

## **ARBITRATION, TORTUOUS AND CONCURRENT LIABILITY IN TORT AND CONTRACT**

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We believe it is appropriate to introduce our presentation with specific case law.

A prime contractor entrusts the drawing up of plans for a building to an architect. This agreement contains an arbitration clause which stipulates that, "Any action resulting from the contract or company shall be submitted to arbitration."

The plans drawn up by the architect had provided for the installation of a septic tank in a non-aedificandi area and more specifically 10 cm from a NATO military pipeline.

For this wrongdoing, the architect is assigned to the ordinary courts by the contracting authority on a quasi-delict basis.

The Court of Appeal of Liège decided that the arbitration clause does not apply when the contracting authority seeks the architect's liability not on a contractual basis but on a quasi-delict basis.<sup>23</sup>

More recently, the Antwerp Court of Appeal<sup>4</sup> has decided that an arbitration clause must be interpreted restrictively and therefore does not include claims based on a party's pre-contractual liability.

Is quasi-delict liability foreign to arbitration? During this study, we will be able to detect a symbiosis between these two institutions.

We will then see to what extent arbitrators are competent to deal with quasi-delict liability in comparative law as well (2). We will then focus on the wording of the clause and the definition of the arbitrators' mission (3). We will briefly examine the situation of third parties and criminal liability, (4) and end with general reflections and recommendations on the drafting of the clause (5). We will not specifically address the issue of the nullity of the contract or its abusive termination.

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<sup>1</sup> I would like to thank Thierry TOMASI, a lawyer in Paris, a specialist in arbitration, for his enlightening thoughts.

<sup>2</sup> Liège, September 4, 1987 J.L.M.B., 1988, p. 309 and note P. HENRY Cumulation of responsibilities and in solidum, A dangerous cocktail; see. G. KEUTGEN & G.A. DAL, National and international arbitration law, Bruylant, volume 1, 2006, p.178.

<sup>3</sup> See, OF BOURNONVILLE (P.), "The subject of the dispute," Rep. Not., Vol. XIII, The notarial procedure, Book 6, Arbitrage, Brussels, Larcier, 2017, no. 73.

<sup>4</sup> December 3, 2012, R.D.C., 2014, p. 373.

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# I. The contractual and non contractual liability contest: reminder of Belgian and comparative law.

## 1.1 Belgian law.

Belgian law has undergone significant changes in this area, but we believe it is preferable to refer to the most important case law on this issue.

In a judgment of February 13, 1930, the Court of Cassation ruled that the parties had the choice of bringing their action on a contractual or non-contractual basis.<sup>5</sup>

In an important judgment of December 7, 1973,<sup>6</sup> the Court was more restrictive. The option between contractual and non-contractual liability presupposes, states the judgment:

- The violation of an obligation that is binding on all
- A damage that is not purely contractual.

This case law severely restricts the possibilities of accumulation of liabilities, which of course strengthens the scope of the arbitration clause since it will be more difficult to bring an action outside the contract.

The Court of Cassation subsequently specified that accumulation was possible in the event of criminal liability.<sup>7</sup>

In the judgment of September 29, 2006, the Court of Cassation held that the option between contractual and non-contractual liability was possible unless the damage was purely contractual.<sup>8</sup>

A draft reform of the law on torts was prepared by a committee of experts set up by the Minister of Justice by ministerial order of September 30, 2017.<sup>9</sup>

The project is based on the freedom of choice between contractual and quasi-delict liability.<sup>10</sup> However, the contractual clauses applicable to the relations between the parties will prevail over non-contractual liability. The draft insists on the necessary respect of the contractual clauses between the parties.<sup>11</sup> It does not mention arbitration clauses, but it can be assumed that they are covered.

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<sup>5</sup> J.T., 1930, p.182.

<sup>6</sup> Cass. 1974, 395, Pas.1974, I, 376, RW1973-74, 1597, note J. HERBOTS, RCJB, 1976 pp.15 e.s. and notes R.O. DALCQ and F. GLANSDORFF

<sup>7</sup> Cass. October 26, 1990, R.C.J.B., 1992, p. 497 and note R.O. DALCQ.

<sup>8</sup> Cass. 2006, 1863; NJW2006, 946, note I. BOONE, RW 2006-07, 1717, note A. Van Oevelen, RW2006-07, TBO 2007, 66, note K. VANHOVE, June 7, 2010 (RG C. 09.0586. N.), March 24, 2016 (RG C.14.0329.N) and March 17, 2017 (AR C.16.0283.N).

<sup>9</sup> See, [https://justice.belgium.be/sites/default/files/voorontwerp\\_van\\_wet\\_aansprakelijkheidsrecht.pdf](https://justice.belgium.be/sites/default/files/voorontwerp_van_wet_aansprakelijkheidsrecht.pdf); [https://justice.belgium.be/sites/default/files/memorie\\_van\\_toelichting\\_aansprakelijkheidsrecht\\_0.pdf](https://justice.belgium.be/sites/default/files/memorie_van_toelichting_aansprakelijkheidsrecht_0.pdf)

<sup>10</sup> See, Explanatory Memorandum, p. 4. See article 5.141.

<sup>11</sup> Explanatory Memorandum, p. 22.

