

Enforceable copies
issued to the parties on:

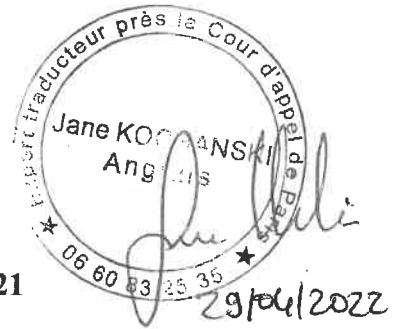
**FRENCH REPUBLIC
IN THE NAME OF THE FRENCH PEOPLE**

**PARIS COURT OF APPEAL
International Commercial Chamber**

Division 5 – Chamber 16

Vu ne varietur
Traduction conforme à l'original en langue française
n° 00927.

DECISION DATED DECEMBER 14, 2021
(no. /2021, 9 pages)



Registration no. on the general roll: **RG no. 20/17247 – Portalis no. 35L7-V-B7E-CCXBI**

Decision deferred before the Court: Judgment dated October 22, 2020 – Paris Commercial Court – RG no.2019027261

APPELLANT:

SOCIETE SENEGALAISE DE REASSURANCE (SENEGALESE REINSURANCE COMPANY),

registered with the Senegal Registry of Trade and Companies under the number SNDKR 1988 B11

With its registered office: 39 avenue Georges Pompidou, BP0386, DAKAR (SENEGAL)

Represented by its legal representative,

Represented by Me *of the*
attorney at the PARIS Bar, court registration: *substituted by Me*
attorney at the PARIS Bar, court registration: .

RESPONDENT:

S.A. ATTIJARIWafa BANK EUROPE

Registered with the Paris Registry of Trade and Companies under the number 485 031 181

With its registered office: 6-8 rue Chauchat 75009 PARIS

Represented by its legal representative,

Represented by Me *of the* *attorney at the PARIS*
Bar, court registration: *substituted by. Me* *of the*
, attorney at the PARIS Bar, court registration:

COMPOSITION OF THE COURT:

The matter was heard on October 26, 2021, in a public hearing, before the Court, comprised of:

Mr. François ANCEL, President
 Mrs. Laure ALDEBERT, Judge
 Mrs. Fabienne SCHALLER, Judge

who deliberated

Court clerk, during the proceedings: Najma EL FARISSI



DECISION:

- in adversarial proceedings
- upon availability of the decision to the court registry, with the parties having been previously informed under the conditions provided in the second paragraph of Article 450 of the French Code of Civil Procedure
- signed by François ANCEL, President and Najma EL FARISSI, Court clerk, who received the minutes of the decision by the signatory judge.

1 – THE FACTS AND PROCEEDINGS

1-The company SENEGALAISE DE REASSURANCES (hereafter “SEN-RE”) is a semi-public company, with a majority capital belonging to the Senegalese State resulting from the partnership between the Senegalese State and all the insurance companies operating on Senegalese territory.

2-ATTIJARIWAFABANK EUROPE (hereafter “AWBE”) is a company governed under French law, a subsidiary of ATTIJARIWAFABANK, an African bank.

3-On December 30, 2016, SEN-RE opened two bank accounts in the books of the AWBE bank’s Paris Opera branch.

4-On April 18, 2018, the SEN-RE acceded to the bank’s professional service by signing the Remote Relationship Management Convention (CGRD) to proceed with certain remote operations on its deposit or savings accounts and in other words to process the operations that it would have ordered by post or email.

5-Between September 14, 2018 and October 1, 2018, the AWBE bank performed five remote transfer orders for the benefit of a Turkish bank, Atakan Kavak Ltd. from the SEN-RE bank account for a total amount of 233,900 euros.

6-On October 3, 2018, when questioned on these transfers by the bank, SEN-RE responded to the bank that it was not the issuer of such transfer orders, which it discovered and that its account had been hacked, to which it had not had access during this period.

7-After having filed a claim against X to the criminal investigations division (DIC) in Dakar, Senegal, for fraud on its bank account, it requested the intervention of a cyber security company, Hacys, which concluded on an cyberattack on November 20, 2018.

Paris Court of Appeal
 Section 5 – Chamber 16

Decision dated December 14, 2021

No. RG 20/17247– Portalis no.

35L7-V-B7E-CCXBI

Vu ne varietur
 Traduction de l'original en langue française

no. 00927.

