

# CONTENTS

<i>List of Contributors</i>	xxxix
<i>Table of Cases</i>	xxxv
<i>Table of Legislation</i>	xlix
<i>List of Abbreviations</i>	xxv
<i>Introduction</i>	xli

## I DEFINING THE PROBLEM: WHO ARE THE PROPER PARTIES TO THE ARBITRATION?

### 1 Non-signatories and International Arbitration: An Arbitrator's Dilemma

I. Introduction	1.01
II. Less-than-obvious Parties	1.08
A. The Basics	1.08
1. A Spectrum of Approaches	1.08
2. Implied Consent	1.11
3. Disregard of Corporate Personality	1.14
4. Conceptual Overlaps	1.17
B. A Word on Taxonomy: Unsigned Agreements	1.26
C. The Devil in the Detail: Relevant Criteria	1.29
III. Transnational Norms	1.33
A. Governing Law	1.33
B. Arbitral Precedent	1.39
C. Deemed Consent	1.44
1. Estoppel	1.48
2. Chains of Transactions	1.52
IV. The <i>Lex Societatis</i>	1.56
A. Veil-piercing	1.56
B. The Place of Incorporation	1.62
V. The "Group of Companies" Doctrine	1.70
A. The <i>Dow Chemical</i> Award	1.70
B. Consenting Non-signatories	1.74
C. Impact in Practice	1.81

VI. Conclusion	1.87
<b>Appendix: Illustrative Arbitral Awards</b>	
A. Awards on consent	28
B. Awards on corporate personality	30
C. Awards with hybrid reasoning	31
D. Award comparison chart	33
<b>2 Multiple Parties and Multiple Contracts in International Arbitration</b>	
I. The Issues	2.01
A. Non-signatories in International Arbitration	2.01
B. Groups of Companies and Groups of Contracts	2.03
C. "Extension" of the Arbitration Clause to Non-signatories is a Misleading Concept, as Consent is Required	2.05
D. The "Group of Companies" Doctrine is Inadequate to Explain Extension of the Arbitration Clause	2.06
E. The "Group of Companies" Doctrine is Not Always the Appropriate Analysis	2.09
F. Inappropriate Use of the Concept of "Piercing the Corporate Veil"	2.10
G. Distinguishing the Non-signatory Issue from the Issues of Joinder and Consolidation	2.11
H. Do the Issues of Extension of an Arbitration Clause to a State and to a Company Arise in the Same Terms?	2.14
I. Procedure and Strategy	2.16
II. The Impact of the Requirement that the Arbitration Clause be in Writing	2.18
III. Review of the Case-law Relating to Extension of the Arbitration Clause to Non-signatory Companies	2.21
A. The Factual Scenarios	2.22
B. Conclusions Regarding Groups of Companies from the Review	2.23
IV. Review of the Case-law Relating to Extension of the Arbitration Clause to a State	2.36
A. Extension of the Arbitration Clause to a State as Additional Respondent	2.37
B. Extension of the Arbitration Clause to a State as Additional Claimant	2.48
V. The Challenge of Awards by Non-signatory Companies and States	2.51

VI. Review of the Case-law Relating to Groups of Contracts	2.64
A. The Factual Scenarios	2.64
B. Conclusions from the Review	2.74
VII. Conclusion	2.79
 3 “Consent” to Arbitral Jurisdiction: Disputes with Non-signatories	
I. Introduction	3.01
II. Is there a Valid Agreement to Arbitrate?	3.03
A. The Problem	3.03
B. Is There a Valid Agreement to Arbitrate Anything at All?	3.14
C. With Whom Am I Obligated to Arbitrate?	3.23
III. What Types of Disputes did the Arbitration Agreement Encompass?	3.25
A. The Significance of <i>First Options</i>	3.25
B. The U.S. Supreme Court’s Recent Holding in <i>Pacificare</i>	3.30
C. The Tendency in the Lower Courts	3.34
D. Institutional Rules	3.36
E. What, Then, Are We Entitled to Presume?	3.41
IV. With Whom am I Obligated to Arbitrate?	3.56
A. Who, Whom?	3.61
B. Enforcing Arbitration against a Non-signatory	3.65
C. Enforcing Arbitration against a Signatory	3.82
1. Assignee and Assignor Together Move to Compel Arbitration	3.90
2. Assignor Alone Moves to Compel Arbitration	3.95
3. Assignee Alone Moves to Compel Arbitration	3.97
V. Under What Conditions has Consent to Arbitrate Been Given?	3.102
VI. Limiting Statutory Remedies	3.107
VII. Conclusion	3.115
 4 Beyond Consent: Applying Alter Ego and Arbitration Doctrines to Bind Sovereign Parents	
I. Introduction	4.01
II. Binding Private Parties to Arbitrate as Alter Egos	4.05
A. A Brief History of Veil-piercing Theory and Law in the United States	4.05
B. The Presumption of Limited Liability in Contract Cases and its Application to Arbitration	4.12
1. The Strength of the Veil in Contract Cases	4.13