## 1.2 English Law

### 1.2.1 Introduction

In previous centuries, the authors did not perceive the problem of the choice between contractual and non contractual liability<sup>12</sup> The accumulation is now allowed , and the two fairly recent judgments cited below retrace the evolution.

In Tai Hing Cotton Mil Ltd v. Li Yu Chang Hing Bank Ltd, Lord Scarman of the Privy Council had stated:

*"Dear Lordship, do not believe that there is anything to the advantage of the law's development in searching for a liability in torts, where the parties are in a contractual relationship."*<sup>13</sup>

This case law was overturned by the House of Lords' case law in an important decision in Henderson v. Merrett Syndicates Ltd.,<sup>14</sup> in which Lord Goff stated:

*"... in the present context, the common law is not antipathetic to concurrent liability and ... there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. The result may be untidy; but given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded."*<sup>15</sup>

We can therefore see the uncertain nature of the decisions, which is undoubtedly linked to the complexity of the delimitation between contractual and quasi-delict liability and the diversity of factual situations.

## 1.3 German law.<sup>16</sup>

Under German law, the violation of a contractual obligation is quite different from the violation of an absolute right within the meaning of paragraph 823 of the BGB, or from the violation of a protective law within the meaning of paragraph 823, number 2 of the BGB.

The only exception exists where the application of the law of non-contractual liability would have the effect of undermining the very purpose of the contractual norm, in particular because that contractual norm provides for exemptions from liability or shorter limitation periods.

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<sup>12</sup> CHITTY, On contracts, 2013, p. 60.

<sup>13</sup> [1986] AC80, 107.

<sup>14</sup> [1995]2 AC 145 at 93-4.

<sup>15</sup> See, AlosHolt y. Payne Skillington, *The Times*, Dec. 22, 1995; See also, Markesinis and Deakin's, *Tort Law*, 6th Edition, by S. DEAKIN, A. JOHNSTON and B. MARKESINIS, Clarendon Press, Oxford, p. 29.

<sup>16</sup> Peter H. SCHLECHTRIEM, "Contract Rules and Regulations and non-contractual liability - A comparative law study on the competition of speeches from contract and tort, American and German Law", work on comparative law (Publications series of the company filr comparative law), Alfred Metzner Publishers, Frankfurt am Main, 1972.

Thus, the application of the articles relating to quasi-delict liability in respect of leases is refused, whereas Article 558 of the Civil Code provides for a much shorter limitation period in respect of leases than in respect of non-contractual liability.<sup>17</sup>

One author has had a significant influence in German law, namely Dietz.<sup>18</sup> The author considers that civil liability law and contract law are not subsidiary to each other and that, moreover, one is not a special matter in relation to the other. There is therefore no competition between the two branches of law and consequently, each can evolve in its own way; Dietz leaves a large place for an evolution completely independent of the action in contractual liability and non-contractual liability, independence even going as far as the competence of the court.<sup>19</sup>

German case law is very illustrative. An example is a decision of the Bundesgerichtshof of April 28, 1953, which clearly states that the carrier or the bailee of goods had an obligation to take care of these goods. This obligation is based on paragraph 823 BGB (tortious liability), even if the parties are bound by a contractual relationship. This same decision specifies that each of the actions may be brought at the same time and that they comply with their respective rules on prescription.<sup>20</sup> The Bundesgerichtshof thus confirms the Reichsgericht's case law.

In a decision of March 17, 1987, the Bundesgerichtshof also confirmed the thesis of option between contract and torts and expressly referred to the aforementioned Dietz book.<sup>21</sup>

In a judgment of November 20, 1984, the Bundesgerichtshof decided that the liability limitation of Article 525 of the Civil Code does not apply when it concerns a violation of a protected right that is not directly related to the object of a donation.<sup>22</sup> This notion of direct relationship with the object of the contract is a very interesting notion in the context of this comparative law study.

Similarly, in a decision of March 23, 1966, the Supreme Court ruled that the limitation of the freight forwarder's liability for loss of or damage to the goods transported, which is based on paragraph 430 of the Commercial Code, does not prevent liability for unlawful acts in the event of damage to property based on paragraph 823 BGB.<sup>23</sup>

It will be noted that, contrary to Belgian law, the fact that the damage is of a contractual nature is not sufficient to exclude the competition.

We will not go into further details and will refer to the draft common European reference framework.<sup>24</sup>

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<sup>17</sup> P. SCHLECHTRIEM, *op. cit.*, p. 39.

<sup>18</sup> R. DIETZ, *Competition in Claims for Breach of Contract and Offence*, 1934, Bonn.

<sup>19</sup> P. SCHLECHTRIEM, *op. cit.*, p. 43; R. DIETZ, *op. cit.*, 1934, Bonn, pp. 169-173.

<sup>20</sup> BGHZ 9, p. 301.

<sup>21</sup> BGHZ, p. 100. The decision cited at page 190, reference to DIETZ's book, on page 100.

<sup>22</sup> BGHZ 93, p. 23.

<sup>23</sup> BGHZ 46, p. 140; *See also*, for another assumption of competing liability BGH, December 20, 1966, BGHZ, 46-313 and especially p. 316 and the references cited; *see also*, P. SCHLECHTRIEM, p. 328 and references cited, which cite a set of examples of cumulative liability in the case of a contract of enterprise.

<sup>24</sup> *Principles, Definitions and Model rules of European Private Law, Draft Common Framework of Reference* (DCFR (Full Edition) Sellier, 2009). Article VI-1:101.

