The Extent of Consent in Multi-Party and Multi-Contract Arbitration under the Perspective of Brazilian Law - Substantive and Procedural Issues

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Submitted by

Leonardo Ohlrogge

from

Germany and Brazil

Approved on the application of

Prof. Dr. Dr. Peter Sester

and

Prof. Dr. André Antunes Soares de Camargo

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This dissertation is dedicated to **Denison Caldeiron**, who first gave me an opportunity to join a European law firm and to **Professor Rolf Trittmann**, who first provided me with an opportunity to work with international arbitration.

With all my gratitude and admiration.

ABSTRACT

The purpose of this dissertation is to analyse the consensual nature of arbitration in the context of multi-party and multi-contract arbitration, with a specific emphasis on Brazilian law. Multi-party and multi-contract arbitration are increasingly common and raise a fundamental problem of arbitration: the tension between the consensual character of arbitration and the need for an efficient dispute resolution mechanism.

Particular emphasis is given to group of companies and group of contracts doctrines. Both theories have *elaborate names* which suggest that an arbitration agreement might be extended to companies and contracts that could potentially be considered as a unit despite the absence of parties' consent. Nevertheless, an in-depth analysis of the Brazilian and international case law demonstrates that both group of companies and group of contracts theories are fundamentally based on consent. This apparent self-contradiction raises the question whether both doctrines really exist as autonomous theories or whether they are merely *elaborate concepts* of what is, in fact, a basic assessment of the existence of consent.

The conclusion reached is that economic considerations play a key role in determining the scope of the arbitration agreement. Nevertheless, they should be taken into account in order to ascertain the parties' consent rather than substituting it. In Brazil, consent is still the overriding element in determining both subjective and objective scope of the arbitration agreement in multi-party and multi-contract arbitrations. An arbitration clause cannot be extended to companies of the same group solely based on the corporate link between them. Neither can an arbitration clause cover disputes from different agreements where this is not in accordance with the parties' intent, even where the contracts are economically related.

The analysis of the Brazilian case law finally shows that there is a tendency in interpreting the arbitration agreement in an increasingly flexible way, rather than a rupture of the arbitrations' consensual character. Today, substance prevails over form and implied consent has gained strong relevance. Decisions from Brazilian courts in this respect are accordance with the international case law.

ZUSAMMENFASSUNG

Die vorliegende Arbeit befasst sich mit dem konsensualen Charakter von Schiedsverfahren bei Mehrparteien- und Mehrvertragsschiedsverfahren und berücksichtigt dabei besonders das brasilianische Recht. Mehrparteien- und Mehrvertragsschiedsverfahren gewinnen in der Praxis zunehmend an Bedeutung und verdeutlichen ein grundsätzliches Problem der Schiedsgerichtsbarkeit: das Spannungsverhältnis zwischen dem konsensualen Charakter des Schiedsverfahrens und der Notwendigkeit eines effizienten und wirtschaftlichen Streitbeilegungsverfahrens.

Ein besonderer Schwerpunkt der Arbeit liegt auf der Analyse der group of companies und group of contracts Doktrinen. Beiden Theorien liegt die Überlegung zugrunde, dass eine Schiedsvereinbarung auch ohne Einverständnis der Parteien auf jene Personen und Verträge ausgedehnt werden kann, die potentiell als Einheit angesehen werden können. Gleichwohl zeigt eine Analyse der brasilianischen und internationalen Rechtsprechung, dass die group of companies und group of contracts Doktrinen auf Konsens beruhen. Dieser vermeintliche Widerspruch wirft die Frage auf, ob den genannten Doktrinen eine eigenständige dogmatische Funktion zukommt, oder ob es sich letztlich bloss um ein ausgefeilteres Konzept zur einfachen Ermittlung eines übereinstimmenden Parteiwillens handelt.

Diese Arbeit kommt zum Schluss, dass wirtschaftlichen Überlegungen eine wichtige Rolle bei der Bestimmung des Geltungsbereiches der Schiedsvereinbarung zukommt. Diese Überlegungen sollten berücksichtigt werden um eine Übereinstimmung des Parteiwillens festzustellen, nicht aber um ihn zu ersetzen. In Brasilien gilt Konsens weiterhin als Grundprinzip bei der Bestimmung des subjektiven und objektiven Geltungsbereiches der Schiedsvereinbarung in Mehrparteien- und Mehrvertragsschiedsverfahren. So kann eine Schiedsklausel nicht ausschliesslich aufgrund der gesellschaftsrechtlichen Verflechtung auf Unternehmen derselben Gruppe ausgedehnt werden. Noch kann eine Schiedsvereinbarung Streitigkeiten aus unterschiedlichen Verträgen abdecken, wenn dies nicht den Absichten der Parteien entspricht, selbst wenn die Verträge wirtschaftlich miteinander verbunden sind.

Letztendlich zeigt eine Analyse der brasilianischen Rechtsprechung keinen Bruch mit dem konsensualen Charakter von Schiedsverfahren, sondern vielmehr eine Tendenz Schiedsvereinbarungen zunehmend flexibel auszulegen. Heutzutage gilt der Vorrang des Inhalts über die Form und konkludente Zustimmung hat eine besondere Bedeutung gewonnen. Die Entscheidungen der brasilianischen Gerichte stimmen in diesem Zusammenhang mit der internationalen Rechtsprechung überein.

RÉSUMÉ

Cette dissertation porte sur l'analyse de la nature consensuelle de l'arbitrage dans le cadre d'arbitrages multipartites et multi-contrats, avec une mise en évidence sur le droit brésilien. Les arbitrages multipartites et multi-contrats sont de plus en plus courants et touchent un problème fondamental de l'arbitrage : la tension entre le caractère consensuel de l'arbitrage et la nécessité de disposer d'un mécanisme efficace de résolution des litiges.

L'accent est mis sur le principe du groupe de sociétés et celui du groupe de contrats. Ces deux principes aux noms sophistiqués suggèrent qu'une convention d'arbitrage puisse être étendue à des sociétés et à des contrats pouvant potentiellement être considérés comme une unité et ce, malgré l'absence de consentement des parties intéressées. Toutefois, une analyse approfondie de la jurisprudence brésilienne et internationale montre que le principe du groupe de sociétés et celui du groupe de contrats sont fondamentalement basés sur le consentement. Cette contradiction apparente soulève la question de savoir si les deux principes mentionnés existent réellement en tant que théories autonomes ou s'ils constituent uniquement des concepts sophistiqués qui résultent, en définitive, d'une appréciation quant à l'existence d'un consentement.

Il en résulte que les considérations d'ordres économiques jouent un rôle déterminant afin d'évaluer le champs d'application de la convention d'arbitrage dans le cadre d'arbitrages multipartites et multi-contrats. Toutefois, ses aspects économiques devraient confirmer le consentement réel des parties, plutôt que de le remplacer. Le consentement des parties est l'élément décisif au Brésil afin de déterminer l'étendue objective et subjective de la convention d'arbitrage multipartite et multi-contractuelle. Une clause d'arbitrage ne peut s'étendre aux entreprises d'un même groupe en se basant exclusivement sur leurs liens corporatifs. La clause ne peut similairement pas s'appliquer aux disputes provenant de contrats différents, même si ceux-ci sont économiquement liés.

Enfin une analyse de la jurisprudence brésilienne démontre aujourd'hui une interprétation flexible de la convention d'arbitrage, plutôt qu'une dissociation du caractère consensuel de l'arbitrage. Ainsi, la substance prévaut sur la forme, et le consentement implicite est dorénavant décisif. Le Brésil est, à ce niveau là, parfaitement aligné avec les tendances des cours internationales.

RESUMO

O presente trabalho objetiva analisar a natureza consensual da arbitragem em cenários envolvendo multiplicidade de partes e de contratos, com especial ênfase no direito brasileiro. Arbitragens multipartes e multicontratuais são cada vez mais frequentes e revelam um problema fundamental da arbitragem: a tensão entre o seu caráter consensual e a necessidade de um meio de resolução de conflitos efetivo.

Particular destaque é dado à teoria dos grupos societários e à teoria dos grupos contratuais. A nomenclatura de ambas teorias sugere que a convenção de arbitragem poderia ser estendida a sociedades e contratos que sejam potencialmente considerados pertencentes a uma mesma unidade, ainda que na ausência de consentimento entre as partes. No entanto, uma análise crítica das decisões brasileiras e internacionais sobre este tema demonstra que tanto a teoria dos grupos societários quanto a teoria dos grupos contratuais possuem caráter estritamente consensual. Desta forma, em virtude desta aparente contradição, é necessário analisar se tais teorias realmente existem de maneira autônoma ou se não passam de noções elaboradas para descrever o que é, na verdade, a análise da existência do consenso.

Conclui-se que considerações econômicas desempenham papel fundamental na análise do escopo da convenção de arbitragem. No entanto, aspectos econômicos devem ser considerados a fim de se verificar a existência do consenso, mas não para suprir a falta deste. No direito brasileiro, o consenso ainda é o fator predominante na determinação dos escopos subjetivo e objetivo da cláusula de arbitragem em procedimentos envolvendo diversas partes e contratos. A cláusula arbitral não pode ser estendida a sociedades distintas simplesmente pelo fato de elas pertencerem ao mesmo grupo. Tampouco pode a cláusula arbitral abranger disputas oriundas de contratos relacionados se esta não for a vontade das partes, ainda que os contratos sejam interligados economicamente.

Finalmente, a análise da jurisprudência brasileira demonstra que há uma tendência em interpretar a convenção de arbitragem de forma cada vez mais flexível, ao invés de uma verdadeira ruptura da natureza consensual da arbitragem. Atualmente, a substância prevalece sobre a forma, de modo que o consentimento implícito adquire especial relevo. Neste sentido, as decisões dos tribunais brasileiros estão de acordo com a jurisprudência estrangeira.

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LIST OF ABBREVIATIONS

Ag. Reg.	Agravo Regimental
AI	Agravo de Instrumento
Am. Rev. Int'l Arb	The American Review of International Arbitration
AMCHAM	Arbitration Center of the American Chamber of Commerce (Brazil)
AMCHAM Rules	Arbitration Rules of the Arbitration Center of the American Chamber of Commerce (Brazil) effective as of 11 June 2018
Ap.	Recourse of Appeal
Arb. Int'l	Arbitration International
ARBITAC	Chamber of Mediation and Arbitration of the Commercial Association of Paraná
ARBITAC Rules	Arbitration Rules of the Chamber of Mediation and Arbitration of the Commercial Association of Paraná effective as of 1 June 2015
Art.	Article
BGB	Deutsches Bürgerliches Gesetzbuch, German Civil Code
BGH	*Bundesgerichtshof*, German Federal Court of Justice
CAM	Market Arbitration Chamber
CAM Rules	Arbitration Rules of the Market Arbitration Chamber, effective as of 26.10.2011
CAM-CCBC	Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada
CAM-CCBC Rules	The Arbitration Rules of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, effective as of 1 January 2012
CC	Conflito de Competência
CAMARB	CAMARB - Business Arbitration chamber – Brazil
CAMARB Rules	Arbitration Rules of the CAMARB - Business Arbitration chamber – Brazil, effective as of 20 September 2017
CIESP/FIESP	Chamber of Conciliation, Mediation and Arbitration CIESP/FIESP

CIESP/FIESP Rules	Arbitration Rules of the Chamber of Conciliation, Mediation and Arbitration of CIESP/FIESP
DIS	German Arbitration Institute (Die Deutsche Institution für Schiedsgerichtsbarkeit)
DIS Rules	Arbitration Rules of the German Arbitration Institute, effective as of 1 March 2018
EI	Embargos Infringentes
FGV	Chamber FGV of Mediation & Arbitration
FGV Rules	Arbitration Rules of the Chamber FGV of Mediation & Arbitration, effective as of 1 July 2016
fn.	Footnote
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	Arbitration Rules of the Hong Kong International Arbitration Centre, effective as of 1 November 2013
ICC	International Chamber of Commerce
ICC Ct. Bull	ICC International Court of Arbitration Bulletin
ICC Rules	The Rules of Arbitration of the International Chamber of Commerce, effective as of 1 March 2017
LCIA	The London Court of International Arbitration
LCIA Rules	The Rules of the London Court of International Arbitration, effective as of 11October 2014
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
p./pp.	Page / Pages
para./paras.	Paragraph / Paragraphs
PILS	Private International Law Statute (Bundesgesetz über das Internationale Privatrecht vom 18. Dezember 1987, SR 291)
REsp	Recurso Especial
Rev. Arb.	Revue de l'arbitrage
SCAI	Swiss Chambers' Arbitration Institution

SCC	Stockholm Chamber of Commerce
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, effective as 1 January 2017
SEC	Sentença Estrangeira Contestada
SIAC	Singapore International Arbitration Centre
SIAC Rules	Arbitration Rules of the Singapore International Arbitration Centre effective as of 1 August 2016
Swiss Rules	Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution effective as of June 2012
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rule (as revised in 2010)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2010
VIAC	Vienna International Arbitral Centre
Vienna Rules	The Rules of Arbitration of the Vienna International Arbitral Centre, effective as of 1 January 2018
Yearbook Comm. Arb'n	Yearbook Commercial Arbitration
ZPO	Zivilprozeßordnung, German Code of Civil Procedure

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Switzerland	X. SA und A. *v* Y. AG, 4C.40/2003, 19.05.03, *in:* 22 ASA Bull. 2/2004, pp. 344-352
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Switzerland	Swiss Federal Tribunal, 4P.126/2001,18.12.2001
Switzerland	Federal Tribunal, decision of 7 August 2001, published in ASA Bull. 1/2002, p. 88
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ad hoc Award	Alpha S.A. *v* Beta & Co., State Company of Ruritanian Law, 1991, in 2 ASA Bull (1992) pp. 202-258
ICC Award	Interim Award in ICC Case No. 15116 of 2008, Yearbook Comm Arb'n, XXXIX (2014) pp. 159-168

ICC Award	Partial Award in ICC Case No. 10510 of 2000, unpublished, see HANOTIAU, Complex Arbitrations (2006), para. 94
ICC Award	Final Award in ICC Case No. 9839 of 1999, Yearbook Comm Arb'n, XXIX (2004), pp. 66-88
ICC Award	Final Award in ICC Case No. 9771, XXIX Y.B. Comm. Arb. 46 (2004)
ICC Award	ICC Case No. 9762 of 2001, Final Award, XXIX Y.B. Comm. Arb. 26, para. 49 (2004)
ICC Award	ICC Case No. 11405, Interim award of 29 November 2001, Unpublished (Sole arbitrator, Paris), quoted in HANOTIAU, Complex Arbitrations (2006), p. 50 fn. 142
ICC Award	ICC Award in ICC Case No. 5103, 115 J.D.I (Clunet) 1207 (1988)
ICC Award	Award in ICC Case No. 4972, in S. Jarvin, Y. Derains & J.-J. Arnaldez (eds.), Collection of ICC Arbitral Awards 1986-1990 380 (1994); Interim Award in ICC Case No. 4504, 113 J.D.I. (Clunet) 1118 (1986)
ICC Award	ICC Case No. 6829 of 1992 in Yearbook Comm. Arb. XIX (1994), pp. 167-183
ICC Award	Final Award in ICC Case No. 6519, 2(2) ICC Ct. Bull. 34, 35 (1991)
ICC Award	ICC Case No. 6223 of 1991, *in:* ICC Bull. 1997, Vol. 8, No. 2, p. 69
ICC Award	Award in ICC Cases Nos. 7604 and 7610, *in:* Arnaldez/Derains/Hascher (eds.), Collection of ICC Arbitral Awards 1996-2000, 2003, pp. 510-516
ICC Award	Partial Award in ICC Case No. 6000, 2(2) ICC Ct. Bull. 31, 34 (1991)

ICC Award	Award in ICC Case No. 6230 of 1990, *in:* Yearbook Coom. Arb'n XVII (1992), pp. 164-177
ICC Award	ICC Award in case No. 5281, *in:* 7 ASA Bull (1992), pp. 313-339.
ICC Award	ICC Case No. 4131, 23 September 1982 *in:* Yearbook Comm. Arb'n IX (1984), pp. 131 – 137
ICC Award	ICC Award No. 5730/1988, *in:* Arnaldez/Derains/Hascher (eds.), Collection of ICC Arbitral Awards 1996-2000, 2003, pp. 410-420
ICC Award	ICC Award No. 5721, Clunet 1990, at 1019 et seq.
ICC Award	ICC Case No. 2626, 105 J.D.I. (Clunet) 980 (1978)
ICC Award	ICC Case No. 2138, in S. Jarvin & Y. Derains (eds.), Collection of ICC Arbitral Awards 1974-1985 242 (1990)

INTRODUCTION

I. THE PURPOSE OF THE DISSERTATION AND RESEARCH QUESTION

1. The purpose of this dissertation is to analyse the consensual nature of the arbitration agreement in the context of multi-party and multi-contract arbitration under the perspective of Brazilian case law and literature. Multi-party and multi-contract arbitration raise fundamental questions regarding both the subjective and objective of scope of the arbitration agreement. To what extent an arbitration agreement binds the so-called *non-signatory parties* and covers disputes of related agreements is one of the most delicate topics in international arbitration. The theme, however, has not yet been explored in-depth by Brazilian scholars despite its theoretical and practical relevance.

2. The increasing number of arbitrations involving multiple parties and multiple agreements shows the tension between the consensual nature of arbitration and its efficiency. In this context, two theories have been developed to extend the arbitration agreement to parties and contracts beyond its original scope: (i) group of companies and (ii) group of contracts.

3. Notably, both the group of companies and the group of contracts theories have elaborate names, which could suggest that an arbitration agreement could be extended to companies and contracts that somehow form a unity. However, on the other hand, an in-depth analysis of the Brazilian and international case law demonstrates that the group of companies and group of contracts theories are fundamentally based on consent. This apparent self-contradiction ignites the question of whether both doctrines really exist as autonomous theories or whether they are merely decorative concepts of what is, in fact, a basic assessment of the existence of consent.

4. In a scenario where arbitrations become increasingly complex, it is necessary to address the question of the extent to which consent is still fundamental. The understanding of the group of companies and group of contracts is essential for a clear comprehension of the issues related to the extent of the subjective and objective scope of the arbitration clause. Therefore, this dissertation aims to answer the question of whether consent is still the

overriding principle in determining the subjective and objective scope of the arbitration agreement in multi-party and multi-contract arbitrations.

5. This dissertation aims to contribute both to Brazilian and foreign arbitration practitioners dealing with arbitrations seated in Brazil or involving Brazilian parties. It provides a critical analysis of the Brazilian decisions within complex arbitrations and addresses important fundamentals of arbitration law relating to consent under the perspective of Brazilian law.

II. STRUCTURE OF THE DISSERTATION

A. DIVISION BETWEEN PROCEDURAL AND MATERIAL ISSUES

6. This dissertation is divided into two parts. The first part addresses the substantial matters of arbitration involving multiple parties and multiple contracts while the second part deals with procedural issues in this context.

7. The first part is divided into three chapters. The first chapter examines the main characteristics of the arbitration agreement and its consequences for multi-party and multi-contract arbitration, such as its separability presumption, consensual nature, and interpretation. The following two chapters deal respectively with multi-party and multi-contract arbitration. The chapter on multi-party arbitration analyses the existing basis for binding the so-called non-signatories to the arbitration agreement. Special attention will be drawn to the group of companies doctrine, as it is the most controversial basis on which a non-signatory may be considered a party to an arbitration and as it fundamentally touches on the importance of consent. The third chapter addresses the most common scenarios out of which arbitrations involving multiple agreements arise and evaluates to what extent an arbitration agreement may cover disputes arising from related agreements in absence of any reference due to the fact they form a group of contracts.

8. The second part concerning the procedural issues is also divided into three chapters. The first chapter deals with procedural mechanisms related to multi-party and multi-contract arbitration proceedings, namely: consolidation, joinder and intervention. The second chapter addresses the constitution of the arbitral tribunal in multi-party arbitration while the

third chapter focuses on the challenges to the arbitral tribunal's jurisdiction and on the setting aside proceedings based mainly on the ground of lack of jurisdiction.

B. BRAZILIAN ARBITRAL INSTITUTIONS

9. Given the amount of arbitral institutions in Brazil, an exhaustive analysis of each of their rules which treat multi-party and multi-contract arbitration would go beyond the scope of this dissertation. Therefore, emphasis will be placed on institutions with a more significant case load, namely:

AMCHAM	AMCHAM Arbitration and Mediation Center attached to the American Chamber of Commerce for Brazil – Sao Paulo
ARBITAC	Chamber of Mediation and Arbitration of the Commercial Association of Paraná
CAM-CCBC	Arbitration and Mediation Centre of the Chamber of Commerce Brazil-Canada
CAMARB	CAMARB - Business Arbitration Chamber - Brazil
CIESP/FIESP	Chamber of Conciliation, Mediation and Arbitration of the Center of Industries of the State of Sao Paulo/Federation of Industries of the State of Sao Paulo
FGV	Chamber FGV of Mediation & Arbitration

C. SCOPE LIMITATION

10. This dissertation confines itself to the study of the subjective and objective scopes of arbitration clauses in commercial contracts. It does not aim, however, to analyse the extension of the effects of statutory arbitration clauses to shareholders of Brazilian companies. Despite being an interesting subject with great practical relevance, it is worth noting that arbitrations between shareholders raise specific questions involving particular principles of corporate law. An analysis of the subjective scope of statutory arbitration clauses requires in-depth examination of the arbitration fundamentals in connection with Brazilian companies' structures and shareholders' rights, which will not be dealt with in

this thesis.[1] In contrast, piercing the corporate veil, succession and corporate groups are matters of corporate law that directly affect arbitration clauses contained in commercial agreements. Hence this dissertation will include these subjects.

D. METHODOLOGY

11. There are several scenarios in which multi-party and multi-contract disputes may arise. Despite the fact that they often overlap each other, the better approach to examine the extent of both objective and subjective scope of the arbitration agreement is to isolate different fact patterns and analyse the consensual nature of arbitration in each of them.

12. Despite the focus on Brazilian law, the research is also largely based on international literature and decisions rendered abroad. The reasons are twofold: firstly, arbitration is intrinsically international and courts outside Brazil have been dealing with multi-party and multi-contract arbitration for much longer. In fact, the most important legal basis for the analysis of the consent in multi-party arbitration – group of companies doctrine – originated in France.

13. Secondly, a comparative law research contributes to a critical analysis of Brazilian case law.[2] Therefore, to the extent possible, a comparison will be drawn with leading arbitration jurisdictions in Europe, mainly England, France, Germany and Switzerland.

[1] TELLECHEA, Arbitragem nas Sociedades Anônimas, 2016, p. 351. For the extent of the subjective scope of the arbitration agreement in intra-corporate disputes in Brazil see MÜSSNICH/PERES, Arbitrabilidade Subjetiva no Direito Societário e Direito de Decesso, *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, pp. 673-694; FINKELSTEIN, Arbitragem em Direito Societário, *in:* FINKESLTEIN/POENÇA (eds.), Sociedades Anônimas, 2007, pp. 303-323; LOBO, A Cláusula Compromissória Estatutária, *in:* Revista Brasileira de Arbitragem e Mediação, 2009(22), pp. 11-32; Lévy, Aspecos Polêmicos da Arbitragem no Mercado de Capitais, *in:* Revista Brasileira de Arbitragem, 2010(27), pp. 7-37.

[2] ZWEIGERT/KÖTZ, Rechtsvergleichung, 3rd ed., 1996, § 2 I: "*Keine Wissenschaft kann es sich leisten, sich allein auf Erkentnisse zu stützen, die innerhalb ihrer nationalen Grenzen produziert worden sind*".

III. CORRELATION BETWEEN MULTI-PARTY AND MULTI-CONTRACT ARBITRATION

14. Arbitration was originally designed and developed as a means of dispute resolution between only two parties.[3] It is therefore natural that the involvement of three or more parties and the interplay between related agreements raise questions concerning the jurisdiction of the arbitrators. In other words, when a case involves multiple parties and a plurality of agreements, it may be questionable which parties are bound by the arbitration agreement and what are the matters they have agreed to arbitrate. Contrary to state courts, which have powers to consolidate and join third parties to the judicial proceedings, the arbitrators' jurisdiction is limited by the intent of the parties. Hence, multi-party and multi-contract arbitration face their main obstacle in the consensual nature of arbitration.[4]

15. Therefore, despite the difference in subjects, multi-party and multi-contract arbitration are intrinsically connected, especially due to the fact that both have requirement for consent as their cornerstone. As a consequence, even though arbitrations with multiple parties and arbitrations with multiple contracts shall be analysed separately, a comparison between these two scenarios is effective in assessing the extent of consent in international arbitration.

A. MULTI-PARTY ARBITRATION

16. Multi-party arbitration is a term that encompasses all scenarios in which arbitral proceedings involve more than two parties.[5] It does not only cover disputes well divided into two poles with a unique group of claimants and/or respondents: it also covers multi-polar disputes with more than two diverging interests.[6]

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[3] VOSER, Multi-party Disputes and Joinder of Third Parties, *in:* VAN DEN BERG (ed.), 50 Years of the New York Convention - ICCA Conference, 2009, p. 351; SCHWARZ, Concluding Remarks, *in:* SCHWARZ/HANOTIAU (eds.), Multiparty Arbitration, 2010, p. 236; WEIGAND/BAUMANN, Introduction, *in:* WEIGAND (ed.), Practitioner's Handbook on International Commercial Arbitration, 2nd ed., 2009, para. 1.285; HEUMAN, Arbitration Law of Sweden: Practice and Procedure, 2003, p. 183.

[4] MEIER, Multi-party Arbitrations, *in*: ARROYO (ed.), Arbitration in Switzerland, The Practitioner's Guide, 2013, p. 1325, para. 4.

[5] MEIER, Multi-party Arbitrations, *in*: ARROYO (ed.), Arbitration in Switzerland, The Practitioner's Guide, 2013, p. 1325, para. 4.

[6] VOSER, Multi-party Disputes and Joinder of Third Parties, *in*: VAN DEN BERG (ed.), 50 Years of the New York Convention - ICCA Conference, 2009, p. 351; EMANUELE/MOLFA, Multiparty arbitration, *in:* Cleary

17. Arbitrators and national courts may face complex substantial and procedural matters when several parties take part in the arbitration. In relation to the substantial matters, the most frequent issue is the extent to which non-signatories may be bound by an agreement that they have not expressly consented to. The theme is among the most delicate and complex issues in international commercial arbitration.[7] Nevertheless, multi-party arbitration does not only raise substantial questions. As for procedural matters, arbitrators have to deal with requests for joinder, intervention, and consolidation as well as the constitution of the arbitral tribunal and jurisdictional objections.

1. CONSENT IN MULTI-PARTY ARBITRATION

18. The issues arising from multi-party arbitration fundamentally relate to the jurisdiction of the arbitrators and are closely connected with the consent requirement, a pre-requisite for the validity of the arbitration agreement. Accordingly, where the parties have expressly consented to the arbitration agreement, *e.g.*, by signing the contract, there is usually no doubt that they are subject to arbitration. However, this is not always the case. Arbitrations often arise from disputes where not all parties have signed the agreement and cannot be easily identified as contracting parties by simply looking at the contracts' cover and signature pages. The literature usually refers to those parties as third parties or non-signatories, even though both terms are subject to criticism as will be shown below.[8]

19. If the agreement does not contain a reference to a party as a contracting party, it is questionable whether this party might be bound by the arbitration agreement and on what basis. To ascertain if the parties may rely on the arbitration clause or be compelled to

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Gottlieb Steen & Hamilton LLP (ed.), Selected Issues in International Arbitration: The Italian Perspective, 2014, p. 119; ROOS, Multi-party Arbitration and Rule-making: Same Issues, Contrasting Approaches, *in*: VAN DEN BERG (ed.), 50 Years of the New York Convention - ICCA Conference, 2009, p. 411.

[7] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 1406; BLESSING, The Arbitration Agreement – Its Multifold Critical Aspects, *in:* BLESSING (ed.), The Arbitration Agreement - Its Multifold Aspects, ASA Special Series No. 8, 1994, p. 18; VOSER, Multi-party Disputes and Joinder of Third Parties, *in*: VAN DEN BERG (ed.), 50 Years of the New York Convention - ICCA Conference, 2009, p. 345; WAINCYMER, Procedure and Evidence in International Arbitration, 2012, p. 495. As put by HANOTIAU: "*One should not exaggerate the difficulties raised by resolving disputes pertaining to interdependent contracts. There are many multiparty, multicontract arbitrations. The problems they create are not always complex ones, and even if they are, more often than not an acceptable solution is found*." (HANOTIAU, Complex Arbitrations - Multiparty, Multicontract, Multi-issue and Class Actions, 2006, para. 225).

[8] See paras. 110 and 112 below.

arbitrate, the arbitral tribunal shall establish whether or not they have consented to the arbitration agreement.

20. Consent may also be inferred by application of contractual and corporate principles, such as agency, assignment, succession and estoppel. There are several grounds on which a party that did not formally conclude the agreement can be subjected to arbitration. To what extent these theories are based on consent is an issue to be analysed individually. The analysis of the role played by consent to bind non-signatories acquires special relevance when it comes to the group of companies doctrine. The group of companies doctrine was developed in international arbitration and will be scrutinized in this dissertation.

2. GROUP OF COMPANIES DOCTRINE

21. It is quite common that a particular company concludes an agreement, but during its performance, companies of the same group also end up being involved in its execution. This is especially true when it comes to multinational companies which globally operate through several subsidiaries established in different countries. Consequently, when the arbitration commences, the parties may dispute the jurisdiction of the arbitral tribunal over such companies that have participated in the contract's performance without formally concluding it. The case may simply involve a single agreement signed by two parties where a parent company or a subsidiary becomes clearly involved in the project. Or the circumstances may however be much more complex. For example, companies of the same group based in different countries concluding several independent agreements relating to a common project might have general terms and conditions providing for incompatible arbitration clauses. Altogether, these countless scenarios involving interconnected companies eventually gave rise to the group of companies doctrine.

22. The group of companies doctrine is a controversial basis for binding non-signatories to the arbitration agreement, which was developed specifically in the arbitration context.[9] According to this doctrine, an arbitration clause may bind companies of the same group of a contracting party based on the assumption that they form a unique economic reality.[10]

[9] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1445.
[10] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 2.43.

However, despite its elaborate name, as will be demonstrated, the group of companies does not rule out the consent requirement, but provides a special dimension to this issue.[11] Even at its outset in the Dow Chemical case the group of companies doctrine should be rather understood as an extra argument to reinforce the existence of consent and not as a legal basis to extend the effects of the arbitration clause to non-signatories that have not agreed to arbitration.[12] It is not the existence of a group of companies in and of itself that serves as basis for joining additional parties, but rather the fact that this was the intention of the parties.[13]

23. In fact, the consensual nature of the group of company doctrine calls into question the existence of the theory as an autonomous basis for the extension of the arbitration agreement to non-signatories.[14] A correct understanding of the group of companies and its consensual character doctrine plays a key role in the understanding of the limits of the subjective scope of the arbitration clause. For that reason, it is important to examine in-depth the controversial literature and case law that stimulates the discussion, not only from the perspective of Brazilian law, but also at an international level.

B. MULTI-CONTRACT ARBITRATION

24. Under multi-contract arbitration it shall be understood those arbitrations which arise out of two or more agreements. In fact, arbitration proceedings frequently involve more than one contract, as high-value projects are rarely based on a single agreement thoroughly covering the entire transaction details. In the best scenario, all agreements involved in the dispute will be clearly connected by the same dispute resolution mechanism. However, this is not always the case and the absence of a clear agreement between the parties often results in disputes concerning its objective scope. Such disputes may arise in form of objections to the jurisdiction of the arbitral tribunals or due to requests for consolidation.

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[11] HANOTIAU, Complex Arbitrations - Multiparty, Multicontract, Multi-issue and Class Actions, 2006, para. 76.
[12] BESSON, Piercing the Corporate Veil: Back on the Right Track, *in:* HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, p. 149.
[13] GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 500.
[14] DERAINS, Is there a group of companies?, *in*: HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, p. 131; YOUSSEF, Consent in Context: Fulfilling the Promise of International Arbitration, 2012, p. 121; STEINGRUBER, Consent in International Arbitration, 2012, para. 5.11.

25. Hence, where there is no express reference that the contracts are covered by the same arbitration clause, the jurisdiction of the arbitral tribunal over certain agreements or matters may be subject to objections. In either case, the parties' intent will be the decisive element in solving the dispute.

1. CONSENT IN MULTI-CONTRACT ARBITRATION

26. When an arbitration clause makes reference to other contracts or, conversely, the contracts refer to an arbitration clause, it is clear that those agreements may be jointly subject to arbitration in case of dispute. In this case, the reference to the arbitration agreement reflects the parties' consent. Nevertheless, where such reference does not exist, it may become unclear whether or the parties have intended to refer all agreements to a single arbitration.[15]

27. Given the fact that multi-contract arbitration may occur in several constellations, there is no general rule to solve the issue that would encompass all such possibilities. The extent of the scope of the arbitration agreement in a particular case will depend upon the interpretation of the will of the parties and vary in accordance with the nature of the dispute, the relationship between the parties and the wording of the arbitration clause.[16]

28. The analysis of consent as a fundamental element for determining the objective scope of the arbitration agreement is particularly interesting in multi-contract arbitration, as economic considerations play an important role in determining the extent of the arbitration clause, which puts the consensual character of arbitration to the test.

29. Hence, to assess the extent of the consent in multi-contract arbitration it is necessary to analyse common scenarios involving group of contracts where such contracts are somehow related to each other, despite any express agreement providing for a unique dispute resolution mechanism.

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[15] GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 519.
[16] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1371.

2. GROUP OF CONTRACTS DOCTRINE

30. Where the agreements do not share a common dispute resolution mechanism, but are in some way related, courts and arbitral tribunals have been willing to consider that the arbitration clause in one of the contracts can also cover disputes arising from related agreements.[17] According to Born, this is the commercially sensible result, which reflects the true intention of the reasonable parties.[18]

31. Contracts can be submitted to the same arbitration based on the assumption that such agreements constitute a group of contracts.19 According to the doctrine of group of contracts, the agreements shall not be considered as totally independent of one another when they have the same object or the same common goal. For this reason, they should be decided together, rather than having a dispute fragmented in several different proceedings.[20] Whether certain agreements can be considered as a group of contracts is a question that arbitral tribunals and courts must answer based on a detailed analysis of the facts of the dispute.[21]

32. When assessing whether several contracts may form a group for arbitrability purposes, there is no doubt that an important factor to be taken into account is the economic link between the contracts.[22] As a matter of fact, if there is no economic relation between them, there is little reason to consider that they should share a common arbitration agreement.[23] Nonetheless, if the conclusion of one agreement leads to the conclusion of interrelated agreements, it seems logical to start with the presumption that disputes arising out of them should be decided together.[24]

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[17] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1370.
[18] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1371.
[19] MEIER, Multi-party Arbitrations, *in*: ARROYO (ed.), Arbitration in Switzerland, The Practitioner's Guide, 2013, p. 1330, para. 22.
[20] YOUSSEF, Consent in Context: Fulfilling the Promise of International Arbitration, 2012, p. 134.
[21] HANOTIAU, Complex Arbitrations - Multiparty, Multicontract, Multi-issue and Class Actions, 2006, para. 351.
[22] GAGLIARDI, O avesso da forma: contribuição do direito material à disciplina dos *terceiros* na arbitragem (uma análise a partir de casos emblemáticos da jurisprudência brasileira, *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, pp. 223-224.
[23] MANTILLA-SERRANO, Multiple Parties and Multiple Contracts: Divergent or comparable issues?, *in*: HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, p. 19.
[24] HANOTIAU, Complex – Multicontract-Multiparty Arbitrations, 14 Arb. Int'l 369 (1998), p. 376.

33. However, it is questionable whether such economic links between the contracts can be considered either as the main characterizing element of a group of contracts or a decisive factor. For instance, where the agreements are economically related, but contain incompatible arbitration clauses, they shall then be decided in separate proceedings.[25]

34. A careful analysis of international and Brazilian case law reveals that arbitral tribunals and courts do not consider that the economic link between the contracts overrides the consensual nature of the arbitration agreement. Therefore, it is crucial that the parties must also have had consented to submit the dispute to arbitration.[26] Since arbitration is fundamentally based on consent and the powers of the arbitrators come from the will of the parties, the starting point to analyse matters in this context is, therefore, the parties' intention.[27]

35. In the following, the term group of contracts is used in its broadest sense and covers all contracts that are related in any particular way.

IV. JOINT ANALYSIS OF MULTI-PARTY AND MULTI-CONTRACT ARBITRATION ISSUES

36. A joint analysis of arbitrations with multiple parties and arbitrations involving multiple contracts is compatible not only because they often occur simultaneously whilst overlapping each other, but also because they relate to the same fundamental element: the parties' consent.[28] In fact, both multi-party and multi-contract arbitration issues call the

[25] GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 521.
[26] MANTILLA-SERRANO, Multiple Parties and Multiple Contracts: Divergent or comparable issues?, *in*: HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, p. 19.
[27] HANOTIAU, Complex Arbitrations - Multiparty, Multicontract, Multi-issue and Class Actions, 2006, para. 229.
[28] RAU, Arbitral Jurisdiction and the Dimensions of "Consent", Arb. Int'l, 2008(24), p. 226. According to the author, in multi-party and multi-contract arbitrations "*the tension between the two pillars of arbitration – autonomy and agreement, on one side, and final and efficient dispute resolution, on the other – becomes palpable*".

consent requirement into question.[29] In addition, multi-party and multi-contract arbitration raise similar procedural issues, such as joinder, intervention and consolidation.

A. SIMULTANEOUS OCCURRENCE

37. Multi-party arbitration can arise from disputes involving one or more contracts. In the latter case, multi-party and multi-contract arbitration will occur simultaneously.[30] In fact, multiple-party and multi-contract arbitration do not only constantly overlap each other, but there are cases in which multi-party and multi-contract issues are necessarily intertwined. This is the case, for instance, where multi-contract arbitration involves one contract that has been concluded with a party that has not concluded the other agreements.

38. Therefore, a joint analysis of the common fact patterns in multi-party and multi-contract arbitration contributes to a better assessment of both subjective and objective scope of the arbitration agreement.

39. Some contractual structures even presuppose the involvement of a third party and the conclusion of other agreements, *e.g.*, succession, assignment, guarantees and subrogation. Multi-arbitration and multi-contract are, therefore, tightly connected to each other. This does not mean, however, that the arbitrators do not need to differentiate these two scenarios to the extent possible when facing jurisdictional objections.

40. According to Hanotiau, in order to properly assess the jurisdiction of the arbitral tribunal, it is important to make a methodological distinction between multi-party and multi-contracts scenarios, which, unfortunately, is not often made.[31] There is a difference between a constellation in which (i) a single agreement has been negotiated and performed by

[29] GILBERT, Multi-Party and Multi-Contract Arbitration, *in:* Arbitration in England, with chapters on Scotland and Ireland, Lew et al. (eds.), 2013, para. 22-20.
[30] HANOTIAU, Complex Arbitrations, 2006, paras. 215ff.
[31] HANOTIAU, Multiple Parties and Multiple Contracts in International Arbitration, *in*: Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, 2009, para. 2.03; CATE, Multi-party and Multi-contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreement under U.S. Law, Am. Rev. Int'l Arb (2004), p. 133.

companies of the same group, and (ii) where the disputes arise from more than one agreement concluded by several parties.[32]

41. With regard to the first constellation, the main issue is the "extension" of the arbitration agreement to non-signatories of the same group. With regard to the second constellation, the main issue relates to the possibility of having disputes arising from these agreements decided in a single proceeding.[33] In the latter scenario, whether the parties are from the same group or not is irrelevant in principle.[34] However, in practice, the fact that the companies are from the same group may clarify the issues that arise from the existence of a group of contracts.[35]

B. CONSENT AS THE CORE OF GROUP OF COMPANIES AND GROUP OF CONTRACTS

42. Group of companies and group of contracts raise similar questions regarding jurisdiction, *i.e.* whether an arbitration clause can be extended to a contract or to a company regardless of their formal independence.[36] Accordingly, both doctrines are very similar in what relates to the role played by consent.[37] When these doctrines are reduced to their essence, it is possible to identify that both doctrines are based on consent. For this reason, to analyse the extent of consent in multi-party and multi-contract arbitration is therefore necessary to scrutinize both theories.

43. The group of companies doctrine concerns "who" has given consent to be bound by the arbitration clause, whereas the group of contracts concerns "what" matters or contracts the parties have consented to submit to arbitration.[38] It is in these scenarios involving multiple

[32] HANOTIAU, Multiple Parties and Multiple Contracts, *in*: Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, 2009, para. 2.03.
[33] HANOTIAU, Multiple Parties and Multiple Contracts, *in*: Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, 2009, para. 2.03.
[34] HANOTIAU, Multiple Parties and Multiple Contracts, *in*: Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, 2009, para. 2.03.
[35] HANOTIAU, Multiple Parties and Multiple Contracts, *in*: Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, 2009, para. 2.03.
[36] MELO, Extensão da Cláusula Compromissória e Grupos de Sociedades, 2013, p. 63.
[37] STEINGRUBER, Consent in International Arbitration, 2012, para. 9.67.
[38] MANTILLA-SERRANO, Multiple Parties and Multiple Contracts: Divergent or comparable issues?, *in*: HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, p. 14.

parties and multiple contracts that the parties' conduct as an expression of implied consent or a substitute for consent assumes a fundamental role.[39]

C. RAISING OF SIMILAR PROCEDURAL ISSUES

44. Aside from the fact that multi-party and multi-contract arbitration revolve around the existence of consent and the scope of the arbitration agreement, it is important to highlight that they also raise similar procedural issues.

45. Requests for joinder and intervention are mainly related to multi-party arbitration while requests for consolidation are related to multi-contract arbitration. However, there are circumstances in which multi-party and multi-contract procedural issues are completely intertwined. For instance, where a party requests the joinder of a non-signatory on the basis of a related agreement. The same applies to a request for consolidation where the parties to the arbitration agreement are, in principle, not the same. In such cases, it is difficult to draw a line separating what might be considered multi-party or a multi-contract matters.

46. Despite referring to joinder, intervention and consolidation as procedural mechanisms, it shall be stressed that they also eventually come down to the material analysis of the existence of consent.[40] Other procedural issues that are related both to multi-party and multi-contract arbitration are the difficulties in balancing the parties' interests when constituting the arbitral tribunal and jurisdictional objections.

[39] HANOTIAU, Complex Arbitrations, 2006, para. 75.
[40] See para. 359 above.

PART I: SUBSTANTIVE ISSUES

CHAPTER 1: ARBITRATION AGREEMENT IN MULTI-PARTY AND MULTI-CONTRACT CONTEXT

47. This first chapter deals with the basic elements and characteristics of the arbitration agreement upon which the proper assessment of its subjective and objective scope depends. It addresses the consensual nature of the arbitration, the interpretation and separability presumption of the arbitration agreement, the disassociation between consent and written form requirements, applicable law and the arbitrators' authority to decide on their own jurisdiction.

48. The analysis of the fundamentals of the arbitration agreement in light of multi-party and multi-contract arbitrations serves as the basis for the second and third chapters, which examine the assessment of consent in the main scenarios involving multiple parties and contracts.

I. CONSENSUAL NATURE OF ARBITRATION

49. Arbitration is essentially consensual.[41] Through arbitration, the parties agree to submit a future or existing dispute to an independent arbitrator or arbitral tribunal which shall render a final decision resolving the dispute. Arbitration is therefore an alternative dispute resolution to national courts. Parties cannot be forced to exclude state jurisdiction, but they may opt to submit themselves to arbitration of their own free will. Hence, arbitration is the jurisdiction chosen by the parties and such choice is expressed through an arbitration agreement.[42] Accordingly, the arbitration agreement is the cornerstone of the arbitration.

[41] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 95; REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 1.40.
[42] LEW/MISTELIS/KRÖLL, Comparative International Commercial Arbitration, 2003, para. 2.2.

II. MANIFESTATION OF CONSENT

50. As a general rule under Brazilian contract law, the manifestation of intent is not subject to form requirements.[43] This principle is set forth in Art. 107 of the Brazilian Civil Code, according to which the validity of the declaration of intent does not depend upon special form, except when required by law. As demonstrated below, Brazilian law requires the arbitration clause to be in writing, but does not set out further requirements as to how the parties' consent to the arbitration agreement shall de manifested. It is widely accepted in international arbitration that consent does not need to be express, *i.e.* it can be explicit or implicit.

51. Accordingly, it is not necessary that the parties sign the arbitration agreement or expressly declare that they accept it. Consent may also be inferred from the parties' conduct and even manifested by silence.[44] In addition, parties may also for example manifest their consent to the arbitration agreement by participating in the arbitration without objecting to the arbitral tribunal's jurisdiction.[45] The consent by conduct is of particular significance in the context of multi-party arbitration and is the cornerstone of the decisions "extending" the effects of

[43] RIZZARDO, Contratos, 11th ed., 2011, p. 40.

[44] The Brazilian Civil Code recognizes silence as a form of manifestation of intent. Pursuant to Art. 111, silence implies consent if the circumstances and common practice so indicate and no express manifestation of will is required. See SPACCAQUERCHE, A Homolgação das Sentenças Arbitrais Estrangeiras desde o Advento da Lei n° 9.307/96, *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, p. 166. See Final Award in ICC Case No. 9771, *in:* XXIX Y.B. Comm. Arb. 46 (2004), p. 51: "*In fact its continued involvement in the performance of the contract, in particular concerning the issues relating to the defects and the consequences thereof, constitutes a confirmation of shipping company A's position as a party to the contract. Thus, in the opinion of the sole arbitrator, both defendants are bound by the arbitration clause in the contract and may be claimed as parties to these proceedings by the claimant".*

[45] In 2005, the Superior Court of Justice held that the participation in the arbitration proceedings without any objection qualifies as consent. The Superior Court of Justice recognized an award ruling that despite the non-existence of an arbitration agreement, the party trying to set aside the award had actively participated in the arbitration without raising any objection (Superior Court of Justice, SEC No. 856-EX, Special Court, Min. Menezes 18.05.2005). According to MUNIZ and PRADO, this decision of the Superior Court of Justice refers for the first time to the possibility of tacit acceptance of the arbitration clause (MUNIZ/PRADO, *Agreement in writing* e requisitos formais da cláusula de arbitragem: nova realidade, velhos paradigmas, *in:* Revista de Arbitragem e Mediação, 2010(26), p. 69). Notably, in ICC Cases Nos. 7604 and 7610, the arbitral tribunal considered a non-signatory bound by the arbitration agreement as the party had relied on the arbitration clause to resist jurisdiction of a court in court proceedings. (Awards published in ARNALDEZ/DERAINS/HASCHER (eds.), *Collection of ICC Arbitral Awards 1996-2000*, 2003, pp. 510-516).

the arbitration agreements to parties that have not signed the contract containing the arbitration clause.[46]

52. Where there are more parties involved in the dispute than there are signatory parties, the question arises as to whether such non-signatories have consented to the arbitration agreement by their conduct, *e.g.*, by performing the underlying contract as if they were a true party to it.[47] As put by Park, implied consent focuses on the parties' true intention.[48] Nevertheless, it shall be highlighted that the involvement of a non-signatory in the negotiation, performance or termination of a contract does not necessary lead to the automatic extension of the arbitration agreement.[49]

III. INTERPRETATION OF THE ARBITRATION AGREEMENT AND ASSESSMENT OF CONSENT

53. The parties' intention is not simply an element of the contract, but also precondition for its validity.[50] However, the plain language of a contract does not always reflect the true intent

[46] See BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1427. ICC Case No. 9771, XXIX Y.B. Comm. Arb. 46 (2004); Final Award in ICC Case No. 6519, 2(2) ICC Ct. Bull. 34, 35 (1991); Partial Award in ICC Case No. 6000, 2(2) ICC Ct. Bull. 31, 34 (1991).

[47] According to BORN: "*Under most developed legal systems, an entity may become a party to a contract, including an arbitration agreement, impliedly – typically, either by conduct or non-explicit declarations, as well as by express agreement or formal execution of an agreement*." (BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1427). See ICC Award No. 5721, Clunet 1990, at 1019 *et seq*.; Final Award in Ad Hoc Arbitration, E. Holding *v* Z Ltd., Mr. G. and others, 24.08.2010, in: 29 ASA Bull. 4/2011, pp. 884–896: "*Therefore, taking into account the active and critical role of the Second Respondent both at the time of the negotiation and performance of the Cooperation Agreement, the Arbitral Tribunal concludes that such behaviour can be construed as expressing the Second Respondent's acceptance to be bound by the Cooperation Agreement including its arbitration clause*". See Swiss Federal Tribunal, 4P.126/2001, 18.12.2001, the Court relied *inter alia* on payments made by the non-signatory party.

[48] PARK, Non-signatories and International Arbitration: An Arbitrators' Dilemma, *in:* Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, 2009, para. 1.13.

