
French Law and Arbitration Clauses — Distinguishing Scope from Validity: Comment on *ICC Case No. 6519 Final Award*

Serge Gravel* and Patricia Peterson**

This comment examines the treatment of two jurisdictional issues in a recent French law arbitration award rendered under the Rules of Arbitration of the International Chamber of Commerce. The first challenge to jurisdiction concerned the application of the *groupe de sociétés* theory to the arbitration clause. This theory has been used in France to justify the application of an arbitration clause to claims made by or against companies that belong to the same corporate group as a party to the contract. The authors observe that the approach taken to this problem is inspired by cases concerning the validity of arbitration clauses. These cases have tended to resolve problems of validity of an arbitration clause without reference to the law governing the contract in which the clause appears. The authors argue that this reasoning is inappropriate for problems of scope, which must be resolved by application of the governing law of the contract.

The second challenge to jurisdiction arose from the application of an arbitration clause, contained in a contract which never came into force, to claims framed in tort. The authors suggest that the validity or existence of the arbitration clause in this context must be considered separately from that of its scope. They argue that, on the basis of the French principle of *autonomie* of the arbitration clause, the clause should be enforceable in this instance. The question of the scope of the arbitration clause must, however, be determined by an interpretation of the clause itself.

Ce commentaire examine le traitement de deux questions de juridiction dans une décision arbitrale rendue récemment en droit français selon les règles d'arbitrage de la Chambre de Commerce Internationale. La première mise en cause de la juridiction concernait l'application de la théorie du groupe de sociétés à la clause d'arbitrage. Cette théorie a été utilisée en France pour justifier l'application d'une clause compromissoire à des réclamations faites par ou contre des compagnies qui appartiennent au même groupe corporatif comme partie au contrat. Les auteurs notent que l'approche est inspirée par des cas concernant la validité de clauses d'arbitrage qui sont généralement résolus sans référence au droit qui gouverne le contrat contenant la clause. Les auteurs soutiennent que ce raisonnement est inapproprié pour des problèmes de portée, qui doivent être résolus par l'application de la loi qui gouverne le contrat.

La seconde question est liée à l'application de la clause d'arbitrage contenue dans un contrat jamais mis en vigueur lors de poursuites en responsabilité civile. Les auteurs suggèrent que la validité ou l'existence de la clause d'arbitrage dans ce contexte doit être considérée séparément de sa portée. Ils soutiennent que selon le principe français d'autonomie de la clause d'arbitrage, la clause devrait être applicable en l'espèce. La question de la portée de la clause doit cependant être déterminée par une interprétation de la clause elle-même.

* Member of the ICC International Court of Arbitration; Partner, Lebray, Gaillot & Gravel, Paris; French Counsel to Ogilvy Renault, Montréal.

** Linklaters & Paines, Paris.

Synopsis

Introduction

- I. The Facts of the Award in *ICC Case No. 6519*
- II. The First Challenge: The *Groupes de Sociétés* Theory
 - A. *The Dow Chemical Arbitral Interim Award*
 - B. *The Decision of the Paris Cour d'appel*
 - C. *Autonomie of the Arbitration Clause*
 - D. *The Role of the Will of the Parties*
 - E. *Application of the Lex Mercatoria*
 - F. *The Reasons of the Arbitral Tribunal in ICC Case No. 6519*
- III. The Second Challenge: Application of the Arbitration Clause to Claims Framed in Quasi-Delict

Conclusion

* * *

Introduction

The contractual foundation of arbitration has proved to be a source of both flexibility and limitation. Important issues such as procedural rules, the law to be applied to the merits and the scope of the arbitral tribunal's powers can all be settled by agreement of the parties. The limitations of arbitration are, however, derived from the fact that in relation to many issues, the agreement of the parties is necessary and this is difficult to obtain when they are in conflict.

An agreement to resolve a dispute by arbitration amounts, in most instances, to a waiver of one's fundamental right to have a state court consider a case on its merits. For this reason, French law has always treated arbitration as an exception. This attitude is well illustrated by article 2061 of the *Code civil*¹ which states that an arbitration clause is null and void unless otherwise provided by law.

¹"La clause compromissoire est nulle s'il n'est disposé autrement par la loi."

The origins of the principle embodied in this provision can be found in an *arrêt de principe* of the Cour de cassation of 10 July 1843 (Cass. civ., 10 July 1843, S.1843.II.561). In this case the Cour de cassation held that, apart from maritime insurance contracts which were specifically dealt with in the *Code de Commerce* of that time, arbitration clauses were null and void. The validity of an arbitration clause in commercial matters was not introduced until 1925 by the law of 31 December 1925 (art. 631 of the *Code de Commerce*). An arbitration clause is therefore prohibited in civil matters. It will be noted, however, that French law distinguishes between an arbitration clause and a "*compromis*," which is an agreement to submit a dispute to arbitration after it has

Nevertheless, as arbitration becomes a prominent method of dispute resolution in the international commercial context, an erosion of certain fundamental principles of French law has occurred. Reforms made to the *Nouveau Code de procédure civile* in 1981 established a set of rules for international arbitration which is far more liberal than the rules which regulate domestic arbitration, making the distinction between the two critical.² The importance of this distinction does not date, however, from 1981.³ French jurisprudence relating to the validity and effects of an agreement to arbitrate has, particularly since the *arrêt de principe* of the Cour de cassation in *Établissements Raymond Gosset v. Société Carapelli*,⁴ relied heavily upon it to side-step the rigours of French law.

The decision in the *Gosset* case conferred upon agreements to arbitrate contained in contracts with an international dimension their much discussed "*autonomie*." The confusion as to precisely what the concept of *autonomie* means continues to surface in relation to a variety of issues connected to the jurisdiction of an arbitral tribunal. A recent award made by three French arbitrators appointed under the Rules of Arbitration of the International Chamber of Commerce (ICC) raised two such jurisdictional issues.⁵ The first related to the extension of an arbitration clause to entities within a group of companies which had not signed the relevant contract. The second concerned the application of the arbitration clause to claims framed in quasi-delict arising out of an agreement which had never entered into force. This comment will be confined to an examination of the two challenges to jurisdiction, leaving aside the decision on the merits.

I. The Facts of the Award in ICC Case No. 6519

Mr. X, the controlling shareholder of companies comprising the French group X, entered into an agreement with an English company, Y, of the Y group

arisen. A *compromis* is generally permitted by art. 2059 of the *Code civil*, subject to exceptions contained in art. 2060. For a highly informative and thoughtful discussion of these provisions and the necessity for reform, see the presentation (and debates) of Charles Jarrosson at the Colloque of 27 January 1992 of the *Comité Français de l'Arbitrage* ("Perspectives d'évolution du droit français de l'arbitrage") to be published in the *Revue de l'arbitrage*.

²The reform of the rules relating to domestic and international arbitration in France were effected by *Décret no 81-500 du 12 mai 1981*, J.O., 14 mai 1981, 1380, (1981) 108 JDI 392 [hereinafter *Nouv. C.p.c.*]. Art. 1492 of the new rules defines international arbitration as arbitration proceedings "qui met en cause des intérêts du commerce international". This rather vague definition, inspired by case law pre-dating the Decree, has been the subject of numerous commentaries. Particularly helpful on this point is the analysis of the reforms of Professor Philippe Fouchard, "L'arbitrage international en France après le décret du 12 mai 1982" (1982) 109 JDI 374 at 377-81.

³French courts began to distinguish between international and domestic contracts in the arbitration context during the period when such clauses were prohibited in domestic matters (*supra*, note 1). The first significant decisions of the Cour de cassation validating arbitration clauses in international contracts came in the 1930s: see Cass. civ., 19 February 1930, D.H. 1930.Jur.228 and Cass. civ., 27 January 1931, S.1933.I.41. These decisions were themselves inspired by the famous *Matter* case (Cass. civ., 17 May 1927, D.P. 1928.I.25) where, in relation to a monetary clause in an international loan contract, the Cour de cassation first applied economic criteria to distinguish between domestic and international contracts (the approach adopted by art. 1492 of the *Nouveau Code de procédure civile*).

⁴Cass. civ. 1re, 7 May 1963, [1963] Rev. arb. 60 [hereinafter *Gosset*].

⁵ICC Case No. 6519 (*final award*), (1991) 118 JDI 1065.

of companies, which provided for the combining of certain assets and resources of the two groups to develop their interests in the luxury hotel and leisure industries in France. The basic idea behind the agreement was that Mr. X and Company Y were to transfer their shareholdings in various French companies active in this business to Company XB, which was controlled by Mr. X. Seventy-five per cent of the capital of Company XB was then to be transferred to a holding company, the capital of which was to be held in the following manner: 50.1 per cent to be held by Mr. X and 49.9 per cent to be held by Company Y. The remaining 25 per cent of the capital of Company XB was to be held by the public and the company was to be quoted. Amongst the companies whose shares were to be transferred to Company XB were the companies XC and XD, both of which were controlled by Mr. X.

