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1. The provisions of the Decree of 13th January 2011 which have amended French Arbitration Law have gradually come into effect [1]. Yet, the judgments of the *Cour de cassation* make no reference to them because the decisions before it were made prior to the amendments coming into force in January 2011. Pending the first rulings of the *Cour de cassation* on the application and interpretation of the newly enacted provisions, the judgments of the lower courts have not been reported [2] and the French Case Law Report for 2012 focuses on the judgments of the *Cour de cassation* alone.

Existence of a Valid Arbitration Agreement

2. Incorporation of arbitration clauses in a contract signed by the parties by reference to another document in which the arbitration clause is inserted is a recurring issue in arbitration law. Article II of the 1958 New York Convention, which sets out formal conditions for the validity of an arbitration agreement by requiring an agreement in writing, stipulates that "the term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams" [3]. The above definition of a written agreement in Article II(2) does not specifically address the incorporation by reference to an arbitration agreement. The validity of such clauses under the New York Convention, to which France is one of the signatories, has therefore given rise to an extensive interpretative case law [4].

3. An international consensus among the courts of the New York Convention Contracting States has gradually emerged that arbitration clauses in standard conditions are considered valid under Article II(2) of the New York Convention when

1. See Article 3 of the Decree of 13 January 2011.
2. Extracts of lower court decisions have been published in this Journal (A. Mourre and P. Pedone, "Panorama", 2012, vol. 1, p. 193, vol. 2, p. 409) and in other publications (D. Bensaude, Gazette du Palais, 13-17 July 2012, Th. Clay (dir.), Petites Affiches, 17 July 2012, n° 142).
3. Article II (2) of the New York Convention.
4. A.-J. van den Berg, *The New York Arbitration Convention of 1958*, Kluwer, 1981.

specific attention is drawn to the existence of the arbitration clause, unless the parties have a continuing trade relationship, in which case, a general reference is sufficient [5].

4. French International Arbitration Law on the matter was not codified in the 13 January 2011 reform which only provides that arbitration agreements are not subject to any requirements as to form [6]. It was set out in the case law of the *Cour de cassation* in the Bomar judgment of 2 November 1993 [7]. In that case, Bomar contended that it had not agreed to the arbitration clause included in the sales conditions of ETAP because no specific reference to the arbitration clause had been made in the exchange of telexes between the parties in the absence of any prior business relation between them. The *Cour de cassation* held that "in international arbitration, an arbitration clause whose existence depends on a *written reference* to a document in which it is contained, for example general conditions or a standard-form contract, is valid even if it is not mentioned in the main agreement, provided that the party who contests it was aware of the terms of such document at the time when the contract was concluded, and accepted, albeit by remaining silent, incorporation of that document into the main agreement" [8]. This means that incorporation by reference of an arbitration clause must be directly asserted according to the above cited rule set forth in the Bomar judgment, regardless of the application of national law.

5. The Bomar decision of 1993 makes no mention of the New York Convention and must be understood in the context of the most favored rule of Article VII(1) of the New York Convention which reserves the right of a party to avail itself of an arbitral award in the manner and to the extent allowed by the law of the country where such an award is sought to be relied upon [9]. The Bomar judgment extends the scope of Article VII(1) both to the validity of an arbitration agreement which is regulated by Article II of the New York Convention independently of Article V on recognition and enforcement of awards and to an annulment action of an award which is not contemplated by the New York Convention.

6. The mention of a written reference clause in the Bomar judgment should not be understood as an exclusion of the tacit acceptance of an arbitration agreement. This would otherwise nullify all efforts to make arbitration clauses by reference valid in spite of the strict wording of the New York Convention. The written reference should instead be interpreted as an indication that the reference clause needs to be evidenced in some way or other. The Bomar judgment was later slightly relaxed in the Prodexport judgment of 3 June 1997 in which the *Cour de cassation* suppressed all mention of a

5. A.-J. van den Berg, "Consolidated Commentary", Yearbook Commercial Arbitration, XXVIII, 2003, Kluwer Law International, pp. 589-591.

6. Article 1507 of the Civil Code of Procedure. Article 1443 of the Code of Civil Procedure provides for domestic arbitration that "In order to be valid, an arbitration agreement shall be in writing. It can result from an exchange of written communications or be contained in a document to which reference is made in the main agreement."

