Jurisprudence française Rapport annuel | French Case Law Annual Report

Dominique HASCHER
Presiding Judge, Court of Appeal (Reims, Champagne)

Béatrice CASTELLANE
Avocat at the Paris Bar, Former member of the Paris Bar Council

Introduction

1. The Decree of 13 January 2011 reforming French arbitration law, which is the major event in French arbitration law this year, [1] is not extensively dealt with in the reported case law for this Annual Report as the new Law only applies to setting aside and enforcementof awards made after 1 May 2011. [2] Almost all decisions of the Paris Court of Appeal and of the Cour de cassation which are reported below from September 2010 to July 2011 weretherefore issued under the former French arbitration law as enacted by the Decrees of 14 May 1980 and 12 May 1981,codified at Articles 1442 to 1507 of the Code of Civil Procedure.

2. The new 2011 Arbitration Lawdraws a distinction between domestic arbitration and international arbitration, as did the old provisions of the 1980 and 1981 Decrees.The touchstone is the definition provided in Article 1492 of the Code of Civil Procedure (left unchanged by the new Article 1504 of 2011) according to which "*An arbitration is international when it involves the interests of international trade*". The judgment of the Court of appeal of Paris in *Bourbon v. Villeneuve* of 7 April 2011 provides yet another example of the predominance of the economic element in the French conception of internationality in arbitration. [3] In this case, a dispute regarding performance of a contract concluded between a French claimant company and a French defendant for the coordination and development of the claimant's commercial interests in Madagascar involved, according to the judgment of the Court, the economies of more than one country, namely France and Madagascar. This interpretation of Article 1492 has been preferred since the 2000's by the Court of

1. E. Gaillard, France Adopts New Law On Arbitration", New York Law Journal, Jan. 24, 2011, vol. 245-NO. 15 ; Ch. Jarrosson et J. Pellerin, « Le Droit français de l'arbitrage après le décret du 13 janvier 2011 », Rev. Arb. 2011.5 .

2. Article 3 of the Decree of 13 January 2011 ; B. Castellane, The New French Law on International Arbitration", (2011) 28 J. Int. Arb. 4 (371-380).

3. Fouchard, Gaillard, Goldman, *On International Commercial Arbitration*, (Savage, ed.), Kluwer, 1999, n^{os} 119 to 126.

appeal over the prior approach which considered whether the disputed contract involved a transfer of goods, services or funds across national boundaries. It gave rise to problems when contractual performance was disputed because no movement of goods or money had actually occurred. [4]

I. Independence and Impartiality of Arbitrators

3. Provided it is admissible, the issue of independence and impartiality of an arbitrator is a question over which, state courts enjoy full power of review. [5] The *Groupe Antoine Tabet v. République du Congo* judgment of 17 March 2011 is an example of such review of the independence and impartiality issue. The applicant, *Groupe Antoine Tabet,* challenged the award on the basis of the alleged existence of a professional relationship between the chairman of the arbitral tribunal and the parent company of the guarantor of debts owed by the Republic of Congo. The outcome of the arbitration between *Groupe Antoine Tabet* and the Republic of Congo was however of no importance, the Courtfound, to the financial position of the guarantor – not a party to the arbitration – which had agreed to indemnify *Groupe Antoine Tabet* regardless of whether or not the Republic of Congo was ordered to pay monies by the award. The Court of appeal concluded that there was no conflict of interest.

4. During the time period under review, the Court of appeal of Paris handed down a number of important decisions that have added significant detail regarding an arbitrator's obligation to disclose. The first is the judgment of 9 September 2010 in *Allaire v. SGS Holding. Allaire* alleged in the arbitration proceedings that the co-arbitrator nominated by *SGS* had a significant consulting practice with the defendant's counsel. The co-arbitrator replied that he had indeed provided such services to the law firm representing the defendant but added that he had not done any work for this law firm since the beginning of the arbitration. He however declined to give any further information as to the amount of fees received for his consultancy work. The Court held that the co-arbitrator's relationship with the defendant's counsel was neither occasional nor had it happened in the distant past and concluded that such circumstances could give rise to reasonable doubts in the claimants' eyes. It decided to annul the award which had been rendered by the arbitral tribunal within twelve days after the information given to the parties by the co-arbitrator, finding that *Allaire* had raised objections relating to the constitution of the arbitral tribunal in the course of the arbitration and was therefore not estopped from bringing the matter before the Court.

5. In the two other landmark decisions, *Nykcool v. Dole France and Agrunord et al.* and *Tecso v. Neoelectra Group* of 10 March 2011, the Court of appeal annulled

4. CA Paris, 29 March 2001, Cartago Films v. Babel Productions, Rev. arb. 2001.543, note by D. Bureau ; RTD com. 2001.649, obs. by E. Loquin.

