

Commentary***The Group Of Companies Doctrine And
The Law Applicable To The Arbitration Agreement***

By
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[Editor's Note: Mr. Gaffney is a partner with O'Flynn Exhams & Partners, Cork. He wishes to express his appreciation to Peter Griffin, a partner with the London office of Baker Botts LLP for his comments and suggestions. Responsibility for any errors remains with the author. Copyright by the author 2004. Replies to this commentary are welcome.]

1. Introduction

It is generally accepted in international arbitration that circumstances may arise in which a party who has not signed an arbitration agreement nonetheless may take advantage of it or be bound by it. In particular, a non-signatory company may benefit from or be bound by an arbitration agreement signed by another company within the group to which it belongs. This is usually referred to as the "group of companies" doctrine.

The decision of an international arbitral tribunal to join one or more non-signatory companies to the arbitral proceedings and/or to award one or more of such companies damages necessarily involves the arbitral tribunal determining the scope and effects of its jurisdiction. It is a settled principle of international arbitration that the arbitration agreement, on which the arbitral tribunal's jurisdiction is founded, is autonomous. The law applicable to the determination by the arbitral tribunal of the scope and effects of its jurisdiction may therefore be subject to a different law than that governing the arbitration agreement or the wider agreement in which the arbitration agreement is contained. In some cases this situation may involve the tribunal in assessing the intention of the parties rather than having recourse to the law applicable to the arbitration agreement. It is in this context the group of companies doctrine has been invoked by arbitral tribunals and, in particular, ICC arbitral tribunals to justify extending the scope and effects of their jurisdiction to non-signatory companies within the group to which the signatory company belongs.

The existence of the group of companies doctrine under English law and its relationship with the applicable law of the arbitration agreement have been considered recently by the English High Court in *Peterson Farms Inc v. C&M Farming Limited*.¹ The purpose of this note is to summarize and comment on the judgement of the High Court and the international arbitral award giving rise to the judgement insofar as the group of companies doctrine and the law applicable to the arbitration agreement are concerned.

2. The Group Of Companies Doctrine

One of the leading cases on the group of companies doctrine is an ICC case, *Dow Chemical France v. Isover Saint Gobain* ("Dow Chemical").² In that case, the ICC Tribunal affirmed in its Interim Award the complete autonomy of the arbitration clause and the power conferred on the arbitrator to take any decision as to his own jurisdiction without obliging him to apply any national law in order to do so on the basis of the former and then current ICC Rules.

In the view of the Tribunal, the arbitrator should determine the scope and effects of the arbitration clause and thereby reach his decision regarding jurisdiction by reference to the common intent of the parties, such as it appears from the circumstances that surrounded the conclusion and characterised the performance and, later, the termination of the contracts in which they appeared. In doing so, the arbitrator may take into account usages conforming to the needs of international commerce, in particular, the presence of a group of companies. At the same time, the Tribunal regarded an arbitrator as bound to assure himself that any solution he adopts is compatible with international public policy of the applicable law.

The Tribunal considered the circumstances that surrounded the conclusion and characterised the performance and, later, the termination of the contracts in dispute. It concluded that the parent company, Dow Chemical Company (USA), both "had and exercised absolute power over its subsidiaries," who were signatory to the arbitration clause, and those subsidiaries, such as Dow Chemical France, which effectively and individually participated in the conclusion, performance and termination of the contracts. The Tribunal also concluded that it should take into account, in ruling on its own jurisdiction pursuant to the ICC Rules, the fact that a group of companies constitutes one and the same economic reality. On that basis, the Tribunal determined that the arbitration clause expressly accepted by certain of the subsidiaries in the Dow Chemicals Group should bind other entities within the same group, which:

"[B]y virtue of their role in the conclusion, performance or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appears to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they give rise."