7. Cass. 1st civ., 2 November 1993, Rev. arb. 1994.108 (note by C. Kessedjian).

8. J.-L. Delvolvé, G. Pointon, J. Rouche, *French Arbitration Law and Practice*, 2nd ed., Wolters Kluwer, 2009, pp. 64-65.

9. "Consolidated Commentary", Yearbook Commercial Arbitration, XXVIII, 2003, Kluwer Law International, pp. 670-677.

reference in writing to hold that "an arbitration clause whose existence depends on a reference" and no more "on a written reference" [10].

7. The Prodexport judgment was decided on the basis of Article 1134 of the French Civil Code on contractual freedom which reads: "Agreements made legally take the place of law for those who make them. They may be revoked only by mutual consent or for causes which the law authorizes. They must be executed in good faith". The Bomar judgment disregards any possible application of a national law to the formal validity of an arbitration clause. It explains in the context of the development of French case law at the time when the *Cour de cassation* in a contemporaneous judgment, Dalico decided on 20 December 1993, only a few weeks later than the Bomar judgment. In Dalico, the *Cour de cassation* held that "by reason of a substantive rule of international arbitration law, an arbitration clause is legally independent of the main contract in which it is contained or to which it refers; its existence and effectiveness must be judged, subject only to mandatory rules of French law and international public policy, in accordance with the common intention of the parties there to, there being no need to refer to the law of any State" [11]. The indication of Article 1134 of the French Civil Code in the Prodexport judgment should not been taken to mean that the Court implicitly admitted that French Law governed the arbitration agreement. If this were true, the use of the substantive law method for regulating the question of incorporation by reference of an arbitration agreement would become meaningless as the solution devised by the *Cour de cassation* in the Bomar judgment could only operate if French Law applied in the first place. In light of the foregoing, a possible explanation for the reference to Article 1134 of the French Civil Code in the Prodexport judgment could lie in the Court's intention to stress the importance of the parties' common will as ground for the validity of the arbitration agreement. This plausible explanation would comport with the validity of an arbitration agreement, inferred in Dalico, from the parties' intentions alone and which culminated in the principle of validity of an arbitration agreement stated in the Zanzi judgment of the *Cour de cassation* on 5 January 1999 [12].

8. As in Prodexport, the *Cour de cassation* judgment of 11 May 2012 in *Ekato Ruhr und Mischtechnik v. Nipponkoa Insurance Company Europe* was decided on the basis of Article 1134 of the French Civil Code. This decision raises the application of French law to the validity of an arbitration agreement contained in the General Conditions LW 188 drafted by the UN Economic Commission for Europe referred to in the sales confirmation of the German seller. While, as seen in Prodexport, grounding the Court's reasoning on Article 1134 of the French Civil Code is more confusing than clarifying

10. Fouchard, Gaillard, Goldman, *On International Commercial Arbitration*, ed. by E. Gaillard and J. Savage, Kluwer Law International, 1999, pp. 273-277.

11. Cass. 1st civ., 20 December 1993, Rev. arb. 1994.116 (note by H. Gaudemet-Tallon), JDI 1994.432 (note by E. Gaillard), Rev. crit. DIP 1994.663 (note by P. Mayer), (note by E. Loquin). J.-L. Delvolvé, G. Pointon, J. Rouche, *French Arbitration Law and Practice*, 2nd ed., Wolters Kluwer, 2009, pp. 40-41.

12. Fouchard, Gaillard, Goldman, *On International Commercial Arbitration*, ed. by E. Gaillard and J. Savage, Kluwer Law International, 1999, pp. 214-217.

for the application of the substantive rules incorporating the solutions of French international arbitration law to the validity of arbitration agreements, and particularly arbitration agreements by reference, reliance on the French Civil Code in Ekatomay still be taken as an inadvertent drafting on the part of the Court.