5. Cass. 1re civ., 6 January 1987, Southern Pacific Properties Ltd. v. Republic of Egypt, Rev. Arb. 1987.469 , note by Ph. Leboulanger and JDI 1987.638, note by B. Goldman.

awards for lack of independence and impartiality of one of the co-arbitrators. In *Nykcool*, all the members of the arbitral tribunal (which included the same co-arbitrator who had been nominated in the *Allaire* case) declined to make any statement regarding their independence. The chairman, on behalf of the Tribunal, merely expressed the arbitrators' regret about the claimant's suspicious attitude. The Court of appeal held that the arbitrators' refusal to disclose their relationships with the parties raised a reasonable doubt about their independence and impartiality. Moreover, it stressed that the co-arbitrator nominated by the defendants was involved in other arbitral proceedings with the defendants. The Court's holding deserves total approval. "Feel honored, we are your judges" is a response oblivious to the contractual origin of the arbitrator's appointment. In *Tecso*, the co-arbitrator nominated by the defendant had been of counsel between 1989 and 2000 with the same law firm as defendant's counsel in the arbitration and had given only vague information regarding his activity with said law firm after 2000. The Court of appeal found that this attitude gave rise to reasonable doubts regarding the co-arbitrator's independence and impartiality.

6. These three decisions contain almost identical language according to which "*an arbitrator is under a duty to disclose all circumstances which may reasonably call into question his independence in the mind of the parties and should particularly inform the parties of any relationship which is not common knowledge and which could be reasonably expected to have an impact on his judgment in the parties' eyes*".After the 2011 Reform, new Article 1456 of the Code of Civil Procedure spells out that "*Before accepting a mandate, an arbitrator shall disclose any circumstances that may affect his or her independence or impartiality. He or she shall disclose promptly any such circumstance that may arise after accepting the mandate*". The continuing nature of the duty to disclose was particularly underlined in the *Nykcool* judgment as a prerequisite for maintaining the parties' trust in the arbitral tribunal. What is remarkable in these three judgments is not so much the language quotedabove, which is already to be found in past decisions of the Court of appeal, [6] but its practical application to the circumstances of these three cases.

7. The *Allaire* judgment notes the "*elliptic character*" of the statement made by the impugned co-arbitrator and the *Tecso* case refers to the vague information provided by the co-arbitrator nominated by the defendant about the number of legal opinions given to the law firm of defendant's counsel after 2000. In *Nykcool*, no disclosure was ever made. The arbitrators' failure or refusal spontaneously to disclose their relationships with the parties' counsel as well as their continued failure to disclose full information in this regard so seriously affected the relationship of confidence with the parties that they could no longer be trusted regarding the accuracy of the information finally disclosed. *Sobrior and Potier v. ITM and La Violette* decided by the Paris Court of appeal on 1 July 2011 illustrates the opposite situation where the chairman had on his own initiative disclosed to the parties at an early stage in the arbitration that he had chaired arbitral tribunals in cases involving the franchisor party and mass marketing

6. CA Paris, 2 June 1989, Gemanco v. Siape, Rev. arb. 1991.87.

businesses. Although the chairman of the tribunal had failed to disclose a prior appointment as arbitrator by a franchising company unrelated to the group of companies of the franchisor party involved in the arbitration proceedings, the Court of appeal held that the chairman's incomplete statement raised no doubts as to his independence or impartiality.

8. It is accepted in French arbitration law that the parties may waive the independence of the arbitrators, [7] but they can only do so to the extent they are aware of the existing relationships of the arbitrators with the parties or with the parties' counsel as underlined in the *Allaire* judgment where, in reply to *SGS*, the Court declared that the association of an arbitrator with one of the parties, but also with one of the parties' counsel if it is a long-standing professional and pecuniary association, may create a relationship of dependence. To conclude, these three judgments invite arbitrators to disclose any kind of relationship they may have with the parties and their counsel, if necessary at the risk of appearing overly cautions.

9. The *Nidera v. Leplatre* judgment of 16 December 2010 illustrates a publicly known circumstance which renders pointless the arbitrator's duty to disclose. The claimant argued that one co-arbitrator had not disclosed that he was the chairman of a professional association of which the defendant was a member. The Court of appeal found that this situation was publicly known by all involved in agricultural trade, including the applicant, and underlined that the defendant was one among the eight hundred competing members of the professional association chaired by the co-arbitrator. As a consequence, claimant's objection to the regularity of the constitution of the arbitral tribunal as a ground for annulment of the award was rejected.The situation was close to giving rise to an estoppel: the Court of appeal remarked that *Nidera* had not challenged the chairman of the tribunal during the arbitration proceedings in spite of this publicly known fact. [8]

10. In *Animatrice de la Franchise v. SARL des Halles*, the applicant raised the lack of independence of the co-arbitrator nominated by the defendant, who had asked the defendant to pay a first advance on fees prior to the drafting of the terms of reference. The Court of appeal declared that this fact had been disclosed at the terms of reference stage without any reaction from the claimant which agreed in the terms of reference that it had no complaint regarding the constitution of the arbitral tribunal. The Court concluded that the applicant was estopped from challenging the award on this ground (judgment of 28 october 2010).