[49] Final Award in Ad Hoc Arbitration, E. Holding *v* Z Ltd., Mr. G. and others, 24.08.2010, *in:* 29 ASA Bull. 4/2011, pp. 884-896; Final Award in ICC Case No. 6519, 2(2) ICC Ct. Bull. 34 (1991); *Award in ICC Case No. 4972*, in S. Jarvin, Y. Derains & J.-J. Arnaldez (eds.), *Collection of ICC Arbitral Awards 1986-1990* 380 (1994); *Interim Award in ICC Case No. 4504*, 113 J.D.I. (Clunet) 1118 (1986); Swiss Federal Tribunal, 4P.48/2005, 20.09.2005; Award in ICC Case No. 2138, in S. Jarvin & Y. Derains (eds.), Collection of ICC Arbitral Awards 1974-1985 242 (1990).

[50] VENOSA, Direito Civil – Teoria Geral das Obrigações e Teoria Geral dos Contratos, Vol. 2, 14th ed, 2014, p. 557.

of the parties.[51] Where this is the case, one has to interpret the parties' declaration of intent in order to determine its meaning and scope.[52]

54. In multi-party and multi-contract arbitration, the interpretation of the contract plays a fundamental role, since determining the scope of the arbitration agreement depends and comes down to the analysis of the real intent of the parties.[53] Therefore, general rules of interpretation and presumptions concerning the parties' intent may be decisive in determining the scope of the arbitration agreement.[54]

55. When arbitrators are confronted with questions related to interpretation, validity, and scope of the arbitration agreement, their first task is to establish the true intent of the parties.[55] They must assess the factual circumstances of the case to ascertain whether an arbitration agreement has been concluded, who has consented to it and to what extent. In other words, the intention of the parties shall be analysed in context.[56] Nevertheless, the arbitrators shall not only analyse the conduct of the parties only at the conclusion of the agreement, but also during its performance and termination.[57]

56. In fact, it is quite common that the parties include a standard clause of an arbitral institution in the agreements they enter into without giving much thought to the real scope of the arbitration agreement and its implications.[58] For example, there are instances where the

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[51] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1325: "*To a greater extent than many other contractual provisions, arbitration clauses are relatively standard and formulaic, but must inevitably deal with often unforeseen and widely varying circumstances and claims. As a consequence, contractual language will frequently not specifically resolve or address issues relating to the coverage of an arbitration clause. Indeed, the parties (and their legal advisers) will frequently not have consciously considered whether their arbitration agreement would apply to particular types of disputes or claims*".

[52] GONÇALVES, Direito Civil Brasileiro, Contratos e Atos Unilaterais, 7th ed., 2010, p. 61; NADER, Curso de Direito Civil – Contratos, Vol. 6, 3rd ed., 2008, p. 64.

[53] MEIER, Multi-party Arbitrations, *in*: ARROYO (ed.), Arbitration in Switzerland, The Practitioner's Guide, 2013, p. 1325, para. 5.

[54] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1326.

[55] BLESSING, Extension of the Arbitration Clause to Non-Signatories in The Arbitration Agreement - Its Multifold Aspects, ASA Special Series No. 8, Blessing (ed.) (1994), p. 160.

[56] GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 477.

[57] GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 477; Ad Hoc Arbitration, E. Holding *v* Z Ltd., Mr. G. and others, 24.08.2010, *in:* 29 ASA Bull. 4/2011, pp. 884-896.

[58] Model clauses provided by arbitral institutions aim at being wide enough to cover all possible disputes that may arise from the underlying contract (GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 513.

parties enter into several contracts related to a project without including an arbitration clause for each agreement. Consequently, when a dispute arises, one of the parties may object to the jurisdiction of the arbitral tribunal alleging that not all agreements are bound by the arbitration clause.

57. Where the wording of an arbitration clause does not suffice to prove the existence of consent to the other connected agreements, arbitrators have to look at factual elements to establish the real intent of the parties. Such elements may include an exchange of emails, previous draft agreements or common practices in the field. This assessment of the true intention of the parties is also referred to as the *subjective method of interpretation*.[59] By assessing the factual circumstances of the case, if the arbitrators reach the conclusion that the parties have intended to enter into an arbitration agreement whose scope is clear, then no further interpretation is necessary.[60]

58. However, in contrast to the subjective method of interpretation, if the circumstances of the case are not sufficient to prove the parties' consent, then the arbitrators have to assess the intention of the parties at the time of the conclusion of the agreement. The arbitrators have then to consider the parties' intention from an objective point of view to determine the putative intention of the parties, presuming that it would be exorbitant if the parties intended to agree on an unreasonable solution.[61]

59. The interpretation of the arbitration agreement shall be in accordance with the law governing the arbitration agreement[62] and has its starting point in applicable general principles of contract law.[63]

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[59] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland. 3rd ed., 2015, para. 481.
[60] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., 2015, para. 480.
[61] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., 2015, para. 481. WAINCYMER, Procedure and Evidence in International Arbitration, 2012, p. 500. As once put by the U.S. Court of Appeal for the Seventh Circuit when assessing consolidation: "*We cannot say that these textual inferences are conclusive in favor of consolidation, but they support it, as do practical considerations, which are relevant to disambiguating a contract, because parties to a contract generally aim at obtaining results in a sensible way."* See para. 30 above.
[62] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland. 3rd ed., 2015, para. 477; POUDRET/BESSON, Comparative Law of International Arbitration. 2nd ed., 2007, para. 304.
[63] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1323.

IV. INTERPRETATION RULES UNDER BRAZILIAN LAW

60. The Brazilian Civil Code contains general provisions concerning the interpretation of contracts. According to Art. 112 of the Brazilian Civil Code, contracts are to be interpreted by taking into account the true intention of the parties rather than the literal meaning of its wording.[64] Hence, the true intention of the parties shall prevail even if wrongly manifested.[65] This general rule is also applicable to arbitration agreements and plays a fundamental role particularly in relation to disputes involving multiple contracts as already held by the Brazilian Superior Court of Justice.[66]

61. In addition, Art. 113 sets forth that legal transactions shall be interpreted in accordance with the principle of good faith and the customs of the place in which it has been concluded. The principle of good faith is the leading principle under Brazilian law to be taken into account during the assessment of the parties' consent. The Brazilian Civil Code entered into force in 2002 and was inspired by the German Civil Code (BGB), including the principle of good faith. Following §242 of the BGB, the Brazilian Code provides fundamentally for the principle of good faith not only in Art. 113, but also in Art. 422.[67]

62. According to Art. 422, the contracting parties have the duty to act in accordance with the principle of good faith at the time of the conclusion of the contract as well as during its performance. This article applies to all types of contracts concluded under Brazilian law, including the arbitration agreement. In fact, with the entry in force of the Brazilian Civil Code in 2002, the principle of good faith acquired the role of a general clause applicable to all contracts.[68]

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[64] In specific cases, the Brazilian Civil Code sets out that the agreement shall be interpreted restrictively, *e.g.,* surety (Art. 819), settlement (Art. 843), donation and waiver of rights in general (Art. 114), but this does not apply to arbitration agreements. See Court of Appeal of Parana, Ap. 0629355-4, 12th Civil Chamber, 02.12.2009.

[65] CAMARGO, Transações entre Partes Relacionadas – Um Desafio Regulatório Complexo e Multidisciplinar, 2nd ed., 2014, p. 114.

[66] Superior Court of Justice, SEC 1 - KR (2007/0156979-5), Min. Rel. Maria Thereza de Assis Moura, 19.10.2011.

[67] NUNES PINTO, A Cláusula Compromissória à Luz do Código Civil, *in:* Revista de Arbitragem e Mediação, 2005 (34), p. 35.

[68] WALD, A Arbitragem, os Grupos Societários e os Conjuntos de Contratos Conexos, *in:* Revista de Arbitragem e Mediação, 2004(2), p. 59.

63. One of the most important purposes of the principle of good faith is to prevent parties from acting contrary to their previous position.[69] The prohibition of *venire contra factum proprium* (no one can set himself in contradiction to his own previous conduct) is well recognized in Brazilian literature and jurisprudence. The prohibition of *venire contra factum proprium* derives not only from Art. 422, but also from Art. 187 of the Brazilian Civil Code, which prohibits the abuse of rights.[70] In multi-party arbitration, the prohibition of *venire contra factum proprium* finds application especially where a party tries to enforce rights under a contract containing an arbitration clause but refuses to arbitrate.

64. With regard to comparative law, Brazilian Civil Code follows the same structure of the Swiss and German civil codes. In Switzerland, Art. 18 of the Code of Obligations establishes that when assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used, either in error or by disguising the true nature of the agreement. Hence, in Switzerland parties are first entitled to submit evidence of their intention at the conclusion of the arbitration agreement to prove whether they have consented to submit eventual disputes to arbitration or not.[71] Where the arbitrators are unable to establish the factual intention of the parties, they have to proceed by determining the putative intention of the parties in accordance with Art. 2 of the Swiss Civil Code.[72] This article provides that every person must act in good faith in the exercise of his or her rights and in performance of his or her obligations. Therefore, as with Brazilian law, the principle of good faith plays a fundamental role under Swiss law to establish the parties' presumed intent.[73]

65. With regard to German law, Art. 133 of the German Civil Code provides that where a declaration of intent is interpreted, it is necessary to ascertain the parties' true intention rather than adhering to the literal meaning of the declaration. In addition, Art. 157 of the

[69] GONÇALVES, Direito Civil Brasileiro, Contratos e Atos Unilaterais, 7th ed, 2010, p. 60; BORDA/TAJRA, Breves considerações sobre a proibição do comportamento contraditório no âmbito do procedimento arbitral, *in:* Revista Brasileira de Arbitragem, 2016(52), p. 15.
[70] GONÇALVES, Direito Civil Brasileiro, Contratos e Atos Unilaterais, 7ed, 2010, p. 60.
[71] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., 2015, para. 480.
[72] VOSER, The Swiss Perspective on Parties in Arbitration: Traditional Approach with a Twist regarding Abuse of Rights" or "Consent Theory Plus", *in:* BREKOULAKIS et al. (eds.), The Evolution and Future of International Arbitration, 2016(37), paras. 9.17-9.18.
[73] KAUFMANN-KOHLER/RIGOZZI, Law and Practice in Switzerland, 2015, para. 3.121.

German Civil Code explicitly sets out that contracts are to be interpreted in good faith, taking customary practice into consideration.

V. FORMAL VALIDITY OF THE ARBITRATION AGREEMENT

66. There are two forms of arbitration agreement: *arbitration clause* (*cláusula compromissória*) and *submission agreement*. (*compromisso arbitral*).[74] When negotiating an agreement, parties may agree to include an arbitration clause providing that all future disputes shall be resolved by arbitration.[75] Alternatively, despite the inexistence of a prior arbitration clause, the parties may agree to submit an existing dispute to arbitration. In this case, the parties will conclude a submission agreement.[76] Submission agreements tend to be more detailed than arbitration clauses, as the dispute will have already arisen and the parties will be able to agree on how they want to proceed in detail.[77] Multi-party and multi-contract issues are usually related to arbitration clauses rather than submission agreements, as the parties that do not want to arbitrate will not enter into a submission agreement when the dispute already exists.

67. The formal validity of the arbitration agreement is often in dispute between the parties at the beginning of the arbitration since the jurisdiction of the arbitral tribunal and the conduct of the arbitration depend thereon. The formal requirement is closely related to the existence of parties' consent, as it is intended to ensure that the parties have indeed agreed to enter into the arbitration agreement.[78] The main function of these formal requisites is to prove consent between the parties as well as the terms of the agreement.[79]

68. Therefore, when the form requirement has been fulfilled, there is a strong presumption that consent has been reached.[80] However, even though form requirement and consent are strongly connected, it is important to distinguish one from the other. They cannot be understood as being a unique prerequisite and both of them have to be fulfilled for the

[74] Brazilian Arbitration Act. Art. 3.
[75] Brazilian Arbitration Act. Art. 3.
[76] Brazilian Arbitration Act. Art. 9.
[77] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 1.42.
[78] LEW/MISTELIS/KRÖLL, Comparative International Commercial Arbitration, 2003, para. 7-5.
[79] STEINGRUBER, Consent in International Arbitration, 2012, paras. 6.02 and 6.24.
[80] STEINGRUBER, Consent in International Arbitration, 2012, paras. 6.02 and 6.33.

arbitration agreement to be valid.[81] It is necessary to differentiate between writing form, signature, and consent to properly deal with issues involving non-signatories in arbitration.

A. WRITTEN FORM REQUIREMENT

69. The Brazilian law sets forth different form requirements for the arbitration clause and the submission agreement. Pursuant to Art. 4 of the Brazilian Arbitration Act, the arbitration clause shall be in writing and can be inserted into the contract itself or in a separate document. Brazilian law does not require the arbitration clause or the underlying agreement to be signed. Nevertheless, where the parties enter into an arbitration agreement after the dispute has arisen, the Brazilian Arbitration Act provides it shall be in written form and signed by two witnesses or notarized by a public notary.[82] It is important to highlight the distinction between the written form requirement of the arbitration clause between the initial contracting parties and the validity of the so-called "extension" of the arbitration clause to non-signatories.[83]

70. It has been long established that the written form requirement only applies to the arbitration clause concluded by the initial parties to the underlying contract in which it is included.[84] Hence, from the moment there is an arbitration clause in writing, it can be transferred to third parties without the need for entering into a new written arbitration agreement.[85]

71. The writing form requirement has lost much of its importance due to complex arbitrations and the evolution of means of communication.[86] As Youssef precisely points out, the writing requirement is "nearly dead*"* in complex arbitrations.[87] Nowadays, it is evident that there is a triumph of substance over form.[88] There is a tendency to interpret the arbitration

[81] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 740.
[82] Brazilian Arbitration Act. Art. 9.
[83] STEINGRUBER, Consent in International Arbitration, 2012, para. 6.52. As put by STEIN, the writing form serves the purpose of proving the existence of the arbitration agreement. It is not a requirement for the validity of the manifestation of intent (STEIN, Arbitralidade no Direito Societário, 2014, p. 90).
[84] Decision of the Swiss Federal Tribunal in this regard: DFT 129 III 727 of 16.10.2003 *in:* 22 ASA Bulletin 2/2004, pp. 364-389.
[85] HANOTIAU, Multiple Parties and Multiple Contracts, *in:* Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, para. 2.18; X. S.A.L., Y. S.A.L. et A. *v* Z. Sàrl, Tribunal federal, Ire Cour Civile, 4P.115/2003, 16.10.03, *in:* 22 ASA Bulletin, 2/2004, pp. 364-389.
[86] STEINGRUBER, Consent in International Arbitration, 2012, para. 6.34.
[87] YOUSSEF, Consent in Context: Fulfilling the Promise of International Arbitration, 2012, p. 298.
[88] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 2.21.

agreement in an increasingly flexible way.[89] Insofar as there is some written evidence of an arbitration agreement, the writing form requirement is considered fulfilled.[90] This understanding is in accordance with the needs of international arbitration as an efficient means of dispute resolution and reinforces the principle that the real intention of the parties shall prevail over unnecessary formalities.[91]

72. In addition, it is not necessary that all agreements contain an individual arbitration clause. It suffices that one arbitration agreement is inserted in just one contract since, in such a case, the writing form requirement has been fulfilled and, due to the separability presumption, an arbitration agreement can cover disputes arising from other contracts than the contract itself in which it has been included.

B. SIGNATURE

73. Whereas several national laws require the arbitration agreement to be in writing, the same requirement does not apply to the signature. Notwithstanding the fact that the lack of signature has already raised some issues in some jurisdictions in the past, it is nowadays well accepted in international arbitration that an arbitration agreement may be valid without having been signed.[92] This understanding is in accordance with the New York Convention, which does not require the signature for an arbitration agreement to be valid.[93] As shown below, although Brazilian law does not set forth signature requirements, Brazilian courts

[89] WALD, A Arbitragem, os Grupos Societários e os Conjuntos de Contratos Conexos, *in:* Revista de Arbitragem e Mediação, 2004(2), p. 58.
[90] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 2.21. The Superior Court of Justice held that the underlying agreement may be concluded orally, but it is necessary that the arbitration agreement fulfils the writing form requirement (Sentença Estrangeira Contestada, 866, 17.05.2006; Court of Appeal of Rio de Janeiro, Ap. 0154701-57.2013.8.19.0001, 19th Civil Chamber, 09.12.2014. The decision of the Court of Rio de Janeiro shall be viewed with criticism. The dispute arose out of an oral amendment to a written contract for the construction of a electrical power transmission line. However, the Court found that the amendment was in fact another agreement in which no arbitration clause had been included. The Court stated that the arbitration agreement should be express and disregarded the fact that an arbitration clause can be extended to another contract based on implied consent.
[91] MUNIZ/PRADO, *Agreement in writing* e requisitos formais da cláusula de arbitragem: nova realidade, velhos paradigmas, *in:* Revista de Arbitragem e Mediação, 2010(26), p. 75.
[92] BORN, International Arbitration - Cases and Materials 2015, p. 574; REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 2.15.
[93] The New York Convention does not require signature for an arbitration agreement to be valid. *See* PARK, Arbitration of International Business Disputes, 2004, p. 303; WEILLER, Transmission et extension de la clause compromissoire en droit français de l'arbitrage International: Etat des lieux, *in:* Revista de Arbitragem e Mediação, 2009(20), p. 208.

have previously also adopted a restrictive approach. However, recent decisions clearly demonstrate that the position of Brazilian courts has changed and it is now in line with the case law of the leading arbitral jurisdictions.

74. There is no doubt that signing the arbitration agreement or the contract in which it is included is the most common and safe means to express consent. Where the parties sign an agreement containing an arbitration clause, their intention to submit future disputes to arbitration is clear, as the parties' consent is explicit. Consequently, even though the signature is not a mandatory requisite for a party to be bound by the arbitration agreement, it is highly recommended that the document containing the arbitration clause should be signed by as many parties to a future dispute as possible.

75. Nevertheless, it is important to dissociate signature from writing form, since the latter does not depend on the former.[94] Today it is commonplace in international arbitration that signature is not the only means of expressing consent.[95] This understanding has already been confirmed by the Superior Court of Justice.[96] In 2016, the Court rejected the allegation that an arbitration agreement would be invalid because it had not been signed. The Superior Court of Justice made clear that Brazilian law does not require an arbitration agreement to be signed and in that case the consent to the arbitration could be ascertained from the negotiations. The decision of the Superior Court of Justice confirms the flexible approach towards formal requirements adopted by Brazilian courts in the last years.[97]

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[94] POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed., 2007, para. 250.

[95] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 796; DERAINS, Is there a group of companies?, *in*: HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, p. 138.

[96] Superior Court of Justice, REsp. 1.569.422/RJ, 3rd Section, Min. Marco Aurélio Bellizze, 26.04.2016. See TORRE/CURY, Antonio Alberto Rondina. Validade da cláusula sobre arbitragem, veiculada em documento apartado do instrumento contratual subjacente. 3ª Turma do STJ, REsp. 1.569.422/RJ (Jurisprudência comentada), *in:* Revista de Arbitragem e Mediação, 2016(50), pp. 666-668.

[97] Nowadays, Brazil is an arbitration friendly jurisdiction. However, arbitration took time to develop in Brazil. In the early 2000s Brazilian superior courts rendered decisions requiring express consent for an arbitration agreement to be valid. See Supreme Federal Court, SEC 6.753-7, Min. Maurício Corrêa, 13.06.2002 and Superior Court of Justice, No. 967, Min. José Delgado, 15.02.2006. Case *Plexus Cotton Limited v Santana Têxtil S/A* in which the parties concluded agreements for the sale of cotton row. The agreements provided for arbitration before the Liverpool Cotton Association. The English company Plexus tried without success to recognize twice the enforcement of the arbitral award in Brazil. The Brazilian Courts held that the award could not be enforced because the agreements had not been signed and for this reason there was no express manifestation of intent. This approach has been followed by other decisions of the Brazilian Superior Court: Superior Court of Justice, No. 978, Min. Hamilton Carvalhido, 17.12.2008 and Superior Court of Justice SEC 885, Min. Francisco Falcão, 18.04.2012.

76. In a case arising out of a franchising agreement, the Court of Appeal of Sao Paulo ruled in 2015 that the arbitration agreement contained in an unsigned agreement was valid.[98] The Court highlighted that both parties recognized the existence of the underlying agreement and the arbitration clause should not be void merely due to the lack of signature.[99]

77. One could argue that signature could be indispensable given the fact that by concluding an arbitration agreement the parties are waiving their right of access to justice and for this reason consent should be explicit. Nevertheless, it is important to consider that arbitration has several advantages over litigation and arbitration is the general rule when it comes to complex agreements, especially when concluded internationally. Accordingly, to require the signature for the validity of the arbitration agreement may be considered as an unnecessary excess of formalism. In addition, contracts are often concluded and performed without parties' signature. This is a common scenario with regard to purchase agreements, where the seller sends an invoice and the buyer makes the payment in absence of a formal agreement signed by both parties.

78. In principle, there are no compelling reasons that justify the imposition of stricter requirements to the conclusion of arbitration agreements in comparison to other contracts, especially when analysing the current status of the Brazilian judiciary structure, as court proceedings in Brazil are likely to drag on for years or decades in very complex cases.

79. In fact, when it comes to international agreements, it is more likely that the parties have agreed to arbitrate than not, especially when agreements involve high financial stakes. Nonetheless, despite all the advantages of arbitration one cannot force the parties to arbitrate in the absence of elements that indicate the existence of an arbitration agreement. Notably, what is dispensable is the signature, not the consent.

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[98] Court of Appeal of Sao Paulo, Ap. 4022778-88.2013.8.26.0405, Chamber for Commercial Law, 20.05.2015.

[99] The Court of Appeal of Sao Paulo also decided that it would not be logical to recognize the existence of the underlying agreement, but not of the arbitration clause. Especially because the only argument against the arbitration agreement was the lack of signature. The Court highlighted that the contract should be considered in its entirety or not at all, *i.e.*, the franchisor could not split the contract selecting the clauses it wishes to rely on and let aside the others.

C. FORMAL REQUIREMENTS FOR ADHESION CONTRACTS AND CONSUMER LAW

80. The Brazilian Arbitration Act contains special rules as to formal requirements for standard form agreements, the so-called *adhesion contracts* under Brazilian law and literature. Pursuant to Art. 4, §2, arbitration clauses contained in adhesion contracts will be valid only where the adhering party (i) takes the initiative of commencing the arbitration or (ii) expressly agrees with the arbitration clause, contained in a separate document attached or written in bold, and there is a signature specifically for the arbitration agreement.

81. Adhesion contracts can be understood as those that are concluded with the acceptance of one the parties to the standard clauses pre-formulated by the other party. In adhesion contracts, the offeree has limited power or no power at all to negotiate or to modify the terms of the contract but to adhere to the contract as drafted by the offeror. Therefore, contracts are considered as adhesion contracts not particularly due to their content, but because of the form of their conclusion. The rationale behind imposing stricter conditions for the validity of the arbitration clause in adhesion contracts lies in the fact that in such agreements the arbitration agreement is imposed by the offeror, conflicting, therefore, with the consensual nature of arbitration.

82. Adhesion contracts are predominantly concluded between consumers and suppliers, whose relationship is usually characterized by the imbalance of forces between the parties. In this regard, it is pertinent to note that Brazil has a very strong consumer protection law and all consumer contracts are subject to the Brazilian Consumer Protection Code, which came into force in 1990 (Law No. 8.078/1990).

83. According to Art. 51, VII, of the Brazilian Consumer Protection Code, every clause providing for compulsory arbitration shall be considered null and void. When the Brazilian Arbitration Act entered into force, a discussion took place as to whether such provision had been revoked by Art. 4, §2, of the Brazilian Arbitration Act, since Art. 4, §2, foresees the possibility of arbitration clauses in adhesion contracts. The debate divided the literature, but now has been settled by the Brazilian Superior Court of Justice.[100] The Brazilian Superior

[100] Respected commentators hold the view that Art. 51, VII, of the Brazilian Consumer Protection Code was indeed revoked, *e.g.*, LEMES, Arbitragem e Seguro, *in*: Revista de Arbitragem e Med o, 2010 (27), p. 61. Other commentators take the view that both are compatible and still in force: RODOVALHO, Cláusula Arbitral

Court of Justice decided that there was neither an express revocation, nor a conflict between both provisions.[101] Brazilian Superior Court of Justice ruled that the norm of Brazilian Consumer Protection Code was more specific than the rule contained in Brazilian Arbitration Act. According to the Court, Art. 4, §2, of the Brazilian Arbitration Act applies to adhesion contracts in general while the applicability of Art. 51, VII, of the Brazilian Consumer Protection Code is limited to agreements concluded between consumers and suppliers. Notably, the Brazilian Superior Court clarified that Art. 51, VII, aims to avoid abuse of suppliers in forcing consumers to arbitrate. Hence, an arbitration clause does not bind the consumer, but in the case that the dispute has already arisen, the arbitration agreement binds the supplier where the consumer initiates the arbitration.[102] In other words, Art. 51, VII, of the Brazilian Consumer Protection Code does not rule out completely consumer disputes from arbitration, since they are arbitrable if the consumer takes the initiative of commencing the arbitration or expressly agrees with its initiation by the supplier.

84. That said, it is important to analyse where adhesion contracts may become most problematic, *i.e.* where the dispute relates to an adhesion contract that does not qualify as a proper consumer agreement. Even though consumer contracts are predominantly adhesion contracts, not all standard contracts fall within the concept of consumer contracts or involve a weaker party.[103] Art. 4, §2, of the Brazilian Arbitration Act faces criticism since it does not differentiate between the standard form contracts in which one party is vulnerable and between those in which they are equal.[104] Therefore, its direct application without careful consideration may lead to an undesirable result.

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nos Contratos de Adesão, 2016, pp. 64-65; SCALETSCKY, Arbitragem e "Parte Fraca": a Qu das Relações de Consumo, *in:* Revista Brasileira de Arbitragem, 2014(41), p. 98.

[101] Brazilian Superior Court of Justice, REsp. 1.169.841/RJ, 3rd Section, Rel: Min. Andrighi, 14.11.2012.

[102] HENRICI/DE ARAUJO, Relações de Consumo, Contratos de Adesão e Arbitragem, *in:* CAMPOS MELO/BENEDUZI (eds.), A Reforma da Lei de Arbitragem, 2016, p. 19; LEVY, Arbitragem em disputas consumeristas no Brasil: breve ensaio sobre a legislação projetada, *in:* CAHALI/RODOVALHO/FREIRE (ed.), Arbitragem – Estudos sobre a Lei No. 13.129, de 26.05.2015, p. 226.

[103] NORONHA, Contratos de Consumo Padronizados e de Adesão, *in:* Revista do Direito do Consumidor, republished in Direito do Consumidor, MARQUES/MIRAGEM (eds.), Coleção Doutrinas Essenciais, vol. 4, 2011, p. 156; RODOVALHO, Cláusula Arbitral nos Contratos de Adesão, 2016, pp. 64-65. See Court of Appeal of Minas Gerais, EI 1.0672.08.315132-0/005, 4th Civil Chamber, 31.01.2013, where the Court decided that the contract entered into by a large size company and a bank should not be considered as an adhesion contract.

[104] RODOVALHO, Cláusula Arbitral nos Contratos de Adesão, 2016, p. 122.

85. For instance, in a high value sales contract that incorporates the standard general terms and conditions set by the seller in a separate document, it would be a simplistic approach to argue that the arbitration clause contained therein is invalid by the simple fact that it does not comply with the preconditions required by Art. 4, §2, of the Brazilian Arbitration Act. If there is no relationship of vulnerability between the parties and the arbitration clause does not contain abusive elements, the imposition of stricter form requirements is in principle not justified. This is especially true with regards to international contracts in which the arbitration clause is the general rule rather than the exception.

86. The better view is that Art. 4, §2, of the Brazilian Arbitration Act should only apply in case of standard form agreements that do not qualify as consumer contracts. In such event, one of the parties could still be considered vulnerable, thus generating the need for extra form requirements in order to ensure the existence of its consent.[105] Notably, there is no reason to apply a protective norm to a case where none of the parties is in a weaker position than another. An example of a negative precedent relating to this matter is the so-called *Jirau case* in which the Court of Appeal of Sao Paulo considered that an arbitration clause contained in policies of insurance regarding the construction of a hydroelectric generating plant in Brazil should not be considered valid as they were adhesion contracts lacking an express consent to the arbitration clause in the terms of Art. 4, §2, of the Brazilian Arbitration Act.[106]

[105] RODOVALHO, Cláusula Arbitral nos Contratos de Adesão, 2016, p. 136; MUNIZ/PRADO, *Agreement in writing* e requisitos formais da cláusula de arbitragem: nova realidade, velhos paradigmas, *in:* Revista de Arbitragem e Mediação, 2010(26), pp. 74-75.

[106] Court of Appeal of Sao Paulo. AI 0304979-49.2011.8.26.0000, 6th Chamber of Private Law, 16.04.2012). The Court has also relied on Art. 44 of the Circular of the 256/2004 of the Brazilian Superintendence of Private Insurance (SUSEP), which contains a similar provision as to writing form requirements for insurance agreements. However, this case concerned a dispute related to two insurance policies contracted by three Brazilian companies with six insurance companies involving the construction of one of the largest hydroelectric power stations. Therefore, it is inconceivable that sophisticated companies and insurers would enter into an agreement without prior discussion of its terms. The decision dealt with an important issue using a simplistic approach. To read more about this decision, see COSTA, A Vontade e a Forma: A Percepção da Arbitragem no Caso de Contrato de Seguro do Projeto Jirau, *in:* Revista de Arbitragem e Mediação, 2013(38), pp. 35-60; PERETTI, Caso Jirau: Decisões na Inglaterra e no Brasil Ressaltam Métodos e Reações Distintas na Determinação da Lei Aplicável à Convenção de Arbitragem, *in:* Revista Brasileira de Arbitragem, 2013(37), pp. 29-49.

VI. SEPARABILITY PRESUMPTION

87. Before analysing current fact patterns in the context of multi-party and multi-contract arbitration, it is important to highlight one of its fundamental principles: the presumption that the agreement to arbitrate is separable from the rest of the contract.[107] It is well established in international arbitration that the arbitration agreement is considered to be separate and independent from the underlying contract in which it is included.[108] Under Brazilian law, this principle is set forth in Art. 8 of the Brazilian Arbitration Act. The principle of separability should be understood more as a legal fiction than an inflexible construct.[109] Even if considered that the arbitration clause is separable from the main agreement, it does not mean that both agreements are not related.[110]

88. The essence of this separability presumption is that the validity of the arbitration agreement is independent from the validity of the main contract.[111] Therefore, an arbitration agreement may be valid despite the invalidity of the contract in which it is inserted, and vice-versa.[112]

89. In addition, as the arbitration agreement and the underlying contract are considered separate agreements, it is also possible that the parties to both contracts are not the same, *e.g.*, one party can consent to the arbitration agreement without becoming a party to the underlying contract. The opposite is also true: a party may consent and become a party to the underlying agreement without consenting to the arbitration clause contained therein. Nevertheless, it is recommended in practice that the party which intends to participate in the performance of the principal contract shall clearly state from the beginning that it is not consenting to the arbitration clause. If the party fails to indicate its reservation and continues to involve itself in the performance of the agreement, it is likely the arbitrators will consider the party's implicit consent to the arbitration agreement.

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[107] CRAIG/PARK/PAULSSON, International of Chamber of Commerce Arbitration, 2000, para. 5.04; BORN, International Commercial Arbitration, 2nd ed., 2014, p. 350.
[108] CRAIG/PARK/PAULSSON, International of Chamber of Commerce Arbitration, 2000, para. 5.04; REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 2.111.
[109] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 2.19.
[110] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1469.
[111] LEW/MISTELIS/KRÖLL, Comparative International Commercial Arbitration, 2003, para. 6.9.
[112] BORN, International Commercial Arbitration, 2nd ed., 2014, pp. 466f.

90. With regard to multi-contract arbitration, the doctrine of separability presumption enables an arbitration clause contained in a certain agreement to cover disputes of other agreements. This may also happen even though no specific reference has been made. Another important consequence of the separability doctrine is the possibility to apply different laws to the arbitration clause and to the underlying agreement. Since the arbitration clause is a separate agreement from the underlying contract, a separate conflict of laws analysis shall take place.[113]

91. Some commentators take the view that the fact that an arbitration clause is independent from the rest of the contract constitutes a basis for the arbitrators to decide on its own competence.[114] However, it is also argued that the separability presumption and the principle of competence-competence does not have a correlation, as both concepts can still exist in the absence of the other.[115] Despite this rhetorical discussion, it is important to note that from a practical standpoint, the separability presumption enables the arbitrators to assess jurisdictional objections focusing specifically on the arbitration agreement, rather than on the underlying agreement.[116]

VII. APPLICABLE LAW TO THE ARBITRATION AGREEMENT

92. The applicable law to the arbitration agreement may become an issue in multi-party and multi-contract arbitration where a party raises an objection arguing that the arbitration clause does not meet the formal or substantive requirements for its validity.

93. The analysis of the governing law to the arbitration agreement has its starting point in the separability presumption.[117] As stated above, the law governing the merits of the arbitration is not necessarily the same law governing the arbitration clause.[118] Furthermore, it is also possible that different laws govern different matters related to the arbitration agreement.[119]

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[113] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 464.
[114] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 2.110.
[115] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 470.
[116] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 471.
[117] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 473.
[118] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 3.10; TRITTMANN/HANEFELD, 10th Book of the German Code of Civil Procedure, *in*: BÖCKSTIEGEL/KRÖLL/NACIMIENTO (eds.), Arbitration in Germany - The Model Law in Practice, 2015, p. 83.
[119] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 473.

The law (or laws) governing the arbitration agreement addresses a variety of matters such as the formal and substantive validity of the arbitration agreement, capacity of the parties to enter into an arbitration agreement, non-arbitrability, interpretation, and assignment of the arbitration agreement.[120] Therefore, the capacity of the parties to enter into the arbitration agreement may for instance be governed by the law of the parties' domicile or place of incorporation, whereas the substantive validity of the arbitration agreement may be governed by the law of the place of arbitration.

94. The possibility of applying different laws to the arbitration agreement is clear from the wording of Art. V(1)(a) of the New York Convention. According to Art. V(1)(a), the recognition and enforcement of an arbitral award may be refused if the parties to the arbitration agreement are under some incapacity in accordance with the law applicable to them or the arbitration agreement is not valid under the law to which the parties have subjected it.[121]

95. Even though it is widely accepted in international arbitration that parties are free to select the law governing the arbitration agreement, in practice, however, they rarely do so.[122] The contracting parties frequently limit themselves to choosing the applicable law to the underlying agreement, without referring specifically to the arbitration clause. When this is the case, arbitrators must decide which law shall govern the arbitration agreement. In this regard, arbitrators will usually choose the law of the seat of the arbitration or the same law selected by the parties to govern the underlying agreement.[123]

96. The question of which law shall govern the arbitration agreement may be more difficult in the context of non-signatories, *i.e.* which law shall govern whether a non-signatory may be bound by an arbitration agreement which it has not formally concluded. Some arbitrators have relied on the application of international principles, as in the case of piercing the

[120] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 489.
[121] NYC. Art. V(1)(a): "The parties to the agreement referred to in Art. II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".
[122] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 3.10; TRITTMANN/HANEFELD, 10th Book of the German Code of Civil Procedure, *in:* BÖCKSTIEGEL/KRÖLL/NACIMIENTO (eds.), Arbitration in Germany - The Model Law in Practice, 2015, p. 83.
[123] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 3.11.

corporate veil, or national laws, as in relation to agency, assignment or succession.[124] Therefore, where the parties have not agreed on the application of a specific national law in advance, the law to be chosen by the arbitrators to decide the issue will depend on the theory invoked. If either the law governing the arbitration agreement or the law governing the underlying agreement may be applicable, the better view is that the arbitrators should apply a validation principle and decide in accordance with either law that gives effect to the arbitration agreement in relation to the third party.[125]

VIII. ARBITRATORS' AUTHORITY TO DECIDE ON THEIR OWN JURISDICTION

97. Arbitrators have authority to decide on their own jurisdiction, including matters concerning the existence and validity of the arbitration agreement.[126] Such principle is also known as *competence-competence* and is considered one of the pillars of arbitration.[127] Brazilian Arbitration Act expressly provides for the principle of competence-competence in Art. 8, sole paragraph, which states that arbitrators have jurisdiction to decide *ex officio* or upon parties' request on the existence and validity of the arbitration agreement and the contract in which it is included.

98. The arbitrators' authority to decide issues as to its own competence plays an important role in multi-contract and multi-party arbitration, since jurisdictional objections involving non-signatories and the objective scope of the arbitration agreement are frequent in this context, and since the principle of competence-competence enables arbitrators to decide on their own jurisdiction prior to national courts.

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[124] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1492.
[125] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1492.
[126] JARVIN/LEVENTHAL, Objections to Jurisdiction, *in:* NEWMAN/HILL (eds.), The Leading Arbitrator's Guide to International Arbitration, 2014, p. 508; BORN, International Arbitration – Law and Practice, 2nd ed., 2015, p. 56.
[127] Even though such terminology is subject to criticism, the term is so firmly embedded in the literature and case law that it is difficult to abandon its use. (BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1050). Virtually all arbitral institutions expressly vest arbitrators with powers to decide on their own jurisdiction. For example: Switzerland: Art. 186 PILS; England: Art. 30 1996 Arbitration Act; Germany: §1040 ZPO. Same applies to arbitral institutions: In Brazil: Art. 4.5 CCBC Rules., Rules Art. 4.1 CIESP/FIESP, Art. 5.4 Amcham Rules, Art. 25 FGV Rules, Art. 3.8 CAMARB. Worldwide: Art. 6(3) ICC Rules, Art. 23 LCIA Rules, Art. 21 Swiss Rules, Art. 24 VIAC Rules and Art. 28 SIAC Rules.

99. The principle of competence-competence has positive and negative effects. With regard to the positive effect, the arbitral tribunal is competent to decide whether or not it has jurisdiction over the dispute. Hence, if a party alleges that it has not consented to the arbitration agreement, the arbitral tribunal does not have to stay the arbitration until a national court rules on the arbitral tribunals' jurisdiction. The arbitral tribunal can and shall proceed to decide on its own competence. In addition, the *competence-competence* principle has also a negative effect. That means that arbitrators not only have the power to decide on their own jurisdiction, but they also shall analyse their competence before the national courts assess the matter.[128]

100. Whereas the positive effect of the principle of competence-competence is recognized in virtually all jurisdictions, the negative effect of the competence-competence is more controversial. With regard to Brazilian law, both positive and negative effects are recognized.[129] As to the negative effect, Brazilian law was mostly influenced by the French law.[130] The negative effects of the arbitration agreement will be analysed in the second part of this arbitration as intrinsically related with procedural issues and the allocation of competence between national courts and arbitrators and challenges of arbitrators' decisions.

IX. PARTIAL CONCLUSION

101. In order to examine properly the existence of consent to arbitration it is necessary to dissociate *signature* from *consent*. It is well accepted in Brazil and worldwide that signature is not the only means to manifest consent, as it can also be implied and inferred from the parties' conduct. Signature is not considered a pre-requisite for the formal validity of the

[128] GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 401. In the authors' words, the negative effect of the principle of competence-competence allows "*the arbitrators to be not the sole judges, but the first judges of their jurisdiction".*

[129] See COGO, Note: OTPPB e Outro *v* RFSA, Court of Justice of the State of São Paulo, Agravo de Instrumento nº 2019207-29.2015.8.26.0000, 29 April 2015, *in:* Revista Brasileira de Arbitragem 2015(48), pp. 142-176; LESSA, A competência-competência no novo Código de Processo Civil: decisão arbitral como pressuposto processual negative, *in:* Revista Brasileira de Arbitragem 2015(48), pp. 33-38; PITOMBO, Efeitos Negativos da Convenção de Arbitragem – Adoção do Princípio Kompetenz-Kompetenz no Brasil, *in:* LEMES/CARMONA/MARTINS (eds.) Arbitragem – Estudos em Homenagem ao Prof. Guido Fernando da Silva Soares, *in Memorian*, 2007, pp. 326-338.

[130] BENEDUZI, Preliminar de Arbitragem no Novo CPC, *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, p. 290.

arbitration agreement under Brazilian law, which only requires the arbitration agreement to be in writing.

102. In fact, the writing form requirement has lost much of its importance and it applies only to the original agreement entered into by the initial parties. Once there is some evidence in writing, it can extend to non-signatories and related agreements as longs as the consent requirement is fulfilled.

103. It is possible to conclude that nowadays substance prevails over form. When ascertaining the existence of consent, the arbitrators must determine the true intention of the parties. The Brazilian Civil Code contains interpretation rules that are applicable to all types of contracts, including arbitration agreements. According to Art. 112, contracts are to be interpreted taking into account the real intention of the parties rather than its literal meaning. Furthermore, arbitrators and courts have to take into account the principle of good faith when interpreting the arbitration agreement pursuant to Arts. 113 and 422. The principle of good faith is the leading principle under Brazilian law that shall be applied when determining the scope of the arbitration agreement.

CHAPTER 2: MULTI-PARTY ARBITRATION

104. This second chapter addresses the main issue concerning multi-party arbitration, *i.e.* the circumstances under which a party may rely on an arbitration agreement that it did not formally conclude in order to initiate an arbitration or be compelled to arbitrate. The chapter aims at analysing the main theories relied upon by arbitrators and courts for binding non-signatories in order to ascertain the role of the requirement of consent.

I. INTRODUCTION TO THE PROBLEMATIC

105. As a general rule in contract law, contracts have effects only upon the contracting parties.[131] This does not differ with arbitration agreements. Arbitration is contractual by nature and therefore only the parties that have entered into an arbitration agreement are in principle bound by it. Accordingly, the parties to an arbitration are generally only those that have concluded and signed the arbitration agreement. Nevertheless, in certain circumstances, it is possible that parties take part in the arbitration proceedings either as claimants or as respondents even though they have not formally concluded the arbitration agreement and do not appear *prima facie* as contracting parties to the main contract. These parties are usually referred to as non-signatories whereas scholars and practitioners generally call this situation an "extension" of the arbitration agreement, even though the use of such terms is not entirely accurate.[132]

106. A non-signatory may be bound, for instance, by application of contract law principles, such as agency and assignment, or principles of corporate law, such as piercing of the corporate veil. The use of theories of contract law to bind third parties is the oldest form of compelling non-signatories to arbitration and has already been used in the 1960s.[133]

107. However, there are cases involving more parties than the original signatories where no theory of contract and corporate law can squarely be applied to compel the non-signatory

[131] GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 498.
[132] See paras. 110 and 111 below.
[133] YOUSSEF, Consent in Context, 2012, p. 76. It is widely accepted that these principles are not only applied to the underlying agreement, but also to the arbitration clause contained thereto.

parties to arbitrate. In these cases, arbitrators and national courts have to analyse carefully the factual circumstances to consider whether or not the non-signatories shall be bound by the arbitration agreement. The scrutiny of the facts aims at finding elements that can prove the existence of expressed or implied consent by the non-signatories.

108. In the context of multi-party arbitration, a judicial theory has been developed under the name of group of companies. As the name may suggest, according to this doctrine the arbitration agreement could be extended to a company if the other entity of the group has concluded an arbitration agreement. Nevertheless, a careful analysis of case law reveals that despite its *elaborate name*, the doctrine has also a contractual nature and is based on the existence of consent. The group of companies doctrine raises the question of to what extent the consent of the parties is still necessary and how it shall be interpreted.

II. TERMINOLOGICAL CAVEAT - INACCURACY OF THE TERMINOLOGY

109. Professionals and scholars usually speak of the *extension* of the arbitration clause to *non-signatories* or *third parties*. Even though these concepts will be used to a certain extent in this dissertation for the sake of clarity, it is important to highlight that they are not entirely accurate and can therefore they be misleading.

A. CRITICISM OF THE TERM *EXTENSION*

110. The term *extension* is problematic because most theories used as grounds to bind entities that do not appear *prima facie* to be parties to the arbitration agreement are usually based on consent.[134] These parties are, therefore, usually compelled to arbitrate because arbitrators and courts have concluded that they are parties to the arbitration agreement.[135] It is a principle of international arbitration that the arbitration agreement binds only parties that have adhered to it.[136]

[134] STEINGRUBER, Consent in International Arbitration, 2012, para. 9.01; HANOTIAU, Complex Arbitrations, 2006, para. 6.
[135] MARZOLINI, Is the Parties' Consent Still an Overriding Principle for Joinder and Intervention of Third Parties in International Commercial Arbitration?, *in*: Swiss Arbitration Academy Series on International Arbitration, Vol. 2., Selected Papers on International Arbitration, p. 129.
[136] GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 498.

111. Therefore, according to Hanotiau, to what extent non-signatories can be compelled to arbitrate is a basic issue concerning (i) who the parties to the arbitration agreement are, (ii) which parties have adhered to it or (iii) which parties are to be estopped from alleging non-adherence to the arbitration clause.[137] Because an arbitration agreement cannot be extended to a party that is actually itself a party to the arbitration agreement, one should use the term "extension" only when referring to doctrines not linked with consent.[138]

B. CRITICISM OF THE TERM *THIRD PARTY*

112. The question of whether a party can be considered as a "third party" depends on the point of view of the interpreter.[139] One can consider a third party a person who does not appear *prima facie* as formally bound by the arbitration agreement[140]. Or from a strict procedural point, third parties can be those who do not figure as claimant or respondent from the very outset of the arbitral proceeding.[141]

113. With regard to the first proposition, the same rationale as to the term *extension* should be applied to the expression *third party*. *Third party* gives the impression that it refers to a party who is totally strange from the arbitration agreement.[142] This is not true, as those parties to which the arbitration agreement is "extended" are indeed real parties to the arbitration agreement. Accordingly, the parties become parties to the arbitration agreement not because of the wording of the agreement, but from tacit acceptance.[143] For this reason, Alan Rau points out that a sharper focus can be achieved by referring to these parties as *un-mentioned parties*. However, this proposition comes with a caveat that the agreement might

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[137] HANOTIAU, Complex Arbitrations, 2006, para. 6.
[138] VOSER, Multi-party Disputes and Joinder of Third Parties, *in*: VAN DEN BERG (ed.), 50 Years of the New York Convention - ICCA Conference, 2009, p. 371.
[139] MARZOLINI, Is the Parties' Consent Still an Overriding Principle for Joinder and Intervention of Third Parties in International Commercial Arbitration?, *in*: Swiss Arbitration Academy Series on International Arbitration, Vol. 2., Selected Papers on International Arbitration, p. 110.
[140] MARZOLINI, Is the Parties' Consent Still an Overriding Principle for Joinder and Intervention of Third Parties, *in*: International Commercial Arbitration? Swiss Arbitration Academy Series on International Arbitration, Vol. 2., Selected Papers on International Arbitration, pp. 110ff.
[141] MARZOLINI, Is the Parties' Consent Still an Overriding Principle for Joinder and Intervention of Third Parties in International Commercial Arbitration?, *in:* Swiss Arbitration Academy Series on International Arbitration, Vol. 2., Selected Papers on International Arbitration, pp. 110ff.
[142] RAU, Arbitral Jurisdiction and the Dimensions of "Consent", Arb. Int'l, 2008(24), p. 229.
[143] POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed., 2007, para. 251.

be drafted in a way to exclude expressly the parties who have been mentioned in the agreement from the scope of the arbitration clause contained therein.[144]

114. With regard to the ICC, when the possibility of joinder was introduced in the institution's rules, the term adopted was *additional party* instead of *third party*, since, as explained above, the latter may imply that the party to be joined might not be bound by the arbitration agreement.[145.] The same applies to the UNCITRAL Arbitration Rules, in which the Working Group preferred using the expression *third person* instead of *third party* in Art. 17 (Joinder)[146] since the latter term could imply the joining party would not be a true party to the arbitration agreement.[147] According to the Working Group, the person to be joined shall be a party to the arbitration agreement as will be demonstrated further in Chapter 4.[148]

C. CRITICISM OF THE TERM *NON-SIGNATORY*

115. According to William Park, the term *non-signatory* is useful for what might be called "less-than-obvious parties". Nevertheless, it can lead to a misleading interpretation, implying that the lack of signature could diminish the validity of the arbitration agreement.[149] However, at least in most developed jurisdictions, the signature is no longer a prerequisite for the validity of the arbitration agreement.[150] The requirement of signature is regarded today as an unnecessary excess of formalism. Notably, there is no necessity of signature under the Brazilian law.

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[144] RAU, "Consent" to Arbitral Jurisdiction: Disputes with Non-signatories, *in:* Permanent Court of Arbitration, Multiple Party Actions, 2009, para. 1.177.
[145] WEBSTER/BÜHLER, Handbook of ICC Arbitration, 2014, para. 7.15.
[146] UNCITRAL Arbitration Rules; Art. 17(5): The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.
[147] Report of Working Group II (Arbitration and Conciliation) on the work of its 49th session in September 2008 – A/CN.9/665, para. 129: "*It was recalled that the words "third person" had been used instead of "third party" in the paragraph, in recognition of the fact that the party to be joined to the arbitration proceedings was a party to the arbitration agreement. The Working Group agreed that the party to be joined should be a party to the arbitration agreement and that reference to the term "third party" should continue to be avoided*."
[148] See para. 364 below.
[149] PARK, Non-signatories and International Arbitration: An Arbitrators' Dilemma in Multiple Party Actions in International Arbitration, Permanent Court of Arbitration (ed.), paras. 1.26-1.27.
[150] See paras. 73ff. and 115 below.