## 1.4 French law

Under French law, the concurrence of liability is in principle prohibited:<sup>25</sup> *"The creditor of a contractual obligation may not rely on the rules of tort against the debtor of that obligation, even if there is an interest in it."*<sup>26</sup> Thus, it is the only contractual responsibility that will govern the relationship between a motorcycle instructor and his injured student.<sup>27</sup>

Some authors have considered that obligations such as the duty to inform do not constitute contractual obligations, thus paving the way for non contractual action; this argument has rightly been criticized because the duty to inform is based on articles 1134, paragraph three and 1135 of the Civil Code.

## 1.5 Conclusions.

It can be seen that the solutions proposed by the different law systems are very different; they depend in particular on the importance given from one law system to another to contractual liability. In German law, tort liability is very restrictive, unlike French or Belgian law, which has a general civil liability clause.<sup>28</sup>

Finally, in some cases, no distinction is made between contractual liability and tortious liability; this includes liability for defective products.

## II. The liability contest: a false problem? Competence of judges and arbitrators in quasi-delict matters.

The notion of the concurrent liabilities in arbitration matters will not arise in terms as acute as those of the Liège decision set out in the introduction if it is considered that the arbitrator may hear disputes in matters of quasi-delict.

We propose to present this topic in the light of foreign case law.

For a long time, the competence of arbitrators in quasi-delict matters has been contested, but we believe we can detect a reversal of the trend in more recent case law.<sup>29</sup>

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<sup>25</sup> See, P. ANCEL, *Le concours de la responsabilité délictuelle et de la responsabilité contractuelle, Responsabilité civile et assurances* n° 2, February 2012, file 8; MR. POUmarede, *Dalloz, Action Liability and Contract Law*, Chapter 3213.

<sup>26</sup> Civ. 1st Chamber Jan. 11, 1989, appeal 86-17323; M. POUmarede, *Dalloz, Liability and Contract Law*, Chapter 3213.

<sup>27</sup> Civ. 2nd, July 10, 2008, no. 07-18.311. See also, Civ. 2nd Ch, June 21, 2001, no., 99-15.732, *Bull. Civ. II*, no. 122.

<sup>28</sup> See, P. ANCEL, *op.cit.* no. 2.

<sup>29</sup> Charles JARROSSON, *Paper 10 Commercial Arbitration, JurisClasseur Notarial Form Internal Law*, CA Paris, 11 Dec. 1981; D. 1982, p. 387; *Rev. arb.* 1982, p. 311, note J. RUBELLIN DEVICHI. - CA Paris, May 24, 2000: *JurisData* no. 2000-117311; *Rev. arb.* 2001, p. 235, note P. DIDIER. - CA Paris, 2 June 2004; *Rev. arb.* 2005, p. 673, 2nd species.

## 2.1 An interesting Greek decision can be cited.

An exclusive agency agreement between a Swedish company and a Greek agent is accompanied by an arbitration clause. The clause provided for arbitration in any dispute arising in connection with the contract.

The contract was for the supply of ammunition.

The agent brings an action against the principal before the ordinary courts on a quasi-delict basis for wrongful termination. In first instance and on appeal, the judges declare themselves competent since this was an extra-contractual action. The Supreme Court overturns the decision of the Court of Appeal. The Supreme Court held that the action for wrongful termination could be based on both contractual and non-contractual liability and, therefore, the arbitration clause had to be fully effective.

## 2.2 Let us also highlight a decision of the French Court of Cassation.<sup>30</sup>

The Court recalls that, under the principle of "competence-competence," it is for the arbitrator to rule on his own jurisdiction unless the arbitration clause is manifestly void or manifestly inapplicable. To put simply the facts a liquidator of a company was bound by a franchise agreement to the defendants; the defendants raise the exception of incompetence on the grounds, in particular, that the liquidator was not a party to the agreement providing for an arbitration clause and that the liability in question was a liability in tort.

The Court of Cassation overturned this decision, holding that the Court of Appeal did not establish that the clause was void or manifestly inapplicable and that the action for ordinary law liability was independent of the collective proceedings.

We can then quote another recent decision of the French Court of Cassation, which is in a different direction. It covered the following facts.<sup>31</sup>

A football club brings an action against FIFA before the ordinary courts. An arbitration clause bound the two disputing parties. FIFA raised the incompetence of the ordinary courts. The football club claimed that the arbitration clause could not be applied in disputes of an extra-contractual nature.

This exception of incompetence was favorably received by the trial judge. The Court of Cassation rejects the appeal brought by the club.

The appeal stated:

*"disputes governed by such a contractual clause can only be contractual disputes and that, consequently, the[club's] tort action was beyond the jurisdiction of the said arbitral tribunal in favor of the French courts."*

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<sup>30</sup> Civil Chamber 1, February 3, 2010, no. 09-12.669.

<sup>31</sup> Cass. July 6, 2016, no.15-19.521

The Court held that an arbitration clause in the event of a dispute between the parties to the contract, drafted in general terms, is not manifestly inapplicable to an action in tort.

