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(Translated from French)

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THE REPUBLIC OF FRANCE
IN THE NAME OF THE PEOPLE OF FRANCE

COURT OF APPEALS OF PARIS
International Commercial Chamber

Section 5 - Chamber 16
RULING OF OCTOBER 26, 2021

(No. , 19 pages)

Docket number: **19/22422 - Portalis No. 35L7-V-B7D-CBEBA**

Decision on appeal before the court: Judgment handed down on October 8, 2019 by the Commercial Court of Bobigny - Docket No. 2016Fo1148.

APPELLANT:

SAS Global Forwarding France

Having its registered office at 45 rue des Trois Soeurs Bâtiment le Renan 93420 Villepinte, France, represented by its legal representatives

Represented by _____, Esq., Attorney-at-Law from the law firm _____, admitted to the Paris Bar Association (Bar Membership # _____) and represented by trial attorney _____, Esq., Attorney-at-Law from the law firm _____, admitted to the Paris Bar Association.

APPELLEES:

SAS Bolloré Africa Logistics, formerly SDV

A corporation registered with the Commercial and Companies Registry of Nanterre under the number 519 127 559, having its registered office at 31-32 quai de Dion Bouton, 92806 Puteaux Cedex, France, and also having its main place of business at Zone Portuaire d'owendo BP 77, Libreville, Gabon, represented by its legal representatives

Represented by _____, Esq., Attorney-at-Law admitted to the Paris Bar Association (Bar Membership # _____) and by represented by trial attorneys _____, Esq., and _____, Esq., Attorneys-at-Law from the law firm _____, admitted to the Paris Bar Association.

SAS CMA CGM

Having its registered office at 4, quai d'Arenc 13002 Marseille, France, represented by its legal representatives

Represented by _____, Esq., Attorney-at-Law admitted to the Paris Bar Association (Bar Membership # _____) and represented by trial attorneys _____, Esq., and _____, Esq., Attorneys-at-Law from the law firm _____, admitted to the Paris Bar Association.

SAS Société Générale de Manutention Portuaire "GMP"

A corporation registered with the Commercial and Companies Registry of Le Havre under the number 306 215 526, having its registered office at avenue du Seizième Port, 76600 Le Havre, France, represented by its legal representatives

Represented by trial attorney _____, Esq., Attorney-at-Law from the law firm _____, admitted to the Paris Bar Association (Bar Membership # _____) and represented by trial attorney _____, Esq., Attorney-at-Law from the law firm _____, admitted to the Paris Bar Association.



SA Nexter Systems

Having its registered office at 34, boulevard de Valmy 42300 Roanne, France, represented by its legal representatives, receiving service in such capacity at their registered office

Represented by _____, Esq., Attorney-at-Law admitted to the Paris Bar Association
(Bar Membership # _____) and represented by trial attorney _____, Esq., Attorney-at-Law admitted to the Paris Bar Association (Bar Membership # _____).

SA Axa Corporate Solutions Assurance

Having its registered office at 61, rue Mstislav Rostropovitch 75832 Paris Cedex 17, France, represented by its legal representatives, receiving service in such capacity at their registered office

Represented by _____, Esq., Attorney-at-Law admitted to the Paris Bar Association
(Bar Membership # _____) and represented by trial attorney _____, Esq., Attorney-at-Law admitted to the Paris Bar Association (Bar Membership # _____).

Allianz Global Corporate & Speciality SE

Having its registered office at 1, Cours Michelet CS 30051 92076 Puteaux-La Défense, France, represented by its legal representatives, receiving service in such capacity at their registered office

Represented by _____, Esq., Attorney-at-Law admitted to the Paris Bar Association
(Bar Membership # _____) and represented by trial attorney _____, Esq., Attorney-at-Law admitted to the Paris Bar Association (Bar Membership # _____).

SA MMA Iard

Having its registered office at 14 boulevard Marie et Alexandre Oyon, 72033 Le Mans, France, represented by its legal representatives, receiving service in such capacity at their registered office

Represented by _____, Esq., Attorney-at-Law admitted to the Paris Bar Association
(Bar Membership # _____) and represented by trial attorney _____, Esq., Attorney-at-Law admitted to the Paris Bar Association (Bar Membership # _____).

SA Generali Iard

Having its registered office at 2, rue Pillet Will, 75009 Paris, France, represented by its legal representatives, receiving service in such capacity at their registered office

Represented by _____, Esq., Attorney-at-Law admitted to the Paris Bar Association
(Bar Membership # _____) and represented by trial attorney _____, Esq., Attorney-at-Law admitted to the Paris Bar Association (Bar Membership # _____).

SA Compagnie Nataise d'Assurances Maritimes et Terrestres

Having its registered office at 46, bis rue des Hauts Pavés, 44000 Nantes, France, represented by its legal representatives, receiving service in such capacity at their registered office

Represented by _____, Esq., Attorney-at-Law admitted to the Paris Bar Association
(Bar Membership # _____) and represented by trial attorney _____, Esq., Attorney-at-Law admitted to the Paris Bar Association (Bar Membership # _____).

Swiss RE International SE

Having its registered office at 2-4 rue Pillet-Will, 75009 Paris, France, represented by its legal representatives, receiving service in such capacity at their registered office

Represented by _____, Esq., Attorney-at-Law admitted to the Paris Bar Association
(Bar Membership # _____) and represented by trial attorney _____, Esq., Attorney-at-Law admitted to the Paris Bar Association (Bar Membership # _____).

MEMBERS OF THE BENCH:

Pursuant to the provisions of articles 804 and 805 of France's Civil Procedure Rules, the case was tried on June 8, 2021 at a hearing open to the public with two justices presenting a report to the Court, the lawyers not being opposed thereto, before the Honorable François Ancel, Presiding Justice, charged with the report and the Honorable Laure Aldebert, Associate Justice.

The following justices reported on the trial hearing during the deliberations of the Court:

The Honorable François Ancel, Presiding Justice
The Honorable Fabienne Schaller, Associate Justice
The Honorable Laure Aldebert, Associate Justice

Clerk: at the appellate hearing: Inès Vilbois.



RULING:

The ruling was handed down by after due process of law and made available at the Administrative Office of the Court, the parties having previously been notified as required by virtue of the second paragraph of article 450 of France's Civil Procedure Rules. The official copy of the ruling was signed by the Honorable François Ancel, Presiding Justice and Najma El Farissi, the clerk to whom the official copy of the ruling was given by the justice who signed it.

