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Founder: Professor Pierre LALIVE
Editor in Chief: Matthias SCHERER

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ASA Secretariat

4, Boulevard du Théâtre, P.O.Box 5429, CH-1204 Geneva,
Tel.: +41 22 310 74 30, Fax: +41 22 310 37 31;
info@arbitration-ch.org, www.arbitration-ch.org

CORRESPONDENCE

ASA Bulletin
Matthias SCHERER
Rue de la Mairie 35, CP 6569, CH-1211 Genève 6
Tel: +41 58 105 2000 – Fax: +41 58 105 2060
mscherer@lalive.law

(For address changes please contact
info@arbitration-ch.org/tel +41 22 310 74 30)

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Brazilian Special Appeal nº. 1.639.035-SP, 18 September 2018, *Paranapanema S/A vs/ BTG Pactual S/A and Santander Brasil S/A*

GUSTAVO SCHEFFER DA SILVEIRA*

Arbitration clause – Group of contracts – Connected contracts – Extension – Conflict of clauses – Implicit consent

In connected contracts, the parties enter into a plurality of legal transactions for the purposes of an economic unity, creating real dependency among them.

Having identified the existence of connected contracts, the extension of the arbitration clause contained in the main contract to the "swap" agreements becomes possible, since they form a single economic transaction.

In the system of connected contracts, the contract considered to be the main contract determines the rules that shall be followed by the other agreements that are connected to it. It is not reasonable to consider that an arbitration clause contained in the main contract does not extend its effects to the others.

Comment

The judgment in the Paranapanema case highlights the difficulty in coordinating traditional notions of law, such as consent, with the complexity of current commercial operations, from both a civil law (*droit civil*) and arbitration law perspectives. In the Paranapanema case, the question was whether the arbitration agreement contained in one contract could "extend its effects"[1] and

* Counsel at Tauil & Chequer Advogados in association with Mayer Brown, Doctor in international private law and international commercial law with the University of Paris II Panthéon-Assas.

1 The expression "extension of the arbitration agreement" is sometimes criticized by the doctrine because, in fact, it is not an extension *per se*. In reality, what judges and arbitrators do is not to extend the arbitration agreement, but rather to determine the arbitration agreement's real and effective scope of application, by verifying whether the implicit will of the parties was that the arbitration agreement contained in one contract also produce effects on other contracts, *ratione materiae* scope, or that non-signatory entities be bound by the arbitration agreement, *ratione personae* scope. However, considering that the

be applied to disputes arising from other contracts, considering that these contracts were connected and formed part of a single economic transaction.

This issue arose in the context of the financial restructuring of Paranapanema S/A ("Paranapanema"), which signed a "Loan Agreement" with the banks BTG Pactual S/A ("BTG") and Santander Brasil S/A ("Santander") (jointly the "banks"), pursuant to which the banks would lend BRL 200 million to Paranapanema. Clause 9 of the Loan Agreement provided that the debt could be paid in two different manners: firstly, by payment in national currency or, secondly, by issuing new shares in the company (Paranapanema) in favor of the banks. Paranapanema opted for the second form of payment.

The Loan Agreement also contained an arbitration agreement in clause 21, which provided that "*any disputes, conflicts, issues, discrepancies or controversies of any kind, related to (i) the existence and / or exercise of any right arising out of this contract and / or (ii) the existence and / or occurrence of any damage; and / or (iii) the interpretation of the terms and conditions of this agreement (any dispute, conflict, issue, discrepancies or controversy referred to herein as "Conflict") shall be settled by arbitration, governed by Brazilian law* [...]" (emphasis added).

However, concurrent with the subscription of Paranapanema's shares by the banks, Paranapanema and the banks entered into additional agreements, named "Swap Agreements". The purpose of the Swap Agreements was to ensure that if the price of the shares were lower than the minimum value contractually agreed during the reference period set in the Loan Agreement, Paranapanema would pay the difference to the banks, thus assuring a minimum market value per share. As stated in the first instance judgment, "*in practice, the parties created a mechanism that prevented the market value of the plaintiff's shares at a certain date from being paid at a value lower than the return projected and accepted by the debtor*".

It is important to note that, contrary to the Loan Agreement, the Swap Agreements did not have an arbitration agreement, but contained a choice of forum clause, attributing exclusive jurisdiction to the courts of the district of São Paulo to assess any dispute relating to the above-mentioned Swap Agreements.

After the banks subscribed to Paranapanema's new shares, Paranapanema notified the banks that it would not comply with its obligation under the Swap Agreements for the payment of the difference of the market value of the shares. Paranapanema alleged that this obligation was "*null and*

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expression is frequently employed by the doctrine, by arbitrators and national courts, as it was the case in the Paranapanema decision, it will be used in this commentary.

void, as it obliges [Paranapanema] *to pay back amounts received as payment for the shares subscribed* [by the banks]*, an operation which is forbidden under of the principle of the intangibility of the share capital*"[2].

In this context, Santander submitted to Paranapanema a payment request under the Swap Agreements and, subsequently, initiated arbitral proceedings against Paranapanema and BTG. Among other things, Santander sought the declaration of the validity of clause 9 of the Loan Agreement, as well as the declaration of the validity of Paranapanema's obligation under the Swap Agreement, *i.e.*, to pay the difference between the market value of the shares and the value of the credit. The arbitral tribunal issued an award declaring the validity of the obligation assumed by Paranapanema in clause 9 of the Loan Agreement and ordering Paranapanema to pay a certain amount in favor of Santander.