III. BASIS FOR SUBJECTING NON-SIGNATORIES TO ARBITRATION AGREEMENT

116. This section analyses the various basis for binding non-signatories to an arbitration agreement. Despite the fact that they are examined in this dissertation as if they were completely separated from each other, they can commonly overlap in praxis and be truly interconnected.[151] For this reason, there are cases where more than one of such basis may apply.[152]

A. AGENCY

117. A non-signatory may be considered a party to the arbitration agreement where the contract containing an arbitration clause has been concluded by a person who acted as its representative, expressly or implicitly.[153] This also applies in Brazil.[154] The represented party will be a party to the arbitration agreement as if it had signed the agreement itself. Brazilian law does not require any special form with regard to the authority to conclude an arbitration agreement in name of a third party. The representative is usually not considered a party to the contract if the representative has made it clear that he or she is acting on behalf of a third party and not on his own behalf.[155] Both individuals and legal entities can act as a representative.

118. The application of agency principles is the simplest and least controversial basis upon which the arbitration agreement can bind a party that has not formally concluded the

[151] WAHAB, Extension of arbitration agreements to third parties: A never ending legal quest through the spatial-temporal continuum, *in:* FERRARI/KRÖLL (eds.), Conflict of Laws in International Arbitration, 2011, p. 145.
[152] BESSON, Piercing the Corporate Veil: Back on the Right Track, *in*: HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, p. 147.
[153] HOSKING, Non-Signatories and International Arbitration in the United States: The Quest for Consent, Arb. Int'l, 20(3), 2004, p. 293.
[154] Court of Appeal of Sao Paulo, Ap. 20150114725-76.2012.8.26.0100, 27th Chamber of Private Law, 10.11.2015; Court of Appeal of Minas Gerais, Ap. 1.0003.09.030832-5/001, 9th Civil Chamber, 13.03.2012; Court of Appeal of Goiás, Ag. 145801-72.2010.8.09.000 2nd Civil Chamber, 20.03.2012; Court of Appeal of Goiás, Ap. 386769-75.2008.8.09.0051, 2nd Chamber for Conciliation and Arbitration, 20.10.2011.
[155] YOUSSEF, Consent in Context, 2012, p. 78.

contract.[156] In case of a formal representation or where the principal subsequently ratifies the representative's act, the consent will be evident.[157] In Brazil, contracts involving representation are defined in and regulated by the law.[158] Hence, the representative, represented party, and the counterparty are aware from the very beginning of the obligations they are assuming.

119. Nonetheless, the issue is more problematic in cases of apparent or undisclosed agents.[159] In arbitration, jurisdictional objections arise mainly when the agency relationship is not explicit.[160] In this respect, the application of agency principles as legal basis for binding non-signatories is closely related to the doctrine of apparent authority, or, as referred to in Brazil, the theory of appearance.[161]

120. In 2011, the Court of Appeal of Sao Paulo relied on the doctrine of apparent authority and held that a non-signatory was bound by the arbitration agreement, notwithstanding the fact that the agent had no authority to conclude the agreement.[162] In its reasoning, the court highlighted that the contract had been performed without any objection of the non-signatory party. The court found that the counterparty acted in good faith and believed that the person had due authority to conclude the agreement. Therefore, the principal was not entitled to claim that it was not bound by the arbitration agreement while benefiting from the agreements' performance. Otherwise, the non-signatory would be unjustly enriching at the counterparty's expenses.

121. Courts in Europe have also relied on the apparent authority theory to bind a person or a company to the arbitration agreement by virtue of acts of an unauthorized party. In Switzerland, the Swiss Federal Tribunal upheld an arbitral award in which the arbitral tribunal found that the principal was bound by the arbitration also based on the principle of good faith, as agent and principal had acted as a unity.[163] Similar decisions were also issued

[156] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1419.
[157] STEINGRUBER, Consent in International Arbitration, 2012, para. 9.07.
[158] In the Brazilian Civil Code contains specific provisions on mandate, commercial agency, distribution and law nº 4.886 deals with self-employed commercial agents.
[159] STEINGRUBER, Consent in International Arbitration, 2012, para. 9.07.
[160] ZUBERBÜHLER, Non-signatories and the Consensus to Arbitrate, 26 ASA Bulletin 1/2008, p. 18.
[161] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1424.
[162] Court of Appeal of Sao Paulo, Ap. 9109857-81.2007.8.26.0000, 5th Chamber of Private Law, 29.04.2011.
[163] Swiss Federal Tribunal, ASA Bulletin, 1996, pp. 623-629. With regard to this decision, see BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., 2015, para. 466;

by courts in France[164] and Germany.[165] Notably, the principle of apparent authority is also recognized in the UNIDROIT Principles.[166]

B. TRANSFER OF CONTRACTS AND CONTRACTUAL RIGHTS

122. Only contracting parties are entitled to rights and assume obligations arising from such contract. Nevertheless, as a general rule, contracts may be transferred to third parties. Consequently, the parties that were initially alien to a contract may replace the original ones. There are several means by which a contract may be transferred to a third party, such as assignment, succession and subrogation. In the context of international arbitration, it may be disputed whether the third party is bound by the arbitration clause contained in the underlying agreement that has been transferred.

123. In fact, it is not entirely accurate to address the scope of the arbitration agreement using the term "extension" of the arbitration agreement as the agreement is not being *extended* to a third party, but *transferred* to it.[167]

124. The effects of the transfer of contracts and contractual rights are analysed under the chapter on multi-party arbitration as an emphasis is given to the joining party who substitutes the signatory. It is important to bear in mind however that the transfer of contracts and contractual rights presuppose a multi-contract situation as in such cases there is a plurality

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ZUBERBÜHLER, Non-signatories and the Consensus to Arbitrate, 26 ASA Bulletin 1/2008, p. 20; MEIER, Multi-party Arbitrations, *in*: ARROYO (ed.), Arbitration in Switzerland, The Practitioner's Guide, 2013, p. 1330, para. 19. Also for apparent authority, see DEVAUD, La convention d'arbitrage signée par le représentant sans pouvoirs, ASA Bulletin, 2005, Vol. 23, Issue 1, pp. 2-21.

[164] Judgement of 7 October 1999, Société Russanglia *v* Société Delom, 2000 Rev. Arb. 288 (Paris Cour d'appel).

[165] Germany No. 29, Seller (Singapore) (1st case) and Seller (Netherlands) (2nd case) *v* Buyer (F.R. Germany), Landgericht, Hamburg, 10 December 1985 (1st case) and 30 December 1985 (second case), *in*: Yearbook Comm. Arb'n XII (1987), pp. 487-489.

[166] UNIDROIT Principles, Art. 2.2.5(2): "However, where the principal causes the third party to reasonably believe that the agent has authority to act on its behalf and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent." The UNIDROIT principles were first applied by Brazilian Courts in 2017 in a decision by the Court of Appeal of Rio Grande do Sul (Ap. 0000409-73.2017.8.21.7000, 12th Civil Chamber, 14.02.2017). See KUYVEN/PIGNATTA, Note: Noridane Foods *v* Anexo Comercial, Court of Justice of the State of Rio Grande do Sul, Apelação Cível nº 70072362940, 14 February 2017, *in*: Revista Brasileira de Arbitragem 2017(54), pp. 140-154.

[167] CLAY, A Extensão da Cláusula Compromissória às Partes não Contratantes (Fora Grupos de Contratos e Grupos de Sociedades/Empresas), *in:* Revista Brasileira de Arbitragem 2005(8), p. 74; SANDROCK, Group of Companies and arbitration, *in:* Tijdschrift Voor Arbitrage, 2005, p. 6.

of contracts: (i) the principal agreement containing an arbitration clause and (ii) the contract whereby one party transfers the underlying contract to a third party. Nevertheless, the dispute will normally arise only from the underlying agreement. If the dispute arises from both agreements, it is then likely that it will also raise multi-contract issues.

1. ASSIGNMENT

125. A non-signatory can be bound to an arbitration agreement when the contract in which the arbitration clause is included is transferred to another party.[168] In fact, the assignee will assume the position of one of the original parties and will become a true party to the arbitration agreement. Accordingly, the third party is then entering into a contractual relationship governed by an arbitration agreement by substituting the transferor and assuming its contractual position.[169] The question that arises as to assignments is related to the principle of separability presumption of the arbitration agreement and the possibility of the assignee to be bound by the arbitration agreement without having expressly agreed to the arbitration clause contained in the contract.

126. The law applicable to the validity of the assignment is either the law chosen by the parties or, in the absence of such agreement, the law with the closest connection to the assignment.[170] Firstly, it shall be analysed whether the assignment of the arbitration agreement is possible; and secondly, what formal conditions are to be fulfilled. The conditions for validity of the assignment should not be confused with the writing requirement that applies to the arbitration agreement itself.[171]

127. The New York Convention requires an arbitration agreement to be in writing, but does not contain any rules regarding its assignment.[172] The same applies to Brazilian law. However,

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[168] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 2.06; LEE, Parecer: Eficácia da Cláusula Arbitral. Aplicação da Lei de Arbitragem no Tempo. Transmissão da Cláusula Compromissória. Anti-suit Injunction, *in:* Revista Brasileira de Arbitragem, 2006(11), pp. 7-36.
[169] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 2.19; MARTINS, Arbitragem. Capacidade, consenso e intervenção de terceiros: uma sobrevista, *in:* FERRAZ/MUNIZ (eds.), Arbitragem Doméstica e Internacional: Estudos em homenagem ao Professor Theóphilo de Azeredo Santos, 2008, pp. 291-307.
[170] KAUFMANN-KOHLER/RIGOZZI, Law and Practice in Switzerland, 2015, para. 3.156; REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 2.54.
[171] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 2.54.
[172] STEINGRUBER, Consent in International Arbitration, 2012, para. 9.15.

according to the international prevailing view, the requirements of form apply only to the initial conclusion of the arbitration agreement and not to later assignments.[173] Most developed arbitral jurisdictions presume that the assignment of the underlying agreement embrace the assignment of the arbitration agreement as well.[174] However, this is only a presumption, since the parties are free to negotiate otherwise.[175]

128. Therefore, when the underlying agreement is assigned, the arbitration clause is also automatically transferred to the assignee, unless the parties have agreed otherwise.[176] Courts in Brazil[177] and in several countries including France[178], Germany[179], England[180], and Switzerland[181] have adopted this approach.[182]

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[173] JAGUSCH/SINCLAIR, The Impact of Third Parties on International Arbitration – Issues of Assignment *in:* LEW/MISTELIS, Pervasive Problems in International Arbitration, 2006, para. 15-7. See para. 70 above.

[174] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 2.55; BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 2.09; BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1466.

[175] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1468.

[176] STEINGRUBER, Consent in International Arbitration, 2012, para. 9.13; CRAIG/PARK/PAULSSON, International of Chamber of Commerce Arbitration, 2000, para. 78.

[177] Superior Court of Justice, SEC 831 - FR, Special Court, Min. Esteves Lima, 03.10.2007. This decision was commented in ALMEIDA, Note: SPIE Enertrans S/A *v* Inepar S/A Indústria e Construções, Superior Tribunal de Justiça, Sentença Estrangeira Contestada nº 831/FR (2005/0031310-2), 3 October 2007, *in:* Revista Brasileira de Arbitragem, 2008(17), pp. 94-99. It also relates to the transfer of the agreement by means of succession. See para. 130 below. Other decisions relating to the transfer of the arbitration agreement and assignment: Court of Appeal of Parana, Ap. 718500-4, 17th Civil Chamber, 09.02.2011. Nevertheless, it shall be mentioned that there are decisions interpreting restrictively this issue by considering only the original parties bound to the arbitration agreement: *e.g.,* Court of Appeal of Sao Paulo, Ap. 0211901-60.2009.8.26.0100, 15th Chamber of Private Law, 14.05.2015.

[178] Société Taurus Films c/ Les Films du Jeudi, Cour de Cassation (1re Ch. Civile), 08.02.2000, *in:* Rev. Arb., 2000, pp. 280-287 with a note by Pierre-Yves Gautier; Orri *v* Société des Lubrifiants Elf Aquitaine, Cour de Cassation (1Ch. civile), 11 June 1991, *in:* Rev. Arb., 1992(1), pp. 73-75 with note by COHEN.

[179] Germany No. 125, Seller *v* Assignee (Germany), Oberlandesgericht Munich, 17 December 2008, Yearbook Commercial Arbitration, 2010(35), pp. 359-361.

[180] W. Tankers Inc. *v* Ras Riunione Adriatica Di Sicurta SpA [2005] EWHC 454 (Comm) (English High Ct.).

[181] See KAUFMANN-KOHLER/RIGOZZI, Law and Practice in Switzerland, 2015, para. 3.159. See Swiss Federal Tribunal, 4A_82/2016, 26.07.2016; Swiss Federal Tribunal, 4A_450/2013, 07.04.2014; Swiss Federal Tribunal, 4A_627/2011, 08.03.2012; Swiss Federal Tribunal, Decision of 9 May 2001, published in ASA Bull. 1/2002, pp. 80-87; BGE 103 II 75, 25.01.1977 (SCHERER, MATTHIAS, Three Recent Decisions of the Swiss Federal Tribunal Regarding Assignments and Transfer of Arbitration Agreements, *in:* 20 ASA Bull. 1/2002, pp. 109-119).

[182] WAHAB, Extension of arbitration agreements to third parties: A never ending legal quest through the spatial-temporal continuum, *in*: FERRARI/KRÖLL (eds.), Conflict of Laws in International Arbitration, 2011, p. 163.

2. SUCCESSION

129. A party will also be bound by the arbitration agreement by virtue of universal succession.[183] In this case, the successor will assume all rights and debts of the predecessor, including all agreements signed by the latter and the arbitration clauses contained therein. In other words, the buyer will assume the position of the original party to the arbitration agreement. The successor is therefore entitled to invoke the arbitration clause and can also be compelled to arbitrate despite the absence of express consent.[184] Common examples of universal succession are the acquisition of a company by means of an asset deal or the merger of two or more companies to form a new one.[185] Although a party may be subject to the arbitration agreement by virtue of succession, regardless of the existence of an express consent, it is worth noting that the arbitration agreement is not being *extended* to a *third party*. Rather, the party is actually taking part to the arbitration agreement.

130. In 2007, the Brazilian Superior Court of Justice confirmed that in the case of an acquisition, the acquirer assumes all rights and liabilities of the target company, including the obligation to arbitrate where the latter has entered into arbitration agreements.[186] In this case, a French company sought to enforce an ICC arbitral award against a Brazilian company, which objected to the jurisdiction of the arbitral tribunal arguing that it had not originally signed the agreement and had not expressly consented to the arbitration agreement at the time of the company's purchase. The dispute arose out of a consortium agreement concluded by the claimant Spie Enertrans S.A. (SPIE), a company constituted in accordance with the laws of France and the Brazilian company Sade Vigesa Industrial e Serviços S.A. (SVE) for the

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[183] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 2.58; POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed., 2007, para. 290; BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1463; Switzerland: X. SA und A. *v* Y. AG, 4C.40/2003, 19.05.03, *in:* 22 ASA Bull. 2/2004, pp. 344-352; France: Société Taurus Films *v* Les Films du Jeudi, Cour de Cassation (1 Ch. civile), 8 February 2000; Germany: BGH, XII ZR 42/98, 03.05.00; BGH, III ZR 177/74, 05.05.1977; ICC Case No. 2626, 105 J.D.I. (Clunet) 980 (1978); Sweden: *Swedish Supreme Court, Braack Schiffahrts KG v Wartsila Diesel Aktiebolag,* Yearbook Comm. Arb'n XXIV (1999), 15.10.1997; ICC Case No. 6223 of 1991, *in:* ICC Bull. 1997, Vol. 8, No. 2, p. 69.

[184] YOUSSEF, Consent in Context, 2012, p. 107 and BORN, International Commercial Arbitration, 2nd ed., 2014, p. 92.

[185] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1463.

[186] Superior Court of Justice, SEC 831 - FR (2005/0031310-2), Special Court, Min. Esteves Lima, 03.10.2007. This decision was commented by ALMEIDA (SPIE Enertrans S/A v. Inepar S/A Indústria e Construções, Superior Tribunal de Justiça, Sentença Estrangeira Contestada nº 831/FR (2005/0031310-2), 3 October 2007*, in:* Revista Brasileira de Arbitragem, 2008(17) pp. 94-99). ALMEIDA represented the in the court proceedings.

construction of electricity transmission lines in Ethiopia. After the conclusion of the agreement, SVE has been acquired by the respondent Inepar S.A. Indústria e Construções. According to the Superior Court of Justice, as a result of the acquisition, the acquirer assumed all rights and obligations of the purchased company, including the duty to arbitrate. Additionally, the Court highlighted that the arbitration proceedings had started against the original party SVE, which had subsequently been replaced by its successor during the arbitration. The successor participated in the arbitration without any reservation and even signed an amendment to the terms of reference.

131. In addition, the Court of Appeal of Sao Paulo held in 2014 that the buyer of a property was entitled to rely on the arbitration agreement contained in the lease agreement between the former owner and the tenant.[187]

3. TRANSFERENCE BY SUBROGATION

132. In international arbitration it is generally accepted that the subrogated party is bound by the arbitration agreement concluded by the original creditor. This is the understanding in Switzerland[188], England[189] and France.[190] However, under the Brazilian law the effects of the arbitration agreement in relation to a third party that absorbs the responsibilities of the original contracting party is still controversial. There are decisions considering that the third party is subject to the arbitration agreement and decisions holding that the arbitration agreement does not produce any effect with regard to the third party.

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[187] Court of Appeal of Sao Paulo, Ap. 0048590-78.2012.8.26.0554, 25th Chamber of Private Law, 08.05.2014.

[188] KAUFMANN-KOHLER/RIGOZZI, Law and Practice in Switzerland, 2015, para. 3.164; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., 2015, paras. 553-555; See *Cour de Justice*, Geneva, 16.10.1987, ASA Bulletin (1987), 269, 273.

[189] GILBERT, Multi-Party and Multi-Contract Arbitration, *in:* Arbitration in England, with chapters on Scotland and Ireland, Lew et al. (ed.), 2013, pp. 22-28; Sheppard, Third Party Non-Signatories in English Arbitration Law, in Brekoulakis et al. (eds.), The Evolution and Future of International Arbitration, International Arbitration Law Library, 2016(37), p. 189; JAGUSCH/SINCLAIR, The Impact of Third Parties on International Arbitration – Issues of Assignment in Pervasive Problems in International Arbitration, Lew/Mistelis (2006), paras. 15-42ff. See Schiffahrtsgesellschaft Detlev von Appen GmbH *v* Voest Alpine Intertrading GmbH ('The Jay Bola'): CA 1997.

[190] POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed., 2007, para. 289; GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 719; WEILLER, LAURA, Transmission et extension de la clause compromissoire en droit français de l'arbitrage International: Etat des lieux, *in:* Revista de Arbitragem e Med o, 2009(20), p. 209; Cour d'appel de Paris, Société Carter c/ société Alsthom et AGF, 06.02.1997, *in:* Rev. Arb. 556-568.

133. A decision considering that the third party was not bound by the arbitration agreement was rendered in 2010 by the Court of Justice of Sao Paulo. The Court held that the arbitration clause did not bind the subrogated cargo insurer whom was not a party to the transport agreement.[191] The transport agreement was concluded between the carrier Panalpina Management Ltd. and the cargo owner Nokia Corporation. Simultaneously, the latter also entered into an insurance agreement with the bank Unibanco. During the transport, the cargo was stolen. Consequently, the insurer paid the insured for his losses and became subrogated to its rights against the carrier. Subsequently, the bank Unibanco filed a claim before the state court seeking reimbursement from the carrier Panalpina. In the first instance, the judge agreed with the objection of lack of jurisdiction raised by the respondent and referred the parties to arbitration, as the transport agreement had an arbitration clause. The insurer appealed arguing that it was not party to the transport agreement, but only to the insurance agreement, which did not contain an arbitration clause.

134. The Court of Justice of Sao Paulo overturned the decision of first instance and ordered the regular course of the court proceedings. The Court stated that the bank neither concluded nor assented to the arbitration agreement and for this reason the bank could not be compelled to arbitrate. As to the subrogation, according to the Court, the right of the bank had its origin in the insurance agreement and not in the transport contract, which contained the arbitration agreement. In addition, the Court highlighted that Art. 786 of the Brazilian Civil Code provides that any act of the insured that reduces or extinguishes the insurer's right for reimbursement is void. Accordingly, the arbitration clause cannot bind the bank; otherwise it would be affecting its right of access to justice. Further decisions followed the same restrictive approach.[192]

135. Nonetheless, it is worth noting that there are decisions also rendered by the same court contrary to this understanding. In 2009, the Court of Appeal of Sao Paulo held that the insurer assumes the insured's rights and obligations, including the obligation to arbitrate.[193]

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[191] Court of Appeal of Sao Paulo, Ap. 990.09.373821-0, 11th Chamber of Private Law, 11.03.2010.
[192] Court of Appeal of Sao Paulo, Ap. 0000254-21.2010.8.26.0002, 13th Chamber of Private Law, 01.02.2012; Court of Appeal of Sao Paulo, Ap. 0030807-20.2010.8.26.0562, 23th Chamber of Private Law, 13.06.2012; Court of Appeal of Espírito Santo, Ap. 0005545-34.2010.8.08.0024, 4th Civil Chamber, 10.11.2014.
[193] Court of Appeal of Sao Paulo, Ap. 7.307.457-0, 14th Chamber of Private Law, 04.02.2009. The parties in this case were the insurer Sul América Companhia Nacional de Seguros and the carrier Armada (Holland) B. V. The contract containing the arbitration clause was a contract for the carriage of salt in bulk. The judges that participated in this judgement were José Tarciso Beraldo, Thiago de Siqueira and Melo Colombi. However, it

136. In 2015, the Court of Appeal of Sao Paulo held that an insurer that subrogated to the rights of the insured was subject to the arbitration agreement.[194] The arbitration arose out of a dispute in which the insurer Bradesco Auto/Re Companhia de Seguros initiated court proceedings against the transport company Panalpina World Transport (PRC) Ltd. seeking to recover the amount it paid to the insured Ericsson Telecomunicações S/A. Panalpina objected alleging that the dispute should be submitted to arbitration as the shipping agreement between Panalpina and Ericsson had an arbitration clause providing for arbitration under the rules of the Stockholm Chamber of Commerce. The court rejected Panalpina's allegation and held the company liable for the costs incurred by the insurer. The first instance decision adopted a very restrictive approach. It decided that an arbitration agreement could not be transferred to a third party without express consent as arbitration affects the parties' right of access to justice and therefore the parties' consent could not be presumed.

137. Subsequently, Panalpina appealed to the Court of Appeal of Sao Paulo, which reversed the judgement of the lower court and held that the dispute should be decided by arbitration. The Court of Appeal recognized that the prevailing view of Brazilian courts is that the arbitration clause is not automatically transferred when a party subrogates to the other parties' rights. However, the better view is that the third party assumes the position of the obligor and becomes a party to the main agreement as it had originally concluded it. According to the Court of Appeal, the inclusion of arbitration agreements in international transport contracts is the general rule and for this reason it should not come as a surprise to the insurer. The Court stated further that the insurer had full knowledge of the arbitration agreement when it issued the insurance policy and could not avoid the arbitration clause.

138. Even though the Court pointed out that the decisions holding the insurer bound by the arbitration agreement exist in small number, it is worth noting that subsequent decisions rendered by Brazilian courts have decided that the subrogated party is also subject to the arbitration agreement. Since this understanding has been reinforced by the subsequent case

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is to note that in 2013, the same 14th Chamber of Private Law rendered a contrary decision (0000375-47.2012.8.26.0562, 31.07.2013). This decision rendered in 2013 did not analyse the issue of the extension of the arbitration clause in-depth. On the contrary, the decision merely states that an arbitration agreement binds only the parties who have entered into it and not third parties.

[194] Court of Appeal of Sao Paulo, Ap. 0149349-88.2011.8.26.0100, 12th Chamber of Private Law, 11.02.2015.

law, it is now questionable whether this is the minority view. It seems that the recent decisions have (correctly) abandoned such restrictive approach. In 2016, another decision of the Court of Appeal of Sao Paulo considered that the insurer obtaining the insured's position was also subject to the arbitration agreement concluded by the insured.[195] More recently, a judgment of the Court of Appeal of Rio de Janeiro in 2017 also decided that the insurer that subrogates to the rights of the insured shall be bound by the arbitration, insofar the arbitration clause is not included in an agreement protected by consumer law.[196]

139. As with case law, there is no consensus in the Brazilian literature regarding the transference of the arbitration clause to non-signatories. On the one hand, there are commentators who take the view that the extension of the arbitration clause to the insurer should be based on consent and therefore that the arbitration agreement should not bind the insurer in the absence of compelling elements.[197]

140. However, there are commentators defending the opposite view. For instance, Fabiane Verçosa states that the institute of subrogation is a matter of substantive law and one should refrain from analysing it as a procedural issue.[198] Hence, since the insurer steps into the shoes of the insured assuming all rights and obligations, the former shall be also bound by the arbitration agreement.[199]

141. There seems to be no reason to adopt a restrictive approach. The subrogated party by entering into a relationship subject to arbitration agrees with the conditions of the original contract. The obligation to arbitrate shall thus be treated the same way as the other clauses.

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[195] Court of Appeal of Sao Paulo, Ap. 1009026-77.2015.8.26.0002, 38th Chamber of Private Law, 17.08.2016.

[196] Court of Appeal of Rio de Janeiro, Ap. 0160745-58.2014.8.19.0001, 20th Civil Chamber, 13.03.2007. In case of adhesion contracts, the party stepping into the shoes of the contracting party will not be bound by the arbitration agreement if the arbitration agreement does not comply with the formal requisites for its validity. See paras. 80ff. Also in this regard: Court of Appeal of Sao Paulo, Ap. 7.307.457-0, 14th Chamber of Private Law, 04.02.2009.

[197] LEMES, Arbitragem e Seguro, *in:* Revista de Arbitragem e Med o, 2010 (27), p. 68. Also contrary to the extension of the arbitration clause: FERNANDES/MERLO, Arbitragem. Arbitragem. A o de Regresso. Sub-Rogaç de Obrigaç Sujeita à C sula Compromiss ria. Arbitrabilidade. Extin o do Processo sem Julgamento de Mérito. republished de Justiça de Paulo. 12a C ara de Direito Privado. Recurso de Apelaç o no 0149349- 88.2011.8.26.0100. Rel. Des. Tasso Duarte de Melo. J. 11.02.2015, *in:* Revista Brasileira de Arbitragem, 2015(47), p. 158; OLIVEIRA/PRADO, A arbitragem nos Contratos de Seguro e Resseguro *in* Revista do Advogado 2013(119), p. 123.

[198] VERÇOSA, Arbitragem e Seguros: Transmissão da Cláusula Compromissória à Seguradora em Caso de Sub-Rogação, *in:* Revista Brasileira de Arbitragem, 2006(11), p. 55.

[199] VERÇOSA, Arbitragem e Seguros: Transmissão da Cláusula Compromissória à Seguradora em Caso de Sub-Rogação, *in:* Revista Brasileira de Arbitragem, 2006(11), p. 55.

This seems to be the most reasonable approach and the one that has been adopted internationally.[200] If the third party does not want to arbitrate it shall refrain from stepping into the shoes of the contracting party.

C. ESTOPPEL

142. The doctrine of estoppel originated in Anglo-American jurisdictions and is increasingly used in the context of arbitration to compel non-signatories to arbitrate.[201] According to the estoppel doctrine, parties can be prevented from denying that they are parties to the arbitration agreement where they invoke rights under a contract containing the arbitration clause.[202] In other words, under the estoppel doctrine, a party is prevented from acting in contradiction to its own statements and conduct.[203] Estoppel is most applied to prevent a non-signatory from denying that it is a party to the arbitration agreement.[204] Indeed, it is usually said that the proper application of estoppel should be as a "shield" and not as a "sword".[205] Nonetheless, in some circumstances, estoppel does not operate only as procedural defence to force a non-signatory to arbitrate, but as a way to avoid a signatory to object to proceedings commenced by non-signatories.[206] Indeed, it appears that there is no reason why estoppel could not be invoked by a non-signatory to force a signatory to arbitrate.[207]

143. According to Brekoulakis, it is possible to divide the theory of estoppel into two subcategories: *equitable estoppel* and *intertwined estoppel*.[208] Pursuant to the equitable estoppel, where a party tries to exercise rights under a contract containing an arbitration clause, the party may not argue at the same time that it is not a party to the arbitration

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[200] See para. 132 above.
[201] WAHAB, Extension of arbitration agreements to third parties: A never-ending legal quest through the spatial-temporal continuum, *in*: FERRARI/KRÖLL (eds.), Conflict of Laws in International Arbitration, 2011, p. 166.
[202] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1472; CARTER/FELLAS, International Commercial Arbitration in New York, 2nd ed, 2016, para. 7.76.
[203] BORN, International Arbitration - Cases and Materials 2015, p. 584.
[204] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1473.
[205] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1475; HANOTIAU, Complex Arbitrations, 2006, para. 50.
[206] YOUSSEF, Consent in Context, 2012, p. 108; CARTER/FELLAS, International Commercial Arbitration in New York, 2nd ed, 2016, para. 7.77.
[207] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1474.
[208] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 4.03.

agreement.[209] Hence, the main question with regard to the equitable version is whether the party objecting to the arbitration agreement has benefited from the underlying contract or not.[210]

144. The intertwined estoppel is however applicable where claims raised by the non-signatory are intertwined with the obligations of the contract containing an arbitration agreement.[211] The importance of the non-signatory benefit is shifted to the connection between the non-signatory claims and the underlying agreement. The prerequisites for binding a non-signatory are (i) the intertwined connection between claims asserted by the non-signatory and the contract in which the arbitration clause is included, and (ii) a close contractual or corporate link between the non-signatory and one of the signatories.[212]

145. In civil law jurisdictions, arbitrators and courts do not usually resort to the estoppel doctrine referring to such nomenclature.[213] However, they reach comparable results by relying on different principles, such as good faith, *venire contra factum proprium* and abuse of right.[214]

146. In 2014, the Brazilian Superior Court of Justice rejected the challenge to the recognition of an arbitral award which relied on the principle of *venire contra factum proprium* to justify that a non-signatory was bound by the arbitration agreement.[215] In this case, ATI Chile entered into a *value added reseller agreement* with the American company Comverse Inc. When a dispute arose between the parties, the American company initiated arbitral proceedings against ATI Chile before the American Arbitration Association. At the outset of the arbitration proceedings, only these two contracting parties were involved. However, the Chilean company filed a counterclaim claiming rights of its subsidiaries that had also performed the contract. None of the subsidiaries had formally signed the contract and at

[209] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 4.07.
[210] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 4.07.
[211] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 4.14.
[212] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 4.14.
[213] HANOTIAU, Complex Arbitrations - Multiparty, Multicontract, Multi-issue and Class Actions, 2006, para. 41.
[214] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1473; MOSES, The Principles and Practice of International Commercial Arbitration. 2nd ed., 2012, p. 36; BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 4.03. In Switzerland: Swiss Federal Tribunal: DFT 129 III 727 of 16.10.2003, *in:* 22 ASA Bulletin 2/2004, pp. 364-389.
[215] Superior Court of Justice. SEC N. 3.709 – US (2008/0266915-8), Special Court, Min. Zavascki, 14.06.2012.

that point they neither were parties to the arbitration proceedings. Nevertheless, during the hearing, the parties agreed that the ATI subsidiaries should take part in the arbitration proceedings and therefore would also be subject to the final award. Among such subsidiaries was a Brazilian company (ATI Brazil).

147. The arbitral tribunal rendered the award ordering ATI Brazil to pay more than twelve million dollars in favour of Comverse. When Comverse sought to enforce the award in Brazil, ATI Brazil objected alleging that the company was not a party to the arbitration agreement and the lawyers of ATI Chile did not have authority to represent the Brazilian subsidiary. Furthermore, ATI Brazil also argued that the company was included in the arbitration after the commencement of the hearing and could not duly participate in the arbitral proceedings. The Brazilian Superior Court of Justice rejected the allegations holding that ATI Brazil was not acting in good faith. According to the Court, the Brazilian company took part in the arbitral proceedings aiming at benefiting from the agreement and its arbitration clause. Therefore, ATI Brazil was not entitled to avoid the award's recognition due to the fact that the decision was adverse to its interests. The Superior Court of Justice also relied on the principle of *nemo auditur propriam turpitudinem allegans*, according to which no one can be heard to invoke one's own turpitude.[216]

148. It remains controversial whether the estoppel doctrine is based on consent or whether the theory would be an exception to the consensual character of arbitration. According to Born and Youssef, the estoppel doctrine falls into the category of the non-consensual basis for binding non-signatories.[217] However, contrary to this view, respected authorities submit that the estoppel doctrine does rely on consent. As Brekoulakis points out, the estoppel doctrine has "been consistently applied on consensual premises".[218] According to Park, the application of the estoppel doctrine should not serve as a substitute for consent and "never

[216] The decision was also analysed in GAGLIARDI, O Avesso da forma: contribuição do direito material à disciplina dos *terceiros* na arbitragem (uma análise a partir de casos emblemáticos da jurisprudência brasileira, *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, pp. 209-211.
[217] YOUSSEF, Consent in Context, 2012, p.107 and BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1414 fn. 44.
[218] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 4.39 The author makes a clear distinction between two types of estoppel doctrine: (i) intertwined estoppel and (ii) equitable estoppel. The affirmation just quoted refers only to the equitable estoppel. The author concludes that the other version of the doctrine have been diminished, and sometimes overlooked, the important of consent (para. 4.38).

replace clear-minded analysis of who agreed to what".[219] In addition, Wahab affirms that courts should compel non-signatories to arbitrate applying the principle of good faith and estoppel doctrine where the "consent of the parties to the arbitration agreement is clear".[220] However, Hosking expresses the concern that estoppel doctrine in certain cases can appear to be used as an "easy option" in substitution to a rigorous legal analysis of contract and agency law principles.[221] With regard to regard Brazilian law, national courts rely on principles of contract law - such as good faith and *venire contra factum proprium* - instead of applying the estoppel doctrine, a decision binding a non-signatory to the arbitration agreement will fundamentally be based on consent.

D. THIRD PARTY BENEFICIARY

149. As a general rule, only the parties that have concluded an agreement benefit from rights and assume obligations under such contract.[222] However, there are certain cases where the contracting parties wish to benefit a third person, *i.e.* the beneficiary of the agreement is not a party to the contract itself. This is particularly true in insurance and transport agreements, for instance. Where the contract with a third party beneficiary contains an arbitration clause, the main question that arises is whether the third party beneficiary may rely on the arbitration agreement and commence arbitration against the promisor or promisee, and *vice versa*, whether the third party beneficiary may be compelled to arbitrate.[223]

150. The Brazilian Civil Code contains particular provisions regarding third party beneficiary in Arts. 436, 437 and 438. Nevertheless, these three articles contain only general provisions and do not deal specifically with arbitration agreements.[224] Equally, the Brazilian Arbitration Act is also silent on the effects of the arbitration clause as to third parties benefiting from such agreements.

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[219] PARK, Non-Signatories and International Contracts: An Arbitrator's Dilemma, *in*: Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, 2009, para. 1.45.
[220] WAHAB, Extension of arbitration agreements to third parties: A never ending legal quest through the spatial-temporal continuum, *in*: FERRARI/KRÖLL (eds.), Conflict of Laws in International Arbitration, 2011, p. 167.
[221] HOSKING, Non-Signatories and International Arbitration in the United States: The Quest for Consent, Arb. Int'l 20(3), 2004, p. 294.
[222] RIZZARDO, Contratos, 11th ed., 2011, p. 145.
[223] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 2.145.
[224] Art. 436 provides that the promisee and the third party beneficiary are entitled to seek enforcement of the contract and when the beneficiary tries to enforce the contract, it becomes subject to the contractual conditions previously set out in the agreement.

151. It is important to highlight that Art. 436, sole paragraph, provides that the third party beneficiary is entitled to demand the fulfilment of the contract. However, by doing so, he or she third party beneficiary becomes subject to same contract conditions as the promisee. Accordingly, the best view is that the third party when enforcing the agreement is subject to all its clauses, including the arbitration agreement.

152. However, this was not the understanding of the Court of Justice of Sao Paulo, which in 2013 rendered a decision considering that a third party beneficiary was not obliged to arbitrate as it was not an original party to the arbitration agreement. In this case, the Court of Justice of Sao Paulo considered that the arbitration clause contained in a bank guarantee concluded by the applicant and the guarantor did not bind the beneficiary that had not signed the agreement.[225] Through a loan agreement, the Companhia Brasileira de Açúcar e Álcool (CBAA) borrowed R$ 19.000.000,00 from the lender Banco Cruzeiro do Sul, which in turn required a bank guarantee. In order to provide the guarantee, CBAA entered into an agreement with Berkley International do Brasil S.A. in favour of Banco Cruzeiro do Sul. The guarantee was not signed by the beneficiary Banco Cruzeiro do Sul and contained an arbitration referring to the rules of the Sugar Association of London.

153. When CBAA failed to pay the debt, Banco Cruzeiro do Sul filed a claim against the guarantor Berkley before the state court in Sao Paulo. However, the court dismissed the claim stating that it had no jurisdiction to hear the case, as the guarantee agreement contained an arbitration clause. The claimant appealed the decision and the Court of Justice of Sao Paulo overruled the judgement considering that the third beneficiary CBAA was not a party to the guarantee agreement, and that for this reason, it was not subject to the arbitration agreement. According to the Court, only the parties to the arbitration agreement could be bound by it and the lender did not become a party to the agreement due to the fact that it was the beneficiary of the guarantee.

154. Hence, the Court of Justice of Sao Paulo concluded that the beneficiary could not be compelled to arbitrate even though it claimed rights under the contract in which the arbitration clause had been included to. Nonetheless, the decision of the Court of Justice of

[225] Court of Appeal of Sao Paulo, Ap. 0106428-85.2009.8.26.0100, 21th Chamber of Private Law, 18.03.2013.

Sao Paulo has to be criticised, since it has not considered Art. 436, sole paragraph, of the Brazilian Civil Code, which sets forth that the third party beneficiary is subject to the provisions of the contract which it tries to enforce. The Court adopted a restrictive approach when considering that the third party beneficiary was not bound by the arbitration agreement on the ground that it was not party to the arbitration agreement.

155. Notably, the decision of the Court of Appeal of Sao Paulo is not in accordance with the majority view worldwide. In several jurisdictions, the understanding is that the third party beneficiary may be subject to arbitration in certain cases.[226] This is the case for example in Switzerland[227], England[228], France[229], Germany[230] and the United States.[231,] In some jurisdictions, there are even express provisions in this regard.[232] Nevertheless, the mere absence of a statutory provision in this regard is not per se an obstacle to the jurisdiction of the arbitrator over the third party beneficiary.

156. First, it is not disputed that the mere status of a third party beneficiary does not oblige the party to arbitrate.[233] However, the opposite is also not true; the status of a third party beneficiary does not necessarily mean that the party cannot invoke the arbitration clause or be compelled to arbitrate. To assess the subjective scope of the arbitration agreement regarding the third party beneficiary is necessary to ascertain whether the contracting

[226] See also ICC Case No. 9762 of 2001, Final Award, XXIX Y.B. Comm. Arb. 26, 49 (2004).
[227] In 2011, the Swiss Federal Tribunal upheld an arbitral award ruling that a party could rely on the arbitration clause contained in a contract, to which it was not a party, but that was concluded in its favour, unless otherwise provided. The arbitral tribunal left open whether a third party beneficiary could be compelled to arbitrate as in this case the beneficiary has voluntarily commenced the arbitration along with the signatories and therefore there was no need to examine the issue any further. In this case, it was established that the signatories intended to give to the beneficiary the right to obtain the agreement's performance and consequently to invoke the arbitration agreement. (Swiss Federal Tribunal, 4A_44/2011, 19.04.2011). See also KAUFMANN-KOHLER/RIGOZZI, Law and Practice in Switzerland, 2015, paras. 3.167 and 3.168; Swiss Federal Tribunal, 4A_450/2013, 07.04.2014; Swiss Federal Tribunal, 4A_627/2011, 08.03.2012.
[228] Nisshin Shipping Co Ltd *v* Cleaves & Co Ltd [2003] EWHC 2602 (See BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, paras. 2.147ff.).
[229] Cour de Cassation, Banque Populaire Loire et lyonnais c/ societé Angar, 11.06.2006, *in:* Rev. Arb. (2006) 969 with a note by LARROUMET.
[230] Bavarian Oberstes Landesgericht, LGZ 255, 267, 09.09.1999.
[231] Cargill International *v* Pavel Dybenko, 991 F.2d 1012, 1019-20 (2d Cir. 1993).
[232] England: Contracts (Rights of Third Parties) Act 1999, Section 8; Singapore Contracts (Rights of Third Parties) Act, 2002. See BORN, International Commercial Arbitration, 2nd ed., 2014 p. 1456.
[233] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 2.165; HOSKING, Non-Signatories and International Arbitration in the United States: the Quest for Consent, Arb. Int'l 20(3), 2004, p. 292.

parties intended to confer rights under the arbitration agreement on third parties in light of the parties' objective intentions and the principle of good faith.[234]

157. To conclude, the prevailing and preferential view is that the third party beneficiary is deemed to have consented to the arbitration clause if it tries to enforce rights under the underlying agreement containing the arbitration agreement.[235] Put differently, where a third party seeks to enforce rights from an agreement with an arbitration clause it will be prevented from arguing that it is not a party itself to the arbitration agreement. Accordingly, courts will apply an "estoppel analysis" to cases involving third party beneficiaries.[236]

E. ALTER EGO AND PIERCING THE CORPORATE VEIL

158. It is well known in international arbitration that a non-signatory may be bound to an arbitration agreement based on the doctrines of alter ego or piercing the corporate veil.[237] In Brazil, the doctrine is referred to as "*desconsideraração da personalidade jurídica*" and it corresponds to the notions of the American "*disregard doctrine*", German and Swiss "*Durchgriff*" and the French "*levée du voile social*". Irrespective of the terminology, the doctrine has similar elements in most jurisdictions in the context of international arbitration.[238]

159. The doctrine of piercing the corporate veil is used to disregard the existence of the company's limited liability in case of fraud or abuse of rights.[239] Hence, the shareholder of a signatory may be compelled to arbitrate when the corporate veil is lifted and he or she is

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[234] See BORN, International Commercial Arbitration, 2nd ed., 2014 pp. 1457-1458; CARTER/FELLAS, International Commercial Arbitration in New York, 2nd ed., 2016, para. 7.81; See Final Award in ICC Case No. 9839 of 1999, *in:* Yearbook Comm Arb'n, XXIX (2004), pp. 66-88: "*The Agreement created rights and obligations on Q-Z and Q, but did not reflect any intent to confer a right of performance on Q-Spain. Because Q-Spain is not a signatory to the Agreement and is not an intended beneficiary of the Agreement, Q-Spain is not a proper party to this arbitration*".

[235] HOSKING, Non-Signatories and International Arbitration in the United States: the Quest for Consent, Arb. Int'l, Vol. 20, No. 3. LCIA, 2004, p. 292. In Switzerland, well known commentators defend the view that third-party beneficiaries should be considered to have agreed to arbitration if they have accepted substantive rights stipulated in their favor, especially where they have sought their performance or have benefited from such rights (KAUFMANN-KOHLER/RIGOZZI, Law and Practice in Switzerland, 2015, para. 3.168).

[236] CARTER/FELLAS, International Commercial Arbitration in New York, 2nd ed., 2016, para. 7.81; BORN, International Commercial Arbitration, 2nd ed., 2014 p. 1459.

[237] CARTER/FELLAS, International Commercial Arbitration in New York, 2nd ed., 2016, para. 7.75.

[238] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1432.

[239] HANOTIAU, Multiple Parties and Multiple Contracts, *in*: Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, para. 2.31.

found liable for the company's obligations. The doctrine may be applicable where companies act indistinctively as if they were a single company and the acts of the controlled company are not for its individual benefit, but for the controlling company.[240]

160. According to Art. 50 of the Brazilian Civil Code, the corporate veil can basically be disregarded when (i) there is an abuse of the legal personality and (ii) confusion of shareholders' and company's patrimonies. Furthermore, piercing the corporate veil without proof of fraud or abuse is also possible in specific cases related to consumer protection[241] and environmental damage.[242]

161. The doctrine of piercing the corporate veil has to be applied with caution, as the theory is based fundamentally on fraud presumption instead of the parties' intent. This has been the approach adopted by the arbitrators, who are usually circumspect in applying the theory in international context.[243] For this reason, the application of classic law theories based on consent should prevail over the doctrine of piercing the corporate veil, which shall play only a subsidiary role.[244]

162. In 2018, the Brazilian Superior Court of Justice held that arbitration proceedings cannot be used as a shield against abusive behaviour where a party fraudulently tries to avoid liability.[245] Notably, the Brazilian Superior Court of Justice still relied on consent in this case by holding that implied consent may be inferred where there is abuse of the corporate veil.

163. The doctrine of piercing the corporate veil is most commonly applied to make the company's shareholders liable for the company's acts and obligations. Nevertheless, in specific cases, the doctrine may be also applied to bind persons who have other kinds of

[240] BADIA, Piercing the Veil of State Enterprises in International Arbitration, 2014, p. 67.
[241] Law 8.078/90. Art. 28, §5.
[242] Law 9.605/98. Art. 4.
[243] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1440.
[244] BESSON, Piercing the Corporate Veil: Back on the Right Track, *in*: HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, p. 149: "*In practice, one sometimes notes the opposite, namely parties writing pages on piercing the corporate veil and not a word on apparent authority arguments*." See also SCALETSCKY, A Teoria dos Grupos Societários e a Extensão da Cláusula Compromissória a Partes Não Signatárias, *in:* Revista Brasileira de Arbitragem, 2015(46), p. 46.
[245] See also LEÃES, Desconsideração da Personalidade e Sucessão Empresarial, *in:* Wald (ed.), Doutrinas Essenciais. Direito Empresarial. Vol. II, 2011, p. 138.

relationship control.[246] In the arbitration context, the theory has been used to compel non-signatories to arbitrate, especially when the party that has concluded the arbitration agreement has become deliberately insolvent.

164. Decisions piercing the corporate veil have been held in Switzerland[247], France[248] and arbitral awards.[249] The arbitral tribunal shall analyse case by case where there is evidence of fraud and abuse of right.[250] If there are no elements of fraud, abuse of rights or implied consent, then piercing the corporate of veil doctrine should better not be applied, but rather only in cases of clear breach of the principle of good faith.[251]

165. Lastly, it shall be noted that mere insolvency is insufficient to lift the corporate veil. To disregard the corporate veil requires proof that the undercapitalization was deliberate. The same applies to shell companies. For instance, a party which enters into an agreement with an undercapitalized company based in fiscal paradises cannot require the application of the piercing the corporate veil doctrine simply based on the fact that the company has no assets, a fact that was known from the very beginning.

F. GROUP OF COMPANIES DOCTRINE

166. Complex projects often involve the participation of more parties than those that have formally concluded the agreements, such as companies of the same group of the contracting

[246] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1440.
[247] Swiss Federal Tribunal, DFT 4A_160/2009 of 25 August 2009. In the view of Swiss commentators, it would not be accurate to refer to an "extension" of the arbitration agreement in the context of piercing the corporate veil, as what occurs is the substitution of the party that signed the arbitration agreement by its shareholders or the alter ego company. See GIRSBERGER/VOSER, International Arbitration in Switzerland, 3rd ed., 2016, para. 101; KAUFMANN-KOHLER/RIGOZZI, Law and Practice in Switzerland, 2015, para. 3.175; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., 2015, para. 572.
[248] COHEN, Note - Cour d'appel de Paris (1re Ch. suppl.) 11 janvier 1990 - Orri *v* Société des Lubrifiants Elf Aquitaine, Rev. Arb., 1992 (1), pp. 99-109.
[249] See *ad hoc* award in 2 ASA Bull (1992), pp. 202-258, "Sentence arbitrale rendue à Genève en 1991 par un Tribunal Arbitral ad hoc dans le litige opposant ALPHA S.A. à BETA & Co., Société de Etat de droit ruritanien".
[250] HANOTIAU, Complex Arbitrations, 2006, para. 209.
[251] WALD, A Arbitragem, os Grupos Societários e os Conjuntos de Contratos Conexos, *in:* Revista de Arbitragem e Mediação, 2004(2), p. 57.

parties, which have participated during the negotiation, performance or termination of the contract.[252]

167. For instance, a Brazilian company may enter into a purchase agreement with a German company for sophisticated machines. After the agreement has been signed by the two parties, a Canadian subsidiary of the German can deliver the products, while the employees from a second subsidiary with a registered office in Argentina may install the machines.

168. In fact, the parties often do not give much thought about which companies are performing the agreement insofar as it is being performed. Notably, it is usually difficult for third parties to identify the internal structure of the group.[253] In this concrete example, it is unlikely that the engineers receiving the equipment as agreed in the contract would consult with the legal department to double check whether or not the delivering company is a party to the contact or to the arbitration agreement.

169. Jurisdictional objections are frequently raised in cases involving the participation of other companies than those that formally entered into the agreements.[254] In cases like this, if the factual situation does not squarely fall within the scope of other legal theories, such as agency and assignment, the parties may argue that the arbitration agreement should be extended to the non-signatory companies based on the fact that they are part of the same group of the signatory parties.

