

**The Reach of the Arbitration Agreement to Parties involved in the Same Legal
Relationship[♦].**

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Abstract

Complex legal relationships may involve a net of companies, linked to each other by several autonomous contracts, performing works and services towards a single project. If disputes arise, resolving each of them independently may result in incompatible decisions, situation which could hinder the project outcome. Therefore, it might be recommended to resolve these disputes into multi-party proceedings or multiple proceedings before the same arbitral tribunal. In order to achieve the purpose, the proper legal instruments shall be identified and, based on these; a contractual framework has to be tailored.

Keywords: Arbitration agreement, complex arbitration clauses, multi-party proceedings, multi-party arbitration, third parties, consent to arbitrate, joinder, intervention, consolidation.

Resumen

Algunas relaciones legales complejas pueden comprender redes comerciales inter-relacionadas mediante contratos independientes que tienen el objetivo de realizar el mismo proyecto. En el supuesto de surgir diferentes controversias respecto del mismo proyecto, la estrategia de resolver cada caso de forma independiente puede dar origen a laudos arbitrales no compatibles, afectando el desempeño y resultado del objeto contractual. Por lo tanto, es

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altamente recomendable resolver las controversias mediante un (multi) procedimiento ante el mismo tribunal arbitral. Con el fin de conseguir el mencionado objetivo deben de ser identificados los instrumentos procesales necesarios para confección de un acuerdo arbitral que permita el procedimiento multiparte.

Palabras Clave: Acuerdo Arbitral, Clausulas Arbitrales Escalonadas, Procedimientos Multiparte, Tercerías, Consentimiento Arbitral, Sociedades Conjuntas, Intervención y Consolidación.

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Introduction

Many legal relationships frequently involve an extensive net of companies, each responsible for a specific performance, though they communicate with each other and may work towards a single goal.

In some legal relationships, such as construction agreements, the owner may hire one or more contractor(s) to perform the work. These, in turn, may enter into several subsequent contracts with subcontractors and suppliers.

Also, the contractor(s) may represent a single company or may be formed by a joint venture or consortium, bringing more than one company, therefore, more than one party, to the contractual relationship. This scenario characterizes a vertical contractual relationship, in which the employer contracts a construction company, which then contracts subcontractors, who may subsequently contract others subcontractors.

Concomitantly, the employer may enter into parallel contracts with an architect/engineer to design the project, and a management company to supervise and guide the work performed by the contractor(s). Additionally, the employer will seek financial resources in order to meet the costs of the work and, as a result, a financing agreement with a Banking institution comes into existence. This scenario characterizes a horizontal contractual relationship.

Equally, construction agreements usually demands technical tasks to be performed, which may include the transfer of technology, license agreements, the designing of tailored machinery, development of software and other components that add complexities to the project. Also, a large construction project may take a couple of years to be completed, which means dealing with possible varied weather conditions, *e.g.*, drought, flood and storms, and the difficulties these may cause.

Furthermore, the foundation of a large project may lead to work performed in underground conditions, situation which represents potential unforeseen circumstances not considered during the procurement stage and contract formation. Less favourable underground conditions

result in additional costs. As a result, dispute regarding the allocation of risk and which contracting and subcontracting party should bear the extra expenses is also likely to arise.

Notwithstanding, the situation becomes more complex when international elements are involved in the contractual scenario. It is common to have the financing agreement with an institution which may be located in a country different from the place where the works will be performed, *e.g.*, the World Bank. Also, there may be the case of a foreign contractor willing to bring his own labour force to country in which the works will be performed, or also willing to have machinery imported as well. This net of different contracts, formed with parties from several countries, could result in a number of legal actions being processed in various jurisdictions, under different applicable laws and interpretation. Nevertheless, all the legal actions would be related to a same single construction project.

It is therefore simple to visualize how many different parties and elements may be involved in a construction project. All of them, in a higher or lower degree, will influence the final result, which is completing the project within the expected contractual time, cost and technical requirements. The circumstances narrated are analogous insurance and reinsurance agreements and many other complex contractual relationships.

The scenario mentioned *supra* sets a high probability for disagreements during the performance of the works, which may eventually result in disputes. These, in accordance with the industry's practice, are preferably resolved via international arbitration.

Therefore, the circumstances described above, allow the identification of two critical points (i) how distinct and parallel arbitral awards may affect the interest of other parties involved in the same legal relationship; and, (ii) the risk of conflict and contradiction among different arbitral awards rendered in parallel arbitrations related to the same legal relationship.

The second point raises further questions. For instance, if an arbitral award determines an issue in proceedings between two parties involved in the legal relationship and, subsequently, one of the parties face other arbitral proceedings. Would the issue previously decided upon be covered by the principle of *res judicata*? If the decision affects the claim or defence of a third

party which was not a party in the first arbitral proceedings, considering this did not have opportunity to present its case, would this party be bound to the terms of the first award?

Those two points suggest that bringing together parties which perform a role in the same project into a single arbitration proceeding, or unifying different arbitration proceedings, would be beneficial for the project itself. Multi-party proceedings may determine liability more precisely than several independent proceedings, hence, avoid incompatible awards.

Additionally, costs and length of arbitration seem to be a consensus in the practitioners worries, as pointed, “A recent study of the Corporate Counsel International Arbitration Group (CCIAG) found that 100% of the corporate counsel participants believe that international arbitration “takes too long” (with 56% of those surveyed strongly agreeing) and “costs too much” (with 69% strongly agreeing)”.² Therefore, the prospect of saving expenses and time is a major advantage.

If the statement above is true, legal relationships such as construction projects, as a whole, would be performed more efficiently and fairly (to the parties involved) if there is the possibility of bringing the parties together with regards to resolving disputes. However, the assertion also raises question. Would it be in the employer’s interest to involve several subcontractors in the arbitral proceedings? Involve parties of which has no direct contractual relationship established, which may be unknown and may likely have a less favourable economic condition (not ideal while collecting damages). On the other hand, while enforcing the arbitral award, could the employer benefit from linking liability to more than one solvent party?

The other way around also has to be considered, since eventual reach of the arbitration agreement could result in the employer being a defendant in proceedings initiated by parties of which initially did not have a contractual relationship with.

Furthermore, would it be interesting for the subcontractors to be joined in an arbitration proceeding held between the employer and the contractor? The business model is structured

² L. Reed, More on Corporate Criticism of International Arbitration, Kluwer Arbitration Blog, 16 July 2010 <http://kluwerarbitrationblog.com/blog/2010/07/16/more-on-corporate-criticism-of-international-arbitration/>

around the fact that the contractor pays the subcontractors based on the payments received from the employer. Therefore, would the participation of subcontractors (as a party) in proceedings held between employer and contractor be reasonable?

Finally, the difficulties faced in a multi-party arbitration have to be acknowledged as well. The arbitration agreement enabling multi-party proceedings may be extremely complex to draft. As a matter of fact, the Final Report on Multi-party Arbitration, published by the ICC's Commission on International Arbitration, has shown a special concern regarding the issue.³

In addition, all of the prerogatives and procedural guarantees provided in bi-party proceedings shall be respected to all the parties involved in the multi-party proceedings.

Thus, the discussion is whether or not an arbitration agreement has the power to bind parties which did not formed a direct contractual relationship, though were involved in the same project. And if it is possible, which requisites should be met in order to achieve legitimacy.

1. Requisites to bring parties into arbitration proceedings.

a) Consent

The arbitration agreement is the fundamental basis on which arbitration is initiated, being indispensable for its legitimacy and recognition. The arbitration agreement is designed to demonstrate the will of the contracting parties to arbitrate disputes originated from a specific contractual relationship. "The foundation stone of modern international arbitration is (and remains) an agreement by the parties to submit to arbitration any disputes or differences

³ "The difficulties of multi-party arbitration all result from a single clause. Arbitration has a contractual basis ; only the common will of the contracting parties can entitle a person to bring a proceeding before an arbitral tribunal against another person and oblige that other person to appear before it. The greater the number of such persons, the greater the degree of care which should be taken to ensure that none of them is joined in the proceedings against its will". ICC International Court of Arbitration Bulletin Vol. 6 No. 1 (1995).

between them. Before there can be a valid arbitration, there must first be a valid agreement to arbitrate”.⁴

As a logical consequence, the National Court’s jurisdiction is renounced, and an arbitral tribunal is empowered with jurisdiction and authority to resolve the disputes. Furthermore, the arbitration agreement determines and delimitates the arbitral tribunal’s power, delineating its competence and scope.

After formalizing the parties’ intention to leave their dispute out of the National Courts’ jurisdiction, referring the dispute to a private means of resolution, the contractual provision becomes irreversible.⁵ This means that the arbitration agreement binds the parties to arbitration, determining the terms (laws, rules, place and conditions) for the future proceedings. Thus, “The arbitration agreement has a *sui generis* nature, with both jurisdictional and contractual characteristics”.⁶

However, the arbitration agreement, in order to remain valid and materialize the effects supra specified, especially with regards to the authority granted to the arbitration tribunal to analyze the dispute, will have to be interpreted and scrutinized according to general contractual rules.

Thus, the arbitration agreement shall respect the principles which regulate the contract law, and especially those of contract formation, which in private international law, have to fulfil three requisites (i) capacity of the contracting parties; (ii) form of the contractual instrument; and (iii) the parties’ consent to arbitrate. As a consequence, “in the context of arbitration, it is generally accepted that the capacity to take part in proceedings is exclusively determined on a contractual basis”.⁷

⁴A. Redfern, M. Hunter. *Redfern and Hunter on International Arbitration*. Ed. Oxford University Press, 5th edn, (2009),

⁵Author’s note: The international principles of contract formation establish that an arbitration agreement can only be revoked by the express and formal consent of all the signatory parties.

⁶J. Lew, L. Mistelis, S. Kroll. *Comparative International Commercial Arbitration*. Ed. Kluwer Law International, 2003.

⁷S. Brekoulakis. *Third Parties in International Arbitration*, quoting : *Russel on Arbitration*, ed D Sutton, J Gill, and M gearing, 23rd edn (Sweet & Maxwell, 2007).

The lack of any identified requisite would result in an invalid arbitration agreement, and set grounds for resisting the recognition and enforcement of the arbitral award according to the New York Convention⁸ (UNCITRAL Model Law and most national legislations provide similar grounds). This situation would render the arbitral proceedings null and void.

