Complex Arbitrations
Multiparty, Multicontract, Multi-issue
and Class Actions

Bernard Hanotiau
Contents

Acknowledgements xv

Introduction 1

Chapter I
Who are the Parties to the Contract(s) or to the Arbitration Clause(s) Contained Therein? The Theories Applied by Courts and Arbitral Tribunals 7

Section I
Introduction 7

Section II
Representation and Agency 10

Section III
Third-party Beneficiaries and Guarantee Clauses (clauses de porte-for) 14

Section IV
Universal and Individual Transfers 18

Section V
Estoppel 20

Section VI
Incorporation by Reference 29

Section VII
Consent or Conduct as an Expression of Implied Consent or as an Alternative to Consent 32

Section VIII
Existence Between the Parties of a Community of Rights and Interests 39

Section IX
Confusion and Fraud; Alter Ego and Piercing the Corporate Veil 43
Chapter II
May an Arbitration Clause be Extended to Non-signatories:
Individuals, States or Other Companies of the Group? 49

Section I
Introduction. The So-Called Group of Companies Doctrine 49

Section II
The Impact of the Requirement That the Arbitration Clause Be in Writing 52

Section III
Analysis of Case Law 54

Sub-section I
The Factual Schemes 54

Sub-section II
Extension to One or More Non-Signatories as Additional Defendant(s) 55
I. Extension to the Parent Company 55
II. Extension to a State 62
III. Extension to One or More Subsidiaries or One or More Companies of the Group That Are Not Subsidiaries 69
IV. Extension to a Sister Corporation and an Employee 75
V. Extension to Another Company, Unrelated to the Signatory 76
VI. Extension to a Director or General Manager or CEO or to the Owner of the Group 77
VII. Extension to an Individual (Possibly a Majority Shareholder of the Group) and Another Company Within the Group 81

Sub-section III
Extension to One or More Non-signatories as Additional Claimant(s) 84
I. Extension to the Parent Company 84
II. Extension to a State 85
III. Extension to an Individual (Possibly a Majority Shareholder of the Group) and Other Companies Within the Group 88
IV. Extension to One or More Subsidiaries or One or More Companies Within the Group That Are Not Subsidiaries 90
V. Extension to a Director and Principal Shareholder 96

Section IV
Conclusions 96
Chapter III
The Possibility of Bringing Together in One Single Proceeding all the Parties who have Participated in the Performance of One Economic Transaction through Interrelated Contracts

Section I
Introduction

Section II
Groups of Contracts

Sub-section I
The Issues and the Various Contractual Schemes

Sub-section II
General Remarks

Sub-section III
Basic Principles

Section III
Analysis of Case Law

Sub-section I
The Parties Are Different but the Contracts Contain the Same Arbitration Clause or at Least the Clauses Are Compatible
   1. Awards Refusing Consolidated Jurisdiction and Eventually Taking the Connected Contract into Consideration
   2. Awards and Decisions Accepting Consolidated Jurisdiction

Sub-section II
The Parties Are Different and the Contracts Do Not Contain Identical or Compatible Arbitration Clauses or One of Them Does Not Contain an Arbitration Clause
   1. Incompatible Arbitration Clauses
   2. Arbitration Clause(s) and Jurisdiction Clause(s)
   3. One or More Identical or Compatible Arbitration Clauses and One or More Contracts without Arbitration Clause
   4. Even If an Arbitral Tribunal Does Not Have Jurisdiction on a Contract, It May Take It into Consideration
   5. The Issue of Bank Guarantees

Sub-section III
The Parties Are the Same and They Have Concluded Two or More Contracts, One Without an Arbitration Clause, or Containing a Clause Which Gives Jurisdiction to National Courts, or Another Incompatible Arbitration Clause.