The contract was subject to three conditions precedent, the most germane to this dispute being the procurement of exchange control authorization from the French Treasury for Company Y's investment in the holding company. There was a clause relating to the conditions precedent which required the parties to use their best efforts to ensure that they were fulfilled. The contract also contained a French governing law clause and an arbitration clause providing for arbitration in Paris under the Rules of Arbitration of the ICC with either one or three arbitrators (the latter option was in fact chosen). The clause provided that the arbitrators were to have the powers of an "*amiable compositeur*."⁶

The contract never came into force as the condition precedent relating to exchange control authorization was not fulfilled. A few months after signing the contract, but prior to the exchange control authorization having been obtained, Company Y withdrew from the transaction. Mr. X, together with Companies XB, XC, and XD, commenced arbitration proceedings against Company Y in which they claimed damages in quasi-delict for losses suffered as a result of Company Y's withdrawal from the joint venture. Counsel for Company Y raised two preliminary questions: first, whether the Arbitral Tribunal had jurisdiction to hear claims made by Companies XB, XC and XD; and second, whether the arbitrators had jurisdiction to consider claims framed in quasi-delict.

In relation to the first challenge to jurisdiction, the Arbitral Tribunal drew a distinction between the situations of Company XB and of Companies XC and XD. It will be recalled that shares in the latter two companies were to be transferred by Mr. X (and other companies which he controlled and whose co-operation in the matter he was to guarantee by a "*promesse de porte fort*") to Company XB. All three claimant companies argued that their involvement in the transactions contemplated by the contract was such that they should be treated like parties to the agreement by application of the "*groupe de sociétés*

⁶For an exhaustive study of the powers of an arbitrator to resolve a dispute as *amiable compositeur*, see the thesis of É. Loquin, *L'amiable compositeur en droit comparé et international* (Paris: Librairies Techniques, 1980). Art. 13(4) of the ICC Rules of Arbitration permits an arbitrator to decide a case as *amiable compositeur* if the parties agree to give him such powers. It will be noted that the Arbitral Tribunal's powers of an *amiable compositeur* are not relevant to this discussion of the two jurisdictional issues as such powers may only be exercised in relation to the merits of a case.

theory.”⁷ The Tribunal rejected this argument with regard to Companies XC and XD as, in its view, this was merely a case of a shareholder freely disposing of his shares.

The arbitrators did, however, consider that the position of Company XB, as the recipient of the shares, justified treating it as a party to the contract. Their reasons were twofold: first, applying the *groupe de sociétés* theory, they found that Company XB had been at the “heart” of all of the negotiations and, without it, the contract would have been without an object; and second, in providing that various assets would be transferred to Company XB, the contract contained a *stipulation pour autrui*. It was apparent from the conduct of Company XB that it had accepted the *stipulation* in its favour which rendered it enforceable. On this basis, the tribunal held that as a third party beneficiary under the contract, this Company could avail itself of the arbitration clause. In support of this conclusion the Arbitral Tribunal found that by taking steps to prepare for the receipt of the assets to be transferred to it, Company XB had implicitly accepted the *stipulation*, and in particular the arbitration clause, which formed an indivisible whole with the rest of the agreement.

With regard to the second challenge to jurisdiction, relying on the theory of the *autonomie* of the arbitration clause, the Tribunal held that it had jurisdiction to consider the plaintiffs’ claims even though they were quasi-delictual. The arbitration clause was meant to cover “tous différends pouvant naître à l’occasion de l’interprétation ou de l’exécution” of the contract. Company Y had argued that the clause was drafted narrowly and only encompassed contractual liability. In deciding that they had jurisdiction to consider the claims, the Tribunal advanced two reasons. First, it stated that, as a matter of principle, an arbitral tribunal has jurisdiction to consider all delicts and quasi-delicts committed in the context of the conclusion or the performance of a contract containing an arbitration clause. Secondly, although the contract never came into effect, Company Y’s behaviour had prevented its performance; the Tribunal therefore viewed this dispute as one relating to performance, a matter coming within the scope of the clause.

The claims in quasi-delict were examined by the Tribunal under French law, the governing law of the contract. Upon examining the case on its merits, the Tribunal awarded reliance damages to Mr. X and to Company XB, although the amount was significantly less than what was claimed.

Each of the jurisdictional issues considered by the Arbitral Tribunal brought it into areas of French law which are topical, but unsettled. In particular, the Tribunal’s reliance on the *groupe de sociétés* theory in relation to the claim of Company XB merits careful examination. The theoretical foundations of this approach to interpreting the scope of an arbitration clause are open to question and will be explored below. It will be argued that methods used to analyze the validity of an arbitration clause are inappropriate for solving problems related to their scope. Although, in the result, the Arbitral Tribunal’s reasoning with regard to its jurisdiction to consider claims in quasi-delict is less vulnerable to

⁷See discussion *infra*, text accompanying note 8.

criticism, it nonetheless lacks precision. This issue also deserves to be reviewed.

II. The First Challenge: The *Groupes de Sociétés* Theory

Since the concept of separate legal personality was first recognised, corporate law and practice have, in most jurisdictions, followed a course which has encouraged the proliferation of separate legal entities, clustered together in economic units that we refer to as corporate groups. The group concept has two dimensions to it, which lead to opposite conclusions when used as a reference point for determining the scope of an arbitration clause: the existence of a group can imply economic unity as profits flow up to the head of the structure where management decisions are made; however, it can also be synonymous with diversity, a certain degree of independence and isolation of liability. When one company is chosen within a group to sign a contract, it is usually no accident. What then happens when other companies within the group, which have not signed the contract, wish to claim against the counterparty? Or conversely, should the counterparty to the contract be permitted to claim against non-signatory companies within the group which have, in some way, been connected with the contract? Although such issues are often difficult to resolve in the context of court proceedings, they have taken on a certain poignancy in the field of arbitration given its contractual foundation.

Many examples now exist of arbitration clauses being extended to apply to claims made by or against companies within a group which have not signed the contract containing the clause.⁸ The principle used to justify this is generally formulated in the following manner: companies within a group that have participated in the negotiation, performance or even termination of a contract along with other group entities, should be treated as parties to the arbitration clause regardless of the fact that they have not signed the relevant agreement. This principle has been applied both to claims advanced by non-signatory companies and to those brought against them, although more often in the former case.

Even the most liberal application of the *groupe de sociétés* theory would suggest that the mere existence of a group is insufficient to warrant automatic extension of an arbitration clause to non-signatories. However, some authors suggest that the observation that a company which has not signed a contract containing an arbitration clause and is a member of the same corporate group

⁸See, for example, ICC, *ICC Bulletin* (November 1991) 20-36 (English and French versions); *ICC Case No. 1434*, (1975) 102 JDI 978; *ICC Case No. 2375*, (1975) 102 JDI 973, *ICC Case No. 4131*, (1983) 110 JDI 899; *ICC Case No. 4504*, (1986) 113 JDI 1118; *ICC Case No. 5103*, (1988) 115 JDI 1206; *ICC Case No. 4972*, (1989) 116 JDI 1100; *ICC Case No. 5721*, (1990) 117 JDI 1990 1020; *ICC Case No. 5730*, (1990) 117 JDI 1029.

One could cite even more cases, were it not for reasons of confidentiality, where such an extension was sought but not granted. For instance, it is not uncommon for the ICC International Court of Arbitration to apply art. 7 of the ICC Rules of Arbitration and decide that there is no *prima facie* agreement to arbitrate in a specific case submitted to it, notwithstanding the claimant's reliance on the *groupe de sociétés* theory. In such a situation the arbitration cannot proceed (sometimes in its entirety, sometimes only vis-à-vis one of several defendants), and there is usually no public record or decision available with respect to the matter, since the decision of the ICC International Court of Arbitration is an administrative and confidential decision.

as a company that has signed it, raises a rebuttable presumption that the clause should be extended to apply to claims made by or against the non-signatory company.⁹ Clearly the mere existence of a group is insufficient to warrant automatic extension of the clause. Perhaps the more conventional view expressed in the *doctrine*, and one which would be more consistent with the implications of submitting a dispute to arbitration, is that the burden of proof in relation to a claim for extending the arbitration clause lies with the party seeking to expand its scope of application.¹⁰

What is the basis of the principle used to justify extension of an arbitration clause to non-signatory members of a corporate group? Some explanation can be found in the first judicial endorsement of the *groupe de sociétés* theory, which was provided by the Paris Cour d'appel in *Société Isover-Saint-Gobain v. Sociétés Dow Chemical France*.¹¹ Both the award,¹² which was rendered by a prestigious panel of arbitrators,¹³ and the decision of the Cour d'appel merit careful consideration.

A. *The Dow Chemical Arbitral Interim Award*

There were two contracts involved in the *Dow Chemical* case, one signed in 1965, and a second in 1968 designed to replace the first contract. For reasons unexplained, both contracts appear to have been at issue. Some further complication in the case stemmed from the fact that the rights of the companies on both sides of the transaction had been assumed by other companies within their respective groups. For our purposes, it is sufficient to note that there were two contracts providing for the distribution in France of certain Dow Chemical products: one between Dow Chemical Europe SA and Isover-Saint-Gobain, and the other between Dow Chemical AG and Isover-Saint-Gobain. Both contracts provided that, at the seller's option, deliveries of the relevant products could be effected by Dow Chemical France SA or any other wholly owned subsidiaries of The Dow Chemical Company or its subsidiaries. The evidence suggested that not only did the French subsidiary supply the products, but its representatives, by reason of their presence in France, negotiated the contracts and ultimately notified Isover-Saint-Gobain of their termination. All of the companies involved were wholly owned subsidiaries of The Dow Chemical Company, which owned all of the intellectual property rights to the products to be distributed under the two contracts. Both contracts contained French governing law clauses and arbitration clauses providing for application of the ICC Rules of Arbitration.

⁹See, for example, A. Chapelle, "L'Arbitrage et les tiers: II — Le droit des Personnes Morales (Groupes de Sociétés; Interventions d'état)" [1988] *Rev. arb.* 475 at 485.