Upon receipt of this arbitral award, Paranapanema started setting aside proceedings before the São Paulo lower Courts based on two independent legal grounds: firstly, alleging irregularities in the constitution of the arbitral tribunal[3] and, secondly, the lack of jurisdiction of the arbitral tribunal on the basis that the contract under which Santander filed its claims was the Swap Agreements, which did not contain an arbitration clause, but a choice of forum clause. This setting aside action was partially accepted by the São Paulo lower Court, which, based on art. 32, subsection VIII, of the Brazilian Arbitration Law, Law nº. 9.307/96, set aside the arbitral award due to a violation of the parties' equality on the constitution of the arbitral tribunal. However, the lower judge rejected the allegation of lack of jurisdiction of the arbitral tribunal and considered that the

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2 In general terms, according to this principle, the shareholders cannot withdraw the share capital (a permanent found), while the company continues to function and when all creditors have not been fully paid. In this regard, see LAZZARESCHI NETO A. S., *Aumento de capital das sociedades anônimas*, Quartier Latin 2012, 2nd ed., spec. p. 38 and 39. As pointed out by the referred author, this principle "*appears in several different manners in the law. It may be in the rigor in the verification of the existence of profits allowing the distribution of dividends, the rules that govern audits and the preparation of balance sheets,* [...] *the impossibility of a company to buy, or receive its own shares as a guarantee* [...], *the subjection of the possibility of reducing the share capital to the agreement (or non objection) of creditors*", among others. In this regard, also see LAMY FILHO A., BULONES PEDREIRA J., *Direito das companhias*, Forense 2017, 2nd ed., p. 146 y 147.

3 According to the Paranapanema, the equal treatment of the parties in the constitution of the arbitral tribunal, as provided for under article 21, paragraph 2 of Law 9.307/1996, had not been respected because, both Paranapanema and BTG, respondent parties in the arbitration proceedings, were prevented from nominating an arbitrator in whom they trusted. At the arbitration stage, respondents Paranapanema and BTG failed to reach an agreement on the election of an arbitrator, as they had divergent interests. Thus, due to the absence of a joint nomination by respondents, the arbitral institution appointed a co-arbitrator on their behalf, while the claimant party was afforded the possibility to appoint the arbitrator of its choice. The situation here was very similar to that of the Dutco case, decided by the French *Cour de cassation*.

arbitration agreement contained in the Loan Agreement extended its effects to the Swap Agreements. Santander and BTG filed an appeal before the São Paulo Court of Appeals, which dismissed the appeals and upheld the terms of the first instance judgement in its entirety.

Two specials appeals were filed before the Superior Court of Justice ("STJ")[4], one by BTG and the other by Paranapanema. However, while Paranapanema alleged that the São Paulo Court of Appeals had violated Brazilian law by wrongly 'extending' the arbitration agreement and excluding the national courts' jurisdiction, BTG's special appeal was based on the fact that were no irregularities in the constitution of the arbitral tribunal.

The Superior Court of Justice was thus facing two questions: firstly, the question of the equality of the parties with respect to the constitution of the arbitral tribunal and, secondly, the question of the *ratione materiae* extension of the arbitration agreement contained in the main contract to accessory agreements.

Regarding the question of the parties' equality on the constitution of the arbitral tribunal, the STJ upheld the appealed decision[5]. However, considering that the São Paulo Court of Appeal's decision was confirmed by the STJ purely on procedural grounds[6], rather than based on a legal analysis of the application of the law, this point will not be the subject of our comment.

The second ground for setting aside the award, however, deserves an in-depth analysis. Concerning the alleged nullity of the arbitral award based on the non-existence of an arbitration agreement in the Swap Agreements, the STJ rejected the special appeals stating the possibility of extending the effects of the arbitration agreement contained in the main contract to the other connected agreements. In the STJ's words, "*having identified the existence of connected contracts, the extension of the arbitration clause contained in the main contract to the "swap" agreements becomes possible, since they form a single economic transaction. 2.3. In the system of connected contracts, the contract*

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4 The STJ is the highest Court for infra-constitutional matters. In general terms, special Appeals are meant to control the correct application of infra-constitutional law and it is not meant to review the merits and the facts of a decision.

5 For a comment on this point of the decision, see DE CAMPOS MELO L., note on the decision of the Court of Appeals of São Paulo, *Rev. bras. arb*. 2013, p. 129

6 In order to dismiss the special appeal filed by the BTG Bank, the STJ decided that "*in order to adopt a position contrary to that of the Court of origin, it would be necessary to review the set of facts and evidence of the case, which, as it has been decided, it is not possible before this higher instance, as per Statement nº. 7 / STJ. 3.2. The modification of the conclusion adopted in the judgment appealed, with respect to the existence of the preclusion, would require the review of the facts and evidence of the case, falling into the application of Statement nº. 7 of the STJ*".

considered to be the main contract determines the rules that shall be followed by the other agreements that are connected to it. It is not reasonable to consider that an arbitration clause contained in the main contract does not extend its effects to the others".

This decision is part of the STJ's efforts to promote and increase the effectiveness of arbitration. However, considering the broad and far-reaching terms of this decision, it deserves some criticism and should even have its value as a precedent (*décision de principe*) attenuated. The criticism is due in light of the legal arguments on which the STJ relied to assert the possibility of extending the arbitration clause contained in one contract to other connected contracts.

In the present case, the judgment by majority of the STJ seems, on the one hand, to have placed excessive importance on an insufficient criterion to justify the extension, without giving sufficient weight to the essential criterion (I) and, on the other hand, to have interpreted in an extremely flexible fashion the express manifestation of the will of the parties (II).

