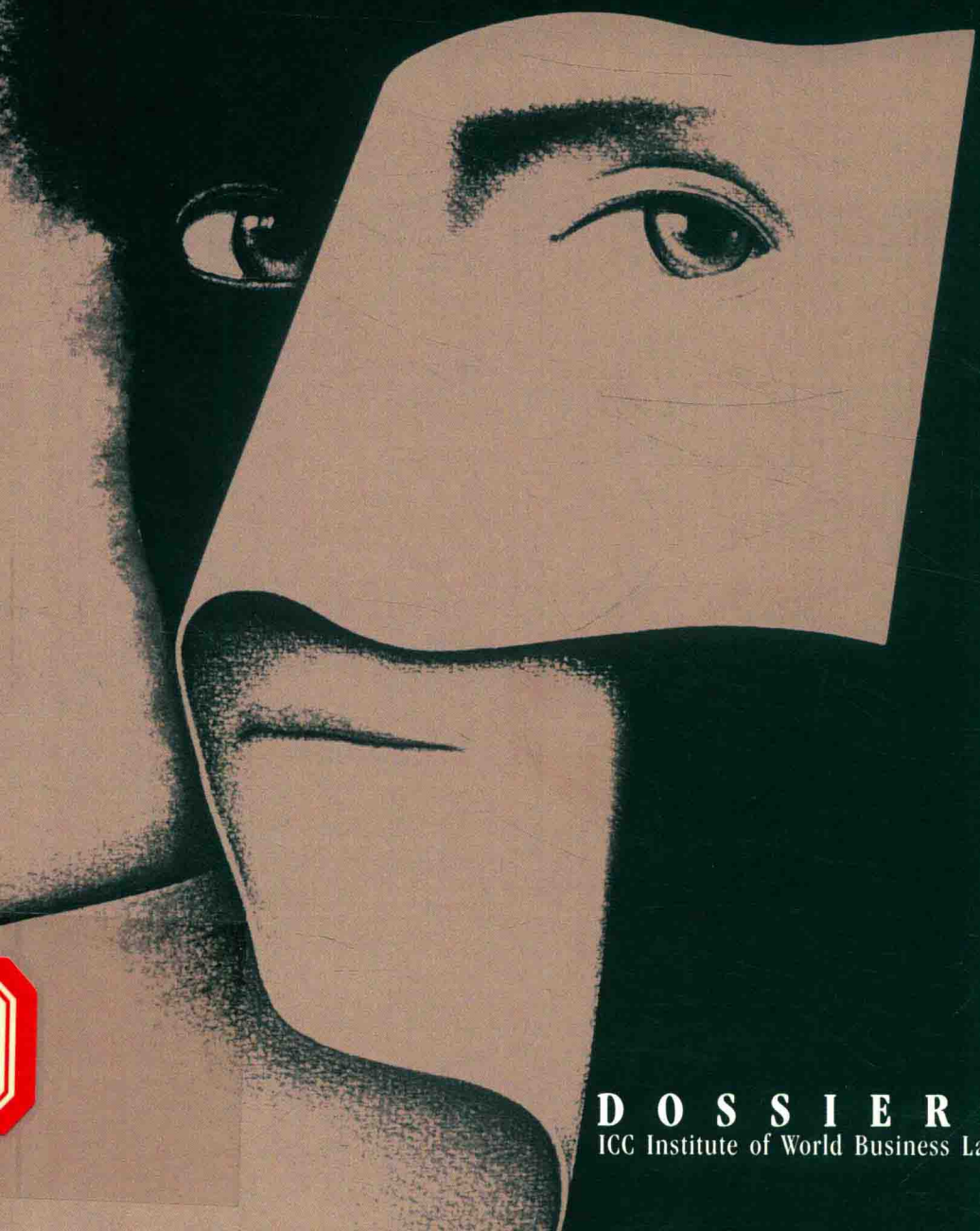
Multiparty Arbitration

Edited by Bernard Hanotiau and Eric A. Schwartz



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FOREWORD

BY SERGE LAZAREFF

Member of the Paris Bar;
Chairman, ICC Institute of World Business Law

One of the most pleasant yearly tasks of the Chairman of the Institute is to write the foreword to our recurrent Dossier. This is especially true for this publication, as this will be my last foreword before I leave the Institute at the end of the year.

I am very grateful to all our friends who have contributed to each edition of the Dossier over the past years and have thus contributed to the renown of the Institute.

The mixture of theoretical knowledge and the pragmatism of practitioners, the quality of the writers, the fine-tuning of their contributions and the dedication of the successive co-editors have allowed the ICC Institute to continue publishing the Dossiers, now valued works of reference.