11. The relationship of an arbitrator with another member of the same arbitral tribunal may raise questions with regard to impartiality if it results in the expression of

7. CA Paris, 18 November 2004, STM Brudey v. Emeraude Lines, Rev. arb. 2006.916, note by L. Perreau-Saussine.

8. Article 1466 of the Code of Civil Procedure provides after the reform of January 2011 that : "A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity". On estoppel, see D. Hascher and B. Castellane, French Case Law Annual Report, Les Cahiers de l'Arbitrage, 2010-4, p. 1017.

a single opinion which is counted twice instead of the addition of two independent opinions as should be the case. [9] In the *Emivir, Loniewski, Gauthier v. ITM* judgment of 1 July 2011, the relationship between the chairman of the arbitral tribunal and a co-arbitrator was under attack by the applicant, who claimed that it cast doubt on the impartiality of the entire arbitral tribunal. The applicant contended that the regular contribution of the chairman to a law review on the editorial board of which a co-arbitrator sat, created an intellectual and pecuniary link between these two members of the arbitral tribunal. The Court of appeal answered that there is no interference between the duties of an arbitrator and participation in a law review, and consequently held that neither a relationship of subordination nor a business relationship could be said to exist as claimed by *Emivir et al*. The Court concluded that in the circumstances of the case, there was no proof of actual bias on the part of the chairman of the tribunal in the eyes of a fair minded observer. This reference to a third party observer departs from the reference generally made to the parties' mind or the parties' eyes. The test for disclosure is not about what the arbitrator may think about his situation but, rather, about what may raise a reasonable suspicion in the parties' mind as to the independence and impartiality of the arbitrator. [10] Arbitrators may however find it difficult to step into the parties' shoes. Reference to a fair minded observer, which should be taken to mean a fair minded or reasonable party, brings some objectivity in an otherwise overly subjective exercise for the arbitrator. In the circumstances of the case, the Court said that there was no obligation for the chairman to disclose his participation in the law review to the parties. In *Tecso*, the chairman of the Arbitral Tribunal was a friend on Facebook of the defendant's counsel. This circumstance, the Court also held, had no bearing on the arbitrator's independence or impartiality.

II. Due Process and International Procedural Public Policy

12. On 29 June 2011, the Cour de cassation rejected the appeal against the judgment of the Court of appeal of Paris in *Overseas Mining Investments v. Commercial Carribean Niquel* which had annulled the award because the arbitrators relied on their own reasoning on loss of chance rather than on the loss of profit approach which had been discussed by the parties. [11] Due process does not of course require that the parties be invited to discuss the reasoning of the arbitral tribunal prior to the making of the award but it does require that the award not be decided on elements of fact or law which have not been discussed by the parties in an adversarial manner (*Apax v. Marsa Fashion, Fino and Partner Textile*, judgment of the Court of appeal of Paris of 9 November 2010). In the same vein, all evidence relied upon by the arbitral tribunal must have been submitted to and discussed by the parties (*Animatrice*

9. See Cass. 1re civ., 29 janvier 2002, Hudault, JCP 2003 I 105, para. 7, obs. J. Béguin, D. 2003, somm.2473, obs. Th. Clay.
10. Cass. 1re civ. 16 March 1999, État du Qatar v. Creighton, Rev. Arb. 1999.308.
11. D. Hascher and B. Castellane, French Case Law Annual Report, p. 1026, *supra*.

de la Franchise v. SARL des Halles, judgment of the Court of appeal of 28 october 2010).

13. Due process implies that each party must be given the opportunity to present its case and to rebut that raised by the opposing party (*Möllers v. Al Khaleej Sugar Company*, judgment of 12 May 2011). The case law of the Court of appeal of Paris provides examples of this aspect of due process (See *Thalès v. Taïwan,* judgment of 9 June 2011 for the alleged use of classified information). The Court of appeal of Paris acknowledged that additional written submissions not foreseen in the provisional procedural timetable complied with due process where the parties had had the opportunity to discuss such submissions (*Animatrice de la Franchise v. SARL des Halles*, judgment of 28 October 2010). In the case of *Standiard and Erjagi v. Solei Environnement and Marseille Recyclage* (judgment of 17 February 2011), the Paris Court of appeal held that the claimant had had sufficient time before the closing of the proceedings on December 21 to answer the note and document produced on December 17 by the respondent in reply to the claimant's written submission of December 15. In addition, although the Claimant had been invited by the Arbitral Tribunal to reply, it had in fact abstained from doing so. In *Merial v. Klocke Verpackungs*, the applicant criticized the arbitral tribunal for its refusal to postpone the date of the hearings originally scheduled in the procedural timetable after the filing of the rejoinder by the respondent. The applicant contended that the respondent had made new counterclaims in these last submissions which substantially changed the legal grounds of the dispute. The Court of appeal remarked that the tribunal had ruled on the admissibility of the counterclaims in a procedural order in which it had also specified that the procedural timetable was confirmed, subject to any changes which might appear necessary at the end of the hearing. The Court stressed that the applicant had had ample opportunity during the arbitral hearing to reply and produce evidence and that it had not asked the arbitral tribunal for permission to file post-hearing briefs. The Arbitral Tribunal had therefore closed the proceedings. The Court concluded that there had been no violation of due process. Further, the Court recalled that dissenting or separate opinions are compatible with French international public policy subject to compliance with the collegial decision making process and deliberations of the tribunal (*Merial v. Klocke Verpackungs*, judgment of 7 April 2011. See also, Cass. 1re civ., 29 June 2011, *Papillon Group Corp. v. République arabe de Syrie*).

