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MULTI-PARTY ARBITRATION: THE ORGANISATION OF MULTI-PARTY PROCEEDINGS – THE PROBLEMS FACED BY PARTIES AND ARBITRATORS

An inquiry into what problems are faced by parties and arbitrators in multi-party arbitrations must start with the question: When are there more parties involved in arbitration proceedings? Thus the circumstances that give rise to “multi-party arbitration” are identified, and the background to such issues as the perennial questions of “When may an arbitration clause be extended to non-signatories?” and “When may the proceedings be extended to others involved in the same economic transaction?” are covered with reference to some of the key cases that instigated a change of approach.

The organisation of the arbitral proceedings in such multi-party arbitral proceedings is then examined, first from the point of view of the parties and then from the point of view of the arbitral tribunal.

From the point of view of the parties the issue of appointment of the arbitrators and the setting up of the arbitral tribunal is discussed, and reference is made to the specific provisions of various institutional rules regarding multi-party arbitral proceedings. The alternatives that are available and what is advisable are discussed. The possibilities of consolidating parallel proceedings and the advisability of thus creating multi-party proceedings, are looked at, again with reference also to the provisions of the rules of various arbitral institutions.

What the arbitral tribunal needs to be aware of in the multi-party situation is also examined, particularly the necessary step of establishing jurisdiction. The establishment of specific issues to be dealt with in a logical order so that parts of a dispute may be dispensed with is recommended and the steps that can be taken to minimise the difficulties that arise from separately conducted parallel proceedings are enumerated. The article identifies that from the point of view of the arbitral tribunal the need to ensure that due process is observed, so that any difficulties with regard to enforcement are minimised, must be constantly taken into account, with a heightened awareness of equal treatment of the various parties.

The conclusion is drawn that multi-party arbitration is on the increase as a result of the more complex economic structures that are now a standard in commercial life. The arbitral community seeks to show that arbitration is the dispute resolution of choice but with more complex, multi-party multi-contract disputes this challenge is now greater than ever. The use of institutional rules is recommended to prevent frustration and delay, and the need for arbitral tribunals to keep themselves informed and be alert to the needs of the parties is emphasised.

Key words: *Multi-party arbitration – Multi-contract – Extension to non-signatory – Connected agreements – Parallel proceedings*

1. INTRODUCTION

This Chapter is based on the talk given at the First Belgrade International Arbitration Conference on 27 March 2009. As stated at the beginning of the presentation in Belgrade, the topic of Multi-Party arbitration is so huge that enormous books, large legal tomes, that have included the writings of some of the most eminent practitioners in International Arbitration, have been written on the subject¹, and so to encapsulate the topic in a presentation of 15 minutes was a challenge indeed.

The topic had been chosen as it was one of the issues in this year's VIS International Commercial Arbitration Moot problem. On the basis that not all in the very large audience were well versed in the intricacies of International Arbitration, and considering it too limiting, and indeed perhaps confusing to focus on one aspect of the problem without presenting something of the big picture to start, therefore for those who were not necessarily that familiar with the issue, a brief outline of how Multi-Party Arbitration could come about was first given, setting the context., Since the presentation was included in the section on procedural issues, under the heading "The organisation of multi-party arbitration", a summary of the problems faced by both parties and arbitrators in terms of the organisation of the proceedings was then set out. A particular indebtedness to a former CMS colleague and one of the most respected authorities on multi-party arbitration, Bernard Hanotiau, for his advice and support, and his writings on the subject was acknowledged. The structure of the presentation, for which Bernard's logical approach was followed², is repeated in this chapter, but with a bit more "flesh on the bones" than was possible at the conference in Belgrade.

¹ See most recently *Multiple Party Actions in International Arbitration*, Oxford University Press, 2009.

² See B. Hanotiau, *Complex Arbitrations— Multiparty, Multicontract, Multi-issue and Class Actions*, Kluwer, 2005; B. Hanotiau, "Problems Raised by Complex Arbitrations Involving Multiple Contracts – Parties– Issues: An Analysis", *Journal of International Arbitration* 3/2001, 251–360.

2. THE CONTEXT OF MULTIPLE PARTY ARBITRATION – WHY WOULD THERE BE MORE THAN TWO PARTIES TO THE ARBITRATION PROCEEDINGS?

2.1. Who are the parties to the contract(s) or to the arbitration clause(s) contained therein?

When drafting a contract the parties include a dispute resolution clause and if they decide on arbitration it is an accepted legal principle that this clause, containing the agreement to go to arbitration, is an agreement in its own right, separable from the main contract. Thus if the parties have signed the contract containing an arbitration clause those signatories of the contract are bound to arbitrate any dispute arising out of that contract, and not turn to, for instance, the local courts.

