problem becomes one of substance, i.e., who is bound by the signature.[16] It will be seen that in the vast majority of cases, arbitral tribunals and courts determine who is party to the arbitration clause without much recourse to conflict rules, on the sole basis of an analysis of the facts and circumstances of the case, sometimes also taking into consideration the usages of international trade.

SECTION II
REPRESENTATION AND AGENCY

18. A person or entity A will be considered a party to a contract and therefore to the arbitration agreement contained in it, if the person or entity B that formally signed the agreement was only representing A. In such circumstances, B's mandate to represent A may be either express or implied. In other words, there must have been an express or apparent mandate.[17]

19. Consequently:

- if the business entity that has signed the contract does not have a legal personality, the owner of the entity is bound by the contract;[18]
- if the signatory of the contract is a branch without a legal personality, the party to the agreement is the parent company;[19]
- if an individual enters into a contract on behalf of a corporation that does not exist, he is obligated under that contract and, therefore, bound by the arbitration clause contained therein;[20]
- a person may not request the extension of the clause to itself on the basis of the fact that it was involved with the signatory in a *société de fait*. Such a *société*

[16] Ibrahim Fadlallah, *Clauses d'Arbitrage et Groupes de Sociétés, supra* note 2, at 112. This solution has been recently confirmed by the Swiss Federal Court (*see infra*, note 144 and accompanying text) and is regularly reaffirmed by US Courts (below, at No. 112).

[17] ICC award in case no. 6519 of 1991, 118 *J. Droit Int'l (Clunet)* 1065 (1991); 3 *ICC Awards*, *supra* note 2 at 420 and observations by Yves Derains.

[18] ICC award in case no. 5730 of 1988, 117 *J. Droit Int'l (Clunet)* 1029 (1990); 2 *ICC Awards*, *supra* note 2 at 410 and observations.

[19] ICC award in case no. 5721 of 1990, 117 *J. Droit Int'l (Clunet)* 1020 (1990); 2 *ICC Awards*, *supra* note 2 at 400 and observations.

[20] *Corporacion Selee De Venez., SA* v. *Selee Corp. and American Arbitration Association*, 7 Misc. 3d 1013 A (S. Ct. N.Y. 2005).

does not have legal personality and therefore does not have representatives who are authorised to sign for the *de facto* partners;[21]

- the arbitration clause may not be extended to a second defendant, non-signatory, on the basis that its president signed the agreement, if he turns out to have done so only as a representative duly mandated by the first defendant.[22]

20. On the other hand, where it is established that the person who signed the agreement was acting as agent of another person or entity, the latter will be considered bound by the arbitration clause, alone[23] or together with the agent.[24] Agency is not presumed however, it must be proved. If no evidence is brought in support of the contention that the party concerned was contracting as an agent on behalf of others without personal engagement, the contention will be dismissed.[25]

21. In an *ad hoc* (UNCITRAL) award of 27 October 1989,[26] the arbitral tribunal considered that the agreement concluded with GIC, an agency of the Government of Ghana, was clearly binding on the government. The tribunal found support for its finding in the arbitration clause which expressly referred to disputes arising "*between the foreign investor and the government in respect of the enterprise*." And in ICC case no. 9797,[27] the arbitral tribunal was also able to find, on the basis of the agency theory, that all member firms of a large worldwide organisation were parties to one arbitration proceeding brought by one group of firms against another group of firms and a Swiss company member of the worldwide organisation whose activities consisted in coordinating on an international basis the professional practices of its partners and the member firms. Member firms were in fact national practice entities that had entered into a member firm interfirm agreement (the "MFIFA" or the

[21] *Ad hoc* award of 17 November 1994, *supra* note 7.

[22] ICC award in case no. 4504 of 1985-1986, 113 *J. Droit Int'l (Clunet)* 1118 (1986); 2 *ICC Awards*, *supra* note 2, at 279 and note Sigvard Jarvin.

[23] For a recent example, *see* English Court of Appeal, Civil Division, 15 February 2002, case no. A3/2001/0542, 27 *Y.B. Com. Arb.* 557 (2002) (United Kingdom, No. 59).

[24] But only in exceptional circumstances. Indeed, the principle prevails that an agent for a disclosed principal is not a party to, and is not personally bound by, a contract that he signs on behalf of a disclosed principal. *Arhontisa Mar. Ltd.* v. *Twinbrook Corp.*, 2001 U.S. Dist. Lexis 15536 (S.D.N.Y. Sept. 26, 2001).

[25] ICC interim award in case no. 6610 of 1991, 19 *Y.B. Com. Arb.* 162 (1994) and ICC final award in case no. 7626 of 1995, 22 *Y.B. Com. Arb.* 132 (1997).

[26] *Marine Drive Complex* v. *Ghana*, 19 *Y.B. Com. Arb.* 11 (1994).

[27] *Andersen Consulting Business Unit Member Firms* v. *Arthur Andersen Business Unit Member Firms*, interim award of 29 April 1999 in ICC case no. 9797, unpublished. The Swiss Federal Court decision of 8 December 1999 dismissing the action to set aside is published in 18 *ASA Bull.* 546 (2000).

45. The *Sunkist* case was referred to in a decision rendered on 30 June 2003 by the California Court of Appeal, Fourth District, in the *Metalclad* case.[60] Metalclad, a waste treatment corporation, brought action in California against Ventana Environmental Organisational Partnership, L.P. (VEOP), North American Environmental Fund, L.P. (NAEF), Ventana Global Limited, a holding company allegedly controlling both entities (collectively "Ventana"), Geologic, one of Ventana's portfolio companies, and others for breach of contract, fraud and other claims arising out of the sale of Econsa, Metalclad's subsidiary, to Geologic. The Metalclad-Geologic agreement included an American Arbitration Association (AAA) arbitration clause. Ventana, which was not signatory to the arbitration agreement, petitioned to compel arbitration. The Superior Court, Orange County, denied the petition. Ventana appealed. The California Court of Appeal reversed the decision, with directions to grant the petition to compel arbitration and stay the litigation. The Court considered that Metalclad's tort allegations that Ventana and Geologic had colluded to obtain Econsa by fraudulent contract was intimately founded in and intertwined with the underlying Geologic contract, which Metalclad signed.

46. *In re Currency Conversion Fee Antitrust* litigation,[61] class actions brought by credit card holders challenging alleged foreign currency conversion policies by credit card networks and their member banks were consolidated for centralised pre-trial proceedings. Among these actions, there were suits by card holders against First USA, Bank of America and their parent companies, Bank One and Bank of America Corporation. The four defendants moved to stay all claims against them by their respective card holders and to compel arbitration of those claims pursuant to their card member agreements. Defendants First USA and Bank of America issue First USA and Bank of America credit cards, respectively. When they send credit cards to their card holders, they forward a card holder agreement setting forth the terms of the card holder's account. The card holder agreement warns that any use of the credit card constitutes acceptance of the terms of the card holder agreements. It includes an arbitration clause. On the other hand, defendants Bank One and Bank of America Corporation, the parent companies of defendants First USA and Bank of America, do not issue credit cards. They are non-signatories to the arbitration agreements. The United States District Court for the Southern District of New York decided that the case had to be referred to arbitration and that card holders were estopped from avoiding arbitration with Bank One and Bank of America Corporation under the estoppel theory. First, the alleged wrongs by Bank One and Bank of America Corporation were intimately founded in and intertwined with the underlying agreements between First USA and Bank of America and their respective

[60] *Metalclad Corp.* v. *Ventana Envtl. Organizational P'ship*, 1 Cal. Rptr. 3d 328 (Ct. App. 2003).

[61] 265 F.Supp. 2d 385 (S.D.N.Y. 2003).

card holders. Moreover, there was a close relationship between First USA and Bank One and between Bank of America and Bank of America Corporation. First USA and Bank of America are indeed wholly owned subsidiaries of First USA and Bank of America Corporation.

47. Following the same line of reasoning, the United States Court of Appeals, Second Circuit, in *Choctaw Generation Limited Partnership* v. *American Home Assurance Company*,[62] decided that a power generator, as signatory to an arbitration agreement contained in a construction contract with Bechtel, was estopped from avoiding arbitration with its surety, as non-signatory to the arbitration agreement, in a dispute associated with a surety contract relating to the contractor's performance in the construction project. The Court considered once again that the issues the non-signatory was seeking to resolve in arbitration were indeed "*intertwined with the agreement that the estopped party had signed*". The case was later cited in support of the same conclusion in *Astra Oil Co.* v. *Rover Navigation, Ltd.*[63]

48. In another decision rendered by the United States Court of Appeals for the Second Circuit, *Smith Enron Cogeneration Ltd P'ship, Inc.* v. *Smith Cogeneration Int'l, Inc.*,[64] the Court enforced an arbitration agreement by requiring a party to the agreement to arbitrate with a person who was no longer a party thereto. The agreement related to a joint venture between Enron and Smith to construct and operate a power plant. The original parties to the agreement later assigned their rights to

[62] 271 F.3d 403 (2nd Cir. 2001). *See also Fujian Pacific Electric Company Limited* v. *Bechtel Power Corporation*, 2004 U.S. Dist. LEXIS 23472 (N.D. Cal. 18 Nov. 2004), in which the United States District Court for the Northern District of California, on the basis of the theory of equitable estoppel, stayed the legal claim filed against Bechtel, the parent guarantor (under a guarantee agreement with developer not containing an arbitration clause) while Bechtel's subsidiaries, contractors, were arbitrating their claims against Fujian, developer, in accordance with the arbitration clause contained in the various construction-related services agreements entered into by Fujian and the Bechtel's subsidiaries. *See also Waste Management* v. *Residuos Industriales Multiquim, S.A.*, 372 F.3d 339 (5th Cir. 2004). *Choctaw* was relied upon in another decision of the United States Court of Appeals for the Second Circuit (*JLM Indus.* v. *Stolt-Nielsen SA*, 387 F.3d, 163 (2nd Cir. 2004)), in which plaintiff JLM, a liquid chemical dealer, filed a putative class action alleging that defendant Parcel Tanker owners had engaged in illegal price fixing. Some of the charter contracts entered into by JLM during the proposed class period had been signed by subsidiaries of the owners, rather than by the owners themselves. With respect to those contracts signed by subsidiaries, JLM argued that the owners could not invoke the arbitration clause contained in the contracts. The argument was rejected by the Court. It considered that the questions the owners seeked to arbitrate were undeniably intertwined with the charters since it was the fact of JLM's entry into the charters containing allegedly inflated price terms that gave rise to the claimed injury.