Court Decisions
   1. Connected Agreements. Absence of an Arbitration Clause in One of Them
COMPLEX ARBITRATIONS

II. Incompatible Arbitration Clauses 137
III. One or More Contracts containing an Arbitration Clause and One Containing a Jurisdiction Clause 138

Sub-section IV
May an Arbitral Tribunal Hearing a Dispute that Arises Principally from a Specific Contract Decide Issues Arising from Connected Agreements Entered into by the Same Parties when One of them Does Not Contain an Arbitration Clause or Contains a Clause which Gives Jurisdiction to National Courts or another Incompatible Arbitration Clause? Arbitral Awards 140
I. Identical Arbitration Clauses 140
II. One or More Contracts Contain an Arbitration Clause (Identical or Compatible); the Other(s) Does (Do) Not 141
III. One Contract Containing an Arbitration Clause, Another One Containing a Jurisdiction Clause 152
IV. Incompatible Arbitration Clauses and the Difference between Giving Effect to an Agreement and Taking this Agreement into Consideration 154
V. Different Wording of the Clauses. Are They Incompatible? 157

Sub-section V
Conclusions 160

Chapter IV
Joinder of Parties and Joinder of Claims: Voluntary and Compelled Intervention of Third Parties, Cross-claims and Consolidation 163

Section I
Who are the Parties to the Arbitral Proceedings? 164

Section II
May a Non-Party to the Arbitration Intervene in the Proceedings? 165

Section III
May a Party to the Arbitration Proceedings Join a Non-Party in the Course of the Procedure? 166
Sub-section I
Ad Hoc Arbitration 166
Sub-section II
Institutional Arbitration 168
I. ICC Arbitration 169
A. The Old Approach 169
B. The New Approach 171
II. Other Institutions 175
CONTENTS

Section IV
May a Respondent to the Arbitration Procedure File a Cross-claim against Another Respondent in the Same Arbitration? 178

Section V
To What Extent is it Possible To Consolidate Two Related Arbitration Proceedings? 179
Sub-section I
Overview 179
Sub-section II
Consolidation by the Institution 180
   I. The ICC Rules 180
   II. CEPANI Rules 183
Sub-section III
Consolidation by the Court 185
Sub-section IV
ICSID and NAFTA 188

Section VI
Is There a Duty to Bring into the Arbitration Proceedings All the Parties to the Agreement? 191

Section VII
Briefs Amicus Curiae 192
Sub-section I
NAFTA 193
Sub-section II
ICSID 195
Sub-section III
Other Conventions 196

Chapter V
Setting in Motion of Arbitral Proceedings and Appointment of Arbitrators 197

Section I
Setting in motion of arbitral proceedings 197
Sub-section I
Decisions Involving Multiple Respondents 198
Sub-section II
Decisions Involving Multiple Claimants 199
Section II
Appointment of Arbitral Tribunal

Chapter VI
Arbitration Proceedings

Section I
Specific Issues That May Arise in the Course of the Arbitral Proceedings

Sub-section I
Opposability of the Name-borrowing Provision

Sub-section II
Pass-through Claims

Sub-section III
Direct Action of the Subcontractor Against the Employer

Sub-section IV
Determination of the Law Applicable to the Various Contracts of the Contractual Chain

Sub-section V
Joint Responsibility for Debts Incurred by a Company of the Group and Set-off

Section II
How to Minimise the Difficulties That Can Arise from Separately Conducted Parallel Arbitral Hearings

Sub-section I
Appointment of the Same Arbitrators

Sub-section II
Communication of Information or Documents Obtained in Another Arbitration

Sub-section III
Independence and Impartiality of the Arbitrator Appointed in Parallel Cases

Sub-section IV
How to Alleviate the Inconveniences That Can Result from the Existence of Parallel Arbitrations

Chapter VII
Enforcement of the Arbitral Award
Chapter VIII
The *Res Judicata* Effect of an Award Rendered in a Connected Arbitration Arising from the Same Project 239

Section I
*Res Judicata*, a General Principle of International Law Recognised by Civilised Nations 239
Sub-section I
The Principle of *Res Judicata* in International Law 239
Sub-section II
*Res Judicata* in National Legal Systems 242
I. *Res Judicata in English Law* 242
II. *Res Judicata in Civil Law Legislation* 243