The question arises: How can there be an extension of the arbitration clause to further parties? That is those who have not signed the arbitration agreement. Generally speaking only those who have signed, and therefore, consented to arbitration, can be forced to arbitrate the dispute. However, it could be that those who formally signed the contract are not the real parties to the agreement, or at least not the sole parties to it.

The legal principles of:

- Representation and agency
- Third-party beneficiaries and guarantee clauses
- Universal and individual transfers
- Estoppel
- Incorporation by reference
- Consent or conduct as an expression of implied consent or as an alternative to consent

have all been relied upon to extend the arbitration clause to another party and so one may end up with more parties than two who are then required to resolve the dispute by arbitration.³

2.2. May an arbitration clause be extended to non-signatories within a group of companies: other companies of the group, directors, and/or shareholders?

The relatively common situation resulting in a claimant introducing more respondents to the proceedings than simply the other party that signed the contract is where the claimant is looking to another corporate entity related to the contractual partner, which it considers has deeper

³ *Ibid.*

pockets/a sounder financial base, to cover the sums due. Equally, once a claimant has commenced proceedings the respondent may seek to counterclaim and include a related company or shareholder of the original claimant as a party to the arbitral proceedings.

Thus a whole series of possibilities arise, but the factual schemes can be divided into two groups, one relating to the extension of the clause to one or several non-signatories as additional defendants/respondents, namely:

- *Extension to the parent company*
- *Extension to one or more subsidiaries or one or more companies of the group which are not subsidiaries*
- *Extension to a sister corporation and an employee*
- *Extension to a director or general manager*
- *Extension to an individual (possibly a majority shareholder of the group) or another company within the group*

And the other to the extension to one or more non-signatories as additional claimant (s), namely:

- *Extension to the parent company*
- *Extension to an individual (possibly a majority shareholder of the group) and another companies within the same group*
- *Extension to one or more subsidiaries or one or more companies within the group which are not subsidiaries*
- *Extension to a director and principal shareholder*

This aspect of the topic had been covered at the conference with reference to specific situations in the excellent presentation of Dr Michael Mraz, “The extension of an Arbitration Agreement to non-signatories”, in the session on “Foundations: the arbitration agreement and arbitrability”. He had shown with detailed diagrams exactly how one could end up with non-signatories being the actual “partner”, and so have reason to have them drawn into the arbitration proceedings.

The topic of non-signatories stands alone and much has been written on it,⁴ but it provides for a host of situations which could result in more than two parties being parties to the arbitration clause and the subsequent arbitral proceedings.

⁴ See for instance W. W. Park *Non-Signatories and International Contracts—An Arbitrator’s Dilemma in Multiple Party Actions in International Arbitration*, Oxford University Press, 2009; W. W. Park “Non-Signatories and International Arbitration” in: L. W. Newman, R. D. Hill (eds.), *The Leading Arbitrator’s Guide to International Arbitration*, 2008²; B. Hanotiau, “Non-Signatories in International Arbitration: Lessons from Thirty Years of Case Law”, *ICCA Congress Series*, 13/2007.

2.3. The possibility of bringing together in one single proceeding all the parties who have participated in the performance of one economic transaction through interrelated contracts.

Often one has the situation that there is an awareness, right at the start of a project, by those participating that, where there are a series of contracts, since the contracts are interlinked, a multi-party arbitration clause may be needed. Indeed often the arbitration clause in the different contracts is sensibly identical, referring to the same institution which is to administer the arbitral proceedings, but equally, sometimes, rather confusingly, different arbitration clauses, referring to different institutions, are used. In any event there is still debate as to the efficiency of bringing together disputes that arise in one project or one economic transaction out of different contracts in a group of interrelated contracts. Further, it has to be remembered that despite the fact that there are interrelated contracts a dispute may arise solely between two parties and it does not follow that there is automatically a multi-party dispute.

These groups of contracts may arise out of various contractual schemes, the most common being the following three contractual arrangements:

- A B and C are members of a consortium but all sign different contracts; a framework agreement or a cooperation agreement, a joint venture agreement, and/or specific contracts.
- A signs a contract with B, one with C and one with D (horizontal unit) (e.g. an Employer signs Contract 1 with the architect, Contract 2 with the construction company and Contract 3 with the consulting engineers).
- A signs a contract with B, B a contract with C and C a contract with D (vertical unit)

The facts of the dispute will dictate which parties are included in the arbitral proceedings and there can be no hard and fast rule. Construction projects will typically have a series of interrelated agreements, for instance the “vertical unit” referred to above is a typical construction project situation where the Employer/Owner contracts with a construction company, which itself then subcontracts the whole undertaking to a subcontractor, and the subcontractor in turn further subcontracts on different parts of the project.

From an analysis of case law, making reference here to only a couple of the landmark decisions, looking at a tiny fraction of the relevant cases,⁵ one may observe that arbitral proceedings relating to disputes concerning multiple parties in these groups of contracts situations have been commenced where:

⁵ See B. Hanotiau, (2001), 304–329.

