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# **Complex Arbitrations**

**Multiparty, Multicontract,  
Multi-issue and Class Actions**

by

**Bernard Hanotiau**

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*Bernard Hanotiau*

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## Introduction

1. The purpose of this book – which originated as an article published in 2001 in the *Journal of International Arbitration*<sup>1</sup> – is to analyse the substantive and procedural legal problems encountered by parties and arbitrators in multicontract, multiparty, multi-issue arbitrations.<sup>2</sup> Where a dispute arises that involves more than two

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<sup>1</sup> Bernard Hanotiau, “Problems Raised by Complex Arbitrations involving Multiple Contracts-Parties-Issues – An Analysis”, 18 *J. Int’l Arb.* 251-360 (No. 3, 2001).

<sup>2</sup> Among the legal commentaries, particular reference will be made to the following books and articles: International Chamber of Commerce Institute of International Business Law and Practice, *Multi-party Arbitration: Views from International Arbitration Specialists* (ICC Publishing, 1991) [hereinafter *ICC Multi-party Arbitration*], in particular the references mentioned by de M. de Boissésou, at 139; the contributions published under the title *Complex Arbitrations, Perspectives on their Procedural Implications*, Special Supplement, *ICC Ct. Bull.*, 2003, including contributions by Anne Marie Whitesell and Eduardo Silva-Romero, Matthieu de Boissésou, Emmanuel Gaillard, Bernard Hanotiau, Elliott Geisinger and Laurent Lévy, Yves Derains, V.V. Veeder and Horacio Grigera Naón; the contributions published under the title “Application of the ICC Rules of Arbitration by the International Court of Arbitration”, 7 *ICC Ct. Bull.* 6 (No. 2, 1996), in particular, Patrice Level, “Joinder of Proceedings, Intervention of Third Parties, and Additional Claims and Counterclaims”, *id.* at 36, and Serge Gravel, “Multiparty Arbitration and Multiple Arbitrations”, *id.* at 45; the contributions published in *L’Arbitrage dans la vie des sociétés* (Brussels: Bruylant, 1999), in particular, Olivier Caprasse, “L’Arbitrage et les groupes de sociétés”, *id.* at 169; Marc Blessing, “Extension of the Scope of an Arbitration Clause to Non-signatories”, in Swiss Arbitration Association, *The Arbitration Agreement – Its Multiform Critical Aspects: A Collection of Reports and Materials Delivered at the ASA Conference held in Basel on 17 June 1994* [hereinafter *ASA 1994 Conference*] 151 (Marc Blessing, ed., 1994); Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer, 2001), p. 653-700; Jean-François Bourque, *Le règlement des litiges multipartites dans l’arbitrage commercial international* (1989) (unpublished thesis); *ICC Guide on Multiparty Arbitration* (1982); Daniel Cohen, “Arbitrage et Société”, *LGDJ*, (1993) and “Arbitrage et Groupes de Contrats”, 1997 *Rev. Arb.* 471; Mathieu de Boissésou, *Le droit français de l’arbitrage* (2nd edn, Paris: Joly, 1990) 514; P. Deltombe, “L’Arbitrage Multipartite”, 1992 *Actualités du Droit* 277; Jean-Louis Delvolvé, “Final Report on Multi-party Arbitrations of the ICC Commission on International Arbitration”, 6 *ICC Ct Arb. Bull.* 26 (1995); Yves Derains et Sophie Schaf, “Clauses d’arbitrage et groupes de sociétés”, 1985 *Revue de droit des affaires internationales* [R.D.A.I.] 231; Yves Derains, “L’extension de la clause d’arbitrage aux non-signataires-La doctrine des groupes de sociétés”, *ASA 1994 Conference*

parties, a series of contracts and multiple issues, it may happen that the plaintiffs or potential plaintiffs are not in a position to bring the various desired defendants to one single arbitration proceeding. The same problem is encountered when a