On the foregoing basis, it joined the parent company, Dow Chemical USA, and the sister company, Dow Chemical France to the proceedings. In arriving at this conclusion, the Tribunal had regard to previous ICC cases³ and to a decision of an American arbitral tribunal, which referring to US national court decisions, observed that:

"It is neither sensible nor practical to exclude [from the arbitral jurisdiction] the claims of companies who have an interest in the venture and who are members of the same corporate family"⁴

Finally, the Tribunal found that its decision to assume jurisdiction over non-signatory corporate entities within the Dow Chemicals Group did not contradict any principle or any rule of international "public policy," in particular that of the French legal system which was the law governing the seat of the arbitration.

The Interim Award of the Tribunal was the subject of an action for setting aside instituted by the Defendant in the French courts. The Court of Appeal in Paris rejected the plea of lack of jurisdiction of the arbitrators. The Court considered that the arbitrators had with good reason concluded that the law applicable to determine the scope and effects of an arbitral clause did not necessary coincide with the law applicable to the merits of the dispute. In the view of the Court, the arbitrators were justified in adopting an autonomous interpretation of the agreement and deciding in accordance with the intention common to all companies involved that non-signatory corporate entities were party to the agreements and, accordingly, that the arbitration clauses were applicable to them as well. The Court also noted that the existence of the group of companies doctrine had not been seriously contested by the Defendant.

Dow Chemical has been followed in a number of subsequent ICC cases.⁵ However, the doctrine has not been without its critics.⁶ The opponents of the group of companies doctrine advocate a traditional approach, according to which the arbitration agreement is governed by a national proper law. Therefore, the question of whether an arbitration agreement binds not only a signa-

tory company but one or more non-signatory companies which belong to the same group should be determined by reference to the proper law of the contract. As Professor Sandrock notes:

“the exceptions to the principle of privity of contract have to be derived from precise, well-defined largely recognised rules of the respective domestic law to which the arbitration agreement in question is subject.”⁷

Such exceptions may include, for example, different national rules on third party beneficiaries.⁸

The benefit of such a conflict of laws approach over the group of companies doctrine is that it leads to:

“precise, well-defined and largely recognised national rules of law thereby assuring the predictability of its results in legal security in international commercial transactions.”⁹

3. *The Peterson Farms Case*

(a) *Background*

Peterson Farms arose out of an application pursuant to Section 67 of the English Arbitration Act 1996 to the High Court by the Respondent in an ICC arbitration in London, Peterson Farms Inc. (“Peterson”), a company organised under Arkansas law, in respect of certain findings in an ICC Arbitration Award (the “Award”) in favour of the Claimant, C&M Farming Limited (“C&M”), an Indian incorporated corporation. Under Section 67, any party to arbitral proceedings may apply to the High Court challenging an award of the arbitral tribunal as to its substantive jurisdiction.

The arbitration involved a claim for damages by C&M against Peterson arising out of the sale by Peterson of live poultry. Peterson sold C&M male “grandparent” birds. C&M mated the birds to produce “parent” males which it would sell on as hatching eggs or day old chicks. Those sales were made both to other “C&M group entities” comprising 60% of such sales, with the remaining 40% to other purchasers. The other C&M group entities used the parent males to breed with parent females to produce broiler chicks, which they would sell on as chicks or hatching eggs.

The sales of poultry were made pursuant to a written contract entitled “Sales Right Agreement” made on 7 September 1996 (the “Agreement”) to which only C&M and Peterson were signatories. The arbitration clause was contained in Clause 17 of the Agreement, which provided that:

“All disputes [. . .] which may arise between the parties out of or in relation to or in connection with this agreement or for the breach thereof, should be finally settled by the International Chamber of Commerce, UK.”

Clause 9 of the Agreement provided:

“This Agreement shall be interpreted and construed in accordance with the laws of Arkansas, USA.”

