Groups of Companies and Groups of Contracts: A General Introduction

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INTRODUCTION

1. There is an increasing number of multiparty—multi-contract arbitrations. They represent approximately one third of the cases at the ICC and they raise a lot of different issues:

- the determination of the parties to the arbitration clause and the underlying agreement;
- the possibility of intervention of a third party in the arbitral procedure;
- the possibility for a party to join a third party to a current arbitration;
- the possibility to consolidate two or more connected arbitrations;
- when consolidation is not possible, how to overcome the difficulties resulting from the existence of parallel arbitrations;
- the appointment of the members of the Arbitral Tribunal when the various claimants or respondents have opposing interests;
- the possibility of formulating cross claims;
- the enforcement of the award;
- the res judicata effect of awards rendered in connected arbitrations;
- class actions.

2. Multiparty arbitrations may arise in connection with groups of companies or groups of contracts, which raise different issues. In other words, a fundamental distinction should be made between issues arising from groups of contracts and issues arising from groups of companies.

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I. THE RECOGNITION OF GROUPS OF COMPANIES IN NATIONAL LEGISLATION

3. Starting with groups of companies, one must notice that although there are more and more national and international groups of companies, there is rarely legislation in which the group itself is treated as an entity. In Europe, such legislation exists only in Germany and Portugal. This does not mean that groups of companies are not recognized for various purposes in other countries. In many jurisdictions, there is legislation which takes into consideration the fact that companies belong to a group, including legislation concerning accounting, conflicts of interest, corporate governance. But it is generally considered that in fact, groups of companies are in most countries, at least in Europe, a construction of the case law rather than a construction of the legislator.

4. On the other hand, in some jurisdictions, courts have declared at various occasions, in particular in relation to arbitration, that groups of companies do not have any legal existence in their legal system. That is the case in Switzerland and England. It makes the issue of groups of companies in international arbitration even more challenging.

II. THE ISSUES RAISED BY GROUPS OF COMPANIES

5. Fundamentally, the existence of a group of companies raises two types of problems: on the one hand, the impact of the group on the management of the entities member of the group and the relationship among the latter; on the other hand, the scope of the undertakings within the group. And it is here that we find the meeting point between group of companies and arbitration. Various issues can arise:

- Can an arbitration clause contained in a contract concluded by a company of the group be “extended” actively or passively to another entity, non-signatory, such as a subsidiary, the parent company, a sister company, or even a director or an employee of those companies (the “extension”);
- Whether a parent company, claimant in an arbitration procedure, may request the payment by respondent not only of the damage that it has itself suffered following a breach of contract or a wrong of the respondent, but also of the damage suffered by its subsidiaries;