteur, se voit opposer un refus, peut saisir un bureau central de tarification dont les conditions de constitution et les règles de fonctionnement sont fixées par le décret en Conseil d'État prévu à l'article L.211-1.» Le bureau central de tarification a pour rôle exclusif de fixer le montant de la prime moyennant laquelle l'entreprise d'assurance intéressée est tenue de garantir le risque qui lui a été proposé. Il peut, dans les condi-

tions fixées par le règlement d'administration publique [*décret en Conseil d'État*] susmentionné, déterminer le montant d'une franchise qui reste à la charge de l'assuré.»

Section L.212-1 *Code des assurances* gives any Automotive Insurance candidate the right to seize the *B.C.T.* in order to comply with its obligation to purchase the said insurance as per section L.211-1. The *B.C.T.* will set the premium; it can, however, impose a deductible as well, within the conditions set by decree of the *Conseil d'État*.

– Compulsory insurance regarding mechanical lifting gear[135]:

«**Art. L. 220-5.** *(L. no. 89-1014 du 31 déc. 1989)* «Toute personne assujettie à l'obligation d'assurance qui n'a pu obtenir la souscription d'un contrat pour les risques mentionnés à l'article L. 220-1 auprès d'au moins trois des entreprises agréées dans la branche correspondante à ces risques peut saisir un bureau central de tarification dont les conditions de constitution et les règles de fonctionnement sont fixées par décret en Conseil d'État.» Le bureau central de tarification a pour rôle exclusif de fixer le montant de la prime moyennant laquelle les entreprises d'assurance auprès desquelles la souscription d'un contrat a été sollicitée, ainsi qu'il est dit à l'alinéa ci-dessus, sont tenues de garantir le risque qui leur a été proposé. Il peut, dans les conditions fixées par règlement d'administration publique, déterminer le montant d'une franchise qui reste à la charge de l'assuré.»

Here, «*l'article L.220-1*» refers to the obligation to procure insurance for any mechanical lifting gear. After three solicitations of insurers licensed to offer Mechanical Lifting Gear Insurance, an applicant may seize the *B.C.T.*, which will set a premium and deductible and force the said insurers to cover the risk.

– Compulsory insurance regarding construction[136]:

«**Art. L. 243-4.** Toute personne assujettie à l'obligation de s'assurer qui, ayant sollicité la souscription d'un contrat auprès d'une entreprise d'assurance dont les statuts n'interdisent pas la prise en charge du risque en cause en raison de sa nature, se voit opposer un refus, peut saisir un bureau central de tarification dont les conditions de constitution et les règles de fonctionnement sont fixées par décret en Conseil d'État. Le bureau central de tarification a pour rôle exclusif de fixer le montant de la prime moyennant laquelle l'entreprise d'assurance intéressée est tenue

de garantir le risque qui lui a été proposé. Il peut déterminer le montant d'une franchise qui reste à la charge de l'assuré.»

Although the powers attributed to the *B.C.T.* in this section are similar in nature to the others, its application has differed slightly. In 2003, a judgment of the *B.C.T.* was overturned by the *Conseil d'État*, which ruled as follows: Where a project under construction for more than 10 years on the date of the *B.C.T.*'s ruling exhibited a quasi-certain risk of triggering the Entrepreneurs' Contractor's Guarantee Insurance, the possibility of coverage should be barred[137]. Similarly, exactly 15 years earlier, the *Conseil d'État* agreed with the *B.C.T.* in refusing to force a company to insure a procedure that will certainly result in damage[138].

– Compulsory insurance for non-salaried persons concerning accidents relating to privacy and labour, and professional illnesses in agriculture-related disciplines[139]:

> «**Art. 1234-10.** *(Loi no. 66-950 du 22 déc. 1966)* Toute personne assujettie à l'obligation d'assurance, qui, ayant sollicité la souscription d'un contrat auprès d'un organisme d'assurance, se voit opposer un refus, peut saisir un bureau central de tarification dont les conditions de constitution et les règles de fonctionnement sont fixées par décret pris sur la proposition du ministre de l'agriculture et du ministre de l'économie et des finances. Le bureau central de tarification est assisté d'un commissaire du Gouvernement....»