I. STATEMENT OF FACTS AND PROCEEDINGS:

1. In May 2015, the French corporation Nexter Systems (hereinafter "Nexter") used the services of DHL Global Forwarding France (hereinafter "DHL") as the primary commission agent for carriage, to ship a Titus armored vehicle departing from Libreville in Gabon bound for Le Havre port in France.
2. DHL used the services of Bolloré Africa Logistics, formerly SDV (hereinafter "Bolloré"), for carriage of the vehicle by road from the l'Amitié stadium in Libreville to the port of export in said city and it used the Services of CMA CGM (hereinafter "CMA CGM") for maritime transport from the Libreville port to the Le Havre port.
3. CMA CGM itself used the services of Générale de Manutention Portuaire (hereinafter "GMP") to unload the vehicle at the Le Havre port.
4. On July 15, 2015, on receipt at the Le Havre port damage was noticed on the turret of the Titus vehicle.
5. An appraisal conducted at the behest of Nexter estimated that it would cost EUR 390,553 to repair the turret.
6. The vehicle was insured by Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality SE, MMA Iard, Generali Iard, Compagnie Nataise d'Assurances Maritimes et Terrestres and Swiss RE International SE (hereinafter the "insurers").
7. Against this backdrop, on July 12, 2016 Nexter and the insurers filed a lawsuit against DHL in the Commercial Court of Bobigny to get it to pay EUR 390,553, plus interest at the statutory interest rate, as reparation for the damage allegedly sustained by the Titus armored vehicle.
8. On July 26, 27 and 29, 2016, DHL brought third-party actions against Bolloré and CMA CGM to have them ordered jointly and severally to relieve and guarantee it from all awards that may be entered against it and to pay it a EUR 5,000 indemnity by virtue of Section 700 of France's Civil Procedure Rules.
9. On October 12, 2016, CMA CGM brought a third-party action against GMP, which unloaded the container containing the Titus vehicle at the Le Havre port so that it relieves and guarantees it from all awards that may be entered against it.
10. In a judgment handed down on October 8, 2019, the Commercial Court of Bobigny found the actions of Axa CS and the other insurers to be admissible, ordered DHL to pay them €105,000 and dismissed its guarantee claims against its subcontractors CMA CGM and Bolloré on the following terms:

"- Finds that the claim of Axa Corporate Solutions Assurance and the other insurers to reply upon the subrogation to the rights of Nexter Systems is admissible and that they do have standing and dismissed all the claims of the defendants on this account;



- Finds that Nexter does not have standing in this case;
- Orders DHL Global Forwarding (France) SAS to pay Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality SE, MMA Iard, Generali Iard, Compagnie Nataise d'Assurances Maritimes et Terrestres and Swiss RE International SE €105,000 plus interest at the statutory interest rate capitalized pursuant to the provisions of Section 1154 of France's Civil Code;
- Dismisses the relief and guarantee claims of DHL GF;
- Dismisses the claim under Section 700;
- Orders the immediate enforcement with no requirement to pay a bond;
- Orders DHL Global Forwarding (France) SAS to pay costs."

11. On December 4, 2019, DHL filed an appeal against this judgment.

II. CLAIMS OF THE PARTIES

12. In its latest legal brief filed electronically on October 13, 2020, DHL asked the court to provide the following relief:

- 1) Accept its appellate brief and find it admissible;
- 2) Reverse the judgment handed down by the Commercial Court of Bobigny in all its provisions, and in particular in that it:
 - Held that Axa Corporate Solutions Assurance and five others had standing when proof of the harm they suffered was not provided;
 - Found that DHL GL committed a personal fault when it was not proven or was a causal link with the damage;
 - Ordered DHL Global Forwarding (France) SAS to pay Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality SE, MMA Iard, Generali Iard, Compagnie Nataise d'Assurances Maritimes et Terrestres and Swiss RE International SE €105,000 plus interest at the statutory interest rate capitalized pursuant to the provisions of Section 1154 of France's Civil Code;
 - Dismissed the relief and guarantee claims of DHL Global Forwarding France to pay costs;
 - Dismissed the claim of DHL Global Forwarding France to pay costs under Section 700;
 - Ordered the immediate enforcement with no requirement to pay a bond;
 - Ordered DHL Global Forwarding France to pay costs.

Ruling anew:

3) Find that the main action brought by Nexter and Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality SE, MMA Iard, Generali Iard, Compagnie Nataise d'Assurances Maritimes et Terrestres and Swiss RE International SE because they do not have standing and proof of their harm was not provided;

As an alternative, in the event that the action of the plaintiffs is found admissible;

4) Find and rule that it did not commit any personal fault;

As an alternative, assuming that it is found to have committed a personal fault and its personal fault has a causal link to the damage;



5) Rind and rule that its liability should be limited to €105,000 (21 T × €5,000) as per subsection 13.2.1 of the commission contract for the carriage of goods;

6) Rind and rule that its liability may not exceed the exchange value of 42,000 SDRs as per the 1924 Brussels Convention, as amended; and, As an alternative, the sum of CFAF 105,000,000 as per the provisions of article 18 of the OHADA Uniform Act on Contracts for the Carriage of Goods by Road;

In any case:

7) Order CMA CGM, a maritime shipping company, and SDV-Bolloré Africa Logistics, a land carriage shipping company, with joint and several liability or one of them if the other defaults, to relieve and guarantee it from all awards that may be entered against it;

8) Order CMA CGM and SDV-Bolloré Africa Logistics, or any losing party, to pay it EUR 7,500 by virtue of Section 700 of France's Civil Procedure Rules.

13. In its latest legal brief filed electronically on April 27, 2021, CMA CGM, a maritime shipping company, asked the court to provide the following relief:

Principally:

- Affirm the judgment handed down on October 8, 2019 by the Commercial Court of Bobigny (Docket No. 2016Fo1148), for its own reasons or by adopting the reasons of the lower court judges, in that it dismissed the third-party action of DHL Global Forwarding France against CMA CGM;

Consequently:

- Dismiss all of the defenses, pleas and submissions of DHL Global Forwarding France against CMA CGM;

As an alternative:

- Limit any award against CMA CGM to the sum, in principal, of 42,000 Special Drawing Rights;

Consequently,

- Dismiss all of the defenses, pleas and submissions of DHL Global Forwarding France against it.