The poultry was infected with avian virus and C&M claimed \$16 million in damages from Peterson. The claim for damages related to both losses suffered by C&M itself, consisting of lost sales because of the reduced number of parent male chicks and hatching eggs it was able to produce and lost market share and loss of future profits (the so called “grandparent losses”), and losses allegedly suffered by the other C&M group entities consisting also of lost sales, lost market share, and loss of future profits (the so called “parent losses”).

C&M initiated the arbitration by a Request dated 27 April 2000. C&M was identified as the only Claimant. The ICC Tribunal comprised Joel Hirschorn, Judge Abraham Gafni, and Julian Lew, who acted as Chairman. Terms of Reference were executed on 24 September 2001 and the hearing took place in London between 1 and 11 July 2002. The Award was dated 10 March 2003.

(b) The Award

The ICC tribunal awarded C&M damages in the sum of US\$6,747,217. This award of damages was made up of compensation for the grandparent losses of US\$1,220,448 and compensation for the alleged parent losses in the total sum of \$5,524,769.

The fact that C&M was claiming compensation for both the grandparent losses it suffered but also for the alleged parent losses which other C&M group entities suffered, did not become apparent until late into the arbitration proceedings. C&M's Request for Arbitration was served in April 2000 in which C&M was identified as the only claimant and a party within the C&M Group to the Agreement. While some of the exchanges between the parties referred to the other C&M entities, it was not until April 2002, when C&M served an "Opinion on losses suffered by C&M Group," that it became apparent that C&M was claiming loss and compensation for the grandparent losses and also the alleged parent losses suffered by the other C&M Group entities. This document was accompanied by a witness statement to the effect that the entities formed "an integrated and inseparable part of the Group" and, furthermore, alleging that even if each company was to be considered as separate and distinct from each other, the calculation of losses set out in the Opinion would remain the same because C&M bore "responsibility to its sister concerns for their losses."

The position adopted by C&M was strongly contested by Peterson in a supplemental Memorandum served on 28 May 2002. In this document, Peterson pointed out to the Tribunal that the vast majority of damages claimed in the arbitration were brought not in respect of C&M's losses but for losses suffered by the other C&M group entities. Peterson argued that reliance by C&M on the group of companies doctrine was misplaced because identification of the parties to the agreement was a matter of substantive law, which in this case was governed by Arkansas law. Moreover, Peterson submitted that it had not been previously suggested that there was an agent/principal relationship between C&M and the other C&M group entities nor was there any evidence of such relationship.

The Tribunal rejected Peterson's arguments. It noted that under the doctrine of separability, an arbitration agreement is separable and autonomous from the underlying contract in which it appears. As a corollary, the law applicable to the arbitration agreement may differ from the law applicable to both the substance of the contract and to the arbitral proceedings themselves. In the view of the Tribunal, the right of C&M to make claims for the C&M Group was a question of interpretation of the arbitration agreement contained in the Agreement.

The Tribunal took the view that the parties did not make any choice of law with regard to the arbitration agreement itself and, therefore, it was entitled to determine this question in accordance with the common intent of the parties. It found that in the negotiations leading up to the conclusion of the Agreement Peterson knew it was contracting with and would have obligations to all C&M Group companies. Furthermore, it determined that C&M contracted on behalf of and as an agent of the entire C&M Group and that this was understood by Peterson.

The Tribunal referred to the group of companies doctrine citing *Dow Chemical* and other ICC case law,¹⁰ in which it was acknowledged that because a group of companies constitute the same "economic reality" one company in the group can bind other members to an agreement if such a result conforms to the mutual intention of all the parties and reflects the good usage of international commerce.

The Tribunal determined that Peterson was aware not only of the integrated nature of the poultry business, but also that an agreement with C&M would impact on the operations of all the C&M Group. Accordingly, the tribunal determined that Peterson “intended” to enter into and perform under a contract with all the entities forming the C&M Group. On that basis, the tribunal decided that the circumstances present in *Dow Chemical* were present in the matter before it.