After considering the above requisites as mandatory, the purpose is to verify whether or not the extension of the arbitration agreement to parties involved in the same project or commercial relation is possible. Following, the threshold testing the validity of the extension of the arbitration agreement shall focus on the parties' intention, *i.e.*, intention to arbitrate in multi-party proceedings and/or to unify distinct proceedings before the same arbitral tribunal.

Parties' intention comes into existence via consent, which can be articulated in different forms, being bound to a number of requisites as well. As a leading commentator expressed, "... in most cases, courts and arbitral tribunals still base their determination of the issue on the existence of a common intent of the parties and, therefore, on consent".⁹

As one award stated, "Arbitration is essentially based upon the principle of consent;" "Clearly an arbitral tribunal has power only with respect to the parties to the arbitration".¹⁰

In the same sense, "The purpose of contract drafting is to make clear the parties' consent to arbitration and to define the scope and limits of that consent".¹¹ Therefore, before analyzing the practical extension of the arbitration agreement itself, the principle of consent (role and manifestation) has to be carefully inspected. The relevance of consent can be explained as, "Unlike litigation in State Courts, where third parties can often be joined to proceedings, the

⁸New York Convention. Art. V, 1. Recognition and enforcement of the award can be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

⁹ B. Hanotiau. *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues* - An Analysis. Kluwer Arbitration, accessed on 12/02/2012, <http://www.kluwerarbitration.com/document.aspx?id=ipn22373b>

¹⁰ Award in ICC case N0. 5721, 117 J.D.I (Clunet) 1019 (1990).

¹¹P. D. Friedland, *Arbitration Clauses for International Contracts*. JurisNet, 2dn ed.

jurisdiction of an arbitral tribunal to allow for the joinder or intervention of third parties to arbitration is limited”.¹²

The case law points to the same direction, “The concept of private arbitrations, derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of arbitration the and that neither the tribunal or any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient the course may be to the party seeking it and however closely associated the disputes in question may be”.¹³

A party cannot be compelled to arbitrate if it has not consented to it. Following the rationale, a party cannot be compelled to arbitrate with a third party or in a procedural form to which it has not consented, unless if bound a mandatory provision. “The requirement for contractual consent to multi-party arbitration is a consequence of the fact that all arbitration is based on the principles of private autonomy and, more specifically, on the principle of freedom of contract”.¹⁴ The same rationale was expressed by the ICC’s working group, “In a multilateral relationship, whether involving a single contract or separate related contracts, it may be appropriate or necessary to have a multi-party arbitration clause”.¹⁵

Therefore, the correct approach shall verify whether there is consent to arbitrate with third parties, *i.e.*, which is not a signatory in the contract in which the arbitration clause is included, though is part of the commercial relationship.

For this reason, the arbitral tribunal, as a starting point, shall indentify in the arbitration agreement the willingness to arbitrate in multi-party proceedings. “The focus in many cases involving questions of non signatory status is one of the parties’ intentions. In particular, the focus is on the parties’ intentions – actual or presumed – that their arbitration agreement will

¹² A. Redfern, M. Hunter. *Redfern and Hunter on International Arbitration*. Oxford University Press, 5th ed.

¹³ *Oxford Shipping Co Ltd v Nippon Yusen Kaisha*, The Eastern Saga [1984] 3 A11 ER 835 at 841.

¹⁴ F. Nicklisch, *Multi-party Arbitration and Dispute Resolution in Major Industrial Projects* [1994] volume 11 issue 4, Kluwer Arbitration, accessed on 03/03/2012 <http://www.kluwerarbitration.com/document.aspx?id=IPN8250>, 06/07/2011.

¹⁵ Final Report on Multi-party Arbitration. ICC International Court of Arbitration Bulletin Vol. 6 No. 1 (1995).

accomplish the purposes for which such agreements are designed”.¹⁶ Commentators have stated, “Hence, one must start from an interpretation of the parties’ intent in the case in question. In order to do so, the arbitration agreement will have to be scrutinized”.¹⁷

In accordance with the above, scholars and case law have established that the consent can be either expressed or implied, included in the contract or in a separate instrument, written or oral and through various forms. “As between the original parties to the arbitration agreement, such consent may be either express, implied, or by reference to a particular set of arbitration rules agreed to by the parties which provide for joinder”.¹⁸

b) **Express Consent.**

Express consent is the common practice, thus, simpler to identify. It regards to the ordinary contract formation and materializes itself via the signature in the instrument. Therefore it is express, while signing the arbitration agreement the party consents with the contractual terms. And it is also formal, by the fact the written instrument records the parties’ intention. The issue has been defined as, “Consent is the foundation of arbitration, and in general a court or an arbitral tribunal will refuse to treat a person or entity as a party to the contract or at least to the arbitration clause if it has not expressly or implicitly consented to it, a fact that in most-but not all-cases will be expressed by the signature of the person or entity concerned on a contractual document”.¹⁹

The case-law considered, “Contrary to litigation in front of state courts where any interested party can join or be adjoined to protect its interests, in arbitration only those who are parties to the arbitration agreement expressed in writing could appear in the arbitral proceedings either as claimants or as defendants. This basic rule, inherent in the essentially voluntary nature of

¹⁶G. B. Born. *International Commercial Arbitration*. Wolters Kluwer, vol I. (2009).

¹⁷ M. Platte. When should an arbitrator join cases? Kluwer Arbitration, accessed on 15/03/2012, <http://www.kluwerarbitration.com/document.aspx?id=IPN24214>, 28/07/11.

¹⁸A. Redfern, M. Hunter. *Redfern and Hunter on International Arbitration*. Oxford University Press, 5th edn, (2009).

¹⁹ B. Hanotiau. *Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues - An Analysis*, accessed on 13/03/2012, <http://www.kluwerarbitration.com/document.aspx?id=jpn22373b>

arbitration, is recognized internationally by virtue of the New York Convention”.²⁰ However, this strict approach may not be the current trend.

Considering the above, if the contractual instruments exchanged among the parties were signed, arbitral tribunal has jurisdiction. Therefore, to be sure of which parties are bound by the arbitration agreement, it would suffice to check the signatures’ page, the power of representation given to the person who signed.

The rationale equally applies to multi-party proceedings. The arbitration agreement is governed by contract law principles, the signatories are bound to its terms, which in a complex project, may demand arbitration proceedings involving more than two parties. “When agreeing on the arbitration clause the parties must or should have been aware that in the event of a dispute it may entail multiparty arbitration”.²¹

Therefore, express consent, *a priori*, materializes in the arbitration agreement, which can be achieved through (i) an umbrella arbitration agreement; or (ii) arbitration clauses containing cross references to clauses inserted in different contracts.

An umbrella arbitration agreement corresponds to a superior agreement in which several subsequent and interconnected contracts are referred to. Therefore, the clause spreads its effects and binds the parties to the related contracts. “The first is where only the heads of agreement, or framework agreement, contains an arbitration clause to which the other related contracts refer. This case presents no difficulty. The parties’ intention is clear: they sought to refer all disputes arising out of the whole set of contracts to arbitration, before a single arbitral tribunal constituted in accordance with the heads of agreement”.²²

Also, it has been suggested “One way of simplifying this is to have all the parties concerned enter into a ‘framework’ or ‘umbrella’ arbitration agreement that sets out the consent of all of

²⁰*Banque Arab et Int’l d’Inv. V. Inter-Arab Inv. Guarantee Corp.*, Ad Hoc award (17 November 1994), XXI Y.B. Comm. Arb. 13, 18 (1996).

²¹J. Lew, L. Mistelis, A. Kroll. *Comparative international commercial arbitration*. Kluwer Law International, (2003).

²²P. Fouchard, E. Gaillard. *Fouchard Gaillard Goldman on International Commercial Arbitration*. Vol. I. Kluwer Law International, (1999).

them to be party to the same arbitration, as well as the guarantees of equal treatment just described”²³.

With regards to cross reference, this means that the arbitration agreement will refer to clauses inserted in other interconnected contracts formed by different parties. The contractual approach aims to form a chain between the contracts, whereby the arbitration in one contract would initiate a binding process among the rest. Practitioners have suggested, “First, they may enter into what might be called ‘push’ or ‘pull’ arbitration agreements, so that A enters into an agreement with B and B with C, D, E and so on, with each agreement containing an express consent to have disputes arising under that agreement consolidated with those arising under other agreements (*i.e.* pushed into a joined proceedings). As importantly, such agreement must also allow disputes under other agreements to be heard together with disputes under the agreement in question (*i.e.*, pulled into a joined proceeding).”²⁴

The efficiency of cross reference arbitration agreements have been confirmed by the Brazilian Superior Court of Justice. The facts related a commercial scenario formed by a gas supplier contracting with the distributor, and a second distinct contract between the distributor and gas purchaser. The supplier decided to increase gas prices. The purchaser invoked arbitration to discuss the gas prices. However, before the constitution of the tribunal the purchaser filed an interim measure in a national court in order compel the gas supplier to (i) do not interrupt the gas supply while the contract was being discussed (ii) maintain the same gas prices while the contract was being discussed.

There was no contractual relationship between the supplier and the purchaser, and the former alleged that the absence of a direct legal link prevented the purchaser from filing the request. Nevertheless, the contracts had the following arbitration clause:

“The parties acknowledge that the resolution of specific disputes arising from this contract or from the second contract [gas supplier-distributor] may have implication on the rights and obligations of the parties to both contracts. Therefore, if a request for

²³ M. McIlwrath, J. Savage. *McIlwrath and Savage in International Arbitration and Mediation: A Practical Guide*, page 72. Wolter Kluwer, (2010).

²⁴J. Jenkins, S. Stebbings. *International Construction Arbitration Law*. Kluwer Law International, 1st ed, (2006).

arbitration is filed in relation to this or that [gas supplier-distributor] contract, in which the decision may have implications in the contractual performance of these parties and the party to the other contract, it is agreed (i) these parties or the third party may cumulate the disputes arising from both contracts in one proceedings; (ii) it is guaranteed to the [gas purchaser] the participation as a party in any arbitration arising from the other [gas supplier-distributor] contract, if fulfilled the requisites above; (iii) the third party may participate in any arbitration arising from this contract, if fulfilled the requisites above; (iv) the [distributor] may request the participation of the [gas supplier] in arbitration arising from this contract, if fulfilled the requisites above.