14. There had been no violation of equality between the parties or of procedural fairness when an arbitral tribunal refused to re-open the discussion on certain facts which the claimant wished to rely upon in support of its case and when the arbitrators had ruled that such facts did not add anything to the arguments and evidence already discussed (*Sobrior and Potier v. ITM and La Violette* of 1 July 2011). An arbitral tribunal,which cannot be dictated to as to how it should establish the facts of the case, commits no breach of procedural fairness in refusing to appoint an expert as requested by one party (*Apax v. Marsa Fashio, Fino and Partner Textile*, judgment of 9 November 2010). In *Botas Petroleum Pipeline Corp. v. Tepe Insaat Sanayii* and in *Merial v. Klocke Verpackungs*, the applicants argued that the arbitral tribunal had breached the principle of equal treatment of the parties and public policy procedural

requirements by reversing the burden of proof. The rule according to which the claimant must prove the allegations of fact on which it relies has been considered as a rule of procedural public policy. [12] The Court of appeal ruled in both these cases that the claimant was seeking a review of the award on the merits,since it was merely criticizing the reasoning of the tribunal (*Botas Petroleum Pipeline Corp.v. Tepe Insaat Sanayii*, judgment of 2 December 2010; *Merial v. Klocke Verpackungs*, judgment of 7 April 2011).

15. The requirement of due process is satisfied when each party has had the opportunity to present its case even if one party decides not to do so. [13] In one case, the Court of appeal held that the claimant had been informed of the commencement of the arbitration proceedings before the arbitration court at the Chamber of Commerce and Industry of Romania and of the claims made against it but deliberately chose not to participate in the proceedings although it had been invited to designate an arbitrator and to attend the hearing (*Sté de la Bergousie v. Willex*, judgment of 23 June 2011). The consensual nature of the arbitration process implies a high degree of cooperation of the parties with the arbitral tribunal and with each other. The existence of an obligation of procedural fair dealing has been often underlined in case law (see above, *Sobrior and Potier v. ITM and La Violette*). In a similar case, *Teman, Damilo v. Norma*, the claimant was held to be in breach of its obligation of procedural fair dealing by failing to complain in the arbitral proceedings that it had not been given notice of the hearing nor invited to file its submissions. It recognized that its counsel had attended the hearing and could have complained before the arbitrators but had abstained from doing so. The Court of appeal held that the claimant was estopped from making its complaint in the annulment proceedings (judgment of 6 January 2011. See also Cass. 1re civ., 1st December 2010, *Generali v. IARD*).

16. The Court of appeal further held that a reference in the summary of facts in the award to a court decision which had only been rendered after the closure of the proceedings did not amount to a breach of due process; it should be read as a mere *dictum* because the arbitral tribunal had not relied on this decision in its reasons for the award (*Teman, Damilo v. Norma*,judgmentof 6 January 2011).

III. International Public Policy (Substance)

17. Performance of a contract in good faith is a principle protected by international public policy. This was already held the Court of appeal of Paris in a 1993 case [14] and has been reiterated in *Botas Petroleum Pipeline Corp. v. Tepe Insaat Sanayii*, judgment of 2 December 2010 although in both cases, the argument raised in

12. Court of appeal of Paris, judgment of 29 November 1990, Payart v. Morgan Crucible, Rev. arb. 1991.659 (1st decision), obs. by J. Pellerin ; Cass. 2e civ., 28 February 1990, Rev. arb. 1991.659, obs. by J. Pellerin.

13. Fouchard, Gaillard, Goldman, "On International Commercial Arbitration", nos 1641.

14. CA Paris, 12 jan. 1993, Rép. Côte d'Ivoire v. Norbert Beyrard, Rev. arb. 1994.685.

this regard was dismissed as a mere attempt to review the merits of the case by a dissatisfied party.

18. Three cases address public policy requirements in bankruptcy matters. [15] In *Accor v. Intertraff*, the Court of appeal of Paris, in accordance with prior case law, [16] denied enforcement of an award made in Belgium in violation of the principle of stay of proceedings in insolvency cases (judgment of 12 May 2011). In *ITM v. Chatain ès qualités de liquidateur des sociétés Alizés, Ermivan and Yeres*, the Court of appeal annulled a domestic award which had ruled on the existence and amount of a debt in violation of the appeal provisions concerning the judgment of the bankruptcy Court, which had already adjudicated on the issue submitted to the arbitral tribunal (judgment of 13 January 2011). In the third case, the respondent went into liquidation pursuant to a court decision in Guinea which had been made, according to the arbitral tribunal, in violation of the respondent's procedural rights. In light of the violation of public policy by the foreign decision, the arbitral tribunal's decision that the respondent should be represented by its officers rather than by the receiver appointed by the bankruptcy court did not infringe French international public policy in a "*flagrant, effective and concrete*" manner (*République de Guinée Equatoriale v. Fitzpatrick Equatorial Guinea*, judgment of 7 April 2011).