It awarded damages to C&M for the grandparent losses and to the other C&M group entities for the alleged parent losses, which far exceeded the losses suffered by C&M itself.

(c) Judgement Of The High Court

In his judgement of 4 February 2004, Mr. Justice Langley found that the Tribunal’s approach to the determination of its jurisdiction was “open to a number of substantial criticisms” and “seriously flawed in law.”¹¹

Turning first to the Tribunal’s approach to determining its jurisdiction, the Judge took issue with the Tribunal’s finding that there was no choice of law by the parties with respect to the arbitration agreement. In his view, the issue of jurisdiction raised the question of the interpretation of the Agreement and such questions were expressly made subject to Arkansas law by clause 19 of the Agreement. Consequently, the “autonomy” of the arbitration agreement was not in point. On that basis, the Judge found:

“There was, therefore, no basis for the tribunal to apply any other law whether supposedly derived from the “common intent of the parties” or not. The common intent was indeed expressed in the Agreement: that is both English and Arkansas law [. . .]. The “law” the tribunal derived from its approach was not the proper law of the agreement nor even the law of the chosen place of arbitration but, in effect, the group of companies doctrine itself.”¹²

The Judge rejected C&M’s contention that the Tribunal’s approach was in accordance with Section 46 of the Arbitration Act 1996. He noted that pursuant to that provision unless otherwise agreed, which he found had not occurred in this case, the Tribunal was obliged to decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute.

Mr. Justice Langley also criticised the tribunal’s findings regarding the “agency” issue. In his view not only had C&M advanced no case in agency before the Tribunal, but had there been an agency relationship there would be no need for C&M to advance the group of companies doctrine.

The Judge held the Tribunal’s finding that it had jurisdiction to consider the claims of the non-signatory C&M entities could not stand on the foregoing grounds.

On the basis that the nature of the Respondent’s application under Section 67 was a re-hearing, he considered whether the result achieved in the Tribunal’s Award could be supported on other grounds.

He first considered the group of companies doctrine again, but did so from the standpoint of whether that doctrine formed part of Arkansas law. He did so by reference to whether it was a doctrine which formed part of English law, as the parties’ legal representatives had agreed prior to the hearing that Arkansas law was to be regarded to be the same as English law for the purpose of the hearing. Referring to his earlier finding that the identification of the parties to an agreement was a question of substantive law, the Judge held that:

“English law treats the issue [of jurisdiction] as one subject to the chosen proper law of the Agreement and that excludes the doctrine which forms no part of English law.”¹³

The Judge then considered whether the Award could be sustained on the basis of agency. Noting that agency was neither alleged nor addressed in evidence before the Tribunal, the Judge held there was no evidence to establish either fact. Indeed, the evidence of commercial reality was to the contrary: C&M itself sold parent chicks to other C&M group entities. This was regarded by the Judge as being consistent with the relationship of buyer and seller, not principal and agent. Moreover, the Judge took into account the fact that the identification of entities for which C&M was said to act as agent was limited to those "who happened subsequently to suffer losses when the infected poultry was delivered."¹⁴

Mr. Justice Langley found that Peterson was entitled to have that part of the Award, which awarded compensation of the parent losses by other C&M group entities, set aside for want of jurisdiction and also held that it was entitled to have the award of costs and expenses remitted to the Tribunal for their consideration in the context of his judgement.¹⁵

4. Comments

The approach of the ICC Tribunal in determining the scope of its jurisdiction according to the group of companies doctrine and its emphatic rejection by the English High Court merit comment in a number of respects.