[252] The group of companies doctrine shall not be confused with the piercing of corporate veil doctrine, which is based on fraud and abuse of rights. See MELO, Extensão da Cláusula Compromissória e Grupos de Sociedades, 2013, p. 64. There are cases where the agreement is performed from its very beginning until its termination by a group acting as an unity. See HANOTIAU, Complex Arbitrations, 2006, para. 94, in which the author refers to ICC Case No. 10510 of 2000. In ths case, the arbitral tribunal found to have jurisdiction over a non-signatory party which participated in the conclusion, performance and termination of the agreement.
[253] CAMARGO, Transações entre Partes Relacionadas – Um Desafio Regulatório Complexo e Multidisciplinar, 2nd ed., 2014, p. 60.
[254] PARK, Arbitration of International Business Disputes, 2004, p. 26.

1. LACK OF DEFINITION

170. Group of companies doctrine is one of the most controversial topics in the international arbitration field.[255] There is neither a legal concept nor a consensus reached by the literature of the meaning of the group of companies doctrine. Awards and court decisions have referred to the term, but have rarely defined it.[256] The existence of a group of companies is rather affirmed case-by-case based on factual elements.[257]

171. An analysis of literature and arbitral awards on the matter reveals not only a lack of uniformity in its understanding but even diametrically opposed comprehensions. On the one hand, some authors have criticized the doctrine arguing that it denies the consensual nature of the arbitration agreement in the sense that it creates a presumption of arbitration based only on the existence of a legal relationship among the companies of the same group.[258] On the other hand, studies which have carefully examined the group of companies doctrine came to the opposite conclusion. They demonstrate that the group of companies doctrine has fundamentally a consensual essence.[259] This is due to the fact that almost all decisions invoking the doctrine have based the "extension" of the arbitration clause not solely on the corporate relationship between the companies but primarily on the facts proving that the non-signatory party has participated in the agreement and therefore has consented to the arbitration agreement.[260]

172. This consensual character of the group of companies doctrine conveys the feeling that there is a conceptual misunderstanding.[261] It brings up the question whether a so-called group of companies doctrine really exists or whether the doctrine is wrongly named.[262]

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[255] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 5.10; STEINGRUBER, Consent in International Arbitration, 2012, para. 9.33, VOSER, Multi-party Disputes and Joinder of Third Parties, *in*: VAN DEN BERG (ed.), 50 Years of the New York Convention - ICCA Conference, 2009, p. 373.
[256] DERAINS, Is there a group of companies?, *in:* HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, p. 131.
[257] DERAINS, Is there a group of companies?, *in:* HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, p. 131.
[258] YOUSSEF, Consent in Context, 2012, p. 120.
[259] YOUSSEF, Consent in Context, 2012, p. 120; STEINGRUBER, Consent in International Arbitration, 2012, para. 9.34; HANOTIAU, Complex Arbitrations, 2006, para. 105; BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 5.10.; BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1451.
[260] STEINGRUBER, Consent in International Arbitration, 2012, para. 9.36.
[261] STEINGRUBER, Consent in International Arbitration, 2012, para. 121.

2. ORIGIN – DOW CHEMICAL CASE

173. Even though there are cases where arbitral awards have previously also dealt with similar issues, the origin of the group of companies doctrine is attributed to the dispute involving *Dow Chemical v Isover* in the early 1980s.[263] The Dow Chemical case is considered a landmark decision where the arbitral tribunal found that the non-signatories were entitled to rely on the arbitration agreement and also expressly referred to the notion of a group of companies.[264]

174. In order to properly analyse the group of companies doctrine and its role in the development of the international arbitration, it is important to examine the facts of the case and the reasoning of this decision. As will be demonstrated below, the arbitral tribunal in this case has not simply extended the arbitration agreement to non-signatories based on the corporate link between them, but it rather considered that the non-signatories have consented to the arbitration agreement by getting involved in the performance and termination of the agreements in dispute.

3. FACTS

175. The Dow Chemical case arose out of a dispute concerning two distribution agreements containing both ICC arbitration clauses. The request for arbitration was filed by four companies of the Dow Chemical group against the distributor Isover Saint Gobain. However, only two out of the four claimants had signed the contracts and were therefore *formal parties* to the arbitration agreement.

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[262] DERAINS, Is there a group of companies?, *in:* HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, p. 131; BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 5.11.

[263] The arbitral tribunal of the Dow Chemical case quoted ICC arbitral awards rendered in ICC Case No. 2375 of 1975, Journal du droit international 1976; and in ICC Case No. 1434 of 1975, id at 978; See DERAINS, Is there a group of companies?, *in*: HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, p. 132; STEINGRUBER, Consent in International Arbitration, 2012, para. 5.04 and para. 9.33.

[264] Dow Chemical case is analysed in virtually all publications on the group of companies doctrine, including MELO, Extensão da Cláusula Compromissória e Grupos de Sociedades, 2013, pp. 67-72; See paras. 181ff below.

176. The first agreement was concluded in 1965 between Dow Chemical (Venezuela) and the French Company Boussois-Isolation for the distribution of thermal isolation equipment in France. Subsequently, the distributor Boussois-Isolation assigned its rights and obligations to another French company Isover Saint Gobain, while Dow Chemical (Venezuela) assigned the agreement to the Dow Chemical AG, a Swiss subsidiary of the American Dow Chemical Company. Dow Chemical AG was also the parent company of the Dow Chemical Europe, a Company also from Switzerland. Dow Chemical Europe had itself signed a second distribution agreement in 1968 with three companies, including Boussois-Isolation, which later was assigned to Isover.

177. Both contracts contained ICC arbitration clauses and provided that the delivery of the products could be made by Dow Chemical France, a subsidiary of Dow Chemical Company or any other company of the group. Dow Chemical France did participate in the agreement's performance by delivering the products. The holding company, Dow Chemical Company, also participated in the conclusion and the performance of both distribution agreements. When the dispute arose out of both distribution agreements, the companies of the Dow Chemical group filed a request for arbitration against the respondent Isover in 1982.

178. Notably, the arbitration request was filed not only by the signatories to the agreements (Dow Chemical Europe and Dow Chemical AG), but also by the American holding the Dow Chemical Company - which participated in the negotiation - and Dow Chemical France - which performed the agreement.[265] The respondent Isover submitted its response raising two preliminary objections. Firstly, Isover argued that the arbitral tribunal had no jurisdiction over the non-signatories, as they were not parties to the arbitration agreement. Secondly, the respondent alleged that once having admitted the objection, the tribunal should reject the claim on the grounds that there was no direct interest of the signatories in the cause of action.

[265] Dow Chemical France, The Dow Chemical Company and others *v* Isover Saint Gobain, Interim Award, ICC Case No. 4131, 23 September 1982, 23 September 1982, *in*: Yearbook Comm. Arb'n. IX (1984), 131 – 137.

4. DECISION

a. APPLICABLE LAW

179. The arbitral tribunal considered first the problem of which law should be applied to decide whether the non-signatories could be part of the arbitration proceedings. The arbitral tribunal highlighted that even though French law governed the underlying agreements, this did not automatically imply that the arbitration agreements - because of their autonomy - should also be subject to the law of France. The arbitral tribunal concluded that it was not obliged to apply any national laws to decide on the scope and effects of the arbitration agreement and should reach its decision regarding jurisdiction by reference to the common intent of the parties in accordance with the circumstances of the case. Moreover, the arbitral tribunal affirmed that the usages and customs of international commerce should also be taken into account.[266] In the arbitral tribunal's view, whether an arbitration agreement can embrace companies of the same group was a matter of international principles, rather than of national law.[267]

b. SCOPE OF THE ARBITRATION CLAUSE

180. After this first point regarding the applicable law, the arbitrators rejected the preliminary objections raised by Isover. The arbitral tribunal concluded that the non-signatories Dow Chemical France and Dow Chemical Company have performed the agreements in such a way that both companies should be considered as parties to the agreements and therefore bound by the arbitration clauses contained therein. The arbitral tribunal highlighted that Dow Chemical France performed the agreements and appeared to be the centre of the group, while Dow Chemical Company played an important role, as it was the owner of the trademarks of the products distributed and had control over all the companies that were, or could be, involved in the performance of the agreements. The arbitral tribunal also

[266] ALVES, Note: Dow Chemical *v* Isover Saint Gobain, Interim Award, ICC Case No. 4.131, 23 September 1982, *in:* Revista Brasileira de Arbitragem, 1998(20), p. 197.

[267] Dow Chemical France, The Dow Chemical Company and others v Isover Saint Gobain, Interim Award, ICC Case No. 4131, 23 September 1982, 23 September 1982, *in*: Yearbook Comm. Arb'n. IX (1984), pp. 131-137: "*In doing so, the tribunal, following, in particular, French case law relating to international arbitration should also take into account, usages conforming to the needs of international commerce, in particular, in the presence of a group of companies*."

emphasized the fact that the holding company was responsible for the manufacturing and distribution of the products.

181. Contrary to what some commentators have inaccurately interpreted, the reference to the notion of *a single economic reality* does not imply that an arbitration clause will be extended to the affiliated companies each time an entity of the group concludes an arbitration agreement.[268] The decision in this case by no means suggests that an arbitration agreement could be extended to non-signatories that have not assented to the arbitration agreement.[269] It was only after the arbitral tribunal concluded that both non-signatories should be considered parties to the arbitration agreement that it addressed the group of companies issue.

182. The fact that the companies belonged to the same group was a reinforcing argument towards the presumption of consent and not the opposite whereby the arbitration clause could be extended to the companies of the same group regardless of the existence of consent.[270] The arbitral tribunal clearly stated that the non-signatories could be bound by an arbitration agreement signed by the other companies of the group by virtue of their participation in the conclusion, performance and termination of the agreements, if such acts were in accordance with the mutual intention of the parties. In other words, the arbitral tribunal did not abandon the consent requirement, but considered that consent can be also implied.[271] If the non-signatories had not been involved with the contracts, then it would be questionable whether the arbitral tribunal would have reached the same conclusion. Hence, the companies' participation in the conclusion and performance of the agreement and the

[268] MAYER, Extension of the Arbitration Clause to Non-Signatories under French Law in Multiple Party Actions in International Arbitration, Permanent Court of Arbitration (ed.), 2009, para. 5.05: "*Fortunately, this is not what the arbitral tribunal intended, as later clarified by two of the arbitrators, Professor Berthold Goldman and Professor Michael Vasseur. The "economic reality" of the group was not in itself sufficient, but was only to be „taken into account" in order to assess the true intention of the various companies*".

[269] HASCHER, Complex Arbitration: Issues in Enforcement and Annulment Actions of Arbitral Awards under French Law in Multiple Party Actions in International Arbitration, Permanent Court of Arbitration (ed.), 2009, para. 16.08; YOUSSEF, Egypt: The Group of Companies Doctrine under Egyptian Law, *in*: BOND/BACHAND (eds.), International Arbitration Court Decidions, 3rd ed., 2011, p. 283; MAYER, Extension of the Arbitration Clause to Non-Signatories under French Law in Multiple Party Actions in International Arbitration, Permanent Court of Arbitration (ed.), 2009, para. 5.05.

[270] BESSON, Piercing the Corporate Veil: Back on the Right Track, *in:* Hanotiau/Schwarz, Multiparty Arbitration, 2010, p. 149; MAYER, Extension of the Arbitration Clause to Non-Signatories under French Law, *in:* Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, 2009, para. 5.05.

[271] WILSKE/SHORE/AHRENS, The "Group of Companies Doctrine" - Where is it heading?, 17 Am. Rev. Int'l Arb. 73 (2006), p. 76.

fact that the companies constitute a unique economic reality were taken into consideration as indices of consent, but not as elements that could substitute the existence of consent.[272]

183. After the arbitral tribunal rejected the respondents' objection, Isover appealed the decision to the Paris Cour d'Appel. The French Court upheld the arbitral award basing its decision on the parties' common intent and did not place much importance to arguments regarding the group of companies and its same economic reality, as the respondent did not strongly contest these arguments.[273]

G. DOCTRINE'S REJECTION

184. It is usually said that the group of companies has been accepted mainly in France.[274] Nevertheless, it is important to note that in France arbitration agreements cannot be extended to companies of the same group without their consent.[275] In fact, the doctrine of group of companies has been largely misunderstood.[276] As the analysis of the Dow Chemical case showed, the reasoning behind the so-called "extension" of the arbitration agreement was not due simply to the existence of the group of companies, but rather because the non-signatories have implicitly consented to the arbitration agreement.[277]

185. The analysis of the decisions rendered in Brazil and in other jurisdictions reinforces the existence of consent as the decisive criterion for determining the subjective scope of the arbitration agreement. This section will examine decisions in France, Switzerland, England, Germany and Brazil. It is to note, however, that the extension of the arbitration agreement within companies of the same group has been rejected by several arbitral awards and other jurisdictions based on the lack of parties' intent.[278]

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[272] YOUSSEF, Consent in Context: Fulfilling the Promise of International Arbitration, 2012, p. 120.
[273] DERAINS, Is there a group of companies, *in:* HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, p. 134. Subsequent decisions also relied on the participation of the companies of the same group in order to justify the "extention" of the arbitration agreement. See *e.g.*, Award in ICC Case No. 5103, 115 J.D.I (Clunet) 1207 (1988); ICC Award No. 5730/1988, *in:* ARNALDEZ/DERAINS/HASCHER (eds.), *Collection of ICC Arbitral Awards 1996-2000*, 2003, pp. 410-420.
[274] PARK, Arbitration of International Business Disputes, 2004, p. 26.
[275] See paras. 187 ff. below.
[276] YOUSSEF in International Arbitration Court Decisions, 3rd ed., BOND/BACHAND (eds.), 2011, p. 283.
[277] See paras. 181 and 182 above.
[278] ICC Award in Case No. 5281, *in:* 7 ASA Bull (1992), pp. 313-339; Interim Award in ICC Case No. 15116 of 2008, Yearbook Comm Arb'n, XXXIX (2014), pp. 159-168. The Court of Cassation of Egypt set aside an arbitral award rendered in an arbitration administered by the Cairo Regional Centre for International

1. CURRENT STATUS OF THE GROUP OF COMPANIES DOCTRINE IN FRANCE

186. Even though it is said that the group of companies doctrine was developed in France, it cannot be affirmed that the group of companies doctrine is well accepted under French law, and that companies of the same group are automatically bound by arbitration agreements signed by their affiliated companies.[279]

187. In fact, as discussed above, the decision in the Dow Chemical case, often regarded as the origin of the group of companies, was fundamentally based on consent.[280] The arbitrators held that the non-signatories should be bound by the arbitration agreement because they were, in fact, parties to the agreement, having concluded and performed the contracts along with the signatories. The arbitral tribunal highlighted that a group of companies constitutes one and the same economic reality (*une réalité économique unique*) that should be taken into account, but this is not *per se* a basis for compelling the non-signatories to arbitrate.[281]

188. According to French commentators, the fact that certain courts have interpreted the arbitration agreement in an extensive manner does not mean that French law accepts a general theory of group of companies and disregards the doctrine that companies have separate corporate personalities.[282] Indeed, even under French law consent has been key in determining the subjective scope of the arbitration agreement.[283] French courts have relied on the conduct of the non-signatory party to find that a member of a group of companies

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Commercial Arbitration which had extended the arbitration agreement to a parent company based solely on the corporate link between the companies. The Egyptian high court ruled that the fact that the companies are part of the same group is not *per se* sufficient evidence of consent to arbitrate (Judgment of the Egypt's Court of Cassation in the Case No. 4729/2004 commented by YOUSSEF Egypt: The Group of Companies Doctrine under Egyptian Law, *in*: BOND/BACHAND (eds.), International Arbitration Court Decidions, 3rd ed., 2011, p. 283.

[279] MAYER, Extension of the Arbitration Clause to Non-Signatories under French Law in Multiple Party Actions in International Arbitration, Permanent Court of Arbitration (ed.), 2009, para. 5.07; WEBSTER/BÜHLER, Handbook of ICC Arbitration, 2014, para. 10-08; WILSKE/SHORE/AHRENS, The "Group of Companies Doctrine" - Where is it heading?, 17 Am. Rev. Int'l Arb. 73 (2006), p. 74.

[280] See para. 182 above.

[281] MAYER, Extension of the Arbitration Clause to Non-Signatories under French Law in Multiple Party Actions in International Arbitration, Permanent Court of Arbitration (ed.), 2009, para. 5.05.

[282] DELVOLVE/POINTON/ROUCHE, French Arbitration Law and Practice, 2009, para. 128.

[283] GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 492.

may be compelled to arbitrate despite not having signed the arbitration agreement.[284] As demonstrated above, even the arbitrators in the Dow Chemical case, regarded as the origin of the doctrine, have case relied on the parties' implied consent.[285]

189. The same is true for other French decisions extending the arbitration agreement to companies of the same group. Other well-known French case relating to group of companies and group of contracts is *Kis France v Société Générale*. This case arises out of a dispute involving a framework agreement for the commercialization of mini photographic laboratories in several countries and related agreements concluded by local subsidiaries for the execution of the principal agreement. In the arbitration the parties disputed the jurisdiction of the arbitral tribunal over non-signatories, which were eventually considered bound by the arbitration agreement.

190. The arbitrators found that the agreements were closely linked to each other and that the parent companies played a dominant role *vis-à-vis* their subsidiaries. In addition, the arbitral tribunal also found that it was the common intention of the parties to consider the non-signatories bound by the arbitration agreement. The decision of the arbitral tribunal was upheld by French Courts. The Court of Appeal of Paris stated that the group of companies doctrine is recognized under French law, but added further that the arbitrators did not rely only on the notion of group of companies, but rather their main finding was that the parties involved in the dispute intended by their agreements to carry out one economic operation by establishing a contractual unity.[286]

191. In addition, in ICC Case No. 11405 of 2001 where French law was applicable, the sole arbitrator confirmed the inexistence of a general rule regarding the extension of the arbitration to non-signatories and reaffirmed the necessity of the existence of consent.[287]

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[284] TYLER/KOVARSKY/STEWART, Beyond Consent: Applying Alter Ego and Arbitration Doctrines to Bind Sovereign Parents, *in:* Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, 2009, para. 5.07.

[285] See paras. 181 and 182 above. See also the interim award in ICC Case No. 15116 of 2008, Yearbook Comm Arb'n, XXXIX (2014), pp. 159-168.

[286] France Société Kis France et autres *v* Société Générale et autres, Paris Cour d'appel, 31 October 1989, Rev. Arb., Volume 1992(1), pp. 90-93.

[287] Interim award of 29 November 2001, Unpublished (Sole arbitrator, Paris). Quoted in HANOTIAU, Complex Arbitrations, 2006, p. 50, fn. 142: "*[t]here is no general rule, in French international arbitration law, that would provide that non-signatory parties members of a same group of companies would be bound by an arbitration clause, whether always in or in determined circumstances. What is relevant is whether all parties*

Further in 2007, the Court of Cassation held in *Alcatel v Amkor* that an arbitration agreement is binding on the parties that were directly involved in the performance of the underlying agreement.[288]

192. In 2008, an arbitral tribunal rejected the application of doctrine referring that the expression *group of companies* was not entirely accurate and stating that under French law it is not the existence of a group that results in the companies of the same group being bound by the arbitration agreement, but rather the "the fact that such was the true intention of the parties".

2. GROUP OF COMPANIES IN SWITZERLAND

193. Swiss law does not recognize the group of companies doctrine.[289] Under Swiss law, an agreement signed by a subsidiary is not sufficient to reverse the presumption that companies are independent legal entities and therefore only those who are party to the arbitration agreement can be obliged to arbitrate.[290]

194. In Switzerland, a party is not entitled to invoke the arbitration clause and cannot be joined into an arbitration solely because it belongs to the same group of a signatory.[291] According

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intended non-signatory parties to be bound by the arbitration clause. Not only the signatory parties, but also the non-signatory parties should have intended (or led the other parties to reasonably believe that they intended) to be bound by the arbitration clause … The legal literature confirms that what is relevant is whether the non-signatory parties were intended to be bound, rather than a general rule about a group of companies: '[c]learly, however, it is not so much the existence of a group that results in the various companies of the group being bound by the agreement signed by only one of them, but rather the fact that such was the true intention of the parties' (Fouchard, Gaillard, Goldman: On International Commercial Arbitration, The Hague, 1999, No. 500, p. 283)".

[288] Alcatel business systems (ABS) SA et al *v* Amkor technology et a., Cour de cassation - Première chamber civile, Arrêt nº 513 du 27 mars 2007, 29 March 2007: "Mais attendu que l'effet de la clause d'arbitrage international s'étend aux parties directement impliquées dans l'exécution du contrat et les litiges qui peuvent en résulter; que la cour d'appel, qui a relevé que les deux sociétés française filiales de la société Amko étaient intervenues pour l'agrément par la société AME, des micro-processeurs électroniques, en a exactement déduit que ces sociétés étaient en droit de se prévaloir, à l'égard de la société ABS et de son assureur subrogé, de la clause d'arbitrage stipulée au contrat liant leur société mère à la société AME."

[289] KAUFMANN-KOHLER/RIGOZZI, Law and Practice in Switzerland, 2015, para. 3.176; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., 2015, para. 574; BÄRTSCH/PETTI, The Arbitration Agreement, *in:* GIRSBERGER/VOSER (eds.), International Arbitration in Switzerland, 2nd ed., 2012, p. 35.

[290] KAUFMANN-KOHLER/RIGOZZI, Law and Practice in Switzerland, 2015, para. 3.176.

[291] In the Butec case, the Swiss Federal Tribunal upheld an arbitral award denying jurisdiction over a company of the same group. The Court rejected the application of the group of companies doctrine and stressed that a non-signatory of the same group cannot be bound by the arbitration agreement in the absence

to the Swiss Federal Tribunal's case law and literature, a non-signatory may be bound by the arbitration agreement if this reflects the parties' intentions in accordance with the principle of good faith. Indeed, there is no difference if the companies belong to the same group or not.[292]

195. In 2003, the Swiss Federal Tribunal rendered a landmark decision in which it concluded that a non-signatory should be bound by the arbitration agreement as the party participated in the performance of the contract.[293] In this case, three Lebanese companies entered into a construction agreement (X, Y and Z), which contained an arbitration clause providing for arbitration in accordance with the ICC Rules. The parties chose Lebanese law to govern the contract and Geneva as seat of the arbitration. When a dispute arose between the parties, the constructor Z initiated arbitral proceedings not only against the project owner Y and its agent X, but also against Mr. A, a businessman who had not signed the agreement. However, according to the claimant Z, Mr. A had participated actively in the negotiation and execution of the agreement. For this reason, the Federal Tribunal found that Mr. A should be bound by the arbitration agreement due to his participation in the performance of the agreement. The Court stated that Swiss law permits an extension based on the real intent of the parties and the principle of good faith.[294]

196. In 2008, the Swiss Federal Tribunal rejected the application of the group of companies doctrine.[295] The case concerned a construction agreement concluded between a company seated in Cyprus ("X") and a Company of Qatar ("Y"). Pursuant to the agreement entered into by the parties, X undertook to perform dredging works to install a refrigeration system

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of special circumstances showing that the non-signatory party induced a contracting party to believe that the non-signatory was bound by the arbitration agreement (Saudi Butec Ltd and Al Fouzan Trading and Contracting Co Ltd *v* Saudi Arabian Saipem Ltd and Saipem SpA, Federal Supreme Court, 29.01.1996, *in:* ASA Bull 3/1996, pp. 496-507). The Butec decision was analysed in ZUBERBÜHLER, Non-signatories and the Consensus to Arbitrate, 26 ASA Bulletin 1/2008, pp. 21-22; PATOCCHI, Switzerland, *in:* ICCA International Handbook on Commercial Arbitration, 2017, p. 28, fn. 46.

[292] VOSER, Multi-party Disputes and Joinder of Third Parties, *in*: VAN DEN BERG (ed.), 50 Years of the New York Convention - ICCA Conference, 2009, p. 370.

[293] X. S.A.L., Y. S.A.L. et A. *v* Z. Sàrl, Tribunal federal, Ire Cour Civile, 4P.115/2003, 16.10.03, *in: 22* ASA Bulletin, 2/2004, pp. 364-389.

[294] "*La possibilité d'une telle extension est d'ailleurs admise par le droit suisse sur le fondement de la volonté réelle des parties ou, à défaut, sur celui du principe de la bonne foi*."

[295] Swiss Federal Supreme Court. 4A_128/2008, 19.08.08, *in:* 26 ASA Bull. 4/2008, pp. 777-792. This decision was also addressed in SCHERER, Bank and Parent company guarantees in international arbitration, *in:* Revista Brasileira de Arbitragem e Mediação, 2009(22), pp. 147-155.

using seawater while Y assumed the obligation to pay the amount of USD 13'750'000 and provide X with a payment guarantee in the value of USD 7'500'000. The agreement contained an arbitration clause providing that all disputes should be finally settled before an ICC tribunal seated in Geneva in accordance with the Swiss law. The guarantee was given by Z, a parent company of Y and the guarantee agreement did not contain an arbitration clause. When a dispute arose between the parties, Y left invoices unpaid and X consequently requested the guarantee, which Z refused to pay.

197. Subsequently, X started arbitration proceedings against its contractual partner Y and the guarantor Z. Nevertheless, the arbitral tribunal decided in an interim award that it did not have jurisdiction over Z because the company was not a party to the construction agreement and the guarantee letter did not contain an arbitration clause.

198. The claimant initiated set aside proceedings in Switzerland, but the Swiss Federal Tribunal rejected the request. According to the Federal Court, Z did not become a party to the arbitration agreement contained in the main contract between X and Y just by assuming the guarantee. Moreover, the Federal Court stated that a simple reference to the main contract is not enough to consider that the guarantor should be bound by the arbitration clause contained thereto. The Federal Court even pointed out that there are some cases where the arbitration clause could bind parties that did not sign the agreement. According to the Federal Court, non-signatories are bound by the agreement if they have adhered to it by their acts, revealing their intention to become a consenting party. Nevertheless, the Federal Court took the view that this was not the case.

199. Swiss courts and arbitral tribunal sitting in Switzerland have applied the law of the seat to determine whether a non-signatory shall be bound by the arbitration agreement or not.[296] Accordingly, when the parties choose Switzerland as the arbitration seat, the scope and reach of the arbitration agreement is determined by Art. 178 (2) PILA.[297] This article sets forth that the arbitration agreement is valid if it confirms either (i) to the law chosen by the

[296] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 5.67.
[297] BLESSING, The Law Applicable to the Arbitration Clause, *in*: VAN DEN BERG (ed.), Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series, Volume 9 Issue, 1999, p. 178.

parties (specifically to govern the arbitration agreement)[298], (ii) or to the law governing the subject-matter of the dispute, in particular, the main contract, (iii) or to Swiss law. It suffices if the arbitration agreement is valid under one of the laws set out by Art. 178(2) PILA. This article constitutes a conflict-of-law rule, which follows a *favour validitatis* approach and has the purpose of avoiding disputes related to the substantive validity of the arbitration agreement.[299] This broad pro-arbitration rule ensures that the intention of the parties to submit the dispute to arbitration will be preserved.[300] By designating three alternative laws or connecting factors, the PILA seeks to reduce the possibility of challenges against the validity of the arbitration agreement.[301] It is disputed whether the Art. 178(2) PILA is a mandatory rule or whether it may be modified by the parties. Most Swiss commentators consider the rule of Art. 178(2) PILA as a mandatory provision.[302]

3. GROUP OF COMPANIES IN ENGLAND

200. In 2004, the group of companies doctrine was expressly rejected in England.[303] According to the English Commercial Court, the group of companies was "no part of English law".[304] The decision was rendered in setting aside proceedings to vacate an award filed by the Arkansas company Peterson Farms, condemned in an arbitration with seat in London to pay damages in favour of an Indian group of companies.

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[298] GIRSBERGER/VOSER, International Arbitration: Comparative and Swiss Perspectives, 3rd ed., 2016, paras. 354ff.

[299] GIRSBERGER/VOSER, International Arbitration: Comparative and Swiss Perspectives, 3rd ed., 2016, para. 356. Regarding Art. 182 (2) PILA, the commenators also state: "*It further reflects the Swiss legislator's pro arbitration bias, i.e., Switzerland's policy to support the validity of the arbitration agreement as much as possible*."

[300] ERK, Parallel Proceedings in International Arbitration, 2014, p. 86.

[301] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., 2015, para. 393.

[302] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland. 3rd ed., 2015, para. 394: "*We consider that the purpose of establishing a rule in favorem validitis, and the fact that the provision is addressed to the arbitral tribunal rather than to the parties, militates in favour of the conclusion that PILS, Art. 178 (2) should be included among the mandatory rules of the Swiss lex arbitri*."

[303] *Peterson Farms Inc. v C&M Farming Ltd* [2004] Arbitration Law Reports and Review (2004) ArbLR 50; 2004. See also Caparo Group Ltd *v* Fagor Arrasate Sociedad Coop. [2000] Arb. & Disp. Res. L.J. 254 (QB) (English High Ct.). PARK, Arbitration of International Business Disputes, 2004, p. 306; HEILBRON, A Practical Guide to International Arbitration in London, 2008, p. 29.

[304] Arbitration Law Reports and Review (2004) ArbLR 50; 2004 (1): 573-585; PARK, Arbitration of International Business Disputes, 2004, p. 306: "*English case law has soundly rejected the "Group of Companies" doctrine. Unambiguous evidence of agency will be required before related corporate entities can be bound to arbitrate in England."*

201. In this case, the respondent Peterson Farms concluded an agreement with the Indian company C&M, undertaking the obligation of selling live poultry. The male birds were used to breed with the female birds owned by the buyer and its related companies, to produce broiler chicks that would be later sold as chicks or hatching eggs. The C&M related companies were not parties to this agreement. Afterwards, it turned out that the poultry delivered by Peterson Farms was infected with an avian virus and consequently the buyer and its affiliated companies suffered losses. Since the underlying contract contained an ICC arbitration clause, the buyer and the other companies of the C&M group started arbitration proceedings against the seller claiming for damages. The seat of arbitration was in London and Arkansas law the applicable law. The arbitral tribunal rendered an award composed of two parts: in the first part, the arbitral tribunal granted the signatory C&M's request and awarded damages in the amount of US$1,222,448 for losses suffered by C&M itself; in the second part, the arbitral tribunal awarded US$5,524,769 for losses suffered by the non-signatory members of the C&M group, which, again, were not formally parties to the agreement.

202. The arbitral tribunal found to have jurisdiction over the non-signatories invoking the group of companies doctrine. In addition, the arbitral tribunal held that the buyer has acted as an agent of the other companies and, for this reason, the non-signatories should be considered as parties to the underlying contract and, consequently, to the arbitration clause. Nevertheless, the arbitral tribunal's reasoning was rejected by the English Commercial Court when the respondent challenged the arbitral award intending to set aside its second part that addressed the damages suffered by the other companies of the C&M group.

203. The English Court decided to vacate the second part of the award on the grounds that the "group of companies forms no part of English law" and there was no evidence that the signatory C&M had acted as an agent. It is important to note that the Court held that the application of the group of doctrine was a matter of substantive law; in this case, the law of Arkansas. The parties agreed during the arbitration proceedings that the application of the group of companies doctrine would be the same if the agreement was governed by English Law rather than Arkansas law. Hence, the court rejected the application of the doctrine on

the ground that the doctrine was not recognized under English law.[305] The Court highlighted that the question concerning the existence of an agency relationship was a matter of fact and was not supported by the submitted evidence.[306]

204. Nevertheless, it is worth noting that if English law governed the arbitration agreement, the non-signatories could fall under the scope of the arbitration agreement if there existed actual consent of the parties without need to apply the group of companies doctrine.[307] The arbitration agreement was in writing and could be considered valid in accordance with Section 5(3) of the Arbitration Act 1996.[308]

4. GROUP OF COMPANIES IN GERMANY

205. With regard to the group of companies, the German Federal Court of Justice (BGH) held that a non-signatory party could be bound by the arbitration agreement if so determined by foreign law.[309] The claimant, a company based in Denmark, filed a lawsuit before the German court against an Indian company. The claimant accused the respondent of presenting in the Hannover-Fair 2010 equipment covered by a patent owned by the claimant's sole shareholder and managing director. The Danish company was entitled to bring the action based on an assignment and litigation authorization declaration (*Abtretungs- und Prozessführungsermächtigungserklärung*) entered into with its parent company, the patent owner.

206. The respondent argued that it was the legal successor of B.I.P Ltd., another Indian company that had entered into a license agreement with I.P.H Ltd., a Mauritius company controlled by the patent owner. The patent owner represented I.P.H Ltd. at the conclusion of the licensee agreement with the Indian company. The agreement, which granted the licensor

[305] Peterson Farms Inc. *v* C&M Farming Ltd [2004] Arbitration Law Reports and Review (2004) ArbLR 50; 2004 (1): 573-585: "*In the context of the group of companies doctrine the agreement was that Arkansas law was the same as English law. As I have already said, English law treats the issue as one subject to the chosen proper law of the Agreement and that excludes the doctrine which forms no part of English law*." TWEEDDALE/TWEEDDALE, Arbitration of Commercial Disputes - International and English Law and Practice, 2005, para. 5.57; See BORN, International Arbitration - Cases and Materials 2015, pp. 566-570.
[306] Arbitration Law Reports and Review (2004) ArbLR 50; 2004 (1): 573-585.
[307] WOOLHOUSE, Group of Companies Doctrine and English Arbitration Law, Arb. Int'l 20(4), 2004, p. 442.
[308] WOOLHOUSE, Group of Companies Doctrine and English Arbitration Law, Arb. Int'l 20(4), 2004, p. 442. Art. 5(3) of the Arbitration Act 1996: Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.
[309] German Federal Supreme Court (BGH). III ZR 371/12.

B.I.P Ltd. the right to explore such equipment in Germany, contained an arbitration clause. Based on that arbitration clause, the respondent raised an objection alleging that the dispute should be referred to arbitration in New Deli in accordance with Indian law, as provided by the arbitration agreement.

207. The court of first instance rejected the objection and confirmed having jurisdiction over the case, as the claimant was not a party to the arbitration agreement. The respondent appealed, without success, to the Higher Regional Court, which dismissed the appeal on the basis that the group of companies doctrine was not recognized under Danish law and its application would violate the German public policy. It is worth noting that the German Court found that the Danish law would be the applicable law to determine whether the Danish company could be bound by an arbitration agreement that it had not signed.

208. Finally, the respondent resorted to the German Federal Court of Justice. The Court decided to set aside the judgment and referred the case back to the Higher Regional Court. According to the Federal Court, the regional Court did not take into account important elements that could lead to the conclusion that the non-signatories could be bound by the arbitration agreement. The Federal Court conducted a systematic conflict of law analysis and arrived at the decision that the issue, whether the patent owner and the claimant should be subject to arbitration, should be decided under the law applicable to the arbitration agreement. In addition, the Federal Court stated that in the absence of a specific agreement between the parties, the law governing the arbitration agreement should be the law of the seat of arbitration. In this case, the Indian law.

209. Moreover, the Court highlighted that German courts are not prevented from applying foreign law and should only abstain from doing so, if the potential result contradicts the fundamental principles of German law.[310] In order to ascertain this issue, it is important to analyse the concrete case, rather than assuming a violation of the German *ordre public* based on an abstract assumption. The Federal Court stated that this would not be the case,

[310] SCHWEDT/GROTHAUS, When Does an Arbitration Agreement Have a Binding Effect on Non-Signatories? The Group of Companies Doctrine vs. Conflict of Laws Rules and Public Policy, Kluwer Arbitration Blog. 30.07.2014.

because the patent owner is not only the assignor of the claim but was also involved in the conclusion of the arbitration agreement.[311]

5. GROUP OF COMPANIES IN BRAZIL

210. Brazilian courts have also been confronted with disputes concerning the effects of the arbitration agreement as to non-signatories where the arbitration agreement has been signed by other companies of the groups. These decisions are analysed below after an introduction to the legal treatment of corporate groups by the Brazilian law.

a. CORPORATE GROUPS UNDER BRAZILIAN LAW

211. With regard to corporate groups, Brazilian law was most influenced by the German legal system and also distinguishes between contractual and factual groups.[312] This nomenclatural differentiation does not derive from the text of the law, but corresponds to the denomination used by the literature.[313]

212. The corporate group formed by a contract is foreseen in Art. 265 of Law No. 6.404/76, which regulates stock corporations in Brazil. However, the provisions of Law No. 6.404/76 regarding corporate groups are also applicable to other types of companies, including the limited liability companies.[314] According to Art. 265, the controlling company and controlled companies may constitute a group by agreeing to combine efforts and resources in order to achieve their aims or to participate in common activities or projects. Accordingly, in a contractual corporate group, the companies establish between them a

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[311] SCHWEDT/GROTHAUS, When Does an Arbitration Agreement Have a Binding Effect on Non-Signatories? The Group of Companies Doctrine vs. Conflict of Laws Rules and Public Policy, Kluwer Arbitration Blog. 30.07.2014. This decision of the German Federal Court of Justice was also analysed in SACHS/NIEDERMAIER, Zur Group of Companiess Doctrine und der Auslegung der subjektiven Reichweite von Schiedsvereinbarungen – Welches Recht ist anwendbar?, *in:* EBKE/OLZEN/SANDROCK, Festschrift für Siegfried H. Elsing zum 65. Geburtstag, 2015, pp. 475-491.

[312] CAMPINHO, O Direito de Empresa, 12th ed., 2011, p. 315; REQUIÃO, Curso de Direito Comercial, 2 Vol., 29 ed., pp. 348-349.

[313] COUTO E SILVA, Grupo de Sociedades, *in:* Revista dos Tribunais, 1989, Vol. 27, p. 8; CAMPINHO, O Direito de Empresa, 12th ed., 2011, p. 315; REQUIÃO, Curso de Direito Comercial, 2 Vol., 29 ed., pp. 348-349; PRADO/TRONCOSO, An ise do fenômeno dos grupos de em empresas na jurisprudência do STJ" *in Revista de Direito Bancário,* 2008, No. 40, p. 103.

[314] VERÇOSA, Direito Comercial – Sociedade por Ações, Vol. 3, 3rd ed., p. 696; EIZIRIK, A Lei das S/A Comentada, vol. 3, Artigos 189 a 300, p. 520.

cooperation bond of an obligational nature.[315] Pursuant to Art. 265, §1, the holding company shall be constituted under Brazilian law and exercise direct or indirect permanent control over the controlled companies either due to its right as a shareholder or by agreement entered into with the shareholders of the other companies.

213. The contractual corporate group is considered to be formed only upon registration of the agreement with the commercial registry.[316] Pursuant to Art. 266 of Law No. 6.404/76, the relationship between the companies, their administrative structure and the subordination of the controlled companies' directors are to be set out in the agreement for the constitution of the group, but each company maintains its personality and distinct patrimony. Hence, the companies of the group are still legally independent entities and are, therefore, responsible only to their own obligations and not jointly liable.[317] As to the group itself, it forms in fact an economic unit, but the law does not vest it with legal personality.[318]

214. Aside from regulating the prerequisites for the constitution of a group, such as mandatory matters to be addressed in the companies' agreement, approval by the companies' shareholders and its registration with the commercial register, Law No. 6.404/76 contains provisions regarding, *inter alia*, remuneration of the directors of the group, financial statements, fiscal councils and rights of minority shareholders.

215. The detailed regulation concerning the contractual corporate groups results from the assumption that companies would prefer to formalize the constitution of contractual groups instead of forming factual groups.[319] However, it turned out that contractual groups are not only rare in Brazil, but also practically non-existent.[320] In fact, factual corporate groups can achieve the same end as contractual groups, so that a formalization of a control agreement turns out to be unnecessary. Consequently, there is a discrepancy between the law and the Brazilian reality.[321]

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[315] EIZIRIK, A Lei das S/A Comentada, vol. 3, Artigos 189 a 300, p. 519.
[316] Law 6.404/76, Art. 269.
[317] EIZIRIK, A Lei das S/A Comentada, vol. 3, Artigos 189 a 300, p. 522.
[318] EIZIRIK, A Lei das S/A Comentada, vol. 3, Artigos 189 a 300, p. 522; REQUIÃO, Curso de Direito Comercial, 2 Vol., 29 ed., p. 379.
[319] EIZIRIK, A Lei das S/A Comentada, vol. 3, Artigos 189 a 300, p. 520.
[320] EIZIRIK, A Lei das S/A Comentada, vol. 3, Artigos 189 a 300, pp. 519-520.
[321] EIZIRIK, A Lei das S/A Comentada, vol. 3, Artigos 189 a 300, p. 330.

216. A factual corporate group exists where a company exercises control over other companies, not due to the existence of a control agreement, but by equity interest, *i.e.* a controlling relationship does exist even if the legal requirements to constitute a formal group are not fulfilled.[322] Hence, factual corporate groups are those formed by parent companies and subsidiaries or affiliated companies in the absence of a formal agreement.[323] For instance, where a company holds the majority of the voting capital of the other company, there is in fact a controlling relationship despite the inexistence of formal agreement. A factual corporate group may also exist where there is no subordination between them, but they have the same shareholder or directors.[324]

217. In addition, under the terms of Arts. 278 and 279 of Law No. 6.404/76 Brazilian companies, whether or not under the same control, may also form a consortium with the objective of participating in a particular enterprise. Under Brazilian law, consortiums do not have a legal personality and there is no presumption of joint liability as companies' liabilities are defined in the consortium agreement.[325]

218. Brazilian law recognizes that separate companies may function as a single economic unity while retaining individual legal capacity. Furthermore, there is no statutory provision establishing legal consequences regarding the arbitration agreements entered into by them. Hence, there is no basis under Brazilian law to consider companies of the same group subject to the arbitration agreements entered into by other companies of the same group. As shown through the analysis of the Brazilian case law below, Brazilian courts do not consider *economic unity* alone as a conclusive factor for determining the subjective scope of the arbitration agreement.[326] This does not mean, however, that the fact that the companies act as a unity cannot be taken into account to establish the parties' implied consent and expectations under the principle of good faith.

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[322] COUTO E SILVA, Grupo de Sociedades, *in:* Revista dos Tribunais, 1989, Vol. 27, p. 10.
[323] NEGRÃO, Manual de Direito Comercial & de Empresa, 9 ed., 2012, p. 516.
[324] COUTO E SILVA, Grupo de Sociedades, *in:* Revista dos Tribunais, 1989, Vol. 27, p. 10.
[325] Even though a consortium does not have legal personality the agreement establishing the consortium shall be registered in the commercial registry. Art. 279 of Law No. 6.404/676 sets forth specific matters that the agreement is supposed to address, such as the name of the consortium, the object of the enterprise, the period of duration and the obligations and liabilities of the companies which form the consortium.
[326] See paras. 219ff.

b. BRAZILIAN CASE LAW CONCERNING COMPANIES OF THE SAME GROUP

219. As demonstrated below, the decisions rendered in Brazil in which the non-signatories were held bound by the arbitration agreement relied on the existence of consent to the arbitration. In none of these cases Brazilian courts extended the effects of the arbitration agreement to a party who had not signed the contract solely based on the fact that the companies were part of the same group.

i. *ANEL V TRELLEBORG*

220. In Brazil, the first decision dealing with the effects of the scope of the arbitration agreement over non-signatories is dated 2004 and arises out of the dispute between Anel *v* Trelleborg, often called in the literature as the *Trelleborg Case*.[327] In this case, Anel and Nelson Pacheco, both shareholders of a company called PAV transferred 60% of the company shares to Trelleborg do Brasil, the Brazilian holding of the Trelleborg group, which is ultimately controlled by the Swedish Trelleborg Industri AB. PAV then became to be called as Trelleborg PAV. The dispute between the parties arose when another company member of the Trelleborg group – Trelleborg Industri AB – acquired another Brazilian company AVS, which was producer of the same product line manufactured by Trelleborg PAV and its main competitor. Subsequently, Anel initiated court proceedings before the state court in Sao Paolo against Trelleborg do Brasil and the Swedish holding Trelleborg Industri AB in order to enforce the arbitration agreement and constitute the arbitral tribunal under the allegation that the acquisition of a competitor constituted a breach of *affectio societatis*.

221. Trelleborg Industri AB objected alleging that it was not a party to the arbitration agreement since only Trelleborg do Brasil had entered into the agreement with the claimant. The first instance court rejected such argument on the basis that Trelleborg Industri AB participated actively in the negotiation of the agreement. The decision also pointed out that all agreements entered by Trelleborg do Brasil have been concluded in Portuguese and English, which demonstrate that the interest of the Trelleborg group was not limited only to the Brazilian company of the group. Likewise, the arbitration clause also required the arbitration and documents to be submitted to the arbitrators should be in English. In view of

[327] Court of Appeal of São Paulo, Ap. 9193203-03.2002.8.26.0000, 7th Chamber of Private Law, 25.05.2006.

such circumstances, the judge concluded that the Trelleborg Industri AB was also bound by the agreement and the arbitration clause contained therein.[328]

222. Trelleborg appealed the decision, but the Court of Appeal of Sao Paulo upheld the first-instance judgement. It is noteworthy that the Court of Appeal neither mentioned the group of companies doctrine, nor emphasized the fact that the companies belonged to the same group, but rather based the decision on factual elements that showed the active role played by the Swedish company.[329] The Court highlighted that the non-signatory company was mentioned in the letter of intent, sent correspondence in English and Portuguese addressing the terms of the negotiation and demonstrated interest in the conclusion of the agreement. The Court of Appeal of Sao Paulo also took into consideration the fact that the respondents paid spontaneously the amount fixed in the award in favour of the claimant. It is noteworthy that the decision of first instance was dated in 2002, while the judgment of the appeal occurred only in 2006. Meanwhile, the arbitration commenced and finished with an award ordering the respondent to pay the amount of USD 4,000,000.00.

ii. *INTERMESA V AVG SIDERURGIA*

223. In a decision in 2011 the Court of Appeal of Minas Gerais adopted a more restrictive approach than that taken in the *Trelleborg* Case and considered that non-signatory was not bound by the arbitration agreement because it had not originally concluded the contract, which was entered into by an Irish member of the same group.[330] The Court of Appeal of Minas Gerais clearly held that the existence of a corporate group did not bear upon the subjective scope of the arbitration agreement.

224. The court proceedings have been initiated by Intermesa Trading Ltda. against AVG Siderurgia Ltda. based on the memorandum of understanding and a supply agreement for iron export concluded by the claimant and the respondent. The respondent, however,

[328] The decision in the first instance was rendered in 2002 and in the operative part the judge appointed the arbitrators, fixed Sao Paulo as the seat of the arbitration and made clear that the arbitrators would establish the procedural rules as well fix their own fees.
[329] GAGLIARDI, O avesso da forma: contribuição do direito material a disciplina dos *terceiros* na arbitragem (Uma análise a partir de casos emblemáticos da jurisprudência brasileira), *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, p. 208.
[330] Court of Appeal of Minas Gerais, Ap. 1.0024.03.137992-8/001, 13th Civil Chamber, 03.03.2011.

objected arguing that the dispute should be submitted to arbitration in accordance with the arbitration clause contained in a related agreement concluded between respondent, the Irish Intermesa Trading Limited and Miller and Company. The judge of first instance accepted respondent's objection and terminated the proceedings. Subsequently, claimant appealed to the Court of Appeal arguing that it was not a party to the contract containing the arbitration agreement and stressing that the memorandum of understanding concluded with respondent had a choice of forum clause (Rio de Janeiro).

225. The Court of Appeal of Minas Gerais overturned the first instance decision holding that arbitration agreements shall be interpreted restrictively since they limit the right of the parties to resort to national courts. In addition, the Court decided that despite the fact that the claimant pertained to the same group of companies of a signatory to the arbitration clause the claimant was not bound by the arbitration agreement as both companies were distinct from each other and the claimant had not signed the contract. Accordingly, the dispute should be resolved in Rio de Janeiro pursuant to the choice of forum clause.

226. The decision of the Court of Appeal of Minas Gerais is not immune to criticism. It is noteworthy that the Court adopted a formalistic approach towards arbitration by ruling that the arbitration clause should be interpreted restrictively. The Court did not seek to ascertain the existence of the consent to arbitration and refrained from assessing the correlation between the agreements. The Court could have reached the same (or a different) conclusion by assessing the parties' intent when celebrating the agreements and their arbitration and choice of forum clauses instead of assuming, without a further analysis, that the arbitration agreement should have no effect on the claimant due to a lack of signature. It is true that the fact that two companies are part of the same economic group is not *per se* a conclusive element to justify the "extension" of the arbitration agreement. Conversely, it is also true that the possibility that a non-signatory might be bound by the arbitration agreement is not automatically excluded just because the companies have separate legal personalities.

iii. *MATLINPATTERSON FUNDS V VRG*

227. In 2012, the Court of Appeal of Sao Paulo upheld the first-instance decision and rejected a request for setting aside an arbitral award rendered against two non-signatories. In this case,

the non-signatories were MatlinPatterson Global Opportunities Partners II LP and MatlinPatterson Global Opportunities Partners (Cayman), two private equity funds hereafter collectively called MatlinPatterson Funds.[331] The arbitration clause was included in a share purchase and sale agreement concluded in March 2007, whereby GTI S.A., a subsidiary of the Brazilian airline Gol Linhas Aéreas Inteligentes S.A. acquired VRG Linhas Aéreas S.A. from two indirect subsidiaries of the MatlinPatterson Funds, Varig Logística S.A. and Volo do Brasil S.A. The MatlinPatterson Funds have negotiated the agreement but they were not parties to it themselves. It is noteworthy that GTI during the proceedings was merged into VRG and the claimant in arbitration then became VRG.[332]

228. The contracting parties entered into several addenda to the share purchase and sale agreement, including *Addendum 5*, a one-page document that was signed by the MatlinPatterson Funds. Under *Addendum 5*, the MatlinPatterson Funds agreed not to compete with VRG or to invest in any of GTI and Gol competitors in the passenger airline market for a period of three years. It is to note that *Addendum 5* neither contained an arbitration clause nor a reference to the arbitration agreement in the underlying contract.