The court reasoned, “The relationship results in inexistence of direct legal relationship between the [gas supplier] and the [gas purchaser] and, considering this, one could not arbitrate with the other. The contractual chain, however, seems to express the commercial relation itself, and the adoption of tri-party arbitration impliedly recognizes that”.²⁵ As a result, the court found itself competent to analyze whether the interim measure should be granted or not. Subsequently, the court referred the parties to multi-party arbitration proceedings.

Opposing, the absence of cross reference clauses may result in the impossibility of multi-party proceedings, even if the factual scenario demands for it, as seen in a English court decision. The case involved a first contract between employer and contractor to build a plant of natural gas. The contractor entered into a second contract with a subcontractor to build a storage system in the plant. The employer commenced arbitration against the contractor due to an alleged defective storage system. The contractor denied the claims and, alternatively, argued that if the system was defective, the subcontractor which built it should be held liable.

The employer initiated an *ad hoc* arbitration in London and opposed the request to join the subcontractor in the proceedings. The contractor initiated proceedings against the subcontractor in London as well. The court was faced with a request for unifying the proceedings and reasoned:

²⁵*Petróleo Brasileiro S/A Petrobras v Tractebel Energia S/A*. Interested party : Companhia de Gás do estado de Mato Grosso do Sul MSGÁS. Recurso Especial n° 954.065-MS (2007/0116555-8).

“There is no power in this court or any other court to do more upon an application such as this as than to appoint an arbitrator or arbitrators, as the case may be; we have no powers to attach conditions to that appointment, and certainly no power to inform or direct an arbitrator as to how he should thereafter conduct the arbitration or arbitrators”.²⁶ As a result, two different arbitration proceedings were conducted.

Logically, in order to achieve effective cross reference arbitration agreements, besides mentioning and linking the other contracts, they shall have the same characteristics. These shall select the same seat of arbitration, applicable law, institutional rules and number of arbitrators. Therefore, compatibility among clauses is mandatory.

Following the rationale, relevant case law has understood the need of an arbitration clause clear and express. Vague references in one of the several exchanged documents between the parties would not be enough to express consent, as determined by a national court, “...it is clear that an arbitration clause is not directly germane to the shipment carriage and delivery of goods. ... it is, therefore, not incorporated by general words in the bill of lading. If it is to be incorporated, it must either be by express words in the bill of lading itself... or by express words in the charter-party itself... if it is desired to bring in an arbitration clause, it must be done explicitly in one document or the other”.²⁷

Lastly, having a model clause designed to bring parties involved in the same project into a single arbitration is considered impracticable. Unlike model arbitration agreements suggested by some institutions, a multi-party arbitration clause, before drafting, demands in-depth analysis of the parties’ intention, pre-contractual negotiation and awareness of each fact which led to the contractual terms. If drafted otherwise, efficiency is unlikely.

Departing from the sphere of express consent, it is interesting to focus on the classic lessons of Professor Philippe Fouchard, as quoted: “the principle of interpretation applied to arbitration agreements are the same as the general principles frequently adopted with respect to all contracts. They include the principle of interpretation in good faith, the principle of

²⁶ *Adgas – Abu Dhabi Gas Liquefaction Co Ltd v Eastern Bechtel Corp* (1982).

²⁷ *Companhia Espanola de Petroleos SA v Nereus Shipping SA*, 527 F 2d 966, 973 (2d Cir 1975).

effective interpretation and the principle of interpretation *contra proferentem*... in fact, this rule of interpretation means that a party's true intention should always prevail over its declared intention, where the two are not the same".²⁸

His interpretation set grounds for some relativization of the principle of *pacta sunt servanda*. It suggests that if the true parties' intention was multi-party arbitration proceedings, it is possible to bring parties to single proceedings or multiple proceedings before a single arbitral tribunal, despite the lack of express consent. The idea, currently disseminated, was supported by the theory of implied consent.

c) Implied Consent.

Implied consent essentially refers to situations in which the parties did not express their will, in the arbitration agreement, to hold multi-party arbitral proceedings. Nevertheless, a group of facts and circumstances would permit an assumption regarding their intention towards that end. As reasoned, "The general nature of the doctrine of implied consent entails treating the question of who is actually bound by the arbitration agreement as a function of intention, weather tacit or explicit".²⁹ Also, "If there is no evidence of an express agreement, courts and arbitral tribunals will often take into consideration the conduct of the party concerned as an expression of implied consent".³⁰

Alternatively, implied consent may include occasions in which there is an arbitration agreement referring to multi-party proceedings, but the third party to be included in the proceedings is not bound to the arbitration agreement. However, if notified to join the arbitration, this third party participates in the proceedings without challenging the tribunal's jurisdiction, there is implied consent binding the party to the arbitration agreement. The conduct of taking part in arbitral proceedings and later challenging it due to the inexistence of

²⁸P. Fouchard, E. Gaillard. *Fouchard Gaillard Goldman on International Commercial Arbitration*. Vol. I. Kluwer Law International, (1999).

²⁹M. Wahab. *Conflicts of Laws in International Arbitration*. Chapter: Extension of Arbitration Agreements to third parties : A never ending legal quest through to the spatial-temporal continuum. JurisNet, 2dn, (2010).

³⁰ B. Hanotiau. *Complex Arbitrations: multi-party, multi-contract, multi issue and class actions*. Kluwer International Law, 2006, pag 35.

valid arbitration agreement is prevented by general law principles of estoppels and good faith, as tested by national courts:

“The requisite of consent to arbitrate is fulfilled if the party, according to the evidence produced, participated in the arbitral proceedings without challenging, at any time, the existence of the arbitration agreement”.³¹

US courts have ruled likewise. One case involved a collective agreement between a corporation and its employee’s union. The collective agreement contained an arbitration agreement. The corporation incorporated another company, and the employees of the latter were not members of the collective agreement. Arbitration took place after incorporation and the employees of the incorporated company participated in the proceedings represented by their counsels. The court ruled for the validity of the multi-party proceedings, and reasoned that the third party became bound to the final award based assumption of obligation to arbitrate, “Although a party is bound by an arbitration award only where it has agreed to arbitrate, an agreement may be implied form the party’s conduct”.³²

Notwithstanding the need of consent, the tribunal has to apply a subsequent test, which refers to the existence of consent from the signatories and from the non-signatories. Initially, the approach demands two questions. Do the signatories consent with a third party joining the proceedings? Does the third party consent with joining the proceedings?

Based on the findings, and in order to legitimize the multi-party proceedings, a successive question is needed. Is it necessary consent from all the signatories and the third parties, only from the signatories or only from the third parties?

Some awards have determined that if a non-signatory wishes to become a party in the proceedings, all the other parties involved (signatories) would have to consent.³³ Nevertheless, recent developments in national legislations and institutional rules have pointed

³¹ Brazilian Superior Court of Justice (2005), *L’Aiglo S/A v. Têxtil União S/A*.

³² *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991).

³³ Final award in ICC case No. 7453, XXII Y.B. Comm. Arb. 107 (1997). (one signatory had not accepted non-signatory as a party, and therefore there was no arbitration agreement).

to divergent conclusions. As a result, the answer to the proposed question will depend on the applicable law and rules, as discussed *infra*.

As mentioned above, implied consent materializes in a variety of forms. This demands detailed and careful analysis from the tribunal of all the facts and circumstances involved in the case.

Following the rationale, implied consent may be characterized by circumstances in which the non-signatory party participates in the work's performance and/or fulfils part of the contractual obligations. As a tribunal reasoned, "Company subject to arbitration clause because it was involved in the conclusion, the performance and the termination of the contract in dispute".³⁴ As well, "Scope of the arbitration clause may be extended to non-signatory companies with separate legal significance only if they played an active role in the negotiations leading to the clause, or if they are directly implicated in the agreement".³⁵ Additionally, "Party's continued involvement in performance of contract confirmed its position as a party, despite assignment of contract to another company".³⁶

With regards to the propositions *supra*, some questions may be asked. Did the third party performed an incidental role or fulfilled most of the obligations? Were the participations performed consistently or was it isolated? The deeper the role in the construction project, the easier it would be for an arbitral tribunal to presume an implied consent. A US court ruled that by the fact of a company had embraced the contract, even though was not a signatory of the arbitration agreement, the same company was prevented from repudiating arbitration via litigation.³⁷

Not only contractual performance is relevant, but also the negotiations which led to the contract formation. Leading scholar's position reasons, "Under most developed legal systems, an entity may become party to a contract, including an arbitration agreement, impliedly – typically, either by conduct or non-explicit declarations, as well as by express agreement or

³⁴ Partial award in ICC Case No. 6000, 2 (2) ICC Ct. Bull. 31, 34 (1991).

³⁵ Final award in ICC case No. 6519, 2 (2) ICC Ct. Bull. 34, 35 (1991).

³⁶ Final award in ICC case No. 9771, XXIX Y.B. Comm. Arb. 46 (2004).

³⁷ *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber and Resin Intermediates, SAS*, 269 F.3d 187, 200 (3d Cir. 2001).

formal execution of an agreement. In general, ordinary principles of contract law apply to issues of implied consent (as to other issues) with respect to arbitration agreements”.³⁸ In addition, “This could be where such party is closely involved with the implementation or performance of the contract or where the contract and arbitration agreement have been assigned to a third party. In these cases the central issue is whether under general principles of contract law the arbitration agreement can be extended to a non-signatory”.³⁹ The same reading applies to contract termination.

If party performing works is aware of the main contractual terms, and its arbitration agreement, it is assumed an implied consent to be bound to its provisions. “In the most cases courts and tribunals require proof of the existence of an intention at least implicit of all the parties that the non-signatories be parties to the underlying contract and its arbitration clause. Some courts however limit themselves to an awareness of the clause and the requirement that the additional claimant or defendant be concerned by the dispute. But the company concerned must always have played a role in the conclusion and the performance of the agreement and this has to be proved by the party requesting the extension of the clause”.⁴⁰

The Court of Appeal of Paris set important benchmark which has been followed since, “In international arbitration law, the effects of the arbitration clause extend to parties directly involved in the performance of the contract, provided that their respective situations and activities raise the presumption that they were aware of the existence and scope of the arbitration clause so that the arbitrator can consider all economic and legal aspects of the dispute”.⁴¹

According to another scholar, the principle of implied consent to arbitrate has been stretched even more in the US, “First, courts have compelled a non-signatory to arbitrate where the non-signatory knowingly exploits or directly receives a ‘benefit’ from the agreement containing the arbitration clause. In such instances, courts have allowed estoppel to be used as

³⁸G. B. Born. *International Commercial Arbitration*. Wolters Kluwer, vol I, (2009).