I. The implicit consent of the parties: essential criterion for the extension

To authorize the *ratione materiae* extension of the arbitration agreement, the first instance judge[7], the São Paulo Court of Appeals[8], and the STJ, gave particular importance to the economic unity of the operation and the interdependence of the contracts. However, these criteria are insufficient to justify the extension (A). It would be better if the STJ engaged in verifying, within the contractual structure, the existence of an implicit consent of the parties, the only criterion capable of justifying the extension (B).

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7 The first instance judge stated that "*there is no doubt that the loan agreement and the swap agreements are interconnected and interdependent, the first being the main agreement and the others the accessory agreements, considering that the value charged by the defendants based on the "swap" agreements has its origin in the loan agreement. The loan agreement cannot, therefore, be considered fully complied and extinguished until the legality of the claim for the payment of the difference of the share value based on the "swap" agreements is decided. In this context, despite the fact that swap agreements do not have arbitration clauses, because the obligations therein derive directly from the main loan agreement (which provides for arbitration in its clause 21, paragraphs 272/273), the arbitration procedure was validly established on the bases of a previous existing broader arbitration clause*".

8 In its turn, the São Paulo Court of Appeals decided that, in view of the facts and the dependence between the contracts, "*it is not possible to state that the offers of the "Options" to subscribe to the new shares (as payment), as well as the "Swap" Operations […], are autonomous and independent of the Loan Agreement*".

A. Unit of the commercial relationship *versus* consent

The existence of connected contracts is obviously an important fact when it comes to the extension *ratione materiae* of the arbitration agreement. Indeed, an arbitration agreement contained in one contract may only be extended to another contract if they are related (1). However, this criterion shall not substitute the foundation of arbitration under Brazilian law, that is, the consent of the parties to arbitrate (2).

1 Insufficient criterion: the connection between the contracts

In practice, the existence of connected contracts forming a single commercial transaction may create the temptation to allow the extension of the arbitration agreement contained in the main contract to the other related contracts. The first reason is that the very definition of connected contracts makes it clear that they only exist to serve a common commercial operation. In the decision here commented, the STJ stated that "*in connected contracts, the parties enter into a plurality of legal transactions for the purposes of an economic unity, creating real dependency among them*". Thus, despite being autonomous, these contracts are not isolated from each other. The common final purpose of the connected contracts leads some authors to assimilate the contract to the economic transaction[9]. Secondly, according to the principle of *effet utile*, "*we must assume that the drafters of a clause wanted to attribute to that clause a real meaning and an operative scope*"[10]. Thus, it could be understood that the intention of the parties would have been to extend the arbitration agreement contained in a contract to the other related contracts.

For the STJ, these two arguments appear to have been of particular importance, as it can be seen in different passages of the judgment. Regarding the first point above, an example would be when the STJ stated in a general manner, that "[i]*dentified the existence of connected contracts, the extension of the arbitration clause contained in the main contract to the "swap" agreements becomes possible, since they form a single economic transaction*" or that "*adopting the understanding that there is indeed a connection between the contracts entered into between the litigating parties, the possibility of extending the arbitration clause provided in the main contract to the swap agreements becomes flagrant, as they are linked by a single economic operation*"[11].

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9 For an explanation of the "contract-economic transaction" v. MARINO F., *Contratos coligados no direito brasileiro*, SARAIVA 2010, spec. p. 24, and for criticism, spec. p. 27.

10 FOUCHARD Ph., GAILLARD E., GOLDMAN, *Traité de l'arbitrage commercial international*, Litec 1996, spec. p. 279, nº. 478.

11 In another passage the STJ indicated "*as already indicated, the Court of Appeals recognized the interdependence of the loan agreement with the "swap" agreements signed between the*

Regarding the *effet utile des conventions*, the STJ indicated that "[*the*] *overall interpretation of the contractual clauses, recommended by art. 112 of the Civil Code, logically entails the need to interpret the connected contracts jointly. In addition to serving as an interpretative means for the other contracts forming part of the group, the connected contract takes part in the construction of the contractual content itself, because many contractual clauses can only be construed from elements present in the texts of all the contracts involved*".

Indeed, the existence of an economic unit around which the contracts are connected is an essential criterion to justify the extension. Without this unity, the connecting factor between the contracts, there would not even be a reason to speak about extension. However, the mere existence of a contractual connection around an economic transaction is an insufficient criterion, since it ignores the very basis for arbitration under Brazilian law, that is, the consent of the parties to submit their dispute to arbitration to the exclusion of state jurisdiction[12].

2 Fundamental criterion: implicit consent

Under Brazilian law, there can only be a valid arbitration if the parties consent to arbitrate their disputes, even if the consent is implicit. The requirement of the existence of consent to arbitration was clearly stated by the Brazilian jurisprudence[13]. The Supreme Federal Tribunal[14], for example, decided in the AGRSE 5.206-7, in which it decided the constitutionality of the arbitration law, that the existence of consent "*is an essential factor when verifying the legitimacy of the arbitration law before the constitution*". In the

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parties, emphasizing that the existence of a connection between the contracts enables the accessory agreements to borrow the legal regime from the main contract".

12 In this regard, PERETTE LEITES G., "To 'Extend' or Not to 'Extend'? An Analysis of the Brazilian Superior Court of Justice's Judgement in RESP. 1.639.035 – SP", *Kluwer Arbitration Blog* 23 November 2018.