229. In December 2007, due to a disagreement over the adjustment to the purchase price, GTI initiated arbitration against the signatories Varig Logística S.A. and Volo do Brasil S.A., the MatlinPatterson Funds and other non-signatory called Volo Logistics LLC. Volo Logistics LLC was also a subsidiary of the MatlinPatterson Funds and, along with Brazilian investors, a parent company of the signatory Volo do Brasil S.A. It is also noteworthy that the Varig Logística S.A. was a subsidiary of Volo do Brasil S.A. Subsequently, the non-signatories objected to the arbitral tribunal's jurisdiction contending that they were not parties to the underlying contract and, therefore, neither to the arbitration agreement.

230. The arbitral tribunal unanimously decided to exclude Volo Logistics LLC from the arbitration. As to the MatlinPatterson Funds, the arbitral decided by majority to have jurisdiction over the MatlinPatterson Funds on the ground that the *Addendum 5* signed by the MatlinPatterson Funds was part of the of contractual relationship and all disputes

[331] Court of Appeal of Sao Paulo, Ap. 0214068-16.2010.8.26.0100, 2nd Commercial Chamber, 16.10.2012.
[332] The facts of the case and the decision are analysed in detail in VERÇOSA, Note - Matlinpatterson Global Opportunities Partners II L.P. e outra *v* VRG Linhas Aéreas S.A., Tribunal de Justiça de São Paulo, Apelação Cível nº 0214068-16.2010.8.26.0100, 16.10.2012, *in:* Revista Brasileira de Arbitragem, 2012(36), pp. 134-156.

arising out of it should be submitted to arbitration. Once rendered the final award in favour of VRG, respondents initiated set aside proceedings invoking several grounds for which the arbitral award should be annulled. However, the arbitral award was upheld in first and second instances. The analysis below is confined to the discussion concerning non-signatories.

231. In the first instance, the judge confirmed the arbitral tribunal's decision stating that the close relationship of companies had been perfectly analysed in detail in the award. He also stressed that the agreements have been structured in a way to fulfil the prerequisites set by Art. 181 of the Brazilian Aeronautical Code which established that the concession of air transport services was possible only to companies headquartered in Brazil, with at least 4/5 of the voting capital held by Brazilians and with Brazilian citizens holding exclusively officer positions. Hence, contrary to the Trelleborg decision, in the MatlinPatterson Funds case the fact that companies formed a group has been indeed taken into account. However, this was not the only ground relied upon to consider the non-signatories bound by the arbitration agreement. It was also highlighted that the MatlinPatterson Funds participated in the negotiation of the original agreements and signed the *Addendum 5* and therefore they became a party to the arbitration agreement.

232. The MatlinPatterson Funds appealed the decision, but the Court of Appeal of Sao Paulo upheld the decision of first instance. The Court of Appeal of Sao Paulo highlighted that the non-signatories signed the *Addendum 5*, which expressly provided that the *Addendum 5* amended the underlying agreement. The Court went further stating that non-signatories' attempt to avoid arbitration violated the principle of *venire contra factum proprium*. According to the Court, the MatlinPatterson Funds signed an addendum, which made express reference to a contract containing an arbitration clause and cannot contend that the non-signatories were not aware that they would be also bound by the arbitration agreement.

233. In conclusion, like the *Trelleborg case*, it is not possible to affirm that the MatlinPatterson Funds case applied the so-called group of companies doctrine. As explicated above, the reference to the fact that the companies were part of the same group was not *per se* the conclusive element. In addition, the judge of first instance also relied upon the context in which the companies have been constituted, *i.e.* to attend a requirement of the Brazilian law

concerning the concession of air transport services. However, it is worthy to mention that the framework in which the group of companies is inserted is an element to be carefully observed by arbitrators and national courts. In this case, even though the *Addendum 5* had not been signed, it would be acceptable to assume that the court would have reached the same conclusion. However, not merely due to the indirect ownership of the signatories by the non-signatories, but rather due to the fact that the MatlinPatterson Funds had negotiated the agreement and were not parties themselves just by virtue of law requirements.

234. In contrast, United State courts denied enforcement of the award against the Matlin Patterson Funds. The District Court of the Southern District of New York held that the non-signatories did not consent to the arbitration agreement by signing the *Addendum 5*.[333] The Court pointed out that *Addendum 5* refers only to the non-compete provision in the underlying agreement and no language within *Addendum 5* purports to obligate MatlinPatterson funds to other provisions contained therein. In addition, the Court took into account that the MatlinPatterson funds elected to limit their signature to the non-compete agreement in *Addendum 5*. The court also pointed out that even though the MatlinPatterson funds had agreed to arbitrate disputes over its non-compete agreement, the non-signatories had not agreed to arbitrate disputes concerning the purchase price, which arise under the Purchase and Sale Agreement, not signed by the MatlinPatterson funds. The United States Court of Appeals for the Second Circuit confirmed the decision of the district court.[334]

iv. *ITARUMÃ V PCBIOS*

235. Similar to the case between Intermesa and AVG[335], the Court of Appeal of Rio de Janeiro adopted in 2013 a restrictive approach towards the effects of an arbitration clause in relation to a non-signatory which was not a party to a shareholders' agreement containing an arbitration clause, but undertook obligations related to it. In this case, Ita Participações S.A. and Participações em Complexos Bioenergéticos S.A. ("PCBios") entered into a joint venture to establish Complexo Bionenergético Itarum - CBIO.[336] The

[333] VRG Linhas Aereas S.A. *v* MatlinPatterson Global Opportunities Partners II L.P., 11 CIV. 0198 MGC, 2014 WL 4928929 (S.D.N.Y. Oct. 2, 2014).
[334] VRG Linhas Aereas S/A *v* MatlinPatterson Global Opportunities Partners II L.P., No. 14-3906-CV, 2015 WL 3971177 (2d Cir. July 1, 2015).
[335] See paras. 223 ff above.
[336] Court of Appeal of Rio de Janeiro, Ap. 0329761-15.2011.8.19.0001, 19th Civil Chamber, 22.01.2013.

administration of the new company was subject to a shareholders' agreement with arbitration clause providing for ICC arbitration. The arbitration agreement, however, had been concluded only between Itarumã and PCBios.

236. When the dispute arose between the parties, Itar initiated arbitration proceedings not only against PCBios, but also against PCBio's shareholders Petrobr s Pe o Brasileiro S.A. and Mitsui & Co. Ltd. Ita contended that Petrobrás and Mitsui should be bound by the arbitration agreement since they have also assumed obligations related to the joint venture. The arbitral tribunal issued a partial award granting Itarum 's request. The arbitral tribunal stated clear that it was not piercing the corporate veil or applying the group of companies doctrine, but was compelling Petrobrás to arbitrate due to the fact that the company had undertook the obligations contained in the shareholders' agreement. Therefore, in the arbitral tribunal's view, the non-signatories were to be considered bound to the arbitration agreement even though they had not formally concluded the shareholders' agreement. In addition, the arbitral tribunal pointed out that the agreements had been concluded by the non-signatories' employees, which acted as PCBios' representatives. According to the arbitral tribunal, even though those employees were not acting on the non-signatories' behalf, they were aware of the existence of the arbitration agreement.

237. Petrobrás initiated court proceedings in order to set aside the award and succeed both in first and second instances. In the first instance, the arbitral award was partially set aside based on the reasoning that for an arbitration to be valid it is necessary the parties' consent and Petrobrás had not signed the arbitration agreement and for this reason there was no declaration of intent and, consequently, no consent.[337] The Court of Appeal of Rio de Janeiro also adopted a restrictive approach and upheld the decision of first instance. According to the Court, parties may be compelled to arbitrate only if they have expressly consented to the arbitration.

238. Notably, the Court of Appeal of Rio de Janeiro also concluded that the arbitration agreement clearly provided that the parties to the arbitration agreement were only PCBios

[337] The judge stated that parties may consent to the arbitration agreement by signing the terms of reference. However, in this case Petrobras made a reservation when it signed the terms of reference.

and its shareholders, as *Shareholders* (Acionistas) and *Company* (Sociedade) were capitalized in the arbitration agreement.[338]

239. The restrictive approach of the decision rendered by the Court of Appeal of Rio de Janeiro in this case is to be criticized as the Court departed from the wrong premise that there was no consent due to the lack of signature.[339] The Court turned a blind eye to the fact that parties can reach an agreement by virtue of implied consent and that there is no requirement under Brazilian law of express consent. This decision was not unanimous and the dissent court of appeal judge correctly stressed in her vote that the issue of "extending" the arbitration agreement to non-signatories is a question of identifying those parties who have consented to the arbitration agreement, either expressly or implicitly.

240. Notably, one can reach the conclusion that despite the involvement of a non-signatory in a contract containing an arbitration clause, the circumstances of the case do not support the existence of consent. In fact, it is possible that a contract provides for the involvement of non-signatories at the same time it clearly sets out that the non-signatories are not part of the arbitration agreement. However, in this particular case, the decision is problematic because it was based on the false premise that the non-signatory should not be bound because it had not signed the arbitration agreement and therefore the decision is technically incorrect, even though the Court of Appeal of Rio de Janeiro took the right approach in seeking the parties' consent rather than focusing on the corporate link between the parties.

v. *TOTALCOM V PRO BRASIL*

241. *Totalcom v Pro Brasil* is another case where the Court of Appeal of Sao Paulo considered a non-signatory bound by the arbitration agreement.[340] In an arbitration seated in Brazil, the arbitral tribunal found that it had jurisdiction over a non-signatory party that performed the

[338] The Court quoted the following part of the arbitration agreement: "*17.1.1 Exceto se de outra forma previsto neste ACORDO DE ACIONISTAS, toda e qualquer controvérsia, litígio, ou qualquer forma de conflito ou desavença de qualquer natureza surgida entre os ACIONISTAS e/ou a SOCIEDADE (doravante designada "CONTROVÉRSIA") decorrente deste ACORDO DE ACIONISTAS ou a ele relacionada será dirimida de acordo com as disposições deste Capítulo. [...]*".

[339] See also GAGLIARDI, O avesso da Forma: Contribuição do Direito Material à Disciplina dos *Terceiros* na Arbitragem (Uma análise a partir de casos emblemáticos da jurisprudência brasileira), *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, p. 213.

[340] Court of Appeal of Sao Paulo, AI 2075342-95.2014.8.26.0000, 28th Chamber of Private Law, 24.09.2014.

agreement. The dispute arose from a mutual obligation agreement concluded by Brazilian companies and governed by Brazilian law. The claimant Totalcom Comunicação e Participações S.A. initiated arbitration proceedings before CAM-CCBC against three respondents: Pro Brasil Propaganda Ltda., Euler Brandão and Júlio Alves. The respondents answered the request for arbitration requiring the joinder of Fischer América Comunicação Total S.A., a claimant's former subsidiary. Totalcom and Fischer objected arguing that the latter had not signed the agreement and therefore had not assumed any obligations towards respondents.

242. The arbitral tribunal held that Fischer should be considered a party to the arbitration agreement. Under the arbitral tribunal's view, Fischer has consented to the agreement, including the arbitration clause, by getting involved in its execution. The contract was not only fulfilled by Fischer, but also set out several obligations undertaken by the respondents towards Fischer. The arbitral tribunal considered that signature is not the only means to express consent and parties may also consent to the arbitration agreement by negotiating and performing the underlying agreement.

243. In addition, the arbitral tribunal pointed out that the companies belonged to the same group. Even after the partial spin-off of Totalcom, Fischer came to be controlled by another company whose majority shareholder was the same shareholder of the claimant Totalcom. According to the arbitral tribunal, the existence of a group of companies and the execution of the contract by Fischer reinforced the conclusion as to the existence of its consent to the arbitration clause.

244. Fischer initiated setting aside proceedings arguing lack of competence of the arbitral tribunal. Nevertheless, the Court of Justice of Sao Paulo dismissed the appeal on the grounds that under Brazilian law, the parties could not challenge the arbitral tribunal's decisions on its own jurisdiction before the final award.[341] Nevertheless, the Court affirmed that the arbitral tribunal considered that the non-signatory has assented to the agreement due to its active involvement in the contract's execution and found that the arbitrators' decision was correct.

[341] This understanding has been revoked by the new Code of Civil Procedure and the decision of the Superior Court of Justice (Superior Court of Justice, REsp. 1.519.041/RJ, 3rd Section, Rel: Min. Marco Aurélio Bellizze, 01.09.2015, See para. 468 below).

vi. *FERNANDO CORRÊA V GP CAPITAL*

245. In 2015, the Court of Appeal of Sao Paulo rendered another decision considering non-signatories bound by the arbitration agreement concluded by other members of the same group.[342] In this case, the question concerning non-signatories members of the same group has been better analysed than in the cases addressed above. In fact, for the first time a Brazilian Court expressly referred to the group of companies doctrine and clearly rejected its applicability.

246. The dispute arose out of a share purchase agreement, whereby the shareholders Fernando Corrêa Soares and Rodrigo Martins transferred the control of Imbra S.A. to Almeria Participações S.A. Almeria was a subsidiary of Baladare Participações S.A., which participated in the agreement as an assenting party. Baladare was controlled by Smiles LLC and the latter was controlled by GP Capital Partners V, LP.

247. GP Capital and Smiles have also been included in the arbitration initiated by Fernando Corrêa Soares and Rodrigo Martins.[343] After the arbitral tribunal issued an award in favour of claimants, GP Capital and Smiles filed a petition before Court of Sao Paulo seeking to set aside the award alleging that they were not parties to the arbitration agreement. However, the judge of first instance rejected non-signatories' request. The decision first made clear that express consent to the arbitration agreement is only required as to adhesion contracts and that the contract in dispute has been preceded by extension negotiation. In addition, the judge also stated that the acceptance to the arbitration agreement could be inferred from the parties' behaviour and this was exactly the case in dispute.

248. The decision of the first instance court upheld the arbitral tribunal's decision holding that the non-signatories had consented, and therefore were bound by the arbitration agreement. However, it is worth noting that the reasoning on the decision addresses mainly GP Capital, the ultimate parent company. According to the arbitral award and the court decision, GP

[342] Court of Appeal of Sao Paulo, Ap. 0035404-55.2013.8.26.0100, 1st Chamber of Commercial Law, 26.08.2015.
[343] It was also a party to arbitration proceedings Arbeit Gestão de Negócios Ltda., which had acquired the control of Imbra S.A. prior to the commencement of the dispute.

Capital financially assisted Imbra and was its indirect controller while the other subsidiaries in between were merely investment vehicles. It was also highlighted that before, during and after the conclusion of the agreement GP Capital was the company in charge of the negotiations. The executives of the GP Capital had negotiated the agreement, taken over the commercial direction and negotiated the transference of the control to Arbeit Gestão de Negócios Ltda.[344]

249. Aside from the participation in the negotiations and the factual control of GP Capital, it was also taken into account that GP Capital had signed an agreement undertaking responsibility for all obligations assumed in the share purchase agreement by Almeria, the signatory party. Furthermore, the decision of first instance also took into consideration that after the conclusion of the agreement, arbitration clauses have been included into the articles of association and shareholders' agreement of Imbra. According to the court decision, GP Capital required from the shareholders to submit disputes to arbitration and should be prevented from adopting a contradictory behaviour stating that the disputes before the acquisition were not subject to arbitration.[345]

250. GP and Smiles appealed attempting to revert the judgment of first instance, but the decision was upheld by the Court of Appeal of Sao Paulo. Initially, the Court stressed that the case was not about piercing the corporate veil, but rather it concerned whether the factual circumstances surrounding the negotiation of the contract allowed the extension of the arbitration agreement to non-signatories based on the principle of private autonomy.[346] Notably, the Court of Appeal of Sao Paulo stated that the question of whether the parties were bound or not by the arbitration agreement could not be resolved based on the group of companies doctrine. The Court of Appeal of Sao Paulo clearly confirmed that the fact that companies are part of the same group does not justify *per se* the extension of the arbitration agreement. According to the Court, this is a simplistic argument. The Court quoted Brazilian scholars defending the view that the "extension" of the arbitration agreement is an

[344] See fn. 343 above.
[345] It is to note that GP has not signed the shareholders' agreement.
[346] In this regard it shall be stressed that both docrines are totally independent, *i.e.* they are not confused with one another. As shown above, piercing the corporate veil is applicable based on fraud and the group of companies (assuming its independent existence) on consent. See MELO, Extensão da Cláusula Compromissória e Grupos de Sociedades na Prática da CCI, *in* Revista de Arbitragem e Mediação, 2013(36), p. 267.

issue to be decided in accordance with the parties' intent. The decision also referred to the Trelleborg and MatlinPatterson cases.[347]

c. NON-RECOGNITION OF GROUP OF COMPANIES IN BRAZIL

251. Despite the existence of decisions of Brazilian courts considering non-signatories as parties to the arbitration agreement in cases involving companies of the same group, such decisions neither refer to the group of companies doctrine nor are they simply based on the existence of an economic unit.

252. Brazilian Courts are reluctant to extend the effects of an arbitration agreement to non-signatories solely based on the fact that the companies are part of the same group. In other words, the fact that the companies are part of the same group is not *per se* a compelling element able to justify the extension of the arbitration agreement. According to Brazilian case law, parties that have not signed a contract containing an arbitration clause may rely on or be bound by the arbitration agreement only insofar as the circumstances of the case show the existence of expressed or implied consent.[348]

6. CONCEPTUAL PROBLEM OF THE GROUP OF COMPANIES DOCTRINE

253. The group of companies doctrine has been criticized for extending an arbitration agreement irrespective of the existence of consent. Nevertheless, this is a result of a misleading interpretation, as the group of companies doctrine is based at least in its origin on parties' consent.[349]

254. Contrary to what its title may insinuate, consent plays a decisive role in the application of the group of companies doctrine and the fact that companies pertain to the same group is not in and of itself enough to compel parties to arbitrate if they have not somehow

[347] See paras. 227ff. above.
[348] GAGLIARDI, O avesso da forma: contribuição do direito material a disciplina dos *terceiros* na arbitragem (uma analise a partir de casos emblematicos da jurisprudencia brasileira), *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, p. 218; MELO, Extensão da Cláusula Compromissória e Grupos de Sociedades na Prática da CCI, *in* Revista de Arbitragem e Mediação, 2013(36), p. 274.
[349] YOUSSEF, Consent in Context: Fulfilling the Promise of International Arbitration, 2012, p. 120; BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 5.10.

consented to it.[350] In order to justify the extension of an arbitration agreement to non-signatories, arbitral tribunals have almost invariably referred to the existence of implied consent of the non-signatory party based on its involvement with the contract.[351]

255. Assuming that the group of companies doctrine rests fundamentally on consent as shown by the analysis above, then it is questionable whether the doctrine really exists as an autonomous basis for binding non-signatories.[352] It may be correctly argued that the group of companies is not an autonomous basis for extending the arbitration agreement, but a factor to be taken into account to determine the parties' intent and this is, since it is in accordance with the consensual nature of arbitration.[353] The group of companies deals with the proper identification of the parties to a contract.[354] In addition, the doctrine cannot be used by arbitrators with the pursuit of sparing their effort to review and to analyse the facts of the case to determine if the non-signatories were or were not indeed parties to the arbitration agreement.[355]

256. When assessing whether a non-signatory shall be compelled, arbitral tribunals and courts have to proceed with caution.[356] It is also important that the companies have somehow participated in the contract, be it during its conclusion or its performance.[357] The subjective scope of the arbitration agreement has to be decided based on the factual elements of the case in order to prove the parties' consent or the absence of it.

257. It is noteworthy that Born defends the existence of the group of companies doctrine. In his view, companies of the same group can agree to be bound by the arbitration agreement

[350] WHITESELL, Multiparty Arbitration: The ICC International Court of Arbitration Perspective in Multiple Party Actions, *in:* Permanent Court of Arbitration (ed.), International Arbitration, 2009, para. 6.10.
[351] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 5.46.
[352] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 5.11.
[353] HANOTIAU, Complex Arbitrations, 2006, para. 105; TEPEDINO, Consensualismo na Arbitragem e Teoria do Grupo de Sociedades *in* Revista dos Tribunais, RT 903/9, 2011, republished in Obrigações e Contratos: Serviços e Circulação, TEPEDINO/FACHIN (eds.), Coleção Doutrinas Essenciais, vol. 6, 2011, p. 951.
[354] BADIA, Piercing the Veil of State Enterprises in International Arbitration, 2014, p. 71.
[355] WILSKE/SHORE/AHRENS, The "Group of Companies Doctrine" - Where is it heading?, 17 Am. Rev. Int'l Arb. 73 (2006), p. 73: The term group of companies has been a subject of criticism "*as it is suggested that it led to an oversimplification of the doctrine, which started to be used as a shortcut to bind non-signatories where the circumstances of a case required rather rigorous legal reasoning".*
[356] TEPEDINO, Consensualismo na Arbitragem e Teoria do Grupo de Sociedades *in* Revista dos Tribunais, RT 903/9, 2011, republished *in*: TEPEDINO/FACHIN (eds.), Obrigações e Contratos: Serviços e Circulação, Coleção Doutrinas Essenciais, vol. 6, 2011, p. 951.
[357] HANOTIAU, Complex Arbitrations, 2006, para. 206.

signed by one of the members of the group without becoming a party to the underlying agreement.[358] According to Born, the group of companies doctrine is based on the presumption that it is the desire of the whole group - when entering into a business transaction - that the arbitration agreements provide an efficient and centralized dispute resolution mechanism for all disputes.[359] For the author, the group of companies doctrine is a way of applying well-accepted principles of agency and implied consent to arbitration agreements, taking into account the parties' true intentions.[360] Accordingly, the group of companies would serve to justify the extension of the arbitration agreement to a non-signatory without considering such non-signatory a party to the main agreement based on the assumption that this was the intention of the entire group.

258. However, it is important to consider that even in this view, the parties' intent would play a fundamental role, as the group of companies would create the presumption of the intent of the parties to be bound by the arbitration agreement. This is actually not so different from what is suggested by those who affirm that the group of companies does not exist or does not subsist without the consent of the parties. The difference lies in Born's view on the fact that the group of companies would create a general presumption while the extension of the arbitration clause based purely on consent searches for the parties' intent taking into account the facts of the case.

259. Truthfully, it is questionable whether the conservative interpretation towards corporate identities and party autonomy would not lead to unsatisfactory conclusions.[361] It is necessary to consider whether the interpretation of the doctrine, inseparably connected with the consent of the parties, would not exclude a meaningful field of its application; especially, where the group is structured and acts deliberately to avoid the direct liability of certain companies.[362] In cases like this, it can be either difficult to demonstrate the real intention of the parties or to prove the existence of a fraud, situation that would induce the use of the piercing the veil doctrine.[363] Therefore, the group of companies could bridge this gap.

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[358] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1454.
[359] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1454.
[360] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1454.
[361] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1454.
[362] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1454.
[363] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1454.

260. Nevertheless, the assumption that an arbitration agreement binds all companies of the group may lead to an abuse of arbitration and to the setting aside of awards. In case of assumption that the group of companies doctrine does exist, it must be highlighted that its scope is very limited.[364] Furthermore, arbitral tribunals should avoid adopting controversial theories if they can reach the same outcome by examining carefully the circumstances of the case and deciding whether the parties' consent may be inferred or not.

261. Even if assumed that the group of companies doctrine is purely consensual, one cannot underestimate the significance of the Dow Chemical case in the development of international arbitration. Its importance does not lie in the creation of a non-consensual basis for extension of the arbitration agreement – which it does not create – but in adopting a more flexible approach with regard to the parties' implied consent.

7. APPLICABLE LAW TO GROUP OF COMPANIES DOCTRINE

262. In practice, discussions as to the application of the group of companies doctrine often raise preliminary questions concerning the applicable law.[365] Unfortunately, given that state courts of different jurisdictions have different approaches, case law does not provide a uniform answer as to which law should be applicable.

263. As examined above, decisions of French courts consider the group of companies doctrine as a matter of international principles, rather than a matter of national law. With regard to English law, in the *Peterson Farms case*, the English court considered the application of group of companies as a matter of substantive law.[366] Contrary to English Courts, the German Federal Supreme Court found that the law applicable to the arbitration agreement should be applied.[367] As to arbitrations in Switzerland, Art. 178(2) PILA provides for a

[364] DERAINS, Is there a group of companies?, *in:* HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, p. 142.
[365] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 5.58.
[366] Peterson Farms Inc. *v* C&M Farming Ltd [2004] Arbitration Law Reports and Review (2004) ArbLR 50 2004 (1): 573-585, TWEEDDALE/TWEEDDALE, Arbitration of Commercial Disputes - International and English Law and Practice, 2005, para. 5.57.
[367] German Federal Supreme Court (BGH). III ZR 371/12.

conflict-of-laws rule, which follows a *favour validitatis* approach.[368] In Brazil, the cases involving the extension of the arbitration agreement within a group of companies have not faced conflict of law issues and have purely relied on the existence of consent. These cases essentially involved Brazilian companies performing contracts in Brazil and governed by Brazilian law.

264. Arbitral tribunals and courts usually rely on the factual circumstances of the case to ascertain whether the non-signatories have consented to the arbitration agreement or not. Accordingly, the "extension" of the arbitration agreement is fundamentally a question of whether or not the party has consented to the arbitration agreement, *i.e.* whether there exists a valid arbitration agreement between the non-signatories and the signatories. As the existence of consent is a decisive element, the better view is that the applicable law to decide on non-signatory issues shall be the law governing the arbitration agreement.[369] The applicable law is therefore used as a benchmark to assess whether consent to arbitration agreement can be extracted from the non-signatories' behaviour.[370]

265. According to Hanotiau, the issue has to be resolved in terms of consent instead of determining whether the group of companies is recognized under a certain legal system or not.[371] By building the decision on the consent rather than on the applicable law, arbitrators avoid a conflict of laws approach and decide the scope of their jurisdiction directly by interpretation of the parties' intentions.[372]

266. Moreover, as stated above, the decisions concerning group of companies are normally based on consent in such a way that the mention to the group of companies doctrine could be dispensable. Except for special circumstances, it is not appropriate to invoke the group of companies doctrine if it is possible to come to the same conclusion by examining the

[368] GIRSBERGER/VOSER, International Arbitration: Comparative and Swiss Perspectives, 3rd ed., 2016, paras. 354ff.
[369] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1455.
[370] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 5.58.
[371] HANOTIAU, Groups of Companies in International Arbitration, *in:* LEW/MISTELIS (eds.), Pervasive Problems in International Arbitration, 2006, p. 281.
[372] YOUSSEF, The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration, *in:* VAN DEN BERG (ed.), The Next Fifty Years, ICCA Congress Series, Volume 16, 2012, p. 104.

facts of the case and thereby verifying the existence of consent: the cornerstone of the arbitration agreement.

H. CRITIC ON IMPLIED CONSENT

267. The analysis of the case law shows that courts and arbitrators still rely on the existence of consent when assessing the subjective of the arbitration agreement and are reluctant to extend the arbitration agreement in absence of parties' consent. Without an express agreement, courts and arbitral tribunals will often take into consideration the conduct of the parties as an expression of implied consent.[373] The assessment of the existence of implied consent is strongly based on factual elements and decided case by case.[374] Therefore, it is recognized that the question of the existence of consent is rather a matter of fact, than a matter of complicated legal issues.[375]

268. Nevertheless, even though multi-party arbitration issues revolve around the establishment of the existence of consent, it is not possible to affirm that this understanding is flawless and not subject to criticism.

269. Brekoulakis points out that the approach of non-signatory theories based on consent is at first in accordance with the consensual nature of the arbitration, but eventually reveals considerable inconsistences.[376] According to Brekoulakis, it is questionable if these fact patterns are able to safely prove the existence of parties' consent, especially because they are often related to the substantive terms of the contract and do not relate specifically to the arbitration clause.[377] Brekoulakis highlights that arbitral tribunals and courts occasionally presume consent based merely on the circumstance that the non-signatory was aware of the arbitration clause and therefore such legal theories may lead to the unjustifiable compromise of consent. [378] In fact, the involvement of a party in the performance of an

[373] HANOTIAU, Complex Arbitrations, 2006, para. 105.
[374] MOSES, The Principles and Practice of International Commercial Arbitration, 2nd ed., 2012, p. 38.
[375] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 793.
[376] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 6.65.
[377] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, paras. 6.66 and 6.67.
[378] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, paras 6.66 and 6.68.

agreement is sometimes not only regarded as evidence of implied consent, but rather as a substitute for consent.[379]

270. Brekoulakis concludes that implicit form of consent is not possible, but that implicit consent needs to be clear and evidenced in full.[380] The evidence has to show the true parties' intention with a certain degree of certainty instead of mere probability.[381]

271. The critic is legitimate. The consent to arbitrate is often inferred from the participation in the underlying agreement instead of more concrete elements indicating the parties' intention to submit the dispute to arbitration. Consequently, the consent to arbitration in the multi-party arbitration context can be considered somehow artificial or as fiction.[382]

272. There is no doubt that non-signatory issues pose a paradoxical controversy. On the one hand the restrictive approach towards the arbitration agreement does not meet the needs of complex commercial relations, whereas on the other hand it is crucial to safeguard the necessity of consent of the parties.[383] To require clear implied consent specifically to arbitration agreement can narrow the scope of the arbitration agreement in such a way that it would lead to undesirable results. This does not mean, however, that the mere involvement in the contract shall unconditionally bind non-signatories parties. The arbitrators and courts may still consider that the non-signatories parties have not consented to the arbitration agreement despite their involvement in the contract. In sum, arbitrators are entitled to consider that the parties have consented to the arbitration agreement by participating in the main contract, but they cannot quickly jump into that conclusion

[379] HANOTIAU, Complex Arbitrations, 2006, para. 76.
[380] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 6.89.
[381] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, paras. 6.66 and 6.90.
[382] BREKOULAKIS challenges the prevailing view that the non-signatory theories are based on consent and that such theories are nothing more than legal fictions (BREKOULAKIS, Parties in International Arbitration: Consent *v* Commercial Reality, *in:* BREKOULAKIS et al. (eds.), The Evolution and Future of International Arbitration, International Arbitration Law Library, 2016(37), pp. 119-160). However, as FELLAS points out, arbitration law is familiar with legal fictions as one of its fundamentals rests on a legal fiction: the separability presumption (Fellas, Comments on Parties in International Arbitration: Consent *v* Commercial Reality by Professor Stavros Brekoulakis, *in:* BREKOULAKIS et al. (eds.), The Evolution and Future of International Arbitration, International Arbitration Law Library, 2016(37), paras. 11-25 - 11.27.
[383] TEPEDINO, Consensualismo na Arbitragem e Teoria do Grupo de Sociedades *in* Revista dos Tribunais, RT 903/9, 2011, republished in TEPEDINO/FACHIN (eds.), Obrigações e Contratos: Serviços e Circulação, Coleção Doutrinas Essenciais, Vol. 6, 2011, p. 935.

without having carefully analysed the factual circumstances under which the contract was concluded.[384]

273. Notably, Youssef refers to a decline of the requirement of consent. In his view, the traditional concept of arbitration based exclusively on consent has been deeply altered.[385] According to the author, in cases involving multiple parties and contracts, the usual consensual analysis has been set aside leading to less- or non-consensual forms of arbitration.[386] In contrast, one may ask whether we are witnessing a flexibilization of the formalism or of the standard of the proof to prove consent, rather than a rupture of the arbitration's consensual nature. By reviewing the theories and principles commonly used to bind non-signatories, Hosking concluded conclusion that from a comparative law perspective, what might in principle appear as a distinction between jurisdictions is often simply a matter of how far a decision-maker is willing to go to find evidence of such consent.[387]

274. Furthermore, Hanotiau points out that decisions on non-signatory issues are rarely based on considerations such as equity or good administration of justice, but they take a contractual approach considering which parties fall within the subjective scope of the arbitration agreement, *i.e.* who has consented to the arbitration agreement, has adhered to it or is estopped from denying that it is not subject to the arbitration agreement.[388] Hanotiau further questions whether such issue is not a "false problem".[389] In this regard, according to

[384] It is noteworthy that BREKOULAKIS proposes a different approach to non-signatories issues shifting the focus from putative consent to the (i) scope of the dispute and (ii) the scope of the arbitration agreement (BREKOULAKIS, Parties in International Arbitration: Consent *v* Commercial Reality, *in:* BREKOULAKIS et al. (eds.), The Evolution and Future of International Arbitration, International Arbitration Law Library, 2016(37), paras. 8.139ff.). BREKOULAKIS`S proposal has been criticized. See FELLAS point out, arbitration law is no stranger to legal fictions as one of its fundamentals rests on e legal fiction: the separability presumption (Fellas, Comments on Parties in International Arbitration: Consent *v* Commercial Reality by Professor Stavros Brekoulakis, *in:* BREKOULAKIS et al. (eds.), The Evolution and Future of International Arbitration, International Arbitration Law Library, 2016(37), pp. 199-208 and VOSER, The Swiss Perspective on Parties in Arbitration: Traditional Approach with a Twist regarding Abuse of Rights" or "Consent Theory Plus", *in:* BREKOULAKIS et al. (eds.), The Evolution and Future of International Arbitration, International Arbitration Law Library, 2016(37), paras. 9.82ff.

[385] YOUSSEF, Consent in Context: Fulfilling the Promise of International Arbitration, 2012, p. 5.

[386] YOUSSEF, Consent in Context: Fulfilling the Promise of International Arbitration, 2012, p. 55.

[387] HOSKING, Non-signatories and International Arbitration in the United States: the Quest for Consent, Arb. Int'l 20(3), 2004, p. 293.

[388] HANOTIAU, Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law, *in:* VAN DEN BERG (ed.), International Arbitration: Back to Basics?, ICCA Congress Series, 2007(13), p. 358.

[389] HANOTIAU, Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law, *in:* VAN DEN BERG (ed.), International Arbitration: Back to Basics?, ICCA Congress Series, 2007(13), p. 358.

Zuberbühler when courts and arbitral tribunals analyse whether a non-signatory may invoke an arbitration agreement or be compelled to arbitrate they tend to follow these steps: (i) ascertain the parties' express or implied consent, (ii) analyse whether the non-signatory's conduct have led the non-signatory to believe in good faith that the non-signatory was bound by the arbitration agreement and (iii) establish if there was an abuse of rights or fraud by the non-signatory.[390]

IV. PARTIAL CONCLUSION

275. The parties' consent is still the prevailing criterion to determine the subjective scope of the arbitration agreement in international arbitration, including in Brazil. In order to determine whether a non-signatory may be subject to arbitration, arbitrators and courts shall first analyse whether the non-signatory can be considered a party to the arbitration agreement by application of contractual and corporate principles such as agency, assignment and succession. Where no contractual or corporate principle is applicable, it shall be considered whether the non-signatory has implicitly consented to the arbitration agreement or whether such non-signatory should be prevented from denying that it is not a party to the arbitration agreement based on the principle of good faith.

276. With regard to the group of companies doctrine, the decisions rendered by Brazilian courts are in line with the international practice. In Brazil, no decision considering non-signatories bound by the arbitration agreement based on the group of companies doctrine or merely on the existence of an economic unit. According to the Brazilian case law, parties that have not signed a contract containing an arbitration clause may rely on or be bound by the arbitration agreement only insofar as the circumstances of the case evidence the existence of consent, express or implied.

277. The group of companies doctrine has been criticised for being a basis to extend an arbitration agreement irrespective of the existence of parties' consent. Nevertheless, this conclusion is a result of a misleading interpretation. The analysis of international case law purportedly relying on the group of companies doctrine shows that in order to determine the subjective scope of the arbitration agreement such decisions rely on the existence of

[390] ZUBERBÜHLER, Non-signatories and the Consensus to Arbitrate, 26 ASA Bulletin 1/2008, p. 32.

consent rather than merely on the corporate relationship between the parties. The fact that the companies pertain to the same group is not able *per se* to justify the extension of the arbitration agreement where there is no consent, but it is an element to be taken into account to infer the existence of parties' consent.

278. In Brazil, in the landmark decision relating to the scope of the arbitration agreement and companies of the same group (*Trelleborg case*), the arbitration clause was not "extended" to a company of the same group due to the fact that signatory and non-signatory were part of the same group, the decision was rather based on the non-signatory's active behaviour of the non-signatory with the agreement.[391] Economic consequences of the existence of a group of companies have not been taken into account. Hence, the Court of Appeal of Sao Paulo would likely draw the same conclusion if the case involved a non-signatory that was not a member of the same group. For that reason, there is no basis to argue that the group of companies is recognized by the Brazilian courts based on the *Trelleborg case*. The subsequent decisions on the issue have reaffirmed the existence of consent as the overriding principle to determine whether non-signatories may be bound by arbitration agreement.

[391] TEPEDINO, Consensualismo na Arbitragem e Teoria do Grupo de Sociedades *in* Revista dos Tribunais, RT 903/9, 2011, republished *in:* TEPEDINO/FACHIN (eds.), Obrigações e Contratos: Serviços e Circulação, Coleção Doutrinas Essenciais, Vol. 6, 2011, p. 951.

CHAPTER 3: MULTI-CONTRACT ARBITRATION

279. Complex contractual transactions involving multiple contracts may impact the unity of an arbitration by giving rise to parallel arbitrations.[392] Complex contracts nowadays contrast with the classic theory of contract based on the assumption of complete independence of a contract from the others provided they do not share a formal link.[393] The parties frequently enter into a principal agreement surrounded by complementary contracts.[394] Consequently, disputes recurrently arise out of more than one contract, giving rise to multi-contract arbitrations.

280. There are two possibilities from which a multi-contract arbitration may arise: either from a single arbitration concerning disputes from more than one agreement or as a result of the consolidation of two or more arbitrations involving interrelated agreements.[395] This chapter examines only the first scenario, *i.e.* to what extent an arbitration agreement may encompass disputes arising from interrelated agreements. The second scenario arising out of consolidation also raises procedural issues and for this reason will be addressed in the second part of this dissertation.

I. INTRODUCTION TO THE PROBLEMATIC

281. Arbitrations often arise from disputes involving more than one agreement. For instance, two parties may enter into several agreements coexisting with each other or enter into successive agreements substituting or amending one another.[396] Multi-contractual transactions may also involve more than two parties, ranging from horizontal contractual relationships in which an employer enters into agreements with several contractors, to

[392] LEBOULANGER, Multi-Contract Arbitration, *in:* Journal of International Arbitration (1996)(4), p. 43.
[393] LEBOULANGER, Multi-Contract Arbitration, *in*: Journal of International Arbitration (1996)(4), p. 46.
[394] POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed., 2007, para. 308.
[395] SILVA ROMERO/WHITESELL, Multiparty and Multicontract Arbitration: Recent ICC experience, in ICC International Court of Arbitration Bulletin, Special Supplement 2003 – Complex Arbitration, p. 14.See *e.g.,* Rule 6 SIAC Rules on multiple contracts.
[396] HANOTIAU, Multiple Parties and Multiple Contracts in International Arbitration, *in:* Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, Permanent Court of Arbitration (ed.), 2009, para. 2.67.

vertical situations in which there are chains of contracts and subcontracts.[397] Like multi-party arbitration, multi-contractual proceedings also encounter difficulties resulting from the fact that international arbitration has been originally tailored to the traditional two-party model of dispute involving a single contract.[398]

282. The jurisdiction of the arbitral tribunal should not be an issue where contracts are interrelated and the parties have expressly agreed that they are covered by the same arbitration agreement. Jurisdictional objections are likely to arise where one of the contracts does not contain an arbitration agreement or a reference to a document in which an arbitration agreement is included.[399] In such a case, arbitrators shall establish whether the arbitration agreement contained in one contract might encompass disputes arising from related agreements.

283. In order to decide on such jurisdictional objections, arbitrators have to look into the parties' intent, *i.e.* they are supposed to analyse whether or not the parties intended to submit all disputes to the same arbitration. Where the arbitrators are unable to establish the common intent of the parties, they must ascertain the parties' putative intention by examining the relationship between the contracts and their dispute resolution provisions.[400] Accordingly, the principle of private autonomy is the main obstacle to extending the objective effects of an agreement.[401] In other words, consent lies at the heart of multi-contract arbitration.

284. To properly analyse the role played by consent in multi-contract arbitration, this chapter will first address the arbitration agreement by reference, *i.e.* where there is a direct indication that the disputes from an agreement fall within the scope of an arbitration agreement contained in another contract. Thereafter, the chapter will analyse the issue of whether and to what extent an arbitration agreement may cover disputes arising from related agreements in absence of an express or implied reference. Commentators and case

[397] HANOTIAU, Multiple Parties and Multiple Contracts in International Arbitration, *in:* Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, 2009, para. 2.66.
[398] LEBOULANGER, Multi-Contract Arbitration, *in*: Journal of International Arbitration, Vol. 13(4), 1996, p. 43.
[399] GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 523.
[400] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland. 3 ed., 2015, para. 514.
[401] GAGO/FERNANDES, Extensão Objetiva da Cláusula Arbitral, *in:* Revista Brasileira de Arbitragem, 2014(43), p. 47.

law often use the term *group of contracts* to refer to the latter scenario and the term is used in its broadest sense for the purposes of this dissertation.[402]

II. TERMINOLOGICAL CAVEAT

285. Literature and case law use and refer to the concept of group of contracts or group of contracts doctrine. However, there is no uniform definition of what should be understood as a group of contracts.[403]

286. In this dissertation, group of contracts is used in its broadest sense, *i.e.* it encompasses all those agreements somehow related that the parties might intend to submit to the same arbitration irrespective of the type of link between them. The use of the expression in its broadest meaning favours a flexible analysis of the issue and therefore it is in line with the pragmatic approach adopted in this dissertation, whose aim lies in assessing the extent of the consent in multi-contract arbitration irrespective of narrower dogmatic definitions.

287. In addition, it is important to note that the expression *group of contracts* in this context has a broad connotation and shall not be confused with substantive law concepts, in particular with the idea of *related agreements.*[404] Even though multi-contract disputes often arise from such *related agreements*, it is important to stress that there are scenarios that go beyond this definition. This is true where agreements are not dependent from each other, but linked by the same arbitration agreement as a result from the parties' intent.

288. Notably, in the context of arbitration, the threshold to find that disputes from different agreements can be brought to the same arbitration is not as high as the threshold for finding

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[402] See paras. 285ff.

[403] In a decision of 2016, the Swiss Federal Court expressly referred to a *group of contract theory*: "*En application de la théorie du groupe de contrats, lorsque plusieurs contrats se trouvent dans une relation de connexité matérielle, tels le contrat-cadre et les différents contrats qui s'y rattachent, mais qu'un seul d'entre eux contient une clause d'arbitrage, il y a lieu de présumer, à défaut d'une règle explicite stipulant le contraire, que les parties ont entendu soumettre également les autres contrats du même groupe à cette clause d'arbitrage (WYSS, op. cit., n. 117 à 119)*". The Court's definition referred to the article written by Lukas Wyss: Aktuelle Zuständigkeitsfragen im Zusammenhang mit internationalen kommerziellen Schiedsgerichten mit Sitz in der Schweiz, Jusletter of June 25, 2012, n. 8/9, Rn. 119-117. However, both the Court and the author left open what should be understood as "*relation de connexité matérielle".*

[404] See paras. 289ff.

"purposes. Put differently, arbitral tribunals can decide that the parties' have agreed on a single means of dispute resolution even though the agreements do not have a unique purpose and do not fall within the category of *related agreements.*

III. CONTRATOS COLIGADOS (*RELATED AGREEMENTS*)

289. Brazilian law recognizes the existence of *contratos coligados*, hereinafter referred to as *related agreements*.[405] The term in its broader sense is used to refer to those contracts that are somehow related and form a unique economic operation.[406] According to Marino, *related agreements* can be defined as those that find themselves in a unilateral or reciprocal dependent relationship by force of law, accessory nature of one contract or intent of the parties.[407]

290. Xavier Leonardo uses a different classification and terminology. According to the author, *related agreements* can be divided into agreements interrelated (i) by force of law, (ii) by an express provision and (iii) linked agreements (*contratos conexos*).

291. Linked agreements are those contracts that are not linked by force of law or by virtue of an express contractual provision, but are interrelated because they share a "functional and economic link".[408] Linked agreements can be subdivided into linked agreements *strictu sensu* (regular commercial contracts) and *rede de contratos*. In the case of *rede de contratos* there is a large-scale network of consumer agreements systematically organized. Hence, the link is not only functional and economic, but it also systematic.[409]

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[405] This topic is surrounded by terminological confusion. For instance, whereas some authors refer to *contratos coligados*, others refer to *contratos conexos.* Some commentators use the term *contratos conexos* to refer to a subespecie of *contratos coligados.* It goes beyond the scope of this dissertation to address critically which terminology is more accurate. Terminological distinctions in this regard have no impact when it comes to the analysis of the scope of the arbitration agreement. To delve deeper in this subject, see *e.g.,* MARINO, Contratos Coligados no Direito Brasileiro, 2010; XAVIER *LEONARDO*, Contratos Coligados, *in:* BRANDELLI (ed.), Estudos em homenagem à Professora Véra Maria Jacob de Fradera, 2013; KONDER, Contratos conexos: grupos de contratos, redes contratuais e contratos coligados, 2006, p. 189.

[406] XAVIER LEONARDO, Contratos Coligados, *in:* BRANDELLI (ed.), Estudos em homenagem à Professora Véra Maria Jacob de Fradera, 2013, p. 3; BERGSTEIN, Conexidade Contratual, Redes de Contratos e Contratos Coligados, *In:* Revista de Direito do Consumidor 2017(109), p. 160.

[407] MARINO, Contratos Coligados no Direito Brasileiro, 2010, p. 99.

[408] XAVIER LEONARDO, Contratos Coligados, *in* BRANDELLI (ed.), Estudos em homenagem à Professora Véra Maria Jacob de Fradera, 2013, p. 14.

[409] XAVIER LEONARDO, Contratos Coligados, *in*: BRANDELLI (ed.), Estudos em homenagem à Professora Véra Maria Jacob de Fradera, 2013, p. 17.

292. Konder highlights the difficulty in reaching a definition able to encompass the great variety of scenarios in which the contracts may be considered linked to each other.[410] However, Konder points out that a common element in almost all definitions is the *functional nexus* between the agreements, *i.e.* the contracts serve a *further purpose* beyond their individual function and therefore they shall have to be interpreted together and not isolated.[411]

293. In fact, there are numerous possibilities to classify several forms of interconnected agreements. Nevertheless, when it comes to arbitration, a deep theoretical analysis of the nature of the link between contracts is less helpful than a pragmatic and simple approach according to which agreements shall be considered as interrelated whenever the parties envisaged a single economic operation.[412] Hence, the general rule is that the arbitration clause shall encompass disputes arising from connected agreements when there is no incompatibly between the dispute resolution provisions.[413]

294. However, the mere fact that the contracts are related and have the same economic goal does not necessarily mean that disputes arising from all contracts might be brought to the same arbitration. In a decision in 2015, the Superior Court of Justice considered that the connection between the agreements and the relationship of dependence between them does not exclude their individuality and autonomy.[414] The focus of this dispute was not on the objective scope of the arbitration clause, but rather on whether a party of a related agreement could be joined to an arbitration arising out of a contract to which it was not a party. This is a good example of how multi-party and multi-contract issues can be intertwined, as in order to decide whether a party could be joined in the arbitration, the arbitral tribunal had to address first the objective scope of the agreements in dispute.

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[410] KONDER, Contratos conexos : grupos de contratos, redes contratuais e contratos coligados, 2006, pp. 180-181.
[411] KONDER, Contratos conexos: grupos de contratos, redes contratuais e contratos coligados, 2006, p. 181. See also XAVIER LEONARDO, Contratos Coligados, *in* BRANDELLI (ed.), Estudos em homenagem à Professora Véra Maria Jacob de Fradera, 2013, p. 14.
[412] GAGO/FERNANDES, Extensão Objetiva da Cláusula Arbitral, *in:* Revista Brasileira de Arbitragem, 2014(43), pp. 55-56.
[413] GAGO/FERNANDES, Extensão Objetiva da Cláusula Arbitral, *in:* Revista Brasileira de Arbitragem, 2014(43), pp. 55-56.
[414] Superior Court of Justice, REsp. 1.519.041/RJ, 3rd Section, Rel: Min. Marco Aurélio Bellizze, 01.09.2015.