In any case:

- Order Générale de Manutention Portuaire, in the event that any award is, contrary to all probability, handed down against CMA CGM relating to the alleged damage, to guarantee it for the totality of such award;

- Order DHL Global Forwarding France and/or Générale de Manutention Portuaire to each pay it €10,000 by virtue of Section 700 of France's Civil Procedure Rules and all costs.

14. In its latest legal brief filed electronically on May 18, 2021, GMP-Générale de Manutention Portuaire-asked the court to provide the following relief:

- Affirm the judgment handed down on October 8, 2019 by the Commercial Court of Bobigny in that it dismissed the third-party action against Générale de Manutention Portuaire;

- Dismiss the appeal of DHL Global Forwarding France as being meritless.



- Order DHL Global Forwarding France to pay it €7,500 by virtue of Section 700 of France's Civil Procedure Rules;

- Order DHL Global Forwarding France to pay all lower court and appellate court costs;

As an alternative, in the event that the Court finds CMA CGM liable;

- Find that it has not been shown that the damage is attributable to Générale de Manutention Portuaire and it is therefore not liable;

Consequently, dismiss the third-party action of CMA CGM against Générale de Manutention Portuaire as being meritless;

- Order CMA CGM to pay Générale de Manutention Portuaire €7,500 by virtue of Section 700 of France's Civil Procedure Rules;

- Order CMA CGM to pay all lower court and appellate court costs;

As a further alternative, in the event that, contrary to all probability, Générale de Manutention Portuaire is found to be liable:

- Find that any award handed down against Générale de Manutention Portuaire be limited to 666.67 SDRs.

15. In its latest legal brief filed electronically on March 17, 2021, Bolloré Africa Logistics (formerly SDV) asked the court to provide the following relief:

Principally:

- Reverse the judgment handed down by the Commercial Court of Bobigny on October 8, 2019;

- Find that the action of Nexter Systems, XL Insurance Company successor-in-interest to Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality SE, MMA Iard, Generali Iard, Compagnie Nataise d'Assurances Maritimes et Terrestres and Swiss RE International SE is inadmissible because they do not have standing;

- Dismiss all of the claims, pleas and submissions of Nexter Systems, XL Insurance Company successor-in-interest to Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality SE, MMA Iard, Generali Iard, Compagnie Nataise d'Assurances Maritimes et Terrestres and Swiss RE International SE;

- Find that the third-party action of DHL Global Forwarding France against SDV-Bolloré Africa Logistics has no purpose.

As an alternative:

- Find that SDV-Bolloré Africa Logistics is not liable for the damage to the Titus vehicle.

- Dismiss all of the claims, pleas and submissions of DHL Global Forwarding France against SDV-Bolloré Africa Logistics.

As an even further alternative, if, in an extraordinary turn of events, SDV-Bolloré Africa Logistics were to be found liable:

- Limit its liability to the exchange value in Euros of the sum of CFAF 105,000,000.

In any case:

- Order Nexter Systems, XL Insurance Company successor-in-interest to Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality SE, MMA Iard, Generali Iard, Compagnie Nataise d'Assurances Maritimes et Terrestres and Swiss RE International SE



and/or DHL Global Forwarding France and/or CMA CGM, each, to pay SDV-Bolloré Africa Logistics the sum of €20,000 by virtue of Section 700 of France's Civil Procedure Rules and all costs to be paid to SCP by virtue of Section 699 of France's Civil Procedure Rules.

16. In its latest legal brief number 3 filed electronically on February 16, 2021, Nexter and its insurers asked the court to provide the following relief:

- Accept the appellate brief of XL Insurance Company successor-in-interest to Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality SE, MMA Iard, Generali Iard, Compagnie Nataise d'Assurances Maritimes et Terrestres and Swiss RE International SE and find it admissible;

- Reverse the judgment handed down by the Commercial Court of Bobigny in all its provisions, and in particular in that it:

"- Ordered DHL Global Forwarding (France) SAS to pay Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality SE, MMA Iard, Generali Iard, Compagnie Nataise d'Assurances Maritimes et Terrestres and Swiss RE International SE €105,000 plus interest at the statutory interest rate capitalized pursuant to the provisions of Section 1154 of France's Civil Code."

And, ruling anew:

- Order DHL Global Forwarding (France) SAS to pay XL Insurance Company successor-in-interest to Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality SE, MMA Iard, Generali Iard, Compagnie Nataise d'Assurances Maritimes et Terrestres and Swiss RE International SE the sum of €305,876.18 plus interest at the statutory interest rate capitalized pursuant to the provisions of Section 1154 of France's Civil Code.

As an alternative, in the event that DHL is afforded the benefit of the limitations of liability

- Order DHL Global Forwarding (France) SAS to pay XL Insurance Company successor-in-interest to Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality SE, MMA Iard, Generali Iard, Compagnie Nataise d'Assurances Maritimes et Terrestres and Swiss RE International SE the exchange value in Euros of the sum of CFAF 105,000,000 on the day of the judgment, plus interest at the statutory interest rate capitalized pursuant to the provisions of Section 1154 of France's Civil Code.

As a further alternative, in the event that GMP were found to be liable:

- Limit any award against Générale de Manutention Portuaire to the exchange value in euros of 42,000 Special Drawing Rights.

In any case:

- Affirm the judgment handed down on October 8, 2019 by the Commercial Court of Bobigny in that it: *"Finds that the claim of Axa Corporate Solutions Assurance and the other insurers to reply upon the subrogation to the rights of Nexter Systems is admissible and that they do have standing and dismissed all the claims of the defendants on this account."*



- Order DHL Global Forwarding (France) SAS to each pay it €10,000 by virtue of Section 700 of France's Civil Procedure Rules;

- Dismiss the claim of Bolloré Africa Logistics under Section 700 of France's Civil Procedure Rules against Nexter;

- Ordered DHL Global Forwarding (France) SAS to pay costs.

17. The parties accepted the protocol that applies at the International Commercial Chamber.

18. The pretrial phase ended on 8 June 2021.

III. DEFENSES OF THE PARTIES

19. DHL acknowledges its role as commission agent for carriage.

20. In support of its appeal, it no longer contests the standing of the insurance companies as subrogees to the rights of Nexter but maintains that the main action brought is inadmissible due to a lack of standing and their failure to prove any harm.