2. Piercing the Veil in Arbitration Cases	4.20
a. <i>Kaplan</i> and the Kevlar Veil	4.20
b. The More Curious <i>Fisser</i> Decision of the Second Circuit and Subsequent Cases	4.25
III. Piercing the Corporate Veil to Reach Sovereign Corporate Parents	4.36
A. <i>First City National Bank v. Banco Para el Comercio Exterior de Cuba</i>	4.37
1. Facts and Procedural History	4.38
2. <i>Bancec</i> 's Choice of Law and its Implications for Comity	4.42
3. Policies Favoring Juridical Separateness	4.44
4. Overcoming the Presumption of Juridical Separateness	4.47
a. Equitable Exceptions Generally	4.47
b. The Origins of <i>Bancec</i> 's Equitable Exception: Seeking U.S. Court Relief through a Front Company, as a "Real Beneficiary"	4.52
B. The Foreign Sovereign Immunities Act—Frequently a Red Herring	4.57
1. Self-Piercing Sovereign Immunity Rules Are Not Relevant to Alter Ego Analysis	4.64
2. Alter Ego and FSIA Jurisdiction	4.66
3. The FSIA Arbitration Exception: Guidance on <i>Bancec</i> Agency and None on "Fraud or Injustice"	4.72
4. Garnishment under the FSIA: <i>Bancec</i> Applied to the Full	4.74
a. From <i>Bancec</i> to <i>Bridas</i>	4.77
IV. <i>Bridas v. Turkmenistan</i> and its Implications	4.80
A. <i>Bridas I</i>	4.85
B. <i>Bridas II</i>	4.88
C. Questions Remaining After <i>Bridas</i>	4.91
1. <i>Bancec</i> Prong 1—Fraud or Injustice	4.92
2. <i>Bancec</i> Prong 2—Dominion and Control	4.96
 5 Extension of the Arbitration Clause to Non-signatories under French Law	
I. Introduction	5.01
II. The "Group of Companies" Doctrine	5.04
III. Participation in the Performance of the Contract	5.08
A. Decisions of the Paris Court of Appeal	5.08
B. Decisions of the <i>Cour de cassation</i>	5.13
IV. Transfer of the Contract or of a Contractual Right	5.16
A. Transfer of a Contract	5.21
B. Transfer of a Single Contractual Right	5.26

C. Consent to be Bound	5.30
1. Must the Assignee Consent to be Bound?	5.31
2. Must the Assigned Consent to be Bound?	5.32
D. Transmission under French Law	5.34
V. Conclusion	5.36

## II THE INSTITUTIONAL PERSPECTIVE

### **6 Multiparty Arbitration: The ICC International Court of Arbitration Perspective**

I. Introduction	6.01
II. Setting in Motion of the Procedure	6.06
A. The Parties	6.06
B. Joinder	6.15
III. Constitution of the Arbitral Tribunal in Multiparty Arbitrations	6.20
IV. Consolidation of Cases Involving Multiple Parties	6.27
V. Costs	6.39
VI. Conclusion	6.45

### **7 Multiple Parties, Multiple Problems: A View from the London Court of International Arbitration**

I. Introduction	7.01
II. The Limits of the Institution's Role	7.03
III. The Institution and the Parties	7.05
IV. The LCIA Arbitration Rules	7.12
A. Multiple Parties and Party Nomination of Arbitrators	7.12
B. Joinder and Consolidation	7.17
1. Joinder	7.18
2. Consolidation	7.27
V. Costs	7.31
VI. The 1996 English Arbitration Act	7.33
VII. Conclusion	7.35

### **8 Consolidation of Arbitral Proceedings in the Netherlands: The Practice and Perspective of the Netherlands Arbitration Institute**