13 The requirement of consent ca also be found in the arbitration law. Article 3 of Law 9.307 of 1996 provides that "*the parties concerned may submit their disputes to arbitration proceedings by means of an arbitration agreement* [convenção de arbitragem]*, which may be in the form of either an arbitration clause* [clásula compromissória] *or a compromisso arbitral* [*compromis d'arbitrage*]". In its turn, article 4 defines an arbitration clause as "*the convention* [that is, the pact or agreement] *by which the parties to a contract undertake to submit to arbitration any disputes that might arise with respect to that contract*". In addition, article 9 defines the "*compromisso arbitral*" as "*the judicial or extrajudicial convention* [that is, the pact or agreement] *by which the parties submit an existing dispute to the arbitration by one or more persons, which may be judicial or extrajudicial*". These articles make it clear that, whether before or after the dispute has arisen, for valid arbitration to exist, Brazilian law requires a "*convenção*" (*une convention*), that is, an agreement of intentions. An agreement of intentions exists only when there is consent from all parties involved, without which there can be no valid arbitration.

14 The *Supremo Tribunal Federal* is the highest court in Brazil for constitutional matters.

same judgment, the STF also indicated that "*the basis of the constitutionality of arbitration rests essentially on the voluntary nature of the bilateral agreement by which the parties to a particular dispute chose to submit it to the decision of a third private person, despite the fact that they could submit such dispute to the State Courts*"[15].

The consensual nature of arbitration was also a central point raised by Justice Luis Felipe Solomon in his dissenting vote in the Paranapanema case: "*it does not seem that the extension* [of the arbitration agreement] *should be automatic, without an analysis of each case at hand. In fact, as it is known, arbitration, as an important dispute settlement mechanism* [...] *has as its guiding principle the autonomy of the will of the parties, which constitutes its very foundation and which authorizes the contracting parties to submit their disputes to arbitration*"[16].

Consequently, in addition to having based the decision on the connection between contracts, the STJ should have devoted a substantial part of its analysis to the verification of the existence of the parties' consent to the extension of the effects of a clause contained in one contract to other related contracts. This point was, however, the object of a marginal analysis by the STJ, which simply stated that "[s]*ubmitting issues arising out of the "Swap Agreements" to State Courts, as supported by the claimant, would be a clear violation of the will of the parties, which is to submit the disputes arising out of their legal transaction to arbitration*".

It is true that in recent years, the notion of consent to arbitrate has suffered profound mutations and is being analyzed in an increasingly flexible manner[17]. However, under Brazilian law, as well as in other national laws,

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15 AGRSE 5.206-7, 12 December 2011, *M B V Commercial and Export Management Establisment c/ Resil Industria e Comercio Ltda*, vote of Minister Sepúlveda Pertence, spec. p. 998.

16 Interestingly, the consensual nature of arbitration was also acknowledged by the São Paulo Court of Appeals in the Paranapanema case when it indicated that "*the power granted to an arbitrator to state the law in a particular case only benefits from the characteristic of imposing a binding decision on the parties because they so wished*". However, as it will be analysed hereunder, the Court of Appels seems to have subsequently ignored the consensual nature of arbitration, as it accepted in the same judgement to extend an arbitration agreement to a contract when this extension seemed to be in clear violation of the will of the parties.

17 Regarding the evolution of consent in arbitration, see PARTIDA S., *La convention d'arbitrage : dans le droit des nouvelles puissances économiques (Chine, Inde, Brésil, Mexique)*; Thèse Paris II, soutenue le 5 juillet 2019. Regarding the issue of the transmission of the arbitration agreement in a chain of contracts transferring ownership; TRAIN F.-X., "Arbitrage et action directe : à propos de l'arrêt ABS du 27 mars 2007" *Cahiers de l'arbitrage* 2008, vol. IV, p. 30; and the issue of the transmission of an arbitration clause to the insurer under legal subrogation; VOLLBRECHT SPERANDIO F., *in Arbitragem, direito securitário e consentimento no direito brasileiro. Book: 20 Anos da Lei de*

consent remains a fundamental element. Therefore, the extension of arbitration agreements shall be based on consent, even if implicit[18]. As indicated by Justice Luis Felipe Salomão in his dissenting vote, "*because of the importance of party autonomy within the institution of arbitration, any analysis of the possibility of extending the effects of an arbitration clause to subsequent connected contracts, the latter with forum choice clauses, must necessarily go through the verification of the will of the parties*".

B The verification of the parties' implicit consent

The *ratione materiae* "extension" of the arbitration agreement in a group of contracts means that an arbitration clause contained in one of the contracts produces effects on the other contracts, so that all disputes arising out of such contracts fall within the arbitral jurisdiction based on a single arbitration agreement. However, following Prof. L. Aynès, it is legitimate to ask whether "*the binding force of a clause contained in one of these contracts extends its effects to another contract, under the pretext that the latter form with the first contract a whol*e"[19].

As the present case demonstrates, the parties do not always establish all the elements of their economic transaction in a single contract. Often, the operation will be organized through "*successive layers*"[20], *i.e.*, a plurality of contracts[21]. When all these contracts are concluded between the same parties and relate to the same commercial operation, it is reasonable to assume that the will of the parties, that included an arbitration agreement in the first contract and that did do not foresee anything regarding the settlement of disputes in the subsequent connected contracts, was to submit all disputes arising out of all such agreements to arbitration, as agreed in the first contract[22]. There are two

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Arbitragem no Brasil, Atlas 2017, espec. p. 821; Mayer P., « La "circulation" des conventions d'arbitrage », *JDI*, 2005, p. 251.