19. Perhaps the most puzzling decision in the field of public policy review of arbitration awards, in light of the test of a "*flagrant, effective and concrete violation*" is *Smeg v. La Poupardine*, a *Cour de cassation* judgment of 29 June 2011. *Smeg*, a Belgian company, contended in the arbitration that the withdrawal of its grain trade export approval by French public authorities did not conform to European Community Law. However, the arbitral tribunal decided that it lacked competence to assess the validity of the withdrawal decision of the French authorities and the compatibilityof the French Rural Code with European Community Law. The arbitrators, thus paying no attention to European law, decided to avoid the sales contract between *La Poupardine*, a French company, and *Smeg*. The *Cour de cassation* ruled that the reviewing court had no authority to review the decision of the arbitral tribunal and that the arbitrators had complied with their mission by declaring themselves not competent to rule on the compatibility of the withdrawal decision with European Community Law.

20. The matter was one of arbitrability which should be discussed anew before the reviewing court as is the case with all jurisdictional matters in respect of which there is "*no restriction upon the power of the court to examine as a matter of law and in consideration of the circumstances of the case, elements pertinent to the grounds* [for setting aside]". [17] The scope and authority of the reviewing court in relation to the arbitrator's jurisdiction were spelled out again by the *Cour de cassation*in the case of *Pharmetica v. Euronda* of 1st June 2011 but appear to have been lost sight of in *La Poupardine*. Here, the arbitrators avoided the contract after deciding that they lacked

15. Ph. Fouchard, Chronique de jurisprudence française : Arbitrage et faillite", Rev. arb. 2003.207.
16. Fouchard, Gaillard, Goldman, « On International Commercial Arbitration », nº 1662.
17. CA Paris, July 12, 1984, République arabe d'Égypte v. Southern Pacific Properties, 112(1) J.D.I. 129 (1985) (note by B. Goldman) ; 1986(1) Rev. arb. 75.

jurisdiction to rule on the validity of the withdrawal decision by the French authorities. Reviewing the merits of the award as the *Cour de cassation* says in the judgment of 29 June 2011 is not the issue. The issue is one of the jurisdiction or of the absence of jurisdiction of the arbitrators to rule upon the validity of the withdrawal decision in conformity with European law. Such decision is subject to judicial review. Having resolved this first step, the next step is whether, as a consequence of the validity or absence of validity of the withdrawal decision, avoidance of the contract may be decided by the arbitral tribunal. This latter finding is not reviewable by the court and remains within the exclusive province of the arbitrators.

21. The *Cour de cassation*concluded in *La Poupardine*that avoidance of the contract as decided by the arbitral tribunal on the basis of the French Rural Code did not offend international public policy. It has been long decided in French law that the scrutiny of the reviewing court in relation to public policy grounds is exclusive of any substantive review of the award.Instead, such scrutiny focuses on the solution given to the dispute, and the award can only be set aside if its enforcement is contrary to public policy. [18] Because the courts may only conduct such a limited review, the *Cour de cassation* stressed that, to be taken into account, the violation of public policy must be flagrant, effective andconcrete. [19] This seems hardly consistent with the decision in *Smeg v. La Poupardine.* The European Commission had given notice that the provisions of the French Rural Code, on the basis of which the withdrawal decision had been made, did not square with the European Directive on the Freedom of Movement and the French legislation was later amended accordingly. Notwithstanding, the reviewing court held that avoidance of the contract, despite the fact that it did not take into account European Law, did not contradict public policy and this holding was approved by the *Cour de cassation*. The outcome of the *Cour de cassation* judgment in *La Poupardine* could be summarized in the following manner: no violation of public policy can occur in situations where arbitrators base their decision in domestic legislation, even though said legislation is not compatible with European legislation, which they do not apply. If that is true, then the ruling of the *Cour de cassation* is no more than a hackneyed restatement of the requirement of a flagrant, effective andconcrete violation of public policy to justify an annulment.

IV. Existence of a Valid Arbitration Agreement

22. The Court of appeal of Paris and the *Cour de cassation* confirmed their liberal approach to the formal validity of international arbitration agreements, which is now incorporated in the new Article 1507 of the Code of Civil Procedure according to which "*An arbitration agreement shall not be subject to any requirements of form*". A provision in an arbitration clause regarding the possibility to appeal the award which

18. CA Paris, Apr. 5, 1990, Courrèges Design v. André Courrèges, 1992(1) Rev. arb. 110 (note by H. Synvet) ; 1991(3) Rev. crit. DIP 580 (note by C. Kessedjian).