This edition, prepared under the keen supervision of both co-editors, Bernard Hanotiau and Eric A. Schwartz, is no exception, and it is a privilege for me to introduce it. With the development of arbitration, the number of multiparty cases is constantly increasing. As the statistics for 2009 show, 28.5% of ICC cases involved multiparty issues. This has raised questions of an academic and practical nature. Each issue is splendidly discussed in this book, which touches upon all aspects of this topic.

As usual, the contributors to this issue have produced some of the best work in this area.

This Dossier, as well as the Institute's activities, both as a think-tank for ICC and as a training centre, would not have been possible without the hard work of Laetitia de Montalivet, Director of the Institute. Son professionnalisme, sa fine intelligence, sa constante loyauté (une si rare qualité!), sa connaissance du monde des affaires et de ses principaux acteurs ont considérablement contribué au cours des dernières années aux activités de l'Institut. Qu'elle en soit ici remerciée ainsi que sa charmante et brillante équipe – Katharine Bernet, Sybille de Rosny-Schwebel... et les autres.

Good luck to all of you.

INTRODUCTION

By Bernard Hanotiau*
Co-Editor

The first seminar of the ICC Institute, which took place thirty years ago, was devoted to the subject of multiparty arbitration. Since then, many developments have taken place in this area. The Council of the Institute therefore decided to select the same subject matter for its 30th anniversary seminar. The topic is also of the utmost importance in current arbitration practice. According to ICC statistics, approximately 30% of all arbitrations governed by its rules involve multiple parties and/or multiple contracts.

Where a dispute arises that involves more than two parties, a series of contracts and multiple issues, the plaintiffs or potential plaintiffs may not be in a position to bring the various desired defendants to one single arbitration proceeding. Arbitration is, indeed, consensual by nature, with the consequence that privity of contract applies to the arbitration clause, limiting its effect to the contracting parties alone. Joining non-signatories or third parties often proves difficult, sometimes impossible.

The issues raised by multiparty, multicontract arbitration are multiple. They include:

- Who are the parties to the contract and/or the arbitration clause contained therein?
- May an arbitration clause be extended to non-signatories? Does the fact that the issue arises in relation to groups of companies make a difference?

- To what extent can one bring to a single arbitration proceeding the various parties that have participated in a single economic transaction through several contracts?
- May an arbitral tribunal that is hearing a dispute that arises principally from a specific contract decide issues arising from connected agreements entered into by the same parties, possibly alongside other contractors?
- If separate arbitration proceedings need to be started, can these different proceedings be consolidated and under what conditions?
- If they cannot be consolidated, how and to what extent can one over come the inconveniences that arise from having several parallel proceedings?
- Who can act as claimant and against which defendants? Can a defendant join other defendants, be they privy to the arbitration agreement or third parties? Can a party to the complex contractual structure intervene voluntarily in the proceedings?
- When there are several defendants who have divergent interests and therefore do not want to appoint the same arbitrator, how does one go about constituting the arbitral panel?
- Can a defendant in the arbitration proceedings bring a claim against another defendant?
- How does one handle these complex or parallel proceedings in the interests of the best administration of justice?
- What are the consequences of the answers to the above questions for the enforceability of the award?
- To what extent should an arbitral tribunal take into consideration an arbitral award rendered in a connected arbitration arising from the same project?
- Is class-wide arbitration possible and desirable?

It was of course impossible to deal with all these topics in one day. The organizers therefore decided to concentrate on some hot topics and fundamental issues.

One of the main problems arising from multiparty arbitration is the intellectual confusion that reigns in this field. This confusion has been generated by unfortunate court decisions and arbitral awards, not to mention poorly written legal articles, which, unfortunately, are legion in this area. For example, a clear methodological distinction should be made – and unfortunately is not often made – between issues arising from the fact that the project at the

centre of a dispute has been negotiated and performed by one or more companies that belong to a group, some of which are not signatories to the arbitration clause, and issues arising from the fact that the dispute concerns problems originating from, or in connection with, two or more agreements entered into by the same and/or different parties that do not all contain the same – or at least compatible – arbitration clause(s). It was therefore decided to devote the first part of the seminar to the distinction between groups of contracts and groups of companies – are they two different subjects? Once the distinction has been clarified, the following question remains: on what basis should the judge or the arbitrator decide to treat separately or consolidate the disputes resulting from connected agreements, which in some cases constitute a single economic transaction?

Groups of companies have developed considerably in recent decades and with them the issue of the possible extension of an arbitration clause to non-signatories, although the issue does not only arise in relation to groups of companies but also to individuals within the group or to states and state entities. A lot has been said, decided and written on the topic. The organizing committee therefore decided to concentrate on fundamental issues and current problems, such as the limits of consent, whether it makes a difference if the issue of extension arises in relation to a non-signatory claimant or a non-signatory defendant and the extent to which the extension of the arbitration clause to a non-signatory state or state entity raises different issues.

