

## **Arbitration clauses and jurisdiction clauses: Two separate sets of rules that should not be confused**

**Arbitration clauses and jurisdiction clauses are frequently included in contracts entered into between merchants. Both types of clauses are designed to set out the procedure that shall govern any dispute arising from or in connection with the contract. However, they should not be confused as they are not exactly the same and are subject to two different sets of rules. This has been recalled by the First Civil Chamber of *Cour de Cassation* (French Supreme Court) in a decision dated September 5, 2018.**

**This decision also provides the opportunity to review the competence-competence principle that applies in arbitration matters and to address the complex implementation of this principle.**

Arbitration clauses and jurisdiction clauses are both dispute settlement provisions.

The arbitration clause<sup>[1]</sup> is a private dispute resolution scheme. It reflects the parties' will to avoid proceedings before national courts and to refer any potential dispute that may arise from or in connection with their contract to an arbitrator.

On the other hand, the jurisdiction clause<sup>[2]</sup> aims at determining in advance the national court that will have exclusive jurisdiction to adjudicate any disputes that may arise in connection with the parties' contractual relationship.

Both types of clause depart from ordinary subject-matter (for the arbitration clause) and territorial (for the

jurisdiction clause) jurisdiction rules.

As such, they must be set forth in writing and expressly accepted by the parties and they are enforceable only between professional traders.

The application of these clauses has given rise to numerous disputes and the decision commented herein<sup>[3]</sup> provides an illustration thereof.

This decision of the *Cour de Cassation* indeed deserves particular attention as it firmly recalls that arbitration clauses and jurisdiction clauses - even though they have common features as they depart from ordinary rules of jurisdiction - are not subject to the same set of legal rules.

### **1/ Arbitration clauses and jurisdiction clauses: Two different sets of rules**

In the case commented herein, company A had concluded with several companies of Group B a contract for the supply of solar modules that included a jurisdiction clause conferring jurisdiction to French courts. To this contract was annexed insurance policies that had been underwritten by companies of Group B with three insurers and that covered *inter alia* potential power losses of the solar modules. A dispute arose between the parties regarding the performance of the contract and Company A summoned its co-contractors before the Commercial Court, as per the terms of the jurisdiction clause, and subsequently called the three insurers into the dispute. One of the insurers raised a plea of lack of jurisdiction, invoking the arbitration clause set forth in the insurance contract.

The Court of Appeals first disregarded the arbitration clause and held that the jurisdiction clause was to be applied. Indeed, the appellate judges, making an extensive interpretation of Article 48 of the French Code of Civil Procedure that deals with jurisdiction clauses, ruled that the Commercial court was competent to hear the dispute. They considered that the insurer had failed to establish that (i) the arbitration clause had been brought to the attention of, and accepted by, Company A, and (ii) it was included in the annexes to the contract.

It should be recalled that pursuant to aforementioned Article 48 of the French Code of Civil Procedure and according to an established case law, the jurisdiction clause, which must have been specified in a very apparent manner in the contractual document signed by the defendant, must necessarily have been brought to the attention of, and accepted by, the latter at the time of contract formation to be enforceable against it<sup>[4]</sup>.

However, in its decision dated September 5, 2018, the *Cour de Cassation* quashed the appellate judgment on this point and specified that ***“the provisions set forth in Article 48 of the French Code of Civil Procedure concerning jurisdiction clauses do not apply to arbitrations clauses”***.

In other words, the *Cour de Cassation* made clear that jurisdiction clauses and arbitration clauses are not to be confused. Even though both types of clauses depart from ordinary jurisdiction rules, they are governed by two different sets of rules.

## **2/ The competence-competence principle**

The September 5, 2018 decision was also the opportunity for the *Cour de Cassation* to recall the competence-competence principle that applies in arbitration matters.

Indeed, in the case at hand, the Court of Appeals had held that the Commercial Court to which the dispute had been initially referred was competent to hear the case, as per the jurisdiction clause. It had disregarded the arbitration clause because this clause was stipulated in the insurance contract entered into between the insurer and an insured and could not, as such, be enforced against a third-party even if such party could benefit from it in case of an insurance claim. As such, according to the appellate judges, the insurer could not rely on the notion of “contractual whole” since it was not involved in the main contract for the supply of solar modules.

The *Cour de Cassation* also quashed the appellate judgment on this point.

It recalled that the Court of Appeals could not rule so without having first acknowledged that the arbitration clause was obviously void or inapplicable.

The *Cour de Cassation* applied the competence-competence principle set forth in Article 1448 of the French Code of Civil Procedure according to which:

*“Where a dispute, referred to an arbitral tribunal pursuant to an arbitration agreement, is brought before a national court of law, the latter must decline jurisdiction, **unless if the case has not yet been brought before the arbitral tribunal and if the arbitration agreement is manifestly void or manifestly inapplicable.***

*The national court may not raise sua sponte its lack of jurisdiction.*

*Any provision or agreement contrary to the rules herein laid down is deemed unwritten.”*<sup>[5]</sup>

In other words, the arbitrator must, as a priority, rule on the existence, validity and scope of the arbitration agreement pursuant to which the dispute is referred to him. The national court has no jurisdiction to do so, unless it finds that the arbitration agreement is manifestly void or inapplicable<sup>[6]</sup>.

As an example, in a case adjudicated by the *Cour de Cassation*, the arbitration clause stipulated in a contract separate from the one whose implementation was requested by one of the contractual parties and that contained a jurisdiction clause was held obviously inapplicable. It followed indeed from the facts of the case that the parties wanted to distinguish between the two contracts - which had different purposes - by inserting contrary dispute resolution clauses<sup>[7]</sup>.

The *Cour de Cassation* is, however, quite demanding when it examines whether trial judges have properly assessed and characterized the manifestly void or inapplicable nature of an arbitration agreement.

It has ruled in the past that a Court of Appeals that, in order to rule that the Commercial Court was competent

to hear an unfair competition claim (i.e. a claim in tort), held that the dispute was therefore outside the contractual scope and that the arbitration clause was limited to the difficulties arising from or in connection with the performance, interpretation or termination of the contract, had failed to characterize the voidness or the inapplicability of such clause.<sup>[8]</sup>

In the matter commented herein, while judges have, to set aside the arbitration clause, considered that such clause could only apply between the insurer and the insured, they failed to acknowledge that this clause was obviously void or inapplicable, thereby infringing aforementioned Article 1448 §1 of the French Code of Civil Procedure.

[1] Cf. Articles 1442 to 1449 of the French Code of Civil Procedure and Articles 2059 to 2061 of the French Civil Code

[2] Cf. Article 48 of the French Code of Civil Procedure

[3] 1<sup>st</sup> Civil Chamber of the *Cour de Cassation*, September 5, 2018, n°17-13837

[4] Commercial Chamber of the *Cour de Cassation*, March 4, 2014, n°13-15846

[5] Emphasis added

[6] 1<sup>st</sup> Civil Chamber of the *Cour de Cassation*, April 11, 2018, n°17-17991

[7] 1<sup>st</sup> Civil Chamber of the *Cour de Cassation*, February 12, 2014, n°13-18059

[8] 1<sup>st</sup> Civil Chamber of the *Cour de Cassation*, November 8, 2005, n°02-18512

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