First, the approach of the Tribunal to determining the scope of its jurisdiction on the basis of the group of companies doctrine mirrors, at least in general terms, the approach adopted by the ICC Tribunal in *Dow Chemical*. However, it is submitted that the approach of the Tribunal differed in a number of material respects to that adopted by the Tribunal in *Dow Chemical*. In *Peterson Farms*, the Tribunal determined that the parties had made no choice of law with respect to the arbitration agreement. The Tribunal in *Dow Chemical* approached this issue in a different manner. As a consequent of the autonomy of the arbitration agreement, it recognised that the law chosen by the parties to govern the merits of the dispute might not have governed the scope and effects of the arbitration agreement (unless the parties agreed otherwise). The Tribunal emphasised this was particularly so in the case of an arbitration clause referring to the ICC Rules, which establish the complete autonomy of the arbitration clause and confer on the arbitrator the power to take any decision as to his own jurisdiction without obliging him to apply any national law whatever in order to do so.

In the writer's view the approach adopted in *Dow Chemical* is to be preferred. In many cases, and possibly the majority of cases, parties do not ordinarily specify a specific law to govern the arbitration clause on the not unreasonable assumption that the law expressly chosen by the parties to govern the entire agreement is intended to govern the arbitration clause as well. It seems something of an artifice to find that parties in such cases should be regarded as having failed to choose a law to govern the arbitration clause. In any event, such an approach seems unnecessary in light of *Dow Chemical* and the well-established principle of the autonomy of the arbitration clause, such that it may be governed by a law other than that chosen by the parties insofar as jurisdictional issues are concerned.

Second, the Tribunal in *Peterson Farms* also followed the approach of the Tribunal in *Dow Chemical* in determining its jurisdiction by reference "to the common intent of the parties." However, the Tribunal did not appear to consider whether its conclusions contradicted any principle or rule of the law applicable to the arbitration agreement or the proper law of the place of the arbitration, at least according to the sections of the Award published in the Judgement. As noted earlier, the Tribunal in *Dow Chemical* took care that its conclusion did not contradict any rule or principle under the applicable law, which in that case was French law so as to ensure its Award was enforceable. It paid particular regard in this respect to any rule or principle that would:

“prohibit giving to an arbitration clause implicating companies that are legally distinct but form part of a group of companies, the scope attributed to it by the present award.”¹⁶

If it is the case that the Tribunal in *Peterson Farms* did not have regard to this consideration, it effectively and entirely “de-localized,” whether intentionally or unintentionally, the law governing the determination of its jurisdiction by excluding all considerations of national law. One wonders whether this approach may have given rise to difficulties in enforcing the Award had it not been challenged under Section 67 of the Arbitration Act.

In any event, Mr. Justice Langley clearly rejected this approach in finding that the “law” the Tribunal derived from its approach was “in effect, the group of companies doctrine itself.” He did not appear to consider whether the ICC Rules, which were implicitly chosen by the parties in this case, constituted the agreement of the parties that the Tribunal by virtue of such Rules should have the power to determine its own jurisdiction without reference to the substantive law governing the merits of the dispute or indeed any national law.

In some respects this is surprising given that it is a well settled principle of English law that the submission by the parties to the rules of an arbitral institution, such as the ICC, will be taken as being an agreement of the parties to adopt those particular rules and to give the arbitrator the powers granted to him by those rules.¹⁷

The Judge’s trenchant views on the Tribunal’s approach also raises the interesting question whether the institutional rules and related jurisprudence (both judicial and arbitral) can be properly regarded as “law” for the purpose of institutional arbitration, such as ICC arbitration, particularly with regard to issues of jurisdiction.

Third, one wonders whether on the facts of *Peterson Farms*, the application by the Tribunal of the group of companies doctrine, as articulated in *Dow Chemical*, was justified. It was not clear from the sections of the Award reproduced in the Judgement whether any of the other group entities comprised a parent entity. If not, no jurisdiction could be established on the basis that any of the other C&M entities should be joined on the basis that any or all of them exercised “absolute control” over C&M, the party to the Agreement. It would appear that no parent was involved as, the Tribunal, consistent with the approach of previous ICC cases, considered whether the other C&M group entities by virtue of “their effective and individual participation in the conclusion and performance of the Agreement” should be regarded as parties to that Agreement. On the basis of the evidence before the Tribunal, at least to the extent disclosed in the Judgement, it is certainly arguable that the other group entities did not actively participate in the conclusion and performance of the Agreement in a manner similar to that of, for example, of *Dow Chemical France* in *Dow Chemical*. Instead, the Tribunal would appear to have justified its conclusions by reference to the “awareness” of Peterson of the integrated nature of the poultry business and the fact that C&M was part of a wider Group.