[63] 344 F.3d 276 (2nd Cir. 2003). This theory may to some extent be put in parallel with the existence between the parties of a community of rights and interests. *See infra* Section VIII.

[64] 198 F.3d 88 (2nd Cir. 1999).

by a telefax to shipping company D. The claimant claimed breach of contract and reimbursement of the advance payment made to D, as well as compensation for all other costs and damages. Since no amicable settlement could be reached, the commodities trading company instituted arbitration against both shipping companies and a sole arbitrator was appointed. First and second defendants argued that only shipping company D, which had performed the obligations of the seller under the contract, should be a party to the contract. The sole arbitrator found that there was no indication of an express assignment of the contract, as argued by defendants. On the other hand, although the commodities trading company accepted shipping company D also as a contractual party, this did not mean that it released shipping company A from its obligations. The contract had been signed by shipping company D and confirmed by shipping company A. They were therefore both bound by the arbitration clause in the contract.

69. The capacity in which a person signs an agreement is also of the utmost importance.[93] In ICC case no. 4504 of 1985-1986,[94] the arbitral tribunal found that it lacked jurisdiction vis-à-vis the second defendant, which was not formally a signatory of the agreement. The fact that the president of the second defendant had signed the agreement was considered irrelevant, since he had done so as the duly mandated representative of the first defendant; and where he had written letters to the claimant, they had been signed in the name of and for the account of the first defendant. In

[93] Or the lack of capacity. In a case submitted to the Swiss Federal Court and which resulted in a decision of 4 July 2003 (First Civil Chamber), *A. Ltd.* v. *B*, 21 *ASA Bull.*, p. 242 (2003), also commented by François Knoepfler and Philippe Schweizer, *Revue suisse de droit international et de droit européen* 2005, p. 134, A had entered into a consultancy agreement with B, which was member of a group of companies. On B's side, the agreement had been signed by X, a shareholder of the group but who did not have the formal power to represent the company. The arbitral tribunal decided that it did not have jurisdiction in the absence of an arbitration clause that could be validly opposed to B. On the other hand, in ICC case no. 5920 of 1989 (interim award, 2 *ICC Ct. Bull.* 27 (1991)), an arbitration had been started by TX company against RZ-A and RZ-B, on the basis of an arbitration clause contained in a contract concerning the realisation of a plant, signed between TX and RZ-A, a Yugoslav enterprise, on behalf of RZ-B, another Yugoslav enterprise. The contract mentioned that it was concluded between RZ and TX and was signed by an officer of RZ-A and RZ-B. The latter disputed the jurisdiction of the arbitral tribunal over it. It was supported by RZ-A, which claimed that it was the only contracting party on the Yugoslav side and the only one authorised to conclude international business transactions in its name and on behalf of RZ-B; that the latter enterprise did not have such legal capacity, as a matter of mandatory Yugoslav law. The arbitral tribunal finally decided that even though RZ-B's signature appeared on the signature page, RZ-A was the only RZ enterprise that was a party to the arbitration agreement because RZ-B lacked the capacity to enter into the agreement, as a matter of Yugoslav law.

[94] 113 *J. Droit Int'l (Clunet)* 1118 (1986); 2 *ICC Awards*, *supra* note 2, at 279 and note Sigvard Jarvin.

much the same vein, in ICC case no. 5721 of 1990,[95] the arbitral tribunal refused to extend its jurisdiction to Mr. Z, who had signed two contracts for the account of X Egypt, a party to the contract and to the arbitration proceedings. The reasoning of the arbitrator was that it was not certain that "*Claimant had the intention to deal with Mr. Z through X, nor that Mr. Z had the intention to be himself party to the arbitration agreement*". In another case,[96] the arbitral tribunal also refused to extend its jurisdiction to a non-signatory company that had issued letters of guarantees in favour of one of the parties to a turnkey contract and the arbitration proceedings. The tribunal considered that the fact that the letters of guarantee had been signed, as had the turnkey contract, by Mr. X, was not sufficient to establish an acceptance of the arbitration clause, in the absence of any clear reference to the latter.

70. In the United States, in *Kaplan* v. *First Options*,[97] the court declined to allow one party to the contract containing an arbitration clause to compel the corporate president of the other party to arbitrate. The court pointed out that the president had signed the loan agreement in his corporate capacity and therefore had never intended to be bound personally by the arbitration clause contained therein. The Supreme Court affirmed the decision and emphasised that arbitration was a matter of contract, that it was indeed a method of resolving disputes – but only those disputes that the parties had agreed to submit to arbitration. The Third Circuit went even further than the Supreme Court in a subsequent decision, *Dayhoff* v. *H.J. Heinz Co.*, construing *First Options* to mean that no party could be compelled to arbitrate unless it specifically and expressly agreed to arbitration.[98]

71. The same conclusion was recently reached by the United States Court of Appeals for the First Circuit in the case *Intergen N.V.* v. *Grina*.[99] Intergen was the corporate parent of certain subsidiaries that had entered into contracts with defendant Alstom's subsidiaries for the purchase of turbines. These contracts included arbitration clauses that committed the parties to arbitration in the London Court of International Arbitration. When problems were encountered with the turbines, litigation ensued. Intergen, not a party or a signatory to the contracts made by its subsidiaries, sued Alstom, which also was not a party or a signatory to the contracts made by its subsidiaries. Intergen crafted its complaints to avoid any contract or quasi-contractual claims and aligned the parties so that no signatory to any agreement with an arbitration clause

[95] 117 *J. Droit Int'l (Clunet)* 1020 (1990); 2 *ICC Awards*, *supra* note 2, at 400 and observations.

[96] Paris Court of Appeal (1st Civ. Ch.), 7 July 1994, 1995 *Rev. Arb.* 107 and note Sigvard Jarvin.

[97] 19 F.3d 1503 (3rd Cir. 1994), *aff'd*, 514 U.S. 938 (1995), commented on by Townsend, *supra* note 2 at 22.

[98] 86 F.3d 1287 (3rd Cir. 1996).

[99] 344 F.3d 134 (1st Cir. 2003).

parallel proceedings. For example, in ICC case Nos 7604 and 7610 of 1995,[170] the claimant had concluded with the first respondent a contract for the development of software. A dispute arose. The claimant terminated the agreement and started an ICC arbitration procedure against the first respondent and its parent company, the second respondent, to obtain the reimbursement of sums already paid. The claimant alleged that the first respondent was not autonomous and that the second respondent had participated in the negotiation, the conclusion, the performance and the termination of the agreement. It also argued that the second respondent had personally proposed to have the dispute submitted to arbitration. The arbitral tribunal, after a very careful analysis of the facts of the case, reached the conclusion that claimant had not demonstrated that the second respondent had participated in the negotiation, conclusion, performance and termination of the agreement. It also pointed out that the second respondent had never ratified the contract, its sole intervention being limited to the issuance of a letter of guarantee. However, in the context of a dispute concerning the letter of guarantee, submitted to an Algerian court, the second respondent had objected to the jurisdiction of that court, alleging that all the disputes which had arisen between the parties had to be submitted to an ICC arbitral tribunal, on the basis of a consensus of all the parties to the project. The arbitral tribunal concluded that this was a clear and unequivocal recognition by the second respondent that it was subject to the jurisdiction of the ICC arbitral tribunal. This conclusion is reminiscent of the estoppel theory in the United States.[171]

II. Extension to a State

128. When a contract is signed by a state-owned company or a state entity, it is not unusual that claimant tries to extend the arbitration clause contained therein to the state itself. As pointed out by Fouchard, Gaillard and Goldman,[172] the problem does not arise in terms which are different from those of the extension of the scope of an arbitration clause within a group of companies (even if the issue may raise additional problems such as immunity from jurisdiction). In both cases, it is the intention of the parties that is the main criterion to determine the scope *rationae personae* of the arbitration clause. This is undoubtedly correct. But is it possible, in relation to states, to reason the problem as it is done with groups of companies, when a court is asked to decide on the extension of the arbitration clause by application of theories such as *alter ego*, agency or third-party beneficiary? Some authors have expressed serious doubts. It is worth in this respect to cite the criticisms addressed by Professor Roger Alford to the decision of the United States Court of Appeals

[170] 125 *J. Droit Int'l* 1027 (1998) and 4 *ICC Awards*, *supra* note 2 at 510 and note D.H. *See also* ICC case no. 7453 of 1994, below at No. 238.

