Fixed-Term Contracts in France

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Introduction

For most employers, the ideal employment relationship is one that would be signed to accomplish a specific task and would automatically end once that task is accomplished. Labour law is reluctant to integrate this type of contractual relationship in its ambit, since the employee is not hired, in principle, to accomplish a precise and specific task, but to be at the employer's disposal to perform a certain type of work. Yet, the rules of labour law have more and more been adapted to integrate these kinds of work relationships, notably through the use of fixed term contracts.

The temptation of employers to hire employees through fixed term contracts rather than permanent contracts has encouraged a reaction of the law. The regulation of fixed term contracts started through contract law, that rapidly turned out to be insufficient; the only guarantee offered by the law of contract was the stability of the contract, since it could only be terminated in case of common agreement, serious breach or Act of God. This turned out to be insufficient, considering the necessity to protect workers under fixed-term contracts who were, with regard to both the employer and the labour market (high risk of unemployment after the end of the contract) in a precarious situation. Statute law on fixed term contracts started timidly in 1979. This creation of a legal regime for fixed term contracts, rather than limiting their use, boosted the practice of fixed term employment.

As a consequence, the left wing government adopted in 1982 a new statute law limiting the grounds that justify the use of fixed term contracts, and providing that the indefinite contract should remain the rule. In 1986, the movement is the other way, with an extension of the use of fixed term contracts. The list of possible grounds is suppressed, and replaced by two main rules. One according to which the fixed term contract can be signed to provide a definite task, the other stating that the conclusion of fixed term contracts cannot have the effect of occupying a durable job associated with the normal and permanent activity of the company.

A statute law of 12 July 1990, limits again the recourse to fixed term contracts, by re-introducing a list of possible grounds, and brings the regulation of fixed term contracts into line with that of temporary work contracts. The EU directive of 28 June 1999 follows the same line, but had a limited impact on French law.

Today, a vast majority of contracts of employment are still permanent contracts, but the rate is declining. Statistics demonstrate that an average of 70% of hirings are today through fixed term contracts. The attraction for such contracts must be related to the highly protective

law of unfair dismissal, that encourages some employees to conclude fixed term contracts that can be easily terminated.

I. Reasons

The general rule is that the fixed term contracts cannot have the object or the effect of occupying durably a job associated with the normal and permanent activity of the company. This is in accordance with the EC directive that requires such contracts to be concluded for objective reasons. The limitation of possible grounds is necessary considering frequent abuses in the use of fixed term contracts. For instance, the possibility, under statute law, to sign a fixed term contract for a temporary peak in activity (infra) is often used at every opportunity, particularly to fill permanent jobs. It is the same for seasonal contracts that sometimes cover the entire year through a succession of seasons.

The reasons provided for by French law are the following. The employer cannot specify two separate reasons.[1]

1) Replacement

The employer can hire through fixed term contracts for the replacement of an employee who is absent, whose contract is suspended (he is sick, she is in maternity leave) or for replacements linked with the organization of the company. The law offers several possibilities. An employee with a fixed term contract is about to leave the company and he will not be replaced; someone can be hired in fixed term contracts for the period between the departure of the former employee and the arrival of the new one; the same applies to complement the work of an employee who has temporarily moved to part time work. Fixed term contracts can also be concluded for the replacement of the head of the company. As a consequence, a contract of employment can be concluded for the replacement of someone who is not an employee of the company.

The main danger concerning replacement is that the fixed term contract would become a way to regulate the lack of staff in the company. To limit such a risk, a fixed term contract can only be signed for the replacement of one employee at a time.[2] This employee must be hired to replace a specific employee, whose name and qualifications must be mentioned in the contract. Indeed, in two decisions of June 28, 2006, the Court of cassation has ruled out the possibility for the employer to conclude a fixed term contract with an employee for the replacement of several employees, even if they are absent in succession.[3]

Non respect of these limits creates the risk for the employer to see the judge requalify the relationship as a permanent one.[4] For instance, in a case where two employees had been hired by successive fixed term contracts for nearly ten years to compensate for absences, the Court of Cassation held that the jobs held by those concerned, maintained in the same job for several years, were associated with normal activity and standing of the company and therefore characterized indefinite labor relations.