- The parties are different but the contracts contain the same arbitration clause or the clauses are compatible.

It will always depend on the facts of the case and the issue in dispute, but nevertheless there will not be an automatic assumption that there is a multi-lateral contract simply because the various contracts contain the same arbitration clause.⁶

- The parties are different and the contracts do not contain identical or compatible arbitration clauses.

The argument being that even where the parties are different and the contracts have differing arbitration clauses, nevertheless the dispute relates to the one and same project and should be decided in one proceeding. However, despite a decision by an arbitral tribunal that it had jurisdiction in relation to complimentary and interdependent contracts, the award rendered in the *Sofidif* ICC arbitration⁷ was annulled by the Paris Court of Appeal on the basis that a single arbitration could only take place with the consent of all the parties concerned.

- The parties are the same and they have concluded two or more contracts, one without an arbitration clause, or containing a clause which gives jurisdiction to national courts, or another incompatible arbitration clause.

The decision as to whether a dispute arising out of two or more agreements between the same group of parties, where one lacks an arbitration clause, may be the subject of a single arbitral proceeding and be decided upon together, will ultimately depend on an interpretation of the will of the parties. A succession of cases has shown that this is indeed possible.⁸

The questions which have arisen have included:

- May an arbitral tribunal hearing a dispute which arises principally from a specific contract decide issues arising from connected agreements entered into by the same parties?

Arbitral tribunals which have established their jurisdiction under an arbitration clause will generally extend their jurisdiction to disputes arising under a closely connected agreement between the same parties even if it does not contain an arbitration clause. This has occurred in a number of cases, including ICC Case No. 7929 of 1995⁹ where a Finnish com-

⁶ See for example *Yearbook of Commercial Arbitration*, 22/1997, 191.

⁷ For references and comment see E. Gaillard, “L’affaire Sofidif ou les difficultés de l’arbitrage multipartite”, *Revue de l’Arbitrage*, 1987, 2759; Y. Derains, E. Schwartz, *A Guide to the ICC Rules of Arbitration*, Kluwer, 2005²

⁸ See *Revue de l’Arbitrage* 1992, 66; *Revue de l’Arbitrage* 1997, 535; Société Firma Waibel v. Käuffer, *ASA Bull.* 2000, 381; *Revue de l’Arbitrage* 2000, 501

⁹ *ASA Bull.* 1996, 544; *Yearbook of Commercial Arbitration* 25/2000, 312.

pany and its wholly owned subsidiary commenced arbitration proceedings in Zurich against an Oregon Corporation based on a series of agreements, where one agreement contained an arbitration clause and another did not. The arbitral tribunal rendered an award determining that it had jurisdiction over any claims arising from the second agreement “if and to the extent it is shown to be part of a unified contractual scheme” with the first agreement. To define the phrase “unified contractual scheme” the arbitrators had referred to the definition used by Craig, Park and Paulsson: “Complex situations where numerous contractual documents relate to one or organic relationship.”¹⁰

- May an arbitral tribunal hearing a dispute which arises principally from one or more contracts decide issues arising from one or more connected agreements when the latter do not bind all the parties to the first agreements or also bind one or more persons who are not parties thereto?

In ICC Case No. 6230 of 1990,¹¹ concerning a main contract, incorporating the FIDIC conditions of contract, and a sub-contract, relating to the construction of a power plant, where both contracts contained the identical arbitration clause, the arbitral tribunal found that it had jurisdiction and held that the claimant, the sub-contractor, was entitled to compensation from the respondent, the main contractor, despite the fact that payments to the sub-contractor had been made dependent on receipt of payment from the owner, (which was now in financial difficulty). However, in another case concerning this issue, ICC case No. 6829 of 1992¹² the arbitral tribunal held that if a number of parties conclude a series of contracts which are interrelated this does not of itself allow the arbitral tribunal to extend its jurisdiction based on one contract to another contract to which only one of the parties to the arbitration is a party.

One last point that needs to be considered in this section is the intervention of third parties, in particular as a result of national legislative provisions which allow a third party to intervene. Generally speaking, however, the joinder to the arbitral proceedings of a third party will require the consent of both parties to the arbitration and the consent of the arbitral tribunal.

¹⁰ L. W. Craig, W. W. Park, J. Paulsson, *ICC Arbitration*, 2000³.

¹¹ Yearbook of Commercial Arbitration 17/1992, 164.

¹² Yearbook of Commercial Arbitration 19/1994, 167.