³⁹J. Lew, L. Mistelis, A. Kroll. *Comparative International Commercial Arbitration*. Kluwer Law International, 2003.

⁴⁰B. Hanotiau. *Complex Arbitrations: multiparty, multicontract, multi-issue and class action*. Kluwer International Law, (2006).

⁴¹ *V2000 (formerly Jaguar France) v. Renault*, Court of Appeal Paris (1994) (1996) *Revue de l'Arbitrage* 245; affirmed Cass. 1e civ. (21 May 1997), (1997) *Revue de l'Arbitrage* 537.

a proverbial ‘sword’ rather than ‘shield,’ *i.e.*, empowering the signatory to demand arbitration of a claim. Secondly, courts have compelled arbitration based on an analysis of (i) the relationship between the claim and the contract containing the arbitration clause and (ii) the existence of a ‘nexus between the parties’. The broad language of this latter test has been especially fertile ground for arguments that in effect use merely the close relationship of the signatory and the non-signatory as the basis for implied consent to arbitration”.⁴²

The correct approach suggests deciding whether to bind or not a third party into multi-party proceedings in accordance with the role this party has played in the legal relationship. In a case where the third party (non-signatory of the arbitration agreement) had the advantage of lower insurance premium and right to trade under French flag, as a reflex of the contract

Containing the arbitration agreement, the party third party was bound to arbitrate.⁴³ In another situation involving a contractual chain, there was an arbitration agreement between the manufacturer and distributor. The buyer, which was not a signatory of the first agreement, contracted with the distributor without providing for arbitration. Later, the buyer alleged a breach in the contractual relationship between manufacturer and distributor, and due to its claim was ordered to arbitrate in multi-party proceedings with the respective both parties.⁴⁴

Applying the same logical reasoning, implied consent may be determined based on the previous contracts formed among the parties. For instance, a supplier delivers different and successive loads of material used to build a project. Each load is purchased through an individual contract and all of them include an arbitration agreement selecting multi-party proceedings. By chance, one contract did not express consent to multi-party arbitration. However, the materials delivered by this very contract may be responsible for the defect which originated the dispute between employer and contractor. The contracts had the same context and were driven to the same purpose; hence, based on the common practice among the parties, it might be assumed implied consent to arbitrate in multi-party proceedings. “If the parties’ prior practice leads to the presumption that they implicitly agreed that the latest

42 J. Hosking. *Non-Signatories and International Arbitration in the United States: the Quest for Consent*. Kluwer Arbitration, accessed on 13/03/2012. <http://www.kluwerarbitration.com/document.aspx?id=ipn25797>

⁴³ *American Bureau of Shipping v. Tencara Shipyard, SPA*, 170 F.3d 349 (2d Cir. 1999).

⁴⁴ *Int'l Paper Co. v. Schwabedissen Maschinen and Anlagen GmbH*, 206 F.3d 411 (4th Cir. 2000)

contract was to contain an arbitration clause, then disputes arising from that contract can also be submitted to arbitration”.⁴⁵ The case-law has led to the same interpretation.⁴⁶

An American court went further to decide that the intention for consolidating proceedings is implied when the contract (arbitration agreement) is silent on the topic, and other contractual provisions and structures of the commercial relation demonstrate that consolidation would be beneficial for the final result.⁴⁷ Similarly, a national court from the same country determined:

“No power... to order consolidation if the parties’ contract does not authorize it... but in deciding whether the contract does authorize it the court may resort to the usual methods of contract interpretation”.⁴⁸

According to the discussed above, in order to determine the existence of implied consent to arbitrate in multi-party proceedings, it is necessary to analyze all the facts surrounding the legal relation. As an award stated, “The question of whether persons not named in an agreement can take advantage of an arbitration clause incorporated therein is a matter which must be decided on a case-by-case basis, requiring a close analyzes of the circumstances in which the agreement was made, the corporate and practical relationship existing on one side and known to those on the other side of the bargain, the actual or presumed intention of the parties as regards rights of the non-signatories to participate in the arbitration agreement, and the extent to which and the circumstances under which non-signatories subsequently became involved in the performance of the agreement and in the dispute arising from it”.⁴⁹

Another characteristic pointing to implied consent is the existence of matching arbitration agreements in several contracts. A scholar reasoned, “... it is generally legitimate to presume

⁴⁵P. Fouchard, E. Gaillard. *Fouchard Gaillard Goldman on International Commercial Arbitration*. Vol. I. Kluwer International Law, (1999).

⁴⁶ ICC case no. 5117, 113 J. Droit Int'l (Clunet) 1113 (1986).

⁴⁷*Maxum Found., Inc. V. Salus Corp.*, 817 F.2d 1086, 1087 (4th Cir. 1987); *Gavlik Constr. Co. V. H.F. Campbell Co.* 526 F.2d 777, 778-79 (3d Cir. 1975).

⁴⁸*Connecticut Gen. Life Ins. Co. V. Sun Life Assur. Co. Of Canada*, 210 F.3d 771 (7th Cir. 2000).

⁴⁹ Interim award in ICC case No. 9517, B. Hanotiau. *Complex Arbitrations: multiparty, multicontract, multi-issue and class action*. Kluwer International Law, (2006).

that by including identical arbitration clauses in the various related contracts, the parties intended to submit the entire operation to a single arbitral tribunal.”⁵⁰

Therefore, identical terms may impliedly direct to the parties’ intention to solve their dispute in the same form, and the global picture in complex commercial relationship may suggest advantages in conducting multi-party proceedings. “Although the issue is complex, the better view in these circumstances is that agreement to substantially similar dispute resolution provisions (meaning the same institutional rules, arbitral seat, substantive law and number of arbitrators) implies acceptance of a consolidated arbitration with joinder and intervention rights as among parties to the relevant arbitration agreements”⁵¹.

In a construction project, the employer entered into two different contracts with two unrelated contractors. One of the instruments contained a provision denying contractual relationship between the contractors. Further, each contract had independent arbitration agreements, though both with similar terms. The national court considered the claims were “intimately founded in and intertwined with the underlying contracts” and compelled the parties to multi-party proceedings.⁵²

As a contrast, the same foundation applies to determine implied consent to do not arbitrate in multi-party proceedings. If contracts related to the same project provide for incompatible arbitration agreements (*e.g.*, different applicable laws and seats) it is assumed intention to have bi-party proceedings between the contracting parties. “By contrast, the presence of consent to multi-party arbitration may be excluded from the outset when contracts such as employer/main contractor and contractors/sub-contractor contracts contain differing arbitration clauses referring to different rules of arbitration or arbitral institutions”.⁵³

The arbitral tribunal shall be convinced of the implied consent. Notwithstanding, multi-party proceedings shall be ordered only if intended to bring tangible benefits to the parties

⁵⁰ P. Fouchard, E. Gaillard. *Fouchard Gaillard Goldman on International Commercial Arbitration*. Vol. I. Wolter Kluwer.

⁵¹ G. B. Born. *International Commercial Arbitration*. Wolters Kluwer, vol II, (2009).

⁵² *McBro Planning and Development Co. v. Triangle Electronic Construction Co., Inc.*, 741 F.2d 342 (11th Cir. 1984)

⁵³ F. Nicklisch, *Multi-party Arbitration and Dispute Resolution in Major Industrial Projects* [1994] volume 11 issue 4, Kluwer Arbitration, accessed on 03/03/2012 <http://www.kluwerarbitration.com/document.aspx?id=IPN8250>, 06/07/2011.

themselves. As stated, “A necessary condition for this result is that the issues of fact and law in the various proceedings are the same. Only if the factual circumstances, contractual provisions and applicable law are identical does the aim of avoiding inconsistent findings make any sense”.⁵⁴ Otherwise, it is advisable do not order multi-party proceedings, as discussed further.

d) Compulsory multi-party proceedings.

As discussed above, consent, express or implied, is a requisite to multi-party arbitral proceedings. It has been reasoned “There are, however, some problems with compulsory joinder and consolidation in arbitral proceedings. The main argument against them is that arbitration rests on consensus. This means that in the absence of specific provisions – or case law – in the *lex arbitri* the parties must have agreed on joinder or consolidation”.⁵⁵

Following the same rationale, “... in all cases the inquiry is whether particular facts satisfy particular legal standards for either establishing consent to an arbitration agreement or a non-consensual basis for binding an entity to the agreement”.⁵⁶

Nevertheless, in few limited occasions, it might be possible for a tribunal to hold multi-party proceedings even if non-existent consent of all parties. The particular situation may be possible depending on the applicable laws, *e.g.*, Dutch law, Hong Kong law, New Zealand law provide for national court volition to unify proceedings under certain circumstances.

As explained, “As to consolidation arbitrations, some jurisdictions have enacted legislation providing for the possibility of court consolidation. Thus the courts of Massachusetts, New York, California and the Netherlands all have the power to consolidate arbitral proceedings

⁵⁴ F. Nicklisch, *Multi-party Arbitration and Dispute Resolution in Major Industrial Projects* [1994] volume 11 issue 4, Kluwer Arbitration, accessed on 03/03/2012 <http://www.kluwerarbitration.com/document.aspx?id=IPN8250>, 06/07/2011.

⁵⁵ M. Platte. When should an arbitrator join cases? Kluwer Arbitration, accessed on 15/03/2012, <http://www.kluwerarbitration.com/document.aspx?id=IPN24214>, 28/07/11.

⁵⁶ G. B. Born. *International Commercial Arbitration*. Wolters Kluwer, vol I, (2009).

where common questions of law or fact are involved”. ... “But court-ordered consolidation arbitration remains the exception rather than the rule”.⁵⁷

Differently, the drafters of the English Arbitration Act 1996 carefully studied the possibility of including a provision in the legislation enabling a national court and arbitral tribunal to determine consolidation.⁵⁸ Though, in the end, the determination was considered incompatible with the principle of party autonomy. For that reason, multi-party proceedings kept consent as a prerequisite.