9. However, in another judgment on 26 October 2011, *Constructions mécaniques de Normandie v. Fagerdala Marine Systems*, the *Cour de cassation* yet again relied on Article 1134 of the French Civil Code for holding that the arbitration agreement of the contract signed between a French company and a Swedish company extends to the German sub-contractor of the Swedish company who knew of the existence of the arbitration agreement when it signed the sub-contract and who also participated in the performance of the initial contract. The discussion turns here on the extension of an arbitration agreement in the context of a group of contracts which is indeed a different matter from the validity of an arbitration clause by reference [13]. Not surprisingly though, French International Arbitration Law is also committed in this domain to a rule of substantive international arbitration law discovered by case law according to which the intention of the parties to refer to arbitration all disputes arising out of a set of related contracts must be ascertained independently of the idiosyncrasies of national laws [14]. The rule spelled out in a 1994 judgment states: "the effects of the arbitration clause extends to parties directly involved in the performance of the contract, provided that their respective situations and activities raise the presumption that they are aware of the existence and scope of the arbitration agreement, so that the arbitrator can consider all economic and legal aspects of the dispute" [15]. We prefer to leave open the question as to whether the judgments in Ekato and Constructions mécaniques de Normandie are copycat decisions of Prodexport or purposeful decisions to apply French Law as the governing law. If the latter were to be the case, these two judgments would revivify two earlier isolated decisions which had recognized that the conflict of laws method may still play a role when the existence and validity of an arbitration agreement is an issue [16].

Court Support of Arbitration

10. Support to arbitration by State courts has been one of the characteristic features of French arbitration law. This role is now recognized after the 2011 Reform in Articles 1459 and 1505 of the French Code of Civil Procedure. The court acting in

13. D. Cohen, « Arbitrage et groupe de contrats », Rev. arb. 1997.471.

14. Fouchard, Gaillard, Goldman, *On International Commercial Arbitration*, ed. by E. Gaillard and J. Savage, Kluwer Law International, 1999, pp. 301-306. F.-X. Train, *Les contrats liés devant l'arbitre du commerce international*, LGDJ, 2003.

15. CA Paris, Jaguar, 7 December 1994, RTD com. (obs. Dubarry and E. Loquin) ; Fouchard, Gaillard, Goldman, *On International Commercial Arbitration*, ed. by E. Gaillard and J. Savage, *Kluwer Law International*, 1999, p. 282, aff'd, Cass. 1re civ., 21 May 1997, RTD com. 1998.330, (obs. by E. Loquin).

16. Cass. 1re civ., 10 July 1990, "L.-B. Cassia v. Pia Investments Ltd.", Rev. arb. 1990.851 (note by J.-H. Moitry and C. Vergne) and 30 March 2004, "Uni-Kod v. Ouralkali", Rev. arb. 2005.959 (note by Ch. Seraglini).

support of arbitration is principally called to constitute the arbitral tribunal or to resolve disputes in this regard if the parties fail to agree in the absence of an administering authority. In the case of Elf Neftegaz, the *ad hoc* agent of Elf Neftegaz, which went into liquidation, nominated a co-arbitrator in accordance with the UNCITRAL arbitration clause of an oilfield exploitation agreement. The mandate of the *ad hoc* agent was however later set aside by the commercial court and Total, the parent company of Elf Neftegaz, requested an injunction from the court to halt the arbitration proceedings because it contended that the nomination of the co-arbitrator and of the president of the Arbitral Tribunal appointed jointly by the co-arbitrators was void. In its judgment of 12 october 2011, the *Cour de cassation* agreed with the appellate court that the French courts could not interfere in the arbitral proceedings located in Stockholm with the Arbitration Institute of the Stockholm Chamber of Commerce acting as the appointing authority under the arbitration clause. The rationale of the judgment is that an Arbitral Tribunal is equated to an international tribunal and considered to operate with complete autonomy from the national legal orders and municipal courts. This is consonant with the "hands off" approach that was first adopted in the République de Guinée case by the French courts in the 1980's [17]. It could also be added that the competence-competence rule places within the exclusive province of the arbitral tribunal any decision regarding the regularity of its constitution before the French Courts can issue a ruling on the subject when reviewing the award.

Amiable Compositeur

11. In *GAT v. The Republic of Congo,* judgment of 12 october 2011, the *Cour de cassation* held that arbitrators, who reduced the contractual rate of interest below the legal rate of interest, have acted as *amiable compositeurs* although they had not been conferred such powers by the parties. One important commentator, Professor Éric Loquin, has expressed some doubts about the deduction from the solution reached by the arbitrators on the interest rate that the Arbitral Tribunal "*necessarily*" acted as an *amiable compositeur* [18]. This abrupt reasoning of the *Cour de cassation* explaining that the contractual rate of interest cannot be diminished, aside from Article 1244-1 of the Civil Code, enabling the determination of a rate of interest no less than the legal rate of interest by taking into account the situation of the debtor and the needs of the creditor, may give the impression of a disagreement with the arbitrators on the ground of an error of law regarding the application of French Law. The correct application of the law by international arbitrators is however traditionally not reviewed by French Courts [19].