### III. Arbitration clause and mission of the arbitrators.

#### 3.1 The arbitration clause: favor Arbitration.

Clauses are generally interpreted broadly.<sup>32</sup>

The wording is different. Some clauses only mention disputes arising out of the contract. In these cases, the breach of an obligation that is binding on all and causes damage that is not purely contractual may not fall within the scope of the clause, but this is not necessarily the case.<sup>33</sup>

In the *Fiona Trust* case,<sup>34</sup> the House of Lords had to hear cases of charter parties submitted to arbitration. One of the parties claimed that the charter parties had been obtained through corruption. The House of Lords considered that, by signing an arbitration clause, businessmen intended to submit all their disputes to arbitration, whether or not there was corruption.

Another case from American case law concerned a contract to rescue a stranded vessel.<sup>35</sup> The vessel was able to be removed, but as a result of the operations, the lifting company damaged the vessel's hull. The above-mentioned decision considered that the dispute was of a quasi-delict nature and was not covered by the arbitration clause, which only covered disputes arising from the contract.

Transposed to the case of the Court of Appeal of Liège mentioned above, one could infer that it is right that the Liège judge considered that the dispute relating to a quasi-delict fault did not fall within the scope of the arbitration clause.

Very close to the facts of the Liège decision are those of the Oberlandsgericht (Austrian) judgment of February 21, 1996.<sup>36</sup>

A contract for the provision of architectural services contained an arbitration clause. The contracting authority blames the architect for the damage caused to the neighboring house, which he had to compensate himself. The question arose during the proceedings as to whether the damage was contractual damage.

The Supreme Court held that the arbitration clause applies whether or not the damage is based on the contract. The solution is therefore far from that of the Liège court.

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<sup>32</sup> *See*, however, in Belgian law, G de LEVAL, "Chapter 1 - Arbitration" in *Judicial Law - Volume 2*, Brussels, Editions Larcier, 2015, p. 1387, which states: "Unlike French law, Belgian law continues to reject here the principle of the negative effect of the competence competence principle, which gives priority in principle to the arbitral tribunal in deciding on its jurisdiction. Indeed, on the basis of Article 1682, when a State court is seized of a decline of jurisdiction, it rules by examining the validity of the agreement, without priority having to be given to the arbitral tribunal that might be constituted. This does not prevent the arbitral proceedings from being initiated, continued and an award rendered."

<sup>33</sup> Lib. P.20.

<sup>34</sup> *Premium Nafta Products Limited and others v. Fili Shipping Company Limited and others*, (UKHL 2007) 40.

<sup>35</sup> *Cape Flattery Ltd v. Titan Maritime LLC.*, (U.S. Court of Appeals, 9th Circuit 2011).

<sup>36</sup> OGH, February 21, 1996, Role No. 7 Ob5 02/96.

Another case concerned an action for damages between partners. The arbitration clause was to apply to any dispute concerning the association's business. The Supreme Court declined jurisdiction; the question in this action was whether the association had rightly requested a supplementary call for funds from each partner. The fact that this matter could be submitted to arbitration was not considered relevant by the Court. Indeed, this was a preliminary question to the claim for damages and therefore was not likely to lead to a decline of jurisdiction in favor of the arbitral courts.

A contract between a taxi driver and a taxi company operating the radio power station contained an arbitration clause,<sup>37</sup> which submitted to arbitration all disputes arising between partners in the contract.

The driver was working with a competing company and wondered whether the unfair competition action fell within the scope of the arbitration clause. The court held that all actions fell within the scope of the clause even if the basis of the action was not the contract itself.

Is the arbitration clause applicable in the event of culpa in contrahendo? In a decision of March 30, 2009,<sup>38</sup> the Austrian Supreme Court, on the basis of an analysis of the facts of the case, answered in the affirmative. This decision can be compared with the one in which the Antwerp court ruled against it.<sup>39</sup>

Another example is the decision on the distribution of voltage measuring instruments.<sup>40</sup> The Austrian distributor claimed to be discriminated against; the prices charged to it were higher than the prices charged to the German distributor and, moreover, some equipment was not provided to it. The distributor's action was based on both the contract and the violation of competition law. The Supreme Court recognized the arbitral jurisdiction. She invoked *the favor arbitrandum*. When a clause covers all disputes arising from the contract, it covers both contractual and non-contractual disputes.

Quasi-delict actions brought subsequently of the contract are, under French law, subject, in principle,<sup>41</sup> to arbitration.<sup>42</sup>

### 3.2 Mission of the arbitrators.<sup>43</sup>

It is also necessary to consider the subject of the dispute.<sup>44</sup> The arbitrator may not rule on an incidental request that goes beyond the limits of the dispute.

Thus, when an incidental claim concerned the tortious liability of a party, the subject matter of that claim went beyond the scope of the dispute, which concerned contractual liability. However,

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<sup>37</sup> OGH, June 19, 1997, Role No. 6 OB 2213/96a.

<sup>38</sup> OGH, March 30, 2009, Role No. 7 Ob 266/08f49.

<sup>39</sup> December 3, 2012, R.D.C., 2014, p.373.

<sup>40</sup> OGH, August 26, 2008, Role No. 40 Ob 80/08f39.

<sup>41</sup> See, however, the judgment of the French Court of Cassation of July 8, 2010 cited below.

<sup>42</sup> E. LOQUIN, *op.cit.* No. 10 which cites Cass. October 11, 1964, Rev. Arbitration, 1965, p. 58. The arbitrator is competent for a dispute concerning facts prior to the conclusion of the contract but which are related to it.