It is questionable whether in the case of sister companies or entities this seemingly passive role in the conclusion of the contracts justifies the application of the group of companies doctrine. It is also open to doubt whether, strictly speaking, the other C&M entities “participated” in the performance of the Agreement. While no doubt, the Agreement was one in a series of contracts underpinning the poultry business carried on by C&M, it would not appear to have been established that the conclusion of what might be regarded as “downstream” contracts was critical to the performance of the “upstream” Agreement between C&M and Peterson.

Fourth, the judgement of Mr. Justice Langley would appear on the face of it to be at odds with the findings of the Court of Appeal in Paris in *Dow Chemical* as to the basis on which an arbitral tribunal may determine the scope and effects of its jurisdiction. As noted earlier, the Court of Appeal found that the Tribunal was entitled on the basis of the autonomy of the arbitration

agreement to find that other non-signatory entities within the same Group could be properly regarded as parties to the agreements at issue. The judgement in *Peterson Farms* appears to adopt a contrary approach by, first, emphasising the essential role played by the law applicable to the merits of the dispute and, second, seemingly dismissing the autonomy of the arbitration agreement as the basis for the Tribunal to determine its own jurisdiction where the parties have expressly chosen a governing law.

It would be premature to contend that there is, following *Peterson Farms*, a direct conflict between English and French jurisprudence and, indeed, ICC arbitral practice on the question of whether an arbitral tribunal is entitled to determine the scope of its jurisdiction by reference, inter alia, to the group of companies doctrine. *Peterson Farms* may turn on its facts. One wonders whether the Tribunal's finding that the parties failed to make a choice of law in respect of the arbitration clause (coupled with the Judge's finding that the doctrine formed no part of English law) prompted the Judge's emphatic rejection of the Tribunal's entire approach to determining jurisdiction.

It is submitted that the Judge's dismissal of the autonomy of the arbitration clause as "not in point" in determining jurisdiction may not be representative of the position under English law. It will be interesting to follow subsequent developments in English caselaw on this issue. It may be the case that English courts, as a corollary of respecting party autonomy in international arbitration and preserving privity of contract, place a significant emphasis on the consent of each of the parties to important issues, such as the joinder of non-signatories to arbitral proceedings¹⁸ and the award of damages to such parties.

In *Peterson Farms*, one could argue that considering the well-established ICC arbitral practice on the group of companies doctrine, the agreement of Peterson to the matter being determined by an ICC Tribunal constituted, at least in principle, consent to the application of such a doctrine (provided that the conditions stipulated in the jurisprudence were satisfied). However, whether or not this was considered by the High Court, such implied consent was not sufficiently explicit for the purposes of English law to justify the Tribunal in extending the scope of its jurisdiction to non-signatory companies. Is it to be taken that a party's agreement to institutional arbitration, which normally under English law is to be regarded as consent to the adoption of the rules of that institution, is under *Peterson Farms* not to be regarded as consent in the manner in which such rules may have been interpreted and applied in previous case law? If this is so, it is suggested that this will result in a rather lop-sided extension of the existing rule. This again raises the earlier-noted question of whether such case law should constitute "law" to which it may be said that parties consent in agreeing to institutional arbitration.