The employer, who hires someone to replace an absent employee, is not obliged to give the replacing employee the job of the absent person. By virtue of his power of direction, he can require a permanent employee to occupy the functions of the absent person.

[1] Cass. soc., 23 janv. 2008, n° 06-41.536.
[2] Cass. soc., 28 juin 2006, JCP S 2006, 1860.
[3] Op.cit.
[4] Cass. soc., 29 sept. 2004, n° 02-43.249, Bull. civ. V, n° 232.

2) Variations in the Activity of the Firm

The company may enter into a fixed-term contracts to meet a temporary increase in activity (C. trav., Art. L. 1242-2, 2o). Here lie the highest risks of abuse in the recourse to fixed term contracts, which have justified reaction by the courts and the administration. Temporary increase requires the performance of a task precisely defined, that falls outside the normal activity of the company.

The term "temporary increase in activity" is under the terms of Circular No. 18-90 of DRT October 30, 1990 a temporary increase in the regular business of the company. This covers accidental or cyclical increases in the workload that the company cannot absorb through its usual workforce. If this increase is not necessarily unique, it must nevertheless be unusual and specifically limited in time.

A typical example of temporary increase in activity is the temporary increase of activity in department stores at Christmas.

Nevertheless, launching a new product, developing a new activity, even if they occasionally cause an increase in activity do not constitute grounds comply because they fall within the normal activity of the company.

Similarly, the opening of a store carries the normal and permanent activity of the company. An employer cannot invoke the increased activity caused by this opening to hire a cashier in fixed term contract.[5]

A specific case is that of the occurrence in the company of an exceptional order to export, whose importance requires the implementation of means exorbitant quantitatively or qualitatively from those it ordinarily uses.

The situation described by "the exceptional order to export" is the market which it is not possible to cope by using the human potential of the usual business. These means must be either insufficient numbers or inadequate given the requisite qualifications. The increase caused by the order should extend at least six months.

Another specific case is that of urgent work, whose immediate implementation is necessary to prevent imminent accidents, organize relief measures or repair the deficiencies of equipment, facilities or buildings presenting a danger to people.

The employee then employed by fixed term contract can be assigned to a position that is not directly related to increased activity. The employer may well, under his power of direction, apply to a permanent employee to perform the tasks required by the temporary increase in activity, which may in particular require some experience.

3) Seasons Work

These are activities that occur every year, around the same date, according to the rhythm of seasons and the collective way of lives. A season cannot exceed eight months, so that a contract for the whole school year cannot be a fixed term contract.[6]

4) Sector Fixed Term Contracts ("CDD d'usage")

In certain areas of activity, defined either by decree or collective agreement, it is of constant customary practice not to have recourse to indefinite contracts, by reason of the nature of the task to accomplish. The activity of the firm must be one of those in the list provided for by the decree or the collective agreement. It includes restaurants, professional

[5] Cass. soc., 5 Juill. 2005, No. 04-40.299.

[6] Rép. min. n^{O} 29165, JOAN Q 11 juill. 1983, p. 3059.

sport, entertainment, cultural activities, broadcasting, film production, education, scientific research conducted within the framework of an international convention, an international administrative arrangement made under such an agreement, or by foreign researchers residing temporarily in France.

5) Welfare Reasons

Though the primary task of the fixed term contract is to facilitate the functioning of the firm and solve temporary organizational problems, it is also used for reasons external to the company, namely welfare reasons. Several categories of people, notably the young and the older, with difficulties in finding a job, may be hired more easily through a fixed term contract.

First, there exists a fixed term contract for older people, called the "CDD senior". It was introduced by the national agreement (ANI) of October 13, 2005 in order to promote the re-employment of older persons and enable them to acquire additional rights for the liquidation of their full pension. It is open to all employers, except those in the agricultural sector, for the employment of any person aged over 57 years. This contract may be concluded for a maximum period of eighteen months. It can be renewed once for a term which, added to the initial contract period cannot exceed thirty-six months.[7] It is not required to follow the waiting period in case of successive contracts.

Second, there exist fixed term contracts for young people. These are called "contrats de professionnalisation" and include both work and training.