¹⁰See, for example, I. Fadlallah, "Clauses d'arbitrage et groupes de sociétés" [1984-85] *Travaux du Comité Français de Droit International Privé* 105 at 118.

¹¹Paris, 21 October 1983, [1984] *Rev. arb.* 98 [hereinafter *Dow Chemical*].

¹²*ICC Interim Award*, 23 September 1982, [1984] *Rev. arb.* 137 [hereinafter *Dow Interim Award*].

¹³The arbitration tribunal was comprised of Prof. Berthold Goldman, Prof. Michel Vasseur and Prof. Pieter Sanders.

Following termination of the contracts, arbitration proceedings were commenced under both arbitration clauses against Isover-Saint-Gobain by the two Swiss subsidiaries, joined by Dow Chemical France SA and The Dow Chemical Company. Isover-Saint-Gobain objected to the claims brought by the latter two plaintiffs as they had not signed either the 1965 or the 1968 contract.

Critical to the result in *Dow Interim Award* was the Arbitral Tribunal's analysis of the sources of law to be applied to interpret the scope of the arbitration clauses. The defendant argued that the scope and effects of the arbitration clauses had to be determined by the application of French law, as this was the governing law of the two contracts. In response, the Arbitral Tribunal placed considerable emphasis on the fact that the parties, by including ICC arbitration clauses in their contracts, had incorporated the ICC Rules by reference; the provisions relating to jurisdiction of arbitrators to define their own jurisdiction contained in the ICC Rules did not refer to any national law.¹⁴ In order to accord itself greater flexibility, the Arbitral Tribunal then observed that the governing law of the contracts did not necessarily govern the arbitration clauses. This, the Tribunal stated, was a consequence of the *autonomie* of an arbitration clause, which related not only to the validity of the arbitration clause, but also to its scope and effects. When the analysis was taken a step further, the *autonomie* concept was also said to imply that, in some cases, an arbitration clause may be governed by sources of law which are unique to it and distinct from those which govern the merits.

On the basis of these principles the Arbitral Tribunal concluded that, in defining its jurisdiction, it would examine the intentions of the parties as reflected in the circumstances surrounding the conclusion, performance and termination of the contracts, taking into account international commercial usages, particularly in relation to groups of companies. The only constraint imposed by French law that was recognised by the Arbitral Tribunal was the requirement that the decision not abridge rules of international public policy.¹⁵

Applying these criteria, the Arbitral Tribunal found that Dow Chemical France SA had been at the centre of the contractual relations between the parties as it had played a primary role in the formation, performance and termination of the two contracts. This finding of fact permitted the Arbitral Tribunal to conclude that the French subsidiary was a party to the contracts and *therefore* to the arbitration clauses. It reached the same conclusion in relation to The Dow Chemical Company, but its analysis concerning this company was fairly brief by comparison and less convincing. In the case of The Dow Chemical Company, it found that its ownership of the intellectual property rights relating to the products to be distributed and its control over the subsidiaries that were directly involved in the conclusion, performance and termination of the contracts suf-

¹⁴See arts 8-3 and 8-4 of the ICC Rules. Some of the ICC Rules were modified with effect as from 1 January 1988, but arts 8-3 and 8-4 have remained unchanged since the ICC Rules were first adopted in 1975.

¹⁵The Arbitral Tribunal was referring here to the concept of *ordre public international* as defined by French law and distinguished from the less tolerant *ordre public* which is applied in domestic matters.

ficed to treat it as a party, thus bringing its claim within the scope of the arbitration clauses.

After deciding that these two plaintiffs were parties to the contracts, the Arbitral Tribunal observed that a corporate group possesses an economic reality, despite the existence of separate legal personalities, which has to be taken into consideration in defining its jurisdiction, particularly as the ICC Rules required it to take account of the *lex mercatoria*. The Arbitral Tribunal then summarised its reasoning as follows:

Considérant, en particulier, que la clause compromissoire expressément acceptée par certaines sociétés du groupe, doit lier les autres sociétés qui par le rôle qu'elles ont joué dans la conclusion, l'exécution ou la résiliation des contrats contenant les dites clauses, apparaissent selon la commune volonté de toutes les parties à la procédure, comme ayant été de véritables parties à ces contrats, ou comme étant concernées, au premier chef, par ceux-ci et par les litiges qui en peuvent découler.¹⁶

The conclusion that the two plaintiffs could assert claims under the arbitration clause therefore rested upon the finding that the intention of the companies involved was that they be treated as parties to the contracts.

B. *The Decision of the Paris Cour d'appel*

Isover-Saint-Gobain brought a *recours en annulation* before the Paris Cour d'appel in which it sought to have the award quashed on two grounds: first, the Arbitral Tribunal should have applied French law to determine the scope of the arbitration clause; and second, there was no agreement to arbitrate.¹⁷ The case was dismissed on both grounds.

In relation to the first ground raised by Isover-Saint-Gobain, the Cour d'appel relied heavily on the wording of the terms of reference (*acte de mission*). Oddly enough, the terms of reference asked the arbitrators to identify the law which governed the contracts, despite the fact that there were French governing law clauses in both of them. As a separate question, the terms of reference asked the arbitrators to define the scope of the arbitration clause. As the terms of reference did not require the arbitrators to apply French law to the merits of the case, the Cour d'appel reasoned that the Arbitral Tribunal was entitled, without any failure to respect their mandate, to decide the question of jurisdiction without referring to French law.

On the second ground, the Cour d'appel, like the Arbitral Tribunal, drew attention to the ICC Rules on jurisdiction, and stated that, in keeping with these Rules, the arbitrators were justified in considering the intention of the parties and the *lex mercatoria*. It confirmed that the law applicable to the scope and effects of the clause was not necessarily the same as the law applicable to the merits of the case. Its conclusion was similar to that of the Arbitral Tribunal:

¹⁶*Supra*, note 12 at 148.

¹⁷Art. 1502(1) *Nouv. C.p.c.*:

L'appel de la décision qui accorde la reconnaissance ou l'exécution n'est ouvert que dans les cas suivants:

1. Si l'arbitre a statué sans convention d'arbitrage ou sur convention nulle ou expirée.

Considérant que par une interprétation souveraine des conventions susvisées et des documents échangés lors de leur négociation et de leur résiliation, les arbitres ont jugé, au terme d'une motivation pertinente et exempte de contradiction, que, suivant la volonté commune de toutes les sociétés intéressées, les sociétés Dow Chemical France et Dow Chemical Company avaient été parties à ces conventions bien que ne les ayant pas matériellement signés, et que la clause compromissoire leur était dès lors applicable; Qu'ils ont aussi fait accessoirement appel à la notion de *groupe de sociétés* dont l'existence à titre d'usage du commerce international n'est pas sérieusement contestée par la demanderesse.¹⁸

The reasoning of the Arbitral Tribunal and the Cour d'appel in the *Dow Chemical* case raises several questions. Perhaps the first is whether, as Professor Vasseur (one of the arbitrators) has suggested,¹⁹ the result in *Dow Chemical* was confined to the facts of the case. Certainly the analysis of the Cour d'appel on the question of the law to be applied to the arbitration clause in order to determine its scope relied to a considerable extent upon the drafting of the terms of reference. One wonders if the result would have been different if the arbitrators had been directed to apply French law to resolve the dispute. In that case, would the Cour d'appel have been more hesitant to sweep French law aside in relation to the arbitration clause? Certain recent decisions of the Paris Cour d'appel on non-signatories suggest not.²⁰

Three years later, the Cour d'appel of Pau, in a much criticised judgment, followed the reasoning of the Paris Cour d'appel in *Dow Chemical*. In *Sponsor A.B. v. Lestrade*,²¹ the group concept was applied to extend an arbitration clause where a Swedish parent company sought to avoid arbitration in relation to an option agreement signed by its French subsidiary. The option agreement had been signed pursuant to an agreement between the parent company, Sponsor A.B., and the shareholders of two French companies providing for the creation of the French subsidiary and for the acquisition of shares in these companies. In performance of this contract the French subsidiary bought 80 per cent of the shares concerned and signed a put option agreement in relation to the balance. When the option was exercised by the vendors, the French subsidiary did not purchase the shares.

The option agreement contained an *ad hoc* arbitration clause providing for arbitration with three arbitrators, pursuant to which the vendors of the shares commenced arbitration proceedings against Sponsor A.B. and its French subsidiary. When both defendants failed to appoint an arbitrator, the plaintiffs filed an application with the Tribunal de Commerce in Tarbes requesting appointment of an arbitrator on their behalf. Instead of contenting itself with the appointment of an arbitrator, the Tribunal de Commerce proceeded to deal with the jurisdictional issue and ruled that Sponsor A.B. must be treated as a party to the arbitration proceedings.

On appeal, the Cour d'appel of Pau held that since the French company was a special purpose vehicle created for this acquisition, its parent company

¹⁸*Supra*, note 11 at 100-01.

¹⁹*Supra*, note 9, contribution of Prof. Vasseur in the debates at 496-98.

²⁰See *infra*, text accompanying notes 41-54.

²¹Pau, 26 November 1986, [1988] Rev. arb. 153.

had played an important role in the conclusion and in the non-performance of the option contract. Sponsor was, in fact, the "tête pensante de la partie contractante,"²² or the party making the decisions. The Court then reproduced the reasoning of the Arbitral Tribunal in the *Dow Chemical* case verbatim, prefacing this with the statement that the principle cited was accepted in law.²³ Although it was not in a position to rely on the ICC Rules, as were the Arbitral Tribunal and the Paris Cour d'appel in *Dow Chemical*, the Court then referred to the *lex mercatoria*, which in its view, recognised the economic reality of corporate groups.