3. THE ORGANIZATION OF MULTI-PARTY ARBITRAL PROCEEDINGS – WHAT DOES A PARTY STARTING PROCEEDINGS NEED TO DO?

3.1. The Setting up of the Arbitral Tribunal in Multi-Party Arbitration –The Appointment of Arbitrators

Once the decision is taken to commence arbitration, following a dispute arising, regardless of whether there are only two parties or whether there are more, the first step, together with the filing of the Request for Arbitration itself, is deciding on the appointment of the arbitral tribunal, with the party commencing arbitration having to nominate “its” arbitrator for the arbitral tribunal, consisting of three arbitrators, or agree on a sole arbitrator. It is accepted practice that the claimant must name its arbitrator already when actually commencing the arbitration proceedings.

There are various options open to the claimant in arbitration proceedings, regardless of how many parties there are to the proceedings, namely:

- Appointment of a Sole Arbitrator
 - By agreement of the parties.
 - By an arbitral institution, either by agreement of the parties or in default of an appointment by the parties.
- Appointment of an Arbitral Tribunal of three members – (only one arbitrator appointed for claimant and one for respondent)
 - In the situation where there is one claimant and one respondent each party nominates its arbitrator, in default of an appointment, e.g. by a non-participating respondent, the arbitral institution may make an appointment.
 - In the situation where there is more than one claimant there needs to be agreement by all claimants on the appointment of “the arbitrator nominated by claimant”, similarly if there is more than one respondent agreement by all respondents on the appointment of “the arbitrator nominated by respondent.”
 - Agreement that an arbitral institution appoints all three members of the arbitral tribunal.

There is generally a great desire by a party to be instrumental in the choosing of “its” arbitrator. In the context of multi-party arbitration this becomes even more contentious – there may well be a conflict of interest, with the different claimants, or different respondents, not necessarily agreeing on who would be the best person for the job.

3.2. Specific provisions on setting up the Arbitral Tribunal under the Applicable Rules – What do the Rules say?

In each case the actual arbitration clause agreed upon by the parties will determine how the parties are to go about choosing their tribunal and reference will be made to the institutional rules chosen.

Looking specifically at the Rules most likely to appear in an arbitration clause in a dispute arising out of a contract in this geographical part of the world, the Central and Eastern European region, one can identify the following clauses dealing with Multi-Party arbitration:

3.2.1. ICC Rules (1998) – Article 10¹³

The issue of appointment by an arbitral institution became the subject of fierce debate as a result of the *Dutco* case (Cour de Cassation decision January 1992¹⁴) following the decision taken by the ICC at the time. It was the ICC Court practice to require the multiple parties named as either claimant or respondent to nominate an arbitrator jointly, failing which the Court would designate an arbitrator on their behalf¹⁵.

The facts of the *Dutco* case are that ICC arbitration was commenced by Dutco one of three consortium partners, against its partners BKMI and Siemens in connection with a dispute concerning a cement plant in Oman. BKMI and Siemens contested the admissibility of the Request for Arbitration and required that Dutco file two separate Requests for Arbitration, one against each of the consortium partners. A joint nomination of arbitrator was made under protest, with a tribunal then being constituted following appointment of the third arbitrator by the ICC Court. This tribunal then rendered an Interim Award finding that it had been properly constituted, considering that the then article in the ICC Rules concerning the appointment of an arbitrator by multiple parties did not conflict with any rule of public policy or general principles of equality as

¹³ Article 10 – Multiple Parties

“(1) – Where there are multiple parties whether as Claimant or as Respondent, and the dispute is to be referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 9.

(2) – In the absence of such a joint nomination and where all parties are unable to agree to a method for the constitution of the Arbitral Tribunal, the Court may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman. In such case the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 9 when it considers this appropriate.”

¹⁴ Sociétés BKMI et Siemens c/ société Dutco, Cour de cassation (7 January 1992), *Revue de l'Arbitrage* 1992, 470.

¹⁵ See S. Bond *The Experience of the ICC International Court of Arbitration, Multi-party Arbitration*, ICC Publishing, 1991.

argued by BKMI and Siemens, and thus the arbitral proceedings could validly continue against both BKMI and Siemens.¹⁶

BKMI and Siemens applied to the Paris Court of Appeal to have the award set aside, on the grounds that the arbitral tribunal was irregularly constituted and that recognition of the award was contrary to international public policy. The Court of Appeal found that the tribunal had been properly constituted and that there had been no violation of public policy. The court reasoned that the arbitration clause between the parties itself was intended to cover disputes involving all three of the parties and it was clear from the clause agreed that they would not each be able to designate an arbitrator. Before the Court of Cassation the judgment of the Court of Appeal was annulled, leaving however the arbitral award itself intact, but remanding the matter for re-hearing before the Court of Appeal of Versailles. Although the parties then settled their dispute amicably and a final answer on the issue was not obtained through the courts, the litigation attracted considerable attention and resulted in the ICC Rules being re-drawn and the emergence of a new provision, the current Article 10. Article 10(1) re-states the general rule, that multiple parties, whether claimant or respondent shall jointly nominate an arbitrator, but Article 10(2) now provides the Court with the power to appoint all members of the arbitral tribunal in the absence of an agreement of all the parties on the joint nomination. With this provision, in the absence of agreement by the parties, the appointment by the Court of all the arbitrators in the tribunal means that all the parties are treated equally, and the arguments raised in the *Dutco* case are overcome.