Special attention has to be paid in the particular situation, and leading practitioners warned, “In summary, whilst there was considerable support for it in the 1980s, compulsory consolidation now recognized as being likely to create more problems than it solves, particularly at the enforcement stage”.⁵⁹

Even if the applicable law allows court ordered unification of proceedings, the arbitration agreements have to be scrutinized. As scholars have explained, “A true pro-arbitration policy is properly limited in scope and does not attempt to impose private proceedings on or against those who cannot be said to have agreed to that method of dispute resolution”.⁶⁰

2. Forms of bringing disputes together.

There are four ways of implementing multi-party arbitration, *i.e.*, joinder, intervention, third-party respondent’s claim and consolidation. The former three result in bringing a third party

⁵⁷ J. Paulsson, Rawding. *Freshfields Guide to Arbitration Clauses in International Contracts*, page 97, (2010).

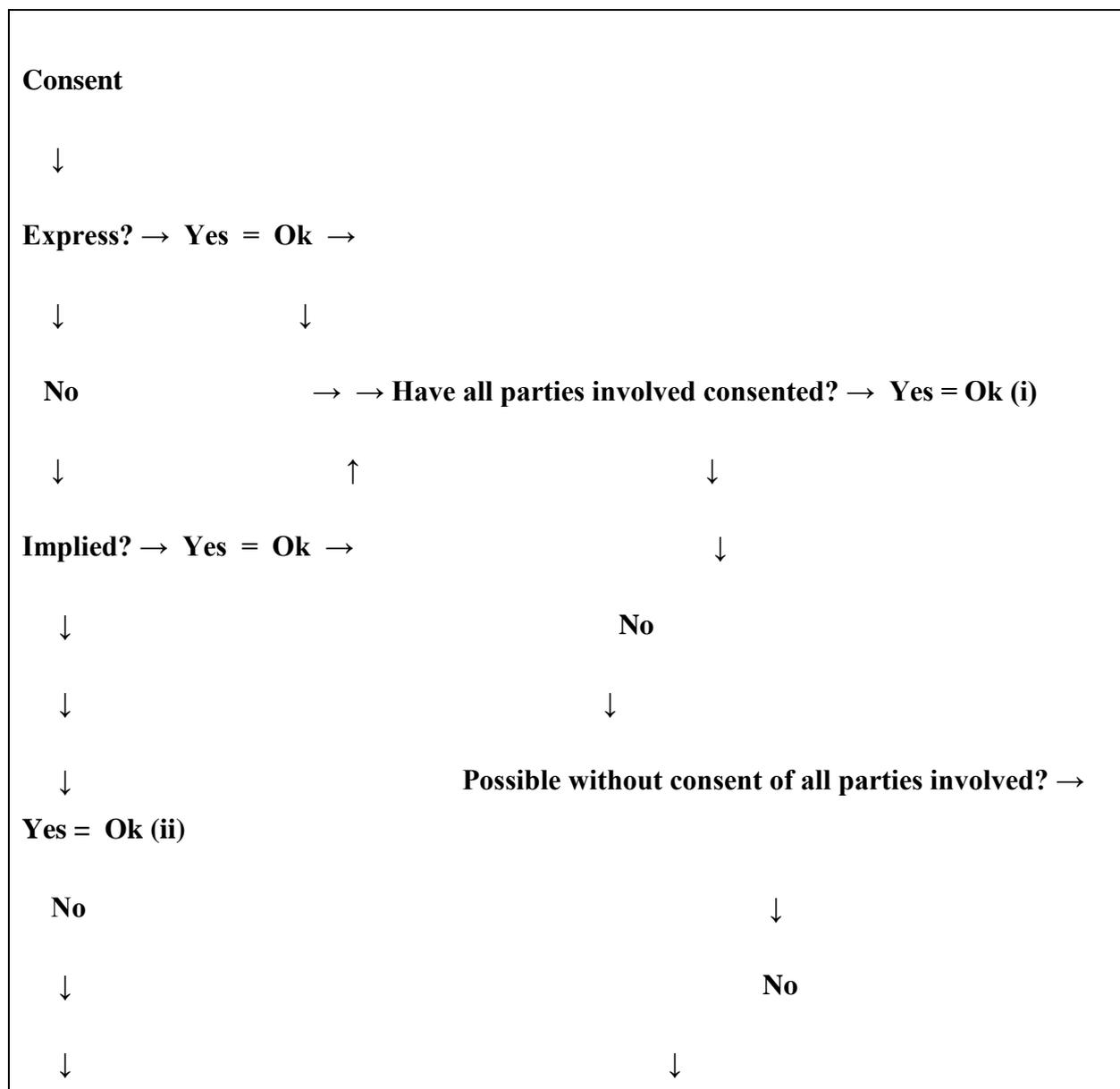
⁵⁸ Report on the Arbitration Bill by the Departmental Advisory Committee on Arbitration Law, February 1996. “In our view it would amount to a negotiation to the principle of party autonomy to give the tribunal or the Court power to order consolidation or concurrent hearings. Indeed it would to our minds go far towards frustrating the agreement of the parties to have their own tribunal for their own disputes. Further difficulties could well arise, such as the disclosure of documents from one arbitration to the other. Accordingly we would be opposed to giving the tribunal or the Court this power. However, if the parties agree to invest with such power, then we would have no objection”.

⁵⁹ J. Paulsson, Rawding. *Freshfields Guide to Arbitration Clauses in International Contracts*, Wolters Kluwer, page 98, (2010).

⁶⁰ S.I Strong, D. Phil. *Non-signatories Right to Appeal the Denial of a Stay of Litigation*. *Journal of International Arbitration*, Volume 28, issue 1 (2011).

into initiated proceedings, while the latter results in unifying different proceedings before the same tribunal.

Independent of the form used to constitute multi-party proceedings, determination by the tribunal requires a case-by-case examination. A tribunal facing a decision may make its decision based in some guide-steps before granting it. The following framework may be helpful:



↓	Multi-party-proceedings shall not be ordered.
	Multi-party proceedings shall not be ordered.
	(i) <i>e.g.</i> joinder and intervention under Belgium Law; consolidation under English arbitration act.
	(ii) <i>e.g.</i> consolidation under ICC rules and under Dutch law.

a) **Joinder**

Joinder allows a party to the arbitration agreement to bring a third party into the proceedings. The party joining can be inserted either as a claimant or a defendant. “Joinder refers to the request of an existing party to the arbitration to add another party, not originally named as such, as a party in the arbitration”.⁶¹

b) **Intervention**

Intervention, similarly to joinder, means a third party becoming a party in the proceedings, though the request is made by the third party itself. Thus, the party initially not included notifies the arbitral tribunal in order to be integrated into the proceedings. It also allows being claimant or defendant. “Intervention of a third party, where a third party applies to the tribunal requesting to participate in the pending proceedings between the original parties to the arbitration proceedings”.⁶²

c) **Consolidation**

⁶¹G. B. Born. *International Commercial Arbitration*. Wolters Kluwer, vol II, (2009).

⁶²S. Brekoulakis. *Third Parties in International Commercial Arbitration*. Oxford, 1st ed., (2010).

The third option is Consolidation, which means merging two or more arbitral proceedings. Obviously, the proceedings have to be interconnected or share common characteristics. If determined, the proceedings are held before the same tribunal, which renders an award, final and binding to all the parties involved, and resolves all the issues aroused from the contracts concerned.

This can be effective for different parties discussing diverse contracts pointing to the same purpose or to the same parties questioning different contracts somehow interconnected. “Consolidation refers to the joining of two separate or potentially separate arbitrations, possibly with different arbitrators, into a single arbitration, where a single tribunal will render an award binding with regard to all of the claims that would have been included in the separate arbitrations”.⁶³ In addition, “The difference between this sort of situation and multi-sided cases is that in this case there are two or more arbitrations, not just one, and that the parties are the same in each proceeding, so there is no issue of having to include a new party to the arbitration”.⁶⁴

When Consolidation is formed, the hearings, evidence and procedural steps may be held at the same time, representing an economy of cost and time. Considering the issues will be solved by the same tribunal, the risk of conflicting decisions is avoided.

d) Third-party respondent’s claims.

The fourth option is identified by few scholars and results in multi-party proceedings in which one party is nominated as defendant regarding one contractual relationship, but, simultaneously, is the claimant in another contractual relationship. For instance, the subcontractor would be liable to the contractor, and this, in turn, would be liable to the employer. “Where the respondent in arbitration proceedings, acting as claimant, files a claim against a third party which may be liable to the initial respondent for all or part of the claim against it”.⁶⁵

⁶³G. B. Born. *International Commercial Arbitration*. Wolters Kluwer, vol II, (2009).

⁶⁴M. McIlwrath, J. Savage. *McIlwrath and Savage in International Arbitration and Mediation: A Practical Guide*, at page 73, Kluwer Law International (2010).

⁶⁵S. Brekoulakis. *Third Parties in International Commercial Arbitration*. Oxford, 1st ed, (2010).

This situation might add complexity to procedural conduct, especially to the party which potentially faces the challenge of presenting the case in two different fronts, as a claimant and as a defendant. Nonetheless, this may be advisable for the sake of compatibility between decisions.

3. **Legal Instruments.**

Effective and valid multi-party proceedings have to be held in accordance with parties' consent and factual background involved in the case. In addition, to properly conduct such proceedings the tribunal shall not deviate from the applicable law and rules.

a) **Conventions.**

The New York Convention, European Convention and Inter-American Convention do not address multi-party proceedings. Nevertheless, the fact that the conventions do not deal with the issue directly does not avert multi-party arbitral proceedings.

In-fact, the New York Convention shall be read in a positive way. For that reason, if the arbitration agreement expresses parties' intention to hold multi-party proceedings, in accordance with art. II (1) and (3) of the Convention, the agreement's terms shall be strictly respected by its signatories States. Therefore, one of the Convention's purposes is to guarantee the parties' right to arbitrate in consonance with the arbitration agreement, *i.e.*, according to their will.

b) **National Laws.**

Many national laws do not address the topic directly either. “In general, most arbitrations laws and institutional rules have opted against making explicit provision for third-party joinder or intervention, and grant no specific powers to the tribunal in that regard”.⁶⁶

Multi-party proceedings are not addressed under the UNCITRAL Model Law, Swiss, Italian and Japanese arbitration laws.