In the absence of a decision of the Cour de cassation on this point, the suggestion of the Pau Cour d'appel that the *Dow Chemical* reasoning has been accepted in law would seem premature. As several academics have commented, this is only an "orientation de la jurisprudence."²⁴ Equally objectionable is the fact that the Cour d'appel proceeded to examine the jurisdiction of the arbitrators rather than leave it to them to define in the first instance. The Cour d'appel should only look at such jurisdictional issues in the context of a *recours en annulation* or a challenge to enforcement of an award.²⁵

C. Autonomie of the Arbitration Clause

Perhaps more troublesome in its implications, however, is the disregard in both cases of French law. Although the Paris Cour d'appel did not refer specifically to the theory of the *autonomie* of the arbitration clause, it approved the reasoning of the Arbitral Tribunal which cited it in support of its decision not to apply French law. The Arbitral Tribunal appears to subscribe to the broadest view of the *autonomie* theory, as it stated that the principle relates not only to the validity of the clause, but also to its scope and effects and involves the application of a law that is unique to the agreement to arbitrate. Prior to commenting on this approach, it may be helpful to review briefly the jurisprudence relating to the *autonomie* of the arbitration clause.

As indicated above, the foundations of this theory were laid in the decision of the Cour de cassation in the *Gosset* case. In *Gosset*, an objection was raised by a French party to the enforcement in France of an award of an Italian arbitral tribunal rendered under Italian law. The French party argued that the contract in question was void *ab initio*, as it was contrary to an import prohibition and therefore *ordre public*. This, it was argued, also rendered the arbitration clause contained in the agreement null and void. The Court dismissed the *pourvoi* on the basis that, in the context of international arbitration, the arbitration clause possesses a complete legal autonomy which precludes it from being affected by the possible invalidity of the contract.²⁶

²²*Ibid.* at 156.

²³*Ibid.*

²⁴See A. Chapelle, Annotation of Pau, 26 November 1986, [1988] Rev. arb. 153 at 158; and comments of Prof. Vasseur in Chapelle, *supra*, note 9 at 497.

²⁵Chapelle, *ibid.*

²⁶*Supra*, note 4 at 61: "une complète autonomie juridique, excluant qu'il [l'accord compromis-soire] puisse être affecté par une éventuelle invalidité de cet acte."

The choice of words used in this decision is not without significance. The result in the *Gosset* case is both logical and consistent with the concept of severability that is now accepted in most jurisdictions in relation to arbitration clauses. However, the Cour de cassation did not use the word "severable"; it said that the clause was autonomous. Some of the doctrine has taken this to mean that a contract containing an arbitration clause consists of two contracts, the main contract and the agreement to arbitrate which is a separate procedural contract between the parties.²⁷ The fact that the Cour de cassation in *Gosset* did not apply Italian law to the question of the validity of the arbitration clause also implied a possible disassociation of the law applicable to the main contract from the law applicable to the agreement to arbitrate.

This disassociation appears to have been effected by the Cour de cassation in *Hecht v. Société Buisman's*.²⁸ In *Hecht*, the Cour de cassation used the *autonomie* concept to save the arbitration clause itself in an otherwise valid contract. Hecht was an *agent commercial* in France who concluded a distribution contract governed by French law with a Dutch party providing for distribution in France of the latter's products. The contract contained an ICC arbitration clause. Hecht commenced proceedings in the French courts for rescission and damages under the contract. The Dutch party objected on the basis of the arbitration clause. Hecht argued that French law should be applied to the arbitration clause and that this led to the conclusion that the clause was null and void, as he did not have the status of a *commerçant*.²⁹

The Cour de cassation upheld the arbitration clause in a decision which hinged upon the fact that this contract fell conveniently into the international category. The rigidity of French law was disposed of with the observation that the principle of the *autonomie* of an arbitration clause contained in an international contract was not a rule of conflicts of laws, but rather a substantive rule of law.³⁰ The Court concluded that the Cour d'appel had correctly upheld the clause on the basis that an arbitration clause, in the international context, enjoys a complete autonomy.³¹

²⁷H. Motulski, Annotation of Cass. civ. Ire, 7 May 1963, (1963) 52 Rev. crit. dr. int. privé 615 at 619.

²⁸Cass. civ. Ire, 4 July 1972, [1974] Rev. arb. 89 [hereinafter *Hecht*].

²⁹Although the status of an *agent commercial* is, in fact, open to debate, it should be noted that, under French law, an arbitration clause contained in a contract to which a non-*commerçant* is a party is void. This is referred to in French law as a mixed civil/commercial contract (*contrat mixte*). See *supra*, note 1.

³⁰The precise term used by the court was "règle matérielle." There is some debate in the doctrine as to whether the "règle matérielle" identified by the Cour de cassation in *Hecht* is merely a rule of French law which validates an arbitration clause contained in any international contract, or whether it is a concept with broader implications. For example, Professor Goldman has suggested that it might be viewed as a "règle de véritable droit international, largement accueillie pour les besoins du commerce international, par les nations qui y sont engagées". See B. Goldman, Annotation of the decision of the Cour d'appel in *Hecht*, J.C.P. 1971.II.16927. We prefer the former view. For an excellent analysis of this issue, see P. Francescakis, "Le principe jurisprudentiel de l'autonomie de l'accord compromissoire après l'arrêt *Hecht* de la Cour de cassation" [1974] Rev. arb. 67 at 83-86.

³¹The most salient passages of the judgment merit a careful reading (*supra*, note 28 at 89-90):
que par lui-même, le caractère international du contrat ne soustrairait pas non plus à la loi française la clause compromissoire dont l'autonomie ne constituerait pas une règle

The *Hecht* case has been interpreted by the majority of the *doctrine* as detaching the arbitration clause from the law of any state.³² It does so by proposing a rule of law which effectively preserves the agreement to arbitrate in the face of allegations of invalidity in any case where the contract is international.³³ To the extent that obscurities in the wording of the *Hecht* judgment left any doubts as to the detachment of an arbitration clause from all state laws, the decision of the Paris Cour d'appel in *Menicucci v. Mahieux*³⁴ sought to eliminate them. When invited to consider the validity of an arbitration clause contained in a contract between two French nationals, one of whom did qualify as a *commerçant*,³⁵ for the distribution in North America of certain French products, the Cour d'appel upheld the clause on the basis of its *autonomie*. The Court stated that it was unnecessary for it to determine the law applicable to the main contract; the concept of the autonomy of an arbitration clause in an international contract implied that such clauses possess a validity which is independent of any state law.³⁶

This approach might be viewed as desirable in the circumstances of *Hecht* and *Menicucci*. In these cases, the French courts were attempting to redress, in the international context, problems raised by French domestic law which has always regarded arbitration with suspicion.³⁷ The question which must be

de conflit, mais une simple règle matérielle, étrangère au litige, postulant que la nullité éventuelle du contrat principal n'atteint pas automatiquement la clause compromissoire; qu'en définitive, l'arrêt attaqué se bornerait à déduire hypothétiquement du caractère international du contrat que les parties "ont pu" l'exclure de la loi française, méconnaissant ainsi la règle française de conflit et refusant de tirer de ses propres constatations, selon lesquelles les parties avaient soumis leur convention à la loi française, les conséquences qui s'en évinceraient;

Mais attendu qu'ayant relevé le caractère international du contrat qui liait les parties et rappelé qu'en matière d'arbitrage international l'accord compromissoire présente une complète autonomie, l'arrêt attaqué en a justement déduit que la clause litigieuse devait en l'espèce recevoir application.

³²See, for example, Franceskakis, *supra*, note 30 at 76.

³³On the question of whether or not this is a rule of French law, see *supra*, note 30.

³⁴Paris, 13 December 1975, (1977) 104 JDI 106 [hereinafter *Menicucci*].

³⁵*Supra*, note 29.

³⁶The relevant passage from the judgment is as follows (*supra*, note 34 at 108):

Considérant que, sans qu'il y ait lieu en l'état de rechercher la loi applicable soit au fond du contrat, qui d'ailleurs en matière de mandat serait celle du lieu de son exécution, soit à l'instance arbitrale et la sentence, il suffit, pour accueillir l'exception d'incompétence, de constater que, compte tenu de l'autonomie de la clause compromissoire instituant un arbitrage dans un contrat international, celle-ci est valable indépendamment de la référence à toute loi étatique.

The second ground of attack in the *Menicucci* case was the assertion that the contract containing the arbitration clause was not international in nature as it was concluded between two French nationals. For an interesting discussion of the application by the Cour d'appel of the economic criteria established in *Matter*, *supra*, note 3, see É. Loquin, (1977) 104 JDI 108 at 108-10.