It should be noted, however, that the current Article 10(2) of the ICC Rules is drafted in such a way as to allow for a certain discretion on the part of the Court and is not intended to apply automatically in all cases where multiple parties fail to make a joint nomination. With the use of the word “may” it was intended that the Court look at each matter on a case by case basis.

3.2.2. *LCIA Rules (1998) – Article 8*¹⁷

The LCIA Rules equally now provide for the appointment of all members of the arbitral tribunal by the institution, disregarding any nomination made by an individual party in the absence of agreement by all the

¹⁶ See Y. Derains, E. Schwartz.

¹⁷ Article 8 Three or More Parties

“1) Where the Arbitration Agreement entitles each party howsoever to nominate an arbitrator and the parties to the dispute number more than two and such parties have not all agreed in writing that the disputant parties represent two separate sides for the formation of the arbitral tribunal as Claimant and Respondent respectively, the LCIA Court shall appoint the arbitral tribunal without regard to any party’s nomination.

parties. However, here the article provides for a mandatory appointment, the LCIA Court “shall” appoint the arbitral tribunal.

3.2.3. *Swiss Rules (2004) – Article 8*¹⁸

The new combined Swiss Rules of 2004 incorporate the same idea of allowing the institution to appoint all three members of the arbitral tribunal where the parties are not in agreement on the appointment of the arbitrator/s, but have chosen to use the word “may”, and therefore imply a discretionary power rather than a mandatory power¹⁹.

3.2.4. *Vienna 2006 Rules*

Article 15 of the new Vienna Rules of 2006 provide a detailed clause on multi-party arbitration²⁰.

(2) In such circumstances, the Arbitration Agreement shall be treated for all purposes as a written agreement by the parties for the appointment of the Arbitral Tribunal by the LCIA Court.”

¹⁸ Article 8 Appointment of Arbitrators in Bi-Party and Multi-Party Proceedings

“(3) In multi-party proceedings, the arbitral tribunal shall be constituted in accordance with the parties’ agreement.

(4) If the parties have not agreed upon a procedure for the constitution of the arbitral tribunal in multi-party proceeding, the Chambers shall set an initial thirty-day time limit for the Claimant or group of Claimants to designate an arbitrator and set a subsequent thirty-day time limit for the Respondents to designate an arbitrator. If the group or groups of parties have each designated an arbitrator, Article 8 paragraph 2 shall apply by analogy to the designation of the presiding arbitrator.

(5) Where a party or group of parties fail(s) to designate an arbitrator in multi-party proceedings, the Chambers may appoint all three arbitrators and shall specify the presiding arbitrator.”

¹⁹ For other arbitration rules with a mandatory power see Article 6(5) of the AAA International Arbitration Rules and Article 18 of the WIPO Arbitration Rules.

²⁰ For commentary see F. Schwarz, C. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria*, Kluwer, 2009. The text of Article 15 reads as follows:

Article 15 – Multiparty Proceedings

(1) A claim against two or more Respondents shall be administered only if the Centre has jurisdiction for all of the Respondents, and, in the case of proceedings before an arbitral tribunal, if all Claimants have nominated the same arbitrator, and:

a) If the applicable law positively provides that the claim is to be directed against several persons; or

b) If all Respondents are by the applicable law in legal accord or are bound by the same facts or are joint and severally bound; or

c) If the admissibility of multiparty proceedings has been agreed upon; or

3.3. The possibilities of consolidating parallel proceedings – Additional Parties to the arbitral proceedings

Again whether the parties may consolidate parallel proceedings will depend on what they have themselves agreed in the initial arbitration clause and the institutional rules they have chosen. From the point of view of Counsel for a party the merits of consolidation need to be considered carefully. When drafting the arbitration agreement in a multiple, related contract situation three complications arise:

d) If all Respondents submit to multiparty proceedings and, in the case of proceedings before an arbitral tribunal, all Respondents nominate the same arbitrator; or

e) If one or more of the Respondents on whom the claim was served fails or fail to provide the particulars mentioned in Article 10 paragraph 2, b) and c) within the thirty-day time limit (Article 10 paragraph 1).

(2) Where a claim against a number of Respondents cannot be served on all Respondents, the arbitral tribunal shall, upon application of the Claimant (the Claimants), be continued against those Respondents on whom the claim was served. The claim against those Respondents to which the claim could not be served shall be subject to separate proceedings.