19. See SNF, Cass. 1st civ., June 4, 2008, Rev. arb. 2008.473, note by I. Fadlallah, See D. Hascher and B. Castellane, "French Case Law Annual Report", p. 1023, *supra*.

is not permitted in French international arbitration law is to be regarded as null and void (*Dyncorp v. International Trading and Industrial Investment*, judgment of 4 November 2010). This judgment confirms the change in the radical position once adopted by the Court of appeal of Paris which invalidated the entire arbitration agreement because it was incompatible with the rules governing judicial recourse against an international arbitration award, where re-examination of the merits of the dispute, such as in an appeal, is inadmissible. [20]

23. In *Facciano v. Sté Coopérative Agricole Nouricia*, the claimant argued that the arbitration agreement in a standard form contract to which the contracts concluded through a broker referred, did not comply with the written form requirement of Articles I and II of the 1958 New York Convention. The Court of appeal of Paris tersely answered that the New York Convention was not applicable in the case and ruled that, notwithstanding the absence of the claimant's signature, the claimant had raised no protest when it received the seven confirmations of contract which it had proceeded to perform (judgment of 9 June 2011. See also, *Brunot v. Ruze*, *Cour de cassation* judgment of 20 October 2010 upholding the validity of an arbitration agreement contained in the sales confirmation of a contract orally concluded following a longstanding business relationship between the parties). A word of explanation is needed regarding the New York Convention: it is not applied in France , in accordance with Article VII(1) of the Convention, because the liberal approach to the formal validity of arbitration agreements in French law is more favorable than the New York Convention standards. [21]

24. The claimant contended in *Möllers v. Al Khaleej Sugar Company* that Article 24 of the ICC Arbitration Rules does not confer on the International Court of Arbitration ("ICC Court") a discretionary power to extend the time limit for the award and that it only discovered in the award that the ICC Court had extended three times the six month time limit set out in Article 24 of the Rules for the making of the award. The claimant alleged that the parties had not been informed of these time extensions and raised doubts about whether such time extensions had actually been made by the ICC Court. The judgment of the Court of appeal of Paris brushes the argument aside, holding that the extensions had been made according to the ICC Rules which confer upon the ICC Court an organizational authority in this regard. It is a well settled question in French arbitration law that decisions of the ICC Court are of an administrative nature and that those made in connection with extension of the time-limit to render the award need not be communicated to the parties, [22]because the arbitration institution is acting on behalf of both parties in its administrative role. In conclusion, the arbitration agreement had not lapsed when the award was rendered (judgment of 12 May 2011). A party who challenged the jurisdiction and constitution of the arbitral tribunal during the arbitration proceedings had not waived its right to

20. CA Paris, 19 october 2000, Rev. arb. 2005.859, note by L. Jaeger.

21. Cass. 1re civ., 9 November 1993, Bomar Oil v. ETAP, Rev. arb. 1994.108, note by C. Kessedjian ; JDI 1994.690, note by E. Loquin.

22. Cass. 2e civ., 8 June 1983, Appareils Dragon, Rev. Arb. 1987.309.

raise the expiry of the arbitration agreement in annulment proceedings although it continued to participate in the arbitration proceedings after the expiry of the six months time period laid down in French domestic arbitration law for the making of an award (Cass. 1re civ., 22 September 2010, *Banque Delubac v. CFCMNE*). [23] Failure to raise the expiry of the arbitration agreement before the arbitrators should have been considered as giving rise to an estoppel in setting aside proceedings, [24] however the holding of the Cour de cassation may be explained by the broad scope of the first ground of annulment of (former) Article 1484-1° of the Code of Civil Procedure which encompassed both expiration and absence of the arbitration agreement.

25. The case law of the *Cour de cassation* provides further illustrations of the competence – competence principle in French arbitration law. According to the said principle, which is now codified at Article 1448 of the Code of civil procedure after the 2011 Reform, courts are prohibited from ruling on the arbitrators' jurisdiction with the sole exception of manifest invalidity or inapplicability of the arbitration agreement. [25] Judgments of lower courts which decided, contrary to that principle, that the arbitration clause was not applicable because the arbitrator had not yet been seized and because some of the parties were not signatories to the contract containing the arbitration clause (*Blonde génétique and France Blonde d'Aquitaine v. SCEA Plante Moulet and Cartaud, Cour de cassation* judgment of 6 October 2010) or because the party who disputed the arbitration agreement in a document written in Spanish subsequent to the initial contract was unaware of the clause (*Lehimosa v. Scala, Moteurs Baudouin, Tallares Mecanicos Bacare, Axa, Winterthur and Catalana Occidente Seguros y Reaseguros, Cour de cassation* judgment of 4 November 2010) have accordingly been quashed.

26. Another rule of French arbitration law regards the assignment of arbitration clauses which are held to apply to the parties to which the contract has been transferred [26] irrespective of the validity of the assignment of the contractual rights. [27] In *Refcomp v. Axa, Emerson and Climaveneta*,a contract between the supplier of an air conditioning device and one of the manufacturers of said device contained an arbitration agreement. The *Cour de cassation*, following what it had earlier decided in a chain of contracts situation, [28] ruled that the Court of appeal was right in deciding that *in a chain of contracts for the transfer of goods, the arbitration agreement is automatically assigned as accessory to the parties' right of action which itself is accessory to the substantial right assigned with the contract*" (judgment of 17 November 2010).