³⁷An alternative approach to the problem would have been to revise art. 2061 of the *Code civil* in order to remove restrictions on arbitration in "contrats mixtes"; the *autonomie* concept could then be focused upon the severability aspect explored by the Cour de cassation in *Gosset*. It has recently been observed that the rationale of *Hecht* and *Menicucci* has mainly served to get around the problems posed by art. 2061 in civil and mixed contracts. When viewed from this perspective, these cases can be seen as establishing a rule of French law applicable to arbitration clauses in international contracts rather than as endorsing the theory of a contract without a law. See J.C.

addressed in relation to the problem of groups of companies is whether the approach used to save an arbitration clause in cases like *Hecht* and *Menicucci* should be used to determine whether the clause should be extended to a party that has not signed a contract. In the group situation, neither the contract nor the agreement to arbitrate between the signatories of the contract is in peril.³⁸

Doubts can even be raised as to whether the *Dow Chemical* reasoning is entirely consistent with the broadest reading of the *autonomie* concept. The first step of the analysis requires one to sever the arbitration clause from the rest of the contract when the decision is taken not to apply French law. The second step involves an examination of the intentions of the parties, and eventually leads to the conclusion that the non-signatory companies were, for all intents and purposes, *de facto* parties to the main contract. Once this is established, the final step is to infer from this finding of fact that the non-signatory was also a party to the arbitration clause (which was severed from the main contract at the outset). Admittedly, this is a somewhat tricky exercise as the only indicia that would support a finding of an agreement to arbitrate on the part of parties who have not signed the main contract is circumstantial and necessarily related to the latter.

The consequences of this analysis are potentially unsatisfactory. The arbitration clause is said to apply to disputes between non-signatories and parties because the non-signatories are parties to the contract. Does this mean that they will be treated as parties when the arbitrators examine the merits of the case? If French law is not applied to this question in the context of defining the scope of the arbitration clause, one could end up with two different regimes governing *l'effet relatif des contrats*: one for French law contracts³⁹ which contain an arbitration clause, and another for those which do not. Such a result would obviously be unsound.⁴⁰

In a series of more recent cases, the Paris Cour d'appel has continued to link the question of the scope of an arbitration clause to the theory of its *autonomie*. In the context of these cases, the Cour d'appel has developed a broad principle which it has presented in the form of a standard paragraph of reasoning reproduced in each case in almost identical terms.

In *Korsnas Marma v. Société Durand-Auzias*,⁴¹ a French subsidiary of a Swedish company (Duran-Auzias) commenced proceedings before the Paris

Dubarry & É. Loquin, "Tribunaux de commerce et arbitrage" (1991) 44 Rev. trim. Droit com. 574 at 578.

³⁸However, one could say that the existence of both the main contract and the agreement to arbitrate is in peril with respect to one or more of the parties involved.

³⁹The general principle of French law applicable to such questions is set forth in art. 1165 of the *Code civil*.

⁴⁰Perhaps the way to reconcile the *Dow Chemical* analysis with the *autonomie* concept and avoid this conceptual problem would be to view the finding that the non-signatories were parties to the agreement to arbitrate as a preliminary matter which does not preclude a re-examination of the question under the governing law of the contract when the merits of the case are considered.

⁴¹Paris, 30 November 1988, [1989] Rev. arb. 691 [hereinafter *Korsnas Marma*].

Tribunal de Commerce on the basis of a contract which provided for distribution of products of another Swedish company (Korsnas Marma). The contract in question had been entered into by the parent company of Durand-Auzias (Barkman) with Korsnas Marma and referred to the French subsidiary as its "Paris office." The contract was terminated and, when Durand-Auzias was given notice, it sued Korsnas Marma for an indemnity. The latter argued that the French courts did not have jurisdiction to hear the matter as there was an arbitration clause in the contract.

For a variety of reasons, the Tribunal de Commerce decided that Durand-Auzias was not a party to the contract between Barkman and Korsnas Marma and that it therefore had jurisdiction to hear the matter. Korsnas Marma appealed to the Paris Cour d'appel, which overruled the decision of the Tribunal de Commerce. The principle applied by the Cour d'appel to justify its reasoning was formulated as follows:

Considérant que la clause compromissoire insérée dans un contrat international a une validité et une efficacité propres qui commandent d'en étendre l'application aux parties directement impliquées dans l'exécution du contrat et dans les litiges qui peuvent en résulter, dès lors qu'il est établi que leur situation et leurs activités font présumer qu'elles ont eu connaissance de l'existence et de la portée de la clause d'arbitrage, bien qu'elles n'aient pas été signataires du contrat la stipulant.⁴²

Applying this principle to the facts, the Court determined that the claim of Durand-Auzias came within the scope of the arbitration clause. The French subsidiary had, in fact, been performing the contract which contained the arbitration clause. Having been referred to as the "Paris office" of Barkman one could, in the circumstances, presume that Durand-Auzias was aware of the arbitration clause. In the final paragraph of its judgment, the Court specified that the question of the law applicable to the merits of the case was distinct from that of the "compétence internationale de la juridiction française saisie,"⁴³ which was the only issue raised by the appeal.

The principle applied by the Cour d'appel in the *Korsnas Marma* case concerning the scope of application of an arbitration clause was cast in broader terms than its reasons in the *Dow Chemical* case, or indeed those of the Arbitral Tribunal. In the *Dow Chemical* case the Cour d'appel was content to affirm the approach taken by the Arbitral Tribunal, based upon the intention of the parties and the *lex mercatoria*, once it had satisfied itself that the Arbitral Tribunal was not obliged to apply French law to resolve the problem. At least three significant differences can be observed in this case. First, the Court has expressed the *autonomie* concept in terms of a "validité et une efficacité propres," an equally vague, but perhaps further reaching concept. Second, although this was a corporate group situation, there is no reference in the judgment to the *groupe de sociétés* theory.⁴⁴ Instead, the Court defined a principle that appears to apply to

⁴²*Ibid.* at 694.

⁴³*Ibid.*

⁴⁴In *Dow Chemical* the group concept was tied to the application of the *lex mercatoria*, referred to specifically in the ICC Rules; the arbitration clause in the *Korsnas Marma* case did not refer to the ICC Rules of Arbitration and this may explain the omission.

any person or entity directly involved in the performance of a contract in circumstances that would enable one to assume that they were aware of the arbitration clause, regardless of whether they have signed it. Thus, the third difference is the lack of a direct reference to the *volonté* or intention of the parties and the emphasis on circumstances that would permit one to presume that the party which has not signed the contract was aware of the existence and meaning of the arbitration clause.⁴⁵

Almost identical wording has appeared in at least three further judgments of the Paris Cour d'appel. A specific reference to the *groupe de sociétés* theory accompanied this paragraph of reasoning in the decision of the Cour d'appel in *Orri v. Société des Lubrifiants Elf-Aquitaine*.⁴⁶ Mr. Orri was a Saudi businessman who owned several companies, each of which operated a ship, comprising the group Saudi Europe Lines (SEL). Elf had supplied certain products to companies within the group and some of its invoices remained unpaid. In the context of negotiations between Mr. Orri and Elf regarding the unsettled invoices, two documents were signed: first, a document acknowledging the debts and providing for a rescheduling of payments was signed by Mr. Orri, and second, a contract providing for the sale of further products to SEL was signed on behalf of "Saudi Europe Lines SA" by another individual. This signature appeared next to Mr. Orri's name, which had been crossed out. Only the second document contained an arbitration clause. When Elf eventually commenced arbitration proceedings against Mr. Orri and SEL for non-payment of the debts, Mr. Orri argued that the arbitrators had no jurisdiction to consider claims against him as he had not signed the second contract. The arbitrators assumed jurisdiction and were upheld by the Cour d'appel.

Of the various reasons⁴⁷ provided by the Court in support of its decision, one would have sufficed: the interposition of a third party as a signatory of the second contract which contained the arbitration clause. The Court held that, in reality, the counterparty to the second contract was Mr. Orri. Apparently under Saudi law, SEL was just a trade name and none of the relevant companies had separate legal personality. The Court went so far as to find that the substitution of the third party who signed the contract on behalf of SEL was a fraudulent act designed to shield Mr. Orri from liability under the contract. The Court's rea-

⁴⁵The suggestion that an arbitration clause might be applied in relation to a party that is aware of the existence and meaning of an arbitration clause, has recently surfaced in a decision of the Cour de cassation relating to incorporation of an arbitration clause by reference to a document where it is set forth. See *Société Dreistern Werk v. Société Crouzer*, Cass. civ. 1re, 26 June 1990, [1991] Rev. arb. 291. This is to be contrasted to the approach taken to this problem in *Société Bomar Oil NV v. ETAP*, Cass. civ. 1re, 11 October 1989, [1990] Rev. arb. 136. Enforcement of an arbitration clause on the basis of implied acceptance is easier to justify in the case of incorporation of a clause by reference, as one is in the presence of parties who have at least signed the main contract and the debate is really over its terms.

⁴⁶Paris, 11 January 1990, (1990) 118 JDI 141.

⁴⁷The Cour d'appel (*ibid.*) advanced three reasons to justify the arbitrators's jurisdiction. First, it held that the two contracts formed part of an indivisible ensemble. Second, it concluded that Mr. Orri was the real counterparty to the contract containing the arbitration clause. Third, it stated that Mr. Orri should be treated as a party to the contract by application of the *groupe de sociétés* theory.

soning in relation to the *autonomie* of an arbitration clause and *groupe de sociétés* was therefore superfluous.⁴⁸

Not all of the Cour d'appel decisions have involved groups of companies. In *Société Ofer Bros v. The Tokyo Marine & Fire Insurance Co.*,⁴⁹ an arbitration clause contained in a charterparty was applied to cover claims made against a carrier on the basis that a bill of lading, which referred to the charterparty, was signed by the ship's captain who also affixed the carrier's stamp to the document. This was more a problem of transfer of an arbitration clause and incorporation by reference than extension of it to a non-signatory.⁵⁰

In another shipping case, *Compagnie Tunisienne de Navigation (Cotunav) v. Société Comptoir Commercial André*⁵¹ the Cour d'appel's principle was used to justify the application of an arbitration clause to claims brought against a carrier designated under an agreement for food aid between the French and Tunisian governments. Among the documents forming the agreement was a "cahier des charges" which established terms for companies participating in the programme. An arbitration clause was included which submitted all disputes between the agent of the country of destination of the goods and the exporter to the Chambre Arbitrale de Paris. Comptoir Commercial André, which was selected by the French government to deliver wheat, commenced arbitration proceedings against Cotunav in relation to a dispute between them over designation of a ship. Cotunav challenged the jurisdiction of the Arbitral Tribunal on the basis that it had not signed the agreement concerned. When the Arbitral Tribunal assumed jurisdiction and ordered Cotunav to pay damages, the latter brought a *recours en annulation* before the Paris Cour d'appel. Applying its now "standard" paragraph of reasoning, the Court held that, in agreeing to be the transporter, Cotunav had accepted the terms set forth in the agreement including the arbitration clause.