(3) If multiparty proceedings are admissible, the Respondents must agree among themselves whether they wish to have the dispute decided by one arbitrator or by three arbitrators, and, if a decision by three arbitrators is desired, must jointly nominate an arbitrator.

(4) In the case covered by paragraph 3 of the present Article, if there is not agreement among the Respondents concerning the number of arbitrators, the respondents shall be requested by the Secretary General to provide evidence of such agreement within 30 days after service of the request.

(5) If no evidence of agreement on the number of arbitrators is presented within the period mentioned in paragraph 4 of the present article, the board shall determine whether the dispute is to be decided by one arbitrator or by an arbitral tribunal.

(6) If the Respondents have agreed that the dispute is to be decided by an arbitral tribunal, but without nominating an arbitrator, they shall be requested by the Secretary General to indicate the name and address of an arbitrator within thirty days after service of the request.

(7) If no arbitrator is jointly nominated within the period mentioned in paragraph 6 of the present Article and if the dispute is to be decided by an arbitral tribunal, the Board shall appoint the arbitrator for the defaulting Respondents.

(8) In cases other than those mentioned in paragraph 1 of the present Article, the consolidation of two or more disputes shall be admissible only if the same arbitrators have been appointed in all the disputes that are to be consolidated and if all parties and the sole arbitrator (arbitral tribunal) agree.

(9) The decision whether multiparty proceedings, as per paragraph 1 of this Article, are admissible, shall be taken by the sole arbitrator (the arbitral tribunal) upon application of one of the Respondents. If the admissibility of multiparty proceedings is denied the arbitral proceedings return to the stage they were in for the Respondents before the sole arbitrator (the arbitral tribunal) was appointed.

- All the related contracts must have identical or complimentary arbitration clauses. While courts in certain jurisdictions have a discretion to order consolidation of related arbitrations, they will not necessarily do so where the parties have provided for inconsistent arbitration proceedings.²¹
- The parties must provide a procedure for consolidation, taking into account a wide range of circumstances, including the risk of multiple and overlapping proceedings being commenced before multiple arbitral tribunals.
- When the related contracts involve more than two parties, as will often be the case, the parties must take into account that there will be a multi-party situation and all that that brings with it.²²

The recommendation is that a separate stand alone protocol setting out the arbitration agreement is obtained and signed by each relevant party.²³ Alternatively a consolidation clause may be included or a fall back option.²⁴

Joining an already existing set of arbitration proceedings will require the consent of all concerned, in keeping with the consensual nature of arbitration. Here a party will need to be aware of the stage of the existing arbitration proceedings; new claims cannot and should not be introduced at an advanced stage of the arbitration. Under the ICC Rules this introduction of new claims is formally not allowed after the signing of the Terms of Reference; and generally speaking it is from a practical point of view not a good idea as this new element, and the need to decide on how the process shall continue is likely to hinder the efficiency and speed of resolving the dispute in hand. Taking into consideration, of course, that one wants a matter resolved speedily – this however, may not always be the case and tying up all the loose ends, for instance, may be the prime concern.

Parties should be made aware that in a project or transaction involving multiple parties and multiple contracts, international arbitration may in fact be a definite disadvantage compared to litigation, since consolidation of related arbitral proceedings is not automatic and cannot be assured with an absent party, bearing in mind the need for consent, and may therefore easily result in inefficiencies and delay.

The relevant institutional rules may have specific provisions that would assist consolidation and joinder as always it is necessary to refer to

²¹ E. Gaillard, J. Savage (eds.), Fouchard, Gaillard, Goldman on International Commercial Arbitration, 1999, 518–524.

²² P. D. Friedland, Arbitration Clauses for International Contracts, Juris 2007, 135–136.

²³ *Ibid.*, 136.

²⁴ For examples of such clauses see *Ibid.*, 137–141.

the provisions in the applicable Rules. The ICC is considered to be a consolidation friendly institution and therefore inclusion of a long clause in the original contract may in fact be unnecessary, bearing in mind that it is difficult to predict what exact constellation of dispute will occur and where consolidation is advisable, thus leaving it to be decided on an ad hoc basis once the dispute has arisen, taking into account the fact that the parties must in any case consent.

Looking at the institutional rules most used in the Central and Eastern European area (ICC Article 4(6)²⁵, LCIA Rules Article 22²⁶ and Article 4 of the Swiss Rules²⁷), the Swiss Rules take the matter of joinder of proceedings further, but it nevertheless remains a discretionary matter, ultimately requiring the consent of all the parties involved.

3.4. Cross-Claims

When there are claims between Respondents the question is should separate proceedings be brought. Counsel for the party will need to de-

²⁵ “When a party submits a Request in connection with a legal relationship in respect of which arbitration proceedings between the same parties are already pending under these Rules, the Court may, at the request of a party, decide to include the claims contained in the Request in the pending proceedings provided that the Terms of Reference have not been signed or approved by the Court. Once the Terms of Reference have been signed or approved by the Court, claims may only be included in the pending proceedings subject to the provisions of Article 19.”