18 In this sense, BORN G., *International Commercial Arbitration*, Wolters Kluwer 2014, 2nd ed., Vol. 1, spec. p. 1371.

19 Cass. comm., 5 March 1991, *Pepratx v/ Fichou*, *Rev. arb.* 1992, p. 66, note L. Aynès, spec. p. 70.

20 Expression employed by J. Carbonnier, *JCP* 1958, II, p. 10.868.

21 By way of example, this is common in some types of construction projects where parts of the project have to be adjusted after the commencement of the construction. Thus, the parties conclude a first contract, called a framework contract, and successive contracts relating to specific points of the work called performance contracts. On this contractual structure s. GOUDSMIT J. J., « Frame Contracts and the Closing of the Eastern Scheldt », *ICL Rev.*, 1986, p. 117.

22 See for example ICC Award nº. 11.440, *YCA* 2003, p. 127; ICC Award nº. 5.759, 1989, *Rec. sent.* CCI vol. III, p. 175; *YCA* 1993, p. 34. This was also the solution given by the French courts in cases: Cass. Comm., 5 March 1991, *Pepratx c/ Fichou*, *Rev. arb.* 1992, p. 66, note

reasons for this assumption. Firstly, this solution seems to be logical from the perspective of the proper administration of justice. In the presence of a single commercial operation, organized through a plurality of contracts concluded between the same parties, the proper administration of justice would normally require that all these components be submitted to a single arbitral tribunal. Secondly, in the presence of connected contracts signed by the same parties, it is possible to emphasize the commercial unity of the group of contracts as an undeniable factual reality.

Accordingly, in these situations, it would be reasonable to consider that a clause referring to "[a]*ny dispute* [...]*, related to (i) the existence and/or exercise of any right arising out of this contract* [...]" actually refers to any dispute arising out of any of the connected contracts forming a single commercial operation[23]. As noted by Prof. Aynès, "[t]*his conception of contract, which becomes the unique transaction that the parties want to perform by means of a plurality of legal instruments, is encouraged by the very notion of efficient cause: each one of the particular agreements has its purpose of being in the existence of the others*"[24].

However, these considerations are valid only for connected contracts concluded between the same parties and are not at all sufficient in cases of multiple contracts concluded by different parties[25]. It is undeniable, for example, that two construction contracts concluded between the same employer and two different contractors for the realization of different parts of the same engineering project are connected and relate to the same commercial operation. In these cases, despite the existence of a connection and a commercial unity (the same project), the fact that a contractor has given its consent to submit its disputes with the employer to arbitration does not mean in any way that the other contractor has also given its consent. The principle

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L. Aynès, spec. p. 70; Paris 23 November 1999, *Rev. arb*. 2000, p. 501, note Li-Kotovtchikhine; *RTD* 2001, p. 59, obs. E. Loquin; Paris 12 June 2012, *Rev. arb.* 2012, p. 811, note L. Aynès.

23 A similar solution is generally adopted by arbitral tribunals when the different contracts have all compatible arbitration clauses. The generally adopted solution was to allow for the establishment of a sole tribunal for the resolution of all disputes under the will of the parties. See for example sent. CCI nº. 5989, 1989, YCA 1990, p. 74; ICC Award nº. 6.149, 1990, *YCA* 1995, p. 47; ICC Award nº. 12.605, 2005, *JDI* 2008, p. 1.193 obs. S. Jarvin and C. T.-N.

24 Cass. comm., 5 March 1991, *Pepratx v/ Fichou*, *Rev. arb.* 1992, p. 66, note L. Aynès, spec. p. 70, spec. p. 71.

25 Gary Born states that in the United States, France, England, Switzerland and Germany, among others, extension is possible, provided that all contracts are concluded between the parties, do not contain incompatible arbitration clauses, or choice of forum clause and that all contracts relate to the same economic transaction; BORN G., *International Commercial Arbitration*, Wolters Kluwer 2014, 2nd ed., Vol. 1, Spec. p. 1372; and p. 1374.

of privity of contracts (*effet relatif des conventions*) prevents the extension of the arbitration agreement to a connected contract that has been concluded by a third entity to the contract containing the arbitration agreement. In such cases, the arbitration agreement contained in a contract shall have its effects restricted to that contract, which shall not reach the connected contracts in light of the absence of consent[26]. In other words, if a party "A" enters into a contract with a party "B", without having foreseen any dispute resolution mechanism, it is not possible to conclude that "A" has consented to the arbitration simply because "B", subsequently or concomitantly, entered into a connected contract with another party "C", the latter containing an arbitration agreement. In these cases, unless otherwise indicated in both contracts, all that can be verified is that "B" and "C" agreed to submit their disputes to arbitration.

Thus, for the *ratione materiae* extension of the arbitration agreement contained in one contract to a connected contract to be possible, unless otherwise indicated in both contracts[27], both contracts will necessarily have to be concluded by the same parties. Otherwise, it will not be possible to verify the existence of consent and the extension will not be possible.

II. The existence of manifestations of will contrary to extension

It is important to emphasize that even in cases of connected contracts concluded between the same parties, the extension should only be possible if there is no manifestation contrary to the extension (A), despite the fact that in some instances national courts do undertake an (artificial?) effort to coordinate incompatible manifestations of will (B).

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26 In addition, even if these two contracts contained each an arbitration agreement, considering that they were entered into by different parties, unless otherwise indicated in the agreements themselves, any dispute would have to be resolved in parallel arbitrations, without any type of extension, *ratione materiae* or *personae*, being possible. In the case of a plurality of parties, the principle of privity of contracts is generally an obstacle to the existence of tacit consent, even in cases of identical arbitration agreements. On the extension *ratione materiae* and *personae* in cases of group of contracts between the same parties and different parties; see SCHEFFER DA SILVEIRA G., *Les modes de règlement des différends dans les contrats internationaux de construction*, Bruylant 2019, spec. p. 498, nº. 472 and p. 516, nº. 491.