Cotunav then brought a *pourvoi* before the Cour de cassation on the same ground.⁵² The Cour de cassation dismissed the case, but said nothing of the *autonomie* of the arbitration clause. It affirmed that the arbitration clause did apply to the claim against Cotunav, but for the sole reason that, in agreeing to perform the contract, Cotunav had ratified it.⁵³

The facts of *Cotunav* were unusual, as the case involved adherence to a contract negotiated between two governments. This, however, made it an easy

⁴⁸There is support for this analysis in the admirable commentary on the case by B. Audit, (1991) 118 JDI 145.

⁴⁹Paris, 14 February 1989, [1989] Rev. arb. 695 at 696.

⁵⁰In view of the fact that this case involved a problem of "transmission," as opposed to the validity of the arbitration clause, it is difficult to understand why the Cour d'appel found it necessary to rely upon the "autonomie" concept to affirm that the clause applied to claims against the carrier. For an excellent critique of this approach see the note of P. Mayer, [1989] Rev. arb. 698, esp. at 707-08.

⁵¹Paris, 28 November 1989, [1990] Rev. arb. 68 [hereinafter *Cotunav*].

⁵²Cass. civ. 1re, 25 June 1991, [1991] Rev. arb. 453.

⁵³Referring to the finding of the Cour d'appel that, in accepting the job of carrier, Cotunav had necessarily subscribed to the terms of the agreement, the Cour de cassation stated that, on the basis of this reason only, the Cour d'appel had legally justified its decision (*ibid.* at 454).

case to decide and the Cour d'appel clearly went much further than it had to when it based its decision on the "validité" and "efficacité propres" of an arbitration clause. It would be premature to conclude that the Cour de cassation will not, in any circumstances, endorse the use of the *autonomie* theory to resolve questions relating to the scope, as opposed to the validity of an arbitration clause. However, the Court does appear to prefer an approach which is consistent with principles of French contract law.

Even in relation to problems of validity, the Cour de cassation has recently drawn a distinction between questions of form which relate to the existence of an arbitration clause and other validity issues such as those raised in *Gosset* and *Hecht*. In *Société L&B Cassia v. Société Pia Investments*,⁵⁴ the Cour de cassation affirmed a decision of the Paris Cour d'appel⁵⁵ which held that there was no agreement to arbitrate where the arbitration clause was contained in a contract which had been initialled, but not signed. The Cour d'appel had taken a conflictual approach to the question and examined rules as to form and validity of a contract both under its proper law (Pakistan) and under the law of the *lex fori* (France). The Cour de cassation approved the conflictual approach to the problem, stating that the principle of the *autonomie* of an arbitration clause finds its limit when the existence of the contract containing the clause is at issue. This question must be resolved by application of the law of the state selected by rules of conflicts of laws.⁵⁶

In the decisions of the Cour de cassation on the *autonomie* of an arbitration clause, one does note a certain progression of thought which led the Court to formulate in more ambitious terms in each subsequent case, a new rule of French law ("règle matérielle") to be applied in relation to arbitration clauses contained in international contracts. This tendency has been referred to by Professor Francescakis as "l'effet d'entraînement"⁵⁷: once an opening had been made in the *Gosset* case, the Court found itself propelled along a course which obliged it to take this principle to its logical conclusions. The Cour d'appel has attempted to pursue the same course. It may be that the *Cotunav* and *Pia Investments* cases will be the first in a series which establishes the limits.

D. *The Role of the Will of the Parties*

There is no real consensus in the doctrine as to how the *groupe de sociétés* problem should be approached, nor even as to the basis of the decisions

⁵⁴Cass. civ. 1re, 10 July 1990, [1990] Rev. arb. 857 [hereinafter *Pia Investments*].

⁵⁵Paris, 26 February 1988, [1990] Rev. arb. 851.

⁵⁶The Cour de cassation summarised the reasoning as follows (*supra*, note 51 at 859):
Mais attendu qu'en matière d'arbitrage international, l'autonomie de la clause compromissoire trouve sa limite dans l'existence, en la forme, de la convention principale qui contiendrait la clause invoquée; que cette existence doit nécessairement s'apprécier d'après la loi qui, selon les principes du droit international privé, régit la forme de la convention; que l'arrêt attaqué, après avoir rappelé le principe d'autonomie, a légitimement apprécié l'existence de la clause compromissoire en fonction d'une loi étatique désignée par la règle de conflit sans encourir les griefs du moyen qui, dès lors, n'est pas davantage fondé.

For an interesting critical analysis of this decision see Dubarry & Loquin, *supra*, note 37 at 578.

⁵⁷Francescakis, *supra*, note 30 at 72.

extending the application of arbitration clauses to companies within a group. Professor Fadlallah, in his review of the problem for the *Comité Français de Droit International Privé*,⁵⁸ identified the intention of the parties as the basis of the arbitral and judicial decisions on this issue, rather than the recognition of the economic relationship between companies that form a group. Extension of the scope of an arbitration clause on the basis of the intention of the parties is presented by Professor Fadlallah and other French academics as the "classic" approach. Although the *accord de volontés* is the "classic" analysis used in French law in relation to formation of contracts, one can still question whether it provides a "classic" solution in this context.

In many group scenarios, the extension of the scope of an arbitration clause to non-signatories on the basis of the will of the parties is a fiction. Consider, for example, the rather common situation where a parent company negotiates a contract on behalf of a subsidiary and, in order to exclude its own liability, it deliberately ensures that only the subsidiary is a signatory to the contract. It would be somewhat disingenuous to permit the parent company to commence arbitration proceedings against the subsidiary's counterparty on the ground that this reflected the will of the parties. Yet the *Dow Chemical* award identifies participation of a non-signatory in the negotiation of a contract as one of the factors which may support a finding that the parties intended to treat the non-signatory as a party to the contract. Surely the desire to be treated as a party after the fact, and against a backdrop of objections from the other side, does not constitute a meeting of the minds or an *accord de volontés*.

Similarly, one might ask whether the theory of the will of the parties may be used to justify the commencement of arbitration proceedings against the parent company in the situation described above. The facts would again defy this conclusion. However, if it could be demonstrated that the parent company had in some way participated in the performance of the contract, or had taken most of the subsidiary's decisions relating to the contract, a finding that it was a *de facto* party might be substantiated. The apparent will of the parties, gleaned from the behaviour of the parent company, is perhaps a good reason to extend the clause.⁵⁹ As Professor Fouchard has suggested, the concepts of "maître de l'affaire" or "dirigeant de fait" are well known in French law.⁶⁰ Their application in this context might be more appropriate than the use of an artificial interpretation of the will of parties. Extension of the arbitration clause would then become a sanction where one is probably warranted.

It is submitted that this analysis provides the most compelling alternative, but it is not exempt from conceptual difficulty. Theories such as "apparence" (creating the appearance of being a party to a contract) and "dirigeant de fait" (actual involvement in decision-making) are probably founded in quasi-delict, rather than contract. These concepts could, therefore, only be used to justify extension of an arbitration clause to a non-signatory if the clause is viewed as

⁵⁸*Supra*, note 10 at 118.

⁵⁹Some support for this position can be found in the comments of Prof. Lagarde in Fadlallah, *supra*, note 10 at 129, and Prof. Fouchard in Chapelle, *supra*, note 9 at 500.

⁶⁰In Chapelle, *ibid.* at 500.

a separate procedural contract which establishes the right to commence proceedings (as distinguished from the cause of action itself).⁶¹ A rule of law would have to be developed to permit extension of the agreement to arbitrate in these special circumstances as an exception to the unusual requirement of an agreement between the parties.

This approach would necessitate a two-step analysis: first, the arbitrators would have to examine the question as to who should be treated as a party to the agreement to arbitrate; second, whilst considering the merits of the case, the arbitrators would have to determine the nature of the cause of action against each defendant. Where the sanction approach is used, the arbitral tribunal would be called upon to consider claims founded in both contract and quasi-delict.⁶² At each stage of the analysis French law should be applied if it is the governing law of contract.

The policy argument that would support the extension of an arbitration clause on the basis of such quasi-delictual concepts stems from the obvious advantages of consolidating proceedings.⁶³ Parallel proceedings before an arbitration tribunal and the state courts could lead to conflicting decisions. It may be that the risk of this problem, combined with the deliberate intervention of a company within a group in a contractual relationship which provides for dispute resolution by means of arbitration, presents a good enough reason to enforce the arbitration clause against a non-signatory.