<sup>43</sup> E. LOQUIN, *Jurisclasseur Civil procedure, Fasc. 1032: Arbitration. - Arbitral jurisdiction. - Investiture of arbitration. - Extended.* The author states that it is from the arbitration clause and not from the mission statement that the arbitrator derives his jurisdiction. (no. 12).

<sup>44</sup> See, on the extension of the arbitration clause as to the subject matter of the dispute, E. LOQUIN, *op. cit.*, no. 18 and 19.

the Court of Appeal had confirmed the award and it was the Court of Cassation that censured this decision of the Paris Court of Appeal.<sup>45</sup>

Interesting is the following decision of the Paris Court of Appeal. The Court notes that Article 1442 of the Code of Civil Procedure refers, as a basis for arbitral jurisdiction, to actions relating to disputes that would arise "in relation to such contract or contracts."<sup>46</sup> The Court concludes that actions in tort are outside the scope of arbitral jurisdiction unless it results from the scheme and economy of the agreement, the generality of the terms of the contract and the common intention of the parties that the parties wanted to submit all disputes arising from the contract to arbitration. The Court specified that in this assessment, it is not appropriate to focus on the qualification given to the action.<sup>47</sup> It is therefore appropriate that the tort, delict or quasi-delict action has a sufficient connection to the contract.<sup>48</sup> This issue is often addressed in disputes involving intellectual property infringement,<sup>49</sup> unfair competition,<sup>50</sup> or abusive breach of contract.<sup>51</sup>

The above-mentioned judgment of April 8, 2010 is interesting: Article 442-6 I-5 of the French Commercial Code sanctions by a mandatory provision the termination of established commercial relations. The injured party brings proceedings before the ordinary courts whereas the contract contained an arbitration clause. The trial judge declares himself incompetent in favor of the arbitral courts. The appeal stressed that the ordinary courts should be declared competent when it comes to the application of a police law.

The Court of Cassation notes that the arbitration clause referred to any dispute arising out of or in connection with the contract; however, the dispute concerning the termination of the contract is thus covered by the arbitration clause, and, the Court points out, it does not matter whether they are mandatory provisions, even police laws.

On the other hand, with regard to the scope of the arbitrator's mission, which was called upon by an arbitral agreement to rule on contractual liability resulting from an abusive breach of negotiations, this mission could not deal with quasi-delict liability because this judgment involves a separate examination of the main mission, both in fact and in law.<sup>52</sup> The Court of Appeal had considered that the claim for quasi-delict liability had a different purpose from the main claim; the Court of Cassation was bound by this factual finding and could therefore only dismiss the appeal brought against the judgment of the Court of Appeal.

It is interesting to draw a parallel with the rules on concurrence of liability; concurrence is possible when the damage is not purely contractual; in the decision of the Paris Court of Appeal, it is in particular the economy of the agreement that will make it possible to assess whether or not the dispute is included in the sphere of the arbitration clause.

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<sup>45</sup> Cass. 1st civ., May 18, 2005, no. 03-12.047; Juris-Data no. 2005-028419; Bull. civ. 2005, I, no. 208. It is difficult to draw too general a conclusion from this text because it is a lack of motivation that is highlighted by the Supreme Court.

<sup>46</sup> E. LOQUIN, *op.cit.*, no. 9.

<sup>47</sup> CA Paris, division 1, Ch. 1, July 1, 2014, No. 13/09208, Sept. of heart: JurisData no. 2014-015198; D. 2014, p. 2544, obs. Clay.

<sup>48</sup> C.A. Douai, Sept. 17, 2009, No. 05/07368; RLDA 2010/55, No. 3177, obs. E. Gillet.

<sup>49</sup> See, note TGI Paris, Dec. 21, 2007, RG no. 05/12975.

<sup>50</sup> C.A. Paris, Apr. 6, 2006: Rev. arb. 2006, 925 (2nd esp.), note D. Bensaude.

<sup>51</sup> Cass. civ. I, July 8, 2010: Bull. civ. 2010, I, no. 156; Rev. arb. 2010.513, note R. Dupeyré.

<sup>52</sup> Cass. 1st Civil Chamber, March 6, 2007, No. 06-16.423; JurisData No. 2007-037778; RTD com. 2007, p. 684, obs. LOQUIN; Rev. arb. 2006, p. 925, 1st esp., note D. BENSABUE.

## 3.2 Arbitration.

An important decision by the United States Supreme Court deserves attention.<sup>53</sup> The judgment concerned the arbitration of actions involving securities fraud. The Supreme Court ruled against the arbitration of such liability actions. But this decision no longer reflects current case law.

## IV. Variations.

### 4.1 Third parties.

Obviously, third parties are not involved in the arbitral proceedings and may bring an action before the ordinary Courts against a party to the contract with an arbitration clause for quasi-delict liability.

Thus, a construction contract includes an arbitration clause; the contractor commits a breach of the rules of the art and damages the neighbor's property during the work; this neighbor can quite naturally bring an action before the ordinary courts.

The same applies if the contractor's liability is implicated following a physical accident on the site of a passer-by. It is then necessary, in the event of strict liability, that it can continue to protect victims; for example, workers' compensation laws.