Section II
*Res Judicata* Applied to Arbitral Awards 246

Chapter IX
Classwide Arbitration 257

Section I
The Issues 257

Section II
Presentation of the Class Action Model: Conditions, Advantages and Disadvantages 260

Section III
Is it for the Courts or the Arbitrator(s) to Decide Whether a Class Action May Be Submitted to Arbitration: The *Green Tree* Case 264

Section IV
The Determination Whether a Particular Agreement Authorises or Prohibits Classwide Arbitration 266
Sub-section I
No General Class Action Exemption from Arbitration 266
Sub-section II
Agreements Authorising Classwide Arbitration 267
Sub-section III
Agreements Prohibiting Classwide Arbitration 267
Sub-section IV
Silent Agreements 271
Section V
Classwide Arbitration Procedure 274

Section VI
Is Classwide Arbitration Desirable? 276

Section VII
Institutional Rules for Class Arbitrations 277

Appendix 1
A Selection of Provisions on Multiparty Arbitration in International Conventions, National Legislations and Institutional Rules 281

I. International Conventions 281
   A. NAFTA (North American Free Trade Agreement) 281
   B. Draft Model Agreement on International Investment prepared by the International Institute for a Sustainable Development, January 2005 285

II. National Legislations 289
   A. Australian International Arbitration Act 1974 289
   B. Belgian Judicial Code, Part VI (4 July 1972) 291
   C. Canada 291
   D. English Arbitration Act 1996 292
   F. Hong Kong Arbitration Ordinance, effective 27 June 1997 294
   G. Ireland’s Arbitration (International Commercial) Act 1998 294
   H. New Zealand Arbitration Act 1996 295
   I. The Spanish Law 60/2003 of 23 December on Arbitration 297

III. Institutional Rules 298
   B. American Arbitration Association (effective 1 July 2003) 298
   C. Association Française d’Arbitrage (AFA) 299
   D. Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber (Vienna Rules) (effective 1 January 2001) 299
   E. CEPANI Arbitration Rules (effective 1 January 2000) 300
CONTENTS

F. The Chartered Institute of Arbitrators Arbitration Rules (2000 edn) (effective 1 December 1999) 301
G. China International Economic and Trade Arbitration Commission (CIETAC) Rules (effective May 1, 2005) 302
H. Rules of the Deutsche Institution für Schiedsgerichtsbarkeit (DIS) in force as of July 1, 1998 302
I. Rules of Proceedings of the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry (effective April 1, 2000) 303
K. Arbitration Rules of the London Court of International Arbitration (LCIA) (effective 1 January 1998) 305
L. London Maritime Arbitration Association Rules (effective 1 January 2002) 305
M. Rules of Arbitration of the Milan Chamber of Commerce (effective 1 January 2004) 306
N. Arbitration Rules of the Netherlands Arbitration Institute (effective 13 November 2001) 306
O. Rules of the Singapore International Arbitration Center (effective 22 October 1997) 307
P. Swiss Rules of International Arbitration (effective 1 January 2004) 307
Q. Court of Arbitration for Sport (CAS) (in force since 22 November 1994) 309
R. WIPO Arbitration and Mediation Rules (effective 1 October 2002) 310

Appendix 2
A Selection of Multiparty-Multicontract Arbitration Clauses 313

I. Proposed Multi-party Arbitration Agreement for an International Joint Venture in which a Number of Contracts are Made Among Diverse Parties with a View to Realizing a Common Economic Transaction 313
II. Clause Referred to in ICC Case no. 5333 of 1986 318
III. The Eurodisney Arbitration Clause 321
IV. Another Model Multiparty Arbitration Clause 325
V. Clause Referred to in ICC Case no. 8708 of 1997 330
VI. Clause Referred to in ICC Award no. 7844 of 1994 330
VII. Further Clauses 330
Appendix 3
Institutional Rules for Class Arbitrations 339

I. American Arbitration Association Supplementary Rules for Class Arbitrations (effective 8 October 2003) 339

II. JAMS Class Action Procedures (February 2005) 346

Appendix 4
The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 351

Selected Bibliography 357

Subject Index 385