27. The *Southern Pacific Properties Ltd. v. Republic of Egypt* judgment of the *Cour de cassation* ("The Pyramids Oasis case") declared that the reviewing court was under

23. The Paris Journal of International Arbitration 2011-2, p. 453, note by L. Jaeger.
24. See *supra*, note 8.
25. D. Hascher and B. Castellane, French Case Law Annual Report", p. 1019, *supra*.
26. Cass. 1re civ., 6 February 2001, *Peavy v. OGF*, Rev. arb. 2001.765, note by D. Cohen. J.-L. Delvolvé, G. Pointon, J. Rouche, French Arbitration Law and Practice, Kluwer, 2009, p. 73.
27. Cass. 1st civ., 28 May, 2002, CIMAT, Rev. arb. 2003.397, note by D. Cohen, J.-L. Delvolvé, G. Pointon, J. Rouche, French Arbitration Law and Practice, *supra*, p. 73.
28. J-L Delvolve, G. Pointon, J. Rouche, French Arbitration Law and Practice, *supra*, pp. 75-76.

no restriction regarding its power to examine as a matter of law and in consideration of the circumstances of the case, the elements pertinent to the issue whether the arbitrator had ruled in the absence of an arbitration agreement or on the basis of an agreement that was void or had expired. [29] The judgment of 1 June 2011 rendered by the *Cour de cassation* in *Pharmethica v. Euronda* accordingly recalls that the arbitrator's decision on jurisdiction, which is reviewable by the courts, is not final. The Court of appeal of Paris had clarified, in earlier case law, that due to the restrictive language of Article 1502-1º which envisaged only the absence of an arbitration agreement, the situation where an arbitral tribunal declared itself not to have jurisdiction, not with standing the existence of an arbitration agreement, should be reviewed under the third ground of former Article 1502 (1502-3º) which addressed the situation where the arbitrator failed to comply with the mission conferred upon him or her. [30] The 2011 reform has now introduced a new Article 1520-1º which reads that an award may be set aside (or denied enforcement) where the arbitral tribunal has wrongly upheld or declined jurisdiction. The same ground for setting aside applies now to both situations. The judgment of the *Cour de cassation* of 6 October 2010 in *Abela* [31] as far as it concerns the former Article 1502-3º in relation to a finding of no jurisdiction is still of relevance today, when it stresses that the scope of the reviewing court's power over decisions of arbitrators pertaining to jurisdiction is unfettered, as decided in the Pyramids Oasis case. The same applies to the judgment of the Court of appeal of Paris of 18 November 2010 in *Gouvernement de la Région de Kaliningrad v. République de Lituanie* approving an ICC award which declined jurisdiction under the arbitration provisions of the BIT between Russia and Lithuania over a dispute relating to the seizure of assets for payment of an LCIA award which had been enforced by the Lithuanian courts in compliance with the New York Convention.

28. Turning now to the case law of the Court of appeal of Paris, the extension of an arbitration agreement to non-signatories clearly illustrates the extent of the reviewing court's power over the decision of the arbitral tribunal. In *Kosa France Holding and Invista v. Rhodia and Rhodianyl* of 5 May 2011, the Court of appeal of Paris decided that the arbitration clause in a joint-venture agreement between *Kosa* and *Rhodianyl* applied to *Invista* and *Rhodia* although they were non-signatories. The Court reasoned that several officers of these non–signatory companies participated as their company representatives in the administration of the joint-venture. Although formally non-signatories, these companies behaved as members of the joint-venture. Less felicitously, the Court revived language which it used in the 1980's before the substantive rules governing arbitration agreements were carved out in the 1990's by

29. Cass. 1re civ., 6 January 1987,Rev. Arb.1987.469 , note by Ph. Leboulanger and JDI 1987.638, note by B. Goldman. See former Article 1502-1º of the Code of Civil Procedure.

30. CA Paris, 16 June 1988, Swiss Oil v. Petrograb, Rev. arb. 1989.309, note by Ch. Jarrosson ; CA Paris, 21 June 1990, Honeywell Bull v. Computacion Bull de Venezuela, Rev. arb. 1991.96, note by J-L Delvolvé ; CA Paris, 7 July 1994, Uzinexportimport Romanian Co. v. Attock Ciment, Rev. arb. 1995.107, note by S. Jarvin.

31. Cass. 1st civ., 6 October 2010, Rev. arb. 2010.813, note by F-X Train ; The Paris Journal of International Arbitration 2011-2, p. 443, note by J-B Racine.

the *Cour de cassation* in the Dalico and Zanzi cases. [32] Such language states that *an arbitration clause in an international contract has a validity and an effectiveness of its own, such that the clause must be extended to parties directly implicated in the performance of the contract and in any disputes arising out of the contract*". [33] This expression, which does not mean much in itself, should only be understood to mean that the validity of an arbitration agreement is assessed independently of all national laws and should rest solely on the consent of the parties.

29. The judgment of the Court of appeal of Paris of 17 February 2011 in *Gouvernement du Pakistan v. Dallah* provides an interesting view of an extension of an arbitration agreement to non-signatories. The facts of the case are now well-known. *Dallah*, a Saudi firm, entered into a contract with a trust set up by the Pakistani Ministry of Religious Affairs for the construction and lease for 99 years of accommodation for Pakistani pilgrims in Mecca. The trust ceased to exist a few weeks before the termination of the contract because of *Dallah*'s purported failure to perform. According to the arbitration agreement in the contract, *Dallah*started an ICC arbitration in Paris against the Government of Pakistan which unsuccessfully challenged the jurisdiction of the arbitral tribunal. The three awards made by the arbitral tribunal were challenged by the Government of Pakistan before the Court of appeal of Paris for want of jurisdiction. The Government of Pakistan contended that there never was a common intent of the parties to include the Ministry of Religious Affairs as a contractual party.