27 Contrary to what is commonly argued by some parties, it is not sufficient for a contract signed between parties A and B to declare that the arbitration agreement contained therein extends to a contract signed between B and C. The principle of privity of contracts requires for the contract between B and C to also provide for this possibility, demonstrating that all parties consent to arbitration with each other.

A. There can be no extension where there is a contrary express manifestation of will

By definition, as shown in the previous section, the material extension of the arbitration agreement contained in a contract to another related contract requires the implicit consent of the parties. For the reasons indicated above, it is reasonable to consider that the parties that conclude a main contract containing an arbitration agreement and who thereafter conclude accessory contracts not containing clauses dealing with the resolution of disputes, implicitly consent that the dispute arising from all the latter instruments be submitted to arbitration under the arbitration agreement contained in the main contract. However, it is not possible to consider that an implicit consent exists when the parties expressly indicated otherwise in the accessory contracts[28]. This is generally the understanding, for example, when the accessory contracts contain incompatible arbitration clauses or, as in the case at hand, a choice of forum clause[29]. The search for the implicit agreement of the parties enabling the extension will, therefore, be limited by the parties' express agreement on the opposite sense.

That being said, in the Paranapanema case the STJ made an extremely flexible interpretation of the will of the parties, giving preference to the commercial unity between the contracts over the express agreement of the parties. In this regard, the reasons for the judgment in question give rise to serious hesitations.

The STJ first cites the São Paulo Court of Appeals, which stated that "[i]*n order to achieve that common domain of all contracts, the will of the parties must prevail in the sense that conflicts arise from the contract (from all connected contracts) are subject to arbitration. Submit the issues arising from the "Swap" Contract to the State jurisdiction, as the claimant contends, would be a blatant violation of the parties' obvious intention to arbitrate disputes arising from the legal relationship concluded*".

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28 DEBOURG C., *Les contrariétés de décisions dans l'arbitrage international*, LGDJ 2012, p. 230, n°. 267. In comparative law, v. Paris 22 May 2003, *Rev. arb.* 2003, p. 1252, note F.-X. Train; *JCP G.* 2004, I, p. 119, nº. 6, obs. Ch. Seraglini. The phenomenon of expressly providing for different forums in the different contracts of the group of contracts was called "*dépaçage procédural de l'ensemble contractuel*"; TRAIN F.-X., *Les contrats liés devant l'arbitre du commerce international*, LGDJ 2003, p. 300.

29 In this regard, see SERAGLINI Ch., ORTSCHEIDT J*., Droit de l'arbitrage interne et internationa*l, Montchrestien 2013, spec. p. 634, nº. 707. On this issue, see in particular, BLANC G., "Clause compromissoire et clause attributive de juridiction dans un même contrat ou dans un même ensemble contractuel – De la concurrence à la subsidiarité de la compétence des tribunaux étatiques", *JCP E* 1991, p. 707, nº. 47.

Although there are precedents in comparative law giving prevalence to the arbitration agreement over choice of jurisdiction clauses[30], the exact opposite conclusion seems to be the most recommended[31]. In the presence of an accessory contract concluded after the main contract, in which the parties expressly provide for a choice of jurisdiction clause without any reference to the arbitration agreement, what seems to be contrary to the will of the parties is to disregard this choice of forum and send the parties to arbitration[32]. If the parties expressly provided in a contract for a choice of forum clause, how could they have implicitly consented that the disputes arising out of that very contract be submitted to arbitration? In the present case, it would seem reasonable to believe that the parties intended that the disputes relating to the Loan Agreement be submitted to arbitration, whereas disputes relating to Swap Agreements be submitted to the state jurisdiction[33]. This solution is the one that prevails in comparative law[34] and arbitral jurisprudence[35].

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30 S. for example France, Paris, 29 November 1991, *Rev. arb.* 1993, p. 617, note L. Aynès; Paris, 11 January 1995, *Brigif*, RG nº. 94/22.398 ; Cass. civ. 2nd, 26 November 1997, *Brigif*, *Rev. arb.* 1997, p. 471, spec. p. 490.

31 Conclusion adopted by the Minister Luis Felipe Salomão in his dissenting vote. In this regard, see TRAIN F.-X., "L'extension de la clause compromissoire – Chronique des années 2012-2-17", *Rev. arb*. 2017, p. 389, espec. p. 419.

32 Therefore, regardless of the contractual connection, any dispute regarding the amounts to be paid under the Swap Agreements should have been submitted to the competent judge in accordance with the choice of forum clause contained in those contracts.

33 That was precisely the statement of Justice Lázaro Guimarães in his vote.

34 The Paris Court of Appeals has decided, for example, "*Considérant en effet que les parties ont pris la précaution de spécifier dans le second contrat que le Tribunal de commerce de Paris serait compétent en cas de contestation, et dans la convention dite «de régie» qu'en cas de désaccord le litige serait porté devant le Tribunal compétent; Que le fait d'avoir adopté – dans une série de conventions pouvant donner naissance à un contentieux complexe aux composantes indissociables – ces dispositions nouvelles ne peuvent au contraire être interprétées que comme l'expression de la volonté des co-contractants de renoncer à la clause compromissoire*"; Paris, December 9, 1987, *G.I.E. Acadi c/ Soc. Thomson-Answare*, *Rev. arb*. 1988, p. 573. See also, Cass. Civ., July 4, 2006, *Rev. arb.* 2006, p. 960, note F.-X. Train; *JCP G*. 2006, I, p. 187, nº. 10, obs. Ch. Seraglini (related to domestic arbitration); Paris, November 16, 2006, *Rev. arb*. 2008, p. 109, note M. de Boisséson.