Nevertheless, art.8 of UNCITRAL Model Law emphasizes the arbitration agreement’s strength, to the extent that what was agreed by the parties (multi-party proceedings) shall be enforced. As reasoned by scholars, “In the absence of specific statutory provisions, however, the topics of consolidation and joinder/intervention should generally be subject to the Model Law’s basic requirement that arbitration agreements to be recognized and enforced in accordance with the parties’ intention”.⁶⁷ Therefore, the same interpretation given to the New York Convention shall be given to arbitration agreements governed by the laws listed in the previous paragraph.

However, to make the assertion above applicable, either the arbitration agreement has to express consent or the facts have to point to implied consent. If negative, there is no authority to order multi-party proceedings, as determined by a national court “A court is not permitted to interfere with private arbitration agreements in order to impose its own view of speed and economy. ... if the contracting parties wish to have all disputes that arise from the same factual situation, they can simply provide for in the arbitration clauses to which they are party”.⁶⁸

U.S. Federal Arbitration Act - FAA.

The American arbitration act does not regulate multi-party proceedings directly. Nonetheless, the US is considered as having an expansive approach to third parties in arbitration and consolidation of proceedings.

⁶⁶A. Redfern, M. Hunter. *Redfern and Hunter on International Arbitration*. Oxford University Press, 5th edn, (2009).

⁶⁷G. B. Born. *International Commercial Arbitration*. Wolters Kluwer, vol II, (2009).

⁶⁸ *The Government of the United Kingdom of Great Britain v. The Boeing Company*, 998 F.2d 68 (2d Cir. 1993).

One of the cases which set the trend refers to a party filling a motion to force consolidation before a national court, despite the fact the parties had not provided for consolidation in their arbitration agreement. The national court understood it had power to determine the matter and reasoned, “The principal reason is the possible prejudice from inconsistent rulings if the illegality question is arbitrated by two panels. The court has broad authority to deal with the question of consolidation and can fashion an arbitral panel as necessary to effect the remedy even though such a consolidated panel is not provided for in the original charter parties”.⁶⁹

National courts have followed the same pro multi-party proceedings view when tested during enforcement proceedings. In a specific case, a party resisted enforcement on the grounds, *inter alia*, that the tribunal had ordered consolidation in a contractual relationship in which the arbitration agreements did not expressly allowed it. The national court aligned with the tribunal’s decision and based its decision based on the facts (i) the parties signed the contracts on the same day; (ii) there was connection between the claims in both proceedings; (iii) distinct proceedings would have meant substantial duplication of evidence. The final reasoning stated, “The contracts’ nature is such that the parties contemplated arbitration in single proceedings”.⁷⁰

Lastly, a recent and particular decision has been rendered by the US Supreme Court and stretched even more the approach to non-signatories parties. According to the decision’s rationale,⁷¹ any party, even one which is not a signatory of the arbitration agreement, can request a stay of litigation when there is ongoing arbitration proceedings. This may result in third parties appealing from the denial of a stay of litigation despite the fact the signatories of the arbitration agreement do not intend that motion. This decision, which may influence international proceedings as well, bends principles of arbitration law and its use for tactic reasons in complex legal relationships is yet to be seen.

English Arbitration Act.

⁶⁹ US Court of Appeals (Second Circuit), Sanders (ed) in Yearbook Commercial Arbitration 1983 - Volume VIII (1983).

⁷⁰ US District Court, Southern District of Texas, Houston Division, Civil Action No. H 01-0634, van den Berg (ed) in Yearbook Commercial Arbitration 2002 - Volume XXVII (2002).

⁷¹ *Arthur Andersen L.L.P. v. Carlisle*, US Supreme Court (2011).

The English act provides that the parties are free to agree on consolidation of proceedings or on concurrent hearings.⁷² As a downside, the legislation does not deal with joinder or intervention directly, having only addressed the appointment of arbitrators when there are more than two parties involved in the proceedings.

Nevertheless, the determination of joinder may be applied by tribunals, as seen in a particular case. The facts involved a construction agreement in which the arbitration agreement provided for arbitration governed by the English Arbitration Act (seat in London) and administered by the LCIA under the UNCITRAL rules. The contractor filed the request for arbitration against (only) the owner of the project. The latter requested to join a third party affiliate which was also a signatory of the contract. The contractor (claimant) opposed the request, though the tribunal determined the joinder.

It is worth-noticing that UNCITRAL rules, differently from art. 22.1 (h) of LCIA rules, does not allow joinder based solely on the assent of the requesting party and the third party. Also, the English Arbitration Act provides only for consolidation and not joinder. Notwithstanding, consolidation, even if it if it was the case, would only be possible if the (all) parties had agreed to grant the power of ordering consolidation to the tribunal.

These characteristics did not prevent the tribunal from understanding that joinder was possible and, according to a scholar involved in the case, the outcome was, “The tribunal relied on the judgment of *Rix Jin Charles M Willie & Co (Shipping) Ltd v. Ocean Laser Shipping Ltd and others (The ‘Smaro’*) ([1999], *Lloyds Rep.* 1, 225–248), ... and emphasised the considerable cost and delay that would result should the third party be required to commence a separate arbitration. It permitted the third party to be joined, and the claimant did not challenge the Partial Award”.⁷³

Dutch Law.

⁷² English Arbitration Act 1996. Section 35 (2). Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.

⁷³ M. Mellwrath, J. Savage. *Mellwrath and Savage in International Arbitration and Mediation: A Practical Guide*, page 322 (2010).

Netherlands has a particular position favoring consolidation.⁷⁴ This expresses that, in the event of two or more arbitrations commenced in Netherlands, with related subject matters, any party involved may request consolidation. The two requisites to render the position applicable are (i) proceedings held in Netherlands and (ii) parties had not agreed against consolidation in the arbitration agreement.

Moreover, the decision shall be rendered by the President of the District Court in Amsterdam and not by the tribunal itself. This, arguably, may render the principle of competence-competence not absolute. Even though the President shall listen to the arbitrators before deciding, the final decision is on his own volition, thus, it constitutes a national court's decision. Additionally, if the parties do not agree on the selection of procedural rules and appointment of arbitrators, the President shall do it.

Therefore, even if there was no consent to consolidation while drafting the arbitration agreement, the request after disputes have aroused is legitimate. Further, consolidation may be granted even if some of the parties oppose the request.

Apparently, the points raised supra fall under the discretion of the President, who simply has to listen to the parties before determining consolidation, though is not bound by their positions. Consequently, the Dutch legislation has legitimized compulsory consolidation.

Hong Kong Law.

The recent Honk Kong law, in its schedule 2 (2) (d), follows the same path established by the Dutch law. In accordance with the aforementioned provision, national courts may determine consolidation if there are common questions of law or facts between the proceedings or if the relief claimed arises out of the same transaction or series of transactions. Curiously, letter (c) of the same article amplifies court's discretion and states the possibility of ordering when "some other reason it is desirable". The language chosen by the provision enables the court to have full discretion to order consolidation whenever feels necessary.

⁷⁴ Art. 1046 of the Netherlands Code of Civil Procedure.

After determining consolidation, the national court also has power to direct the payment of the cost in the proceedings. Also, if the parties do not agree, the national court will have subsequent power to appoint the arbitrator(s).

Similarly to Netherlands, the national legislation has provided for consolidation even if not agreed in the arbitration agreement.

New Zealand law.

In accordance with schedule 2 (2) (1), in situations in which all the proceedings have the same tribunal, a party may request consolidation to the tribunal. If the tribunal refuses to order consolidation, a party is entitled to repeat the request to the High Court.

With regards to situations in which the proceedings do not have the same tribunal, schedule 2 (2) (2) states that any tribunal, on the request of any party, may order consolidation on the terms it considers appropriate. After ordering consolidation, if the tribunal for other proceedings refuses to comply with the order, any party may repeat the order to the High Court.

The constitution of the tribunal competent to decide the consolidated proceedings shall be agreed by the parties. If the parties do not agree, the High Court may appoint the tribunal. The decisions related to matters of consolidation rendered by the High Court are not subject to appeal. Lastly, the consolidation provisions apply automatically to all national arbitrations, and to international arbitrations if the parties agree so.

New Zealand law aligns itself with Dutch and Hong Kong law. The national court has wide discretion, being legitimate to order consolidation when considers it is desirable and without the consent of all the parties involved.

Belgium law.

Belgium is recognized for being in the arbitration-related vanguard. This statement is supported by its multi-party proceedings provisions. Though, it is worth-noticing that

consolidation is not addressed by the Belgian Judicial Code,⁷⁵ which deals only with intervention and joinder.

With regards to intervention (party asking to join the proceedings), the third party may request it directly to the tribunal. Likewise, joinder follows the same procedure, a party to the proceedings may request the tribunal to join a third party. Nonetheless, the provision states the need for an arbitration agreement between the signatory parties and the third party, which means a pre-existing consent previous to the request presented to the tribunal.

Finally, despite the intention of all the parties involved, the tribunal has full discretion whether to allow or not the intervention/joinder. In case of refusal, this would not be in conflict with the arbitration agreement's terms, but represent a conclusion by the tribunal that the joinder or intervention would not be beneficial or compatible with the proceedings held, *e.g.*, hearings already took place and the joining a party would put in unfair opportunity to present its case.

French Law.

The new French arbitration law address does not directly address joinder, intervention or consolidation. The law only deals with appointment of arbitrators in proceedings involving more than two parties, as discussed *infra*. Nevertheless, France is one of the most pro-arbitration countries in the world and its abundant case law has assured the possibility of holding multi-party proceedings according to the parties' intent and circumstances surrounding the case.

Brazilian Law.

The Brazilian arbitration law, enacted in the year 1996 and inspired in the French law, does not address the topic. Though, art. 5 specifies that by selecting institutional rules in the arbitration agreement, the proceedings shall be conducted in accordance with those rules. The

⁷⁵Art. 1696 bis. 1. Any interested third party may request the arbitral tribunal authorization in order to intervene in the proceedings. This request is addressed in writing to the arbitral tribunal, which shall communicate it to the parties. 2. A party may call upon a third party in order to intervene. 3. In any event, in order to be admitted, the intervention requires an arbitration agreement between the third party and the parties involved in the arbitration. Moreover, it is conditional on the assent of the arbitral tribunal, which decides unanimously.

better interpretation is for the parties' freedom to contract multi-party proceedings, either by including express provision in the arbitration agreement or by selecting institutional rules which provide for it.