E. Application of the Lex Mercatoria

The extent to which one may rely upon usages or the *lex mercatoria* as a reason for extending the scope of an arbitration clause is a much debated point. This discussion is usually focused upon the *Dow Chemical* case and the refer-

⁶¹Some support for this analysis of the nature of an arbitration clause can be found in the comment of Dean Loquin in the discussion following J.L. Goutal, "L'Arbitrage et les Tiers: I — Le Droit des Contrats" [1988] Rev. arb. 439 at 472.

⁶²See the discussion on the scope of arbitration and claims in quasi-delict, *infra* at text accompanying note 69.

⁶³The problem of consolidating proceedings has been considered by the French courts in the context of groups of contracts involving the same parties, or some of the same parties, where the contracts contain arbitration clauses. The somewhat restrictive approach taken by the courts is well illustrated by the decisions of the Paris Cour d'appel (19 December 1986, [1987] Rev. arb. 359), the Cour de cassation (8 March 1988, [1989] Rev. arb. 481) and the Cour d'appel of Versailles (7 March 1990, [1991] Rev. arb. 326: *renvoi* from the Cour de cassation quashing the decision of the Paris Cour d'appel relating to ICC arbitration proceedings commenced by SOFIDIF, COGEMA and EURODIF against OIAETI and OEAI). The proceedings were commenced on the basis of three different arbitration clauses: (1) a clause providing for French law arbitration in Paris; (2) a clause providing for French law arbitration in Geneva and (3) a clause which did not establish the governing law, nor the place of arbitration. It was ultimately decided that differences in the three clauses suggested a lack of intention on the part of the parties to consolidate proceedings. This less imaginative approach to the question of the will of the parties contrasts greatly with the *groupe de sociétés* cases. It also suggests a reluctance on the part of the French courts to accept arguments based on consolidation. In contrast to this, however, see the decision of the Paris Cour d'appel in *KIS France SA v. Société Générale*, 31 October 1989 (unpublished) where a group of contracts concluded by various companies within two distinct groups resulted in a single arbitration proceeding.

ence to the *lex mercatoria* in the decision of the Cour d'appel. Some commentators have taken the view that usages have been relegated by the Cour d'appel to a position which is subordinate to the will of the parties; the concept of groups of companies as a usage is only considered in the process of attempting to identify the will of the parties. To proponents of the application of the *lex mercatoria*, like Professor Berthold Goldman,⁶⁴ this analysis effectively identifies the will of the parties as the sole basis of the decision. Professor Goldman is correct, but it is submitted that reference to usages in this context, as a justification for extension of an arbitration clause, should be undertaken with great care, if at all.

Groups of companies are not constructed in order to make their components interchangeable. Since isolation of liability is just as much a usage as economic unity or common control, which usage does one choose to recognise? It would not be uncommon to find that they are all present in a given situation. One detects a certain tone of morality in the assertion that the usage of groups of companies should be employed to combat the problem of subsidiaries being used to shield parent companies from liability for the consequences of their own decisions.⁶⁵ However, as Professor Lagarde⁶⁶ has suggested, morality only works as a justification when a non-signatory is being pursued; this result can be achieved through the application of the theory of the *maître de l'affaire* or *l'ingérence*.

The *groupe de sociétés* problem is, in our view, one which relates primarily to the effects of a contract (*l'effet relatif des contrats*). It is generally resolved by identifying the parties to the contract, and this is a matter which should be determined by application of its governing law. Where this is French law, recognised principles such as agency and ratification should be applied. As suggested above, in appropriate cases, extra-contractual principles such as *apparence* or *gestion de fait* may also justify extension of the arbitration clause. Where extension of an arbitration clause cannot be justified on the basis of truly "classic" concepts, it should not be extended.

One of the implications of this analysis worth noting is that, unless one can find that a non-signatory party involved in the negotiation of a contract was represented by its signatory, participation in the negotiations will never, by itself, be sufficient. Application of the concept of agency will usually lead to the conclusion that the non-signatory represented the company which signed the contract. The assumption of obligations under the contract or participation in decision-making in relation to the contract may, however, be sufficient in some cases.

F. The Reasons of the Arbitral Tribunal in ICC Case No. 6519

The test applied by the Arbitral Tribunal to determine the scope of the arbitration clause was inspired by the *Dow Chemical* case, although it did vary the

⁶⁴See comments of Prof. Goldman in Fadlallah, *supra*, note 10 at 125.

⁶⁵*Ibid.* at 126, 129.

⁶⁶*Supra*, note 59.

formula slightly. In the Tribunal's view, an arbitration clause may only be extended to cover claims made by or against companies within a group if the non-signatory company was represented expressly or impliedly by the company that signed the relevant contract, if it played an active role in the negotiation of the contract, or if it was "directly concerned" by it. It will be noted that, rather than referring to involvement in the performance of the contract, the Tribunal has proposed the broader test of being "directly concerned" by it.

In relation to the first two plaintiffs, Companies XC and XD, the Tribunal's decision appears to be correct. The extent of their involvement in the transaction was limited to that of having their shares transferred by Mr. X and certain other companies that he controlled to Company XB. Companies XC and XD did not acquire any rights or assume any obligations under the contract. Regardless of whether one applies the *groupe de sociétés* theory or classic principles of French law, the answer to this question is undoubtedly that they could not avail themselves of the arbitration clause.

The Tribunal's reasoning in relation to Company XB is more vulnerable to criticism. This part of the award is somewhat confused as it appears to rely on both the *groupe de sociétés* theory and the fact that Company XB was a third party beneficiary under the contract (*bénéficiaire* of a *stipulation pour autrui*), two analyses which, it is submitted, are incompatible. The *Dow Chemical* approach requires a conclusion that the non-signatory was *de facto* party to the contract. This cannot be reconciled with a finding that the Company was a third party beneficiary under the contract.

Even if one accepts the *groupe de sociétés* approach, the Arbitral Tribunal's application of the theory may be incorrect. From the recital of the facts, it appears that the contract in question was essentially a joint venture agreement. Company XB may have been, as the Tribunal stated, at the heart of the scheme, but it was merely a vehicle. The fact that, in its role as vehicle, it was to receive substantial assets could only support a finding that it was a third party beneficiary and, therefore, not a party to the contract. The Tribunal's substitution of the criterion that the non-signatory company be "directly concerned" by the contract for the *Dow Chemical* test of involvement in performance of the relevant contract, which suggests an assumption of obligations thereunder, does not resolve the problem. Each test is designed to lead to the conclusion that the company in question was a party to the contract and therefore a party to the arbitration clause.

If one disregards the *groupe de sociétés* aspect of the reasoning, the Tribunal also seems to have erred in its use of the third party beneficiary concept as a basis for extending application of the arbitration clause. In *Bisutti v. Société Financière Monsigny (Sefimo)*,⁶⁷ the Cour de cassation held that a third party beneficiary could not avail itself of an arbitration clause contained in the contract which establishes its rights as beneficiary.

⁶⁷Cass. com., 4 June 1985, [1987] Rev. arb. 139 [hereinafter *Bisutti*].

The facts of the *Bisutti* case are perhaps worth mentioning. In a contract between Madame Bisutti and another party for the sale of certain shares, a portion of the shares to be sold were to be transferred by Madame Bisutti to Sefimo. When the latter refused to pay for the shares, Madame Bisutti commenced proceedings before the Tribunal de Commerce. In an attempt to avoid the suit, Sefimo invoked the arbitration clause contained in the contract which established its right to the shares as third party beneficiary. This argument was accepted by the Tribunal de Commerce and the Versailles Cour d'appel. The Cour de cassation rejected it on the basis that the arbitration clause only bound "le stipulant et le promettant."⁶⁸

Under French law, a *stipulation pour autrui* confers upon the beneficiary the right to receive what he has been promised. Once the promise has been accepted by the beneficiary, it becomes a right which he may enforce.⁶⁹ As a third party beneficiary does not assume any obligations under the contract, it has been a long-settled point that an arbitration clause cannot be asserted against him. Some of the *doctrine* has argued that a third party beneficiary should be permitted to invoke an arbitration clause to enforce his rights. The argument advanced in support of this position is that the arbitration clause attaches itself to the clause containing the promise as a term relating to the manner in which it may be enforced. This may be what the Tribunal meant when it stated at the end of the section of its award dealing with this issue, that the arbitration clause formed with the rest of the agreement an indivisible whole. This argument appears to have been rejected by the Cour de cassation. Furthermore, if the *groupe de sociétés* theory relies upon the *autonomie* of the arbitration clause, this statement clearly contradicts it.

III. The Second Challenge: Application of the Arbitration Clause to Claims Framed in Quasi-Delict

The contract that the Arbitral Tribunal was invited to consider was one which had been duly concluded, but had never entered into force. Liability in relation to a contract which has lapsed for failure of conditions precedent takes one across the rather ill-defined border in French law between contract and quasi-delict. Faced with allegations that Company Y's withdrawal from the transaction prevented the condition relating to exchange control from being fulfilled, the Tribunal decided that it had jurisdiction even though the claim was framed in quasi-delict. Its decision was founded principally upon the proposition that an arbitral tribunal has jurisdiction to examine delictual and quasi-delictual liability when it is related to the conclusion or performance of a contract containing an arbitration clause.

An analysis of the Tribunal's reasoning requires one to distinguish two issues. The jurisdiction of the arbitrators to hear the matter in view of the fact

⁶⁸*Ibid.* at 140.