[171] *See supra* No. 41 and following

[172] *Supra* note 2, p. 290 and following.

for the Fifth Circuit in *Bridas S.A.P.I.C.* v. *Government of Turkmenistan*[173] in which the Court considered unjustified, and therefore invalidated, the decision of an ICC arbitral tribunal to extend to the Government of Turkmenistan the arbitration clause contained in an agreement concluded by Bridas and entities owned by the Turkmen Government:

> thus, the goal of such government instrumentalities is to create within the government structure a special enterprise that resembles a private corporate entity in form and purpose. Such entities often are created devoid of any traditional regulatory function, and specially established for the purpose of engaging in commercial activities. Thus, while the entity itself may resemble a private corporation, the motivation of the government in establishing the entity, and the relationship of that entity vis-à-vis its "parent" are quite distinct. Bridas virtually ignored these distinctions, assuming that principles derived in the private sphere could be brought and applied in the government context. For example, in holding that the District Court erred in its *alter-ego* determination, the Court imposed a test for parent-subsidiary *alter ego* status that is far removed from the context of government instrumentalities. One cannot address, as the Court requires, whether the government of Turkmenistan is the *alter ego* of Turkmeneft based on the fact that the parent and subsidiary have "common business departments" or "consolidated financial statements" or "common directors and officers" or "common stock ownership". In addition, the Court utilised traditional third-party beneficiary cases without addressing the special rules applicable to government contracts that may reflect public policies that afford rights to third parties to enforce the agreement. Likewise, in its analysis of agency, the Court utilised traditional notions of private agency to determine whether an "agency relationship" existed between Turkmeneft and Turkmenistan. Yet government agencies and instrumentalities do not easily lend themselves to such private comparisons. … As difficult as it may be to develop a more accurate analysis of the circumstances under which a sovereign non-signatory should be bound by the signature of its instrumentality, Bridas certainly underscores the hazards of freely transposing criteria established in the private sector to government contracts.[174]

[173] 345 F.3d 347 (5th Cir. 2003) rehearing and rehearing *en banc* denied, 84 Fed. Appx 472 (5th Cir. 2003), cert. denied, 124 S.Ct. 1660, 158 L.Ed. 2d 357 (2004); Binding Sovereign Non-Signatories, 19-3 *Mealey's Intl. Arb. Rep.* 14 (2004); summary of the decision by C. Lamm, E. Hellbeck and A. Kovina in 2004 *Int'l A.L.R.*, N – 58.

[174] Under United States law, the mere status of an entity as an agency or instrumentality of a foreign state is insufficient to subject the foreign state to suit for the agency or instrumentality's wrongdoings. US Courts generally look to the principal / agent relationship between a sovereign and a state-owned entity, or to abuses of the corporate form, such as where the

167. In another ICC case no. 5721 of 1990,[222] an employer had concluded an agreement with X Egypt (main contractor) and had appointed SA, a European company, the claimant in the arbitration, as subcontractor. SA had concluded two subcontracts with X Egypt, which had presented itself as a subsidiary being established (*en formation*) in Egypt of a US company, X USA, represented by its president, Mr. Z. Mr. Z had signed the two contracts on behalf of X Egypt. The latter did not perform its duties and the employer therefore decided to expel it from the site and gave the direct responsibility of the project to SA. X Egypt then tried to call several first-demand guarantees – guarantee of restitution of down payment and guarantee of good performance – which had been supplied by SA. The SA started arbitration against X USA, X Egypt, and Mr. Z in Geneva. SA requested the arbitral tribunal, among other things, to decide that the subcontracts had been terminated and that the letters of guarantee were null and void.

168. In the first place, X USA argued that the arbitral tribunal had no jurisdiction over it and that only X Egypt had entered into the contract. It emerged that X Egypt was only a branch, without legal personality. The arbitral tribunal therefore decided that as X USA had signed the subcontracts through its Egyptian branch, it had jurisdiction over X USA.

169. On the other hand, Mr. Z argued that the arbitral tribunal did not have jurisdiction over him, since he had not been party to the subcontracts, which he had signed in his capacity as president of X. To decide this issue, the arbitral tribunal applied the rules of *lex mercatoria*, i.e., the general notion of good faith in business and the usages of international commercial trade. The tribunal also proceeded to examine the position of the law of the United States, Switzerland and Egypt concerning the lifting of the corporate veil, and concluded:

> In the United States, the corporate veil may be lifted in particular circumstances such as where the subsidiary is a "mere instrument" of the parent company, that is, where one of the parties is in fact no more than a representative or mere instrument in the control of another… The concept of lifting the corporate veil … is justifiable wherever the principle of limited liability gives rise to situations which are wholly unjust.
>
> In Swiss law … [t]he Durchgriff theory is based upon the prohibition against abuse of law … a company's independence should only be disregarded in exceptional cases, where it is used fraudulently, that is, contrary to the principle of good faith …
>
> …

[222] 117 *J. Droit Int'l (Clunet)* 1020 (1990); 2 *ICC Awards*, *supra* note 2, at 400 and note.

> Egyptian law does not contradict these general principles. It too attaches decisive importance to the principle of good faith and punishes any abuse of the law …

170. The arbitral tribunal then proceeded to set forth the principles which, in its opinion, were to govern the issue of extension of the arbitration clause:

> It is worth adding that arbitration is essentially based upon the principle of consent. So too, any extension of the scope of application of the arbitration clause must have a voluntary basis.
>
> Of course, such an intention can be merely implicit, otherwise any discussion of extension would have no meaning. But any extension must not, on the other hand, take place as a way of punishing the behaviour of a third party. Such action must be reserved to the ordinary courts before which a party may raise an argument drawn from the lifting of the corporate veil.
>
> In summary, the fact that two companies belong to the same group, or that a single shareholder has a dominant position, are never sufficient, in and of themselves, to legally justify lifting the corporate veil. Nevertheless, where a company or an individual appears to be the pivotal point in contractual relations in a particular matter, it is appropriate to examine carefully whether the legal independence of the parties should, exceptionally, be disregarded in favour of a global judgement. This exception will be accepted where confusion is fostered by the group or by the majority shareholder.[223]

171. The arbitral tribunal applied the above principles to the facts of the case. It concluded that they did not reveal the existence of a confusion between Mr. Z and company X and therefore that the arbitration clause could not be extended to Mr. Z. The tribunal further pointed out that:

> An arbitral body must be very circumspect in relation to the extension of the effect of an arbitral clause to a director or manager who has acted strictly in this capacity. Any such extension presupposes that the artificial person has been no more than the business instrument of the natural person, so that one can ascribe to the natural person the contracts and undertakings signed by the artificial person. In the present case, the presumptions enumerated above do not afford complete certainty in this regard.

172. The arbitrators concluded that it was not certain that:

> the claimant intended to deal with Mr. Z through X, or that Mr. Z intended personally to be a party to the arbitration agreement. If claimant wishes to put Mr. Z's liability in issue because of fraud or other conduct, such as the

[223] 2 *ICC Awards*, *supra* note 2, at 404-405.

246. Reference may also be made in this Sub-section to the *Pertamina* case which is referred to in Chapter VII "Enforcement of the Award".[290] The arbitral tribunal decided in this case to consolidate into one single proceeding all the claims made by claimant arising from two closely connected agreements entered into, respectively, by KBC and Pertamina on the one hand, and by KBC, Pertamina and PLN on the other hand. Both contracts contained almost identical arbitration clauses.

Sub-section II
The Parties Are Different and the Contracts Do Not Contain Identical or Compatible Arbitration Clauses or One of Them Does Not Contain an Arbitration Clause

I. Incompatible Arbitration Clauses

247. When the parties to the various contracts are not the same and the contracts do not contain compatible arbitration clauses, bringing the disputes together in one single arbitration proceeding will generally not be possible.[291] One early example is the *Sofidif* case.[292] Three different French entities, Eurodif, Sofidif and Cogema together started ICC arbitration against the Iranian Atomic Energy Organisation (OEAI) and the Iranian Organisation for Investment and Economic and Technical Aid (OIAETI) under different contracts (between different parties and containing different arbitration clauses) relating to Iran's cooperation with France in a uranium enrichment project. OEAI and OIAETI objected to the tribunal's jurisdiction but the arbitration proceeded. The arbitral tribunal decided that it had jurisdiction given

[290] *See infra*, No. 501 and following.

[291] For example, French courts refuse to accept jurisdiction over a dispute arising from a contract containing an arbitration clause even if it has jurisdiction to decide another dispute arising from a connected agreement and the disputes are considered indivisible. *See* the note by Daniel Cohen under Cass. (First Civil Ch.) 16 October 2001, 2002 *Rev. Arb.* 919. In this case, an English editor had started two actions before French courts: a first one against a French company relating to the extent of the rights granted to the company by virtue of a distribution contract in France of a book edited by claimant and a second one, an action in copyright infringement (*action en contrefaçon*) against a Canadian company which was selling an identical book in France. The agreement between the French and the English companies contained an arbitration clause. The Paris Court of Appeals decided that since the disputes were indivisible – the existence of an infringement depending upon the determination of the rights resulting from the agreement – it had jurisdiction to decide both cases. The French Supreme Court set aside the decision considering that the sole circumstance of an indivisibility was not enough to prevent the setting in motion of the arbitration clause.