8-Considering that the AWBE bank was liable under the statutory liability provided by Article L.133-18 of the Monetary and Financial Code and, failing that, for violation of its duty of care, and after an unsuccessful attempt at an amicable conciliation, the SEN-RE summoned the AWBE bank by deed of bailiff dated May 7, 2019, for the reimbursement of the amount of 233,900 euros.

9-In a judgment dated October 22, 2020, the Paris commercial court dismissed the SEN-RE of all its claims and ordered it to pay the amount of 5,000 euros under Article 700 of the French Code of Civil Procedure, and to pay the costs.

10-By declaration dated November 30, 2020, the SEN-RE lodged an appeal on the decision.

11-The parties adhered to the International Commercial Chamber's protocol.

12-The close of proceedings was pronounced on October 12, 2021.

II/THE PARTIES' PLEAS

13-Pursuant to its latest submissions no. 3 transmitted electronically dated October 6, 2021, the SEN-RE requested of the court, under Articles 1937 of the Civil Code, L.133-2 of the Monetary and Financial Code, L.133-18 *et seq.* of the Monetary and Financial Code, 1190 of the Civil Code and 1170 of the Civil Code to do as follows:

-accepts its appeal and declare it admissible;

-OVERTURN the judgment, including the appeal, insofar as it:

- Dismissed all its claims against ATTIJARIWafa BANK EUROPE;
- Ordered it to pay the amount of 5,000 euros to ATTIJARIWafa BANK EUROPE under Article 700 of the Code of Civil Procedure, and the costs, including those to be recovered by the court registry, settled at the amount of 75.50 euros, with provisional enforcement;

AND DECIDING IN A FURTHER HEARING:

-In the principle, on the basis of Articles 1170, 1190 and 1937 of the Civil Code, L.133-2 of the Monetary and Financial Code, L.133-18 *et seq.* of the Monetary and Financial Code, to:

- ORDER ATTIJARIWafa BANK EUROPE to pay the amount of 233,900 euros, with interest at the statutory rate as from November 27, 2018, date of formal notice, and with compound interest, in accordance with the provisions of Article 1343-2 of the Civil Code;

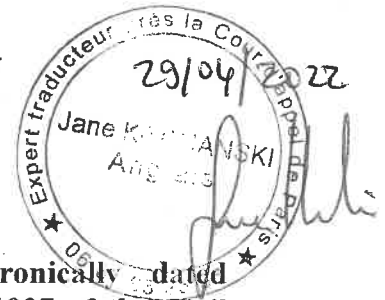
-In the alternative, on the basis of Articles 1170, 1190 and 1231-1 of the Civil Code, L.561-6 of the Monetary and Financial Code, and given the banker's duty of care, to:

- ORDER ATTIJARIWafa BANK EUROPE to pay the amount of 233,900 euros, with interest at the statutory rate as from November 27, 2018, date of formal notice, and with compound interest, in accordance with the provisions of Article 1343-2 of the Civil Code;

Paris Court of Appeal
Section 5 – Chamber 16

Decision dated December 14, 2021
No. RG 20/17247 – Portalis no.
35L7-V-B7E-CCXBI

Vu ne variatur
Traduction en français de la décision rendue en langue anglaise
N° 00927



-In any event:

- ORDER ATTIJARIWafa BANK EUROPE to pay the company SENEGALAISE DE REASSURANCE the amount of 15,000 euros in accordance with Article 700 of the Code of Civil Procedure;
- ORDER ATTIJARIWafa BANK EUROPE to pay all the costs before the lower court and on appeal.
- DISMISS ATTIJARIWafa BANK EUROPE of all its claims.

14-In accordance with its submissions no.2 transmitted electronically on September 30, 2021, AWBE requested of the court, under Articles 6 and 9 of the Code of Civil Procedure, Article 1103 of the Civil Code and Articles L.133-1 *et seq.* of the Monetary and Financial Code, to proceed as follows:

- APPROVE the judgment rendered by the Paris Commercial Court on October 22, 2020 in all its provisions;
- DISMISS the company SENEGALAISE DE REASSURANCES (SEN-RE) of all its claims against ATTIJARIWafa BANK EUROPE;
- ORDER the SENEGALAISE DE REASSURANCES (SEN-RE) to pay ATTIJARIWafa BANK EUROPE the amount of 10,000 euros for the irrecoverable costs of the appeal on the basis of Article 700 of the Code of Civil Procedure;
- ORDER the SENEGALAISE DE REASSURANCES (SEN-RE) to pay all the costs of the proceedings.