– Compulsory insurance relating to medical and paramedical activities[140]:

> «**Art. L. 252-1.** Toute personne assujettie à l'obligation d'assurance prevue à l'article L. 1142-2 du code de la santé publique qui, ayant sollicité la souscription d'un contrat auprès d'une enterprise d'assurance couvrant en France les risques de responsabilité civile mentionnée au même article, se voit opposer deux refus, peut saisir un bureau central de tarification dont les conditions de constitution et les règles de fonctionnement sont fixées par décret en Conseil d'État. Le bureau central de tarification a pour rôle exclusif de fixer le montant de la prime moyennant laquelle l'entreprise d'assurance intéressée est tenue de garantir le risque qui lui a été proposé. Il peut, dans les conditions fixées par décret en Conseil d'État, déterminer le montant d'une franchise qui reste à la charge de l'assuré. Le bureau central de tarification saisit le représentant de l'État dans le département lorsqu'une personne assujettie à l'obligation d'assurance prévue à l'article L. 1142-2 du code de la santé publique présente un

risque d'assurance anormalement élevé. Il en informe le professionnel concerné. Dans ce cas, il fixe le montant de la prime pour un contrat dont la durée ne peut excéder six mois.»

The *B.C.T.*'s primordial mission, largely defined, is to find solutions to individual situations where compulsory insurance (in particular, the ones for which it is competent under law – see enumeration above) cannot be procured for whatever reason. However, the *B.C.T.* will also intervene in situations concerning non-compulsory insurance relating to natural catastrophes. As seen earlier, this type of insurance is voluntary; however, once sold, the Insurer must adhere to a certain coverage imposed by compulsory insurance legislation.

### *b) The Tribunal's Composition*

The composition of the *B.C.T.* is defined at section R. 250-1 of the *Code des* assurances. The tribunal is made up of a president, representatives of insurance companies and representatives of the insured public[141]. The *B.C.T.* is an independent administrative authority, its decisions are subject to the supervision and judicial control of the *Conseil d'État*[142]; it is by no means a jurisdiction in its own right[143].

### *c) Filing a claim with the* B.C.T.*: A three-step Procedure*

1) Solicitation of an appropriate insurer:

Insurance must first have been solicited by registered letter sent to the Insurer's head office, along with a request for notification upon receipt or immediate acknowledgement of receipt[144]. This step is outlined in section L.125-6 *Code des assurances*, among others:

**«L. 125-6.**

[...]

Lorsqu'un assuré s'est vu refuser par une entreprise d'assurance l'application des dispositions du présent chapitre, il peut saisir le bureau central de tarification, qui impose à l'entreprise d'assurance concernée de le garantir...

[...]»

Normally, one solicitation suffices in order for the *B.C.T.* to intervene; however, the minimum number of approaches differs for Natural Catastrophe Insurance (two)[145] as well as for Mechanical Lifting Gear Insurance (three)[146]. In addition, insurers may also use the same procedure (provided at section L.125-6 *Code des assurances*) in order to file a derogation request with the *B.C.T.*: The

Insurer must have notified its proposition to the Insured via a registered letter along with a request for notification upon receipt[147].

2) Refusal of the Insurer(s):

For the purposes of the *B.C.T.*'s procedural requirements, a decision by an insurer not to insure can only be qualified as a "refusal" if it is licensed (as per sections L.321-1 or L.321-7 – L.321-9 *Code des assurances*) to offer the type of insurance that was solicited. When solicitation is for a new contract, refusal is considered implicit after more than 15 days has elapsed since the said solicitation; that period stretches to 45 days for cases concerning Construction Insurance[148]. Also, an insurer's adding non-compulsory coverage to the policy against the will of the Insured, as a condition for accepting, is assimilated to a "refusal". Finally, it is noteworthy that where an insured exercises his or her right to cancel a contract by reason of his or her insurer's canceling another contract by reason of a claim[149] (a right that exists under Quebec Insurance Law as well), that insured cannot file a claim with the *B.C.T.* with respect to the said insurer for a period of one year from the second cancellation.

3) Seizure of the Tribunal:

Under sanction of inadmissibility, the *B.C.T.* must be seized via registered letter with request for notification upon receipt within 15 days of the "refusal" of the last insurer solicited[150]. Where an insurer is requesting the right to derogate from compulsory insurance legislation regarding natural catastrophes, it must seize the *B.C.T.* within 21 days of its notifying a proposition to the Insured[151]. In all cases, both parties must provide the Tribunal with all pertinent information pertaining to the dispute (for example, the premium being charged by the Insurer for the proposed risk)[152].