[292] Paris Court of Appeal (1st Suppl. Ch.), 19 December 1986, 1987 *Rev. Arb.* 359 and Cass., 8 March 1988, 1989 *Rev. Arb.* 481 and note Ch. Jarrosson. For references and a comment, *see* E. Gaillard, "L'affaire Sofidif ou les difficultés de l'arbitrage multipartite", 1987 *Rev. Arb.* 275 and Yves Derains and Eric Schwartz, *A Guide to the New ICC Rules of Arbitration* (Kluwer, 1998) 98.

the relationship and interdependence of the contracts. The award was annulled by the Paris Court of Appeals and, in a series of subsequent judgments, the French courts pointed out that in the circumstances of the case, a single arbitration could take place only with the consent of all the parties concerned.

248. Reference may also be made to a decision rendered in India on 31 August 2001 by the City Civil judge at Ahmedabad.[293] In this case, Nirma Ltd. had entered into an agreement with the first respondent "*for supply of know how and supervision for three numbers CFB boilers of 100tph each for the purpose of steam generation to be used for process requirement and power generation for its Soda Ash and Pure Water Plant to be set up at its site*". The contract provided for ICC Arbitration in London in case of dispute. Subsequently, the first respondent incorporated in India the second respondent as its wholly owned subsidiary with a view to nominating the second respondent as the engineer, contractor and erection contractor under three agreements (detailed engineering, supply and erection and commissioning) entered into between Nirma and the second respondent in pursuance of the first agreement. These three agreements provided for arbitration in India in case of dispute. Certain disputes arose between the parties and, consequently, Nirma started arbitration in India against the first and the second respondent. The first respondent objected to the jurisdiction of the arbitral tribunal. The tribunal decided in favour of the first respondent and the matter was subsequently submitted to the city civil judge at Ahmedabad which confirmed the arbitral tribunal's finding. In the meantime, the first respondent started arbitration against Nirma in London under the arbitration clause contained in the first agreement.

249. According to the court, the last three agreements were necessary for the implementation of the first one. The contracts were closely intertwined. Nirma and the first respondent were required to facilitate the performance of the first agreement. It was provided that the appointment of the engineer, erection contractor and contractor was to be decided by Nirma and approved by the first respondent. The latter also ensured the performance of the three last agreements as a guarantor. But it remained that the first agreement and the last three had incompatible arbitration clauses and that no evidence was supplied that the first respondent had agreed to arbitration in India or had agreed to any of the terms and conditions of the last three agreements with the consequence that it would have accepted to be a party to them. Finally, the court also rejected Nirma's arguments that by refusing to be joined to the Indian arbitration, the first respondent tried to evade its liability or

[293] Court No. 11, Civil Miscellaneous Application No. 155 of 2001, *Nirma Limited* v. *Lurgi Lentjes Energietechnik GmbH (Germany) and Lentjes Energy (India) Pvt. Ltd.* For an overview of Indian cases dealing with these issues, *see* Dushyant Dave, "Non-Party Participation – The Extent to which Non-Contracting Parties can be encouraged or compelled to join the Proceedings", 2000 *Int. A.L.R.*, 78.

276. However, in a recent decision, the Svea Court of Appeal[326] held that the supplier, which was party to a contract containing an arbitration clause, was entitled to rely on the clause to institute arbitration proceedings against a guarantor, even though the guarantee itself did not include an arbitration clause. The supplier, a Middle Eastern company, had entered into the agreement with a certain agro-industrial grouping (the buyer) in one of the recently founded republics of the former Soviet Union. The buyer was described as a corporate type enterprise in public ownership. The agreement provided for arbitration by a sole arbitrator according to the Rules of the Stockholm Chamber of Commerce. Following the conclusion of the agreement, the buyer's government issued a guarantee according to which the state guaranteed the buyer's payment obligations under the agreement (the guarantor). The guarantee did not include an arbitration clause or any reference to the arbitration clause in the main agreement. No payment was ever made by the buyer and its business was eventually dissolved. As a result, the supplier instituted arbitral proceedings against the guarantor for the outstanding monies owed by the buyer. The guarantor challenged the arbitrator's jurisdiction. The arbitrator declared himself competent and ordered the guarantor to pay the supplier the substantial outstanding sums of money. In reaching his decision, he relied heavily on the fact that the buyer's and the guarantor's respective obligations were identical, and that the guarantor was aware of the presence of an arbitration clause in the main agreement. The arbitral award was challenged before the Stockholm District Court, which dismissed the action. A further appeal was made to the Svea Court of Appeal, which arrived at the same conclusion.

277. In ICC case no. 3896 of 1982,[327] various European companies started arbitration proceedings against an Asian respondent in relation to the construction of a power plant, alleging defaults of payment. The claimants had terminated the agreement. Bank guarantees had been issued by Banque de l'Union Européenne in favour of the respondent. These guarantees created a direct contractual relationship between the bank and respondent. They contained the following arbitration clause: "*Any dispute arising under this guarantee shall be settled in accordance with the contractual provisions relating to the settlement of disputes.*"

278. In the course of the arbitration, the claimants requested from the arbitral tribunal a decision that the bank guarantees were null and void and that the call to the guarantees should be considered fraudulent and abusive. The arbitral tribunal decided that it could not and did not intend to decide a dispute arising among the parties to the bank guarantees, but that this did not prevent the arbitrators from

[326] The Svea Court of Appeal case no. T4496-01, judgment rendered on 16 May 2002, Stockholm Arbitration Report, 2003-1, 273 and observations by Hans Smit, "When does an arbitration clause extend to a guarantee that does not contain it?".

[327] 1 *ICC Awards*, *supra* note 2, at 481.

discussing issues relating to these guarantees and, among other things, the issue of their validity between the parties to the arbitration. The arbitral tribunal decided that it had jurisdiction to decide between the parties to the arbitration the issue of whether the call to the guarantees was abusive and also to decide in due course, together with the merits, whether the guarantees – in the relationship between claimants and respondent – were to be considered null and void.

279. The same result, on the basis of the same reasoning, was reached by the arbitral tribunal in ICC case no. 5721 of 1990.[328] The case concerned a dispute that had arisen in relation to a construction project in Egypt. An employer had concluded a main agreement with X Egypt (main contractor) and had appointed SA (claimant), a European company, as subcontractor. SA had concluded two subcontracts with X Egypt, which had presented itself as a subsidiary in formation in Egypt of a US company X USA and was in fact a branch – without legal personality – of the latter. X Egypt did not perform its obligations and therefore the employer decided to expel it from the site and to give the direct responsibility of the project to SA. X Egypt then tried to call several first demand guarantees, which had been supplied by SA. SA started an arbitration against various parties, including X USA and X Egypt, and requested the arbitral tribunal to decide that the subcontracts had been terminated and that the letters of guarantee were null and void. The arbitral tribunal decided that it had jurisdiction to decide these issues. It pointed out that a bank guarantee – a contract concluded between the guarantor and the beneficiary – is independent of the underlying agreement.[329] However, since the bank guarantee

[328] 117 *J. Droit Int'l (Clunet)* 1020 (1990) and 2 *ICC Awards*, *supra* note 2 at 400 and observations.

[329] The issue has been often addressed by courts in France. As we have seen, the position in French law is that the creditor under the main agreement may not in principle invoke the arbitration clause (contained in said agreement) against the surety. It is also agreed that the surety may not invoke the arbitration clause against the creditor. On the other hand, if the surety pays the creditor under the suretyship agreement, he is subrogated in his rights against the main debtor and any dispute between the main debtor and the surety will therefore be submitted to arbitration under the clause contained in the main agreement. In relation to counter-guarantees, *see* for example Paris, 1st Ch. A, 14 December 1987, Dalloz, 1988, 248 and note; 1989 *Rev. Arb.*, 240 and note Vasseur. CSEE had concluded a supply agreement with an Algerian company. The agreement provided for the setting up of guarantees in favour of the Algerian party (which were later issued by Crédit Populaire d'Algérie) and of counter-guarantees (which were issued in favour of CPA by BNP). Following a dispute between the parties to the underlying agreement, CPA called on the counter-guarantees and CSEE immediately started an action (*en référé*) to obtain an injunction against BNP. The underlying agreement contained an ICC arbitration clause, as did the contracts between BNP and CPA. On the other hand, there was no arbitration clause in the agreement concluded between BNP and CSEE. To obtain the injunction, CSEE invoked among other arguments that it had started an arbitration procedure against BNP and CPA on the basis of the arbitration provision contained in the agreement between the two banks. French courts refused to grant the

314. The arbitral tribunal proceeded to the same extension in ICC case no. 5759 of 1989.[361] The parties (the main contractor and a subcontractor) were bound by a subcontract and a Memorandum of Agreement, whose purpose was to determine the modalities of performance of obligations already contained in the subcontract and to settle various issues connected to it. The Memorandum was therefore complementary to the subcontract containing the arbitration clause.

315. In ICC case no. 5675 of 1988,[362] the parties had concluded a contract in 1966 for the distribution of chemical products. It provided that any dispute relating to the agreement would be submitted to ICC arbitration. In 1985, the principal shipped products to the distributor but the invoices remained unpaid. The principal therefore started an ICC arbitration procedure. The distributor disputed the jurisdiction of the sole arbitrator. The latter decided that it had jurisdiction on the basis of German law, the law of the seat of the arbitral tribunal. Even if the orders did not contain an arbitration clause and did not refer to the main agreement, the deliveries had been made on the basis of the 1996 framework agreement and therefore entered into the scope of the arbitration clause.

