"Better safe than sorry" – A company executing independent contracts with a common commercial nexus should rather provide for matching arbitration clauses than rely on the "group of contracts" doctrine

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Abstract: A party executing distinct international contracts with a common economic nexus should provide in each of them for matching arbitration or, generally speaking, dispute resolution clauses. If she fails to do so, and once disputes arise, different triers of fact might issue conflicting decisions with relation to the same business venture involving different or even the same parties. Notably the "group of contracts" doctrine and concepts to that effect cannot be deemed a remedy fit to avert that risk. Because, first, the doctrine is known internationally to some but not all jurisdictions. And second, courts of a "group of contracts" jurisdiction might still not rely on it in a given case. Or may differ in its application depending on a given case.

Three decisions rendered in three different jurisdictions, that is Brazil, England, and Switzerland, serve for a short tale that if a business party wishes for at least some degree of predictability and control over arbitration and dispute resolution processes under independent yet related contracts she should accordingly contract for it.

Keywords: International arbitration, disputes over related contracts, parallel proceedings, consent to arbitrate, group of contracts doctrine, extending arbitration to non-signatories, choice of forum, midnight clauses, clause drafting, matching arbitration clauses.

A short tale of three "group of contracts" patterns and cases

Three selected decisions stand exemplary for the contention that the "group of contracts" doctrine should not be seen as a "jack of all trades" remedy to avert conflicting decisions rendered by different triers of fact in disputes over related contracts some but not all of which encompass arbitration or, generally speaking, dispute resolution clauses. On the other hand, one can claim neither that the

doctrine is "master of none" for, in a given case, it might mitigate those risks. Yet relying on it for that purpose amounts to rolling the dice.

In the Judgement of the High Court of England & Wales (QBD) A v B [2020] EWHC 809 (TCC), of 3 April 2020, (the "English" court), and the Decision of the Swiss Federal Supreme Court 4A_386/2018. Of 27 February 2019, the courts of England and Switzerland denied to enforce a forum selection and an arbitration clause, respectively, that were provided for in other contracts that were related to contracts at issue which, however, failed to entail those provisions. Both decisions touched upon further issues that are not addressed here.

In the English case, an NDA was executed between the claimant and the defendant (to the English court proceedings) in view of expert services to be provided by the defendant to the claimant in connection to an ICC arbitration seated in London over a construction project in the Middle East. The NDA provided for a forum selection clause, that is state courts of Abu Dhabi. The expert service contract itself, which was executed after the NDA, had no dispute resolution clause. The English court was seized later on for injunctive relief by the triggered by another ICC arbitration in London, that was also conducted because of the same construction project, where her opponent, that was not a party to the first arbitration, called also the defendant as expert against the claimant (the claimant requested that defendant be enjoyed to provide expert services in that second arbitration in view of their prior established relationship). The English court found that at issue was the service contract rather than the NDA. Since the service contract failed to provide for any forum, it accepted jurisdiction under its choice of forum and law principles (*i.a.,* based on the situs of the arbitration being in London, and English law applicable to the merits). The court did not consider any dogmatic concepts to the effect of the "group of contracts" doctrine, nor did it give much deference to the pending arbitrations.

In the Swiss case, two related but separate agreements executed by the same parties provided each for a different dispute resolution clause. First, an agency agreement over the procurement of construction businesses in Qatar was executed between the claimant and the defendant (to the Swiss court proceedings). It provided for an ICC Zurich arbitration. After disputes broke out, the parties settled, before the tribunal was constituted, and signed a settlement agreement. For disputes arising under the settlement agreement, they agreed on the jurisdiction of Qatari courts. The settlement agreement contained also new obligations in relation to commissions for future contract assignments. The parties also reinstated that the former agency agreement and its arbitration clause remained valid insofar as not contradicting the settlement agreement. After further services were rendered under the settlement agreement, disputes arose again. Both parties filed suits with

Qatari courts, which dismissed. Later on, the claimant filed for ICC arbitration. Yet, the tribunal deemed, among other things, that it lacked jurisdiction. The claimant challenged that decision directly to the Swiss Federal Supreme Court under Article 190 Swiss Private International Law Act. The Swiss court deferred to the decision of the arbitral tribunal. In particular, the court held to the effect that there was little room to apply any doctrine against the clear wording of the contracts and of either dispute resolution clauses. Accordingly, while the first agreement was governed by the arbitration agreement the second was not. Qatari courts remained competent.