²⁶ Article 22 Additional Powers of the Arbitral Tribunal

Article 22 (h) – to allow, upon the application of a party, one or more third persons to be joined in the arbitration as a party, provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.

²⁷ Article 4 Consolidation of Arbitral Proceedings (Joinder) Participation of Third Parties

(1) Where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the Chambers may decide, after consulting with the parties to all proceedings and the Special Committee, that the new case shall be referred to the arbitral tribunal already constituted for the existing proceedings. The Chambers may proceed likewise where a Notice of Arbitration is submitted between parties that are not identical to the parties in the existing arbitral proceedings. When rendering their decision, the Chambers shall take into account all circumstances, including the links between the two cases and the progress already made in the existing proceedings. Where Chambers decide to refer the new case to the existing arbitral tribunal, the parties to the new case shall be deemed to have waived their right to designate an arbitrator.

(2) Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable.

cide whether the matter will be dealt with more speedily in separate arbitral proceedings, if that is the ultimate aim of the party. This is really a matter to be decided on a case by case basis. It must be understood that from a procedural point of view, in any event in order to simplify dealing with the issues in dispute, the arbitral tribunal is likely to separate the disputes between different parties depending on the actual issues (see below).

4. THE ORGANIZATION OF MULTI-PARTY ARBITRAL PROCEEDINGS – WHAT CAN THE ARBITRAL TRIBUNAL DO?

4.1. The Organisation of the Arbitration Proceedings by the Arbitral Tribunal

The Arbitral Tribunal will receive the file and on seeing that here one has proceedings with a long list of parties – what does the Tribunal do? Whilst observing the standard procedure of having a preparatory conference to discuss the conduct of the proceedings with the parties, in multi-party proceedings the first step will be to establish whether all parties have been correctly included as parties to the arbitration proceedings.

As has been identified above although a party may have not signed the original arbitration agreement there may be circumstances which make it nevertheless a party to that agreement and fully justify its inclusion in the arbitral proceedings. Equally it is inevitable that a party that has not signed the agreement that contained the arbitration clause, a non-signatory, will raise the defence that it cannot be a party to the arbitration since it never agreed to be bound by an arbitration agreement.²⁸

Hence as a first step the Arbitral Tribunal must establish its jurisdiction over all the parties. Thereafter it should look at any specific issues which typically arise when there are more than two parties in dispute and the arbitral tribunal will then want to find ways and means of minimising delays caused by and the difficulties that arise when there are separate parallel proceedings concerning the same or similar issues in dispute between the parties.

4.1.1. Establish Jurisdiction– Establishing who is a party to the arbitral proceedings– that is over whom does the arbitral tribunal have jurisdiction.

Ideally the jurisdictional issue should be dealt with as a preliminary step – with separate briefs/ submissions by the parties concerned, and a hearing simply on jurisdiction if necessary. Following which the arbitral

²⁸ See the situations identified in Section A I-III, above.

tribunal should then render an Award on Jurisdiction. Including a party in proceedings on the merits, where that party objects to its involvement, leaving a decision on the validity of the participation of that one party until the final award raises a costs issue, and can even raise problems with regard to the enforceability of that final award. It is wise, therefore, for a tribunal to deal with this issue of jurisdiction as a first step, rather than forcing a party to participate on the merits.

The preparation of the jurisdictional side of the proceedings will follow the same standard practice as that necessary in the resolution of the dispute on the merits.²⁹ Thus a procedural timetable, establishing the sequence of exchange of briefs by the parties, and when and how evidence (documentary and witness evidence as necessary) is to be presented, will need to be agreed with the parties. All the practical matters that would need to be covered in respect of a hearing on the merits would need to be dealt with. Here, however, with the issue in dispute being limited to jurisdiction of the arbitral tribunal over one or other particular party.

The arguments that can be raised for and against establishing jurisdiction have been covered in section A above, setting out why there might be more parties to the arbitral proceedings. A respondent party that has been named as one of several parties in the Request for Arbitration but which did not sign the agreement containing the arbitration clause will want to present evidence in support of its position that it cannot be made party to the arbitral proceedings. Ultimately each matter will revolve around its own facts and whilst efforts are made by arbitral tribunals to be consistent with previous decisions, there still is no rule of precedent requiring an arbitral tribunal to follow a particular course and an arbitral tribunal is free to distinguish a matter on the facts of the case.