316. The same approach was followed by an arbitral tribunal[363] that had jurisdiction under an arbitration clause contained in a protocol in which the buyer of the company undertook that the chairman of the board would have his director's mandate renewed. The renewal took place and the director's contract was reconfirmed. However, some time later, the director was dismissed and his contract was terminated. He started an arbitration procedure and the arbitral tribunal rendered an award on the claim for damages based both on the breach of the undertaking contained in the protocol and the termination of the contract of employment (which did not contain an arbitration clause). An action to set aside was introduced before the Paris Court of Appeals. The Court of Appeals dismissed the claim considering that the arbitrators rightly decided that at the occasion of the sale of the shares, the parties had intended to establish between themselves a new relationship, which included the confirmation

[361] 18 *Y.B. Com. Arb.* 34 (1993) also cited by Train, *id.*, at footnote 11, p. 50 and at nos 706, 711 and 712. The arbitration clause provided: "*(1) Tout litige entre l'entrepreneur et le sous-traitant en relation avec le présent sous-contrat et qui n'implique pas l'ouvrage à construire sera tranché définitivement conformément au Règlement de conciliation et d'arbitrage de la Chambre de Commerce Internationale […]. (2) Tout litige en relation avec le présent sous-contrat et qui concerne, de quelque façon que ce soit, l'ouvrage à construire […] sera soumis au mode de résolution des litiges prévu … aux conditions générales du contrat [principal].*" In this case, the contractor had undertaken to pay to the subcontractor all the taxes that he would have to pay to the administrations of the state of the place of construction.

[362] Final award, unpublished, cited by Train, *id.*, at No. 130.

[363] The award is known through the decision of the Paris Court of Appeal which dismissed an action to set aside. Paris Court of Appeals, 1st Suppl. Ch., 28 February 1992, 1992 *Rev. Arb.* 649 and note by Cohen.

of the contract. The dispute was therefore linked to the obligations undertaken in the protocol and hence fell under the arbitration clause.

317. The close interrelation between the second disputed agreement that did not contain an arbitration clause and the first one that did contain such a clause, also explains the decision of the arbitral tribunal in ICC case no. 5954 of 1991.[364] A contract for the management of agricultural land (*contrat de gestion en régie intéressée*) had been concluded in 1981 among the three claimant companies and the two public-entity defendants. A second contract had been concluded in 1984 among the same parties to transform, subject to various conditions precedent, the initial management contract into a long term lease (*bail emphytéotique*). The arbitral tribunal decided that it had jurisdiction to decide whether the second agreement had entered into force. It further determined that two conditions precedent had not been fulfilled and that, therefore, the 1981 contract remained valid. It consequently rendered a decision on the liability of the defendants in relation to the non fulfillment of the conditions.

318. In ICC case no. 7210 of 1994,[365] a state of Western Africa had granted a foreign company the right to exploit a mining zone. In this context, four contracts had been concluded the same day:

- a mining concession agreement according to which the grantee (claimant), in consideration of the exploitation rights, agreed to abandon to the state (defendant) one third of the production: the contract was governed by the law of that state;
- a loan agreement, governed by the law of the United Kingdom, to finance the purchase by the state (borrower) of the results of the underground drilling performed by a third party, part of which also had to be communicated to the grantee (lender);
- a promissory note in which the state acknowledged its debt towards the grantee resulting from the loan, and providing for penalties in case of late payment of the installments: the note was also submitted to the law of the United Kingdom;
- an escrow agreement, governed by Swiss law, appointing an escrow agent to whom the parties had to deliver the borrowed money and various documents and who would be in charge of the processing of the extracted minerals and of their distribution between the parties. Each agreement, with the exception

[364] Final award (Paris, law of a French-speaking African state), unpublished, cited by Train, *id.*,No.s 256-258.

[365] Final award, unpublished, analysed by Train, *id.*, Nos 133, 160 and 742 and footnotes 3 p. 150 and 68 p. 317.

365. If the arbitration is institutional, one will have to look at the rules of the institution and determine if they say something in this respect.[404] If they do not, the same solution applying to an *ad hoc* case will prevail.

366. A difficulty arises in cases where the parties include in their agreement or make reference to institutional rules that provide for certain conditions for the joinder or do not specifically allow it. In such a case, these rules must be deemed part and parcel of the arbitration agreement and therefore the expression of the will of the parties.

SECTION III
MAY A PARTY TO THE ARBITRATION PROCEEDINGS JOIN A NON-PARTY IN THE COURSE OF THE PROCEDURE ?

367. In a classic example, may A, the claimant, which has started an arbitration against B, later join C? Or conversely, may B, the respondent, join C, a non-party in the initial request?

368. A distinction must be made between *ad hoc* and institutional proceedings. Bringing into the proceedings a party to the agreement that had not originally been a named party to the arbitral proceedings raises more difficulties where the arbitration is institutional rather than *ad hoc*.

Sub-section I
Ad Hoc Arbitration

369. For example, in the *ad hoc* (UNCITRAL) case *Marine Drive Complex* v. *Ghana*,[405] the claimants started arbitration proceedings against Ghana Investment Centre and, after the arbitration had started, decided to join the Government of Ghana as defendant. The arbitral tribunal accepted the joinder, pointing out that under Article 20 of the UNCITRAL rules, a claimant may amend its claim at any time, unless factors such as undue delay or prejudice suggest that such an amendment is inappropriate or the amended claim would fall outside the arbitration clause. The arbitral tribunal concluded that in consideration of the circumstances of the case, no prejudice appeared and therefore the amendment could be accepted.[406]

[404] The new rules of the Swiss Chambers of Commerce are probably the most flexible. They provide in their Article 4(2) that: "*Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all the parties, taking into account all circumstances it deems relevant and applicable*".

[405] Award of 27 October 1989, 19 *Y.B. Com. Arb.* 11 (1994).

[406] At 17-18.

370. The answer of the arbitral tribunal was exactly the same in another recent unpublished *ad hoc* case of 3 March 1999[407] in which the claimant extended the arbitral proceedings to three new defendants several years after the arbitration had started. The three companies claimed that they should have been asked to participate in the proceedings from the very beginning of the arbitration. The arbitrators considered that there was no reason why the claimant could not join, at a later stage of the proceedings, other parties to the contract containing the arbitration clause. They pointed out that an arbitral proceeding cannot be fully equated to a judicial proceeding. The arbitral tribunal further determined that in the case at hand, the parties had provided that the arbitrators were not bound by the rules applicable to judicial proceedings. There was therefore no requirement to identify all the defendants *in limine litis*, in the request for arbitration.

371. In its reasoning, the arbitral tribunal quoted one of our articles, as follows:

> This issue has been succinctly dealt with by Professor Bernard Hanotiau in his recent article: "Complex – Multicontract-multiparty – Arbitrations", in: *Arbitration International*, 1998, Volume 11, No. 4, p. 383: "Once an arbitration has started, can the claimant decide to join, at a later stage of the procedure, other parties to the contract or third parties? Can the defendant do the same? As far as other parties are concerned, it appears that the answer must be a priori affirmative, as much for the claimant as for the defendant, whenever the arbitration clause binding the three parties provides that all the disputes which might arise between them, and which relate to the interpretation or performance of the contract, are to be settled through arbitration. This is of course subject to the particular provisions of the arbitration rules to which the parties have referred."
>
> On the other hand, an arbitration procedure is extremely different by nature, even though there may be several similarities with a judicial procedure. An arbitration procedure merely entails the performance of the arbitration agreement. As a result, the parties to the arbitration agreement are parties to the arbitration procedure. Conversely, the identification of parties to an arbitration procedure is in fact akin to the identification of the parties to the arbitration agreement.
>
> This is why Bernard Hanotiau, in another passage from his article, writes: "One party to the arbitral proceedings, claimant or defendant, is always entitled to request other parties to participate in the proceedings, as long as it can prove that they are indeed parties, not to the proceedings, but to the arbitration agreement." (*idem*, p. 384.) This conclusion, overlooked

[407] Cited by M. de Boisséson, "Joinder of Parties to Arbitral Proceedings; Two Contrasting Decisions", in *Complex Arbitrations*, *supra* note 2, at 19, 21.

the significant direct competition among the claimants and the consequent need for complex confidentiality measures throughout the arbitration process would render consolidation extremely difficult and might adversely affect the ability of claimants to fully present their case. In this respect, the Tribunal decided that since party autonomy has to be read into Article 1126, the desires of the parties had to be taken into account in the interpretation and application of Article 1126. It noted that three of the four parties before it did not wish to have the claims consolidated. The Consolidation Tribunal finally pointed out that the risk of unfairness to Mexico from potentially inconsistent awards resulting from separate proceedings could not outweigh the unfairness to the claimants of the procedural inefficiencies that would arise in consolidated proceedings. It therefore rejected Mexico's request for consolidation on 20 May 2005.