Third, French law has created fixed term contracts for job transitions, called "contrats de transition professionnelle". This contract, of a duration of twelve months, was created on an experimental basis. It is a device for employees threatened with economic dismissals in firms with fewer than 1,000 employees and companies close to bankruptcy. It allows beneficiaries to make a transition to a new job. Work during this transition period is provided through fixed term contracts. These contracts are for less than six months, renewable once with the same employer within a total period itself less than six months. These periods of work cannot exceed a total of nine months. The current government has called for the development of such contracts, in order to fight unemployment.

Apart from these possible reasons for recourse to fixed term contracts, the law explicitly forbids a certain number of reasons. These are the replacement of an employee whose employment contract is suspended due to a labour dispute, the performing of a particularly dangerous work, on a list established by ministerial decree, and the hiring of a fixed term employee for reason of temporary increase of activity on a post having been made redundant over the last six months

II. Duration of the contract

The parties to a fixed term contract can provide for a trial period during which one can break the contract at any time without having to prove just cause. When the initial period does not exceed six months (26 weeks), duration of the trial period is one day per week and cannot exceed two weeks. When these periods exceed six months, the duration of the trial period is capped at one month.[8]

[7] C. trav., Art. D. 1242-7.
[8] C. trav., Art. L. 1242-10.

The end of the fixed term contract must be specifically specified for in the contract. Renewable once, it can not exceed 18 months, including renewal, with some exceptions. This maximum is not applicable to seasonal contracts and "sector" contracts. The duration of the renewal itself may be less, equal or higher than the initial period.

French law recognizes the validity of two types of fixed-term contracts: the contract whose term is fixed precisely and the contract concluded for a specific task, whose precise date of completion is unknown.

Certain contracts necessarily fit in the first categories and must, as a consequence, be concluded from date to date. These are the temporary increase of activity, performance of a task or occasional urgent work of rescue or prevention of the occurrence of an exceptional order to export, the final departure of an employee prior to the suppression of his job, and the recruitment of certain categories of job seekers.

When the contract is entered into without specific term, it ends, in principle, once the task is achieved provided that the minimum contract period has expired. These contracts are seasonal contracts, "sector" contracts and replacement contracts. Contracts with an uncertain term (for example the replacement of an employee, whose date of return is unknown) are subject to specific rules, including a minimal period of employment. For example, it will not accept that someone is hired to replace an employee, with the expectation that it will last several weeks or months, and that the sick employee comes back the next day and takes his place back.

Any breach of the maximum length of the contract results in the requalification of the original contract in a permanent contract.

III. Successive contracts

Successive fixed term contracts are suspicious, in that they may hide a permanent employment relationship.

a) For the same job

When a fixed term contract expires, it is not possible, except for certain cases, to conclude with the same employee or a different employee a new fixed term contract for identical work, before the expiration of a period, which differs depending on the length of the original contract.

For a contract for initial work of less than 14 days, renewal included, the waiting period is equal to half the length of the first contract.

For an employment contract of at least 14 days, the waiting period between contracts is equal to one third of the initial contract term.

The notion of identical work is assessed according to the nature of work entrusted to the employee and not to the geographic location of the workplace. Thus, if one employee is required through successive contracts to perform the same work in different places, the employer is also required to meet the waiting period between each.[9]

These rules relating to the waiting period do not apply in certain circumstances and for certain types of contracts listed in the Labour code. These are

(1) the employee who was replaced is absent again;
(2) Emergency work necessitated by security measures;

[9] Cass. soc., 31 oct. 1989, n° 86-43.137.

(3) Seasonal jobs;
(4) Sector contracts ;
(5) Certain fixed term contracts for welfare reasons, namely those for employees aged over 57.

b) With the same employee

The succession of fixed term contracts with the same employee is also limited. Indeed, any contractual relationship that continues after the initial contract, or the renewal of the initial contract provided the maximum period of 18 months is respected, becomes of indefinite duration.

To rehire the same employee on a fixed term contract, the employer must observe a period of break between each contract.

The delay is that stated above if the same employee works on the same job (see A). The duration is not specified by law if the employee works on a different post. To avoid any subsequent requalification by the judge, it is suggested that the period of interruption should not be too brief. It depends on the duration of the employment contract that has just expired. It should also be devoid of any fraudulent intent.

The rules on successive contracts support a few exceptions. An employer may conclude with the same employee successive fixed-term contracts without interruption in the following cases:

Replacement of an absent employee or manager (employee or self-employed), seasonal employment and "sector" contracts.