### *d) The* B.C.T.*'s Decisions and their Enforcement*

The *B.C.T.*'s exclusive mandate is to set the premium and deductible against which the Insurer solicited will be forced to accept the risk that it refused to cover[153]. If the Insurer in question still refuses to cover the said risk for the premium and deductible set by the *B.C.T.*, its license[154] can be revoked, as it would then no longer be acting in conformity with legislation[155]. For example, this sanction is announced at section L.243-6 with regards to compulsory Construction Insurance:

> «**L.243-6.** Toute entreprise d'assurance qui maintient son refus de garantir un risque dont la prime a été fixée par le bureau central de tarification est considérée comme ne fonctionnant

plus conformément à la règlementation en vigueur et encourt le retrait de l'agrément administrative prévu par l'article L. 321-1 du présent code.»

The same statement is repeated for the other compulsory insurance stipulations for which the *B.C.T.* is considered competent, with slight variations.

### *e) Conflicts with Reinsurance Treaties*

In order to justify its refusal to cover a certain risk, an insurer could invoke exclusions contained in a reinsurance treaty to which it is bound by its re-insurer. Anticipating this, the *Code des assurances* states that any clause in a re-insurance treaty that excludes coverage imposed by the *B.C.T.* is null and void[156]. For example, section L.243-5 reads as follows, with regards to compulsory Construction Insurance:

> «**L.243-5.** Est nulle toute clause des traits de réassurance tendant à exclure certains risques dc la garantie de réassurance en raison de la tarification adoptée par le bureau central de tarification.»

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*Distribution of Financial Products and Services Act*, R.S.Q., c. D-9.2.

*Off-Highway Vehicle Act*, R.S.Q., c. V-1.2.

*Prescription Drug Insurance Act*, R.S.Q., c. A-29.01.

*Professional Code*, R.S.Q., c. C-26.

**Regulations:**

*Decree considering the amount of the first annual dues that firms, independent representatives and independent partnerships must pay to the «Bureau des services financiers» for the account of the «Chambre de l'assurance de dommages» and the «Chambre de la sécurité financière»*, c. D-9.2, r.2.

*Regulation respecting the certificate of financial responsibility required under the Automobile Insurance Act*, R.R.Q., c. A-25, r.1.

*Regulation respecting compulsory contribution to the Professional Liability Insurance Fund of the Barreau du Québec*, R.R.Q., c. B-1, r. 12.01.

*Regulation respecting exemptions from the obligation to hold a liability insurance contract*, R.R.Q., c. A-25, r.5.2.

*Regulation respecting subscription to the Professional Liability Insurance Fund of the Chambre des notaires du Québec*, R.R.Q., c. C-26, r. 19.3.

*Règlement sur le cabinet, le représentant autonome et la société autonome*, L.R.Q., c. D-9.2, r. 0 .2.

*Règlement sur la souscription obligatoire au Fonds d'assurance-responsabilité professionnelle du Barreau du Québec*, L.R.Q., c. B-1, r. 12 .01.

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*Règlement sur l'assurance de la responsabilité professionnelle de la Chambre des huissiers de justice du Québec*, L.R.Q., c. C-26, r. 98 .1.01.

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*Règlement sur l'assurance-responsabilité professionnelle des comptables en management accrédités du Québec*, L.R.Q., c. C-26, r. 20 .2.

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## Notes

1. Franck LESAGE, «La place du droit commun des contrats et du droit des assurances dans les assurances obligatoires», Doctoral Thesis (Montpellier I), 2000, p. 4.

2. *Ibid.*

3. G.VINEY, *Traité de droit civil, «les obligations, la responsabilité : conditions»*, (Paris : LGDJ, 1982), pages 18 and following.

4. Franck LESAGE, supra, note 1, p. 4.

5. *Ibid.*

6. *Ibid.*

7. Franck LESAGE, supra, note 1.

8. Franck LESAGE, supra, note 1, p. 6.

9. *Ibid.* The prescription period in the French Civil Law of Contracts is normally 30 years (s. 2262 of the French Civil Code). Insurers commonly stipulated a prescription period of 6 months, considering the regular Civil Law period to be too long.