424. A few days earlier, on 6 May 2005, a second Consolidation Tribunal was convened under NAFTA to hear a request – filed by the United States – for consolidation of three parallel investment arbitrations against the United States of America. These three arbitrations have been initiated respectively by three different Canadian softwood lumber producers: Canfor Corporation, Tembec Inc. (and two affiliates, Tembec Investments Inc., and Tembec Industries Inc.) and Terminal Forest Products Ltd. The three companies have brought damages claims under NAFTA Chapter 11, alleging that duties imposed upon Canadian softwood lumber exports harmed the companies' US-based investments. In an Order dated 7 September 2005, the Consolidation Tribunal ordered consolidation of the three procedures. After thorough analysis of the legislative history of Article 1126 and of each of its conditions, it concluded that all four conditions of Article 1126(2) had been met and in particular that the three arbitrations involved many common questions of law and fact (a condition which was said to be not purely quantitative but also to involve a qualitative aspect); and that the interests of fair and efficient resolution of the claims (to be assessed taking into consideration procedural economy – the main purpose of Article 1126 – as well as time, costs and avoidance of conflicting decisions) were in favour of consolidation of all the claims – and not only part of them. The Tribunal also pointed out that in its view, the general trend in investor-state arbitration was transparency of process and that, therefore, confidentiality and the fact that the parties to the various cases are direct competitors was of little relevance, save for highly exceptional cases where consolidation would completely defeat the efficiency of proceedings or infringe the principle of due process. This was not the case here. The Tribunal explained that the difference of outcome with the *Corn Products* decision could be explained on this basis but also on various other legal and factual grounds. It also decided that contrary to the allegation made by Tembec, an Article 1126 Tribunal could decide on objections to jurisdiction and that a request for consolidation by a party did not imply a waiver of its jurisdictional challenge. The Tribunal also rejected Tembec's allegation that Article 1126 involved structural problems and in particular that it placed the members of the Tribunal in

the position of deciding a question in which they have a financial interest. It pointed out in particular that the situation was identical for all arbitral tribunals which had to decide on a challenge to jurisdiction.

SECTION VI
IS THERE A DUTY TO BRING INTO THE ARBITRATION PROCEEDINGS ALL THE PARTIES TO THE AGREEMENT?

425. In ICC case no. 5625 analysed above,[477] the question was raised on a preliminary basis as to whether claimant A could claim under the contract without the presence of company B as co-claimant. The arbitral tribunal considered that the issue should be decided together with the merits of the case. The answer to the question which constitutes the title of this section will generally depend upon the contents of the applicable law and the divisible or indivisible character of the dispute or the obligations involved therein. In ICC case no. 5029,[478] a joint venture agreement was entered into by the contractor, a joint venture X, consisting of French company A, its subsidiary B and two Egyptian companies, C and D. The defendant was an Egyptian employer. Both parties had concluded a contract for the construction of certain civil works in Egypt. Arbitration was started by companies A and B, with the exclusion of companies C and D. The question arose whether A and B had *locus standi* to start the arbitration. After having determined that the joint venture was a mere contractual relationship, the arbitral tribunal decided that the authorisation of one party to act on behalf of another in an arbitration in a case where the other party is also linked to the contract that forms the subject matter of the arbitration, must be determined under the law governing the contract at issue. In the case under reference, the applicable provision was Article 302 of the Egyptian Civil Code which provides that when there are several creditors in respect of an indivisible obligation, each of the creditors may demand the performance in its entirety of the indivisible obligation. Co-creditors will then have remedies against a creditor who has received payment, each for its share. The arbitral tribunal had previously determined that the parties had clearly intended the defendant's obligations to be indivisible under the contract.

426. On the other hand, the following solution was advocated by Professor Giorgio Bernini, taking into consideration mainly Italian law:

> A feature peculiar to the same hypothesis resides in the circumstance that all parties are contractually bound by the arbitration clause/agreement; therefore,

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[477] *See* note 412.

[478] Interim award of 16 July 1986, 3 *Int'l Constr. L. Rev* 473-476 (1986); 12 *Y.B. Com. Arb.* 113 (1987).

Arkansas law. The judge decided that Arkansas law applied and added that in the context of the group of companies doctrine, the parties agreed that Arkansas law was the same as English law, which excluded the doctrine of group of companies. The judge also reached the conclusion that the award could not be sustained on the basis of agency by application of the same law of Arkansas. The Court therefore concluded that Peterson was entitled to have the part of the award which awarded payment of losses suffered by group entities set aside for lack of jurisdiction.

465. Was the issue submitted to the Commercial Court a real issue of jurisdiction in relation to a group of companies? Was it not rather an issue of the extent of the damages that could be recovered by the purchasers? In other words, could the latter, beyond the damages they had suffered, also recover the damages suffered by companies closely connected to them and to the contractual scheme? From a discussion of this issue the present author had recently with a number of lawyers from England and Continental Europe, it appears that all of them would agree that, although the reasoning of the Court is correct from the strict point of view of English law in relation to the group of companies doctrine, the approach to the problem in the award and in the Commercial Court decision is quite unusual. A more usual approach would have been to consider that the tribunal had jurisdiction *ratione personae* and then to address on the merits the issue of whether claimant could also recover the damages suffered by members of its group. In this respect, it should be once again emphasised that the issue of "pass-through claims" is not specific to groups of companies and does not necessarily have to be decided on the basis of this doctrine. For example, it is not unusual for a main contractor to claim from the owner not only its own damages but also the damages suffered by its subcontractors, which the main contractor has already indemnified. Whether this pass-through claim should be granted as such is a function of the applicable law, which is most probably the law applicable to the main agreement.

466. Does the *Peterson Farms* case mean the end of any possibility of extension of the arbitration clause to a non-signatory company when the underlying contract is governed by English law? The Commercial Court decision does not inevitably command such a conclusion. As I already pointed out above, the existence of a group of companies is not the ground on which courts and arbitral tribunals usually extend arbitral clauses to non-signatories. They generally base their decision on consent or on conduct as an expression of implied consent, or as a substitute for consent. It is mainly in this context that the fact that the signatory and the non-signatories are part of a group (whether or not this notion remains purely factual or is legally recognised) plays a role in their determination. Moreover, the extension of an arbitration clause to a non-signatory may still be considered on the basis of other theories, such as agency, trust or piercing the corporate veil.

467. In much the same vein, an arbitral tribunal also decided recently that a claimant suing company X could not extend its claim to include sums owed by a subsidiary

of the respondent which was not a party to the proceedings. In ICC case no. 8817 of 1997,[518] J, a Spanish distributor, was suing X, a Danish company, claiming damages for unjustified termination of a distribution agreement. Arbitration took place in Paris and the sole arbitrator decided to apply the Vienna Convention and the Unidroit principles. In the course of the proceedings, J extended its claim to certain sums owed to J by XX Inc., a US subsidiary company of X. X argued that it could not be directed to pay the debts of a separate US company as it could not be held liable for XX Inc. not meeting its obligations. It further argued that the arbitrator had no jurisdiction over XX Inc., which was not a party to the arbitral proceedings. The arbitrator pointed out that there could be cases in which an arbitration agreement could be extended to other legal entities belonging to the same economic group even if they had not signed the agreement at issue. It was not the case here. Even if XX Inc. was a customer of J, it was not a party to the execution of the exclusive distributorship agreement.

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

468. When a subcontractor has a direct action against the employer and is bound by an arbitration clause in its relations with the main contractor, does he have a choice between starting an arbitration against the main contractor or court proceedings against the employer? In ICC case no. 5721 of 1990,[519] the arbitral tribunal answered in the affirmative:

> The contract between X and the applicant is ancillary to the main contract between the employer and X. Egyptian law gives the subcontractor a right of direct action. Article 662 CCE provides that "Subcontractors and workers working for a contractor in the performance of works have a right of direct action against the employer up to the amounts of the sums he owes to the principal contractor at the time the action is commenced …"

469. It should however be noted that:

- this right of direct action is a form of guarantee for the subcontractor and does not deprive him of his right to take direct action against his immediate contractual counterpart;
- this right of direct action is limited to whatever the employer owes to the main contractor, and this, in the present case, would cause the claimant to be exposed to all the risks of the relationship between the employer and X.

[518] 25 *Y.B. Com. Arb.* 355 (2000).

[519] 117 *J. Droit Int'l (Clunet)* 1020 (1990); 2 *ICC Awards*, *supra* note 2, at 400 and observations.

SECTION II
RES JUDICATA APPLIED TO ARBITRAL AWARDS

538. It is now commonly accepted that arbitral awards have *res judicata* effect.[612] It is indeed so provided in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[613] and in various national statutes.

539. In France, Articles 1476 and 1500 NCPC state that once an arbitral award has been rendered it has *res judicata* effect with respect to the dispute it settles. The same is true in Belgium where Article 1703 JC provides that, unless the award is contrary to public policy or the dispute is not capable of settlement by arbitration, the arbitral award is *res judicata* once it has been notified to the parties and thereafter may not be challenged before arbitrators. Article 1055 of the German Code of Civil Procedure provides that an arbitral award has the same effect, for example, between the parties as a final and binding court judgment. Similar provisions also exist in the Netherlands (Article 1059 Code of Civil Procedure), Austria (Article 594 Code of Civil Procedure), Switzerland (Article 190 Act on Private International Law),[614] Italy (Article 829 (8) Code of Civil Procedure) and Spain (Article 43 Arbitration Act).