35 V. For example, ICC Award nº. 4.392, 1983, *JDI* 907, obs. Y. Derains. The doctrine generally indicates that "*the arbitrators are generally more resistant to the idea of* [extending the arbitration agreement within a group of contracts] *when the clauses of arbitration are not compatible between them, as they are very different on essential points, and,* a fortiori*, in the presence of an arbitration clause in one contract and a choice of jurisdiction clause in another*"; SERAGLINI Ch., ORTSCHEIDT J., *Droit de l'arbitrage interne et international*, Montchrestien 2013, spec. p. 632, nº. 706. See also, RICCI GAGO J. and FERNANDES W., "Extensão objetiva da cláusula arbitral", *Rev. bras. arb.* 2014, p. 33, spec. p. 55-56.

This very problematic point of the judgment mentioned above was highlighted by the dissenting vote of Justice Luis Felipe Salomão, who indicated that "[a]*nother reason demonstrating the impossibility of submitting to arbitration the disputes arising out of the connected contracts which do not contain arbitration clauses, without the careful analysis of the specific case, has to do with a particular point invoked in the reasons for the special appeal, which is that, in the subsequent connected contracts the parties established a choice of forum clause, which indicates the absence of the agreement of the parties to submit their disputes to arbitration*"[36]. Justice Salomão concludes his dissenting vote by stating that "*the swap agreements,* […] *in addition to not contain an express arbitration clause or to not expressly refer to the arbitration clause provided in the Loan Agreement, have a choice of forum clause, which indicates the intention of the parties to submit any disputes arising out of these subsequent contracts to the state jurisdiction*" (emphasis added).

The STJ's decision in the Paranapanema case seems, therefore, to violate the principle of party autonomy and that of *pacta sunt servanda*.

B. The (artificial?) effort to render both clauses compatible

Trying to justify its decision, the STJ indicated that "*the doctrine explains that, even in cases in which the parties establish the arbitration clause, there may also be a choice of forum clause*". In this regard, the STJ continues to explain that "*the choice of forum clause constitutes an alternative path, and not the main route, for the resolution of disputes between the parties, as the coexistence of the arbitration clause and choice of forum clause is perfectly possible*".

In this judgment, the STJ based its decision on the jurisprudence and the supporting doctrine that the existence of both a choice of forum clause and an arbitration agreement in the same contract would not necessarily render them incompatible[37], "*since their scope of application may be different, as it may be*

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[36] The issue here is entirely different from the problem of the existence of an arbitration clause and choice forum clause in the same contract. On this issue, the STJ has already had the opportunity to decide that when both clauses are contained in the same contract, they would not necessarily be incompatible, RESP. 904.813-PR, 20 October 2011.

[37] See, for example, RESP. 904.813-PR, of 20 October 2011. This was precisely the basis adopted by the Paris Court of Appeals, in order to make the arbitration clause contained in the framework contract prevail over the choice forum clause contained in the application contract. The Paris Court of Appeals operated the extension asserting that the choice forum clause had been agreed in the second contract as an alternative for cases where the arbitral tribunal could not decide; Paris, 29 November 1991, *Rev. arb*. 1993, p. 617, note L. Aynès. However, in his note commenting on that decision, Prof. L. Aynès criticized the coordination between the two clauses, stating that it was possible only because of a "*pirouette*" given by

necessary for a case to be brought before state courts, for example, for the granting of emergency measures, enforcement of the arbitral award, the institution of the arbitration when one of the parties does not voluntarily accept it (Min. Nancy Andrighi) and also, naturally, for the setting aside proceedings if initiated by one of the parties to the arbitration"[38].

However, the issue discussed here is very different. When an arbitration clause and a choice of forum clause, which are theoretically incompatible, are inserted in the same contract, the solution provided by the STJ allows to coordinate them and give some effect to both clauses of the same contract. The problem is that in the Paranapanema case each contract contained its one and only manifestation of the will, which in Swap Agreements was to submit all disputes to the State courts of São Paulo. There was no need for such coordination. To apply that jurisprudence to the Paranapanema case amounts to ignoring the autonomy between the connected contracts, in order to overvalue the global economic transaction, *i.e.*, the "*contrat-opération économique*". Unfortunately, it seems that it was precisely what both the STJ and the Court of Appeals of São Paulo did, insofar as both courts decided that it was "*the parties' obvious intention to arbitrate disputes arising from the legal relationship concluded*", referring to the "legal relationship" in the singular as covering all contracts.

Despite being connected, the underlying contracts forming the group of contracts do not cease to be autonomous binding contracts[39]. As indicated by doctrine cited by the STJ itself, "[in] *connected or related contracts, there is a set of several transactions in order to achieve on a commercial transaction. However, these connected contracts, unlike the so-called mixed contracts, do not lose their autonomy. Each one preserves its characteristics, peculiarities*

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the national Court. For this jurisprudence, the subsidiarity of the choice of jurisdiction clause would be justified by the difference in nature between the two clauses. In this regard, Paris Court of Appeals decided that "*[the] scope of the arbitration clause as an expression of the will of the parties is much broader than that of a choice of jurisdiction clause, in the sense that the arbitration agreement has the effect of giving arbitrators the power to judge, while excluding the jurisdiction of the State, whereas the choice of jurisdiction clause merely designates the jurisdiction territorially competent to decide the dispute*". However, as supported by an important part of the doctrine, the legal basis for this solution "*is one of the weakest*", as there is no reason to consider that the forum choice clause has an inferior nature; COHEN D., "Arbitrage et groupes de contrats", *Rev. arb.* 1997, p. 471, spec. p. 490.