10. *Ibid.*, p. 6-7.

11. *Ibid.*, p. 7.

12. *Ibid.*

13. *Ibid.*; for example, the shorter two-year prescription period set for insurance contracts by Section L.114-1 of the French *Code des assurances*.

14. *Ibid.*, p. 7; for example, the formal and limitative character necessary of all exclusion clauses (Section L. 113-1(1) *Code des assurances*), as well as their necessary mention in bold font in the policy (Section L. 112-4, last paragraph, *Code des assurances*).

15. Franck LESAGE, supra, note 1, p. 7.

16. See Appendix II: Book II of the French *Code des assurances*, pertaining to compulsory insurance provisions.

17. *Ibid.*, p. 11; the said three strata of rules are exposed in detail infra.

18. *Ibid.*, p. 8.

19. On this topic, see F. EWALD, *L'État providence*, (Paris: Éditions Grasset & Fasquelle, 1986), 608 p.

20. Jean BIGOT, *Traité de droit des assurances*, Tome 3: Le contrat d'assurance, (Paris : Librairie Générale de Droit et de Jurisprudence, E.J.A., 2002), p. 141-142.

21. Franck LESAGE, supra, note 1, p. 8-9.

22 Franck LESAGE, supra, note 1, p.10.

23. G.VINEY, *Traité de droit civil : «Introduction à la responsabilité»*, 2nd ed., (Paris : LGDJ, 1995), p. 30, No. 26; see also : G.VINEY, «Le déclin de la responsabilité individuelle», thesis (Paris : LGDJ, 1965), prologue by A.Tunc.

24. G.VINEY, supra, note 22, p. 30 No. 26.

25. From approximately 15 by the end of the 1950s to over 100 in 2002.

26. Franck LESAGE, supra, note 1, p. 12.

27. *Ibid.*

28. *Ibid.*, p. 13.

29. *Revue de Droit Social*, May 1988, p. 371.

30. Franck LESAGE, supra, note 1, p. 14.

31. *Ibid.*, p. 15.

32. Jean BIGOT, supra, note 19, p. 154.

33. *Ibid.*, p. 155; also, see Franck LESAGE, supra, note 1 on this topic.

34. For example, the Compulsory Guarantee concerning natural catastrophes refers directly to the Property Insurance Law notion of direct material damage.

35. For example, the compulsory insurance for reparation of disorder caused by construction does not extend to immaterial damage; to this effect, see the *Cour de cassation, Première chambre civile* judgment dated February 28th, 1992, *RDI* 1992.231, obs. LEGUAY.

36. Examples: In Automotive Insurance, the prohibition of forfeiture clauses for drunk driving (Section L.211-6 *Code des assurances*) and ineffectivity against third-parties of the proportional reduction sanction; in Contractor's Guarantee Insurance, the ineffectivity against third-parties of the forfeiture sanction for inexcusable non-compliance with professional practice (Section A.243-1 *Code des assurances*), and of deductibles or ceilings..

37. For example, in immovable construction, two separate categories of property are created: buildings and 'civil engineering works', the former being subject to Compulsory Insurance Law and the latter to the Civil Law of Contracts or Insurance Law.

38. Jean BIGOT, supra, note 19, p. 154.

39. *Ibid.*, p. 156.

40. Examples: In Automotive Insurance, the forfeiture clause for drunk driving is nul and void with respect to the compulsory insurance for damage caused to third-parties (Section L.211-6 *Code des assurances*); however, such a clause would remain applicable for damage caused to the insured vehicle (*Cour de cassation, Première chambre civile* judgment dated May 1st, 1999, *Argus*, May 28th, 1999). As well, in Compulsory Contractor's Guarantee Insurance, where immaterial damage is not subject to compulsory insurance, any optional coverage for such damage would not be subject to the expert and period related constraints applicable to compulsory insurance. The same would be true with regards to optional insurance for damage to works prior to their reception (*Cour de cassation, Troisième chambre civile* judgment dated November 10th, 1998, *Resp. et Ass.* 1999, No.20)..

41. Jean BIGOT, supra, note 19, p. 156; However, the *Cour de cassation* has until now refused to do so, instead validating mandatory clauses included in non-compulsory insurance contracts (*Cour de cassation, Troisième chambre civile* judgment dated May 6th, 1998, *Resp. et Ass.*, 1998.364, obs. H. GROUTEL).