These exceptions are open to criticism, with regard to the fundamental rule according to which a fixed-term contract should never be the basis for a permanent employment relationship. The Court of cassation tempers the rigor of the rule by recognizing the existence of an overall relationship of indefinite duration, when the employee was hired for all seasons or for the entire duration of a season, or if the parties had stipulated a renewal clause.

The succession of different employees on different positions does not create any difficulties.

IV. Formalism

In French law, the validity of the contract of employment is not, in principle, subject to a written statement, in conformity with the general rules of civil law. For reasons of protection of employees, fixed term contracts are an exception to the rule. Statute law requires employers to submit to the employee the contract in writing, not later than two days after hiring. The contract should expressly stipulate a certain number of informations, that cover most elements of the employment relationship including the precise definition of the job and, in case of replacement, the name and qualifications of the person replaced.

Formalism is of increasing force. For a long time, the absence of writing created a rebuttable presumption of an indefinite contract. Evidence to the contrary could result from the willingness of the parties, through the examination of facts. It was difficult to prove, all the more so as indefinite contracts are the rule. Since 1996, the Court of cassation considers that the presumption cannot be rebutted.[10]

[10] Soc. 21 mai 1996, n° 92-43.875, Bull. civ. V, n° 190.

Formalism has become so important that the employer cannot invoke before the judge a reason other than that he indicated in the contract.

If the fixed-term contract is, during its execution, modified in its substantial elements (salary, place of work, working time and job function) the modification should be a written addendum to the original contract.

The renewal of a fixed term contract must necessarily be by writing when the original contract provides only for the possibility to renew the contract or does not provide at all for the possibility of renewal.

V. Termination of the contract

The contract automatically expires at the arrival of its term without either side having to take any initiative. The possibility to terminate the contract before the end is restrictive. For instance, it is not possible to include in the contract a term allowing one of the parties to terminate the contract unilaterally.[11] And the employee is not allowed to resign from the fixed term contract, except for the reasons that follow.

The grounds that justify anticipatory termination of the contract are the following:

Mutual agreement - The employer and employee may terminate at any time fixed-term contract by mutual agreement. The law of contract, notably the rules on integrity of consent, applies to such agreement.

Gross misconduct - There is no statutory definition of gross misconduct; this concept is essentially judicial. Under the case law of the Court of cassation, the misconduct alleged by the employer to justify the premature termination of a contract term or dismissal is "that which makes it impossible to maintain the employee in the company". The early termination of fixed term contract for misconduct amounts to a penalty. It is therefore subject to disciplinary proceedings. Gross misconduct is the only ground for breach of the contract for a reason proper to the employee, which means that the incapacity or inability of the employee with regard to the job cannot justify anticipatory breach.

Act of god - The Act of God (in French "Force majeure") is very rarely admitted, and economic difficulties of the employer do not constitute such an act.[12]

The employee has been offered an unfixed term job - The employee may terminate the contract before its term if he has been offered a job for an indefinite period. It may be a job in another company, but also in another plant of the same company. Employees must provide their employer any evidence capable of establishing the reality of the employment provided. A letter of appointment or an employment contract specifying a date of hire may be the evidence, if the indefinite nature of the contract is contained therein. In contrast, a mere declaration of intent without hiring date, or future employer's commitment is not sufficient justification**.** Unless the parties agree, the employee is required to comply with a notice which runs from the notification of the breach.

The early termination by the employer for a reason other than gross misconduct or "force majeure" or agreement of the parties or outside the trial period entail payment of damages in favor of the employee. The latter is entitled to a sum equivalent to the amount of remuneration remaining until the end of his contract and to compensation for termination.

[11] Cass. soc., 22 déc. 1988, no 85-42.208.
[12] Cass. soc., 20 févr. 1996, n° 93-42.663, Bull. civ. V, n° 59.

If early termination is at the initiative of the employee, he will have to pay damages to his employer, except if he has been hired through a permanent contract. Such indemnity is set by the judge according to the damage suffered.

At the end of the fixed term contract, the parties are free to decide the conclusion of a contract of indefinite duration. In this case, the employer may validly modify the employee's working conditions.