III/ THE PARTIES' GROUNDS

15-The SEN-RE asserted, on the basis of Article L.133-18 of the Monetary and Financial Code, that the bank was obliged to return the amount debited from its account insofar as it had executed a fraudulent transfer which had not been authorized by its holder.

16-It asserted that the bank establishment could only exempt itself from its liability with regard to its client by establishing the existence of fraudulent manoeuvres or serious or intentional violations on the latter's part, which is not even asserted.

17-It added that it had been subject to impersonation and that the impersonator had ordered the transfers for the benefit of a company located in Turkey to remunerate services that were unrelated to its activity, which it had not authorized; that the fraudulent nature of the transfers had been confirmed by the technical investigation carried out by Hacys, that had been accomplished at its request, which acknowledged that the transfers had been forged and that it had been subject to a cyberattack.

18-It asserted that the bank may not be exempt from the automatic liability regime provided under Article L.133-18 of the Monetary and Financial Code, which is of public policy.

19-It inferred that the clause provided under Article 3 in which the bank exempted itself from liability in the event of a forged identity, albeit applicable, is not lawful and must be considered void as it depletes the service provider of its essential obligation to return the deposited funds.

Paris Court of Appeal
Section 5 – Chamber 16

Decision dated December 14, 2021
No. RG 20/17247 – Portalis
35L7-V-B7E-CCXBI



20-It acknowledged that whilst, as agreed under Article 5 of the remote relational management convention, the operation issued by its service is presumed to be consistent, it is only a mere presumption which is extensively reversed by the numerous apparent material inconsistencies which establishes that it is not the issuer of the transfer orders without it having to establish the existence of a fraud.

21-It emphasized that it had protected its bank data in a regular and reasonable manner by having recourse to antiviruses. It added that it did not have access to its electronic bank account for a period of around ten days, period during which the unauthorized transfers were ordered and that it was only on October 1, 2018, in the context of the verification carried out by the bank that it discovered that it had been victim of a cyberattack and had reacted immediately by requesting the bank to stop the transfers and by filing a claim on the same date.

22-It inferred that as it concerned a forged transfer order, the bank must reimburse it for the amount debited, in accordance with the statutory regime provided.

23-In the alternative, it asserted that given its regular commercial relations and anomalies observed, the bank was liable for fault on the basis of Article L.561-6 of the Monetary and Financial Code.

24-It emphasized that the transfer orders included evident inconsistencies which should have been identified by the AWBE bank and should have prompted the latter to establish confirmation or accomplish verifications to avert the latter, which it did belatedly on October 1, 2018, after the 5th fraud.

25-It inferred that the bank was liable for violation of its duty of care and must compensate for its prejudice for up to the amounts unduly debited.

26-In response, the AWBE bank objected to the request for payment on the basis of the banker's liability without fault by asserting Article 3 of the provisions of the remote relational management convention (CGRD), which exempts its liability in the event of an improper service enforcement resulting from the impersonation of the client's authentication methods, which, it asserts to be lawful between professionals.

27-Whilst the limited liability clause was dismissed, it asserted that its automatic liability may also not be initiated with regard to a transfer order respecting the purported process issued by the SEN-RE, which does not contest the authenticity of the signature included on the transfer orders.

28-It added in this regard that the hypothesis of fraud is not sufficiently established by the sole production of an investigation report, for which the technician who intervened after the events, did not carry out any technical analysis and simply issued an opinion, which is the role of a private investigator rather than that of an I.T. expert.

Paris Court of Appeal
Section 5 – Chamber 10



Decision dated December 14, 2021
No. RG 20/17247– Portalis no.
35L7-V-B7E-CCXBI

Traduction conforme à l'original en langue française

no 00927.

29-Concerning the alternative claim based on its liability for fault, it contested any violation of its duty of care obligations by asserting that the transfer orders did not include any blatant anomaly which should have drawn its attention.

30-Finally, if the fraud were to be established, it asserted that the embezzlement could only have been accomplished through the appellant's insufficient securitization, which had committed faults constituting the exclusive cause of its liability.

IV/THE GROUNDS OF THE DECISION

Concerning the applicable law

31-In accordance with the EC regulation no.593/2008 of the European Parliament and Council dated June 17, 2008, called Rome I, the French law chosen by the parties in the remote relational management convention (Article 9 of the convention) shall apply to the dispute.