42. Jean BIGOT, supra, note 19.

43. *Cour de cassation, Première chambre civile* judgment dated February 13th, 1996, *RGDA*, 1996.380, note A. d'HAUTEVILLE.

44. *Cour de cassation, Première chambre civile* judgment dated April 29th, 1997, *Gaz. Pal.*, Nov. 16th, 1997, note F. LESAGE.

45. *Cour de cassation, Première chambre civile* judgment dated January 28th, 1998, *Trib. Ass.*, May 1998, No. 76, p. 5.

46. *Cour de cassation, Première chambre civile* judgment dated October 14th, 1997, *Argus*, January 16th, 1998.

47. *Cour de cassation, Première chambre civile* judgment dated December 19th, 1990, *JCP* 1991.II.21.656, note BIGOT.

48. *Conseil d'État* decision dated December 29th, 2000, Beule, *RGDA*, 2001.33.

49. See section L. 124-1 *Code des assurances* regarding coverage in Liability Insurance.

50. *Cour de cassation, Première chambre civile* judgment dated June 10th, 1997, *Gaz. Pal.*, Nov. 28th, 1997, note ROCHEX.

51. *Cour de cassation, Première chambre civile* judgment dated February 25th, 1992, *RDI* 1992.231, obs. LEGUAY. Generally, evidence rules derived from Civil Law are applied in Insurance Law cases; to this effect, see the *Cour de cassation, Première chambre civile* judgment dated May 22nd, 1991, *RGAT*, 1991.305.

52. *Cour de cassation, Première chambre civile* judgment dated March 30th, 1994, *D.* 1995.279, note RAFFY.

53. To this effect, see section L. 241-1 *Code des assurances*, referring to sections 1792 and following of the French Civil Code.

54. Jean BIGOT, supra, note 19, p. 157.

55. See infra, p. 28.

56. *Cour de cassation, Première chambre civile* judgment dated May 17th, 1982, *Gaz. Pal.*, Nov. 25th, 1982, note ROUSSEL.

57. Jean BIGOT, supra, note 19, p. 147.

58. *Ibid.*

59. *Ibid.*; for example: Compulsory offer of indemnification and special periods for inquiry and claims resolution.

60. *Ibid.*, p. 158; see section R.11-7 *Code des assurances* for Automotive Insurance, section L.222-13C *Code rural* for Hunting Insurance, and section 2 of the mandatory

clauses annexed to section A.220-3 *Code des assurances* for Mechanical Lifting Gear Insurance.

61. *Ibid.*; with respect to compulsory insurance concerning non-corporal damage, see section R.211-7 *Code des assurances* for Automotive Insurance (3 million Francs per vehicle per material accident), section 205 of Decree dated November 27th, 1991, for Lawyer's Liability Insurance (2 million Francs per insured per year), etc.

62. *Ibid.*, p. 159; as per section 8 of the May 28th, 1956 Decree, each notary must be covered for at least twice the average of firm's gross annual income.

63. See section L.241-1 *Code des assurances*.

64. Jean BIGOT, supra, note 19, p. 158; see the Decree dated June 15th, 1994, for Travel Agents' Insurance, as well as the Decree dated March 18th, 1993, for Sporting Event Insurance.

65. To this effect, see the *Cour de cassation, Première chambre civile* judgments dated May 25th, 1992, *RGAT*, 1992.566, and February 17th, 1998, *RGDA*, 1998.317; also, see André-Favre ROCHEX and G. COURTIEU, *Le droit des assurances obligatoires*, (Paris : Librairie Générale de Droit et de Jurisprudence, E.J.A., 2000), par. 1-27.

66. Jean BIGOT, supra, note 19, p. 159.

67. GROUTEL, «Droit commun de l'assurance et régimes spécifiques d'assurance obligatoires», *Resp. et Ass.*, 1995, Chron. 6.

68. *Cour de cassation, Première chambre civile* judgments dated May 25th, 1992, *RGAT* 1992.566, and April 27th, 1994, *RGAT* 1994.918, note PERINET-MARQUET.

69. André-Favre ROCHEX and G. COURTIEU, supra, note 64, par. 1-29.

70. For example, a maximum deductible amount is set at 10% for Property Administrators, Statutory Auditors and Lawyers; 20% for Insurance Brokers.