In a judgment of September 13, 2017,<sup>54</sup> the Court of Cassation recalled that the ordinary court must decline jurisdiction if the arbitration agreement is manifestly inapplicable. Company A entrusts work to an economic interest group B, which in turn enters into two subcontracts with C, one of which contains an arbitration clause. The subcontractor brings an action for the cancellation of the subcontract concluded with the economic interest group. The company introduces a decline of jurisdiction based on the arbitration clause.

The Court of Appeal of Nîmes, set aside this decline in a judgment of February 19, 2016, considering that there was no contractual relationship between the contracting authority and the subcontractor.

Interestingly enough, the Court of Cassation reversed this judgment on the grounds that the judgment had not sufficiently examined the contractual relations between the parties and had not shown that the arbitration clause was manifestly inapplicable.

Such a decision would probably not have been rendered in the same way in all countries; indeed, the appeal referred to Article 14 of the Law of December 31, 1975 on subcontracting, which strengthens the links between the main contract and the subcontracting contract, which are driven by the same objective.

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<sup>53</sup> *Wilko v. Swan*, 346 U.S. 427 (1953), G. BORN, *International Commercial Arbitration*, Second Edition, Vol. I, p. 945 e.s. The case law that deals more with conflicts between the Securities Act of 1933 and the Federal Arbitration Act has evolved since then. (See, *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) and the *Wilko* decision no longer truly reflects American law.

<sup>54</sup> Appeals 16-22326.

Another interesting example related to the transfer of receivables :a company transfers a receivable to a factoring company. The claim related to a contract of sale between this company and a buyer, which contained an arbitration clause. The factoring company, the holder of the claim, brings an action against the buyer, on an extra contractual basis (for lack of information of the factor). The trial judge considered that the arbitration clause was not applicable because the action had a tortuous basis. The Court of Cassation overturned this judgment on the grounds that the claim was related to the contracts of sale and that the trial judge did not prove that the arbitration clause was manifestly inapplicable.<sup>55</sup>

Reference should also be made to the above-mentioned decision of the First Civil Division of the Court of Cassation of February 3, 2010, which logically considers that the arbitration clause binds the liquidator of a company.<sup>56</sup>

What about the third-party complicity? A distribution contract binds two companies, one producer and the other retailer; the contract contains an arbitration clause; a dispute arises after the termination of distribution; a former employee comes to commit acts of unfair competition by working directly with the producer; he is sued before the Labor Court. The latter declares himself incompetent by referring to the distribution contract. This decision is reversed on appeal and the Court of Cassation reverses this last decision. The retailer summons the producer company to appear before the ordinary courts as an accomplice third party of the former employee. The producing company raises the court's lack of jurisdiction in view of the arbitration clause; it considers that the third-party complicity is a quasi-delict liability and is therefore unrelated to the arbitration clause which covers disputes in connection with the contract. In a judgment of October 17, 2002, the Court of Appeal of Versailles dismissed its jurisdiction;<sup>57</sup> the complaints concern the consequences of the loss of exclusivity of distribution and, even if subsequent to the performance of the contract, are not foreign to it.

## 4.2 What if criminal liability? Corruption.

We believe that in this case, in the presence of an arbitration clause, the contracting party harmed by the corruption committed by its contracting partner may file a criminal complaint in the event of corruption. Can it be a civil party?

The teaching of French law is interesting. The case law admits that when a party to the arbitration clause makes a claim on the merits before State courts, it thereby waives its right to invoke that clause:

*"The parties to an arbitration agreement may waive its benefit, and such waiver may be deduced from the referral to the State courts by one of the parties,*

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<sup>55</sup> Cass. July 4, 2018, Appeal No. 17-13069; Gazette of the Palace, No. 38, p. 22.

<sup>56</sup> See also, in insurance matters, which often involves quasi-delict liability, in the event of subrogation, the accessories, and therefore the arbitration clause, are transferred with the claim. See also, D. MATRAY & F. VIDTS, Arbitration and insurance, relations with third parties, in Arbitration and third party law, CEPANI, Bruylant, 2015, p. 136 and the case law cited; in the event of a stipulation for others, the third party beneficiary remains outside the contract; but the promisor can always continue to invoke the arbitration clause if he is assigned by the beneficiary since, let us recall, the beneficiary's claim is related to the life and risks of the basic contract.

<sup>57</sup> RG 01/07176.

*provided that it is a claim on the merits which should have been submitted to arbitration.*"<sup>58</sup>

It remains to be seen whether this solution also applies to the claim of civil parties. Before the criminal courts, the Paris Court of Appeal was confronted with this issue in the Thales case, relating to the sale by Thomson CSF of frigates to Taiwan.

In the present case, Thales had argued that the Navy of the Republic of China in Taiwan had brought a civil action before the filing of its request for arbitration in criminal proceedings in France, alleging facts and damage identical to those claimed before the arbitral tribunal. In its judgment of June 29, 2006, the Paris Court of Appeal dismissed the Thales company's argument on the grounds that the claim of civil parties had been deemed inadmissible, that they did not contain any specific request and that the damage claimed "did not result directly from the facts before the investigating judge."<sup>59</sup>

This judgment was overturned by a judgment of the Court of Cassation and the case referred to the same otherwise composed Court of Appeal, which issued a new judgment on May 11, 2010. On the basis of the vindictive role of the claim of a civil party, exclusive of any claim for compensation, the Court of Appeal established that:

*"The bringing of a civil action is subject to the allegation of personal injury directly caused by the offence [...] that it may [...] must not be accompanied by any claim for compensation and must have the sole purpose of corroborating the public action, in particular where compensation for the damage caused by the offence falls outside the jurisdiction of the criminal court: such an action cannot, therefore, by itself and independently of the circumstances of the case, give rise to a presumption that the person who exercises it has renounced the benefit of an arbitration agreement."*<sup>60</sup>

Even if in this case the Paris Court of Appeal concluded that the constitutions of civil parties could not unequivocally establish the party's waiver of the arbitration agreement, the analysis of the judgments of the Court of Appeal suggests that, in principle, the constitution of civil parties could, if necessary, be interpreted as a waiver of arbitration.<sup>61</sup>

Such an approach is confirmed by French doctrine:

*"Thus, for the Court of Appeal, it seems to be accepted that the constitution of a civil party may be analyzed as an unequivocal waiver of the arbitration clause on condition that such constitution of a civil party is accompanied by a claim on the merits which falls within the jurisdiction of the Arbitral Tribunal, in particular a claim for compensation. As a result, the Court of Appeal invites a case-by-case analysis of civil party constitutions and to distinguish between those with and without claims."*<sup>62</sup>

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<sup>58</sup> Paris, July 7, 1994, Uzinexportimport S.A., Rev. arb., 1995, p. 107, note J. Savarin; *See also*, David Chilstein, Criminal Law and Arbitration, Arbitration Review, 2009, Issue 1, p. 42.

<sup>59</sup> CA Paris, June 29, 2006.

<sup>60</sup> CA Paris, May 11, 2010.

<sup>61</sup> David Chilstein, Criminal Law and Arbitration, Review of Arbitration, 2009, Issue 1, pp. 42-45.

<sup>62</sup> Alexandre De Fontmichel, Criminal Procedure and International Commercial Arbitration: some points of impact, 2012 p. 12-13.

Thus, French doctrine seems to admit that the constitution of a civil party could constitute a waiver of arbitration when the claim for civil compensation for the damage suffered accompanying the constitution of a civil party falls within the jurisdiction of the arbitral tribunal:

*"In the end, and beyond the contingent reasons invoked by the decision, it is indeed a principle of no waiver of the arbitration clause in the event of the constitution of an exclusive civil party to any claim for civil compensation that should be made, regardless of its admissibility. [...]"*

*The situation is different only if the claim for civil compensation for the damage suffered accompanying the constitution of a civil party is superimposed on the very subject of the dispute submitted to arbitration. In this case, the claim for compensation could be analyzed as a pure and simple waiver of the arbitration clause because of its identity in relation to an action for compensation brought before a civil court. In practice, however, this hypothesis seems unlikely to us because of the limited interest in appealing to the criminal court for compensation for damages resulting from a contractual fault. The interest of criminal proceedings for the victim of an offence is quite different, in fact, due to the probationary work carried out by the public prosecutor's office. This logic seems to be followed in this case by the ROCN, which certainly hoped to provide itself with evidence useful for the arbitral proceedings relying on the coercive powers of the criminal courts in the collection of evidence."<sup>63</sup>*

However, some authors consider that, given the role of the constitution of a civil party in criminal matters, it cannot be interpreted as a waiver of arbitration:

*"There remains the question of principle itself, namely whether or not the claim for compensation for direct damage suffered by the victim of an offence can be interpreted as a waiver of arbitration. We do not think so for the reasons mentioned above, which are related to the complexity and ambivalence of the role of the constitution of civil parties in criminal matters. As we have seen, this is more than a simple claim for damages by the victim of the offence; it implies a real procedural status. In the light of this consideration alone, it does not seem to us that the constitution of a civil party can ever be considered as an "unequivocal" sign of any renunciation of arbitration."<sup>64</sup>*

An interesting case has been submitted to the Finnish courts. Thus, the Korkein Oikeus (Supreme Court, Finland) considered that the arbitral courts had jurisdiction even if the breach met the conditions for fraud within the meaning of criminal law.<sup>65</sup>

In Belgian law, we are familiar with the dynamics of the constitution of a civil party, which allows interaction between the injured parties and the investigation of the case. It would be a pity to be deprived of this dynamic in the arbitration proceedings. We therefore believe, based on the latest French authors cited, that the fact of bringing a civil action should not be considered as a renunciation of arbitration and the best thing is undoubtedly to bring it for a symbolic euro.

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<sup>63</sup> Maximin De Fontmichel et al, Arbitration Law Chronicle No. 7, 2011, pp. 9-10.

<sup>64</sup> David Chilstein, Criminal Law and Arbitration, Review of Arbitration, 2009, Issue 1, pp. 42-45.

<sup>65</sup> Korkein oikeus, judgment of November 27, 2008, KKO, 2008:102, *available at* the following Internet address: <http://www.finlex.fi/fi/oikeus/kko/kko/2008/20080102>.

### 4.3 Action for damages under competition law.

These actions have become important in the last decade; for example, in cartel matters, the difference between the cartel price and the market price can be claimed in civil courts; similarly, a party who is the victim of an abuse of a dominant position can claim the damage resulting from this abuse.

But can one consider claiming damages suffered before the arbitral courts? in principle, this is also an action for extracontractual liability. Competition is a matter of public policy and in a cartel, not only the parties to a contract but also other cartelists who have not necessarily contracted with the party harmed by the cartel are involved.