38 RANGEL DINAMARCO C., *A Arbitragem na Teoria Geral do Processo*, Malheiros, 2013, p. 255-256.

39 As one author indicated, plurality of agreements "*will translate the conscious and strategic choice of the parties, desirous of structuring the underlying commercial operation by means of two or more known types of contracts, with the advantages to be taken thereof*"; MARINO F., op. cit. p. 125.

and effects because they are layers connected to enable a particular economic activity. Concerning connected contracts, there will be a simple combination of complete contracts"[40].

The autonomy between the contracts forming a group of contracts was even the solution adopted by the STJ in the case *Pernambucana de Gas Company – COPERGÁS vs Termopernambuco S.A*. In that case, the STJ decided that "*the nexus of the functionality between the agreements does not diminish the autonomy nor the individuality of the legal relationship created in each contract, which have their own parties and purposes*"[41]. This position is based on the logic of Brazilian civil law, according to which "*in the presence of connected contracts, each contract is united around a global legal transaction, without however losing their autonomy, as they are governed by their specific rules*" [42].

Therefore, even though the interpretation of a contract which forms part of a group of contracts is often made in a global manner, with references to the other connected contracts[43], the specific rules of each contract shall be applied[44]. The parties are free to organize their legal and economic relationship in the manner they consider most appropriate, that is, in one or more contracts having their individual legal regimes. Thus, if the parties choose to organize their economic relationship in more than one contract with different dispute resolution regimes, as indeed was the case here, that choice must be respected[45].

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40 Daniel Carnacchioni, Manual de Direito Civil – single volume - Salvador: JusPodivm, 2017, pág. 843.

41 RESP. nº. 1.519.041 – RJ, 1 September 2016, *Termopernambuco S.A. c/ Companhia Pernambucana de Gás Copergás*.

42 DINIZ M. H., *Tratado Teórico e Prático dos Contratos*, Saraiva 1993, vol. I.

43 In this regard, s. MARINO F., *op. cit.*, spec. p. 224.

44 Prof. L. Aynès explains that, although closely connected, the contracts forming the group of contracts remain separate exchanges of consent and, precisely because they are different from each other, it is possible for such contracts to be connected; *Rev. arb*. 1993, p. 617, p. 622. There are, however, exceptional reasons which may justify disregarding the structure adopted by the parties, such as fraud, simulation and abuse of contractual power. In this sense, MARINO F., *op. cit*., spec. p. 125.

45 In this regard, it is supported that "[the] *voluntary connection, as we have already emphasized, is an expression of the freedom to contract. Under this principle, the parties may determine with whom they wish to contract, as well to determine the content of the contract*"; TAKEMI KATAOKA E., *A coligação contratual*, Lumen Juris 2008, spec. p. 64-65.

Conclusion

The efforts made by Brazilian courts to ensure the promotion and efficiency of arbitration in Brazil are remarkable. The great growth of the use of this mechanism in just 23 years[46] of Law 9.307 of 1996 is due, in a large part, thanks to the policy of *favor arbitrandum* and the legal certainty brought mainly by the decisions of the STJ[47].

However, arbitration in Brazil now seems to be moving out of the simple expansion phase to also enter into a consolidation phase. Thus, to ensure that the institute continues to develop on a solid foundation and free of criticism from possible detractors, it is necessary that its legal regime remains consistent, always based on the two pillars of arbitration: consensual source, jurisdictional function[48].

Regarding the question of the extension of the arbitration agreement, whether *ratione materiae* or *personae*, the main key would be the first pillar, the conventional source. Only the verification of the existence of consent, even if implicit, will determine the scope of application of the arbitration agreement.

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46 Compared to almost two hundred years of arbitral jurisprudence that some jurisdictions may have such as France.

47 As, for example, in the tireless defense of the negative effect of the principle of *compétence-compétence*.

48 In this regard, Prof. Charles Jarrosson stated that the arbitration clause "*also falls within the confines of material and procedural law*" *in* « La sanction du non-respect d'une clause instituant un préliminaire obligatoire de conciliation ou de mediation: Note – Cour de cassation (2e Ch. civ.) 6 July 2000 ; Cour de cassation (1re Ch. civ.) 23 January and 6 February 2001 », *Rev. arb.* 2001, p. 749, spec. p. 755, n°. 7.

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*

Summary

Despite not being a new issue, the determination of the *ratione materiae* scope of an arbitration agreement within a group of contracts continues to highlight the difficulty in coordinating traditional notions of law, such as consent, with the complexity of current commercial operations, from both a private law (*droit civil*) and arbitration law perspectives. The recent decision of the Brazilian Superior Court of Justice ("STJ") in the Paranapanema case is a good example of this difficulty. In the referred case, the STJ, very questionably, accepted to "extend" the arbitration agreement contained in one contract to another connected contract, under the argument that the arbitration agreement contained in the main contract extends its effect to the accessory agreements. However, in its reasoning, the STJ seems to not have given sufficient importance to the fact that the second contract contained a choice of forum clause attributing exclusive jurisdiction to the courts of the district of São Paulo. It may, therefore, be argued that the Paranapanema decision is not only contrary to the principle of party-autonomy, but also to the clearly established requirement under Brazilian law that there can be no arbitration without consent. This commentary analyses grounds of the Paranapanema decision and the conditions required for the *ratione materiae* extension of an arbitration agreement within a group of contracts to be possible.

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