295. In this case, Companhia Pernambucana de Gás (Copergás) entered into a gas supply agreement with Petrobrás (*upstream agreement*), which included an arbitration clause. Termopernambuco S.A. was an assenting party to this upstream agreement. In parallel, Copergás concluded an agreement with Termopernambuco S.A (*downstream agreement*) and Petrobrás was an assenting party to this downstream agreement. Through this contractual structure, Copergás acquired natural gas from Petrobrás in order to sell it to Termopernambuco. Due to a change in the business structure, the downstream operation became subject to VAT and such tax amounts have been passed on to Termopernambuco by Copergás. Termopernambuco disagreed and initiated arbitration proceedings against Copergás, which, in turn, requested the joinder of Petrobrás. The arbitral tribunal recognized that the contracts were interrelated (*coligados*), but rejected Coperg s' request.

296. The arbitral tribunal found that even though the contracts were indeed connected, Petrobrás did not assume any obligation under the downstream contract in dispute and the obligations of each contract were limited to the respective contracting parties. The arbitral tribunal highlighted that multi-contract arbitration is not a compulsory consequence of related agreement. The arbitral tribunal stated further that the particular circumstances under which the agreements were concluded, their wording and the consensual nature of the arbitration did not lead to the conclusion that Petrobrás should be a party to the arbitration. In addition, it was stressed that the dispute was only about the downstream agreement and the effects of the arbitral award would not affect the upstream agreement or have impact on Petrobrás. The Superior Court of Justice upheld the award.

IV. ARBITRATION AGREEMENT BY REFERENCE

297. Arbitration agreement by reference occurs when a contract makes a reference to a separate and pre-existing agreement or document containing an arbitration clause.[415] The document containing the arbitration clause does not need to be an agreement; it may be, for instance, general terms and conditions, sales and conditions of a supplier, statutes, etc.[416] As demonstrated above, the fact that the arbitration agreement has been included in another

[415] POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed., 2007, para. 213; KAUFMANN-KOHLER/RIGOZZI, Law and Practice in Switzerland, 2015, para. 3.83; STEINGRUBER, Consent in International Arbitration, 2012, para. 8.16.
[416] POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed., 2007, para. 213.

document does not affect the validity of the arbitration agreement (separability presumption).[417]

298. The reference may be specific or global. A specific reference exists where the reference has an express indication particularly to the arbitration agreement inserted in the separate document.[418] A global reference is a general reference to a document containing an arbitration clause.[419] To be valid, an arbitration agreement incorporated by reference has to fulfil formal and substantive requirements.[420]

A. ARBITRATION AGREEMENT BY REFERENCE AND REQUIREMENTS OF FORM

299. As to formal requirements, the fact that the arbitration agreement is contained in a separate document does not affect its validity. The principle of the autonomy of the arbitration agreement does not require the inclusion of the arbitration agreement to be within the same document.[421] The Brazilian Arbitration Act expressly recognizes the possibility of arbitrations agreement by reference. According to Art. 4, §1, the arbitration agreement shall be in writing and can be included in the contract or into a separate document to which it refers.[422] It suffices if the arbitration agreement is simply evidenced in a separate document. At an international level, the New York Convention does not address the arbitration agreement by reference.[423] However, it is common ground in virtually all jurisdictions that arbitration clauses may be incorporated by reference. Therefore, Brazilian law is in accordance with international practice.

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[417] See paras. 87 ff.
[418] HUBER, Arbitration Clause by Reference, *in:* BLESSING (ed.), The Arbitration Agreement - Its Multifold Aspects, ASA Special Series No. 8, 1994, p. 178.
[419] VON SEGESSER/GEORGE, Swiss Private International Law Act (Chapter 12), *in:* MISTELIS (ed.), Concise International Arbitration, 2nd ed., 2015, p. 1196.
[420] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland. 3rd ed., 2015, para. 452.
[421] GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 492.
[422] As shown above, signature is not a precondition for formal validty of the arbitration agreement. See paras. 73ff.
[423] In this regard, BORN points out that despite the silence of the New York Convention on incorporated arbitration agreements, there were commentators and even decisions considering that the New York Convention required that the reference should be specific. This view has been however abandoned. According to BORN: "*There is nothing in the text or legislative history of the Convention that would suggest an effort to prescribe mandatory terms by which arbitration agreements may be incorporated. In fact, the correct view of the Convention is the opposite – that Art. II forbids Contracting States from imposing automatic "specific" reference requirements to international arbitration agreements*" (BORN, International Commercial Arbitration, 2nd ed., 2014, p. 820.

B. ARBITRATION AGREEMENT BY REFERENCE AND SUBSTANTIVE VALIDITY

300. The main issue relating to the validity of the arbitration agreement by reference relates to its substantive validity, *i.e.* whether the parties have consented to the arbitration clause of a separate document.[424] In this regard, no difficulty arises if the related agreements refer expressly to the arbitration clause contained in the main contract.[425] In these circumstances, there is no doubt as to the intention of the parties to submit the ancillary contracts to arbitration. The analysis of the substantive validity becomes more problematic where there is a global reference. In this case, it may become necessary to resort to contractual interpretation in order to examine whether or not this reference fulfils the requirement of consent.[426]

301. Where there is no express reference to the arbitration agreement or even to the underlying contract at all, courts and arbitrators tend to decide on a case-by-case basis to decide if the arbitration clause contained in one agreement covers disputes arising from interconnected agreements.[427] It is important to consider that an arbitration agreement by reference is a matter of consent rather than of form.[428]

302. A party may argue that it was not aware that the agreement contained a reference to a document containing an arbitration clause.[429] In this case, the party will contend that the consent requirement was not fulfilled and therefore the arbitration agreement is invalid. In such cases, the mere reading of the contracts is unlikely to suffice in determining whether the parties have consented to the arbitration agreement or whether consent might be

[424] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland. 3rd ed., 2015, para. 455.
[425] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland. 3rd ed., 2015, para. 456.
[426] BÄRTSCH/PETTI, The Arbitration Agreement, *in:* GIRSBERGER/VOSER (eds.), International Arbitration in Switzerland: A Handbook for Practitioners, 2nd ed., 2012, p. 32; GIRSBERGER/VOSER, International Arbitration: Comparative and Swiss Perspectives, 3rd ed., 2016, para. 291; MÜLLER, Art. 178 PILS, *in*: ARROYO (ed.), Arbitration in Switzerland, The Practitioner's Guide, 2013, p. 68, para. 61.
[427] KAUFMANN-KOHLER/RIGOZZI, Law and Practice in Switzerland, 2015, para. 3.85.
[428] GIRSBERGER/VOSER, International Arbitration: Comparative and Swiss Perspectives, 3rd ed., 2016, para. 347.
[429] HANOTIAU, Complex Arbitrations, 2006, para. 58. The experience of the parties is an element that to be taken into account. Even though the existence of experience is not *per se* conclusive, if the parties are familiar with a certain sector, a global reference is normally sufficient to conclude that the party consented to the arbitration agreement. Difficulties may arise where one of the parties does not have enough experience. In such a case, the assessment of consent will require a more detailed analysis. See BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland. 3rd ed., 2015, paras. 457 and 458.

inferred. Hence, arbitrators are to analyse the factual circumstances surrounding the case. For instance, whether the parties are sophisticated parties or whether the arbitration clause is in accordance with the practice in certain fields.[430]

303. Let us assume an international contract whereby a Brazilian company acquires dredging equipment for offshore mining from a company based in Norway. It is possible that the parties will in this case enter into a contract specifying only the price and the products without dealing further details, as the contract will have a reference to extensive seller's general conditions, which will likely contain an arbitration clause. In such situations, buyers often do not give much thought to the arbitration agreement. Nevertheless, it is also reasonable to expect that the buyer should be aware of the possibility of an arbitration clause, given the fact that the contract involved a large sum of money and was concluded between parties from different countries.

304. In addition, it may be assumed that the Norwegian company enters into agreements with companies throughout the globe and the inclusion of an arbitration clause in standard general conditions would be a natural and logical consequence. From a legal perspective, it may not be reasonable to expect that the Norwegian company submits itself to judicial proceedings before several different courts depending on the buyer's nationality. From an economic point of view, the arbitration agreement inserted in general conditions reduce the transaction costs as the seller will not have to negotiate tailor made arbitration clauses with each specific buyer.

305. Furthermore, an arbitration clause in an international agreement is not unusual. On the contrary, arbitration is the standard practice when it comes to high-value contracts. Nevertheless, there may be greater uncertainty if a contract refers to a document containing an arbitration agreement with unusual provisions.

V. GROUP OF CONTRACTS

306. Group of contracts concerns disputes involving multiple agreements concluded by (at least some of) the same parties, but not expressly linked by the same arbitration clause.[431] As

[430] HANOTIAU, Complex Arbitrations, 2006, para. 58.

explained above, it is usually possible to submit different agreements to a single arbitration, where they, by express reference, share the same dispute resolution mechanism.[432] In this case, the crucial question is whether or not it is admissible to have unique arbitral proceedings with jurisdiction over all these agreements based on the fact that the agreements form a "group of contracts".[433] In other words, the question is whether an arbitration clause contained in one contract encompasses disputes of related agreements, regardless of their formal independence.[434]

307. The contracts can for instance be concluded simultaneously or consecutively, be dependent or interdependent and complementary or not. Group of contracts can involve only two or multiple parties. Therefore, several are the contractual scenarios that can raise questions regarding group of contracts. For instance, where a main construction agreement contains an arbitration clause whereas the other subcontracts do not or when an arbitration clause was included in the purchase agreement, but not in the guarantee agreement.

A. PRE-REQUISITES

1. COMPATIBILITY OF THE ARBITRATION CLAUSES

308. Different contracts can be submitted to the same arbitration only where they are covered by the same arbitration agreement or where the arbitration agreements are compatible. It is not a pre-requisite for multi-contract arbitration that every agreement contain its own arbitration clause, as the arbitration clause in a certain contract can also cover disputes arising from separate agreements which do not have their own arbitration clause.

309. The dispute resolution provisions do not need to be necessarily identical to be considered compatible. Contracts covered by arbitration agreements with different wordings can still be brought to the same arbitration. However, it may become problematic where the arbitration agreements deviate substantially from each other, which often occurs in the

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[431] MANTILLA-SERRANO, Multiple Parties and Multiple Contracts: Divergent or comparable issues?, *in:* HANOTIAU/SCHWARZ (eds.), Multiparty Arbitration, 2010, p. 13.
[432] See paras. 300ff.
[433] MEIER, Multi-party Arbitrations, *in*: ARROYO (ed.), Arbitration in Switzerland, The Practitioner's Guide, 2013, p. 1330, para. 22.
[434] STEINGRUBER, Consent in International Arbitration, 2012, para. 9.67.

practice.[435] This happens for instance where the arbitration clauses provide for different seats or different arbitration institutions. In this case, the arbitration agreements are unlikely to be considered compatible,[436] even where the contracts form a group.[437]

310. In addition, instead of different arbitration agreements, it is possible that one of the contracts contains a choice-of-forum rather than an arbitration clause. In principle, the fact that a contract provides that the disputes shall be litigated before a particular court weighs against the extension of the arbitration agreement. Particularly if the agreements are related, but not intrinsically interdependent from one another. In this case, the first impression is that the parties have agreed to submit disputes of one contract to arbitration whereas the disputes of the other contract to litigation. Hence, the extension of the arbitration agreement would be barred due to the lack of consent.[438] Nevertheless, the existence of a choice-of-forum clause is not in itself an absolute obstacle to arbitrate disputes arising from such agreements and does not preclude the proper assessment of consent. In fact, even where a contract contains both choice-of-forum and an arbitration agreement, such clauses may be considered compatible.[439] It is also possible that arbitrators and national courts find that

[435] GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 521.

[436] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2584; GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 521; GREENBERG/FERRIS/ALBANESI, Consolidação, Integração, Pedidos Cruzados (Cross Claims), Arbitragem Multiparte e Multicontratual, *in:* Revista de Arbitragem e Mediação, 2011(28), p. 95. Arbitration agreements may also be considered incompatible where they differ as to the number or method of appointment of arbitrators. The Court of Appeal of Paris upheld an arbitral award in which the arbitral tribunal decided disputes arising from different agreements with arbitration clauses providing for different languages (Cour d'appel de Paris, SA JDA Software France et autres *v* SA Kiabi, 11 April 2002, *in:* Rev. Arb, 2003 (4), pp. 1252-1262). Regarding this decision, HANOTIAU states: "*The difference of language is certainly a delicate issue. In this particular case, the Paris Court of Appeals considered that it did not make the clauses incompatible. The decision is based on the particular circumstances of the case. It is not at all certain that it can be generalised to all cases where the arbitration clauses contained in the various agreements provide for arbitration in different languages*" (HANOTIAU, Complex Arbitrations, 2006, para. 269). For the language of the dispute, see PATOCCHI et. al., L'usage des langues dans arbitrage, *in:* Rev. Arb., 2016(3), pp. 749–790.

[437] According to GAILLARD/PINSOLLE: "*In the presence of different arbitration clauses, even within a contractual group, it will be very difficult for a party to impose the jurisdiction of a single tribunal, at least as long as the other party objects to it*". (GAILLARD/PINSOLLE, Strategic Considerations in Developing an International Arbitration Case, *in:* The Art of Advocacy in International Arbitration, BISHOP/KEHOE (eds.), 2010, p. 189.

[438] Court of Appeal of Pernambuco, AI in EDcl in Ap. No. 344396-5, 5th Civil Chamber, 21.10.2015; In an ICC case involving only Brazilian companies, the arbitral tribunal rejected the extension of the arbitration agreement to a related contract with a choice-of-forum clause due to the incompatibility of the two clauses and in spite of the clear connection between those (WALD, A Arbitragem, os Grupos Societários e os Conjuntos de Contratos Conexos, *in:* Revista de Arbitragem e Mediação, 2004(2), p. 55).

[439] Superior Court of Justice, REsp. 904.813 - PR (2006/0038111-2), 3rd Section, Min. Nancy Andrighi, 20.10.2011; Court of Appeal of Minas Gerais, Ap. 1.0024.05.773271-1/003, 16th Civil Chamber, 30.05.2011).

only part of the disputes falls within the scope of the arbitration agreement while the other disputes shall be decided before state courts.[440]

2. INTENTION OF THE PARTIES

311. An arbitration clause does not automatically attract disputes from related agreements. Even if the contracts are part of the same economic transaction, it does not necessarily mean that the parties desired and agreed upon a joint dispute resolution.[441] That is not to say that the economic purpose of the contracts shall be disregarded; on the contrary, the contracts' purpose and the business context in which they were entered into shall definitely be analysed and taken into account.[442] However, the economic link between the contracts is not *per se* sufficient for multi-contract arbitration if the factual circumstances indicate that this was not the parties' intention.

312. Neither the fact that contracts contain compatible agreement suffices to allow unconditionally a multi-contract arbitration, especially where the parties are not the same. As highlighted above, arbitration is consensual: different agreements shall be submitted to the same arbitration only where this does not deviate from the parties' intent. Accordingly,

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[440] Court of Appeal of Sao Paulo, Ap. 9108327-71.2009.8.26.0000, Extraordinary Chamber of Private Law, 17.12.2014.

[441] WAINCYMER, Procedure and Evidence in International Arbitration, 2012, p. 550. The arbitral tribunal is allowed to take into considerations agreements that are not covered by the arbitration clause in order to decide a dispute, but this is not a determining factor to bring all disputes to the same arbitration in absence of parties' consent. See ICC Case No. 6829 of 1992; *in* ICC Case No. 6829 of 1992 in Yearbook Comm. Arb. XIX (1994), pp. 167-183: "*There might be circumstances under which a tribunal's duty is to look beyond the specific contract brought before it and to take into account the economic or business realities behind the legal structure. In the present case, however, the intent of the creators of the complex business structure in question has clearly been to set up different legal entities, entering into different contractual relationships, with different dispute settlement mechanisms. This clear and undisputed intent would be frustrated if the Tribunal were to disregard the explicit provisions of the legal instruments agreed upon by the various parties with a view to reassembling what the parties had reason to separate; in particular, the intentions of the parties would be frustrated if the Tribunal were to approach the Cargo Handling Contract with its arbitration clause as having no autonomous validity and vitality. Both the intentions of the parties and the language of the relevant legal instruments do not permit such an approach*." See also HANOTIAU, Complex Arbitrations, 2006, paras. 239ff. and 270ff.; ICC Award No. 6230 of 1990, *in:* Yearbook Coom. Arb'n XVII (1992), pp. 164-177, which was upheld by the Swiss Federal Tribunal (DFT 14 November 1990, 116/1990 II 634-639).

[442] GAGLIARDI, O Avesso da Forma: Contribuição do Direito Material à Disciplina dos *Terceiros* na Arbitragem (Uma análise a partir de casos emblemáticos da jurisprudência brasileira), *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, pp. 223-224.

the critical question first is whether the parties have agreed to arbitrate anything at all, at any time. Subsequently, the relevant inquiry is to determine the scope of this agreement.[443]

313. Where the existence of the arbitration agreement is in dispute, one should not immediately presume that the parties have agreed upon arbitration.[444] However, once the existence of the arbitration agreement is established, its objective scope shall be interpreted broadly to include all disputes related to the underlying agreement.[445] The rationale behind such understanding is that the parties presumably have agreed to a one-stop dispute resolution mechanism for the disputes in connection to the contract in which the arbitration clause is included.[446] Still, if the agreement contains incompatible dispute resolution provisions the dispute between the parties shall be fragmented and submitted to diverse arbitrations in the absence of other compelling elements indicating otherwise.

314. Differently from the assessment of consent in multi-party scenarios where consent is mostly inferred from the parties' behaviour and actions, the analysis of the existence of consent in multi-contract scenarios is mainly based on the wording of the arbitration agreements, on how broad the disputes are described and whether or not the arbitration clauses are compatible.[447] Nevertheless, it is important to note that arbitration clauses are usually very concise and broad. Often the parties include standard arbitration agreements copied from the website of arbitral institutions. Therefore, it may be difficult to ascertain the real intent of the parties solely from reading the arbitration agreements. Consequently, arbitral tribunal and courts are supposed to infer their presumed intent case by case. In this regard, it is noteworthy that aside from the factual circumstances, the business context and economic considerations play a key role in the interpretation of the contracts.[448]

315. As will be portrayed through the analysis of recurrent multi-contract scenarios, the common practice can serve as a starting point for the interpretation of the parties' agreement. For instance, where contracts have the same purpose and are so intrinsically connected that it is

[443] RAU, Arbitral Jurisdiction and the Dimensions of "Consent", Arb. Int'l 2008(24), p. 203.
[444] PATOCCHI, Switzerland, *in:* ICCA International Handbook on Commercial Arbitration, 2017, p. 21.
[445] PATOCCHI, Switzerland, *in:* ICCA International Handbook on Commercial Arbitration, 2017, p. 22.
[446] PATOCCHI, Switzerland, *in:* ICCA International Handbook on Commercial Arbitration, 2017, p. 22.
[447] WAINCYMER, Procedure and Evidence in International Arbitration, 2012, p. 544. However, this does not mean that the parties' actions during the negotiation, performance or termination of the agreement cannot be relevant to ascertain the parties' consent.
[448] LEBOULANGER, Multi-Contract Arbitration, *in:* Journal of International Arbitration (1996)(4), p. 46.

not possible to separate one from another, it is reasonable to assume that the parties have agreed on a broad arbitration agreement covering disputes from all of them.[449] Nevertheless, where there is a contract and a subcontract, it is fair to assume that the contracts do not share a dispute resolution mechanism, as the employer generally wants to hold the contractor fully liable rather than have to with several subcontractors. In addition, it may also be presumed that parties are conscious from the very beginning that the subcontractor does not want to participate in disputes involving employer and subcontractor. Hence, a multi-party arbitration does not always appear to be in accordance with the parties' intention when it comes to construction projects involving subcontracts.[450]

B. COMMON SCENARIOS

316. There is a plurality of contractual structures that may result in multi-contractual disputes. The requisites of intention and compatibility of arbitration clauses apply in principle to all of them. This section deals with the most common scenarios from which disputes involving multiple contracts may arise. This list is not exhaustive and different fact patterns constantly overlap each other in the practice. A distinction between different scenarios is however useful since it allows the analysis of the parties' consent in multi-party arbitration, taking into account particularities of given contractual structures.

1. PRINCIPAL AND ACCESSORY AGREEMENTS

317. It is generally accepted that disputes from ancillary agreements fall into the scope of the main framework agreement, especially when the parties to all contracts are the same.[451] Brazilian case law confirms this understanding. Even if the ancillary agreements are silent

[449] WALD, A Arbitragem, os Grupos Societários e os Conjuntos de Contratos Conexos *in* Revista de Arbitragem e Mediação, 2004(2), p. 53; GAGO/FERNANDES, Extensão Objetiva da Cláusula Arbitral, *in:* Revista Brasileira de Arbitragem, 2014(43), p. 55. WALD also points out that even if the contracts concern the same project and are interdependent, the arbitrators have to analyse the parties' intent (p. 58).

[450] AUSTMANN, Commercial Multi-party Arbitration: A Case-by-case Approach, *in:* Am. Rev. Int'l Arb (1990), p. 362.

[451] Swiss Federal Tribunal, BGer 4A_103/2011, 20.09.2011. Decision of the Swiss Federal Tribunal in which the it found that an arbitration agreement in a license agreement covered disputes from related sales agreements. The Swiss Federal Tribunal stressed that there was an obvious link between the license agreement and the sale agreements, evidenced by the fact that the parties did not find it necessary to formalize the ancillary agreements, nor to stipulate a dispute resolution clause. Subsequently, the Federal Court added that the arbitral tribunal correctly interpreted the intention of the parties when it considered the sale agreements to be bound by the arbitration clause. See also Swiss Federal Tribunal, 4A_376/2008, 05.12.2008.

as to the dispute resolution, it will usually be difficult to find a strong argument to allege that the framework agreement does not cover disputes from the related contracts. Since the contracts concern the same operation, it is presumed that parties have agreed that all disputes should be decided together by arbitration.[452] In situations like these, if a party wishes to dispute the scope of the arbitration clause, then such party will carry the burden of proof to demonstrate that there is a convincing factual element able to remove such presumption.

318. In 2014, the Court of Appeal of Sao Paulo held that an arbitration clause contained in a credit agreement should cover disputes originating from connected SWAP agreements concluded thereafter between the parties.[453] The loan agreement was entered into between the borrower Paranápanema S.A. and the lenders Santander S.A. and BTG Pactual S.A and the parties agreed to an arbitration clause providing that all disputes arising out of the contract should be settled in accordance with the Rules of the CAM-CCBC. The loan was fully paid through subscription by the lenders of shares issued by the borrower. In addition, the parties concluded a swap agreement providing for an extra payment by the borrower in case the value of the shares turned out to be lower than a certain value upon on a certain date.

319. The swap agreement did not contain a dispute resolution clause or any reference to the arbitration clause of the main contract, which did not prevent Santander. from commencing arbitration against the borrower Paranápanema and the co-lender BTG Pactual before the CAM-CCBC based on the swap agreements. The borrower Paranápanema challenged the competence of the arbitral tribunal arguing that the swap agreement was not subject to the arbitration clause contained in the loan agreement. Nonetheless, the arbitral tribunal confirmed its own jurisdiction and continued with the arbitration proceedings. After the arbitral tribunal rendered the award, Paranápanema filed a request for setting aside the award on the basis of a lack of competence of the arbitral tribunal and breach of the principle of equality between the parties. The Court of Appeal of Sao Paulo confirmed the

[452] GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 520.
[453] Court of Appeal of Sao Paulo, Ap. 0002163-90.2013.8.26.0100, 11th Chamber of Private Law, 03.07.2014.

decision of the first instance court and rejected the claimant's allegations that the swap agreements should not be bound by the arbitration clause contained in the loan agreement.

320. According to the Court of Appeal of Sao Paulo, the swap agreement is dependent on the loan agreement. The Court understood that the swap agreement was by its nature an accessory agreement, which existed only because and for the main contract; as the obligations regulated by the swap agreement had their origin in the credit agreement. The court also highlighted the fact that the main contract and its accessory contracts are seen as one whole by the parties and shall be interpreted taking into account this unity. The Brazilian court held that if it decided otherwise, it would then be disregarding the intention of the parties in submitting all the disputes arising out of the main contract to the same forum, in this case the arbitral tribunal. The Court of Appeal also highlighted that when analysing the parties' declaration of intention, it is important to focus on the real intent of the parties and aim to avoid a mere literal interpretation.[454] The Court of Appeal of Sao Paulo adopted the correct approach as it analysed the connection between the agreements in light of the commercial circumstances of the case and the real intention of the parties.

321. The real intention of the parties as determining factor for multi-contract arbitration in the context of framework agreements was also stressed by the Brazilian Superior Court of Justice in 2011. In this case, the Brazilian Superior Court of Justice recognized a foreign award in which the arbitral tribunal decided that an arbitration clause contained in a joint venture agreement encompassed disputes arising out from a related shareholders' agreement.[455] In this case, the respondents alleged that the joint venture agreement was a preliminary agreement, which had been replaced by subsequent agreements, namely, a shareholders' agreement and a company's by-law. Consequently, as stated by respondents, the arbitration agreement had been implicitly revoked by the subsequent agreements.

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[454] This decision is also analysed in LAMAS, Ações anulatórias de sentença arbitral, *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, p. 171. The court set aside the award based on a different ground (See para. 424). The court found that a structural imbalance occurred as to the constitution of the arbitration agreement in favour of the claimant. The claimant, Bradesco, filed a request for arbitration against the borrower Paranapanema and the co-lender BTG and appointed one arbitrator. The respondents did not agree on the appointment of a joint arbitrator, as they had opposite interests. Therefore, the president of CAM/CCBC appointed a co-arbitrator and a presiding arbitrator to form the arbitral tribunal with the arbitrator nominated by the claimant. Hence, only the claimant could appoint an arbitrator, which, according to the Court of Appeal of Sao Paulo, was not in line with the principle of parties' equal treatment.

[455] In fact, the decision was only partially recognized, since matters decided by the arbitral tribunal had already been addressed by a Brazilian court and thefore could not be recognized due to the res judicata effect.

322. The Superior Court rejected the objection by concluding that the arbitration agreement was still in force and the disputes arising out of the shareholders' agreement felt within its scope, even though the shareholders' agreement contained a choice-of-forum clause. The decision relied on the nature of the joint venture agreement as well as on Art. 112 of the Brazilian Civil Code, according to which the real intention of the parties should prevail over its literal meaning.[456] First, the decision quoted Brazilian commentators explaining the common practice in joint ventures, whereby the parties enter into a framework agreement containing the main provisions, such as the objective of the enterprise, the allocation of investment and the dispute resolution mechanism and that this framework agreement will serve as basis for subsequent agreements.[457] The Court stated further that the joint venture agreement was the *mother cell* of the other agreements, including the shareholders' agreement. To establish the parties' intent the decision also took into account that the parties had entered into a complex agreement assisted by specialists providing for an extensive arbitration agreement and it would be hard to believe that the parties would tacitly revoke such arrangement, *i.e.* without making any reference to it.[458]

323. In addition, the Court of Appeal of Amazonas also rendered a decision concluding that the arbitration clause of a framework agreement entered into by the Brazilian Humax CO Ltda. and the Finnish Elcoteq SE covered disputes arising out of a product supply agreement concluded between the Brazilian company and the Brazilian subsidiary of the Finnish company, Elcoteq da Amazonia Ltda.[459] The Court of Appeal of Amazonas held that it was clearly set out that the framework agreement should also apply to the Elcoteq' signatories and to future product supply agreements. Hence, disputes in connection with the related supply agreements should be adjudicated by arbitration under the rules of the Stockholm Chamber of Commerce as provided by the framework agreement.

324. In 2014, the Court of Appeal of Sao Paulo considered that an arbitration clause contained in a credit life insurance covered disputes of a related agreement, even though both contracts

[456] See para. 60.
[457] TIMM/RODRIGUES, Os Conflitos nas *joint ventures* e a arbitragem, *in:* Revista de Arbitragem e Mediação, 2009 (21), pp. 64-83.
[458] See para. 302.
[459] Court of Appeal of Amazonas, Ap. 0213018-02.2012.8.04.000, 2nd Civil Chamber, 13.04.2015.

had different objectives and have not been concluded squarely by the same parties.[460] In this case, Assurant Seguradora S.A. concluded the credit life insurance agreement with the insurance brokerage company F&M Corretora de Seguros Ltda. and the bank BGN S.A. The objective of this contract was for the insurance agreement to be offered to the bank's clients. This agreement contained an arbitration clause providing for the CIESP/FIESP rules. At the same time, Assurant Seguradora S.A. entered into a business cooperation agreement with another brokerage company namely Barros & Galvão Corretora de Seguros Ltda. The purpose of this second agreement was to regulate the relationship between these two contracting parties in what concerned the execution of the principal insurance agreement. This business cooperation agreement did not contain an arbitration clause, but a choice-of-forum clause electing the Court of the District of Barueri in the State of Sao Paulo.

325. When a dispute arose out between the parties, both brokerage companies F&M and Barros & Galvão initiated arbitration proceedings against the insurer company Assurant Seguradora S.A.[461] The insurer Assurant refused to arbitrate with Barros & Galvão arguing that this agreement did not contain an arbitration clause. Therefore, both brokers applied for an order from the state court compelling Assurant to arbitrate while the arbitral tribunal decided to suspend the proceedings until the court decision.

326. The first instance court ruled that Assurant should not be compelled to arbitrate against Barros & Galvão basing the decision on the lack of an arbitration agreement between these two companies. According to this decision, the arbitration clause did not cover disputes from the business cooperation agreement, since both contracts were independent from each other. The judge did not agree with the claimant's contention that the business cooperation agreement was attached to the principal insurance agreement and therefore it was also covered by the arbitration clause.

327. Subsequently, the broker Barros & Galvão filed an appeal to the Court of Justice of Sao Paulo, which overturned the decision of the lower court. According to the court, the insurance agreement should be understood as a framework agreement, which also governed accessory business related to the main operation. Therefore, the arbitration agreement

[460] Court of Appeal of Sao Paulo, Ap. 0018814-07.2010.8.26.0068, 34th Chamber of Private Law, 31.03.2014.
[461] The bank was not involved in the dispute.

included therein could also cover disputes concerning the related contracts, including those arising out of the business cooperation agreement concluded with Barros & Galvão. The Court of Appeal recognized that both agreements had different objectives, but found that the agreements were related and concluded for the same purpose. Accordingly, the Court of Appeal found that the arbitral tribunal had competence to decide on the issue of the arbitrability of the accessory agreement, as the fact that this agreement did not contain an arbitration clause was irrelevant.

328. To conclude that the business cooperation agreement is strongly related to the insurance agreement, the court did not merely consider the content of the agreements, but also matters of fact that surrounded the conclusion of the agreement. The Court highlighted that the agreements and their amendments were concluded on the same date and that Barros & Galvão and F&M were represented by the same person, a common shareholder of both companies.[462] The court also stated that denying that both agreements are closely connected would be against the principle of good faith.

329. However, it shall be pointed out that the existence of a mere connection between contracts does not suffice to extend the arbitration agreement to all interrelated agreements. In another case involving an arbitration clause contained only in an ancillary contract, the Court of Justice of Rio de Janeiro was reluctant to find that the disputes arising from the main agreement would fall within its scope. The court stated that it would have no problem in considering that the arbitration clause of the main contract would also cover disputes which originated from the ancillary agreements, but the other way around is questionable. In addition, it is noteworthy that in this particular case, the ancillary contract was transitory and the contract that replaced it did not contain an arbitration clause. For this reason, the court understood that there was no arbitration agreement.[463.]

[462] According to LEBOULANGER, there is a strong indication of interdependence of agreements where they have been concluded on the same date, for the same duration and for the same purpose (LEBOULANGER, Multi-Contract Arbitration, *in:* Journal of International Arbitration (1996)(4), p. 52).

[463] Court of Justice of Rio de Janeiro, AI 0040089-75.2014.8.19.0000, 16th Civil Chamber, 21.10.2014. Similar approach was adopted by the Court of Appeal of Sao Paulo in a case involving a contract for sale of real estate in which there was no arbitration clause and a related contract for construction containing an arbitration agreement. The decision of Court of Appeal of Sao Paulo dated 2014 held that the arbitration clause of the construction agreement could not be extended to the main contract. Court of Appeal of Sao Paulo, Ap. 0008991- 92.2010.8.26.0008, 4th Extraordinary Chamber of Private Law 17.09.2014.

2. CONTRACTS AND SUBCONTRACTS

330. In contrast to framework and ancillary contracts where it is usually presumed that the parties intended to submit all disputes to the same arbitration, in the case of contracts and subcontracts one should depart from the inverse assumption, *i.e*. that the disputes arising from such agreements cannot be brought to the same arbitration.

331. This is not only because due to the fact that subcontracts imply the involvement of third parties, but mainly because when assessing which parties shall be bound by the arbitration agreement, the arbitrators have to ascertain the parties' intention taking into account commercial factors and common practice in the parties' commercial field.

332. For instance, in agreements related to construction projects, the employer generally does not see many advantages in consolidated proceedings involving subcontractors in addition to the main contractor with which the employer has directly concluded the main agreement.[464] In general, the employer wants to hold the full contractor responsible for any problems that may arise out of the contract rather than having to deal with subcontractors selected by the general contractor.[465] As a matter of fact, one of the main purposes of contracting a general contractor is to avoid dealing with several separate contractors.[466] Furthermore, involving subcontractors would increase costs and require more time in order to establish whether the subcontractor should be liable to the contractor or not, a dispute in which the employer does not have interest.[467]

333. Likewise, the subcontractor also may not want to be involved in disputes with the employer under the main contract. In fact, the parties usually are aware of this allocation of roles at the time they enter into such agreements. Consequently, the contractor may be the only one that sees any advantage of consolidated proceedings, since the contractor may want to prove the subcontractor's liability and then avoid another arbitration that it would need to commence for that purpose.

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[464] HANOTIAU, Complex Arbitrations, 2006, para. 226.
[465] HANOTIAU, Complex Arbitrations, 2006, para. 226.
[466] AUSTMANN, Commercial Multi-party Arbitration: A Case-by-case Approach, *in:* Am. Rev. Int'l Arb (1990), p. 361.
[467] MEIER, Multi-party, *in*: ARROYO (ed.), Arbitration in Switzerland, The Practitioner's Guide, 2013, p. 1325, para. 26.

334. Nevertheless, it is also possible that neither the contractor has interest in the arbitration. The contractor may also wish to have different arbitrations so that it can maintain different positions.[468] For instance, the contractor may argue in the arbitration against the employer that an eventual damage has been caused by an event not related to the services rendered whereas, in the second arbitration against the subcontractor, the contractor will recognize that there is a fault and the subcontractor is responsible for it.

335. In sum, in the absence of elements proving the contrary, it is not appropriate to quickly conclude that the employer and subcontractor have implicitly consented to multi-party arbitration, even if the arbitration clauses in the main contract and the subcontract have the same wording.[469] Even though it seems reasonable to avoid opposing decisions from different proceedings, in this case, public and private interest will diverge.[470]

336. The better view is that courts should require a clear reference or compelling factual reasons to accept that the parties intended to submit a dispute arising out of contracts and subcontracts to a multi-contract arbitration.[471] Standard global references between the contracts are usually encountered in construction agreements and do not suffice to consider the subcontractor a party to the arbitration agreement of the main contract.[472] Arbitrators are likely to consider such references as standard provisions instead of clauses from which they can infer consent to multi-party arbitration.[473]

337. Notably, there is a precedent from Rio de Janeiro contrary to this understanding. In 2000, the Court of Appeal of Rio de Janeiro dismissed a claim involving the construction of a ship filed before the state court by the owner against the subcontractor holding that the

[468] HEUMAN, Arbitration Law of Sweden: Practice and Procedure, 2003, p. 185; MARRIN, Multiparty Arbitration in the Construction Industry, *in:* Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, 2009, para. 17.12.
[469] MEIER, Multi-party Arbitrations, *in*: ARROYO (ed.), Arbitration in Switzerland, The Practitioner's Guide, 2013, p. 1325, para. 26; AUSTMANN, Commercial Multi-party Arbitration: A Case-by-case Approach, *in:* Am. Rev. Int'l Arb (1990), p. 362.
[470] WEIGAND/BAUMANN, Introduction in Practitioner's Handbook on International Commercial Arbitration, WEIGAND (ed.), 2nd ed. (2009), para. 1.285.
[471] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 2.289.
[472] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 2.289.
[473] BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, para. 2.289.

dispute was covered by arbitration, regardless of the inexistence of a direct arbitration agreement concluded between these parties.[474]

338. The employer Chaval Navegação Ltda. entered into an agreement with the contractor EMAQ - Engenharia e Máquina S.A., for the construction of a cargo ship. Subsequently, the contractor assigned the agreement to a new contractor Verolme Estaleiros Reunidos do Brasil. During the execution of the agreement, Verolme entered into a subcontract with Liebherr Brasil Guindastes e Máquinas Operatrizes Ltda. through which the latter undertook to install three cranes for cargo handling in the ship. All agreements contained arbitration clauses, but there was no direct arbitration agreement between the owner and the subcontractor.

339. After the ship's construction, the cranes presented problems during the operation. Consequently, the employer initiated court proceedings claiming for damages against the subcontractor Liebherr, responsible for the cranes. The subcontractor objected to the jurisdiction of the state court arguing that the agreements contained arbitration clauses and therefore disputes arising from them should be submitted to arbitration. The court disregarded the fact that there was no direct agreement between the parties and decided that the dispute should be arbitrated.[475] According to the Court of Appeal of Rio de Janeiro, the agreements were connected to each other and the employer had not entered into the subcontract, but has assented to it.

340. In 2007, however, the Court of Appeal of Rio de Janeiro rendered a decision in accordance with the prevailing view that the arbitration clause contained in the contract did not cover disputes from subcontracts, save where the parties had agreed otherwise. In this case, the Court of Appeal of Rio Grande do Sul reversed the judgement of the first instance court, which had held that an arbitration agreement contained in the principal agreement covered disputes resulting from a subcontract. The Court of Appeal concluded from the wording of the arbitration clause that the only parties bound by the arbitration agreement were the principal and the contractor. Furthermore, the decision also highlighted that the agreement entered into by the contractor and subcontractor contained a choice of forum clause.

[474] Court of Justice of Rio de Janeiro, AI 0022745-72.2000.8.19.0000, 15th Civil Chamber, 11.04.2001.
[475] The Superior Court of Justice upheld the decision (REsp. 653.733, 3rd Section, Min. Nancy Andrighi, 03.08.2006).

Accordingly, the court held that there was no arbitration agreement between contractor and subcontractor and the arbitration clause contained in the principal contract should not extend to the subcontractor.[476]

3. GUARANTEE CONTRACTS

341. Multi-contract issues often arise out of disputes relating to several types of guarantees and may occur in the most different forms, which usually involve additional parties, such as banks or parent companies.[477] Accordingly, arbitrations involving guarantees often raise problems not only related to multiple contracts, but also to non-signatories. The matter falls into this chapter on multi-contract arbitration as the approach taken by arbitral tribunals and national courts have been giving more emphasis on the objective rather than the subjective scope. The issue whether an arbitration clause in the principal agreement may encompass disputes from the guarantee agreement is rather a question of how such agreements are interrelated to each other and under what circumstances they have been signed instead of whom has given the guarantee.

342. In general, guarantee agreements are independent from the principal agreement and therefore the scope of the arbitration clause is limited to the contracts in which it is included, unless the factual circumstances show that the parties intended to agree otherwise, *e.g.*, that the parties' true intention was that the guarantee agreement should also be subject to the arbitration agreement contained in the principal contract.[478] In this case, the guarantor will qualify as party to the principal agreement on the basis of implied consent.[479] The arbitral tribunal is therefore expected to assess the parties' intent by analysing how the operation is structured and the wording of the agreements.[480] This is the prevailing view worldwide.[481]

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[476] Court of Appeal of Rio Grande do Sul, Ap. 70016974636, 10th Civil Chamber, 22.03.2007.
[477] HANOTIAU, Arbitration and Bank Guarantees: An Illustration of the Issue of Consent to Arbitration in Multicontract–Multiparty Disputes, Journal of International Arbitration, 1999, Vol. 16(2), p. 15.
[478] GAILLARD/SAVAGE (eds.), Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 498.
[479] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1461.
[480] AMARAL/CASTRIOTO/DE ALMEIDA, O Contrato de Seguro Garantia e a Extenção Objetiva da Cláusula Compromissória *in* Arbitragem no Brasil, Vol. 2, Mattos Filho (ed.), p. 49; BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1462.
[481] In Switzerland, the question as to whether an arbitration agreement in the underlying agreement may be extended to the guarantee agreement shall be decided in accordance with the factual circumstances (SCHERER,

343. In a decision in 2015, the Court of Appeal of Sao Paulo upheld the decision of the first instance court, in which it was decided that the disputes arising out of a surety agreement were covered by the arbitration clauses contained in the principal agreements (two share purchase agreements).[482] In this case, the seller Abengoa Concessões Brasil Holding S.A., entered into two share purchase agreements with the buyer ATE III Transmissora de Energia S.A. Under the terms of the agreement, the seller undertook responsibility for the payment of debts concerning the period prior to the conclusion of the agreement. In addition, Banco Votorantim bound itself as surety towards the buyer for eventual losses arising from the agreement. Contrary to the share purchase agreements, the guarantee agreement did not contain an arbitration clause. When the buyer notified the guarantor requiring the payment in connection with the principal agreements, the seller initiated court proceedings with the aim of preventing the bank from making the payment to the buyer. According to the Court of Appeal of Sao Paulo, the surety agreement was an ancillary contract to the share purchase agreements and there was an inseparable link between the obligations set forth in these contracts. The Court further stated that the dispute arising out of the surety agreement depended from the interpretation of the clauses contained in the purchase agreements and should thus be submitted to arbitration.[483]

344. It is also suggested that the employer required the contractor to agree upon an arbitration clause with the insurer with a view to submit eventual disputes together to arbitration.[484]

Bank and Parent company guarantees in international arbitration, *in:* Revista Brasileira de Arbitragem e Mediação, 2009(22), p. 155. With regard to Swiss case law, *e.g.*, in a decision dated August 2008, the Swiss Federal Supreme Court ruled that the arbitration agreement in the underlying agreement did not cover disputes of the guarantee agreement, even though the guarantor was the parent company of a company which was a party to the arbitration agreement (Swiss Federal Supreme Court, 4A_128/2008, 19.08.08) See para. 196 above. On the other hand, the Swiss Federal Supreme Court also upheld an award which considered the guarantor bound by the arbitration agreement. In this latter case, the arbitral tribunal found that the guarantor was also a party to the arbitration agreement (Swiss Federal Supreme Court, 4A_194/2008). As to England, see Stellar Shipping Co. LLC *v* Hudson Shipping Lines [2010] EWHC 2985 (Comm) (English High Ct.) (18 November 2010) considering that a company the a company has consented to the arbitration agreement when it had endorsed a contract of affreightment as guarantor.

[482] Court of Appeal of Sao Paulo, Ap. 1012681- 91.2014.8.26.0002, 38th Chamber of Private Law, 06.05.2015.

[483] Nevertheless, the fact that an arbitrator shall look at related contracts does not justify *per se* a multi-party arbitration. See fn. 441.

[484] AMARAL/CASTRIOTO/DE ALMEIDA, O Contrato de Seguro Garantia e a Extenção Objetiva da Cláusula Compromissória *in* Arbitragem no Brasil, Vol. 2, Mattos Filho (ed.), p. 48. HADDAD takes the view that where one of the parties requires the counterparty to enter into an insurance contract containing an arbitration clause, the party that imposes such condition shall also be bound by the arbitration agreement (HADDAD, A Arbitragem e os Terceiros nas Relações Securitárias *in:* Revista de Arbitragem e Mediação, 2014(41), p. 219.

However, it is worth noting that there are cases where the parties may not wish to bring together in one single preceding disputes from the guarantee and the principal agreement, *e.g.*, in cases involving independent first demand guarantees.[485] Therefore, in order to avoid disputes on the objective scope of the arbitration agreement, the parties should clearly define the scope of the arbitration agreement either by stating that the guarantee agreement is also subject to the arbitration agreement contained in the principal contract or excluding the guarantee agreement from scope of the arbitration clause.

345. Lastly, it is substantial to note that in case the guarantee and the principal agreement contain incompatible arbitration clauses, disputes arising from such agreements shall be submitted to different arbitrations, in the absence of extraordinary factual circumstances indicating the parties had sought or desired the opposite.

4. SUCCESSIVE AGREEMENTS

346. Other multi-contractual structure consists of identical or similar successive agreements concluded between the same or similar parties. The term *successive agreements* in this context shall be interpreted restrictively, *i.e.*, contracts that do not fall within the category of complementary agreements and neither consist of a principal and accessory agreement, but rather independent agreements that are entered after each other.

347. A recurrent factual situation involving successive contracts is where parties to an ongoing business relationship enter into similar or substantially identical agreements.[486] For instance, an exporter and an importer may enter into successive contracts for the sale of fungible goods or a constructor may acquire different seafloor drills through contracts concluded one after the other. The successive agreements can be related to the same or different projects.[487]

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[485] TORGGLER, The Arbitration Agreement and Arbitrability - Arbitration Clauses in Bank Guarantees, *in:* Austrian Arbitration Yearbook, 2008, pp. 41-42.

[486] GIRSBERGER/VOSER, International Arbitration: Comparative and Swiss Perspectives, 3rd ed., 2016, para. 589.

[487] The term *successive agreements* shall be here interpreted restrictively, *i.e.* contracts that neither fall within the category of complementary agreement and nor consist of a principal and an accessory agreement but agreements that are entered after each other independent of the previous agreements.

348. In the context of successive agreements, the main question as to the jurisdiction of the arbitral tribunal arises where not all of them contain an arbitration clause. The arbitrators will have then to ascertain whether the arbitration clause of one contract covers disputes arising from subsequent or previous contracts.[488] Since successive agreements are independent from each other, the question of the extension of the arbitration agreement does not depend ultimately on the existence of an economic link between the contracts, but rather on the commercial relationship between the parties.

349. Taking as an example two parties that have concluded successive written agreements containing an arbitration agreement, but due to the trust built between the parties they started entering into oral agreements, the disputes arising under the non-written agreements would not be subject to arbitration in accordance with a formalistic view as they do not contain an arbitration agreement. It might be argued that the disputes are not arbitrable because of the lack of consent, since there is no arbitration agreement between the parties. Nevertheless, the factual circumstances of the case may support an inverse conclusion, namely, that the parties have assumed that all agreements are subject to arbitration; particularly where the parties continue to perform the agreements in the same way they did when they used to enter into written agreements with an arbitration clause. The issue may become more complicated if the parties continue to enter into written contracts without an arbitration clause. In such cases, the arbitrators have to ascertain the reasons why the arbitration clause was left out.

350. Therefore, when it comes to disputes involving successive agreements the arbitral tribunal has to assess the negotiations or prior practice between the parties in order to determine whether the parties implicitly agreed that the disputes arising out of the contract not containing an arbitration clause should also be arbitrated.[489]

351. A restrictive approach in the sense that the disputes might not be arbitrated based on the mere inexistence of an arbitration agreement shall be rejected. The better view is that the

[488] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1377. Notably, this issue does not arise exclusively in a multi-contract arbitration where a party seeks to arbitrate disputes in connection with two or more agreements. It is also possible that a party initiates arbitration based on a single contract without arbitration clause claiming that such contract shall be subject to the arbitration by virtue of the practice established between the parties in previous agreements containing an arbitration agreement.
[489] GIRSBERGER/VOSER, International Arbitration: Comparative and Swiss Perspectives, 3rd ed., 2016, para. 589.

arbitral tribunal will need to examine the language and relationship of the parties' agreements in order to determine their intent assuming that parties generally desire a single and efficient dispute resolution mechanism.[490]

352. Another common scenario involving the conclusion of subsequent agreements involves the following agreements amending the previous ones. Where the subsequent agreements contain a different arbitration clause or a choice-of-forum clause it is usually presumed that they have revoked the arbitration agreement if there is no circumstances indicating otherwise.[491] Nevertheless, if the subsequent agreements are silent on the dispute resolution provision, the arbitrators and courts shall examine the contracts in order to assess the parties' presumed intent.

VI. PARTIAL CONCLUSION

353. Different agreements can be brought to the same arbitration even where there is no reference. However, where the contracts have different arbitration agreements and there is a strong incompatibility between them, such as different seats, it is unlikely that they can be submitted to the same arbitration; unless there are exceptional factual circumstances that lead the arbitral tribunal to reach a different conclusion.

354. The parties' consent plays a key role in determining the objective scope of the arbitration agreement. The compatibility of the arbitration clauses and the economic link between contracts are not *per se* compelling factors justifying a multi-contract arbitration. Contracts cannot be submitted to a single arbitration where the factual circumstances of the case indicate that this was not the intention of the parties. Even where there is a jurisdictional objection regarding an arbitration agreement by reference the problem is a matter of consent rather than of form.

[490] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1376.
[491] Court of Appel of Sao Paulo, AI 2148169-07.2014.8.26.0000, 31th Chamber of Private Law, 14.10.2014. The opposite also holds true: when the parties enter into a subsequent related agreement with an arbitration agreement, it is also possible to consider depending on the factual circumstances that the arbitration agreement shall prevail over the choice-of-forum clause contained in the previous agreements (Court of Appeal of Parana, Ap. 1.600.531-3, 11th Civil Chamber, 22.02.2017).