Common to either approach of the English and the Swiss courts is that both looked first whether there was an explicit arbitration or forum selection clause in the contract at issue that governed the dispute. If there was, the wording of it was given deference. As a consequence of that method, the parties in the Swiss case were heard by courts they arguably agreed on – an outcome that was rather predictable. Conversely, the parties in the English case could predict less whether or to what extent the English court would accept jurisdiction in view of that only one of the two related contracts provided for an explicit choice clause while the other remained silent.

The third case is an internationally prominent case that was already discussed in publications.[1] It is the decision rendered by the Superior Court of Justice of Brazil (STJ) – Resp: 1.639.035 - SP 2015/0257748-2, Paranapanema S.A. v. BTG Pactual S.A. and Santander Brasil S.A., 18 September 2018.

In that case, a company and two lending banks executed a loan agreement. To repay the loan the borrower would issue shares for the lenders. To hedge shortfalls in value of the shares further swap agreements were executed. Those swap agreements provided for exclusive competence of state courts of São Paulo in case of disputes. Later on, one of the lenders filed for arbitration under the swap agreements. The borrower disputed jurisdiction of the arbitral tribunal arguing that there was no arbitration clause in the swap agreements. Yet, the arbitral tribunal confirmed its jurisdiction and issued an award. The borrower then challenged the award with the state courts of São Paulo under several grounds. Among other things, it pleaded lack of jurisdiction of the arbitral tribunal. The court deemed the swap agreements connected with the loan agreement because the obligations under the

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For instance, Gustavo Scheffer da Silveira, 'Brazilian Special Appeal no. 1.639.035-SP, 18 September 2018, Paranapanema S/A vs/ BTG Pactual S/A and Santander Brasil S/A', (2019), 37, ASA Bulletin, Issue 4, pp. 853-870.

former arose from the latter.[2] Accordingly, the borrower's set aside motion was rejected under that ground. The decision was challenged to the Superior Court of Justice of Brazil. That court confirmed, however, and held that despite the non-existence of an arbitration clause in the swap agreements, the loan agreement's arbitration clause should be extended to the swap agreements because all were related and concerned the same economic operation. There was also a dissenting opinion according to which the swap agreements, although related and joined by a causal link to the loan agreement, were autonomous and provided for forum selection clauses. Thus, the arbitral tribunal had no jurisdiction.

The three referenced decisions provide for a spectrum of potential applications or non-applications of the "group of contracts" doctrine or concepts to that effect (*see infra* for the scope). While the English court did not apply or refer to any such concepts, although there was a nexus between the agreements (the doctrine is not limited to arbitration clauses only) – and while the Swiss court found no reason to rely on the doctrine, which is available under Swiss case law,[3] since the wording of the pertinent clauses was plain –, the Superior Court of Justice of Brazil went arguably to the far side of the "group of contracts" doctrine and extended the arbitration agreement to ancillary contracts in spite of the latter providing explicitly for choice of forum clauses.[4]

The benefit of the "group of contracts" doctrine for related contracts

International business demands the execution of contracts sophisticated in kind, big in numbers, and with many different parties – typically over a long period time. When negotiating contracts, divergent interests, bargaining power, and compromises reached may lead to divergent substantial provisions in related contracts executed with the same or different parties. To make matters worse, related contracts may entail conflicting dispute resolution provisions. Also, because parties bargain last if at all about those "midnight" clauses. It is a

[2] *See also* https://www.machadomeyer.com.br/en/recent-publications/publications/litigation-arbitration-and-dispute-resolution/paranapanema-case-extension-of-arbitration-clauses-to-ancillary-contracts [visited on 24 September 2020].

[3] Under the case law of the Swiss Federal Supreme Court, if one contract provides for arbitration and is substantially connected to other contracts, the presumption follows that all contracts are subject to that one arbitration clause subject to the stipulation of the parties to the contrary in those other contracts, *see* Decision of the Swiss Federal Supreme Court 142 (2016) III 239, *p.* 255, *cons.* 5.2.3. In view thereof, the swap agreements in the Paranapanema case would have been rather deemed governed by the forum selection clauses if reviewed under Swiss law.

[4] *Cf.* Leonardo Ohlrogge, The Extent of Consent in Multi-Party and Multi-Contract Arbitration under the Perspective of Brazilian Law - Substantive and Procedural Issues, Doctoral Thesis University of St. Gallen, 2018, at 29, 34, and 35.

conundrum well known that those are deemed of lesser importance in business contract negotiations. Parties rather offer business issues their "blood, toil, tears and sweat".