21. On the merits, in substance it alleges that the lower court judges found it to be liable and seeks to be relieved and guaranteed jointly and severally by the maritime shipping company CMA CGM and, in the alternative, by the ground shipping services company Bolloré within the limits of the coverage provided.

22. It is thus seeking respectively, depending on whether they maritime or land shipping company is found liable, that any award be necessarily limited to the exchange value of 42,000 SDRs pursuant to the limitations set forth in the 1924 Brussels Convention, as amended, or limited to the sum of CFAF 105,000,000 as per the provisions of article 18 of the OHADA Uniform Act on Contracts for the Carriage of Goods by Road, March 22, 2003.

23. With respect to the examination of the liabilities, it maintains primarily that by the effect of the chain of presumptions, since the maritime shipping company CMA CGM took charge of the armored vehicle with no reservations at the port where it was load in Gabon and the damage found upon its arrival at the Le Havre port, the damage necessarily occurred when the vehicle was in the custody maritime shipper which must be found liable.

24. CMA GCM, in charge of the maritime shipping, is seeking an affirmation of the lower court judgment.

25. It maintains for its part that DHL has failed to provide proof that the damage occurred when the vehicle was in its custody and claims, on the contrary, that it was during the haulage phase that it was damaged.

26. To this end, it claims that the presumption of compliant delivery is not applicable to it give a said to contain clause on the bill of landing and circumstances that would make it difficult for ground personnel to perform a visual inspection of the roof of the armored vehicle.

27. It adds that in any case the presumption of compliant delivery gives way to all the evidence gathered, in particular in the reports of the appraisers issued onsite in Le Havre on the basis of which an inference emerges that the damage was necessarily caused during the ground segment in Gabon.



28. Lastly, it contends that the maximum indemnity that could be awarded is the exchange value of 42,000 SDRs and, on the basis of Section L 5422-19 of France's Transportation Code, brought a third-party action against GMP, which unloaded the vehicle, on grounds that the damage could only have occurred during the unloading process.
29. **GMP**, which was involved in the unloading, is seeking principally the affirmation of the judgment.
30. In support of the same arguments as those made by CMA GCM, in particular relying on its appraisal, it claims that the maritime shipper is not liable and that the damage could only have occurred during the carriage of the vehicle by road in Gabon.
31. Failing that, it contests that third-party action brought by CMA GC, claiming that the legal requirements of its liability are not met to the extent that the damage could not have happened at the Le Havre port.
32. Lastly, it invokes a limitation of liability of 666.67 SDRs.
33. Bolloré Africa Logistics, the carrier by road, maintains for its part that failing proof concerning the payment of an indemnification by the insurance companies to their policyholder, the conditions of the statutory subrogation and of the contractual subrogation are not met so the action of Nexter and its insurers is inadmissible.
34. It adds that since no harm was shown, their action is inadmissible pursuant to Section 31 of France's Civil Procedure Rules.
35. In the alternative, on the merits, Bolloré is seeking to have the judgment, which did not find it liable, affirmed.
36. In this regard, it maintains in short that the plaintiffs (Nexter and its insurers) on whom the burden of proof falls, have failed to show that the vehicle was damaged during the haulage phase that took place between the l'Amitié stadium and the Owendo port that was only 34 kilometers and the damage cannot be attributed to it.
37. It claims that since CMA CGM took charge of the vehicle with no reservations on May 23, 2015, a presumption of compliant delivery should apply on the terms of Section L133-3 of France's Business Code and article 1483 of the OHADA Uniform Act on Contracts for the Carriage of Goods by Road and no evidence has been put forward to reverse that presumption.
38. To this end, it notes that:
- it took care to arrange for carriage so as to avoid interchanges along the way and it carried the vehicle up to the port with no incidents;
 - it was not invited to take part in the private appraisal that took place at the Le Havre port to which it was not a party and that are not binding and enforceable on it, in particular the report produced by Nexter by a private appraiser hired unilaterally;
 - it was rather during the various stages of the unloading process handled by the maritime shipping company, in particular the loading and unloading on the ship, that the cause of the damage needs to be looked for. And this all the more so because during the maritime shipping the Titus vehicle was transhipped to Tangiers in Morocco, which implies additional loading and unloading operations;
 - it is unfortunately common for containers to be struck at the terminal by cargo-handling gear or by other containers and often violently;



- if the damage had occurred during the carriage by road, it would have been reported and been the subject of reservations upon delivery at the port in Libreville since, according to CMA CGM's appraiser during the examination of the container in Le Havre, to vehicle's protective tarpaulin cover was torn and the cannon stuck out.

39. Lastly, it further claims that if it were to be found liable, its liability could not exceed the sum of: $(21,000 \times 5,000) = \text{CFAF } 105,000,000$ as per article 18 of the OHADA Uniform Act on Contracts for the Carriage of Goods by Road and it disputes that there was any inexcusable fault liable to thwart the limitations of liability, concluding that the cause of the damage is unknown and that, in any case, striking a bridge is not sufficient in and of itself to qualify as inexcusable fault.

40. **In response, the insurers** maintain that their standing is sufficiently demonstrated by the fact that they indemnified Nexter, paying it EUR 305,876.18, and they are subrogated to their rights of their policyholder and, consequently, their claim that DHL be ordered to pay them said amount is admissible and well-founded.

41. They are seeking with **Nexter** the affirmation of the decision of the lower court judges who found DHL liable but they are seeking a reversal with respect to the quantum of damages awarded.

42. In this regard, they maintain that DHL is automatically liable in its role as commission agent for carriage by the mere fact of the occurrence of damage by virtue of the standard-form commission contract for the carriage of goods and Section L 132-4 of France's Business Code.

43. They maintain that it is liable and for the actions of its subcontractors, *i.e.*, the ground carrier Balloré.

44. With respect to the circumstances of the damage, they maintain for the reasons mentioned by the maritime shipper and GMP, in light of the evidence gathered by the various appraisers, the accident occurred during the haulage phase in Gabon before loading and they add that the probable impact with a bridge could have been avoided if DHL had given the necessary instructions.

45. They infer from this that DHL, which knew that there were bridges along the route taken by Bolloré and knew the specificities of the loading and the height of the entire route is liable and it cannot, in this regard, assert the limitations of its subcontracting.