12. The *Cour de cassation* confirmed in a judgment of 1 February 2012, *Gascogne Paper v. EDF* [20], that when the parties have conferred to the arbitral tribunal the powers

17. Rev. arb. 1988.657 (note by Ph. Fouchard).
18. Rev. arb. 2012.91 (note by E. Loquin).
19. S. Crépin, *Les sentences arbitrales devant le juge français*, LGDJ, 1995.
20. Rev. arb. 2012.91 (note by E. Loquin).

of *amiable compositeur* [21], the arbitral tribunal has an obligation to apply such powers and must therefore indicate in the award that it has taken fairness into account. The *Cour de cassation* has a firmly established policy since the 2000s that an *amiable compositeur* clause is not of an exhortatory nature but has a compulsory character. The arbitrators must therefore explain in their award why their decision is fair.Such control on the part of the State courts, although it adds to the monitoring task of the court, is in no way a review of the appropriateness of the reasoning followed by the arbitrators in the award about their sense of fairness [22]. The court is only asked to check whether the arbitrators have indeed used their powers of *amiable compositeurs*; it is not required to agree with the decision reached by the arbitral tribunal.

Due Process and International Public Policy

13. The procedural timetable drawn up by the Arbitral Tribunal for the conduct of the proceedings may give rise to a number of issues regarding due process when applied by the Tribunal. In a judgment of 20 June 2012 (*CMA v. Adjor Sofal Nemoneh Pars*), the *Cour de cassation* agreed with the judgment of the Court of Appeal that no violation of due process exists when the arbitrator has relied on one exchange of written pleading as was discussed and agreed to by the parties in the procedural timetable. On the other hand, an Arbitral Tribunal is under no obligation to organize a second set of oral pleadings and may validly decide on the basis of the arguments made by the parties in the absence of a procedural timetable which would provide otherwise (judgment of 6 June 2012, *X and Y v. SCEA Domaine de la Petite Vennerie*).

14. Bankruptcy rules have always been considered as part of substantive international public policy whose violation by the arbitral tribunal leads to the setting aside or refusal of enforcement of the award [23]. In light of the equal treatment of unsecured creditors, the *Cour de cassation* has in two decisions of 28 September 2011, *Carrefour Proximité France v. Le Castel* and *CSF v. Le Castel*, approved the lower court decision to set aside an award which ordered the insolvent debtor to pay the creditor whose claim had not been registered with the administrator.

Award (Definition)

15. French Arbitration Law sets out, after the reform of 13 January 2011, that an Arbitral Tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set the conditions for such measures and, if necessary, attach

21. Article 1512 of the Code of Civil Procedure "The arbitral tribunal shall rule as *amiable compositeur* if the parties have empowered it to do so".

22. D. Hascher and B. Castellane, "French Case Law Annual Report", Les Cahiers de l'Arbitrage, 2010-4, pp. 1021-1022.

23. Fouchard, Gaillard, Goldman, *On International Commercial Arbitration*, ed. by E. Gaillard and J. Savage, Kluwer Law International, 1999, pp. 960-962.

penalties for such order [24]. It does not however determine whether the arbitral decision should be made in the form of an award or of a procedural order. In the judgment of 12 October 2011, *GAT v. The Republic of Congo* [25], the Court agreed with the appellate court that a decision of the Arbitral Tribunal ordering one party to deposit,with the head of the bar, a sum in excess of that received from a third party before the setting up of an escrow account, is not an award. As a consequence, no action to set aside lies against this decision. Where provisional measures are concerned, prior case law recognizes that arbitrators enjoy ample latitude to decide the matter by way of an award or by way of a procedural decision [26]. The Court stated that an award is a decision of the Arbitral Tribunal which resolves in a final manner, whether partially or totally, the dispute submitted to the arbitral tribunal on the merits of the dispute, on the competence of the tribunal, or on procedural grounds which end the arbitral proceedings [27]. It should be said that the court may always characterize the decision of the arbitrators whatever the title given by them to their decision.

24. Article 1468 of the Code of Civil Procedure.
25. Rev. arb. 2012.86 (note by F.-X. Train).
26. CA Paris, 7 october 2004, Otor, Rev. arb. 2005.737 (note by E. Jeuland).
27. See also Cass. 1re civ., 17 June 2009, Credirente v. Compagnie générale de garantie, Rev. arb. 2009.741 (note by C. Chenais).