⁶⁹Art. 1121 of the *Code civil*; P. Malaurie & L. Aynes, *Cours de droit civil: les obligations*, 2d ed. (Paris: Cujas, 1990) at 366; H.L. Mazeaud, J. Mazeaud & F. Chabas, *Obligations: Théorie Générale*, 7th ed. (Paris: Montchrestien, 1985) at 888-89, 891-93.

that the contract had lapsed must be viewed as a separate and distinct question from that of the scope of their jurisdiction. On the first point, the recent decision of the Cour de cassation in *Société Navimpex Centrale Navala v. Société Viking Trader*⁷⁰ has determined that, on the basis of the *autonomie* of the arbitration clause, an arbitral tribunal may assume jurisdiction over a dispute related to the conclusion of a contract which has never come into force. The theory of *autonomie*, then, would clearly justify the investiture of the Arbitral Tribunal in the present case. Although in the *Navimpex* arbitral award liability was founded in quasi-delict, the Cour de cassation was not called upon to consider the question of the scope of the Arbitral Tribunal's jurisdiction, as the Cour d'appel held that liability was actually sustainable in contract.

In his comments on this decision, Professor Goldman has suggested that an arbitral tribunal is competent to consider any delicts or quasi-delicts committed in connection with the conclusion, performance or the termination of a contract.⁷¹ This is a compelling argument, particularly in the present case, given that the parties have expressed a desire in the contract that they concluded to resolve at least certain disputes related to the contract through the process of arbitration. However, one is not dispensed, as the arbitrators in the present case suggested, from examining the clause itself in order to determine its scope.

An arbitral tribunal's jurisdiction⁷² to define the limits of its own jurisdiction, referred to in France as the "compétence-compétence," necessarily includes the power to interpret the arbitration clause. Generally, an arbitral tribunal's findings on matters of interpretation of a contract cannot be disturbed by the Cour d'appel unless they result in some distortion of its terms. This is not the case, however, with regard to questions of the arbitral tribunal's jurisdiction. The Cour de cassation has confirmed that, in the context of a *recours en annulation* or a challenge to the enforcement of an arbitral award, the Cour d'appel must itself interpret the relevant contract in order to determine whether the arbitral tribunal had jurisdiction to hear the matter.⁷³ The interpretation of the Cour d'appel will not be reversed by the Cour de cassation except where it is manifestly incorrect.

Although they are not numerous, some examples can be found in the jurisprudence of judicial interpretation of an arbitration clause. In *Société Merle et Cie v. SFEIC*,⁷⁴ the Cour de cassation held that, due to the presence of an arbitration clause, the Tribunal de Commerce must decline jurisdiction in relation to a quasi-delictual claim founded upon the improper issue of a *protêt*. The *protêt* had been served on the purchaser of certain goods by the unpaid vendor,

⁷⁰Cass. civ. 1re, 6 December 1988, [1989] Rev. arb. 641 [hereinafter *Navimpex*]. This case is to be contrasted with *Pia Investments, supra*, note 54, where the contract did not come into existence because it was not properly formed.

⁷¹See B. Goldman, Annotation of Cass. civ. 1re, 6 December 1988, [1989] Rev. arb. 642 at 651.

⁷²Although this is more or less a universally accepted principle, authority for the "compétence-compétence" of the Tribunal can be found in art. 1466 of the *Nouveau Code de procédure civile* and in art. 8(3) of the ICC Rules of Arbitration.

⁷³Cass. civ. 1re, 6 January 1987, (1987) 114 JDI 638 at 639.

⁷⁴Cass. com., 11 October 1954, [1955] Rev. arb. 58 [hereinafter *Société Merle*].

which had allegedly failed to respect the terms of the contract. Unfortunately the judgment does not provide the exact wording of the arbitration clause that was considered, but the clause appears to have referred at least to disputes relating to performance of the contract. In response to the argument that the issue of a *protêt* was an act external to the contract, the Court stated that the arbitration clause would cover any difficulty arising out of the performance of the agreement.

A similar liberal approach was taken by the Paris Cour d'appel in *BRGM v. Patino International N.V.*⁷⁵ An arbitration clause submitting all disputes arising out of the agreement to arbitration was held to cover a quasi-delictual claim to the effect that the defendants had fraudulently prevented the plaintiffs from exercising certain of their rights under the contract. The *Patino* case can probably be cited as authority for the proposition that, where an arbitration clause is broadly drafted, any quasi-delictual or delictual claims related to the performance of the contract containing the clause may be submitted to arbitration.⁷⁶

When asked to construe more narrowly drafted arbitration clauses, the French courts have, in some instances, been less generous in their interpretations. There are indeed some cases which suggest that an arbitration clause should be interpreted restrictively, meaning that the power of an arbitral tribunal is limited to the literal meaning of the words used in the arbitration clause.⁷⁷ For example, the Paris Cour d'appel quashed an award where the arbitrators, with powers to hear disputes relating to the interpretation of a contract, had granted the plaintiffs the remedies of rescission and damages.⁷⁸ The Court reasoned that the conferment of powers to interpret the contract meant that the arbitrators could only define the obligations of the parties which gave rise to the dispute, but they could not sanction a breach of those obligations.

Another regrettable example in the jurisprudence concerns a clause identical to the one in the ICC case being examined: the arbitrators were given jurisdiction over all disputes related to the interpretation and/or performance of the contract concerned. In *Dame Krebs v. Milton Stern*⁷⁹ arbitrators with powers of an *amiable compositeur* had awarded damages to the plaintiff on the basis that the defendant's reliance upon a rather harsh clause in the contract constituted an *abus de droit*. This reasoning was upheld by the Paris Cour d'appel. However, the Cour de cassation found that the Paris Cour d'appel had erred in not requiring the arbitrators to examine whether or not the relief requested on this basis was founded in quasi-delict and therefore outside the scope of the arbitration clause. The Court did not provide any further guidance as to the meaning of the

⁷⁵Paris, 11 December 1981, [1982] Rev. arb. 31 [hereinafter *Patino*]. Note that the *Avocat général* in this case, J.C. Lecantz, cited in his "conclusions" the decision of the Cour de cassation in *Société Merle*, *supra*, note 74 and recommended that it be followed. See D.1982.Jur.387 at 388.

⁷⁶Indeed, Prof. Goldman has cited it for this proposition. See Goldman, *supra*, note 71 at 651. We would only point out that the clause in the *Patino* case was very broadly drafted and easily lent itself to this conclusion.

⁷⁷*Juris-classeur droit international*, "Arbitrage commercial international," fasc. 586-2, par B. Goldman, n° 45.

⁷⁸Paris, 25 January 1972, *Quijano Aguero v. Marcel Laporte*, [1973] Rev. arb. 158.

⁷⁹Cass. civ. 1re, 16 June 1976, [1977] Rev. arb. 272.

clause. The least that can be said is that this decision is difficult to reconcile with the *Société Merle* decision cited above.

In the present case, the Arbitral Tribunal only examined the arbitration clause as a subsidiary point in its reasoning. The Tribunal took the view that the allegation that Company Y had prevented the contract from being performed brought the plaintiffs' claims within the purview of the arbitration clause. Quasi-delictual prevention of the contract from coming into force was therefore equated with a dispute arising out of the performance of the contract.

The wording of the arbitration clause in this case was unfortunate and the Arbitral Tribunal was clearly stretching it in order to establish its jurisdiction.⁸⁰

Given the current state of French law, this issue might have formed the basis of a successful jurisdictional *recours en annulation*.⁸¹ On a policy level, however, we would suggest that it is inappropriate for the courts to construe an arbitration clause very narrowly or literally where it is clear that such an agreement exists between the parties,⁸² as was done in the cases cited above. If the parties have agreed to resolve disputes relating to the contract by arbitration, this should, as Professor Goldman has suggested, be considered to include claims in delict or quasi-delict which are related to the conclusion, performance or termination of the contract.

In its examination of the quasi-delictual claims in the present case, the Arbitral Tribunal applied the law of the contract to resolve them. In the arbitration context, claims in quasi-delict can give rise to difficulties in applying rules of conflicts of laws. A discussion of these difficulties is obviously beyond the scope of this paper; however, as a final observation, we would endorse the Arbitral Tribunal's application of the law of the contract to the claims in quasi-delict, which would appear to be in line with several cases on the subject.⁸³ As most quasi-delicts examined by an arbitral tribunal would relate to the contract from which the arbitrators derive their powers, it is preferable to consider claims arising in contract and quasi-delict under a single system of law as the boundaries between these two areas are not drawn uniformly in all jurisdictions.

Conclusion

ICC Case No. 6519 provides an excellent example of some of the complex jurisdictional issues which arbitrators are often called upon to resolve. Although French law has, for some time, contained well developed principles for dealing with problems related to the validity of an arbitration clause, this is not the case

⁸⁰It will be noted that the plaintiffs do not appear to have advanced any claims framed in contract in this case.

⁸¹To our knowledge, this award was not the subject of any challenge.

⁸²This is to be contrasted to the discussion in relation to the first jurisdictional issue which concerned cases where there is no written agreement to submit disputes to arbitration between a non-signatory and signatories of the contract containing the clause.

⁸³See discussion and debates led by C. Reymond entitled "Conflits de lois en matière de responsabilité délictuelle devant l'arbitre international" (17 May 1989) to be published in the *Travaux du Comité Français de Droit International Public* (1988-1989).

with regard to problems of scope. Judicial clarification of this area is needed to put an end to the current confusion in the jurisprudence between these two issues. It is hoped that, in contrast to questions of validity, the approach taken to matters of scope of an arbitration clause will be consistent with the governing law of the contract.