The violation of rules on fixed-term contract is not sanctioned by invalidity of the contract, or by awarding damages, but by a requalification of the fixed term contract into a permanent contract. The demand for requalification, which can be made by the employee (neither the employer, nor the judge can invoke this reclassification) is under an accelerated procedure before the judge. It covers a wide range of irregularities: absence of written statement, violation of the grounds that justify recourse to fixed-term contracts.

VI. Status of the fixed-term employee

The precariousness of the position of a fixed term employee is partly compensated by a protective status, aimed at bringing closer the status of fixed term workers and that of permanent workers.

A. Equality of Treatment

Under L. 1242-14 Labour code, "Unless specific legislation provides for the contrary and with the exception of the provisions concerning termination of employment contract, that are not applicable, the legal and conventional as well as those resulting from customary practice applicable to employees bound by an employment contract of indefinite duration, also apply to employees bound by a contract of fixed-term employment".

In other words, employees hired under fixed-term contracts should be treated on an equal footing with employees holding a permanent contract. They have the same rights and same obligations. They enjoy the same terms of benefits granted under statute law, collective agreement or customary practice. They cannot be excluded from an agreement or a contractual entitlement for the only reason that they are under fixed term contracts.

Thus, in firms with a working time of 35 hours, fixed-term contract employees shall also be subject to this duration.

Fixed term employees have access to all facilities (transport, canteen, showers, changing rooms, restaurant vouchers, pension scheme …) They must also receive safety training in the same conditions as permanent employees of the company. They must, however, like all other employees, meet any conditions of service to which some rights are subordinate. Employees hired under fixed term contracts for short periods may thus be denied the benefits of a minimum duration of presence (seniority bonus, compensation for sickness absence, annual premium).

The remuneration of employees under fixed term contracts cannot be less than that would receive in the same company after the trial period, an employee under contract of indefinite duration with equivalent qualifications and occupying the same functions.[13]

Admittedly, the assertion of parity of treatment can be purely formal in that a number of legal rights or benefits, conventional or customary are related to durable presence within the company. However, the brevity of the job characteristic of fixed-term contracts, most often

[13] C. trav., Art. L. 1242-15.

excludes the acquisition of substantial social rights, lack of seniority in the company. One can also doubt the effectiveness of the text because of the *de facto* inequality of the parties involved.

Fixed term contract employees can vote for, and be elected as workers' representatives.

B. Social Security

Fixed term contract employees benefit from the same rights. To enable fixed term employees to have a level of social protection at least equivalent to those enjoyed by employees under permanent contracts, companies who have recourse to fixed term contracts owe an additional contribution.This contribution is 0.5% of the total gross remuneration paid to employees in CDD.

C. Information on Job Vacancies

The employer is required to inform employees bound by a fixed contract term of the list of vacancies in the company under indefinite contracts, when such a device information already exists in the company for employees bound by a contract of indefinite duration.[14]

D. Indemnities and Sanctions

Employees hired under fixed term contracts are entitled to an allowance to compensate their precarious situation. This allowance should normally be paid to the employee at the termination of the contract.[15]

The amount of this allowance shall, unless the contract or agreement is more favorable, to 10% of global gross wages due the employee.[16]

The sanctions of the breach of the law relative to fixed term contracts is severe. In addition to requalification of the fixed term contract as an indefinite contract and indemnities, non-compliance with provisions relating to fixed term contracts is punishable by a fine of 3,750 € to reach 7,500 € and accompanied by a prison term of six months (or one of these two penalties) in cases of recidivism (C. trav., art. L. 1248-1 et seq.).

Criminal sanctions are only applicable to certain types of breaches. These are non-compliance relating to the reasons for entering into fixed-term contracts, duration and succession of fixed term contracts; no written contract and precise definition of the pattern of use; no transmission of the contract to the employee within two days of hiring; non-observance of the principle of equal pay.

VII. New developments

The fixed-term contract has been at the heart of two strongly debated legal devices. The first was recently adopted, the second, elaborated by lawyers and economists, was never adopted but raised important discussions as to the future of labour law.

A. The Unique Contract

The current President of France had the idea of suppressing the opposition between fixed term and indefinite contracts by creating what has been called a "unique contract". The

[14] C. trav., Art. L. 1242-17.
[15] C. trav., Art. L. 1243-8.
[16] C. trav., Art. L. 1243-8.

project was severely criticized because it was moving French law towards "employment at will", by weakening the requirement of a fair ground of dismissal.