If disputes then arise in relation to projects where various contracts were executed with one or several different parties, divergent clauses may provide for different jurisdictions around the globe; typically for either state courts or arbitration tribunals. Those may in turn render conflicting decisions with regard to the same business. Such was the case in the referenced English and Swiss decisions where several state courts and arbitration tribunals decided, sometimes concurring other times dissenting, over the same or connected matters. And such was the general experience of many during the global Covid-19 pandemic in 2020, where conflicting dispute resolution clauses in upstream and downstream contracts provided for little help. Yet even if a dispute stays domestic, as was the case in the Paranapanema case, conflicting decisions by arbitral tribunals and state courts may still loom.

Parties might agree to amend the clauses once a dispute breaks out. Yet, when push comes to shove and each party engages in her pursuit of happiness, that might be an outcome difficult to achieve. Certainly, that was not the case in the referenced English and Swiss decisions, where, quite to the contrary, relief was sought from different triers of fact at several fora.

To avert or at least mitigate dangers inherent to parallel proceedings, the "group of contracts" doctrine has been applied, notably in international arbitration. A propeller of that doctrine were courts in civil law jurisdictions as can be inferred from the Brazilian Paranapanema decision or from case law of the Swiss Federal Supreme Court – while the doctrine may not always be referred to as such.[5]

Under the "group of contracts" doctrine, the presumption follows that parties implied to submit any disputes arising under contracts with a joint nexus, which will typically be economic in nature, to the same trier of fact, typically an arbitral tribunal, irrespective of whether each of them has a matching arbitration clause or remains silent – subject to any explicit stipulations to the contrary.[6] In other words, consent to arbitrate is being construed extensively whereas the economic nexus serves as evidence of parties' explicit or implicit intent.[7] [7] Thus, that doctrine is

[5] *See* [3] and for a thorough review [1] and [4].

[6] S*ee* [3] and [4]*; see also* The Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v. Westinghouse Electric Corporation ICC Case No. 7375/CK, 205 [1996]; Raw material processor, Processing group v Raw material seller, Award, HKZ Case No. 273/95, 31 May 1996, in Albert Jan Van den Berg (ed), Yearbook Commercial Arbitration 1998 - Volume XXIII, Yearbook Commercial Arbitration, Volume 23, ICCA & Kluwer Law International 1998, pp. 128 - 148; Société Ouest Africaine des Bétons Industriels v. Senegal, ICSID Case No. ARB/82/1; Bernard Hanotiau, Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law, in Albert Jan Van den Berg (ed), International Arbitration 2006: Back to Basics?, ICCA Congress Series, Volume 13, ICCA & Kluwer Law International 2007, 341 - 358.

[7] In the Brazilian Parapanema case the arbitration agreement of the main loan agreement was extended to the swap agreements although the latter provided explicitly for an forum selection clause while under

not a brand-new or stand-alone dogmatic concept and courts need not to explicitly refer to it under that label in order to apply it.

Further, whether a party is a signatory or a non-signatory to the arbitration agreement or the underlying substantial agreements, which is a pivoting point under US laws,[8] is not at the core of the scrutiny under that doctrine, or not only. Rather, the focus lies on the behavior of a party that courts construe from an objective point of view. That general behavior might accordingly be deemed a party's implied consent to arbitrate. The rationale of that qualification is to protect the other party's reasonable reliance in good faith on that behavior.

While many jurisdictions became home of that doctrine due to common consent theories, among others, the French, the Swiss, and the Brazilian – all civil law jurisdictions –, common law jurisdictions are traditionally rather wary of extending arbitration agreements to non-signatories. Yet, in view of the high volume of international arbitrations seated in Switzerland and France and many best practices and international principles originating in those jurisdictions, that doctrine cannot be discarded in international arbitration. The Brazilian Paranapanema decision is yet another proof of the international availability of it. Accordingly, the doctrine is not the abovementioned "master of none".

Despite its availability in international arbitration, several reasons still argue against relying on it by parties to independent yet commercially related international contracts that seek to prevent parallel proceedings or that wish to obtain some degree of predictability and control over the direction the ship might sail. In other words, several arguments reveal that the doctrine is not the abovementioned "jack of all trades".