46. In this regard, they maintain that the circumstances according to which the carrier went under the bridge without being careful about the height of its shipment and chose to conceal the accident characterize the existence of inexcusable fault and fraudulent misconduct depriving DHL of the benefit of the limitations of indemnification provided for by virtue of the provisions of the OHADA Uniform Act on Contracts for the Carriage of Goods by Road.

47. Lastly, they maintain that in the event that DHL is permitted to assert the limitations of liability, its liability shall be limited to the exchange value in euros of CFAF 105,000,000.

48. Otherwise, if the maritime shipper were found to be liable, they claim that the limitation is, as enshrined in consistent precedent, calculated based on the total gross weight of the damaged good, rendered unusable as in this case, which here is $21,000 \text{ (kg)} \times 2$ or 42,000 SDRs.



IV. GROUNDS OF THE DECISION

49. The ground of inadmissibility asserted by DHL and Bolloré

50. Under Section 122 of France's Civil Procedure Rules, a ground of inadmissibility is any reason that tends to find the claim of an adversary inadmissible with no examination of the merits due to a lack of right to take action such a lack of standing, the expiration of the statute of limitations, a nonsuspendable period, the force of res judicata.

51. By virtue of Section 31 of the same code law, action is available to all those who have a legitimate interest in the success or the failure of a claim, subject to the cases in which the law recognizes the standing of only persons or entities that it qualifies to raise or challenge a claim or to defend a specific interest.

52. It should be recalled that standing is not conditional upon first demonstrating the merits of the action.

53. The insurer that paid the insurance indemnity has, against the third parties, by their actions, that caused the damage that gave rise to the liability of the insurer, not only the statutory subrogation under Section L. 121-12 of France's Insurance Code, but the right to invoke the contractual subrogation to the rights of its policyholder, provided for in Section 1250 of France's Civil Code (now Section 1346 of France's Civil Code), arising from the express will of the policyholder manifested concurrently or prior to the payment received from the insurer.

54. Based on exhibits produced in this case:

- on December 7, 2017, Cabinet *Transports Risques divers*, authorized by Axa Corporate Solutions Assurance, the leading insurer, paid EUR 305,876.10 to Nexter (exhibit 7 produced by Nexter and its insurers);
- Nexter issued a subrogation release dated on the same day (exhibit 4 produced by Nexter and its insurers) in which Nexter acknowledged that it "received the sum of EUR 305,876.10 from Cabinet *Transports Risques divers*, authorized by Axa Corporate Solutions Assurances, the leading insurer on policy F 10.645 co-insurers Allianz GCS, Covea Fleet, Generali Iard, CNAMT, *Swiiv Re* for losses and damage: impact (collision with a concrete structure) to the following vehicle: Titus armored vehicle (Tourelle ARX 20) carried by CMA CGM/DHL, sea waybill number LVH1221992 dated June 17, 2015 Travel Gabon-France and in consideration of this payment we subrogate the aforementioned company and the co-insurers of the aforesaid contract to all our rights, actions and claims against any persons or entitles liable (shippers and/or others) because of said damage;"
- Nexter and the insurers produce insurance policy number F 10.645 by virtue of which payment was made to the policyholder, the reality of this payment being proven by the subrogation release, established concurrently with the payment of the insurance indemnity.

55. In light of the foregoing and without prejudice to the merits, the judgment will be affirmed in that it found that the action of Axa Corporate Solutions Assurance and the other insurers admissible.

56. The circumstances of the damage affecting the canon of the armored vehicle

57. It is undisputed that in May 2015, Nexter used the services of DHL to organize the shipment of a Titus armored truck that was equipped with an ARX20 canon on the top of its canon, between Libreville, Gabon, and Le Havre, France.

58. Said vehicle had previously been on display at the Shield Africa exhibition which took place in the l'Amitié stadium in Libreville in May 2015.

59. Based on exhibits produced in this matter, for shipping purposes the Titus truck was loaded onto flat rack container number TCLU6055992 at the l'Amitié stadium.



60. The container was then covered with a protective tarpaulin cover, then it was placed on a trailer by a local shipper under cover of Bolloré.
61. The road carrier arrived at the Libreville port and turned the container over for loading to CMA CGM, which did not make any reservations when it took possession of the container.
62. On June 17, 2015 CMA CGM loaded the container on to the Wehr Weser ship with sea waybill number LHV1221992 issued on June 17, 2015.
63. On July 15, 2015 after transshipment in Tangiers, Morocco, the ship arrived in Le Havre and the container was unloaded from the ship by GMP, which took possession of it without making any reservations and then parked it France terminal in Le Havre.
64. On July 20, 2015 at the request of Cabinet , Nexter's insurer, the insurance appraisal company AM, hired to attend the unpacking of the container at the Le Havre port in the presence of DHL and GMP, discovered damage to the ARX20 cannon turret.
65. During the appraisal and unpacking process, it was noticed that the ARX20 cannon had been damaged by a frontal impact to the cover.
66. The parties do not dispute that the damage occurred during shipping but they are in disagreement about when the armored vehicle was damaged.
67. In the case in point, it is undisputed that in shipping law, the absence of reservations at the time of the Titus vehicle at the Libreville port on May 23, 2015 results in a presumption of compliant delivery so the vehicle was presumed not to have sustained any damage prior to the maritime shipping.
68. However, it is a simple presumption that can be overturned.
69. CMA CGM has failed to show how the said to contain clause on the bill of lading is liable to defeat this presumption when no issue was mentioned with respect to the indications of the goods transported.
70. However, it is well-established that container number TCLU6055992 was covered by a thick protective tarpaulin cover so it was difficult for CMA CGM's ground personnel to verify the condition of the Titus truck and in particular its cannon, which is on top at a considerable height.
71. Furthermore, based on exhibits produced the appraisers involved at the request of the insurers, DHL, CMA CGM and GMP also concluded that the Titus vehicle had sustained a violent impact probably during the haulage phase, which is the only place where it could have struck a concrete structure like a bridge at a high speed and been involved in an accident that damaged in the area of the turret.
72. Based in fact on AM Group's appraisal report, which the Court cannot refuse to examine it on grounds that it was prepared at the behest of the insurers because it was properly produced in court and subject to adversarial debate, the appraisal conducted at the Le Havre port on July 20, 2015 the appraiser noted that *"the cannon turret was found to be severed/torn off from the room of the Titus vehicle carried on the 40 flat container TCLU 605 599/2 on July 20, 2015 at the France terminal CFS zone at the Le Havre port during the unpacking of the package and before the process of unloading/reloading the vehicle on the ground trailer"* and found that *"the damage to the cannon turret clearly came from a longitudinal collision by a movement from the back to the front of the Titus vehicle, the impact of which was noticed on the top of the weapon," "bits of concrete were found on the roof of the vehicle near the area of the damage to the ARX20 cannon turret" "the damage could not have taken place during the process of lifting the vehicle but rather a haulage phase."* (Page 21 of the report)