Portuguese Law.

The recent Portuguese arbitration law, in force on 14 March 2012, expressly addresses multi-party arbitration. With regards to intervention, the legislation chose a conservative approach in its art. 36 (1), which states that only third parties bound to the arbitration agreement in which the proceedings are based may intervene. Deviating from most national laws, this excludes the possibility of joinder and states that the request for intervention is conditional to the acceptance of all parties involved.

The tribunal shall render the decision after listening to the parties to the arbitration agreement and the third party requesting intervention. Also, intervention requested before the constitution of the tribunal is only allowed in institutional arbitrations (excluded *ad hoc*), and if the selected rules guarantee equality to the parties, *e.g.*, appointment of arbitrators.

Finally, art. 36 (7) states that the arbitration agreement may regulate intervention differently from how provided in the law, if respected the principle of parties' equality. This is in consonance with the principle of party autonomy and duty to strictly enforce the arbitration agreement's terms, in accordance with the New York Convention.

c) Institutional Rules.

Some relevant institutional rules are silent regarding joinder, intervention and consolidation, including ICDR, AAA, and VIAC rules. UNCITRAL arbitration rules address only the appointment of arbitrators in multi-party proceedings. On the other hand, considering there is no provision opposing multi-party proceedings, the parties are free to agree on it in the arbitration agreement or mold it while drafting the initial procedure's guidelines.

Nonetheless, the selection of the institutional rules may play a decisive role, as highlighted by practitioners, "The arbitral rules of various professional associations also provide similar mechanisms. Industry arbitration rules tend to be less cautious and sometimes provide for

consolidation at the insistence of the institution. The US National Association of Securities Dealers, for example, and commodity associations, such as GAFTA (the Grain and Feed Trade Association), often provide for a single arbitration between the first and last parties to string a contractual arrangements, with the resulting award binding on every contracting party”.⁷⁶

International Chamber of Commerce - ICC rules.

The recently revised ICC’s arbitration rules, in force on 1st January 2012, included entirely new provisions addressing multi-party proceedings. In 2009, one third of the ICC cases involved more than two parties, 88% of those cases involved from three to five parties and 12% of those cases six or more parties. The situation brought awareness on how international commercial relationships have become more complex and the institution attempted to provide the more comprehensive framework to deal with the issue.

The first innovation is the provision for joinder of additional parties, stated in art. 7. This determines that any party may join an additional party, though the request for arbitration shall be submitted before the appointment or confirmation of any arbitrator.

The provision impacts in a practical way by a number of reasons. Firstly, any party is entitled to request the joinder of an additional party, no matter if claimant or defendant. In comparison with the previous rules, the parties to the proceedings were the ones named by the claimant in the request for arbitration, hence, the defendant did not have the prerogative include parties into the proceedings.

Secondly, the interpretation of the provision’s text points to the possibility of the third party, which joined the arbitration, being legitimate to request the joinder of a subsequent additional party as well.

Thirdly, the provision states that if a request for joinder is made after the appointment or confirmation of any arbitration, all the parties have to agree with the joinder. As a result, the

⁷⁶ *PLC Arbitration*, based on an original by James Rogers, Herbert Smith, accessed on 10/03/2012 at: <http://www.practicallaw.com/2-380-9347?q=multi-party+arbitration>

language used in art. 7 (1) impliedly discard the need of all the parties to the arbitration agreement agreeing on the joinder, if requested before appointing arbitrators.

ICC, arguably, left room for joinder of a third party even if a party initially named in the proceedings and/or the party to be included opposes the request. In accordance with the new rules, if the ICC court is *prima facie* satisfied with the parties being bound to the arbitration agreement, the proceedings shall proceed. In a subsequent stage, any question of jurisdiction and whether the claims can be decided in multi-party proceedings, will eventually be determined by the tribunal itself. This result in the ICC court and tribunal having full discretion to determine the joinder of a third party without the consent of any other party being required.

Further, art. 8 of the ICC rules clearly state that claims may be made by any party against any other party. This enables the situation of third-party respondent's claims (mentioned supra), in which respondent in the proceedings may join a third party, and simultaneously be a claimant, in the same proceedings, towards a third party which has been included.

Following, the rules innovates by providing in art. 9 for the possibility of resolving disputes originated from multiple contracts in a sole arbitration. Different from multiple contracts which refer to an umbrella arbitration agreement (as discussed supra), the provision allows single proceedings irrespective of whether the claims were originated from more than one arbitration agreement. The only requisite is that the arbitration agreements shall fall under the ICC rules.

Consolidation had been addressed in the previous ICC rules, nonetheless, the current rules has broaden its scope. The first important characteristic expressed in art. 10 is the competence of the ICC court itself to order consolidation, instead of the tribunal. In addition, if authorized, proceedings shall be consolidated into the arbitration that commenced first, unless agreed otherwise by all parties. The provision was designed to avoid two or more constituted tribunals declaring themselves with jurisdiction and not willing to decline their competence to resolve the dispute.

Also, ICC court may determine consolidation if all the parties assented to consolidation. If there is refusal, the ICC court may still determine if the claims are made under the same arbitration agreement. If negative, the ICC court may still order if the claims originated from more than one arbitration agreement, as long as involving the same parties, the disputes arouse in connection with the same legal relationship and the arbitration agreements are compatible.

Despite standing at the vanguard, ICC decided to not address intervention. As a result, including a third party in the arbitration may be possible only after a request made by a party in the proceedings.

London Court of International Arbitration - LCIA rules.

LCIA stands as one of the most relevant arbitration institutions in the world. Diverging from the ICC, LCIA provides options for joinder and intervention, though not for consolidation.

Article 22 (1) (h) provides an application for joinder shall be made by a party and, upon consent in writing of this party and the third party, the tribunal may determine the joinder. The rules do not require assent of all the parties, but differently from the ICC rules, which does not require consent of the party to be joined, LCIA does. With regards to the provision, it was commented, “Nonetheless, even in such arbitral rules, the third party must agree to be joined. As a creature of contract, the arbitral tribunal cannot force an unwilling third party to be part of the arbitral process. This is, of course, unlike the case in litigation proceedings”.⁷⁷

LCIA rules, diverging from the recent ICC rules, does not provide any guidance on how the third party will procedurally be joined nor on how this should conduct the proceedings. This situation demands more diligence from the appointed arbitrators.

Swiss Chamber’s Court of Arbitration and Mediation rules.

The rules for international arbitration provide for joinder, intervention and consolidation in its art. 4. If a request for arbitration is filed against a party already involved in proceedings

⁷⁷ R. C. Mohan, L. Wee Teck. Some contractual approaches to the problem of inconsistent awards in multi-party, multi-contract arbitration proceedings. *Kluwer Arbitration*, accessed on 28/07/2011, <http://www.kluwerarbitration.com/search.aspx>, 28/07/11.

governed by the Swiss rules, the new case may be referred to the tribunal already constituted for consolidation. The decision will be rendered by the institution, after consulting the parties and a special committee formed to render an opinion about whether possible or not to hold consolidated proceedings. Similarly to the Dutch substantive law and ICC rules the principle of tribunal's competence-competence is relegated in favor of a decision rendered by the institution itself.

Worth-noticing that consolidation of proceedings under Swiss rules may be ordered in cases where parties are not identical among the proceedings. The criteria of which the institution will base its decision are the links among the cases and the progress already reached on the on-going proceedings. The latter clearly concerns to a fair opportunity to the parties to present their case, *e.g.*, evidence already produced in the original proceedings may render consolidation impractical.

With regards to requests for joinder or intervention, the tribunal will decide whether is possible or not only after consulting all the parties involved. As a result, consent is a prerequisite.

Netherlands Arbitration Institute – NAI rules.

The institution regulates joinder and intervention in its art. 41. Any party may request to bring a party to, or to be brought to, the proceedings. Nonetheless, consent of all parties involved is a required and shall be expressed in a written agreement.

Brasil-Canada Chamber of Commerce – CAM/CCBC rules.

One of the most expressive institutions in Latin America has revised its rules, in force on 1st January 2012, in order to address the issue of consolidation. Issues of joinder and intervention were still left out of the set of rules.

Unifying proceedings, in accordance with art. 4.20, is possible in two situations (i) requests for arbitration have the same subject matter or the claims correspond to proceedings already commenced before the CAM/CCBC; and, (ii) the parties are the same and there are interconnected claims. Therefore, the rules address situation in which two or more proceedings are brought before the same tribunal, *i.e.*, consolidation.

With regards to the provision above (i) the parties shall request for consolidation, and tribunal's *ex officio* orders are not permitted; (ii) the president of CAM/CCBC, and not the tribunal itself, will decide upon the request; and, (iii) the president shall decide before the signature of the term of reference, hence, there is a time restriction to consolidate proceedings.

4. **Contractual Relationships.**

The first step to be taken by a tribunal which faces a request for multi-party proceedings is to identify the contractual scenario and factual background. The legitimacy for multi-party proceedings may originate from different frameworks, as quoted, “Where there is a multi-party arbitration, it may be because there are several parties to one contract; or it may be because there are several contracts with different parties that have a bearing on the matters in dispute. It is helpful to distinguish between the two”.⁷⁸

In complex legal relationships there may be various contracts formed among different parties, in which they all play a role towards the same outcome. An award rendered in arbitration originated from one contractual relationship may reverberate in the performance and interests of the parties to the remaining contracts.