355. When assessing the objective scope of the arbitration agreement, arbitrators shall take into account the factual circumstances of the case, the common business practice and the economic context in which the agreement has been concluded. Examples of multi-contract disputes can be multiplied indefinitely. Nevertheless, there are factual patterns that are common to several of these scenarios, *e.g.,* framework agreements and ancillary agreements, contracts and subcontracts, successive agreements and agreements involving guarantees. These fact patterns shall serve as starting points for the analysis of the existence of consent and the scope of the arbitration agreement. Depending on the fact pattern, the arbitrators shall start from the assumption that there is an agreement between the parties regarding multi-contract; *e.g.*, framework and ancillary agreements. Nevertheless, in different scenarios the presumption shall be that the parties did not intended a multi-contract arbitration, *e.g.,* contracts and subcontracts.

356. The economic link between the agreements is an important factor in establishing the extent of the objective scope of the arbitration agreement. Where the agreements are economically related it is normally presumed that the parties intended to agree on a common dispute resolution mechanism. In any case, even if the contracts are part of the same economic transaction, it does not necessarily imply that the parties desired and agreed upon multi-contract arbitration. A party is duly entitled to prove that there was no consent in this regard. If this is this case, the contracts shall be submitted to different arbitrations.

PART II: PROCEDURAL ISSUES

CHAPTER 4: JOINDER, INTERVENTION AND CONSOLIDATION

357. Since arbitration was originally based on bipolar proceedings, the participation of multiple parties and the interrelation between several agreements naturally give rise to several issues during the arbitration proceedings.[492] To what extent arbitrators are allowed to join third parties to an arbitration or have powers to consolidate separate proceedings are matters frequently disputed in international arbitration.

358. In court litigation, most legal systems, if not virtually all, have developed procedural mechanisms in order to entail efficiency and fairness and overcome obstacles in multi-party and multi-contract court proceedings.[493] National courts have extensive powers to consolidate court proceedings or to compel parties to take part in the judicial process, as well as to render decisions with a binding effect on those parties regardless of their consent.[494] In contrast, arbitration is fundamentally consensual.[495] For this reason, the powers of arbitrators to join third parties and to consolidate arbitral proceedings are limited by the parties' consent.

359. This chapter addresses the joining of additional parties after the commencement of the arbitration by means of joinder or intervention and the unification of different proceedings through consolidation. These are the main procedural mechanisms in the context of multi-party and multi-contract arbitration. Even if they can be seen as procedural tools, the essence of joinder, intervention and consolidation are predominantly a substantive matter concerning the scope of the arbitration agreement and therefore are referred to by some authors as *quasi-procedural matters*.[496] For this reason, despite the fact that joinder and

[492] VOSER, Multi-party Disputes and Joinder of Third Parties, *in*: VAN DEN BERG (ed.), 50 Years of the New York Convention - ICCA Conference, 2009, p. 351.
[493] CATE, Multi-party and Multi-contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreement under U.S. Law, Am. Rev. Int'l Arb (2004), p. 134; KILLIAS, Mehrzahl von Parteien und/oder Ansprüchen, *in:* TORGGLER et al., Handbuch Schiedsgerichtsbarkeit, 2nd ed., 2017, para. 1041.
[494] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 2566.
[495] See para. 0.
[496] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 2573.

intervention relate to multi-party arbitration and consolidation is a multi-contract matter, both topics are comparable, since they touch fundamentally upon the scope of the arbitration agreement and the consensual character of the arbitration. Hence, another example of how multi-contract and multi-party issues go hand in hand.

I. JOINDER AND INTERVENTION

A. JOINING OF ADDITIONAL PARTIES AND CONSENT

360. The term joinder is used to refer to situations where a third party is asked to join in an already pending arbitral proceeding.[497] By joining additional parties into a single proceeding it is possible to avoid concurrent or successive proceedings and consequently enhance arbitration efficiency.[498] The request for joinder may be filed either by the claimant or the by the respondent.[499] Where a third party requests to join in the arbitration at its own initiative, the situation can also be referred to as *intervention*. It is true that some commentators and institutional rules use the term joinder for both cases and, in practice, the terminology does not play a decisive role.[500] However, the distinction between both terms is helpful for academic purposes and is adopted in this dissertation for the sake of clarity.

361. Normally the claimant will determine the parties of the arbitration when filling the request for arbitration. Nevertheless, not only the respondent may wish to add an additional party to the arbitration proceedings, but also the claimant itself may want to include a party to whom it has not initially referred. Additional parties may be joined as claimants or respondents.

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[497] VOSER, Multi-party Disputes and Joinder of Third Parties, *in*: VAN DEN BERG (ed.), 50 Years of the New York Convention - ICCA Conference, 2009, p. 370.
[498] CARON/KAPLAN, The UNCITRAL Arbitration Rules, 2nd ed., 2013, p. 54.
[499] It is widely accepted in international arbitration that both claimant and respondent may request additional parties to be joined in the arbitration proceedings. However, this was not always the case. Arbitral institutions have once adopted a more conservative approach, especially in cases where requests for joinder were filed by the respondent. According to SILVA ROMERO/WHITESELL: "*One of the most controversial topics regarding multiparty scenarios in ICC arbitration is the possibility for a respondent to request successfully from the Court the joinder of a new party to the arbitral proceedings. In this respect, the Court maintains a conservative approach. However, such an approach has recently been moderated*." (Multiparty and Multicontract Arbitration: Recent ICC experience, in ICC International Court of Arbitration Bulletin, Special Supplement 2003 – Complex Arbitration, p. 10).
[500] For instance, Art. 4 Swiss Rules, Art. 7 SIAC Rules, Art. 27.6 HKIAC, Art. 14 VIAC Rules and Art. 6.1 CAM Rules (English version).

362. With regard to intervention, under the procedural rules of several leading arbitral institutions, it is possible for a third-party to the arbitration proceedings to request permission to join in the arbitration at its own initiative. The request for intervention usually follows the same procedure as the request for joinder.[501] Indeed, from a theoretical point of view, there is no difference between joinder and intervention, except for the fact that in relation to intervention, the consent of the third party is evident. Nevertheless, not all arbitral institutions permit the intervention of third parties. For instance, Art. 7(1) of the ICC Rules only allows existing parties involved in an arbitration to join additional parties and does not proceed with the requests filed by third parties.[502]

363. When one of the parties submits a request for joinder or a third party wants to join in the arbitration at its own initiative, it is important to ascertain whether the additional party is a party to the arbitration agreement or not.[503] The admissibility of joinder and intervention of third parties also require the arbitral tribunal's jurisdiction.[504] Both joinder and intervention do not constitute an autonomous basis for jurisdiction, but rather are applicable where a third party is also subject to the arbitration agreement.[505] This means that in principle only parties to the arbitration agreement may file a request for intervention or may be requested to join in an arbitration. This is clear, for instance, in the UNCITRAL Arbitration Rules, which clearly state that joinder is possible only under the condition that the additional party is also a true party to the arbitration agreement. Art. 17(5) of the UNCITRAL Arbitration Rules expressly provides that the arbitral tribunal may allow a third person to be joined in the arbitration provided that such person is a party to the arbitration agreement.[506]

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[501] For instance, Art. 4 Swiss Rules and Art. 27 HKIAC Rules. Both rules provide for e and intervention in the same provision without differing between them.

[502] GREENBERG/FERRIS/ALBANESI, Consolidação, Integração, Pedidos Cruzados (Cross Claims), Arbitragem Multiparte e Multicontratual, *in:* Revista de Arbitragem e Mediação, 2011(28), p. 105. FRY/GREENBERG/MAZZA, The Secretariat's Guide to ICC Arbitration, 2012, para 3-294. However, it is important to point out that it is admitted that if all parties and the arbitral consent to invervention, then it would be possibile to accept a request for intervention. See WEBSTER/BÜHLER, Handbook of ICC Arbitration, 2014, paras. 7-11 - 7-12.

[503] STEINGRUBER holds a different view and states that the additional party would not be disadvantaged if all members of the arbitral tribunal have been appointed by the arbitral institution (Consent in International Arbitration, 2012, para. 10.20.

[504] See OBERHAMMER /KOLLER in Handbook Vienna Rules, VIAC (eds.), 2014, Art. 14, para. 10.

[505] OBERHAMMER /KOLLER in Handbook Vienna Rules, VIAC (eds.), 2014, Art. 14, para. 10.

[506] UNCITRAL Arbitration Rules. Art. 17(5): The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be

364. The original wording of this provision in the draft of the UNCITRAL Arbitration Rules provided that the arbitral tribunal might allow a third person to be joined provided that this person had "consented to be joined". However, the Working Group considered that this part was unnecessary as the rules were already providing that such third party should be a party to the arbitration agreement.[507]

365. If there is no previous arbitration agreement between the third party and the original parties, then the additional party may become a party to the arbitration proceedings only upon consent of all parties.[508] In this case, with the consent of all parties, the third party becomes a true party to the arbitration agreement and, consequently, the arbitral tribunal also assumes jurisdiction over it. If one of the original parties to the proceedings does not agree with the request for joinder or intervention, then it will not be possible for the party to participate in the arbitration. The inclusion of a third party when one is objecting to it is only possible if the party is a true party to the arbitration agreement. Otherwise, the joinder or intervention will not be possible, because one party cannot be forced to arbitrate with those it has not consented to.

366. The joining of additional parties can be a very complex issue in practice. Therefore, it is recommended that the counsel drafting arbitration agreements in contracts involving several parties give proper consideration to the issue.[509] A careful drafting may also avoid discussions as to whether or not joinder or intervention fall within the scope of the arbitration agreement, especially where the arbitration agreement provides for *an ad hoc* arbitration.

367. Aside from the parties' consent, a key consideration in deciding whether an additional party can join the proceedings is the stage of proceedings. A request for joinder shall be

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joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

[507] See BINDER, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, 3rd ed., 2010, para. 11-005.

[508] MEIER, Einbezug Dritter vor internationalen Schiedsgerichten, 2007, p. 221.

[509] GUTIERREZ, Non-Signatories and Arbitration: Recent Developments, *in:* FERNANDEZ-BALLESTEROS/ARIAS (eds.), Liber Amicorum Bernardo Cremades, 2010, p. 571; JOSEHPH Q.C., Jurisdiction and Arbitration Agreements and their Enforcement, 2nd ed., 2010, para. 4-76.

submitted preferably at an early stage of the proceedings, especially before the appointment of any arbitrators, as the constitution of the arbitral tribunal can be a major obstacle for joining an additional party.[510]

B. JOINDER AND INTERVENTION UNDER ARBITRATION INSTITUTIONAL RULES

368. With regard to joinder and intervention, some Brazilian arbitration institutions are a step behind international arbitration institutions. Out of the main Brazilian institutions, four have specific rules concerning the joining of additional parties: AMCHAM, ARBITAC, CAM and CIESP/FIESP. The rules of CAM-CCBC, CAMARB and FGV are silent in this regard, but the institutions consider requests for joinder admissible.

369. The CIESP/FIESP Rules provide that prior to the constitution of the arbitral tribunal, it is for the president of the institution to decide *prima facie* issues related to the validity of the arbitration agreement, consolidation of proceedings and the extension of the arbitration clause. After the constitution of the arbitral tribunal, the arbitrators may confirm or change the preliminary decision made by the president of CIESP/FIESP. It is important to emphasize that the wording of this provision shall be viewed with criticism since it is not technically accurate as it refers to "*extension of the arbitration agreement*" and, as demonstrated above, the use of the expression is inaccurate.[511]

370. Art. 8 of the ARBITAC Rules also sets forth that a party may request the joinder of additional parties to the arbitration. Similarly to the CIESP/FIESP, the ARBITAC Rules provide that the institution shall render a preliminary decision while the final decision to be made by the arbitral tribunal.[512]

371. Art. 6.1 of the CAM Rules foresees the possibility of joinder and intervention before the appointment of any arbitrator. The request shall be filed with the institutions' secretariat and it will be analysed by the president of the institution. If the president grants the request

[510] WEBSTER, Handbook of UNCITRAL Arbitration, 2nd ed., 2015, para. 17-98.
[511] See paras. 110 and 111 above.
[512] According to Art. 8, §3, of the ARBITAC Rules, the *prima facie* decision shall be rendered by taking into account the evidence of a legal relationship between the parties.

and any of the parties oppose, the Arbitral Tribunal once constituted shall re-examine the matter.

372. AMCHAM amended its rules on 11 June 2018 and one of the key changes was the inclusion of a provision for joinder (Art. 10). The request for joinder shall be filed with the secretariat and no additional party may be joined after the appointment of any arbitrator.[513] Objections to arbitral jurisdiction will be decided by the arbitral tribunal.[514]

373. As to the leading international arbitration institutions, all of them contain provisions concerning additional parties, *e.g.*, Art. 7 (2) ICC Rules[515], Art. 4.2. Swiss Rules, Art. 22.1(viii) LCIA Rules, Art. 7 SIAC Rules, Art. 14 VIAC Rules, Art. 14 SCC Rules, Art. 19 DIS Rules, Art. 27 HKIAC Rules. Notably, such provisions are more detailed than those of the Brazilian institutions. This is also due to the fact that the rules have been recently amended. The more recent the rules have been amended the more detailed they tend to be.[516]

II. CONSOLIDATION OF PROCEEDINGS

A. CONSOLIDATION AND CONSENT

374. Consolidation is a procedural mechanism whereby two or more pending arbitral proceedings are merged into a single arbitration.[517] The consolidation may also be partial, where partial claims are brought together while some of them keep proceeding separately.[518]

375. As opposed to court proceedings where judges have inherent powers to consolidate separate proceedings into a single one regardless the intention of the parties, the arbitrators' powers

[513] AMCHAM Rules. Arts. 10. 1 and 10.3.
[514] AMCHAM Rules. Arts. 10.6, Art. 4 and Art. 5.6.
[515] Art. 7(1) of the ICC Rules does not provide for consolidation, but only allows existing parties to an arbitration to join additional parties FRY/GREENBERG/MAZZA, The Secretariat's Guide to ICC Arbitration, 2012, para. 3-294.
[516] WELSER, Mehrparteien-Schiedsverfahren aus praktischer Sicht: Segen oder Fluch?, *in:* EBKE/OLZEN/SANDROCK, Festschrift für Siegfried H. Elsing zum 65. Geburtstag, 2015, p. 655.
[517] FRY/GREENBERG/MAZZA, The Secretariat's Guide to ICC Arbitration, 2012, para. 3-347.
[518] CATE, Multi-party and Multi-contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreement under U.S. Law, Am. Rev. Int'l Arb (2004), p. 136.

are circumscribed by the arbitration agreement concluded by the parties.[519] Therefore, the first step to be taken in order to reach a decision as to whether or not proceedings shall be consolidated is to analyse the existence of parties' consent. Courts and arbitrators shall therefore assess where such mechanisms fall within the scope of the arbitration agreement.[520]

376. Where the arbitration agreement makes reference to an institution whose rules expressly provide for the possibility of consolidation or joinder, questions about parties' consent do not play a fundamental role.[521] Once the parties select an arbitral institution to administer the case they are indirectly consenting to its procedural mechanisms, such as joinder and intervention of third parties and consolidation.[522] That is, the rules of a selected arbitral institution are incorporated in the arbitration agreement.[523] Accordingly, the arbitral tribunal can even order the consolidation of the proceedings or permit the joinder of additional parties regardless opposition of the original parties, if they find that there is a valid agreement between all the parties involved.

377. The fact that the wording of the arbitration clause does not foresee the possibility of consolidation does not necessarily mean that the parties have opted out of the possibility of having the disputes consolidated. In most cases arbitration agreements are silent on the possibility of consolidation.[524] Indeed, arbitration agreements rarely are very specifically tailored to particular cases.[525] Moreover, one might argue that if the parties did give thought to the possibility of consolidation they would have rather expressly excluded consolidation instead of just silencing on that issue in case they did not want consolidation at all. This would be especially the case where the arbitration included in the agreement is a sample clause. If the arbitration clause is detailed, then the arbitrators will have to analyse its

[519] POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed., 2007, para. 239.
[520] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2580.
[521] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 2580.
[522] STEINGRUBER, Consent in International Arbitration, 2012, para. 10.04; WELSER/STOFFL, The Arbitrator and the Arbitration Procedure, Multi-Party Arbitration, Austrian Yearbook on International Arbitration, 2015, p. 278.
[523] CATE, Multi-party and Multi-contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreement under U.S. Law, Am. Rev. Int'l Arb (2004), p. 153; LEW/MISTELIS/KRÖLL, Comparative International Commercial Arbitration, 2003, para. 16-19.
[524] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2581.
[525] CATE, Multi-party and Multi-contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreement under U.S. Law, Am. Rev. Int'l Arb (2004), p. 142; CHIU, Consolidation of Arbitral Proceedings and International Commercial Arbitration, J. Int'l Arb. (1990), pp. 57-58.

wording and the circumstances of the case in order to assess why there is no provision on consolidation, either because parties did not think about it or because it was not their intention to bind all agreements to the same dispute resolution method.

378. According to Born, taking into consideration the parties' intent to consolidate or not the arbitral proceedings is somewhat artificial, as at the time of the conclusion of the contract, parties rarely consciously think whether arbitrations can be consolidated or third parties may be joined.[526] Nonetheless, arbitrators tend to consider that parties have opted to arbitration in order to have a neutral, enforceable and speedy decision.[527] Accordingly, Born points out that determining the parties' intentions with regard to consolidations and joinder often turns on presumptions of the parties' expectations.[528]

379. The question of whether merging arbitrations is desirable cannot be answered in abstract, as consolidation has benefits and drawbacks, which shall be considered by the arbitrators in the light of the factual and commercial circumstances of a specific case.[529]

380. One of the purposes of consolidation of arbitrations is to avoid the risk of inconsistent decisions that may arise if separate proceedings concerning the same matter or related issues are brought before different arbitral tribunals.[530] There is no rule in international arbitrational establishing a system of binding precedents.[531] Hence, different arbitral tribunals which are confronted with the same issue may arrive at different conclusions.[532]

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[526] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2569.
[527] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2569.
[528] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2569.
[529] CHIU, Consolidation of Arbitral Proceedings and International Commercial Arbitration, J. Int'l Arb. (1990), p. 55; CATE, Multi-party and Multi-contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreement under U.S. Law, Am. Rev. Int'l Arb (2004), p. 138: Whether a party should be joined or separate proceedings consolidated highly depends on factual determination.
[530] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 2.240; WEBSTER/BÜHLER, Handbook of ICC Arbitration, 2014, para. 10-3; WOOLLETT/SASSON, Multi-party Arbitration, SAR (2002), JurisNet, p. 17; AUSTMANN, Commercial Multi-party Arbitration: A Case-by-case Approach, *in:* Am. Rev. Int'l Arb (1990), p. 347. (JurisNet); POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed., 2007, para. 238; KILLIAS, Mehrzahl von Parteien und/oder Ansprüchen, *in:* TORGGLER et al., Handbuch Schiedsgerichtsbarkeit, 2nd ed., 2017, para. 1033; BITTER, Consolidation of Arbitral Proceedings in the Netherlands: The Practice and Perspective of the Netherlands Arbitration Institute, *in:* Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, 2009, para. 8.01.
[531] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 1.116.
[532] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 1.116.

381. Nevertheless, the argument that separate proceedings may result in conflicting awards is not irrefutable *per se*.[533] It is clear that this is an undesirable outcome from a jurisdictional point of view, but this does not make it a definitive argument. The parties interested in avoiding inconsistent decisions are those who are parties to all proceedings and not necessarily those that are parties to a single one. Hence, the arbitrators have to balance the interests of the parties and the compatibility of the arbitrations and the arbitration clauses on which they are based.

382. The arbitrators may find that the requirements for consolidation of the proceedings are met, but balancing the interests of the parties they may conclude that the arbitrations shall proceed separately. It is the same outcome as in the case that a consolidation would be desirable, but the arbitration agreements are incompatible, for instance, due to the fact that they refer to different arbitral institutions or have different places of arbitration.[534]

383. The consolidation may also reduce the amount of time and money significantly where different arbitral proceedings are based on common or closely factual circumstances.[535] More specifically, parties will minimize costs in relation to arbitrators' fees, legal fees, expert reports, hearings and also witnesses' time. In addition, arbitrators are more likely to get a more comprehensive picture of the dispute and the parties' obligation to each other as all of them will have the opportunity to present their case.[536]

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[533] AUSTMANN, Commercial Multi-party Arbitration: A Case-by-case Approach, *in:* Am. Rev. Int'l Arb (1990), p. 348.

[534] WHITESELL, Multiparty Arbitration: The ICC International Court of Arbitration Perspective, *in*: Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, 2009, para. 6.32: "*Nevertheless, satisfying [the requirements for consolidation set by the ICC Rules] may not be sufficient. In cases where there have been requests for consolidation and a party has objected, the ICC Court has decided not to consolidate, even though the requirements of Art. 4(6) were met. As an example, in two cases, the arbitration agreement in each matter referred to different places of arbitration. The ICC Court refused the consolidation, considering that it was clear that the parties had intended to have separate arbitration with different seats*." See also HASCHER, Complex Arbitration: Issues in Enforcement and Annulment Actions of Arbitral Awards under French Law in Multiple Party Actions in International Arbitration, Permanent Court of Arbitration (ed.), 2009, paras. 16.25-16.27.

[535] WEBSTER/BÜHLER, Handbook of ICC Arbitration, 2014, para. 10-3.; WINSTANLEY, Multiple Parties, Multiple Problems: A View from the London Court of International Arbitration, *in:* Permanent Court of Arbitration (ed.), Multiple Party Actions in International Arbitration, 2009, para. 7.21.

[536] CHIU, Consolidation of Arbitral Proceedings and International Commercial Arbitration, J. Int'l Arb. (1990), p. 60; CATE, Multi-party and Multi-contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreement under U.S. Law, Am. Rev. Int'l Arb (2004), p. 138.

384. Nonetheless, a single consolidated arbitration has also its disadvantages. The consolidated proceedings may be more expensive for certain parties, which would rather prefer to arbitrate a specific point in one arbitration, but end up as a party in a much more complex arbitration in which it has no interest.[537] In that case, the benefits of consolidating arbitrations will be gained at the expenses of these parties, which could arbitrate their disputes in separate and direct proceeding.[538] Hence, there is usually at least one party that sees advantages in separate proceedings.[539] Another disadvantage in consolidating proceedings lies in the fact that a party may force the consolidation in order to deliberately threaten to increase the costs of the arbitration and, in this way, press the parties to settle the dispute.[540]

385. Consolidation does not necessarily imply a multi-party arbitration, except where more than two parties take part in the proceedings to be consolidated. However, consolidation may serve as a tool for joining additional parties to the proceedings. In other words, if a claimant commences arbitral proceedings against the respondent, the latter may file a parallel request for arbitration against an additional party and then try to consolidate the proceedings. To illustrate the case, a seller may enter into two different separate agreements consisting in a sales agreement with the buyer and an independent guarantee with the guarantor. Subsequently, if the buyer commences an arbitration against the seller, the latter may initiate a parallel arbitration against the guarantor and try to consolidate these two proceedings. Likewise, a claimant may also file two separate proceedings against two different respondents and ask the arbitral institution to consolidate them if the agreements

[537] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2569. According to FRICK, it is questionable whether multi-party arbitration is really faster or more efficient then the conduct of several singular proceedings. He further states that, even if assumed that multi-party arbitration is faster than various arbitration proceedings that start one after the other, this would be relative as it would depend on the interest of the party. It would be positive for those parties that have to take part in several proceedings, but negative for those parties that could take part in just one arbitration as a multi-party arbitration takes more time and consequently costs more money (FRICK, Arbitration and Complex International Contracts, 2001, p. 231). In addition: BÜHRING, Arbitration and Mediation in International Business (1996), p. 65; GAGLIARDI, O Avesso da Forma: Contribuição do Direito Material à Disciplina dos *Terceiros* na Arbitragem (Uma análise a partir de casos emblemáticos da jurisprudência brasileira), *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, p. 204.

[538] CATE, Multi-party and Multi-contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreement under U.S. Law, Am. Rev. Int'l Arb (2004), p. 139; BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2569.

[539] LEW/MISTELIS/KRÖLL, Comparative International Commercial Arbitration, 2003, para. 16-37.

[540] CATE, Multi-party and Multi-contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreement under U.S. Law, Am. Rev. Int'l Arb (2004), p. 138.

are somehow related. As a result, in these two cases a multi-party arbitration will arise out of the consolidation of these two proceedings.

386. It is important to note that the consolidation of proceedings may also result not only in multi-arbitration, but also in multi-polar disputes. The participation of other parties in the arbitration may result in a loss of confidentiality.[541] In addition, where the parties do not clearly fall in two groups of claimants and respondents with aligned interests will likely make the arbitration more complex. This can have a strong impact as to the constitution of the arbitral tribunal. In multi-polar disputes there is the risk that all arbitrators will eventually be appointed by the arbitral institution, which not all parties may desire. [542]

B. CONSOLIDATION UNDER BRAZILIAN CASE LAW

387. Even though the Brazilian Arbitration Act does not contain provisions regarding consolidation ordered by national courts, in 2013 the Court of Appeal of Rio de Janeiro decided to consolidate three arbitral proceedings into a single one. [543]

388. The dispute originated from contracts concerning an agreement for the supply of goods and services concerning the installation of the hydroelectric power plant Corumbá III. After a disagreement between the parties, some contractors initiated two different arbitral proceedings before the arbitration chamber of FGV against the owner Consórcio Empreendedor Corumbá III. The owner also filed a request for arbitration and asked for the consolidation of the three proceedings. However, the contractors did not agree with the consolidation of the proceedings and the chamber's executive director denied the request.[544] At this time, the FGV rules did not contain any provision permitting the consolidation of proceedings. For this reason, the owner required asked the Brazilian court to order the consolidtation. The request for consolidation was filed with the court before the constitution of the arbitral tribunal in all the three proceedings.

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[541] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2568. WOOLLETT/SASSON, Multi-party Arbitration, *in:* Stockholm Arbitration Report, 2002(1), p. 17. A party may not want to arbitrate with additional parties in order to keep commercial and technological information confidential. When related proceedings are merged, the documentary and testamentary evidence will be presented to all parties in the dispute. In addition, witnesses may be cross-examined by all of them.

[542] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 2568.

[543] Court of Justice of Rio de Janeiro, Ap. 0301553-55.2010.8.19.0001, 19th Civil Chamber, 21.05.2013.

[544] The decision is not available. Hence, the reasoning is unknown.

389. In the first instance, the judge ruled in favour of the owner and ordered the consolidation of the proceedings in a single arbitration whose arbitral tribunal should be appointed by FGV. From the start, the owner obtained a preliminary injunction to suspend the arbitral proceedings until the final decision. After hearing the counterparties, the consolidation of the proceedings was finally ordered.[545] The judge concluded that the institution did not have powers authority to consolidate the proceedings, as its rules did not contain any provision concerning the possibility of consolidation. Moreover, FGV rules did not give any power to the institution or its directors to decide on this matter. Due to this lack of competence, the judge also stated that the decision of the chamber's director rejecting the consolidation should not be binding. The decision recognized that in principle, courts should not intervene in the arbitral proceedings. However, since the institutional rules did not address the possibility of consolidation and none of the arbitral tribunals have been constituted, the court found that the parties were entitled to request a judicial order of consolidation. According to the decision, the consolidation would not cause practical problems and there was a significant risk of conflicting decisions. The contractors appealed, but the Court of Justice of Rio de Janeiro confirmed the first instance judgment based on the same fundamentals.

C. CONSOLIDATION UNDER BRAZILIAN INSTITUTIONAL RULES

390. Except for FGV, the main Brazilian arbitral institutions provides for the possibility of consolidating proceedings. Under the CAM-CCBC Rules, Art. 4.20 sets forth that, upon parties' request, the president of the institution may order the consolidation of proceedings if a request for arbitration is filed by the time another arbitration involving the same object is pending. Or, in the case where arbitrations have different objects, the president of CAM-CCBC may proceed with the consolidation if the arbitrations have the same parties and one of these arbitrations has a broader scope, which encompasses the claims of the other proceedings. The same provision also establishes that the consolidation may be ordered

[545] The first decision suspending the arbitral proceedings was commented by AYMONE, Note - Consórcio Empreendedor Corumbá III v. Consórcio Construtor Centro-Oeste, EIT Empresa Industrial Técnica S.A., Energ Power S.A. e Themag Engenharia e Gerenciamento, Tribunal de Justiça do Rio De Janeiro (7ª Vara Empresarial), Processo n° 0301553-55.2010.8.19.0001, 23 September 2010; *in* Revista Brasileira de Arbitragem, 2011 (30), pp. 104-112.

only up to the time the terms of reference are signed.[546] In accordance with Art. 4.5, the arbitral tribunal may modify the decision on consolidation made by the president of CAM-CCBC.[547]

391. The CAM Rules the possibility of consolidation since 2011. According to Art. 6.2, when a request for arbitration is filed and there is already a pending proceeding involving common issues of fact or law, the institution's president may consolidate the proceedings after hearing the parties and taking into consideration the circumstances and the stage of the process already existing. If in none of the arbitrations the arbitral tribunal have been constituted and the parties fail to reach a consensus on its composition, all arbitrators shall be appointed by the president of the chamber.[548] In case the arbitral tribunal has already been constituted in the pending proceeding, it shall have jurisdiction over the new related proceedings.[549] However, the rules provide that this is only possible where the parties to the more recent proceeding agree to the composition of the arbitral tribunal.[550] The parties to the new proceeding have five days to raise an objection to the consolidation, which will be analysed by the CAM' president and vice presidents.[551]

392. With regard to the CIESP/FIESP Rules, they do not specify under which circumstances arbitrators may consolidate arbitral proceedings, but the rules recognize such possibility, as Art. 4.1 provides that the President of the arbitral institution may decide *prima facie* whether there exists a connection between cases and the extent of the arbitral clause. The same provision makes clear that the President's decision may be modified by the arbitral tribunal once it is constituted.

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[546] CAM-CCBC. Arbitration Rules 2012. Art. 4.20. If a request for the commencement of an Arbitration is submitted and has the same purpose or same cause of action as an arbitration currently proceeding at the CAM-CCBC or if the same parties and causes of action are present in two arbitrations, but the subject matter of one, because it is broader, includes that of the others, the President of the CAM-CCBC can, upon request of the parties, up to the time the Terms of Reference are signed, order joinder of the proceedings.
[547] CAM-CCBC. Arbitration Rules 2012. Art. 4.5. Before the Arbitral Tribunal is constituted, the President of the CAM-CCBC will examine objections regarding the existence, validity or effectiveness of the arbitration agreement that can be immediately resolved, without the production of evidence, and will examine requests regarding joinder of claims, under Art. 4.20. In both cases, the Arbitral Tribunal, once it is constituted, will decide on its jurisdiction, confirming or modifying the decision previously made.
[548] CAM Rules. Art. 6.2.
[549] CAM Rules. Art. 6.2.
[550] CAM Rules. Art. 6.2.
[551] CAM Rules. Art. 6.2.3.
[551] CAM Rules. Arts. 6.2.4 and 6.2.5.

393. CAMARB also contains a provision concerning consolidation. Art. 3.7 provides that where a party submits a request for arbitration and there is an ongoing arbitration related to the same legal relationship between the same parties or where the object of the dispute is the same, the arbitral tribunal of the pending arbitration shall decide on the possible consolidation between the proceedings. If the arbitral tribunal has not yet been constituted, CAMARB Board of Directors shall decide whether the arbitrations shall be consolidated or not. After the constitution of the arbitral tribunal, the arbitrators may confirm or modify the decision taken by the board.

394. According to Art. 11.11 AMCHAM Rules, upon parties' request and where they have agreed on the consolidation, the AMCHAM Secretary General may approve the consolidation if the parties have agreed on it, provided that the same arbitrators have been appointed in the proceedings to be consolidated.

395. The ARBITAC Rules also provide for consolidation in Arts. 4, §4, and 12. Pursuant to such articles, the requests for consolidation shall be first analysed *prima facie* by the institution, but the final decision is for the arbitral tribunal to make.

396. With regard to international institutions, their rules also contain rules for the consolidation of proceedings; some very detailed others not as much.[552] A difference between Brazilian and foreign institutions is that Brazilian Chambers vest arbitrators with much more power than international instances. Aside from CAM, the provisions of the other chambers provide that the arbitral tribunal may modify the decision of the institution. As to foreign institutions, only under the SIAC Rules the arbitrators have power to modify the decision made by the institution.[553]

III. APPLICABLE LAW TO JOINDER, INTERVENTION AND CONSOLIDATION

397. The applicable law to solve issues related to joinder, intervention and consolidation shall be the substantive law governing the arbitration agreement given the dominant role played by

[552] Art. 10 ICC Rules; Art. 22.1(ix) and (x) LCIA Rules; Art. 4.1 Swiss Rules; Art. 15 SCC Rules; Art. 15 VIAC Rules; Rule 8 SIAC Rules, Art. 8 DIS Rules.
[553] Rule 8.4 SIAC Rules.

party autonomy on the subject.[554] Predominantly, but not always, the applicable law to the arbitration agreement will be the law of the seat of the arbitration.[555] This understanding is consistent with the character of these mechanisms and is in accordance with the consensual nature of these agreements.[556]

398. In Brazil, there is neither legislative provision addressing joinder and intervention nor consolidation.[557] However, as mentioned above, there is precedent of the Court of Appeal of Rio de Janeiro ordering the consolidation of three proceedings. The arbitration proceedings that have been unified were being administered by the same arbitral institution. It is doubtful that Brazilian Courts would order the consolidation of arbitration proceedings arising out of incompatible arbitration agreements.[558]

399. In principle, one might argue that laying down specific rules in national arbitration laws concerning multi-party arbitration would promote predictability and uniformity. However, it is difficult to reconcile statutory provisions with the consensual nature of the arbitration, unless such provisions are subject to the consent of the parties. Statutory provisions might have a negative impact on the consensual character of arbitration.[559] The Commission of Jurists in charge of the Brazilian Arbitration Act Reform discussed the participation of third parties in arbitration, but reached the (apparently correct) conclusion that there was no need to include provisions in this regard.[560]

400. Therefore, it seems that the better view is to leave for the parties to elaborate their own rules or for institutional rules to which the parties can refer in their arbitration agreement, as

[554] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 2573; MEIER, Multi-party Arbitrations in Arbitration in Switzerland: The Practitioner's Guide, *in:* ARROYO (ed.), 2013, p. 1325, para. 5.
[555] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 2573.
[556] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 2573.
[557] Other jurisdictions which do not contain statutory provisions on intervention, joinder and consolidation are Germany, Switzerland and Austria. See KILLIAS, Mehrzahl von Parteien und/oder Ansprüchen, *in:* TORGGLER et al., Handbuch Schiedsgerichtsbarkeit, 2nd ed., 2017, paras. 1034 and 1042; PITKOWITZ, Multi-Party Arbitrations – Joinder and Consolidation under the Vienna Rules 2013, *in:* Austrian Yearbook on International Arbitration, 2015, p. 309.
[558] See paras. 308ff.
[559] MAZZONETTO, A Discussão em torno dos terceiros na arbitragem e a modernização da Lei de Arbitragem Brasileira, *in:* CAHALI/RODOVALHO/FREIRE (ed.), Arbitragem – Estudos sobre a Lei No. 13.129, de 26.05-2015, p. 460.
[560] Commission of Jurists in charge of the Brazilian Arbitration Act Minutes of Meeting, 12ª Meeting on 26 September 2013.

the arbitration agreement is where the parties' intent is expressed in its full extent.[561] Given the fact that situations involving multi-party arbitration are so diverse, it would not be very difficult for an arbitral institution to include detailed rules aiming at providing an exhaustive system that would deal with every case and at the same time maintain the procedural simplicity of the rules.[562] One should keep in mind that one of the main advantages of arbitration is the flexibility to adapt to each case and this is particularly appropriate when it comes to multi-party and multi-contract arbitration.[563]

IV. PARTIAL CONCLUSION

401. Joinder, intervention and consolidation are procedural mechanisms, but they are not strictly procedural matters in the narrower sense, as they are strictly related to the existence, validity, and scope of the arbitration agreement.

402. Joinder and intervention provisions do not constitute an autonomous base for binding parties that have not consented to arbitration. Therefore, additional parties cannot be compelled to arbitrate where they have not consented to the arbitration agreement.

403. The consent requirement plays also a key role as to consolidation. Arbitration can be consolidated only insofar the parties reach agreement in this regard. When addressing consolidation, joinder and intervention, courts and arbitrators shall determine not only whether there is consent to the arbitration agreement in general, but also whether such mechanisms fall within the scope of the arbitration agreement. Notably, where the arbitration agreements refer to institutional rules the parties are consenting to their rules concerning joinder, intervention and consolidation, if any occasion for such should arise.

404. The complication as to whether additional parties may be joined or arbitrations proceedings be consolidated does not limit itself in the existence of the consent, but also leads to

[561] KONDEV, Statutory Approaches to Multi-Party/Multi-contract Construction Arbitration in The Vindobona Journal, Vol. 19 Issue 12015, p. 50.
[562] WEBSTER/BÜHLER, Handbook of ICC Arbitration, 2014, para. 10-07.
[563] WEBSTER/BÜHLER, Handbook of ICC Arbitration, 2014, para. 10-07; FIEBINGER/HAUSER, Mehrparteienschiedsverfahren nach den neuen Wiener Regeln, *in:* EBKE/OLZEN/SANDROCK, Festschrift für Siegfried H. Elsing zum 65. Geburtstag, 2015, p. 111.

problems in finding a balance between the parties' interests. Even though multi-party arbitration may offer advantages, like consolidation of proceedings, it may give rise to a series of inconveniences in relation, for instance, to the constitution of the arbitral tribunal and costs. Accordingly, for the joining of additional parties and consolidation of proceedings it does not suffice that all requirements are met but it is also necessary to consider and balance the parties' interests. Consequently, whether a party should be joined or separate proceedings consolidated highly depends on the balance of the parties' interests and the circumstances of the case.

CHAPTER 5: CONSTITUTION OF THE ARBITRAL TRIBUNAL IN MULTI-PARTY ARBITRATION

405. This chapter examines the main aspects of the appointment of arbitrators as well as the parties' right to an equal treatment in the constitution of the arbitral tribunal in multi-party proceedings, including in cases of joinder, intervention and consolidation.

406. Where there are more than two parties involved in an arbitration, the constitution of the arbitral tribunal may become complicated.[564] In multi-party proceedings it is not possible to give every party the right to appoint one arbitrator.[565] This would be impractical, as it would lead to expensive arbitral tribunals composed of an excessive number of arbitrators or to an unequal composition of the arbitral tribunal where a majority of parties has aligned interests. Furthermore, none of the parties can be deprived from the right to participate in the constitution of the arbitral tribunal on an equal footing with the other parties.[566]

I. PARTICIPATION IN THE SELECTION OF THE ARBITRAL TRIBUNAL AS KEY ADVANTAGE OF ARBITRATION

407. The appointment of arbitrators in whom the parties have confidence is a key advantage of international arbitration.[567] According to empirical evidence, this is seen as one of the main advantages of arbitration versus litigation.[568] The constitution of the arbitral tribunal is

[564] WELSER/STOFFL, The Arbitrator and the Arbitration Procedure, Multi-Party Arbitration, Austrian Yearbook on International Arbitration, 2015, p. 277.
[565] LEW/MISTELIS/KRÖLL, Comparative International Commercial Arbitration, 2003, para. 16-11; BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2607.
[566] RUBINO-SAMMARTANO, MAURO, International Arbitration, Law and Practice, 3rd ed., 2014, p. 401.
[567] RIVKIN, Strategic Considerations in Developing an International Arbitration Case, *in:* The Art of Advocacy in International Arbitration, BISHOP/KEHOE (eds.), 2010, p. 160: "*A good party-appointed arbitrator will not risk losing credibility by becoming a party advocate, but is rather someone who will ensure that you have a fair opportunity to present your case*." LEW/MISTELIS/KRÖLL, Comparative International Commercial Arbitration, 2003, para. 10-4; LUDWIG, Impedimento e Suspeição de árbitros no direito brasileiro por falta de independência e imparcialidade: análise legislativa, pesquisa jurisprudencial e esboço de melhores práticas, *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, p. 116; BRODSKY/MADEIRA FILHO, A Seleção dos árbitros nos procedimentos arbitrais, *in:* Revista de Arbitragem e Mediação, 2009(20), p. 195.
[568] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 1640; BÜHRING-UHLE, A Survey on Arbitration and Settlement in International Business Disputes: Advantages of Arbitration in Towards a Science of International Arbitration (2005), DRAHOZAL/NAIMARK (eds.), pp. 32-33: A survey conducted by

critically important as the outcome of arbitrations depends largely on the arbitrators' ability and experience.[569]

II. INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS

408. The independence and impartiality of arbitrators is a fundamental principle in international arbitration.[570] Arbitrators are under duty to behave equitably and impartially.[571] When appointing a co-arbitrator, the party expects him or her to understand its position and ensures that the arbitral tribunal will also understand it too, but this does not imply that the arbitrator can be subject to pressure by the appointing party.[572]

409. Brazilian Arbitration Act provides that the arbitrators shall conduct the proceedings with impartiality, independency, competence, diligence and discretion.[573] Art. 13 of the Brazilian Arbitration Act also sets out that any individual with legal capacity in whom the parties have *confidence* may serve as an arbitrator. The persons nominated or appointed to act as arbitrators have the duty do disclose, before accepting, any fact that may give rise to a reasonable doubt as to his or her impartiality and independency.[574]

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the author between 1991 and 1992 revealed that the possibilty to select members of the arbitral tribunal was often cited as one of the advantages of the arbitration and the expersite of the arbitral tribunal was deemed "highly relevant or,significant" by 60% of the survey respondents.

[569] LEW/MISTELIS/KRÖLL, Comparative International Commercial Arbitration, 2003, para. 10-1; REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 4.13: "[C]*hoosing the right arbitral tribunal is critical to the success of the arbitral process. It is an important choice not only for the parties to the particular dispute, but also for the reputation and standing of the process itself. It is, above all, the quality of the arbitral tribunal that makes or breaks the arbitration, and it is one of the unique distinguishing factors of arbitration as opposed to national judicial proceedings".* See also NEVES, A escolha do árbitro como fundamento da arbitragem, *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, p. 572.

[570] MCILWRATH/SAVAGE, International Arbitration and Mediation, 2010, para. 5-062. See also HENRY, Le devoir d'indépendance de l'arbitre (2001); BERGER, Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration, 3rd ed., 2015, para. 23-1.

[571] FOUCHARD, Relationship between the Arbitrator and the Parties and the Arbitral Institution in The Status of the Arbitrator, ICC, Special Supplement, p. 13.

[572] RUBINO-SAMMARTANO, Real and Feared Arbitrator Conflicts of Interest, *in:* NEWMAN/HILL (eds.), The Leading Arbitrator's Guide to International Arbitration, 2014, p. 256.

[573] Brazilian Arbitration Act. Art. 13, §6. In addition, Art. 21, § 2 sets forth that the principles of the right to be heard, equal treatment, impartiality of arbitrators and arbitrator's free conviction shall be observed during the arbitration

[574] Brazilian Arbitration Act. Art. 14 §1. Arbitrator's failure to disclose constitutes a ground for setting aside the award or for its non-recognition: Superior Court of Justice, SEC 9.412, Special Court, Min. João Otávio de Noronha, 19.04.2017. See also FERRAZ JR., Suspeição e Impedimento em Arbitragem, *in:* Revista de Arbitragem e Mediação, 2011(28), pp. 78ff. According to LEMES, the arbitrators' duty to disclose is a consequence of the *confidence* criterium (LEMES, A Independência e a Imparcialidade do Árbitro e o Dever de Revelação, *in:* Revista Brasileira de Arbitragem, 2010(26), p. 24. Also in this regard: MARQUES, 'Breves

410. Where the arbitrator fails to act with impartiality, he or she is subject to criminal sanctions as if he or she were a public servant.[575] Therefore, arbitrators should act with the same degree of impartiality as national judges. Otherwise, in addition to criminal sanctions, the arbitral award will also be set aside.[576]

III. PARTIES' RIGHT TO EQUAL TREATMENT IN THE CONSTITUTION OF THE ARBITRAL TRIBUNAL

411. The principle of equal treatment is a fundamental principle of international arbitration and it prevents parties to be favoured by the appointment of a certain arbitrator.[577] Reasonable opportunity to participating in the constitution of the arbitral tribunal must be given. However, this does not allow each party to appoint an arbitrator per se.[578] In fact, in proceedings involving more than three parties, except for rare circumstances, it is not possible for each one of them to appoint a co-arbitrator.

412. Party autonomy in the appointment of arbitrators is not absolute.[579] Their freedom finds its limit in the principle of equality between the parties.[580] This principle is part of the public policy and its violation may result in setting aside the award.[581] Where the arbitral tribunal has not been treated equally, the arbitral award can be set aside based on Arts. 32, VIII, and 21, §2, of the Brazilian Arbitration Act.[582]

Apontamentos sobre a Extensão do Dever de Revelação do Árbitro, *in:* Revista Brasileira de Arbitragem, 2011(31), p. 65; CAVALIERI, Imparcialidade na Arbitragem, *in:* Revista Brasileira de Arbitragem 2014(41), p. 123.

[575] Brazilian Arbitration Act. Art. 17.

[576] Brazilian Arbitration Act. Ar. 32, VIII.

[577] KAUFMANN-KOHLER/RIGOZZI, Law and Practice in Switzerland, 2015, para. 4.80.

[578] KAUFMANN-KOHLER/RIGOZZI, Law and Practice in Switzerland, 2015, para. 4.80; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland. 3rd ed., 2015, para. 836.

[579] POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed., 2007, para. 401.

[580] POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed., 2007, para. 401; BORN, International Commercial Arbitration, 2nd ed., 2014 p. 1638.

[581] POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed., 2007, para. 401. See below paras. 417ff ("Appointment of Arbitrators in Multi-Polar Disputes, para. 423 (Dutco case) and 424 (Decision of the Court of Appeal of Sao Paulo, Ap. 0002163-90.2013.8.26.0100, 11th Chamber of Private Law, 03.07.2014).

[582] See para. 423 below.

413. In the context of the constitution of the arbitral tribunal in multi-party disputes, the *Dutco case* is one of the most illustrative examples of the equal treatment of the parties.[583] In that case, as will be demonstrated below, the arbitral award has been set aside due to the fact that respondents with different interests were under obligation to appoint a common co-arbitrator.

IV. JOINT APPOINTMENT OF ARBITRATORS IN BIPOLAR PROCEEDINGS

414. In disputes between two parties that have agreed to an arbitral tribunal composed of three arbitrators, the common procedure is the following: each party appoints a co-arbitrator, while the presiding arbitrator is chosen by the co-arbitrators or by an appointing authority, which usually is the president or committee of an arbitral institution.

415. This rule does not change simply by the fact that there are more than two parties. Where the disputes involve a plurality of parties, the common practice is that the group of claimants will appoint a co-arbitrator and the group of respondents the other co-arbitrator. For instance, there are many disputes in which all claimants or all respondents pertain to the same group and hence are under a unique control. In cases like these, the parties will be represented by the same attorney and will act before the arbitrators as if they were a single party, yet maintaining their autonomy with respect to their own liabilities for the sake of the final award. Accordingly, it is commonplace that groups with aligned interests will appoint a single co-arbitrator, irrespective of the number of parties. However, this standard method of individual or joint appointments is unlikely to be suitable in respect of arbitration with multiple poles.

416. Finally, it is worth mentioning that institutions may appoint a co-arbitrator on a party's behalf, while still maintaining the appointment of the arbitrator nominated by the other party.[584] By proceeding in this way, the institutions will avoid that a group with converging

[583] LOZADA, The Principle of Equal Treatment of the Parties in International Commercial Arbitration, The Vindobona Journal in The Vindobona Journal, Vol. 19 Issue 22015, p. 177.
[584] KAUFMANN-KOHLER/RIGOZZI, Law and Practice in Switzerland, 2015, para. 4.87.

interests refrains from appointing an arbitrator for tactical reasons intending to prejudice the other side's right to appoint a co-arbitrator.[585]

V. APPOINTMENT OF ARBITRATORS IN MULTI-POLAR DISPUTES

417. The constitution of the arbitral tribunal is a delicate issue in multipolar proceedings, *i.e.* where the parties cannot be simply divided into two groups of claimants and respondents.[586] As said before, arbitration has developed as a means of dispute resolution between two poles.[587] This is clearly evident in the method of appointment of arbitrators, where it is common that arbitral rules and national laws depart from the assumption that the dispute arises between two parties and set forth that each party shall appoint a co-arbitrator. However, when the arbitration does not fit squarely into a bipolar proceeding and a multilateral arbitration takes place, everything can become more complex, especially the constitution of the arbitral tribunal.[588.]

418. It may happen that a claimant asserts claims against two respondents that have opposing interests and therefore they will likely fail to reach an agreement as to the nomination of a co-arbitrator. In another example, a claimant may commence arbitration proceedings against two respondents and one of them brings claims against the other respondent and the latter makes a counterclaim against claimant. In this second scenario the dispute will draw a triangle where the three parties will be "claimant and respondent at the same time".