73. It concludes on the cause of the damage that *"there is a very strong probability that the damage occurred as a result of the Titus vehicle carried on container TCLU 605 599/2 striking a bridge between the Shield Africa exhibition in Gabon and the port where it was unloaded in Le Havre."*

74. These findings converge on those noted by the appraiser used by CMA CGM who confirmed in an email *"that this damage is apparently the result of striking an obstacle made of concrete and thus it no doubt occurred elsewhere than during the maritime shipping properly speaking"* and with the findings of the CL Surveys appraisal report which includes *"on July 20, 2015 the appraisal highlighted significant damage to the turret, which had been partly torn off with tearing of the protective tarpaulin cover and the presence of concrete type debris—it should be noted that the damage and the torn tarpaulin cover were difficultly visible and the area where the unloading of goods takes place and where they are made available does not have any concrete structure—because of their conformations, the damages is believed to have been caused by a longitudinal collision while backing up for the Titus vehicle. An impact on a concrete object (bridge structure for example) during haulage and not during lifting should be investigated. In this regard, we have not received any feedback concerning the road carriage operations in Libreville, which corresponds to the only road carriage done in this case."*

75. What is more, the photographs included with the different appraisal reports confirm these visual findings with respect to the damage.

76. All of the foregoing findings, which corroborate one another, make the theory of a violent impact with a concrete structure that took place when the truck was driving at a very high speed very probable.

77. This analysis moreover corresponds to the one that DHL provides in the first place in the letter setting forth reservations addressed Bolloré (then SDV Gabon) on August 5, 2015 in which it indicates *"concrete debris was found on the cover of the turret, which accredits the fact that during shipping by you, your driver must have gone under a bridge without being careful to the height of his shipment which struck it, thereby considerably damaging the turret"* and added *"with the understanding that there are bridges along the route that you took, you may be liable for the damage sustained by your client."*

78. The response of Bolloré to DHL in its letter dated August 10, 2015 according to which its driver had confirmed he carried the good with no major incidents and shipping was arranged so as to avoid any interchanges cannot in and of itself, without any other evidence from an investigation, be sufficient to exonerate the probative value of the evidence from the technical analyses of the different private appraisers subject to discussion, which establish through findings sufficiently supported the likely hypothetical of damage that could only have happened when the vehicle was en route by striking a concrete structure, specifically a bridge on the road in Gabon, which was before the container was loaded on the ship.

79. The allegations according to which the impact apparently took place in the port area were contradicted by the analysis of the appraiser hired by GMA CGM according to which *"the maritime container terminals are not generally equipped with concrete structures and the likelihood of such damage at a terminal is limited."*

80. The Court further notes that no technical evidence accredits the possibility of such an impact during the maritime shipping or during loading, unloading or moving of the vehicle at the port terminals, all the more so because any such moving is slow and the container was not damaged.

81. There is in effect no haulage phase at a high speed at a terminal but only phases where the flat rack container was lifted by forklift trucks that only move about at low speeds, bearing in mind that the photograph of a straddle carrier with a side extension that showed



signs of having been struck, which, besides, has nothing to do with the disputed shipment, is not persuasive of the probability of striking this structure, which, on the contrary, is designed to protect the good.

82. Thus, based on a body of evidence of serious, specific and corroborating presumptions that the Titus armored vehicle was violently struck by a concrete structure that tore off the turret from its base; this collision, which implies that that trust was en route, could not have happened on the ship or during the loading or unloading process because the vehicle was not moving at a significant speed and the areas are not generally equipped with concrete structures; therefore, the damage necessarily occurred before the vehicle arrived at the terminal, during the carriage of the vehicle by road by Bolloré in Gabon by striking a bridge that was along the route taken.

83. The examination of the liability of DHL as the commission agent for carriage

84. DHL acknowledges that it entered into a commission contract for the carriage of goods with Nexter under which Nexter used its services to carry the Titus armored vehicle from the l'Amitié stadium in Libreville up to its delivery at the Le Havre port.

85. The parties did not produce any particular contract memorializing their agreement with respect to the organization of the shipment.

86. Under Section L. 1432-7 of France's Transportation Code, commission contracts for the carriage of goods, regardless of the method of carriage, are subject to the rules provided for in articles L. 132-3 to L. 132-9 of France's Business Code.

87. Pursuant to Section L. 132-5 of France's Business Code, a commission agent is the guarantor of the damaging or perishing of goods and effects, if there is no clause providing otherwise in the waybill or force majeure.

88. Under Section L. 132-6 of France's Business Code, a commission agent is the guarantor of actions of the intermediary commission agent to which it addresses the goods.

89. By virtue of these provisions and subject to the contractual limited liability clauses a commission agent is the guarantor, except in case force majeure, a defect in the good or fault by the sender, damaging or perishing of the goods that it entrusted to the carrier chosen by it.

90. It is thereby required to provide end-to-end carriage and assumes with respect to the client an obligation to use sufficient means so as to bring about the contractually agreed-upon outcome both for itself and for its subcontractors.

91. The client does not have to prove the fault of the commission agent or of its subcontractors; it is established by the mere fact of the existence of damage at the time of delivery and the commission agent is from that instant automatically liable.

92. However, the commission agent cannot be liable toward the client above and beyond what its subcontractor is liable for, except where it committed a personal fault in the performance of the service that it was hired to provide.

93. It has personal liability on the terms set forth in Sections L. 132-4 and L. 132-5 of France's Business Code for any personal fault which must be proven if it caused the damage.

94. Under Section L. 1432-9 of France's Transportation Code, relations between the parties to a commission contract for the carriage of goods with respect to the subject matters mentioned in Section L. 1432-2 are governed by the provisions of Sections L. 1432-3 and L. 1432-4.