I. Introduction: the Issue of Consolidation	8.01
---	------

A. Two Examples	8.03
B. How Consolidation Can be Achieved	8.05
II. Consolidation under the Netherlands Arbitration Act	8.09
A. Procedure	8.11
B. Consolidation May be Expressly Excluded	8.16
III. The Netherlands Arbitration Institute's Position on Consolidation	8.19
IV. Case-law between 1986 and 2006	8.24
A. Rejections of Requests for Consolidation	8.25
B. A Consolidation Order Does Not Amount to a Decision on Jurisdiction	8.30
V. Alternatives: Consolidation Without Court Involvement	8.33
A. <i>Ad Hoc</i> Measures	8.34
B. Proceedings Conducted under Other Procedural Rules	8.38
VI. A Review of the Statutory System	8.39
A. General Considerations	8.39
B. Consolidation in Practice	8.41
1. Does the System Work?	8.42
2. Does the System Serve a Purpose?	8.43
3. Are There Any Defects in the System?	8.44
VII. A Recent Proposal for the Legal Regime to be Modified	8.47
VIII. Conclusion	8.49

### III MULTIPLE PARTIES AND INVESTMENT ARBITRATION

#### 9 Multiple Claimants in Investment Arbitration: Shareholders and Other Stakeholders

I. Introduction	9.01
II. ICSID Convention, Article 25: Jurisdiction	
<i>Ratione Personae</i>	9.04
A. Introduction	9.04
B. Immediate Owner of the Investment	9.10
C. Intermediate Owner of the Investment	9.16
D. Ultimate Owner of the Investment	9.19
III. Vertical Shareholder Claims	9.20

IV. Horizontal Shareholder Claims: Shareholders From Different Countries Claiming under Different Bilateral Investment Treaties	9.23
V. Contractual Non-signatory Affiliates as Claimants	9.25
VI. Representative Claims under a Bilateral Investment Treaty	9.29
VII. Multiple Party Claims under Different Instruments	9.34
VIII. Potential Inconsistent Outcomes with Separate Cases	9.37
IX. Assignments and Successors	9.40
X. Conclusion	9.47
 <b>10 Multiple Party Investment Dispute Resolution: Who are the Proper Parties?</b>	
I. Introduction	10.01
II. Multiplying the Defendable State Measures: the State and State Enterprises	10.06
A. Lifting the Corporate Veil of State Enterprises	10.07
B. A Procedure for Each Personality of the “Contracting State” as Party to the Dispute	10.15
III. Multiplying the Beneficiaries of Actionable Claims: the Private Enterprise and its Shareholders	10.23
A. Lifting the Corporate Veil of Private Enterprises	10.24
B. A Procedure for Each Personality of the “Investor” as Party to the Dispute	10.40
V. Conclusion	10.50
 <b>11 The Manifold Respondent: Multiparty Issues Involving States in Investor-State Arbitration</b>	
I. Introduction	11.01
II. “The State” as Respondent in Investment Arbitration	11.03
A. Practical Problems	11.03
B. Technical Problems	11.11
III. Enforcement of Arbitral Awards against States	11.19
A. Is the State Bound by the Award?	11.26
B. Is This the State’s Property?	11.32
C. Immunity and the Different Faces of the State	11.48
IV. Conclusion: Fairness and Equity in Enforcement	11.57

## IV MASS CLAIMS AND CLASS-WIDE ARBITRATION

<b>12 Arbitrating Mass Investor Claims: Lessons of International Claims Commissions</b>	
I. Introduction	12.01
II. The “Glorious Past” of International Claims Commissions and Claims Tribunals	12.04
III. Classification of International Claims Commissions and Claims Tribunals	12.11
A. Claims Commissions v. Claims Tribunals	12.11
B. State Responsibility Paradigm v. Human Rights Paradigm	12.17
IV. Mass Claims Processing Methods and Techniques	12.23
A. General Observations	12.23
B. Computerization	12.33
C. Delegation of Claims Review	12.37
D. Grouping of Claims and Common Issue Determination	12.41
E. Cover Decisions	12.44
F. Discovery of Evidence <i>ex officio</i>	12.47
G. Evidentiary Presumptions	12.52
H. Relaxed Standard of Proof	12.55
I. Statistics	12.60
V. Conclusion	12.65
<b>13 The Administration of Class Action Arbitrations</b>	
I. Introduction	13.01
II. Class Action Litigation	13.02
III. <i>Green Tree Financial Corp. v. Bazzle</i>	13.07
IV. Class Action Procedures: AAA’s Supplementary Rules for Class Arbitrations	13.13
V. Court Review of Class Action Awards	13.23
A. The Jurisdictional Issue	13.24
B. The Standard of Review	13.25
C. Case Examples	13.26
VI. International Class Action Arbitrations	13.33
VII. Conclusion	13.36