Concerning the principle claim

Vu ne varietur
Tribunal de Commerce de Paris en langue française

32-The claim relates to five operations for which the SEN-RE had not given its consent and which, according to the latter, resulted from a cyberattack.

33-Given the date of operations, this claim is subject to the provisions resulting from the transposition of the "payment services" directives, in Articles L.133-18 to 133-20 and L.133-23 to L.133-24 of the Monetary and Financial Code which apply to payment instruments such as the transfers.

34-It must be recalled that according to Article L.133-6 of the Monetary and Financial Code, a payment operation is authorized if the payer has consented to its enforcement.

35-Article L.133-18 of the aforementioned Code sets forth as follows "*In the event of an unauthorized payment operation reported by the user in the conditions provided in Article L.133-24, the payer's payment service provider shall reimburse the payer for the amount of the unauthorized operation immediately after having become aware of the operation or after having been informed, and, in any event, at the latest at the end of the first following business day, unless there are good reasons to suspect fraud by the payment service user and if such reasons are communicated in writing to the Banque de France. As the case maybe, the payer's payment service provider shall re-establish the account debited to its situation prior to that of the unauthorized payment operation.*"

36-Article L.133-23 of the aforementioned Code sets forth as follows "*When a payment service user denies having authorized a payment operation which has been enforced, or asserts that the payment operation has not been correctly enforced, its payment services provider must establish that the operation in question has been authenticated, duly registered and entered in the accounts, and that it has not been subject to a technical deficiency or other*" and that "*the use of the payment instrument such as registered by the payment services provider shall not necessarily be sufficient to establish that the operation was authorized by*

Paris Court of Appeal
Section 5 – Chamber 16



Decision dated December 14, 2021

N° RG 20/17247 – Portalis no.

3517-V-B7E-CCXBI

1°. 00927.

29/04/2022

the payer or that the latter has not met its relevant obligations in this regard, intentionally or through gross negligence”.

Finally, this text adds that *“The payment service provider, including, as the case maybe, the payment service provider providing a payment initiation service, shall provide elements in order to establish the fraud or gross negligence committed by the payment service user.”*

37-In principle, this liability regime requires the bank to establish the regularity of the operation.

38-In other words, when the user denies having authorized the operation, the bank must, in principle, establish that the order is duly issued by the payer or the user or substantively establish the fraud or a gross violation of the obligations by the account holder, failing which the user must reimburse the amount misappropriated.

39-Article L.133-2 of said Code provides that, except in the case whereby the user is an individual acting for non-professional purposes, a contractual exemption may be provided for with regard to the provisions of Article L.133-1-1, the last two paragraphs of Article L.133-7, Articles L.133-8, L.133-19, L.133-20, L.133-22, L.133-23, L.133-25, L.133-25-1, L.133-25-2 and I and III of Article L.133-26.

40-It results from these provisions that it is possible for legal entities acting for their professional needs to derogate from Article L.133-23, expressly mentioned, i.e., to agree upon a modification of the evidence in the context of this liability regime.

41-On the other hand, no exemption of Article L.133-18 is authorized.

42-Accordingly, under the title *“The Parties’ obligations and liabilities”* in Article 3 of the remote relational management convention, the parties agreed that the Bank could not be held liable for the non-performance or improper performance of the service as a result:

*“(…)
-of an error, insufficiency or unavailability of the Client in the authentication process, the use of the service or resulting from the impersonation of its authentication methods,
-of the absence of the Client’s notification to the Bank, by registered letter with acknowledgment of receipt or against receipt at the Paris-Opera agency, for any loss, compromise, disclosure or impersonation of its authentication methods”.*

43-Article 5 entitled *“Proof of operations-complaints requests”* sets forth as follows: *“Due to the confidentiality of its authentication procedure, it is expressly agreed that any operation relating to the Client’s account(s), respecting this process, is deemed to originate from the Client”.*

44-In this case, the SEN-RE denies having consented to five transfer orders received by the AWBE bank between the 14th of September and the 1st of October 2018 for the benefit of a Turkish company, ATAVANKAVAK LIMITED, for the following amounts:

Paris Court of Appeal
Section 5 – Chamber



Decision dated December 14, 2021
No. RG 20/17247– Portalis no.
35L7-V-B7E-CCXBI

Vu et certifié
Traduction conforme à l'original en langue française

00927.