540. On the other hand, it appears that "*[n]owhere in a statute of a common law country is it stated that an arbitral award has a* res judicata *effect like a judgement*".[615] The UNCITRAL Model Law on International Commercial Arbitration just mentions that the award "*shall be recognized as binding*" (Article 35(1)). The United States Federal Arbitration Act does not even provide that an award is binding upon the parties. Nonetheless, in the United States arbitral awards are in principle regarded as having *res judicata* effect, including collateral estoppel, and judicially confirmed awards enjoy full faith and credit under the United States Constitution.[616] In England,

[612] *See* commentary on the award in ICC case no. 3383 of 1979, 1 *ICC Awards*, *supra* note 2, 394 at 397.

[613] Article III, which however only refers to arbitral awards as "binding".

[614] *See also* the references cited in J.-F. Poudret & S. Besson *Droit comparé de l'arbitrage international* (Zurich: Schulthess, 2002) at § 475ff.

[615] P. Schlosser, "Arbitral Tribunals or State Courts: Who must Defer to Whom?", in *Arbitral Tribunals or State Courts: Who must Defer to Whom?*, ASA Special Series No. 15 (2001) 15 at 21.

[616] US courts have also repeatedly affirmed that a *res judicata* objection to a new arbitration based on prior arbitration proceedings is a legal defence that, in turn, is a component of the dispute on the merits and must be considered by the arbitrator, not the courts. *See* e.g. *Chiron Corporation* v. *Ortho Diagnostics Systems, Inc.*, 207F.3d 1/26 (9th Cir. 2000); *John Hancock Mutual Life Insurance Co.* v. *Olick*, 151F.3d 132 (3rd Cir.1998); *National Union Fire Insurance Co.* v. *Belco Petroleum Corp.*, 88F.3d 129 (2nd Cir. 1996). On the issue of

Article 58 of the Arbitration Act 1996 states that the award is "f*inal and binding*". Although there is therefore no doubt that *res judicata* applies to arbitration as it does to litigation,[617] it has been pointed out that:

> [t]he doctrine of *res judicata*, in either its broad or its narrow sense, has no application to issues falling outside the terms of the arbitration agreement; and it is doubtful whether the rule in *Henderson* v. *Henderson* applies to issues which are outside the scope of the matters referred to the arbitrator even though they fall within the terms of the arbitration agreement.[618]

541. The binding effect of arbitral awards is also mentioned in many institutional rules, for example Article 28 (6) of the ICC Rules,[619] Article 26.9 of the LCIA Rules and Article 32 (2) of the UNCITRAL Rules.

542. The *res judicata* effect of arbitral awards is also recognised by Article III of the New York Convention, which provides that:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in the following articles.

543. An arbitrator who renders an award in violation of *res judicata* also runs the risk that the award might be subsequently set aside:

- either for lack of a valid arbitration agreement[620] or because the tribunal has exceeded its mandate,[621] having become *functus officio* upon rendering the first award; or
- because its reasons contradict those of the first award;[622] or

res judicata in commercial arbitration, *see* R. Shell, "*Res Judicata* and Collateral Estoppel Effects of Commercial Arbitration" (1988) 35 *UCLA L. Rev.* 623; S. Riback, "Are Arbitrations Final?" (1995) 67:7 *New York State Bar Journal* 18 and "*Res Judicata* and the FAA" (1988) 9 *World Arbitration and Mediation Report* 291.

[617] *See* the judgment of Lord Diplock in *Fidelitas Shipping Co. Ltd.* v. *V/O Exportchlep*, [1965] 1 Q.B. 630.

[618] M.J. Mustill and S.C. Boyd, *The Law and Practice of Commercial Arbitration in England*, (2nd edn, London: Butterworths, 1989) at 413.

[619] "*Each award shall be binding on the parties. By submitting the dispute to arbitration under these rules, the parties undertake to carry out any Award without delay …*".

[620] E.g. pursuant to Article 1704(2)(c) JC or Article 1502-1 NCPC.

[621] E.g. pursuant to Article 1704(2)(d) JC or Article 1502-3 NCPC.

[622] E.g. pursuant to Article 1704(2)(j) JC.

in civil law countries.[646] Most of the statutes authorising multiparty actions in Europe concern consumer protection. For example, in a number of countries,[647] independent administrative authorities or consumer organisations have for many years been recognised as having *locus standi* to apply to the courts for an injunction or prohibition order regarding forbidden or unfair commercial practices. On the other hand, the legislations of EU Member States also have been or are about to be amended to incorporate the provisions of Directive 98/27/EC which permits consumer organisations to apply to courts in fellow Member States for an injunction against an infringement of any of a number of consumer trading Directives, covering areas such as misleading advertising, unfair contract terms, consumer credit, package holidays and consumer guarantees, committed in the organisation's own state by an entity in the fellow state. But these actions are representative proceedings, quite different from group actions. Although some EU and non EU states also have legislations on group litigation,[648] their scope and impact remain quite limited. The only European jurisdictions that have significant experience with group actions for compensatory damages, are the common law countries: England and Wales.

559. The leading country in the area of group actions is the United States, whose class action model has also been largely adopted in Canada and Australia, without however encountering the same success. It is therefore not surprising that it is also

[646] In 2003, Sweden adopted the Swedish Group Proceedings Act, which is closer to the Canadian approach than that of the United States. Group actions may be brought by individual members of the group or by an organisation on behalf of the public. Although there is no certification process for a group action, there are specific requirements that must be met before such an action may be brought. First, there must be one or more questions of fact or law common to all members of the group. Bringing a group action should be the best available procedure for adjudication. The group must be adequately defined and, lastly, the group's representative must be suitable for the task. Group actions in Sweden follow the opt-in regime, where notices are sent out by either the court or the parties to all possible group members. Members will not become parties to the action nor will they be bound by any adjudication unless they specifically intervene as parties. Although group representatives may make settlement decisions, they are only binding after other members have been notified and there has been a court order finalising the settlement. In the Netherlands, a draft statute is under discussion to permit collective settlements out of court by defendants and representative organisations. In France, there is a great interest for legislation to be enacted on collective actions. On 4 January 2005, President Chirac declared "*I am asking the government to put forward an amendment of legislation in order to allow groups of consumers and consumer associations to bring collective actions concerning wrongful practices undertaken on some markets*". A project of legislation on class action also exists in Germany.

[647] Denmark, Germany, Greece, Spain, France, Italy, Luxembourg, the Netherlands, Portugal, Belgium. *See* in this respect Hodges, *supra* note 645 at p. 323.

[648] *See* Sherman, *supra* note 645 at p. 403 and Hodges, *id.* at pp. 327-328. In Europe, legislations allowing group actions seems to exist only in Sweden, the Netherlands, England and Wales.

in the United States that the issue has arisen in the first place, whether class actions could be initiated through arbitration. The various facets of the problem have been recently much debated in courts and in scholarly writings.[649] They will be further discussed in this chapter. They may be summarised as follows:

1. When a standard agreement provides for arbitration of disputes arising under it, may a class action be initiated or are claimants obliged to introduce individual arbitrations? And in particular:
   - is classwide arbitration possible when the arbitration clause is silent on this issue?
   - are arbitration clauses prohibiting class actions valid and enforceable?
2. Who will decide issue number one: the court seized of the class action? Or should the court, confronted with the arbitration clause, remand the case to arbitration and leave it to the arbitrators to decide?
3. If a class action may be initiated, how shall it proceed? To what extent will the courts' assistance be necessary?

Before analysing these issues, we will first present the class action model and the leading case in relation to classwide arbitration, the *Green Tree* case.[650]

[649] *See* in particular John F. Dienelt, "Settling Franchise Class Actions", 21 *WTR Franchise L.J.* 113 (2002); Samuel Estreicher and Kenneth J. Turnbull, "Class Actions and Arbitration", 223 *N.Y.L.J.* 3 (2000); Richard Jeydel, "Consolidation, Joinder and Class Actions", 57-JAN *Disp. Resol. J.* 24 (2003); Andrea Lockridge, "The Silent Treatment: Removing the Class Action from the Plaintiff's Toolbox Without Ever Saying a Word", 2003 *J. Disp. Resol.* 255; M. Jared Marsh, "The Class Action Lack of Fairness Act of 2002: Congress Attempts to Federalize Class Action Lawsuits", 71 *UMCK L. Rev.* 151 (2002); Scott S. Megrerian, "The Use of Mandatory Arbitration to Defeat Antitrust Class Actions", 13 Sum-antitrust 63 (1999); Carroll E. Neeseman, "Should an Arbitration Provision Trump the Class Action", 8 No. 3 *Disp. Resol. Mag.* 13 (2002); Robert Alexander Schwartz, "Can Arbitration do More for Consumers? The TILA Class Action Reconsidered", 78 *N.Y.U.L. Rev.* 809 (2003); Jean R. Sternlight, "As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?", *William and Mary Law Review*, October 2000, 5 and "Should an Arbitration Provision Trump the Class Action", 8 No. 3 *Disp. Resol. Mag.* – 13 (2002); Daniel R. Waltcher, "Classwide Arbitration and 10B – 5 Claims in the Wake of *Shearson / American Express, Inc.* v. *McMahon*", 74 *Cornell L. Rev.* 380 (1989); Edward Wood Dunham, "The Arbitration Clause as a Class Action Shield", 16 – *SPG Franchise L.J.* 141.