Peterson Farms may also have implications for London (or other venues in England and Wales) as a seat of international arbitration. On the one hand, if *Peterson Farms* is followed in subsequent decisions, parties may choose to make their agreements subject to English law and ICC arbitration in London without the risk that an award will be made in favour of entities with whom they have not contracted, but which are affiliated to the counterparty.¹⁹ On the other hand, one wonders whether the judgement in *Peterson Farms* will discourage parties from making London as a seat of arbitration due to the scope or challenge of an arbitral award? For example, once an award were rendered, might a losing party scrutinise the accounts of the successful party to see whether certain losses are booked from an accounting perspective, by another group company although it is not a signatory to the arbitration agreement? If this were the case, it could raise the unappealing prospect of protracted, accounting-focused, litigation following an arbitration simply to show the successful party, which has been awarded compensation, actually suffered the claimed losses.

5. Conclusion

The judgement in *Peterson Farms* raises a serious question mark over the validity of the group of companies doctrine under English law. As such, the judgement should be carefully considered by the parties and their legal advisers if choosing English law as the applicable law of the

arbitration agreement and London (or some other venue in England and Wales) as the seat of arbitration.

ENDNOTES

1. [2002] EWHC121 (Comm) (Judgment of Mr. Justice Langley of 4 February 2004).
2. ICC Case No. 4131, Interim Award of 23 September 1982. Published in: 110 *Journal du Droit International* (Clunet) 1983, pp. 899/905, with note Y.Derains, pp. 905/907 (Arbitrators: Professor Pieter Sanders (President), Professor Berthold Goldman and Professor Michael Vasseur).
3. ICC Cases No. 2138, *Journal du Droit International* 1975 of p. 934 and Case No. 2375, *Journal du Droit International* 1976 of p. 973 and Case No. 1434, *id* at 978.
4. Society of Maritime Arbitrators, Inc., New York, Partial Final Award No. 1510, 28 November 1980, VII *Yearbook Commercial Arbitration, American Awards*, p. 151(1982).
5. See e.g., ICC Cases No.'s. 4972 and 6519 (in which the issue under consideration was whether an arbitration clause signed by a parent company alone must be extended to one or more of its subsidiaries) and ICC cases 5730 and 5721 (in which the issue was whether an arbitration clause signed by a subsidiary can or should be extended to its parent company).
6. See e.g., Sandrock, *The International Lawyer*, Volume 27 (1993) pp. 941-961; and Sandrock, "Extending the Scope of Arbitration Agreements to Non-Signatories," *ASA Special Series No. 8* (December 1994) 1, pp. 165-180.
7. Sandrock, *ASA Special Series No. 8. op. cit.*, p. 169.
8. *Ibid.*
9. *Ibid.*, p. 172.
10. ICC Case No.'s 2375, *op.cit.*, and 5103.
11. The Judge considered a number of other issues on appeal, including the nature of a challenge to jurisdiction under Section 67 of the Arbitration Act 1996 and the issue of whether Peterson lost it right to object to the award for lack of jurisdiction on the basis of delay. The sections of the Judgment dealing with these issues are not addressed in this Commentary.
12. Paragraph 47.
13. Paragraph 62.
14. Paragraph 65.
15. Paragraph 71. The Judge also considered the issue of jurisdiction from the point of view of equitable estoppel and ad hoc jurisdiction, both of which he categorically dismissed in brief terms.
16. In fact, the finding of the Tribunal in that case seemed to accord with French case law.
17. *Dalmia Cement Ltd. v. National Bank of Pakistan* [1975] QB 9, [1974] 3 All ER 189.
18. See e.g., *Bay Hotels and Resort Limited and Zurich Indemnity Company of London v. Cavalier Construction Co. Ltd. and Ors* [2001] UKPC 34 (16 July 2001); Commentary by Gaffney and Rosenblum, **Mealey's International Arbitration Report** Vol. 17. No. 1 (2002).
19. See Leadley and Williams "Choice of Arkansas Law, org. English Law in Arbitration Agreement, excludes ICC "Group of Companies" Doctrine, English Judge Rules," *Baker & McKenzie International Litigation & Arbitration Newsletter*, Volume 3, issue 3 (March 2004). ■