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165; Ibrahim Fadlallah, "Clauses d'arbitrage et groupes de sociétés", in *Travaux du Comité Français de Droit International Privé 1984-1985* (1987) 105; Emmanuel Gaillard & John Savage, eds, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer, 1999) 280; Walter Habscheid, "Zum Problem der Mehrparteischiedsgerichtsbarkeit", in Claude Reymond & Eugène Bucher, eds, *ASA Swiss Essays on International Arbitration* (1984) 173; Bernard Hanotiau, "Complex – Multicontract-Multiparty – Arbitrations", 14 *Arb. Int'l* 369 (1998); "L'arbitrage et les groupes de sociétés", *Les Cahiers de l'Arbitrage, Gazette du Palais*, vol. II, p. 111; James Hosking, "Non-signatories and International Arbitration in the United States: The Quest for Consent", 20 *Arb. Int'l* 289 (2004); Charles Jarrosson, "Conventions d'arbitrage et groupes de sociétés", *ASA 1994 Conference* 209; Sigvard Jarvin, "The Group of Companies Doctrine", *ASA 1994 Conference* 181; Pierre Karrer, "Multi-party and Complex Arbitration under the Zurich Rules", in *Aspekte des Wirtschaftsrecht* (1994) 261; Carolyn Lamm and Jocelyn Aqua, "Defining The Party – Who is a Proper Party in An International Arbitration before the American Arbitration Association?", 2002 *Int'l A.L.R.*, 84; Philippe Leboulanger, "Multi-contract Arbitration", 13 *J. Int'l Arb.*, 43 (No. 4, 1996); Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003) 377-409; Alexis Mourre, "L'intervention des tiers à l'arbitrage", *Les Cahiers de l'Arbitrage, Gazette du Palais*, 2002, 100; Michael Mustill, "Mutipartite Arbitrations", 7 *Arb. Int'l* 393 (1991); Horacio Grigera Naon, "Lessons for Multi-party and Complex International Commercial Arbitration from Recent International Economic Cooperation Agreements", in *ILA Report of the Sixty-seventh Conference*, Helsinki 1996; Fritz Nicklisch, "Multi-Party Arbitration and Dispute Resolution in Major Industrial Projects", 11 *J. Int'l Arb.* 57 (No. 4, 1994); Jean-François Poudret and Sébastien Besson, "Droit comparé de l'arbitrage international", 2002 *L.G.D.J.* 205-267; Jean-François Poudret, "Arbitrage multipartite et droit suisse", in 9 *ASA Bull.* 8 (1991); "L'extension de la clause d'arbitrage: approches française et suisse", 122 *J. Droit Int'l (Clunet)* 893 (1995); Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 1994) 150; Otto Sandrock, "Arbitration Agreements and Groups of Companies", in *Etudes de droit international en l'honneur de Pierre Lalive* (1993), 625; "Extending the Scope of Arbitration Agreements to Non-Signatories", *ASA 1994 Conference* 165; "The Extension of Arbitration Agreements to Non-signatories: an Enigma Still Unresolved", in *Liber Amicorum Richard M. Buxbaum* (Aspen, 2000) 461; "Group of Companies and Arbitration", 2005 *Tijdschrift voor Arbitrage*, 3; Eric Schwartz, "Multi-party Arbitration and the ICC-in the Wake of Dutco", 10 *J. Int'l Arb.* 5 (No. 3, 1993); Emmanuel Stauffer, "L'extension de la portée de la clause arbitrale à des non-signataires", *ASA 1994 Conference* 229; James R. Sentner, "Who is Bound by Arbitration Agreements? Enforcement by and against Non-Signatories", 2005 *Business Law International*, 55; Eduardo Silva-Romero, "Brief Report on Counterclaims and Cross-Claims: The ICC Perspective", in *Arbitral Procedure at the Dawn of the New Millenium* (Brussels: CEPANI, Bruylant, 2005) 73; Irene M. Ten Cate, "Multi-party and Multi-contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreements under US Law", 2004 *Am. Rev. Int. Arb.* 133; John Townsend, "Non-signatories and Arbitration", 3 *ADR Currents* 19 (1998); François-Xavier Train, *Les contrats liés devant l'arbitre du commerce international* (Paris: Bibliothèque de Droit Privé, LGDJ, 2003); U.K. Departmental Advisory Committee on Arbitration Law, 1990 "Report on 'Consolidation'",



claimant or defendant wishes to add to the proceedings another party to the economic transaction. Such will be the case, for example, if out of the three contracts forming a contractual chain, one includes an arbitration clause and the two others include clauses giving jurisdiction to different courts; or alternatively, if the three contracts contain different arbitration clauses (different institutions or different seats); or if a plaintiff wishes to join as an additional defendant or claimant in the arbitration a subsidiary of the defendant's or claimant's group that has not formally signed the contract containing the arbitration clause but has played a leading role in the conclusion and performance of the disputed project.

2. Such problems are accentuated when the parties have provided for submission to arbitration rather than to ordinary courts. Arbitration is, in essence, consensual by nature, with the consequence that the principle of 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.
3. The issues raised by multiparty, multicontract arbitration are essentially the following:
  - 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 (the extension is requested to other companies of the group, directors or shareholders) make a difference?
  - To what extent can one bring to a single arbitration proceeding the various parties who have participated in a single economic transaction through several contracts?

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reprinted in 7 *Arb. Int'l* 389 (1991); Jacques van Compernelle, "L'arbitrage multipartite", in Lambert Matray & Georges de Leval, eds, *L'arbitrage – Travaux offerts au Professeur Albert Fettweis* (1989) 81; Pierre van Ommeslaghe, "L'arbitrage multipartite", in *L'arbitrage; Het Scheidsgerecht*: Papers Presented at a Conference organised in Brussels on 17 December 1982 by the Brussels Bar and CEPANI 109 (1983); Arnaldo Wald, "A Arbitragem, os grupos societarios e os conjuntos de contrados conexos", 2004 *Revista de Arbitragem e Mediação*, 31; Philip Yang, "Who is a Party? The Case of the Non-signatory (Assignment)", 2005 *Asian DR* 43. Reference will also be made throughout to the four volumes published by the ICC containing the ICC arbitral awards rendered between, respectively, 1974 and 1985 (Yves Derains and Sigvard Jarvin), 1986 and 1990 (Yves Derains, Sigvard Jarvin and J.J. Arnaldez), 1991 and 1995 (J.J. Arnaldez, Yves Derains and Dominique Hascher), 1996 and 2000 (*idem*), under the title *Collection of ICC Arbitral Awards* (hereinafter referred to, respectively, as 1, 2, 3 or 4 *ICC Awards*).