According to the project, the contract would have been a permanent contract, in order to promote the continuous accumulation of employee rights, and avoid the effects of rupture between fixed term contracts and permanent contracts. All forms of fixed term contracts would disappear.

In case of dismissal, the legal requirements imposed on the company would be lighter (no more compulsory redeployment; no more control of the existence of an economic motive). This easing of legal requirements would be compensated by payment, at the time of termination, of indemnities proportionate to the total wages paid throughout the contract of employment. These indemnities would benefit both the employee and government.

This is the major issue. The law of unfair dismissal is strongly debated at the moment, with the idea, developed by some economists, that the difficulty to fire employees explains the reluctance of employers to hire people, and partly causes the high unemployment in France. The requirement for a fair ground of dismissal is particularly under criticism. It is notably suggested that it should be replaced by taxation, which would avoid litigation on dismissals. This criticism of dismissal law ignores the importance for the employee to be able to discuss the grounds of his dismissal. On the economic side, no serious study has proved, with certainty, that unemployment would decline through a change in dismissal law. On the legal side, it is likely that French courts would not have validated such a contract. In a recent case, the French Court of cassation considered a contract enabling the employer to terminate the contract at will during the first two years ("contrat nouvelles embauches"), as contrary to convention n°158 of the ILO. The two years period was considered unreasonable.[17]

B. The Project Contract

Act No. 2008-596 of June 25, 2008 (OJ June 26) establishes on an experimental basis for five years, a fixed term contract whose purpose is the realization of a specific task. This contract is also called "project contract". The contract called "Project" is designed exclusively for engineers and managers. It is governed by the rules on fixed term contracts, except if statute law says the contrary. The duration of this contract must be between eighteen months and three years.

The use of this contract is conditional on the conclusion of an industry-wide agreement or, failing that, a collective enterprise agreement. The collective agreement must define:

- The economic necessities which these contracts are likely to make an appropriate response;
- The conditions under which the employees concerned will receive a series of guarantees (outplacement, priority re-employment and access to vocational training)
- The conditions under which the employees holding such a contract have priority access to jobs with permanent contracts in the company

The contract ends with the realization of the purpose for which it was concluded, with a minimum period of two months. It is not renewable. It can be broken by either party after eighteen months, for a reasonable ground, and then on the anniversary date of its conclusion.

The possibility to terminate the contract for a reasonable ground (which is equivalent to the rule on unfair dismissals applicable to permanent contracts) is very much open to criticism.

[17] Cass. soc. 7 juill. 2008, n° 07-44124.

Indeed this contract adds to the precariousness of the fixed term contract the instability of the unfixed term contract.

It is easy to see that such a contract may modify the whole structure of the French labour market, if it were applicable to all workers. At present, it is only for engineers and managers. This contract is undoubtedly attractive. You do not need to have a permanent worker, whom you must pay in the summer where you do not have any task to give him. You hire him for a specific task; then he is back to unemployment; and then again, you hire him for another task. All the law does is to require a "reasonable" period between these two contracts.

This fits very well into a new model for labour law. This model is probably one of the most discussed issues in France at the moment.[18]

The idea grows, because of high unemployment, that the nature of the job - fixed or unfixed term, contract of employment or independant contract - is not important anymore. That having no job is not even a problem. More precisely, the focus of labour law moves from the contract to the person. The law should protect the person, whatever the contract she possesses or wherever she has a contract or not. If you apply this idea to the fixed term contract, the main flaw of a fixed term contract, which is the absence of continuous employment, is not a problem anymore. Indeed, the law is going to care about the transition between the contract that has just finished, and the next contract. If we follow that direction, labour law and social security law will come closer, and will possibly merge into a new labour law. That labour law will not be aimed at protecting workers but at regulating the labour market (with a strong risk of instrumentalisation of legal rules).

It is difficult to imagine a model so far from the Japanese life employment model. The aim is about the same: granting a status to the individual from 16 or 18 to the retirement age. But the method is totally opposite. The employment relationship, in the new model, is not unique, and the link with the company becomes both precarious and of limited importance. What the law should do is only maintain, during your whole life, both your ability to work and enough money to live a decent life.

Let's be very careful about this model that legitimates precarious work.

[18] See not. A. Supiot, Au-delà de l'emploi, Flammarion, 1999.