95. According to these last articles, relations between the parties to the contract with respect to the subject matters mentioned in article L. 1432-2 are defined in a written agreement that complies with the legislative provisions governing contracts and, as the case may be, the mandatory provisions from international treaties (article L. 1432-3).

96. Under article L. 1432-4 of this same code law, *"In the absence of a written agreement and without prejudice to the legislative provisions governing contracts, relations between the parties are, by right, those defined in the standard-form contracts provided for in section 3."*

97. The aforesaid section 3 contains an article L. 1432-12 according to which the *"clauses of contracts for the carriage of goods and standard-form commission contracts for the carriage of goods are established by regulation."*

98. This type of commission contract for the carriage of goods, even though its purpose is to organize international carriage, is subject to domestic law, in the case in point French law, since, based on Section L. 1432-10 of France's Transportation Code, it applies by right to commission contracts for the carriage of goods entered into for the purpose of an international delivery.

99. Under article D. 1432-3 of this same code law, *"standard-form commission contracts for the carriage of goods established pursuant to article L. 1432-12 and the purpose of which is to define the terms and condition under which a commission agent organizes on behalf of a principal called a client the carriage of goods, is contained in an annex to this book."*

100. Under articles 5 and 13 of the standard-form commission contracts for the carriage of goods contained in the annex to article D. 1432-3 of France's Transportation Code, as codified from the Decree No. 2014-530 of May 22, 2014, applicable in this case since contractual relations between DHL and Nexter began in 2015, it is provided that:

"5.1 Nature of the Obligations

The commission agent for carriage is presumed to be responsible for proper completion of the carriage and is bound by an obligation to use sufficient means so as to bring about the contractually agreed-upon outcome.

It organizes the operation based on information, requests and instructions of the client.

5.6 Obligations of the commission agent for carriage with respect to its subcontractors

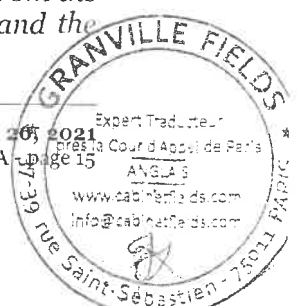
5.6.1 *The commission agent for carriage must ensure, prior to entering into commission contract for the carriage of goods, that the subcontractor that it is planning to use is qualified to provide the services for which it is hired and has the required capacity.*

5.6.2 *The commission agent for carriage alone shall chose its subcontractors. It is not required to get the agreement of the client before using the services of any intermediary commission agents or subcontractors. Except in case of personal fault on its part, the commission agent is not liable for any intermediary commission agents or subcontractors formally imposed on it by the client or by public authorities.*

5.6.3 *The commission agent for carriage is under obligation to pass on to any intermediary commission agents or subcontractors all information, requests and instructions from the client and to inform them of any special details regarding the goods or the operation and give them the ability to perform the contract in accordance with the services it has been hired to provide by the client."*

101. Article 13 entitled Liability also provides:

"A commission agent for carriage is presumed to be liable for damage resulting from the carriage, from its organization and from the provision of the related services and the specific instructions.



The indemnification of proven, direct and foreseeable harm is provided on the following terms:

13.1. Liability for subcontractors

The reparation of this proven harm due by the commission agent for carriage is limited to that faced by the subcontractor in connection with the carriage that is entrusted to it. When the indemnification limitations are not known or are not the result of mandatory, statutory or regulatory provisions, they are deemed to be identical to those relating to the personal liability of the commission agent for carriage.

13.2. Personal liability of a commission agent for carriage

Except in case of intentional and inexcusable fault, the indemnity for a proven personal fault by the commission agent for carriage is strictly limited as per the provisions hereinafter:

102. All of these texts are in agreement that, as part of its obligation to use sufficient means so as to bring about the contractually agreed-upon outcome, the commission agent faces a double liability: liability for its subcontractors and liability for its own actions and this case seeks to determine both.

103. It is not contested that the damage found on the armored vehicle during its carriage at a time when DHL was responsible for it so that damage occurred during the carriage of which DHL, the commission agent in charge of such carriage, is liable towards the client, Nexter and the insurers subrogated to its rights.

104. To the extent that Nexter used its services to organize the carriage from Gabon to France, DHL was liable for it vis-à-vis its client up to the delivery, independently of any personal fault.

105. It is presumed to be liable for the damage given that it has not established or alleged force majeure or the fault of its client with respect to the occurrence of this damage.

106. Since it is automatically liable, its third-party liability and its personal liability should be examined.

107. The liability of its subcontractors (carriers)

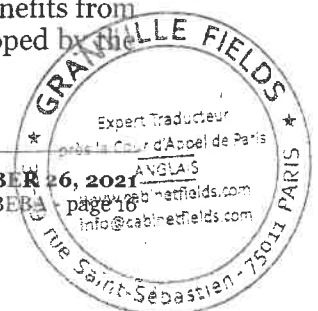
108. Under article L. 132-6 of France's Business Code, a commission agent for carriage is the guarantor of actions by the intermediary commission agent to which it addresses the goods, with the understanding that subject to proven personal fault, a commission agent cannot be bound with respect to its principal beyond what its subcontractor is required to do.

109. In consideration of the observations made above, it was found that Nexter provided sufficient proof that the damage caused occurred during the road carriage in Gabon between the l'Amitié stadium where the Shied Africa exhibition took place and the Owendo port in Libreville, which DHL hired Bolloré to do.

110. In light of this, DHL is guarantor of the actions of Bolloré.

111. As indicated above and enshrined in subsection 13.1 of the standard form commission contract, the commission agent cannot be held liable vis-à-vis the client above and beyond what its subcontractor is liable for, except in case of personal fault on its part.

112. DHL can therefore invoke the limitations of liability that its subcontractor benefits from and assert the limited liability clauses legally provided for in the relations developed by the commission agent and Bolloré for the carriage, except in case of personal fault.