Once the dispute has arisen, the parties may agree that the parties will submit the dispute to arbitration.<sup>66</sup>

But what if, for example, a distribution contract contains an arbitration clause and the producer price is a cartel price? Is the question controversial.

Advocate General Jääskinen in his Opinion of December 11, 2014 in the CDC<sup>67</sup> case takes a rather opposite position to arbitration law in the field of competition law. According to him, Article 101 TFEU must be interpreted as meaning that, in the context of an action for compensation for damage caused by an agreement declared to be contrary to that article, the implementation of jurisdiction and/or arbitration clauses does not in itself compromise the principle of the full effectiveness of the prohibition of agreements, decisions and concerted practices. In so far as a clause of one or other of those categories could be declared applicable, pursuant to the law of a Member State, in a dispute concerning liability in matters of tort, delict or quasi-delict that might follow from such an agreement, that principle, in my view, precludes jurisdiction over that dispute being attributed under a clause of a contract whose content had been agreed when the party against whom that clause is relied on was unaware of the cartel agreement in question and of its unlawful nature, and could not, therefore, have foreseen that the clause could apply to the damages sought on that basis. "<sup>68</sup>

In the Apple Sales judgment,<sup>69</sup> the Court of Justice emphasizes that competition disputes may be decided by the arbitral courts; it states: " **Article 23 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that the application, in the context of an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU, of a jurisdiction clause within the contract binding the parties is not excluded on the sole ground that that clause does not expressly refer to disputes relating to liability incurred as a result of an infringement of competition law "**

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<sup>66</sup> See, ECJ judgment, Eco Swiss China Time Ltd v Benetton International No. C-126/97, 1999.

<sup>67</sup> Case C-352/13.

<sup>68</sup> Nr 132.

<sup>69</sup> Decision of the Court of Justice of the European Union, Apple Sales International, Apple Inc. and Apple retail France EURL v. MJA, as liquidator of eBzicuss.com, October 24, 2018, Case No C-595/17.

The Court insists on predictability: a link must exist between the violation of competition law and the clause. It can also be seen that, with regard to this link, it is closer in the case of abuse of a dominant position than in the case of cartels.

It would therefore be necessary to include a clause, for example in the distribution contract, which provides that the arbitration clause also applies to disputes relating to competition issues, but such expressly broad clauses are not frequent. Eminent authors consider that a general clause is sufficient to establish the existence between the dispute and the violation of competition law.<sup>70</sup>

## V. Recommendations and Conclusions.

First, strangely enough, the question of the concurrent liability in contract and tort and the scope of the arbitration clause are similar. The quasi-delict action may be brought, and the arbitrator shall not have jurisdiction when the action concerns facts or actions that are too outside the contract. It should be noted that the criterion of the general scheme and economy of the contract adopted by the judgment of the Court of Appeal of July 1, 2014: is the action integrated into it or not? If so, the arbitration clause leads to the divestiture of state courts.

The same criterion could be applied in the context of contractual and tortious actions? Reference can be made to the criterion of the subject-matter of the contract adopted by the German BGH judgment of November 20, 1984: if the dispute is not integrated into the economy of the contract, the concurrence would be possible. The rapprochement is worth considering.

Secondly, the decision of the Court of Appeal of Liège introducing this article too easily precludes arbitration in our opinion and we believe that, in this case, the ordinary courts should have declined their jurisdiction on the basis of the considerations and decisions contained in this study, namely that the principle of *favor arbitrandum* must be observed and that quasi-delict liability is within the arbitrator's jurisdiction.

Thirdly, let us underline the complexity of the question of the concurrence, the very varied solutions offered by comparative law. In addition, there is little case law and doctrine on the competence of arbitrators in non-contractual matters.

Fourth, we believe that, in general, by inserting an arbitration clause, the parties intended to place their dispute before the arbitral courts and thus waived their right to sue the ordinary courts. In order to limit the risks of a decline in jurisdiction, it is advisable to provide as broad a provision as possible for disputes between parties that will be submitted to arbitration.<sup>71</sup>

Thus, if it is agreed that arbitration clause will focus only on disputes relating to the interpretation of contracts, a dispute concerning the termination of the contract will not fall within the scope of arbitration, unless the clause is interpreted broadly.<sup>72</sup>

It may then be useful to provide that the arbitration clause will apply to both contractual and non-contractual disputes. If possible, as the case may be, reference should also be made to

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<sup>70</sup> H. GAUDEMET-TALLON, Contributory clause of jurisdiction and competition law; the eBizcuss.com case before the ECJ, Dalloz Collection p.2338.

<sup>71</sup> See, I. WELSER & S. MOLITORIS, The scope of arbitration or "All dispute arising out or in connection with this contract," p.30.

<sup>72</sup> OF BOURNONVILLE (P.), "The subject of the dispute", Rep. Not., Vol. XIII, The notarial procedure, Book 6, Arbitration, Brussels, Larcier, 2017, no. 73 which cites Liège November 17, 1993, R. Reg. Right, 1994, p.89.

competition law disputes. But it can be considered that a general clause, which covers all disputes between parties, may be sufficient to cover all disputes.

Fifthly and finally, the diversity of legal systems as regards the scope of contractual and non-contractual actions recommends that particular attention be paid to the applicable law.