419. In arbitrations with multiple sides, the most reasonable solution is in principle for all arbitrators to be appointed by an independent authority, which will be the arbitral institution itself in case of institutional arbitration and in case of *ad hoc* arbitration the appointing

[585] KAUFMANN-KOHLER/RIGOZZI, Law and Practice in Switzerland, 2015, para. 4.87; PITKOWITZ, Multi-Party Arbitrations – Joinder and Consolidation under the Vienna Rules 2013, *in:* Austrian Yearbook on International Arbitration, 2015, p. 305.
[586] MCILWRATH/SAVAGE, International Arbitration and Mediation, 2010, para. 5-056.
[587] See para. 14 above.
[588] CAPRASSE, The setting up of the arbitral tribunal in multi-party arbitration, I.B.L.J. 2006, 2, p. 198.

authority designated by the parties or the competent judge.[589] Virtually all Brazilian and foreign institutions adopt this approach.[590]

420. The alternatives would result either in an unbalance due to aligned interests of some parties or an excessive number of arbitrators. In a dispute involving, for example, one claimant and two respondents it would be unreasonable to permit the three parties to appoint one of the three arbitrators. First, it is likely that respondents' interests are aligned. Hence, it would be possible to argue that this would result in an unbalance as to the composition of the arbitral tribunal, since arbitrators appointed by the respondents would have the majority of votes.[591] Furthermore, even though the respondents are not aligned, their interests are likely to have more proximity with each other than with the claimant who is suing them. In addition, diverging interests between the respondents at the beginning of the proceedings does not mean that they will not join forces in the future.

421. Moreover, the appointment of three arbitrators by three parties may raise a procedural issue as to the decision making of the arbitral award. According to Art. 24, §1, of the Brazilian Arbitration Act, the decision of the arbitral tribunal shall be made by majority vote and, if this turns out not to be possible, the vote of the presiding arbitrator shall prevail. Therefore, it would unequal if the arbitrator appointed by one party acted as presiding arbitrator while the arbitrators selected by the other were the of co-arbitrators. In addition, the lack of a presiding arbitrator would be a problem if the arbitrators could neither reach a unanimous decision nor a decision by majority of votes. Therefore, this approach would be impractical.[592]

422. The appointment of more than three arbitrators, except in special circumstances involving a very delicate issue with great repercussion, is not recommendable. Arbitral tribunals with five or more arbitrators would constitute an excessive number. According to some commentators, even in cases of major importance, three arbitrators carefully chosen should

[589] This was de solution adopted in the Dutco case, landmark decision in this respect which is analysed below. See para. 423 above.
[590] Brazilian institutions: Art. 4.16 CAM-CCBC; Art. 3.1 CIESP/FIES, Art. 4.8 CAMARB, Art. 21, §2, Arbitac, Art. 16, § 2, FGV and Art. 3.6 CAM. International Institutions: Art. 12.8 ICC Rules; Art. 8.1 LCIA Rules; Art. 8.5 Swiss Rules; Art. 17.5 SCC Rules; Rule 12.2 SIAC Rules.
[591] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2607.
[592] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland. 3rd ed., 2015, para. 838.

be sufficient.[593] In addition, co-ordinating the schedule of five arbitrators would demand much effort and lead to considerable delay.[594] The practice of states in appointing five or more arbitrators is more politically than pragmatically driven.[595]

A. DUTCO CASE

423. With regard to the constitution of the arbitral tribunal in a multi-party arbitration context, the most famous decision is the one rendered in the French Dutco case. Here, the Court of Cassation has set aside an ICC arbitral award on the grounds of lack of equality of the parties in appointing arbitrators.[596] In this case, a Dubai company (Dutco) concluded, in 1981, a consortium agreement with two German Companies (Siemens and BKMI) for the construction of a cement plant in Oman. In 1986, Dutco initiated an arbitration against the other companies in accordance with the ICC Rules. The two respondents, despite having different interests, nominated a single arbitrator under protest and with all due reservations. In a partial award, the arbitral tribunal considered to have been properly constituted. Thereafter, respondents initiated set aside proceedings arguing that the principle of equal treatment between the parties had been breached. The Court of Appeal upheld the decision, but the Court of Cassation in 1992 ruled in favour of the respondents, considering that the principle of equal treatment in the appointment of arbitrators had been indeed violated. According to the court, this principle is a matter of public policy (*ordre public*), which can be waived only after a dispute has arisen.

B. THE "BRAZILIAN DUTCO CASE"

424. In the arbitral proceedings previously mentioned above involving the loan agreement entered into by the borrower Paranápanema S.A., and the lenders Santander S.A. and BTG Pactual S.A, the arbitral award was set aside, as the Court of Justice of Sao Paulo found that the composition of the arbitral tribunal favoured the claimant Santander over the

[593] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 4.32.
[594] LEW/MISTELIS/KRÖLL, Comparative International Commercial Arbitration, 2003, para. 10-29.
[595] REDFERN et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 4.32.
[596] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 898.
[596] BKMI Industrieanlagen GmbH & Siemens AG *v* Dutco Construction, Cour de Cassation (1er Chambre Civile), Pourvoi No. 89-18708 89-18726, 7.01.1992; *in:* Yearbook Comm. Arb'n. XVIII (1993), pp. 140-142.

respondents.[597] In this case, Santander filed a request for arbitration agreement against the borrower and the co-lender and appointed an arbitrator. Not surprisingly, both respondents had different interests and could not agree on the appointment of a co-arbitrator. The agreement provided for arbitration under the CAM-CCBC rules, which did not contain provisions concerning that particular case at that time. Accordingly, the president of the arbitral institution appointed a co-arbitrator for the respondents and maintained the arbitrator nominated by the claimant.

425. After three years, the arbitral tribunal rendered a final award putting an end to the arbitral proceedings and condemning the borrower to pay the amount due. Subsequently, the borrower Paranápanema filed a request before the state court of Sao Paulo for setting aside the arbitral award. In the first instance, the judged ruled in favour of Paranápanema stating that the decision of the institution's president violated the principle of equal treatment to the parties. According to the judge, even though it is expected that the arbitrators are technical and impartial, there are other circumstances surrounding the choice of an arbitrator, which are taken into account by the parties. For example, the possibility of being a specialist in a specific detail in the case, availability of arbitrators, and affinity with academic thinking. Therefore, the prejudice to the party is objective and does not need to be proven.[598]

426. The judge of first instance also stated that as it was not possible to conciliate the parties' interests, another measure should be adopted that would not maintain the arbitrator appointed by the claimant. According to the judge, the institution should appoint two co-arbitrators, which would be in charge to selecting the presiding arbitrator. As stated by the judge, if it is not possible to follow strictly the rules of the arbitration agreement, the intervention of the arbitral institution's president should be in accordance with the principle of equality of treatment between the parties.

427. The Court of Justice of Sao Paulo upheld the judgment of first instance. The Court highlighted that the Paranápanema made a proper objection during the arbitral proceedings and dismissed the allegations of the appellants regarding preclusion. According to the Brazilian Arbitration Act, when the arbitrators do not accept the challenge made by the

[597] Court of Appeal of Sao Paulo, Ap. 0002163-90.2013.8.26.0100, 11th Chamber of Private Law, 03.07.2014. See para. 318 above.
[598] See para. 407 above.

party, the arbitration shall proceed normally, subject to further review after the award on merits is rendered.[599]

C. CONSTITUTION OF THE ARBITRAL TRIBUNAL IN MULTI-PARTY ARBITRATION UNDER BRAZILIAN LAW

428. The only provision concerning multi-party arbitration in the Brazilian Arbitration Act was introduced in 2015 and concerns the constitution of the arbitral tribunal. However, Art. 13, §4, of Law No. 9.307/96 merely limits itself to setting forth that in case of multi-party arbitration the applicable rules on the constitution of the arbitral tribunal shall be observed.[600] Even though it appears to be settled that the arbitration institution shall appoint all members of the arbitral tribunal in multi-party arbitration where claimants or respondents fail to appoint joint arbitrators, the reform of the Brazilian law could make this clear in order to reflect the current practice. If the Brazilian legislators intended to maintain a broad provision, they could have followed the example of the simple wording of Art. 362(2) of the Swiss Civil Procedure Code, which states in case of multi-party arbitration, the competent court may appoint all arbitrators.[601]

VI. CHALLENGE TO ARBITRATORS AND TO THE CONSTITUTION OF THE ARBITRAL TRIBUNAL

429. Art. 20 of the Brazilian Arbitration Act sets forth that challenges to the arbitrators and to the jurisdiction of the arbitral tribunal shall be made by the parties at the first opportunity after its the constitution.[602] If a party fails to raise an objection, it is presumed that it has

[599] Law No. 9.307/96. Arts. 20, §2.
[600] Law No. 9.307/96. Art. 13 §4.
[601] Swiss Civil Procedure Code. Art. 362(2): *In case of a multi-party arbitration, the ordinary court competent under Art. 356, § 2, may appoint all the arbitrators.* Even though this provision is contained in the Swiss Civil Procedure Code, which governs domestic arbitration in Switzerland, it is argued that Art. 362(2) shall be observed by Swiss courts also to international arbitration seated in Switzerland by force of Art. 179(2) of the Federal Statute on Private International Law. See BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland. 3rd ed., 2015, para. 838.
[602] Superior Court of Jusice, SE 9.713, Min. João Otávio Noronha, 30.06.2014; Superior Court of Justice SEC 4.837, Special Court, Min. Francisco Falcão, 15.08.2012 ; Court of Appeal of Sao Paulo, Ap. 0009881-43.2011.8.26.0510, 1st Commercial Chamber, 11.03.2015; Court of Appeal of Goiás, Ap. 8061-50.2009.8.09.0051, 2nd Civil Chamber, 16.04.2013; Court of Appeal of Mato Grosso do Sul, Ap. 0040889-66.2012.8.12.0001, 5th Civil Chamber, 07.02.2013; Court of Appeal of Mato Grosso, Ap. 23651/2009, 2nd Civil Chamber, 24.02.2010; Court of Appeal of Goiás, Ap. 65345-40.2014.8.09.0051, 3rd Civil Chamber,

consented to the constitution of the arbitral tribunal and to the jurisdiction of the arbitrators. Accordingly, where the parties to a multi-party arbitration do not agree with the procedure of appointment, they shall immediately make this clear, for instance in the terms of reference. In case the objection is denied, the arbitration shall proceed and the challenging party may raise this issue again by challenging the arbitral award.[603]

430. In the GP Capital case[604], claimants jointly appointed an arbitrator whereas respondents could not reach an agreement as to the appointment of a joint co-arbitrator. Therefore, the co-arbitrator was appointed by the president of CAM-CCBC in accordance with the institution's former rules. Respondents did not object and signed the terms of reference. Claimants raised the issue only when trying to annul the arbitral award. The Court of Appeal of Sao Paulo rejected the argument on the ground that Respondents failed to not make an objection in the terms of reference. In addition, it was also pointed out that Respondents informed the arbitral institution that they have not reached an agreement for the appointment of the arbitrator and for this reason left the decision for the president of the institution.

VII. ARBITRAL CONSTITUTION IN JOINDER, INTERVENTION AND CONSOLIDATION

431. The selection of the arbitral tribunal is one of the main difficulties that arise in relation to joinder, intervention or consolidation.[605] Apart from the existence of consent to the arbitration agreement, it is necessary for the enforceability of the award that the parties have been treated equally during the arbitration proceedings. Therefore, arbitrators and arbitral institutions must ensure equal opportunity with regard to the constitution of the arbitral tribunal.

07.06.2016; Court of Appeal of Goiás, Ap. 29656-03.2012.8.09.0051, 6th Civil Chamber, 11.03.2016; Court of Appeal of Parana, Ap. 436.093-6, 17th Civil Chamber, 14.11.2007.

[603] Brazilian Arbitration Act, Arts. 20, §2, and 32, II (where the award was rendered by those who could not be arbitrator); 21, §2, and 32, VIII (breach of the equal treatment between the parties). See paras. 411ff. and 460ff.

[604] See paras. 245ff above.

[605] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2607.

432. As a general rule, when the arbitral tribunal has been already constituted, the third party may take part in the arbitration only if it has consented.[606] Its consent does not only relate to the arbitration agreement, but also to the constitution of the arbitral tribunal.[607]

433. For instance, Art. 7(1) of the ICC Rules and Art. 7 of the ICDR Rules expressly preclude parties from joining additional parties once an arbitrator has been appointed or confirmed, unless all parties, including the party to be included, expressly agree otherwise. The reasoning behind this rule lies in the fact that the additional party would not have had the same opportunity to participate in the constitution of the arbitral tribunal as the others. This argument subsists even where the arbitral institution has appointed all members of the arbitral tribunal or appointing authority and the original parties have not themselves selected the arbitrators, since they had at least the opportunity to challenge the arbitrators and to be heard on that matter.

434. With regard to consolidation, if the arbitral tribunal has already been constituted or arbitrators have been appointed, the consolidation of arbitration proceedings may not be recommendable unless the objects of the disputes are intrinsically intertwined. The rationale behind this is that the parties may choose to appoint different arbitrators to decide different arbitrations. Hence, the consolidation of proceedings could violate the parties' right to participate in the constitution of the arbitral tribunal.

VIII. PARTIAL CONCLUSION

435. The possibility of nominating the arbitrators is one of the key advantages in comparison to litigation, but this does not mean that this is an absolute right of the parties in arbitration proceedings. Particularly in cases involving multiple parties, it is usually not possible that each party appoint a separate arbitrator. In this case it is likely that the arbitral institution or the appointing authority will appoint all arbitrators. By doing this, the institution ensures that none of the parties obtain a procedural advantage in the constitution of the proceedings,

[606] VOSER/MEIER, Joinder of Parties or the Need to (Sometimes) Be Inefficient, in: Austrian Arbitration Yearbook, 2008, p. 123: "As a general rule, the joinder of a party after the arbitral tribunal has been constituted is only possible if the third party accepts the arbitral tribunal constituted. This is, in practice, unlikely".
[607] STEINGRUBER, Consent in International Arbitration, 2012, para. 10.21.

which would lead to the annulment of the award pursuant to Arts. 32, VIII, and 21, §2, of the Brazilian Arbitration Act.

436. Nevertheless, if a two-pole dispute arises between a group of claimants and a group of respondents with coordinated defences, and one of the poles fails to nominate a joint arbitrator without good reason, the arbitral institution shall appoint only a co-arbitrator on claimants' or respondents' behalf and maintain the arbitrator nominated by the opposing side. The rationale behind this approach is to avoid that the parties deliberately do not appoint an arbitrator in order to prevent the other party from appointing an arbitrator.

437. Under Brazilian law, objections to the constitution of the arbitral tribunal shall be raised at the earliest opportunity or immediately after its constitution. If a party fails to do so and raise the objection only when trying to set aside the final award, Brazilian courts will likely consider that the applicant has consented to the constitution of the arbitral tribunal and refuse to annul the arbitral award based on this ground.

438. The constitution of the arbitral tribunal is one of the main difficulties in multi-party arbitrations and a strong obstacle to the joining of additional parties and consolidation of the proceedings. An additional party shall not be joined and arbitration proceedings shall not be consolidated without parties' consent after the appointment of the arbitrators, save for very specific cases where the factual circumstances indicate that none of the parties will be prejudiced. Hence, the parties' interests shall be weighed in order to avoid any unbalance between the parties as to the composition of the arbitral tribunal.

CHAPTER 6: CHALLENGES TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL AND CHALLENGE OF ARBITRAL AWARDS ON JURISDICTIONAL GROUNDS

439. Jurisdictional objections are frequently raised in multi-party and multi-contract arbitrations. The parties may contend that they are not a party to the arbitration agreement or argue that some claims fall outside the scope of the arbitration agreement. The parties shall raise jurisdictional objections at the outset of the arbitration. However, disputes on jurisdiction also often reach national courts in set aside proceedings.

440. Challenges to the jurisdiction of arbitral tribunals are not only intrinsically related to substantive matters concerning the scope of the arbitration agreement, but also touch upon several procedural issues, such as the competence to decide on the objection and bifurcation of arbitrations.

I. OBJECTIONS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

441. According to Art. 20 of the Brazilian Arbitration Act, objections to jurisdiction shall be made at the first opportunity after the commencement of the arbitration. In case of institutional arbitration, the parties shall comply with the time limits provided by the rules of the institution. In general, international arbitral institutions set forth that jurisdictional objections shall be raised no later than the submission of the statement of defense.[608] Brazilian arbitral institutions are usually silent in this regard. Therefore, Art. 20 of the Brazilian Arbitration Act shall apply where Brazilian law is applicable.

442. Where a party fails to raise an objection at the beginning of the proceedings, it will be deemed to have consented to the arbitration. Especially if a party makes such an objection only after the arbitral award has been rendered.[609] In such circumstances, even if the losing

[608] Art. 23.3 LCIA Rules, 28.3 SIAC Rules, 21.3 Swiss Rules, 24(1) VIAC Rules, 29(2)(i) SCC Rules, 19.3 HKIAC Rules.

[609] Court of Appeal of Sao Paulo, Ap. 1006878-60.2013.8.26.0068, 2nd Commercial Chamber, 17.02.2014; Court of Appeal of Tocantins, AI 0003720-55.2017.827.0000, 2nd Civil Chamber, 26.04.2017; Court of Appeal of Parana, EI 428.067-1/10, 07.12.2011; Court of Appeal of Goiás, 5th Civil Chamber, Ap. 59064-

party proves that there was no arbitration agreement, this shall have no impact on the arbitral award.[610] The participation in the arbitration without any objection shall be considered as consent to the arbitration.

A. ARBITRAL TRIBUNAL'S DECISION ON JURISDICTION AND BIFURCATION

443. Where a party objects to the arbitral tribunal's jurisdiction, the arbitral tribunal has basically three options (i) to rule immediately on the objection denying jurisdiction, (ii) invite the parties to comment on the objection and render an interim award or (iii) decide on the objection at the end of the proceedings jointly with the merits.[611] However, if the parties have agreed on a challenge procedure, the arbitrators shall respect the arbitration agreement.[612] For instance, where the arbitration agreement rules out the possibility of the arbitrators to render an interim award on jurisdiction, the arbitral tribunal has to refrain from doing so.[613] The arbitrators cannot override the parties' intention where they have limited their authority.

444. Arbitral tribunals opt for the first option when the lack of jurisdiction is so evident that the arbitral tribunal feel compelled to reject jurisdiction.[614] In fact, there is no doubt that objections to jurisdiction are also commonly used as a dilatory tactic and in such cases the arbitral tribunal shall ensure that the obstructive party does not succeed in delaying the arbitration.

445. Where the objection is not evidently baseless, the arbitrators may decide to bifurcate the proceedings to avoid that the parties incur unnecessary costs. That means the arbitral

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44.2009.8.09.0051, 17.11.2016; Court of Appeal of Goiás, Ap. 204892-03.2011.8.09.0051, 4th Civil Chamber, 20.09.2012.

[610] Court of Appeal of Minas Gerais, AI 1.0525.10.004531-5/001, 13th Civil Chamber, 31.05.2012.

[611] JARVIN/LEVENTHAL, Objections to Jurisdiction, *in:* NEWMAN/HILL (eds.), The Leading Arbitrator's Guide to International Arbitration, 2014, p. 512.

[612] TWEEDDALE/TWEEDDALE, Arbitration of Commercial Disputes - International and English Law and Practice, 2005, para. 24.21.

[613] In England, Art. 31(4) the 1996 Arbitration Act sets out that where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may (a) rule on the matter in an award as to jurisdiction, or (b) deal with the objection in its award on the merits. The same provision states further that if the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly. The Brazilian Arbitration Act does not contain any provision in this regard.

[614] JARVIN/LEVENTHAL, Objections to Jurisdiction, *in:* NEWMAN/HILL (eds.), The Leading Arbitrator's Guide to International Arbitration, 2014, p. 512.

tribunal will divide the proceedings into two phases dealing respectively first with the jurisdiction and second with the merits.[615] However, if the facts relating to jurisdiction are intertwined with the merits it will not be possible to dissociate both issues clearly. In such a case, the arbitral tribunal will postpone the decision on jurisdiction until the end of the proceedings.

446. Even though bifurcation may present some advantages, arbitrators should not underestimate its disadvantages and hastily come to the conclusion that the proceedings should be bifurcated. Experienced arbitrators have learned that being bound by a first award has negative implications and recommend caution when deciding whether or not to bifurcate.[616]

447. The party requesting bifurcation bears the burden to prove that the claims or defences concerning jurisdiction and merits are not intertwined and that both issues can be decided separately at different stages.

B. NEGATIVE EFFECT OF THE ARBITRATION AGREEMENT

448. As explained above, the principle of competence-competence has positive and negative effects and both are recognized under Brazilian law.[617] The positive effect relates to the arbitrators' power to decide on their own jurisdiction. According to the negative effect, arbitrators have priority over national courts to decide on their jurisdiction. This means that courts are prevented from assessing the arbitrators' jurisdiction prior to the analysis by the arbitral tribunal.

449. Pursuant to Art. 485, VII, of the Brazilian Code of Civil Procedure, if a party initiates court proceedings relating to a matter subject to an arbitration agreement, the court shall not

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[615] JARVIN/LEVENTHAL, Objections to Jurisdiction, *in:* NEWMAN/HILL (eds.) The Leading Arbitrator's Guide to International Arbitration, 2014, p. 513.

[616] VAN DEN BERG, Organizing an International Arbitration: Practice Pointers, *in:* NEWMAN/HILL (eds.), The Leading Arbitrator's Guide to International Arbitration, 2014, p. 435: "*I have also been for some time in favor of bifurcation. More recently, I have become more cautious, since in a number of cases I have seen that evidence that came up during the second phase would have had a material impact on (part of) the decisions made in the first phase. However, decisions on the merits rendered in the first phase cannot be amended as they have become final. The lesson to be learned is that if one believes that bifurcation is to be adopted, one should be rather generous with respect to the evidence that can be introduced by the parties during the first phase*".

[617] See paras. 99 and 100 above.

proceed to the merits if the objection is upheld or if there is a decision of the arbitral tribunal in favour of its own jurisdiction. Notably, Brazilian courts cannot at its own initiative recognize the existence of an arbitration agreement and terminate the proceedings, *i.e.,* the counterparty shall raise an jurisdictional objection.[618]

450. The party wishing to object to the jurisdiction of the Brazilian court shall invoke the existence of the arbitration agreement with the statement of defence.[619] Failing to raise such objection, the party will be deemed to have accepted the competence of the national court.[620]

451. The negative competence-competence is well recognized under Brazilian case law.[621] In a dispute concerning multiple contracts where the arbitration clause expressly excluded some matters from its scope, the Court of Appeal of Rio de Janeiro referred the parties to arbitration for the arbitrators to examine first the extent of the arbitration clause.[622]

452. Brazilian commentators take the view that the negative effect of competence-competence is even stronger in Brazil than in France.[623] Whereas Art. 1.448 of the French Civil Code of Procedure provides that courts shall not decline jurisdiction if the arbitral tribunal has not yet been constituted or if the arbitration agreement is manifestly void or not applicable, such exceptions are not envisaged by Brazilian law.[624]

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[618] CREMASCO, O artigo 485, VII, do Novo Código de Processo Civil e o reconhecimento de competência pelo árbitro como pressuposto processual negativo no processo judicial, *in:* Revista Brasileira de Arbitragem 2017(53), p. 19.
[619] Brazilian Code of Civil Procedure. Art. 337, X.
[620] Brazilian Code of Civil Procedure. Art. 337, §6.
[621] Superior Court of Justice, REsp. 1.355.831/SP, 3rd Section, Min. Sidnei Benetti, 19.03.2013; Court of Appeal of Sao Paulo, Ap. 1033180-59.2015.8.26.0100, 34th Chamber of Private Law, 05.04.2017; Court of Appeal of Sao Paulo, Ap. 1032895-03.2014.8.26.0100, 2nd Commercial Chamber, 11.04.2016; Court of Appeal of Sao Paulo, Ag. Reg. 2069258-15.2013.8.26.0000, 2nd Commercial Chamber, 25.08.2014.
[622] Court of Appeal of Rio de Janeiro, AI 0054241-31.2014.8.19.0000, 11th Civil Chamber, 28.01.2015. Decision commented in DE ASSIS, Note: BRPR VII Empreendimentos e Participações Ltda. *v* Manchester Patrimonial S/A, Court of Justice of the State of Rio de Janeiro, Agravo de Instrumento nº 0054241-31.2014.8.19.0000, 28 January 2015, *in:* Revista Brasileira de Arbitragem 2015(48), pp. 130-138. See also COGO, Note: OTPPB e outro *v* RFSA, Court of Justice of the State of São Paulo, Agravo de Instrumento nº 2019207-29.2015.8.26.0000, 29 April 2015, *in*: Revista Brasileira de Arbitragem 2015(48), p. 146 fn. 10.
[623] BENEDUZI, Preliminar de Arbitragem no Novo CPC, *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, p. 290; COGO, Note: OTPPB e outro *v* RFSA, Court of Justice of the State of São Paulo, Agravo de Instrumento nº 2019207-29.2015.8.26.0000, 29 April 2015, *in:* Revista Brasileira de Arbitragem 2015(48), p. 1475.
[624] BENEDUZI criticizes the approach of the Brazilian Arbitration Act (Preliminar de Arbitragem no Novo CPC, *in:* A Reforma da Arbitragem, MELO/BENEDUZI (eds.), 2016, pp. 290ff.).

453. The Superior Court of Justice has already held that courts shall refrain from assessing the scope and validity of the arbitration agreement even if the arbitration has not commenced yet.[625] However, the parties may resort to national courts prior to the commencement of the arbitration where an arbitration agreement neither refers to an institution nor contains specific rules concerning the constitution of the arbitral tribunal. In this case, the parties are entitled to seek judicial assistance to enforce the arbitration agreement based on Art. 7 of the Brazilian Arbitration Act.[626] A non-signatory may enforce an arbitration agreement that it has not formally concluded based on Art. 7. However, the non-signatory bears the burden to prove that implied consent exists.

C. CONFLICT OF COMPETENCE BETWEEN ARBITRAL TRIBUNALS AND STATE COURTS

454. National courts are allowed to intervene in arbitration proceeding only where permitted by law. As explained above, one of the negative effects of the arbitration agreement is that courts shall refrain from deciding disputes subject to arbitration.[627] This is expressly provided in Art. 485, VII, of the Code of Civil Procedure, which sets forth that state courts shall terminate court proceedings where there is a decision of the arbitral tribunal in favour of its own jurisdiction. For this reason, positive conflicts of competence between courts and arbitral tribunals should theoretically not occur; however, in practice they do. This is due mainly to the inability of state judges that are unfamiliar with arbitration.[628]

455. In Brazil, the competent court to decide on conflict of competence is the Superior Court of Justice. The competence of the Superior Court of Justice was originally thought considering only conflicts between state courts. However, the Superior Court of Justice has also been called to decide disputes in relation to arbitration and decided that it is also competent to decide on conflicts between state courts and arbitral tribunals seated in Brazil.[629]

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[625] Superior Court of Justice, REsp. 1.278.852/MG, 4th Section, Min. Luis Felipe Salomão, 21.05.2013.
[626] Superior Court of Justice, REsp. 1.082.498/MT, 4th Section, Min. Min. Luis Felipe Salomão, 20.11.2012.
[627] See paras. 448 ffs above.
[628] LADEIRA, Conflito de Competência em Matéria de Arbitragem*, in:* Revista Brasileira de Arbitragem 2014(41), p. 62.
[629] NACHIF, The theories of international arbitration and related practical issues: the Brazilian approach (particularly the recent leading case on recognition of annulled awards) vis-à-vis the "delocalization trend", *in:* Revista Brasileira de Arbitragem, 2016(52), p. 53.

456. The leading case on the competence of the Superior Court of Justice is dated of 2013 and relates to a dispute involving the authority to decide on interim measures.[630] In this case, the state court ordered an interim measure before the commencement of the arbitration and refused to accept the jurisdiction of the arbitral tribunal over the issue after its constitution. The Superior Court of Justice held that it had jurisdiction to decide the conflict of competence and ruled in favour of the arbitral tribunal.

457. The Superior Court of Justice reaffirmed its competence to rule on conflicts between state courts and arbitral tribunals in several subsequent cases.[631] Notably, a recent decision on conflict of competence concerns a multi-party arbitration involving a non-signatory.[632] The dispute arose out of a franchising agreement entered into between the franchisor Partout Administração de Franquias e Bens Ltda. and the franchisee To Be Kids Comércio Varejista de Brinquedos Ltda. The arbitration was initiated by Partout against To Be Kids and other companies of the same group, including Toys Comércio de Brinquedos Ltda., which had not signed the agreement. However, according to Partout, the non-signatory Toys was also bound by the arbitration agreement as Toys had assumed all rights and obligations of the underlying agreement. Hence, the claimant Partout alleged that the agreement had been assigned to Toys.

458. The sole arbitrator upheld the claimant's allegations that there was a *prima facie* agreement between the parties. In parallel, To Be Kids and Toys initiated court proceedings against Partout seeking a declaration that the franchising agreement was still valid and asserting claims under the contract. The arbitral tribunal found that the behaviour of Toys was contradictory, since on the one hand Toys alleged that it was not a party to the arbitration agreement, but on the other hand the company was claiming rights under such agreement in court proceedings. The sole arbitrator also stressed that the companies were part of the same group and represented by the same person. On the contrary, the state court of Belem in the Brazilian state of Pará took the restrictive view that Toys was not a party to the

[630] Superior Court of Justice, CC 111.230/DF, Min. Nancy Andrighi, 08.05.2013.
[631] Superior Court of Justice, CC 150.830-PA, 09.02.2017, Decisão Monocrática Min. Marco Aurélio Bellizze; Superior Court of Justice CC 147.427-PA, 28.11.2016, Decisão Monocrática Min. Marco Aurélio Bellizze; Superior Court of Justice, CC No. 132.312-SC, 08.08.2016, Decisão Monocrática. Min. Ricardo Villas Bôas Cueva.
[632] Superior Court of Justice, CC 146.939-PA, 23.11.2016, 2nd Section, Min. Marco Aurélio Bellizze.

arbitration due to the absence of a written agreement containing an arbitration clause to which Toys was a party. Based on these two diverging decisions, Partout asked the Superior Court of Justice to decide on the conflict of competence, which the Superior Court decided in favour of the arbitration relying on the principle of competence-competence.

II. CHALLENGE OF ARBITRAL AWARDS ON JURISDICTIONAL GROUNDS

459. As explained above, jurisdictional objections shall be first submitted to the arbitral tribunal.[633] However, the decision of the arbitral tribunal on its own jurisdiction is not absolutely final. Once an award on jurisdiction has been rendered, Brazilian national courts can review the decision when the parties initiate setting aside proceedings challenging the arbitral award.

A. SETTING ASIDE PROCEEDINGS UNDER BRAZILIAN LAW

460. Pursuant to Art. 23 of the Brazilian Arbitration Act, the time limit within which the arbitral tribunal shall render the final award is six months commencing from the date of the constitution of the arbitral tribunal. Art. 23, §2, provides that the parties and the arbitrators may agree on an extension of time for rendering the final award. Nevertheless, in case of institutional arbitration, such time limit is subject to the respective institutional rules.

461. Arbitral awards can be directly enforced if made within the Brazilian territory.[634] According to Art. 33, §1, of the Brazilian Arbitration Act, a party may initiate annulment proceedings within 90 days of the notification of the award, final or partial, or of the decision on a motion for clarification. The petition shall be filed before the competent court of first instance.

462. Art. 32 of the Brazilian Arbitration Act establishes the grounds according to which an arbitral award may be set aside, namely: (i) the arbitration agreement is not valid, (ii) the award was rendered by an individual who could not be arbitrator, (iii) the award does not

[633] See paras. 448ff. above.
[634] Brazilian Arbitration Act, Art. 31.

contain the necessary elements in accordance with Art. 26[635], (iv) the award exceeded the limits of the arbitration agreement, (v) corruption, (vi) the award was not rendered within the established time limits, (vii) violation of the following principles: the right to be heard, equal treatment of the parties, impartiality of the arbitrator and arbitrator's free conviction.

463. The parties to multi-party and multi-contract arbitrations intending to set aside an award rely mainly on Art. 32, IV, of the Brazilian Arbitration Act alleging that the arbitral tribunal exceeded its powers by deciding on claims arising out of contracts that are not subject to the arbitration agreement or by issuing an award against a party that has not consented to the arbitration agreement. The parties also often invoke Art. 32, VIII, arguing that the constitution of the arbitral tribunal violated the equal treatment between the parties.

464. Notably, it is unlikely that the parties will succeed in setting aside the award on such grounds where they have not raised an objection promptly during the arbitration.[636] In relation to the scope of the arbitration agreement, the objection shall be raised at the first opportunity, normally in response to the request for arbitration. As to the breach of equal treatment in the constitution of the arbitral tribunal the parties shall object as soon as the arbitrators have been appointed. By failing to do so, the parties are deemed to have consented to the arbitration or the constitution of the arbitral tribunal.

B. CHALLENGE OF ARBITRAL AWARDS ON JURISDICTION

465. With the reform of 2015, the Brazilian Arbitration Act was amended to expressly provide arbitrators with the authority to grant partial awards.[637] Despite the lack of an express provision, it is noteworthy that partial arbitral awards were also accepted prior to the arbitration reform; nevertheless, not without controversy.[638] The possibility of rendering partial awards was disputed by some commentators as being inadmissible not only because

[635] Art. 26 sets out that the arbitral award shall contain the summary of the proceedings, the reasons for the decision, the operative part, date and place where the award was issued.
[636] See paras. 441 and 442 above.
[637] Brazilian Arbitration Act. 23, §1º. See ZAKIA, Um panorama geral da reforma da Lei de Arbitragem: o que mudou com a Lei Ordinária nº 13.129/2015, *in:* Revista Brasileira de Arbitragem, 2016 (51), pp. 56-59.
[638] FICHTNER/MANNHEIMER/MONTEIRO, A Sentença Parcial na Reforma da Lei de Arbitragem Brasileira, *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, p. 537. See also MARTINS, A Arbitragem e o Mito da Sentença Arbitral, *in:* LEMES/CARMONA/MARTINS (eds.), Arbitragem – Estudos em Homenagem ao Prof. Guido Fernando da Silva Soares, *in Memorian*, 2007, pp. 277-284; GIUSTI/MARQUES, Sentenças Arbitrais: Uma Análise Prática, *in:* Revista de Arbitragem e Mediação, 2010(26), pp. 46-58.

there was no provision in this regard, but also because they took the view that partial judgments were in discordance with the former Brazilian Code of Civil Procedure.[639] The discussion is now moot.

466. The revised wording of Art. 23, first paragraph, of the Brazilian Arbitration Act, is clear stating that *the arbitrators may render partial awards*. The Brazilian Arbitration Act does not define what constitutes a partial award. Consequently, one might ask whether partial awards are only those which decide part of the merits or whether the term also refers to those awards which do not dispose of part of the parties' claims but are merely a progressive step towards the final award.[640] This distinction is particularly relevant to determine whether or not an award on jurisdiction may be subject to set aside proceedings.

467. Notably, in international arbitration arbitral awards may be generally distinguished into final, partial and interim awards.[641] The literature is unclear in defining these types of awards, including the award on jurisdiction.[642] For instance, under Swiss law, awards on jurisdiction do not fall under the scope of partial awards, but they are rather considered as interim awards.[643] In fact, the terms *interim award* and *partial award* are often used interchangeably.[644]

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[639] Several commentators argue that the reform of the Brazilian Code of Civil Procedure in 2005 (Law 11.323/205) had made clear that partial judgements were admissible under Brazilian law and thefore so were partial awards. See CARMONA, A Sentença Arbitral Parcial, *in:* Revista Brasileira de Arbitragem, 2008(18), p. 26.

[640] VON SEGESSER/GEORGE, Swiss Private International Law Act (Chapter 12), *in:* MISTELIS (ed.), Concise International Arbitration, 2nd ed., 2015, p. 1229.

[641] See *e.g.,* Art. 2(V) ICC Rules. (v) "award" includes, *inter alia*, an interim, partial or final award.

[642] BORN, International Commercial Arbitration, 2nd ed., 2014, p. 3012: *"Most national laws and institutional arbitration rules provide for a variety of different types of arbitral "awards," including final awards, interim awards, consent awards and default awards. (...) Unfortunately, there is some inconsistency in the usage of these various terms;(...) different authorities, and different legal systems, sometimes adopt different meanings for the same term, or the same meaning for different terms, requiring that these labels be used with care."*

[643] VON SEGESSER/GEORGE, Swiss Private International Law Act (Chapter 12), *in:* MISTELIS (ed.), Concise International Arbitration, 2nd ed., 2015, p. 1229; GIRSBERGER/VOSER, International Arbitration: Comparative and Swiss Perspectives, 3rd ed., 2016, para. 1445: "*An interim award on a procedural issue is, for example, a decision affirming the arbitrator's jurisdiction despite the objection of a party*." Indeed, Art. 186(3) of the Swiss Federal Statute on Private International Law sets forth that the arbitral tribunal shall, as a rule, decide on its jurisdiction by preliminary award, whereas Art. 190(3) is special provision regarding the challenge of preliminary awards differently from those rules applicable to partial awards.

[644] GIRSBERGER/VOSER, International Arbitration: Comparative and Swiss Perspectives, 3rd ed., 2016, para. 1445.

468. Anyway, in a decision of 2015, the Superior Court of Justice held that (i) partial awards were admissible under Brazilian law even prior to the 2015 reform, (ii) the award on the jurisdiction of the arbitral tribunal is a partial award and (iii) the application for setting aside partial awards shall be made within 90 days from the notification of the partial award.[645] This understanding is also supported in the literature, as commentators also take the view that the parties shall challenge the award on jurisdiction immediately without having to wait until the final award has been issued.[646]

C. RECOGNITION OF FOREIGN ARBITRAL AWARDS

469. Brazilian law draws a distinction between domestic awards, *i.e.*, awards made within the territory of Brazil and foreign awards, those rendered outside of Brazil. National awards may be directly enforced, whereas foreign awards shall be first recognized before the Superior Court of Justice.[647]

470. Even though Brazil ratified the New York Convention only in 2002, the provisions in the Brazilian Arbitration Act concerning the recognition of foreign awards are based on the New York Convention. [648] Arts. 38 and 39 of the Brazilian Arbitration Act fundamentally correspond respectively to Art. V(1) and Art. V(2) of the New York Convention.

471. Art. 38 sets forth that the recognition of the arbitral award may be denied only where the (i) the parties do not have capacity to be part of an arbitration agreement, (ii) the arbitration agreement was not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, (iii) the party has not been notified of the appointment of the arbitrator or of the arbitration proceedings or its right to present its case has been somehow violated, (iv) the arbitral award goes

[645] Superior Court of Justice, REsp 1.519.041/RJ, 3rd Section, Min. Marco Aurélio Bellizze, 01.09.2015. Art. 33, §1, of the Brazilian Arbitration Act provides that a party may initiate annulment proceedings within 90 days of the notification of the award, final or partial, or of the decision on a motion for clarification.
[646] BENEDUZI, Preliminar de Arbitragem no Novo CPC, *in:* MELO/BENEDUZI, A Reforma da Arbitragem, 2016, p. 287. See also CORREA, Limites Objetivos da Demanda na Arbitragem, *in:* Revista Brasileira de Arbitragem, 2013(40), p. 71.
[647] Brazilian Arbitration Act. Art. 35. The recognition process is governed by Resolution No. 9 of the Superior Court of Justice, which entered into force in 2005. See ABBUD, Homologação de Sentenças Arbitrais Estrangeiras, 2008, p. 33.
[648] Brazil ratified the New York Convention on 7 June 2002, which entered into force in the country on 5 September 2002. See Decree 4.311/2012.

beyond the limits of the arbitration agreement and it is not possible to separate the exceeding portion from the part which falls within the scope of the arbitration agreement, (v) the institution of the arbitration proceedings are not in accordance with the arbitration agreement, (vi) the arbitral award has not yet become binding on the parties or it has been set aside or suspended by a competent authority of the country where the arbitral award was rendered.

472. Art. 39 provides that foreign awards shall not be recognized if the object of the dispute is not arbitrable or the decision violates national public policy.

473. With regard to multi-party and multi-contract arbitrations, the parties may argue that the arbitral award was rendered beyond the limits of the arbitration agreement when the arbitral tribunal finds to have jurisdiction over non-signatories or related agreements as previously addressed above. [649]

474. Notably, Art. V (1)(d) of the New York Convention and Art. 38(v) of the Brazilian Arbitration Act provide that the recognition and enforcement of an arbitral award may be refused where the arbitral procedure was not in accordance with the agreement of the parties.[650] This includes issues related to consolidation, joinder and intervention. Therefore, if the arbitration agreement expressly prohibits consolidation or the inclusion of additional parties during the proceedings, the award may be set aside or recognition may be refused in case the arbitrators have proceeded otherwise.[651] Nevertheless, if the arbitral tribunal has permitted the consolidation of arbitrations or the joinder of additional parties based on parties consent, either express or implied, then Art. V(1)(d) of the New York Convention shall not be applied.[652] In this case, the arbitral tribunal would not be violating the arbitration agreement, but would be giving effect to it as required by Art. II(1) and (3).[653] It is also argued that parties are implicitly agreeing with mandatory consolidation when they select as a place of arbitration a jurisdiction whose laws allow courts to do so.[654] However,

[649] See paras. 463 and 464 above.
[650] See SPACCAQUERCHE, A Homolgação das Sentenças Arbitrais Estrangeiras desde o Advento da Lei n° 9.307/96, *in:* MELO/BENEDUZI (eds.), A Reforma da Arbitragem, 2016, p. 152.
[651] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2571.
[652] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2571.
[653] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2572.
[654] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2572.

national courts should refrain from ordering consolidation in case the parties have expressly excluded the possibility of consolidation.[655]

III. PARTIAL CONCLUSION

475. Disputes over the jurisdiction of the arbitral tribunal are recurrent in multi-party and multi-contract disputes. They shall be raised at the beginning of the arbitration pursuant to Art. 20 of the Brazilian Arbitration Act. Otherwise, the parties are deemed to have consented to arbitration.

476. Brazilian law recognizes both positive and negative effect of the principle of competence-competence. According to the positive effect, arbitrators have powers to decide on their own jurisdiction and, pursuant to the negative effect, Brazilian courts are prevented from assessing the arbitrators' jurisdiction prior to their arbitral tribunal's own analysis. Even when the arbitration has not commenced, if a party initiates court proceedings and the counterparty raise a preliminary objection concerning the jurisdiction of the arbitral tribunal, Brazilian courts shall refer the parties to the arbitration.

477. The parties may initiate setting aside proceedings within ninety days after the award (partial or final) has been rendered. Awards on jurisdiction fall within the scope of partial awards under Brazilian law. The grounds for annulment awards in the Brazilian Arbitration Act are fundamentally the same as those set out in the New York Convention. In multi-party and multi-contract arbitrations the main ground invoked by the parties is provided for in Art. 32, IV, of the Brazilian Arbitration Act: the award has been issued beyond the scope of the arbitration agreement. If possible to separate the exceeding portion from the remainder of the award, the award will be partially enforced.

[655] BORN, International Commercial Arbitration, 2nd ed., 2014 p. 2572.

CONCLUSION

478. The assessment of both subjective and objective scope of the arbitration agreement in multi-party and multi-contract arbitration is a topic of great practical and theoretical relevance. Disputes involving multiple parties and arising out of more than one agreement are increasingly common and touch a fundamental problem of arbitration: the tension between the consensual character of arbitration and the need for an efficient dispute resolution mechanism.

479. Arbitration is fundamentally based on private autonomy and therefore limited by the parties' consent. Historically, arbitration has been developed as a private means of dispute resolution between two parties to adjudicate controversies arising from a single contract. Nowadays disputes submitted to arbitrators frequently arise from more than one agreement and involve more than two parties. In addition, arbitration has shifted from being the exception to the general rule in relation to high value agreements. In this new scenario, arbitration did not lose its consensual character, but multi-party and multi-contract disputes have clearly impacted the manner in which consent is assessed and the arbitration agreement is interpreted. This dissertation aimed at ascertaining whether consent is still the overriding factor to determine the scope of the dispute in multi-party and multi-contract arbitrations or whether the focus has been shifted from consent to economic considerations.

480. A joint analysis of multi-party and multi-contract arbitrations is possible as both subjective and objective scope fundamentally concern the requirement for consent. In addition, multi-contract and multi-contract issues constantly overlap each other and raise the same procedural issues. To analyse the extent of consent properly, this dissertation was divided into two parts dealing with substantive issues and procedural issues respectively.

481. The first part addressed the main fundamentals of multi-party and multi-contract arbitration as well as the main fact patterns from which multi-party and multi-contract issues arise. Particular emphasis was placed on the group of companies and group of contracts doctrines. Both theories have been developed in international arbitration and call into question the consensual character of arbitration.

482. The conclusion drawn from literature and international and Brazilian case law is that consent is still the overriding element to determine whether parties and contracts may be subject to the same arbitration. This also applies to scenarios involving groups of companies and groups of contracts. Indeed, group of companies and group of contracts are merely elaborate concepts to the basic analysis of implied consent. An arbitration agreement cannot be extended to companies of the same group solely based on the existence of the corporate link between the companies neither can it be extended to related agreements if the circumstances of the case indicate that the parties originally intended otherwise.

483. There is no doubt that economic considerations and the context in which the contract was entered into shall play a key role in determining the scope of the arbitration agreement. Nevertheless, these considerations have to be taken into account in order to assess the existence of consent and not to substitute it. Therefore, the fact that the companies or contracts form a unit is not *per se* a conclusive element towards multi-party and multi-contract arbitration beyond the parties' consent.

484. It is to note that in multi-party scenarios consent of the parties is mostly inferred from their behaviour and involvement with the contracts containing the arbitration agreement, while the analysis of the existence of consent in multi-contract arbitration is mainly based on the wording of the arbitration agreements, their compatibility and the common practice in the field. In multi-party and multi-contract arbitrations the principle of good faith is the leading principle under Brazilian law that shall apply to the determination of the scope of the arbitration agreement.

485. The context in which multiple contracts are structured should serve as a starting point to assess the existence of consent. For instance, where there is a framework and ancillary agreements it is fair to presume that the parties intended to agree on a common dispute resolution mechanism to encompass all disputes arising out of such contracts. Nonetheless, in a scenario of contracts and subcontracts arbitrators and courts shall start from the opposite assumption that the parties did not desire to submit all disputes to a single arbitration, as the common practice is that the employer wishes to hold the main contractor

responsible for the acts of the subcontractors. Nevertheless, the circumstances of the case may indicate otherwise, *i.e.*, that the ancillary contracts do not fall within the scope of the arbitration clause in the principal agreement and that the contracts and subcontracts shall be subject to the same arbitration.

486. Some commentators argue that arbitration agreement is losing its consensual nature and that the legal theories used to bind non-signatories are based on a presumed existence of consent, which is somehow artificial since they are usually related to the underlying agreement and not to the arbitration agreement itself.

487. The better view, however, is that there is a tendency to interpret the arbitration agreement in an increasingly flexible way rather than a rupture of the arbitration's consensual character. Notably, jurisdictional decisions on multi-party and multi-contract arbitrations continue to be based on elements indicating consent and not on equitable principles. Currently, there is a prevalence of the substance over form and the consent in its implied form has gained strong relevance. Notably, the legal basis for binding non-signatories have been developed over decades to meet the needs of international arbitration based on contractual principles applied to contracts in general and there is no compelling reason why they should not apply to the arbitration agreement as well.

488. The second part of this dissertation dealt with procedural issues in connection with multi-party and multi-contract arbitration. Joinder, intervention and consolidation are procedural mechanisms intrinsically related to the scope of the arbitration agreement and therefore also limited by the parties' intent. Joinder and intervention provisions set out in institutional rules do not constitute an autonomous basis for joining non-signatories irrespective of their consent. Unless otherwise agreed by the parties after the dispute has arisen, only parties that have expressly or implicitly consented to the arbitration agreement may join the proceedings. As to consolidation, the risk of incompatible decisions does not justify the consolidation of proceedings where the parties have originally intended otherwise.

489. Even though the requirements for joinder and consolidation are met, this does not automatically imply that the additional parties may join the arbitration or that arbitrations shall be consolidated without further considerations. The joining of additional parties and

consolidation of proceedings have advantages and disadvantages. For this reason, arbitral institutions and arbitrators must find a balance between the parties' interests. The main obstacle to joinder and consolidation is the previous appointment of the arbitrators. It is not recommended to order joinder or consolidation after the appointment of arbitrators unless there are compelling reasons to do so that do not violate the parties' right to equal treatment. The rules of the Brazilian arbitral institutions are in general a step behind the leading arbitral institutions worldwide in what concerns provisions regarding joinder and consolidation. There are Brazilian arbitral institutions that are silent with regard to such procedural mechanisms and others wherein the wording of the relevant provisions could be further clarified. Nevertheless, it is likely that they will follow the example of the main rules and be updated in order to incorporate the international practice.

490. Finally, it is important to consider that multi-party and multi-contractual scenarios can multiply indefinitely and it remains to be seen whether the current consensual approach will continue to meet the needs of international arbitration in the future or arbitration will lose its consensual character. In addition, it shall be highlighted that even though the consensual nature of arbitration may be an obstacle to the efficiency of the arbitration in multi-party and multi-contract arbitration, this problem may be solved to a great extent with arbitration agreements carefully drafted.

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