- a transfer order for 23,500 euros dated September 14, 2018;
- a transfer order for 37,000 euros dated September 19, 2018;
- a transfer order for 72,600 euros dated September 24, 2018;
- a transfer order for 53,700 euros dated September 27, 2018;
- a transfer order for 47,100 euros dated October 1, 2018.

45- The SEN-RE alleges that these transfer orders are fictitious and result from an impersonation of its authentication methods.

46- With regard to the situation according to which the SEN-RE would not have consented, the bank shall, in principle, be automatically held liable on the basis of Article L.133-18 of the Monetary and Financial Code, to which it may not be exempt therefrom, as previously mentioned.

47-The elusive liability clause when the non-performance or improper performance of the service results from the following: “(...) *an error, insufficiency or unavailability of the Client in the authentication process, in the use of the service or resulting from the impersonation of its authentication methods*” (emphasized by the court), shall, consequently, not impede the statutory liability regime for the depositing establishment’s liability, without it being necessary to declare it void.

48-The issue at stake in the context of this liability action is that of the evidence of the unauthorized or forged nature of the transfer orders sent to the bank.

49-Accordingly, reference should be made to the aforementioned Article 5 of the convention, which provides for a constitution of evidence clause, for which the SEN-RE does not query the unlawful nature, with regard to professionals who were duly able to derogate from the means of establishment of evidence under Article L.133-23, in accordance with Article L.133-2.

50-Article 5 provides for a presumption of regularity of the operation for the benefit of the bank, which, accordingly is not required to provide evidence thereof, insofar as the transfer respects the contractually agreed authentication process, which was the case herein.

51-The process agreed for the transfer orders sent to AWBE was as follows:

- sending of the transfer orders via the email address [redacted]
- verification of the representatives’ signature, Mr. [redacted] general director of the SEN-RE, on the orders received.

52-It is established in the proceedings that this process was respected, it being observed that Mr. [redacted]’s signature is authentic, and, thus, the transfer orders are presumed to be valid.

53-Accordingly, the SEN-RE is in charge of establishing the evidence that it is not at the origin of the transfers ordered, which were obtained by an impersonation of its identity in the context of a cyberattack.

Paris Court of Appeal
Section 5 – Chamber 16



Decision dated December 14, 2021

No. RG 20/17247– Portalis no.

35L7-V-B7E-CCXBI

Vu et validé par

2027

54-In this regard, it asserted that the evidence results from the findings of the investigation report, which acknowledged that the transfer orders had been forged and that it had been the victim of a cyberattack and in particular, a certain number of elements mentioned on the transfer orders and invoices, which were suspicious and which should have been noticed by the bank.

55-Nevertheless, the technical investigation report established by Hacys in November 2018, at the SEN-RE's request, followed by a complaint, which apparently did not give rise to any investigation measure or investigation over the past 3 years, is not corroborated by any exterior element.

56-Its findings are contested by the AWBE bank, which duly acknowledges that the report dated November 20, 2018, is an opinion given on the analysis of the exchanges between the bank and the SEN-RE.

57-It also results from the completed document that the investigations were carried out solely based on the SEN-RE's declarations as the technician acknowledges that he had arrived belatedly, mentioning, in particular *"unfortunately, for reasons of security and availability and to ensure the SEN-RE's production capacity, the servers hacked by ransomware were reinstalled prior to our visit"*, *"accordingly, we were unable to recuperate the logs to analyse the origin of the cyberattack"*.

58-This report, which, incidentally, is an audit mission, the purpose of which was to *"try to determine what had happened (the vulnerabilities exploited) and to propose a plan of action to better secure the systems and the network"* shall not, consequently, constitute certain evidence of the alleged fraudulent actions or establish that the mail box [...] was used by third parties following a cyberattack.

59-On the basis of these acknowledgments and statements, without it being necessary to examine the other contextual elements opposed at this stage, which relate to a violation of the duty of care by the bank and which fall within the action in liability for fault, the claim based on Article 133-18 of the Monetary and Financial Code should be dismissed, unless the SEN-RE is able to provide evidence of the forged nature of such transfer orders.

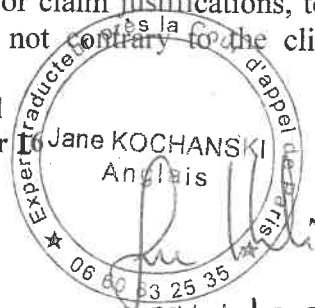
60-The decision by the lower court judges shall be approved on this count.