71. Jean BIGOT, supra, note 19, p. 160.

72. *Cour de cassation, Première chambre civile* judgment dated February 25th, 1992, *RGAT*, 1992.324.

73. Jean BIGOT, supra, note 19, p. 160.

74. This is generally the case for all compulsory insurance stipulations (For Automotive Insurance, see section L.212-1 *Code des assurances*; for Mechanical Lifting Gear Insurance, see section L.220-5 *Code des assurances*; for Contractor's Guarantee Insurance, see section L.243-4 *Code des assurances*.). However, the deductible is always recuperated by the Insurer from the Insured. Where the Law does not stipulate ineffectivity of the deductible against injured third-parties, it is to be considered effective [illegible] them by virtue of Civil Law.

75. Section L.112-6 *Code des assurances*.

76. To this effect, see *Cour de cassation, Première chambre civile* judgment dated June 15th, 1931, *RGAT*, 1931.801, note PICARD.

77. Section R.211-13 *Code des assurances*.

78. Sections R.211-10 and R.211-11 *Code des assurances*.

79. *TGI Pontoise* judgment dated March 2nd, 1979, *RGAT*, 1970.51.

80. For Sporting Event Insurance, see section 4 of the Decree dated March 18th, 1993; regarding Mechanical Lifting Gear Insurance, see section A.220-3 *Code des assurances*, section 5 of the mandatory clause.

81. Decree dated January 23rd, 1991.

82. Sections R.2043 - R.2047 *Code de la santé publique*.

83. See Mandatory Clauses Regarding Civil Liability, Section 243-1, Annexe I.

84. *Conseil d'État* Directive dated December 29th, 2000, Beule.

85. Jean BIGOT, supra, note 19, p. 162.

86. *Cour de cassation, Première chambre civile* judgment dated December 16th, 1997, *RGDA*, 1998.130, note MAYAUX.

87. Decree dated May 28th, 1956.

88. Jean BIGOT, supra, note 19, p. 143.

89. For example, the following three are Compulsory Guarantees in France: The *Garantie des catastrophes naturelles* (imposes coverage for damage caused by natural catastrophes), the *Garantie tempête* (imposes coverage for damage due to storms) and the *Garantie des actes de terrorisme* (imposes coverage for damage due to acts of terrorism).

90. *Conseil d'État* Directive dated February 24th, 1994, *RGAT*, 1994.487.

91. Often referred to in France as l'*autonomie de la volonté des contractants* (the autonomous will of the parties to an agreement) or *la liberté contractuelle* (contractual freedom).

92. Jean BIGOT, supra, note 19, p. 149; note: Such conditions can only be set if warranted by the nature of the activity or profession and are subject to judicial control regarding abuse of power.

93. *Ibid.*; note: The Government must repeal or modify an act if asked to do so in the context of a dispute arising from a compulsory insurance stipulation, where the constitutional invalidity of such a stipulation is raised and upheld by the Court.

94. *Ibid.*, p. 150; For example, it would be illegal for a Sporting Federation to impose its choice of insurer and its desired content of the policy upon its member groups (*Conseil d'État* Directive dated July 2nd, 1999, *Resp. et Ass.*, 1999.377). However, a Regulated Professional Order could do so (for example, compulsory membership in a collective professional insurance fund) if the Act or Regulation is silent on the matter (*Cour de cassation, 1ière chambre civile* judgment dated February 23rd, 1999, *Lamy Line*).

95. *Ibid.*

96. Section L.111-4 of the *Code des assurances* allows an administrative organism to impose the use of mandatory clauses; the *Ministère de l'Économie et des Finances*, the Ministry responsible for insurance issues in France, imposes the use of such clauses by virtue of this section.

97. *Conseil d'État* Directive dated November 30th, 1979, *RGAT*, 1979.485, note BESSON. For example, the *Conseil d'État* applied this rule, in its Directive dated December 29th, 2000, *RGDA*, 2001.97, concerning the validity of regulations pertaining to compulsory insurance for blood transfusion clinics.

98. Jean BIGOT, supra, note 19, p. 151.

99. Refusal to enter into contract; resolution or cancellation (where the contract is of successive performance); damages; compulsory execution; specific performance (in certain cases).

