

## The « règles matérielles » of International Arbitration Law and the Law Applicable to Arbitration Agreements —Through the Analysis of French Case Law on the Extension of Arbitration Agreements to Non-Signatories (summary)

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In international commercial arbitration, French courts have established the principle of the “autonomy of arbitration clause with regard to any State law” (*see* Court of cassation, judgement of 23<sup>rd</sup> December 1993, “Dalico case”). Under this principle, French courts have excluded the conflict of law rules when they examine the existence and effect of an arbitration clause, and then adopted the method of “*règles matérielles* (material rules).”

In this article, the author researched into the nature of such material rules of international arbitration law, and the source of these material rules. This research focused on the French jurisprudence on the “extension” of arbitration clause to non-signatories.

The effect of an arbitration clause on a party who does not sign the contract has been one of the most controversial issues in the international commercial arbitration. French courts have developed an interesting solution for this issue : “*The arbitration clause inserted in the international contract have proper validity and effect which order to extend its application to the parties directly involved in the enforcement of contract and in the disputes resulting from the contract, as it is established that their contractual situation and their activities make a presumption that they have accepted the arbitration clause of which they were aware of the existence and the scope, even if they had not been signatories of the contract containing that clause.*” (Court of Appeal of Paris, judgement of 23th June 2020, “*Kabab-ji v Kout Food Goup case*”).

In this way, French courts presume, from the participation of non-signatory parties in each phase of contract, that they were aware of the arbitration clause contained in the contract and then, even their acceptance to the arbitration clause. An author comments on this presumption as “almost un rebuttable” (Jean-Baptiste Racine, *Droit de l'arbitrage* (PUF 2016) para. 325). This reflects an idea, which seems prevailing in France, that the international commercial arbitration is a “*mode normal* (normal method)\*” of the dispute resolution system for international commercial operation. (\*Philippe Fouchard et al., *Traité de l'ar-*

*bitrage commercial international* (Paris, Litec., 1996) p. 3.)

This article examined the origin, or the source of such a method of “extension” of arbitration clause to non-signatories. First, the author investigated into cases in French internal law : cases where a parent company was declared responsible for the activities of its subsidiaries towards their contracting parties under French company law, cases where courts suggested the possibility of “*action directe*” between a sub-contractor and a master of works under French civil law, or even a case on the effect of a choice of court agreement towards a third party.

The result of that examination suggests that the theory of “extension” of arbitration clause found in French jurisprudence, however, does not seem to have been influenced by these areas of French internal law. Rather, arbitrators in international commercial arbitration had already developed an “arbitral case law” by virtue of the international trade usages. Therefore, it would be reasonable to understand that French courts have been inspired by this arbitral case law.

It is interesting that French courts apply the arbitral case law instead of relying on French domestic law rules. From the examination in this article, it is suggested that the “material rules” of international arbitration law, applied by French courts, find its source in international arbitration practice, that is *lex mercatoria*. Considering that rules of law of any State of domestic source are not always arbitration-friendly, French courts have tried to refrain from imposing any State law rules, even rules of their own State. By virtue of the Autonomy of arbitration clauses with regard to any State law, French courts thus give priority to the rules developed in the international community of merchants.