[650] *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (2003), 2003 WL 21433403 (USSC). The South Carolina Supreme Court decision reviewed by the US Supreme Court was published at 351 S.C. 244, 569 S.E. 2d 349 (2002); *Green Tree Fin. Corp.* v. *Randolph*, 531 U.S. 79 (2000).

contrast that the certification determination could be made by the arbitrator,[717] with court review only after termination of the procedure.[718] Generally, the case would proceed as a typical arbitration. If too many class members disagreed on the choice of arbitrator, the matter would be denied certification or those persons would have to opt out of the class. In other words, the arbitral model would be apt to protect due process interests and arbitrators could easily deal with potential abuses, as can courts.

602. It is also this author's opinion that experienced arbitrators are as well equipped as courts to guarantee the protection of due process rights in all circumstances and that, consequently, the role of the courts in classwide arbitration should be reduced to a minimum, like in any other arbitration conducted on an individual basis. It is beyond doubt that class actions are complex procedures but arbitrations in general tend to be more and more intricate without this increasing complexity raising insurmountable problems for arbitration experts.

603. On the other hand, this author would agree, in the line of several United States Supreme Court cases,[719] that in the context of class action arbitration, either defendants or objecting plaintiffs should be permitted, at the time of the initial proceeding, to raise the claim that the procedures do not adequately protect the due process interests of absent class members. Indeed, once the initial class action is resolved, it may not be possible for absent class members to bring individual claims.

SECTION VI
IS CLASSWIDE ARBITRATION DESIRABLE?

604. As was already pointed out above,[720] in the securities industry, both self-regulated organisations and the SEC have concluded that the arbitral class action was not desirable. Several scholars and judges have equally objected to the process, on the basis of due process and logistical concerns. In actual practice, the procedure

[717] The Third and the Sixth Circuits have indeed determined that class certification was a procedural issue that is best left to the arbitrators. *Independent Association of Continental Pilots* v. *Continental Airlines*, 155 F.3d 685, 696 (3rd Cir. 1998); *Fillinger* v. *Cleveland Society for the Blind*, 591 F.2d 378, 380 (6th Cir. 1979).

[718] Note, "Classwide Arbitration: Efficient Adjudication or Procedural Quagmire?", 67 *Va. L. Rev.* 787, 814 (1981).

[719] *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) and *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 805 (1985). The court decided in the Phillips case that "*whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by* res judicata *just as petitioner is bound*".

[720] *See supra*, No. 579.

would differ very little from litigation and would therefore offer few, if any, advantages.

605. Is such a conclusion justified? Given the early stage of development of classwide arbitration, it is probably premature to express a final conclusion. One thing is certain: in the United States, classwide arbitration is possible when it is not precluded by the relevant arbitration clause and experienced arbitrators have undoubtedly the capability of handling such complex cases in compliance with due process requirements. To what extent it is an efficient method of handling class actions and to what extent court intervention is necessary, remains to be determined, together with many other issues, such as for example the determination of the amount of the arbitrators' fees – and who will finally support them at the end of the procedure.

SECTION VII
INSTITUTIONAL RULES FOR CLASS ARBITRATIONS

606. Following the *Green Tree* decision, the two leading arbitration institutions in the United States, AAA, followed by JAMS, promulgated rules and guidelines for class action arbitrations[721]. Both organisations have procedures that deal with clause construction, class certification, notice and procedure until the final award.

607. In 2004, the AAA issued its "Policy on Class Arbitration (2004)" which provides that it will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitration if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.

608. The Supplementary Rules, Rule 3 (effective 8 October 2003) provides that upon appointment, an arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the Clause Construction Award). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least thirty days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial

[721] They are reproduced in Appendix 3, below.

(a) that the proceedings be consolidated on terms specified in the order;

(b) that the proceedings be heard at the same time or in a sequence specified in the order;

(c) that any of the proceedings be stayed pending the determination of any other of the proceedings.

(3) Where an application has been made under subsection (1) in relation to 2 or more arbitral proceedings (in this section called the "related proceedings"), the following provisions have effect.

(4) If all the related proceedings are being heard by the same tribunal, the tribunal may make such order under this section as it thinks fit in relation to those proceedings and, if such an order is made, the proceedings shall be dealt with in accordance with the order.

(5) If 2 or more arbitral tribunals are hearing the related proceedings:

(a) the tribunal that received the application shall communicate the substance of the application to the other tribunals concerned; and

(b) the tribunals shall, as soon as practicable, deliberate jointly on the application.

(6) Where the tribunals agree, after deliberation on the application, that a particular order under this section should be made in relation to the related proceedings:

(a) the tribunals shall jointly make the order;

(b) the related proceedings shall be dealt with in accordance with the order; and

(c) if the order is that the related proceedings be consolidated — the arbitrator or arbitrators for the purposes of the consolidated proceedings shall be appointed, in accordance with Articles 10 and 11 of the Model Law, from the members of the tribunals.

(7) If the tribunals are unable to make an order under subsection (6), the related proceedings shall proceed as if no application has been made under subsection (1).

(8) This section does not prevent the parties to related proceedings from agreeing to consolidate them and taking such steps as are necessary to effect that consolidation.

B. Belgian Judicial Code, Part VI (4 July 1972, as amended by the Law of 19 May 1998)

Article 1696 Bis:

1. Any interested third party can request the arbitral tribunal authorization in order to intervene in the procedure. This request is addressed in writing to the arbitral tribunal, which shall communicate it to the parties.

A party may call upon a third party in order to intervene.

In any event, in order to be admitted, the intervention requires an arbitration agreement between the third party and the parties involved in the arbitration. Moreover, it is conditional on the assent of the arbitral tribunal, which decides unanimously.

C. Canada

The International Commercial Arbitration Act of British Columbia 1996

Section 27

(1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the Supreme Court assistance in taking evidence and the court may execute the request within its competence and according to its rules on taking evidence.

(2) If the parties to two or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, the Supreme Court may, on application by one party with the consent of all the other parties to those arbitration agreements, do one or more of the following:

a) order the arbitrations to be consolidated on terms the Court considers just and necessary;

b) where all parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with section 11 (8);

c) where all parties cannot agree on any matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.

(3) Nothing in this section is to be construed as preventing the parties to 2 or more arbitrations from agreeing to consolidate those arbitrations and taking any steps that are necessary to effect that consolidation.

(ii) that the evidence given in one arbitration shall be received and admitted in the other arbitration, subject to all parties being given a reasonable opportunity to comment upon it and subject to such other conditions as the tribunal may determine.

M. Rules of Arbitration of the Milan Chamber of Commerce (effective 1 January 2004)

Article 16 – Appointment of arbitrators in multi-party arbitration

Where the request for arbitration is filed by or against several parties, the Arbitral Council shall appoint all the members of the Arbitral Tribunal, notwithstanding a different provision in the arbitration agreement, if any; it shall appoint a sole arbitrator where it deems it appropriate and the arbitration agreement does not provide for a panel. However, where the parties form into two groups at the outset and each group appoints an arbitrator, as if the dispute were between two parties only, and accept that the Arbitral Tribunal consist of three members, the Arbitral Council shall appoint only the President.

N. Arbitration Rules of the Netherlands Arbitration Institute (effective 13 November 2001)

Article 41 – Third Parties

1. A third party who has an interest in the outcome of arbitral proceedings to which these Rules apply may request the arbitral tribunal for permission to join the proceedings or to intervene therein.

2. Such request shall be filed with the Administrator in six copies. The Administrator shall communicate a copy of the request to the parties and to the arbitral tribunal.

3. A party who claims to be indemnified by a third party may serve a notice of joinder on such a party. A copy of the notice shall be sent without delay to the arbitral tribunal, the other party and the Administrator.

4. The joinder, intervention or joinder for the claim of indemnity may only be permitted by the arbitral tribunal, having heard the parties and the third party, if the third party accedes to the arbitration agreement by an agreement in writing between him and the parties to the arbitration agreement. On the grant of request for joinder, intervention or joinder for the claim of indemnity, the third party becomes a party to the arbitral proceedings.

5. In case of a request or notice as referred to in paragraphs (1) and (3), respectively, the arbitral tribunal may suspend the proceedings.

After the suspension, the proceedings shall be resumed in the manner as determined by the arbitral tribunal, unless the parties have agreed otherwise.

6. The provisions on the costs of the arbitration contained in the sixth section shall apply accordingly to a third party who has acceded to the arbitration agreement in accordance with the provisions of paragraph (4).

O. Rules of the Singapore International Arbitration Center (effective 22 October 1997)

Rule 9 – Multi-party Appointment of Arbitrator(s)

9.1 If there are three or more parties in the arbitration, the parties shall endeavour to agree on the procedure for appointing the arbitrator(s) and if within twenty-one (21) days of the receipt of the Notice of Arbitration, the parties have not reached an agreement on the procedure for appointing the arbitrator(s), the arbitrator(s) shall be appointed by the Chairman as soon as practicable after the receipt of a party's request to the Chairman.

9.2 A decision on a matter entrusted by Rule 9.1 to the Chairman shall not be subject to appeal.

Rule 25 – Additional Powers of the Tribunal

Unless the parties at any time agree otherwise, and subject to any mandatory limitations of any applicable law, the Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a proper opportunity to state their views, to:

...

(b) allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes between them.

P. Swiss Rules of International Arbitration (effective 1 January 2004)

Consolidation of arbitral proceedings (joinder)

Participation of third parties

Article 4

1. Where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the Chambers may decide, after consulting with the parties to all proceedings and the Special Committee, that the new case shall be referred to the arbitral tribunal already constituted for