4.1.2. Look at Specific Issues

The difficulty of multi-party arbitration is that the different disputes may have become a tangled web and it is difficult to see what gave rise to what. It still remains doubtful as to whether a multi-party arbitration will be more efficient and faster than commencing individual arbitrations for the individual claims.³⁰ As in any arbitration, however, the easiest and most efficient way to proceed is to establish a list of the issues in dispute as early as possible. The arbitral tribunal is then likely to deal with different sets of issues in stages, always with the agreement of and after consultation with the parties, hopefully in a logical order.

²⁹ For the organisation of proceedings in International Arbitration generally see A. J. van den Berg, "Organizing an International Arbitration: Practice Pointers", in L. W. Newman, R. D. Hill.

³⁰ J. G. Frick *Arbitration and Complex International Contracts*, Kluwer, 2001.

Specific issues which may arise in the course of the arbitral proceedings

- Opposability of the name-borrowing provision
- Pass-through claims
- Direct action of the subcontractor against the employer
- Determination of the law applicable to the various contracts within the contractual chain
- Joint responsibility for debts incurred by a company of the group and set-off

4.1.3. Minimise the difficulties which can arise from separately conducted parallel arbitral hearings

The initiative to minimise the difficulties associated with parallel proceedings lies with the parties themselves in that at the outset they may appoint either the same arbitrators, or at least the same chairman as in the already existing proceedings.

The question is do the parties want the knowledge and information gained in one arbitration to be available in the other arbitration. Information available to an arbitrator can sometimes in fact quite unwittingly impede his/her ability to remain completely impartial.

Listing the problems that are likely to arise and how they can be avoided:

Communication of information or documents obtained in another arbitration.

The question will always be to what extent may there be a communication of information or documents obtained in another arbitration, and confidentiality issues will arise, this issue must be resolved with the consent of the parties involved.

Independence and impartiality of the arbitrators

Clearly the independence and impartiality of the arbitrators appointed in parallel cases must be unquestionable, and not give rise to any later ground for challenge of the award.

Nomination of same technical expert

By nominating the same technical expert the risk of inconsistent assessments is avoided. Generally, particularly in common law based arbitral proceedings the onus will be with the parties themselves to facilitate this side of presenting the evidence, but where an expert is appointed by the arbitral tribunal, as is likely to happen in proceedings with a civil law based tribunal, then it would be necessary for the tribunal to inform itself on who the technical experts in the parallel proceedings are.

Fixing the timetable for the proceedings so that no pre-judgment of certain common issues takes place

An arbitral tribunal can make an informed scheduling of the sequence of dealing with the issues in a multi-party dispute, so that by fixing the timetable with deadlines for Briefs, submission of evidence, hearing of witnesses etc established in such a way it does not result in pre-judgment of any issue, which logically needs further evidence and debate.

The classic way of dealing with this problem is bifurcation – breaking up the proceedings into issues which can be resolved by Partial Award. This generally has the advantage of also assisting the parties to then reach a settlement, as once certain issues are dealt with the remaining contentious business may no longer have the same paralyzing effect, allowing the parties to resolve the matter themselves.

4.1.4. Be aware of the effects on Enforcement of the Arbitral Award

Finally, but by no means to be ignored, is the fact that multi-party proceedings raise issues with regard to enforcement of the arbitral award, specifically the equal treatment of the parties. Particular attention must, therefore, be paid to and there should be an all-prevailing awareness by the arbitral tribunal of the need to respect due process with equal treatment of the parties.

More than ever in multi-party arbitration the grounds for refusal of enforcement under Article V of the New York Convention must be at the forefront of the minds of the arbitral tribunal.

Additionally there should be an awareness of the Res Judicatur effect of an award rendered elsewhere in an arbitration arising from the same project, although there is still the difficulty of lack of a doctrine of precedent and, therefore, it is certainly not clear that an arbitral tribunal is bound by the decision of another arbitral tribunal.

5. CONCLUSION

Multi-party arbitration is on the increase, with more complex economic constellations having now become standard in commercial life. The ICC considers that one third of arbitrations now involve a complex multi-party, multi-contract issue. Further, multi-party arbitration presents even greater challenges to arbitrators and the arbitral community, seeking to show that international arbitration is the dispute resolution procedure of choice.

What conclusion can be drawn with regard to optimising the organisation of multi-party arbitration proceedings? Clearly Institutional Rules agreed by the parties in the arbitration clause assist in preventing delay and frustration of proceedings. Although generally there is some sort of recourse to local courts for assistance with the appointment of arbitrators, as a rule this is considered inadvisable, and certainly time consuming. Therefore, from the claimant's point of view, any such delaying tactics are best avoided by having a clear agreement on institutional rules in the arbitration agreement included in the contract between the parties right at the start.

At the end of the day however, how one best handles complex or parallel proceedings in the interests of the administration of justice will turn on the facts of each case, it is the experience and awareness of the arbitral tribunal, its sensitivity to and its ability to keep itself informed of all the issues between the parties, that will determine how quickly and efficiently the disputes will be resolved.