<b>14 Class-wide Arbitration in California</b>	
I. Introduction	14.01
II. The California Arbitration Act	14.04
III. The United States Supreme Court Decides <i>Bazzle</i>	14.13
IV. Arbitral Institutions Respond to <i>Bazzle</i>	14.19
V. Standard of Review of Arbitral Awards	14.21
VI. Actual Institutional Experience in Administering, Managing, and Deciding Class-wide Arbitrations Since <i>Bazzle</i>	14.27
A. A Word About Class Preclusion or Waiver Clauses	14.27
B. Clause Construction: The Reasoned Partial Final Award	14.29
1. AAA Cases	14.30
2. JAMS Cases	14.32
3. Court Decisions	14.33
C. Class Certification	14.34
1. The Reasoned Partial Final Award	14.34
2. Case Analysis	14.37
D. Notice to Class Members	14.39
E. Management of the Pre-hearing and Hearing Process	14.43
F. Attorney Fee Awards	14.45
G. The Final Award	14.46
H. Settlement, Voluntary Dismissal, and Compromise	14.47
I. Confidentiality	14.49
VII. Conclusion	14.52

## V ENFORCEMENT ISSUES

<b>15 The Globalization of American Class Actions: International Enforcement of Class Action Arbitral Awards</b>	
I. Introduction	15.01
II. The Enforcement of International Class Action Court Judgments	15.03
III. The Enforcement of Class Action Arbitral Awards	15.31
A. Class Action Waivers	15.42
B. The Validity of an Opt-Out Class in Arbitration	15.44
C. Notice	15.48
IV. Conclusion	15.56

<b>16 Complex Arbitration: Issues in Enforcement and Annulment Actions of Arbitral Awards under French Law</b>	
I. Introduction	16.01
II. The Existence and Scope of an Arbitration Agreement: Article 1502(1)	16.04
A. Joinder of Parties	16.07
B. Consolidation of Actions	16.12
1. Linked Actions	16.12
2. Indivisible Disputes	16.16
3. Multiple Contracts Issues	16.18
4. Incompatible Arbitration Clauses	16.25
5. Language Issues	16.28
III. Irregular Constitution of the Arbitral Tribunal: Article 1502(2)	16.31
A. Appointment of Common Arbitrators in Related Proceedings	16.31
B. Nomination of the Same Co-arbitrator in Related Cases	16.33
C. Nomination of an Arbitrator Involved in a Prior Related Case	16.35
D. Equality of the Parties in the Constitution of the Arbitral Tribunal: The <i>Dutco</i> Case	16.37
IV. Violation of International Public Policy: Article 1502(5)	16.42
A. The Principle of Equality of the Parties	16.42
B. Responses to the <i>Dutco</i> Decision	16.44
C. The <i>Dutco</i> Decision in Context	16.47
V. Conclusion	16.51
 VI PRACTICAL SOLUTIONS TO MULTIPARTY PROBLEMS	
<b>17 Multiparty Arbitration in the Construction Industry</b>	
I. Introduction	17.01
II. Categories of Multiparty Dispute	17.03
III. Attitudes to Multiparty Arbitration	17.06
IV. Techniques for Introducing a Third Party	17.14
V. Contractual Provision	17.18
VI. Incorporation of Institutional Rules	17.27
VII. State Court Intervention	17.30
VIII. Conclusion	17.35

APPENDICES

Appendix 1: Article 1046 of the Netherlands Code of Civil Proceedings: Consolidation of Arbitral Proceedings	
Appendix 2: Supplementary Rules for Class Arbitrations of the American Arbitration Association	
Appendix 3: JAMS Class Action Procedures	
Appendix 4: Clause 18 of the Blue Form of Sub-Contract for Use in Conjunction with the Institution of Chemical Engineers ("ICE") Conditions	
Bibliography	427