100. Jean BIGOT, supra, note 19, p. 165.

101. André-Favre ROCHEX and G. COURTIEU, supra, note 64, par. 1-59 and 1-60.

102. *Conseil d'État* Directive dated February 16th, 1977, *D.* 1977, 633.

103. André-Favre ROCHEX and G. COURTIEU, supra, note 64, par. 1-61.

104. *Cour de cassation, Troisième chambre civile* judgment dated June 5th, 1973, *D.* 1973, *Inf. rap.* 203.

105. *Cour de cassation, chambre criminelle* judgment dated February 4th, 1998, *Resp. Civ. et assur.* 1998.257.

106. *Ibid.*

107. André-Favre ROCHEX and G. COURTIEU, par. 1-62.

108. *Ibid.*

109. *Ibid.*, par. 1-58.

110. Sections 24 and following of the Decree dated February 25th, 1982.

111. Section 2(7) of the Decree dated March 5th, 1991.

112. Act 99-5 dated January 6th, 1999.

113. André-Favre ROCHEX and G. COURTIEU, supra, note 64, par. 1-57.

114. *Ibid.*, par. 1-65 and following.

115. *Ibid.*, par. 1-65.

116. Sections L.126-1, L.126-2, L.422-1 – L.422-5 *Code des assurances* .

117. Sections 706-3 and following of the French Penal Code of Procedure.

118. Act 91-1406 dated December 31st, 1991; Decree 92-183 dated February 26th, 1992.

119. André-Favre ROCHEX and G. COURTIEU, supra, note 64, par. 1-80; For example, Accountants are covered by a safeguard insurance policy purchased by the High Council of their order (see André-Favre ROCHEX and G. COURTIEU, supra, note 64, par. 4-118).

120. *Ibid.*; for example, Lawyers' and Notaries' professional orders.

121. *Ibid.*, par. 1-81.

122. *Ibid.*

123. *Ibid.*

124. *Ibid.*

125. In its judgment dated February 16th, 1977, *D.* 1977.633, note J.Y. PLOUVIN.

126. See Title I, Chapter I *Code des assurances.*

127. André-Favre ROCHEX and G. COURTIEU, supra, note 64, par. 1-84 and 1-85.

128. *Ibid.*, par. 1-86.

129. See sections A.335-9-1 and A.335-9-2 *Code des assurances.*

130. André-Favre ROCHEX and G. COURTIEU, supra, note 64, par. 1-87.

131. *Ibid.*

132. *Ibid.*, par. 1-88; Jean BIGOT, supra, note 19, p. 166.

133. Section L.125-6 *Code des assurances.*

134. Section L.212-1 *Code des assurances.*

135. Section L.220-5 *Code des assurances.*

136. Section L.243-4 *Code des assurances.*

137. *Conseil d'État* judgment dated January 29th, 2003, *RGAT*, 2003.264.

138. *Conseil d'État* judgment dated January 29th, 1988, *RGAT*, 1988.833 obs. MOREAU.

139. Section 1234-10 *Code rural.*

140. Section L.252-1 *Code des assurances*; Act 2002-303 dated March 4th, 2002.

141. André-Favre ROCHEX and G. COURTIEU, supra, note 64, par. 1-89; section R. 250-1 of the *Code des assurances.*

142. *Conseil d'État* Directive dated November 7th, 1984, *RGAT* 1985.257.

143. Jean BIGOT, supra, note 19, p. 166.

144. Section R.250-2 *Code des assurances.*

145. Section L.125-6(6) *Code des assurances.*

146. Section L.220-5 *Code des assurances.*

147. Section R.250-3(1) *Code des assurances.*

148. Section R.250-2(3) *Code des assurances.*

149. Section R.113-10 *Code des assurances.*

150. Section 250-2(2) *Code des assurances.*

151. Section R.250-3(4) *Code des assurances.*

152. Section R.250-4 *Code des assurances.*

153. Sections L.212-1, L.220-5, L.243-4 *Code des assurances* and section L.1234-10 *Code rural.*

154. Regarding licensing, see sections L.321-1 or L.321-7 – L.321-9 *Code des assurances.*

155. Sections L.125-6(7), L.212-3, L.220-5(3), L.243-6 *Code des assurances* and section L.1234-10 *Code rural.*

156. To this effect, see sections L.125-6(8), L.212-2, L.243-5 and L.220-5(4) *Code des assurances.*