30. Extension to the State of an arbitration agreement in a contract signed by a legally independent entity had already been addressed by the French courts in the Pyramids case. [34] The Republic of Egypt similarly disputed that is was bound by the arbitration clause and was successful before the Court of appeal of Paris which annulled the award. The Court of appeal held that the words "approved, agree, ratified" added to the last page of the contract above the signature of the Egyptian Minister of Tourism meant no more than an administrative approval required by Egyptian law. There was no implied intention of the State to be bound by the arbitration clause. How does the outcome of the *Dallah* case differ from the holding in the Pyramids case? The judgment of the Court notes that the Government of Pakistan was involved in the negotiation, performance and termination of the contract with *Dallah*. The Court of appeal does not limit its finding to the negotiation stage in which the Ministry of Religious Affairs was exclusively involved and to the later approval of the contract by the representatives of the Government of Pakistan. It went on to state that two officials of the Ministry of Religious Affairs intervened during the performance stage, with two letters addressed to *Dallah* on the financing and advertising of the

32. Cass. 1re civ. , Dalico, 20 December 1993, Rev. arb. 1994. 116, note by H. Gaudemet-Tallon, JDI 1994.432, note by E. Gaillard and Zanzi, 5 January 1999, Rev. arb. 1999.260, note by Ph. Fouchard. See E. Gaillard, « Aspects philosophiques du droit de l'arbitrage international », Académie de droit international de La Haye, Martinus Nijhoff, 2008 ; J-B Racine, « Réflexions sur l'autonomie de l'arbitrage commercial international », Rev. arb. 2005.305.

33. Fouchard, Gaillard, Goldman, On International Commercial Arbitration", nº 505.

34. Cass. 1re civ., 6 January 1987, *supra*.

project and the judgment stresses that this interference cannot be explained by their official duties. The Court carefully notes that the legal existence of the Trust was not extended by the Pakistani Government and that one month later, the contract was terminated under the letter-head of the Ministry by the Secretary of the Ministry of the Religious Affairs, who was also the Trust Secretary. The Government of Pakistan reminded the Court that the award had been refused enforcement in the United Kingdom, an argument which appears not to have been taken into consideration by the French Court.

31. In the United Kingdom as in France, courts conduct an independent and full examination of the arbitral tribunal's findings on jurisdiction. The United Kingdom courts decided,contrary to the French courts, that the Government of Pakistan was not bound by the arbitration agreement, relying on the structure of the contract which had been made and agreed between *Dallah* and the Trust exclusively. [35] An example of a decision where the *Cour de cassation* agreed that the arbitration agreement should not be extended to the State is provided in Cass. 1st civ., 29 June 2011, *Papillon Group Corp. v. République arabe de Syrie*. In this case, evidence of the Republic of Syria's intent to be bound by the arbitration agreement in the contract which only created obligations between the signatory parties, *Papillon Group Corp.* and *Golan*, was not adduced, although one of the parties acted as an agent for a State Syrian Committee which was responsible for the delayed performance of the contract with *Golan*.

32. In *République de Guinée Équatoriale v. Commercial Bank Guinea Ecuatorial*, the Court of appeal of Paris held that the authority of the signatory of the contract containing the arbitration clause should not be ascertained according to the requirements of a particular national law but according to a factual analysis of the circumstances of the case as to whether the other party could, without fault, legitimately believe in the existence of such power. The Republic of Guinea argued that it had not agreed to the arbitration agreement because no mention of its representative was made in the contract and, therefore, proof of its consent was not adduced. To the contrary, the Court remarked that the cabinet member who had signed the contract for the opening of a bank in Guinea was also the Guinean Monetary Authority at the time of the contractual negotiations. The Court found that the alleged lack of authority of the apparent representative of the Republic of Guinea was no basis to invalidate the arbitration clause. The Republic of Guinea also contended that non-compliance with the formal conditions required in its own legislation for the execution of a contract by a cabinet member invalidated both the contract and the arbitration clause. The Court of appeal recalled the principle of separability of the arbitration agreement from the contract in which it is included, recognized in French arbitration law [36] and also enshrined in the OHADA Uniform Arbitration Act applicable in Guinea (judgment of 18 November 2010). [37]

35. D. Khanna, Dallah : The Supreme Court's Positively Pro-Arbitration No "to Enforcement", Journal of International Arbitration 28(2) : 127-135, 2011.

36. See also Article 1447 of the Code of Civil Procedure.

37. Other case law reports can be consulted : D. Bensaude, Chronique en droit de l'arbitrage, Gazette du Palais, 15-17 May 2011, p. 13 ; Petites Affiches, Chronique droit de l'arbitrage (under the supervision of Th. lay), 21-23 February 2011, nos. 36-38 ; Th. lay, Panorama Arbitrage, D. 2010.2933 ; J. Béguin, J. Ortscheid, Ch. Seraglini, « Droit de l'arbitrage », JCP 2010.2403.