First, the "group of contracts" doctrine is as referenced established in some but not all jurisdictions. Whether one will arbitrate, or litigate, in a jurisdiction that applies that doctrine might be certain only once a dispute has arisen, and once a tribunal or court accepted jurisdiction under that doctrine or not. The English court in the referenced decision, for instance, did not rely on it or on considerations to that effect. Further, if there is no explicit clause at all in the contract at issue while there may be one in a contract that is related (as was the case in the referenced English decision), courts from any jurisdiction might still prefer to rely on further

the Swiss landmark case, *see* [3], the arbitration agreement extends only if the ancillary contract is silent or ambiguous regarding the competent trier of fact if any. The Paranapanema decision with its stark reliance on the objective condition of the economic nexus might indeed stretch the nature of the "group of contracts" doctrine as a concept of consent only, *see* [1], at 860, and *cf.* [4].

8 *Cf.* GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC, 590 U.S. __ (2020) (slip opinion); Ivan Singh Khosa & Parul Khanna, Arbitral Estoppel as an Alternative to the 'Group of Companies' Doctrine: The U.S. Approach, in: the Alternatives to the High Cost of Litigation, Vol. 35 No. 6 June 2017, pp. 83-86.

choice of forum or law principles under their local laws than to construe the parties' consent extensively to the effect of the "group of contracts" doctrine.

Second, jurisdictions that know that doctrine still vary in scope of its application. This provides again for little predictability and control over the direction the dispute will take and whether a trier of fact will accept jurisdiction based on it or not. For instance, the application under the Paranapanema decision differs from the one under Swiss case law.[9]

Third, the application of it relies on a case by case objective interpretation of the parties' behavior and consent by tribunals and courts, as referenced in both Swiss and Brazilian cases. This again impedes predictability and planning.

Parties are not best advised to rely as their first choice on a remedy that fails to meet the goal of providing predictability and control. The "group of contracts" doctrine amounts rather to a stopgap solution if any. From a business perspective, where determining the amount of chances for one event or another transfers into price tags, that doctrine and any reliance on it amount to an errand bullet rather than a bulletproof tactic.

Notably the English and the Swiss decisions point to an alternative. They indicate that the "group of contracts" doctrine should not be relied upon since state courts prefer to rely on the language of a given dispute resolution clause or the lack of such a wording to infer any conclusions at law. As mentioned, even in a jurisdiction that applies that doctrine, courts might still decide admissibility and jurisdiction without venturing into further dogmatic concepts.

Thus, preference should be given to the drafting of matching clauses. That undertaking may level the odds for the risk that disputes over related contracts will not be heard by the same court or the same arbitral tribunal, thus, lowering risks of diverging judgements and awards.

As a sidenote, and in view of the approach taken by the Swiss and the English courts, the Paranapanema decision, where the court enforced the arbitration clause of the loan agreement against the wording of the ancillary contracts that provided for a forum selection clause, seems rather an exception under that doctrine. While it also must be noted that the Brazilian courts still applied one of the clauses the parties executed. Thus, the drafting was not in vain and served predictability and control, albeit to a lesser degree, while the parties arguably got only half of the benefit of the bargain. Still, the parties effectively prevented the application of a further, unknown, not designated forum. One could even argue that their contracting was bulletproof but for an extensive if not odd application of the "group of contracts" doctrine (according the information available and the personal

[9] *See* [3] and [7].

understanding of that case). To that end, the arguments raised in a referenced publication are food for thought.[10]

Without a doubt, drafting and executing matching dispute resolution clauses in one's dozens if not hundreds international contracts is not easy. Yet, it seems worth the effort. The alternative, different fora and divergent decisions, seems less appealing.

If, for any reasons, a party or all parties involved in the contract drafting wish to provide for diversity in the clauses, they may do so of course. That approach might be warranted to provide for some options. Divergent clauses may also be the effect of the bargaining process over other, substantive, contract provisions. However, parties should opt for divergent clauses only if mindful of the risks of that approach. Diversity may lead to less predictability and control over future dispute resolution processes further adding to time and costs.

The purpose of this note was to make a case for the drafting of matching arbitration or, generally speaking, dispute resolution clauses for the relying on a dogmatic doctrine may not fit the needs of the parties of international commerce. The outcome of the referenced decisions might have differed depending on the laws applicable, or on the amount of deference given to parallel arbitrations, or on one's legal point of view as demonstrated by the dissenting opinions in the Paranapanema decision. Yet, the main flaw remains: if the parties fail to provide for uniform arbitration provisions in their related contracts, they will even less likely arbitrate for all of them at the same forum. Therefore, business parties should work with their in-house or outside counsels to match their arbitration or dispute resolution clauses provided for in related contracts.

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[10] *See* [1] and [7].