113. In the case in point, the carriage of goods by road by Bolloré in Gabon, an OHADA member country, is governed by the OHADA Uniform Act on Contracts for the Carriage of Goods by Road, in accordance with article 1.1 which provides *"This Uniform Act shall apply to every contract for the carriage of goods by road, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are either situated in the territory of an OHADA State Party or on the territory of two different States, of which at least one is an OHADA Member. The Uniform Act shall apply irrespective of the place of residence and nationality of the parties to the contract of carriage."*

114. According to article 18 of the treaty entitled *"Limits of Liability"* *"1) The compensation in respect of damage, or of total or partial loss of the goods, shall be calculated by reference to the value of the goods, and shall not exceed CFAF 5,000 per kilogram of gross weight of the goods. However, where the value of the goods or a special interest in delivery has been declared by the sender in the consignment note, the compensation for the loss suffered shall not exceed the amount declared."*

115. The treaty includes a Loss of right of exemption and limitation of liability clause in article 21, which reads as follows:

"1) The carrier shall not be entitled to avail himself of the exemption and limitation of liability provided for in this Uniform Act, nor to the period of limitation of action laid down in Article 25 below, if it is proved that the loss, damage or delay results from an act or omission of the carrier, which was done with intent to cause such loss, damage or delay, or recklessly and with the knowledge that such loss, damage or delay would probably result."

116. In this regard, Nexter and its co-insurers assert that by driving under a bridge without being careful about the height of the shipment, the carrier was extremely reckless and committed an inexcusable fault that deprives it of the benefit of limitations of liability provided for in article 18 of the Uniform Act.

117. They add that in addition to the inexcusable fault, the carrier, by concealing the accident on his arrival, which the driver could not have failed to notice, committed a fraudulent fault that is not covered by the limited liability clause.

118. However, the exact circumstances of the accident, even though it is taken for granted that it took place during the road segment, are not sufficiently elucidated to impute an on the driver an inexcusable fault, the intentional nature of such a fault would furthermore have to be demonstrated, and which assumes establishing that by taking the route chosen, he was fully aware that he would strike a bridge or a comparable structure and that damage to the vehicle's canon would probably occur as a result.

119. Separately, the alleged deception, even assuming that it is established, occurred after the incident is not the cause of the damage and therefore not liable to thwart the limited liability clause as defined in the aforesaid statutes.

120. The existence of an inexcusable fault will therefore not be found and the claim of Nexter and its co-insurers will be dismissed on this account.

121. The personal liability of DHL, the commission agent for carriage

122. Personal liability sanctions breaches of the personal obligations assumed by the commission agent for carriage towards its client, in terms of its service which was to organize the shipment of the vehicle, which should be confused with this obligation.

123. It must be found liable for its fault that client must establish.

124. To establish the personal liability of DHL, Nexter asserts that despite its requests, it failed to communicate the travel document for the carriage of the vehicle by road as well as the additional information relating to the carriage and in particular its instructions.



125. However, Nexter on which the burden of proof rests, failed to provide proof of the instructions given to the commission agent DHL or to show how they were improperly followed.

126. In fact, it did not produce any letter or communication with DHL relating to special instructions or even the commission contract for carriage that may have contained information on measures or initiatives to take, which DHL had breached in the proper road carriage so the existence of a personal fault is not proven.

127. Consequently, the claim made by Nexter and its insurers on this account will be dismissed and DHL will be found liable on as a guarantor of the road carrier, Bolloré, hired to carry the vehicle by road, within the limit of the statutory limit of its liability.

128. In light of these findings, DHL will be ordered, within the limit of what Bolloré is legally liable for, which is the exchange value in euro of CFAF 105,000,000 according to the provisions of the Uniform Treaty.

129. DHL is entitled to take action against its subcontractor, which is not in dispute.

130. Consequently, Bolloré will be ordered to relieve and guarantee DHL from this award.

131. The judgment will be overturned on this account.

132. The Other Claims

133. The other claims made against maritime shipper CMA CGM or the third-party action against GMP, which no longer serves any purpose, will not be granted.

134. Expenses and Costs

135. Pursuant to Sections 696 and 700 of France's Civil Procedure Rules, DHL and Bolloré, who are the losing parties, must pay costs, pay their own out-of-pocket expenses and pay, for the out-of-pocket expenses that were forced to incur, a total indemnity of €10,000 to XL Insurance Company SE, successor-in-interest to Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality SE, MMA Iard, Generali Iard, Compagnie Nataise d'Assurances Maritimes et Terrestres and Swiss RE International SE and an indemnity of €5,000 each to CMA CGM and GMP.

V) ON THESE GROUNDS:

The Court,

1. Affirms the judgment from the Commercial Court of Bobigny dated October 8, 2019, in that it found that the claim of Axa Corporate Solutions Assurance and the other insurers to reply upon the subrogation to the rights of Nexter Systems is admissible and that they do have standing and dismissed all the claims of the defendants on this account;

2. Overturns the rest.

Ruling anew:



3. Orders DHL Global Forwarding (France) SAS to XL Insurance Company SE, successor-in-interest to Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality SE, MMA Iard, Generali Iard, Compagnie Nataise d'Assurances Maritimes et Terrestres and Swiss RE International SE the exchange value in euro of CFAF 105,000,000 on the day of the ruling for its damages, plus interest at the statutory interest rate from the date of this decision.

4. Orders the capitalization of interest for a full year starting on January 10, 2019, the date of the claim made in a legal brief in the lower court, pursuant to the provisions of Section 1154, now Section 1343-2 of France's Civil Code;

5. Order Bolloré Africa Logistics, formerly SDV, the carrier of the vehicle by road, to relieve and guarantee DHL Global Forwarding (France) from all awards that may be entered against it;

6. Dismisses all the other claims;

7. Orders Bolloré Africa Logistics and DHL Global Forwarding to pay the total sum of €10,000 to XL Insurance Company SE, successor-in-interest to Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality SE, MMA Iard, Generali Iard, Compagnie Nataise d'Assurances Maritimes et Terrestres and Swiss RE International SE and an indemnity of €5,000 each to CMA CGM and Générale de Manutention Portuaire;

8. Dismisses all other claims based on Section 700 of France's Civil Procedure Rules;

9. Orders Bolloré Africa Logistics and DHL Global Forwarding to pay the lower court and appellate court costs, of which each of them will pay half.

The Clerk

The Presiding Judge

Najma El Farissi

François Ancel





I, Granville Wesley Fields,
sworn translator,
French/English, certify that
the preceding is an exact
translation of the original
and of the attached copy
in French

This document is assigned
the number 2022-888

Signed and stamped *ne varietur* in
Paris, France
on March 31, 2022