As indicated above, confusion in the case law and doctrinal writings has complicated issues that at the outset were relatively simple. For example, reference is very often made to a so-called 'group of companies' doctrine. The undersigned considers that this doctrine is totally unnecessary and confusing. In the same vein, a lot of confusion surrounds the theory of piercing the corporate veil which – rightly or wrongly – has from time to time allowed the extension of an arbitration clause to a non-signatory. Asking two distinguished speakers to put the two doctrines 'back on track' was therefore judged appropriate.

Moreover, one cannot deal with groups of companies without addressing other complex procedural issues that frequently arise in this area, such as consolidation, joinder and cross-claims, as well as ICC practice in relation to these issues.

It was finally decided to devote the last part of the seminar to enforcement issues – which are particularly sensitive in multiparty, multicontract cases – and to a topic that has acquired great importance in theory and practice in the United States: class action arbitrations.

The seminar was a great success due to the efforts of many people who deserve our warm thanks: the ICC Council and, in particular, its President, Serge Lazareff; Eric Schwartz, who co-organized the seminar; Laetitia de Montalivet and Katharine Bernet and their whole team at the Institute, who took charge of the organization; and of course the speakers whose contributions are published in this volume. Their presentations were excellent. They have made a great contribution to the law of multiparty arbitration.

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CHAPTER 1

MULTIPLE PARTIES AND MULTIPLE CONTRACTS: DIVERGENT OR COMPARABLE ISSUES?

FERNANDO MANTILLA-SERRANO*

1. INTRODUCTION

The reality of complex international commercial transactions in today's expanding global market has given rise to complex arbitration. These complex transactions often result in multiparty arbitration, as well as arbitration involving multiple contracts. The often imperfect arbitration agreements that have been fashioned in an attempt to extend arbitral jurisdiction over these commercial transactions have resulted in complicated situations in which not all the relevant parties, or all the relevant contracts, were explicitly included in the arbitration agreement. These situations have given rise to a number of questions that arbitral tribunals, national courts and scholars have attempted to address. In response to these questions, the 'group of companies' and 'group of contracts' doctrines have developed. These doctrines have encountered varying levels of acceptance and application across national jurisdictions.

The proximity of both these doctrines to the issues often encountered in connection with complex international transactions may lead to confusion of the two and raises a number of questions. Are we in the same universe of complexity when we speak of multiparty arbitration and arbitrations involving multiple contracts? Are the 'group of companies' and 'group of contracts' doctrines necessary components of complex arbitration? Are these doctrines to be distinguished from or likened to one another given their, at least superficial, similarities?

Setting aside the relative acceptance or rejection of either of these doctrines in various national jurisdictions[1], this analysis aims to identify the basic differences and similarities behind the doctrines to better approach the questions raised. I will therefore consider these issues in the light of two opposing propositions. First, multiple parties and multiple contracts are two different subjects. Second, multiple parties and multiple contracts raise, in essence, the same issues. In conclusion, I will attempt to reconcile these seemingly incompatible propositions to achieve a more nuanced understanding of whether the 'group of companies' and 'group of contracts' doctrines are more likely to differ or overlap.

2. FIRST PROPOSITION: THE 'GROUP OF COMPANIES' DOCTRINE AND THE 'GROUP OF CONTRACTS' DOCTRINE ARE TWO DIFFERENT THINGS

In order to consider where the 'group of companies' and 'group of contracts' doctrines diverge, this section addresses the following basic issues: (a) each doctrine raises different fundamental questions regarding its application; (b) the economic aspects of the situation do not carry the same importance under both doctrines; and (c) procedurally, the doctrines arise in different scenarios.

a. Each doctrine raises different fundamental questions

In order to simplify matters and thus get to the essence of the two doctrines, it is necessary to isolate the two variables (i.e. contracts and parties) for each one. We will start with the 'group of companies' doctrine and assume that only one contract exists. With respect to the 'group of contracts' doctrine, we will assume a situation with multiple contracts entered into between the same parties.

The 'group of companies' doctrine concerns one contract and multiple parties, and necessarily concerns companies that all have a separate legal personality from the companies that are signatories of the contract[2]. The name 'group of companies' suggests that this doctrine only applies to companies. For this reason, among others, criticism has been directed at the usage of the term 'group of companies' in connection with this doctrine, for failing to adequately represent its scope. It has also been suggested that this term has led to an oversimplification of the doctrine by arbitral tribunals and courts, leading to shortcuts, when in fact deciding whether the doctrine applies in a given situation requires rigorous legal reasoning.[3]