Concerning the alternative claim based on the liability for fault

61-In accordance with Article L.561-6 of the Monetary and Financial Code, the bank must ensure that a continuous duty of care is applied to the business relation and that an attentive examination is made of the operations carried out, by ensuring that they are consistent with the updated information that it has at its disposal concerning its client.

62-Whilst the banker is bound by an obligation of non-interference which obliges it not to intervene in its clients' business, and that such duty of care implies that the bank shall not carry out research, or claim justifications, to assure that the operations requested by a client are consistent and not contrary to the client's interest, such duty is nonetheless limited

Paris Court of Appeal
Section 5 – Chamber 16



Decision dated December 14, 2021
No. RG 20/17247– Portalis no.
35L7-V-B7E-CCXBI

Vu le verbatim
Révisé le 06/04/2022

n° 00927

concerning the duty of care and surveillance which requires the banker to identify any apparent anomalies.

63-It results from the exhibits produced that the disputed transfer orders, were all addressed to the AWBE bank, and to which invoices were attached for the attention the SEN-RE, according to the contractually provided procedure.

64-The exchanges do not include any apparent deletion or material arrangement.

65-The orders all included a duly authentic signature corresponding to that of Mr. [X], general director of the SEN-RE, which was verified on the five orders received, sent through the email address [...] according to the procedure contractually chosen without any apparent falsification.

66-The amounts of these transfer orders, included between 20,000 euros and 70,000 euros, were less than the threshold authorized set by the SEN-RE at 1,000,000 euros, according to the specific conditions of the relational management convention.

67-These amounts appear to be ordinary, with regard to the standard functioning of the account produced and the funds available on the SEN-RE bank account which, on the date of the receipt of the first transfers contested, was creditor for more than 600,000 euros.

68-Furthermore, the bank statement and list of transfers abroad, produced in the proceedings, establish that the SEN-RE regularly used the remote relation management service to make transfers abroad in various countries such as Tunisia, Gabon, the United Kingdom, the Lebanon, without the convention distinguishing between the destinations, and, thus, the place of location of the beneficiary company in Turkey does not appear to be suspicious or at risk, and did not require the bank to be authorized to carry out further verifications on the invoices for which only two included a minor spelling mistake.

69-Finally, the evidence of freezing of the SEN-RE account during the period of the disputed transfers preventing the normal access to its accounts, which it had immediately frozen on October 3, 2018, after being contacted by the bank, is not corroborated by any incident report and this position is contradicted by the bank statements which, on the contrary, evidence that the account was functioning during this period.

70-It results from these acknowledgments and statements that the SEN-RE, which fails to provide evidence of its assertions, shall be dismissed of its claim and the decision which dismissed the bank's automatic liability shall be approved on this count.

71-As the SEN-RE failed to provide evidence of a violation of the duty of care by the bank, it shall be dismissed of its incidental claim, and the judgment shall be integrally approved.

Concerning the expenses and costs

72-The SEN-RE, as the unsuccessful party, shall be ordered to pay the costs.

Paris Court of Appeal
Section 5 – Chamber 16



Decision dated December 14, 2021
No. RG 20/17247 – Portalis no.
35L7-V-B7E-CCXBI

29/01/2022

70-Furthermore, it must be ordered to pay an indemnity to the AWBE bank, which was obliged to incur the irrecoverable costs to assert its rights, under Article 700 of the French Code of Civil Procedure, which is equitably set at 5,000 euros.

IV/ ON THESE GROUNDS

1-Approve the judgment by the Paris commercial court dated October 22, 2020, in all its provisions;

2-Order the company SENEGALAISE DE REASSURANCES to pay ATTIJARIWAFABANK EUROPE the amount of 5,000 euros under Article 700 of the French Code of Civil Procedure;

3-Order the company SENEGALAISE DE REASSURANCES to pay the costs.

The Court Clerk

Najma EL FARISSI

The President

François. Ancel

Pour traduction certifiée conforme à l'original en langue française *visé ne variatur* sub numéro 00927 ; Ce jour, le 29 avril 2022. Jane Kochanski



Paris Court of Appeal
Section 5 – Chamber 16

Decision dated December 14, 2021
No. RG 20/17247– Portalis no.
35L7-V-B7E-CCXBI