In addition, back-to-back contracts commonly raise questions on the validity of multi-party proceedings. Back-to-back contractual practice is usually adopted in construction projects and is basically drawn as (i) an employer enters into a construction agreement with the contractor; (ii) subsequently, the contractor, in turn, enters into a second agreement with a subcontractor; (iii) the second agreement simply states that all provisions and terms of the main contract shall be kept, though the contractor takes the place of the employer and the subcontractor takes the place of the contractor. Case law has affirmed that subcontractor was not bound to the arbitration agreement due to the fact this did not have power to bargain the first contract. The decisions also ruled that back-to-back contracts have to state an express arbitration clause in order to bind the all parties involved in the construction project, thus, general reference to

⁷⁸A. Redfern, M. Hunter. *Redfern and Hunter on International Arbitration*. Oxford University Press, 5th edn (2009).

terms of a particular contract does not suffice the requites to arbitrate in multi-party proceedings.⁷⁹

Divergent interpretation may also arise when the third party acts as a guarantor. In a specific case, the construction agreement included a wide arbitration clause providing that disputes arising out of or relating to the agreement would be resolved by arbitration. The work performance by the contractor was guaranteed by a bank, which was not a signatory of the construction contract containing the arbitration agreement. Nevertheless, the court decided that the bank was bound by the arbitration agreement.⁸⁰

Similar position was rendered in insurance legal relationships. The order to bind a third party to the arbitration proceedings was based on the fact that an insurance policy itself was subject to the facultative reinsurance agreement. This, in turn, provided for arbitration, situation which reflected the standard commercial usage. Even though the insurance policy did not provide for arbitration, by the fact the reinsurance policy did, the parties involved in the contractual chain were bound to arbitrate.⁸¹

In another insurance dispute, the decision was based in practical considerations such as probability of contradicting decisions. Though, the primarily reasoning was based on the fact the contractual relationships did not forbid, and impliedly permitted several retrocessionaries to arbitrate in single proceedings. The national court ordered seven retrocedents and three retrocessionaires which had insured the same coverage to resolve the common dispute in one arbitration.⁸²

Considering the above, understanding the drafting history and bearing in mind that multiple agreements may form a single contractual relationship is the cornerstone to order multi-party proceedings.

5. Procedural Characteristics.

⁷⁹ *Roche Products Ltd v. Freeman Process Systems Ltd* (1996) [80 BLR 110]; *Cegelec Projects Ltd v. Pirelli Construction Ltd* (1998) EWHC (TCC) 319.

⁸⁰ *Kvaerner v. Bank of Tokyo Mitsubishi*. 210nF. 3d 262 (4th Cir. 2000).

⁸¹ *Progressive Casualty Insurance Co. v. C.A. Reasuradora Nacional de Venezuela*, 991 F.2d 42 (2d Cir. 1993).

⁸² *Connecticut General Life Ins. Co. v. Sun Life Assur. Co. of Canada*, 210 F.3d 771 (7th Cir. 2000).

a) **Time.**

The moment to allow joinder, intervention or consolidation is crucial in order to guarantee proceedings properly conducted. A determination for multi-party proceedings shall be given only at an early stage of the proceedings. If determined after the tribunal was appointed, grounds for challenging the procedure are likely to arise, as stated, “Problems may arise in respect of joining a third party once the tribunal has been constituted, the need to ensure that all parties are treated equally and, if relevant, the procedure for participation in the appointment of the tribunal must be respected”.⁸³

A party which joins or intervenes shall have the principles of equality and fair opportunity to present its case assured. As aforementioned, if evidence have been produced by the parties initially named in the arbitration, bringing a third party would result in two inevitable situations, (i) need to repeat hearings, redo expert witnesses’ reports and regress to a initial procedural stage in order to guarantee fair opportunity to all parties to present their case; (ii) render an award which may face challenges. Further, depending on the applicable law and rules, a new tribunal would have to be constituted with the participation of the third party.

If procedural steps which had already been held have to be repeated, advantages of multi-party proceedings such as saving time and cost would not be applicable. Therefore, time is an imperative characteristic to whether carrying out or not multi-party proceedings.

6. Problems

a) **Appointment of Arbitrators.**

Appointing arbitrator is probably the main obstacle to multi-party proceedings. Basic principles as due process and equal treatment have to be assured to all parties and respected in all circumstances.

⁸³A. Redfern, M. Hunter. *Redfern and Hunter on International Arbitration*. Oxford University Press, 5th edn, (2009).

As a result, there shall be balance among the parties while constituting the tribunal. The parties shall have the right to equally influence the composition of the tribunal, which is a matter of public policy, “The principle of equality between the parties in the matter of nominating arbitrators has been described as a fundamental right of the parties involved in arbitration”.⁸⁴

The issue was firstly tested by the *Dutco* case. Disputes arose out of a consortium agreement and the claimant filed the request for arbitration before ICC against the two respondents. The claimant appointed the arbitrator and the two defendants had to jointly appoint one arbitrator. The respondents had divergent interests and made reservations towards the joint appointment.

The Paris Court of Appeals upheld the award but the *Cour de Cassation* annulled the award on the basis that one party (claimant) had more influence on the constitution of the tribunal, and ruled:

“The principle of equality of the parties in the designation of arbitrators is a matter of public policy; it can be waived only after the dispute has arisen”.⁸⁵

The issue brought awareness to the arbitration community and motivated amendments in institutional rules and national laws. The trend set by the *Ducto* case basically determines that parties on the same side, either claimant or defendant, shall agree on the arbitrator to be appointed. If agreement is not reached, none of the parties will appoint its arbitrators and each member of the tribunal will be appointed by a specific authority.

The ICC rules provides in art. 12 (8) that, in the absence of a joint nomination by claimants or defendants, the Court “may” appoint each member of the tribunal. The AAA rules follow identical position in art. 11 (c). LCIA and SCC rules follow very similar approach and state in art. 8 and art. 13 (4), respectively, that the Institution “shall” appoint the tribunal when facing the same scenario.

⁸⁴ F. Nicklisch, *Multi-party Arbitration and Dispute Resolution in Major Industrial Projects* [1994] volume 11 issue 4, Kluwer Arbitration, accessed on 03/03/2012 <http://www.kluwerarbitration.com/document.aspx?id=IPN8250>, 06/07/2011.

⁸⁵ *Siemens AG/BKMI Industrienlagen GmbH v Dutco Construction Company*, XVIII YBCA 140 (1993).

The WIPO rules, in its art. 18, provide for the most meticulous procedure to the appointment of arbitrators in multi-party proceedings. The institution follows the same rationale set by the *Ducto* case, though, provides for particular provision affirming that art. 18 apply irrespective of the arbitration agreement's terms with respect to the appointment procedure, unless the parties have opted out of art. 18.

Deviating from the common institutional approach, the Swiss Chamber's Arbitration Institution has adopted an unique approach. It states in art. 4 (1) that where the institution decides to refer a new proceedings to consolidation, the parties to the new case shall be deemed to have waived their right to appoint an arbitrator. This could raise a red flag due to the breach of balance and equality among the parties in the proceedings. Nevertheless, by selecting the institutional rules, it is assumed that parties were aware of the provision and waived their right to appoint an arbitrator in the specific situation. Thus, a party could not challenge the validity of a contractual provision of which has agreed.

With regards to national laws, art. 1453 of the recent French law determines that the institutional administering or, where there is no such, the national court shall appoint the tribunal. The Portuguese law, which is also recent, provides in art. 11 (2) for the possibility, opposed to obligation, of a national court appointing the tribunal.

This framework for appointment of arbitrators was designed to avoid grounds for challenging recognition and enforcement of the award. Inequalities among the parties may fall under art. V (1) (d) and art. V (2) (b) of the New York Convention and render the whole arbitration null and void. For that reason the current provisions to appointment of arbitrators aim to guarantee equivalent influence to all the parties involved in the proceedings.

b) Two Competent Tribunals.

A request for consolidation may raise conflict between two or more competent tribunals. If the tribunals have been constituted and are formed by different arbitrators, which one should decline jurisdiction in favor of the other tribunal?

The common sense approach may suggest consolidation towards the tribunal previously constituted. However, this approach demand acceptance by the member of the most recently constituted tribunal. If there is no acceptance, the positive conflict of competence has to be solved in accordance with the applicable provision.

With regards to procedural law, schedule 2 (2) (2) of the New Zealand arbitration act ascertains the point by giving competence to the High Court to decide when the tribunals do not agree. In respect to institutional rules, art. 10 of the ICC rules determine proceedings shall be consolidated into the arbitration that commenced first.

If the applicable law and rules do not provide for a solution, this may render consolidation impracticable, despite the fact of all the parties involved have agreed towards consolidation.

c) Loss of Confidentiality.

Confidentiality may be an issue in situations in which competitors render services in the same project and to the same contracting party. Before ordering multi-party proceedings, the tribunal has to be aware of the disputed subject matter.

If specific know-how, classified technology or privileged information of the market may be discussed during the proceedings, conducting multi-party proceedings may not be advisable. “Where the arbitration involves confidential information that may be relevant only to issues between some of the parties and not all, its disclosure to parties who would not otherwise have access to the information and to whom access it not strictly necessary, would pose problems”.⁸⁶ As a result, a case-by-case analyzes shall be applied by the tribunal.

7. Proceedings not in accordance with the arbitration agreement.

⁸⁶ R. C. Mohan, L. Wee Teck. Some contractual approaches to the problem of inconsistent awards in multi-party, multi-contract arbitration proceedings. *Kluwer Arbitration*, accessed on 28/07/2011, <http://www.kluwerarbitration.com/search.aspx>, 28/07/11.

If a tribunal or national court ignores the parties' intention, express or implied, and proceed with multi-party arbitration, this results in proceedings not in accordance with the terms contracted by the parties. Likewise, if the parties did contract for multi-party arbitration, *e.g.*, umbrella arbitration clauses, holding distinct proceedings is no in accordance with the arbitration agreement. Procedures conducted differently from the arbitration agreement's terms fall under art. V (1) (d) New York Convention and may render an award unenforceable.

The issue has been tested in national courts. In the specific case, the owner of an iron ore mine entered into an agreement with a mining company. The mining company subsequently entered into an agreement with a subcontractor. The owner repudiated the contract and commenced proceedings, based on a clause which provided for arbitration between the owner and the mining company. The tribunal rendered an award granting damages to the owner. The mining company and the subcontractor were held liable by the award. The subcontractor participated in procedural steps.

The owner started proceedings to enforce the award in Australia. The subcontractor resisted on the basis it was not a party to the arbitration agreement. The first instance court dismissed resistance. The Supreme Court of Victoria (commercial and equity division) reversed the decision on the basis, "that when it does not appear *prima facie* from the documents submitted for seeking enforcement that the award creditor and the award debtor are parties to the arbitration agreement, the burden of proving this condition falls on the party seeking enforcement".⁸⁷ By joining the subcontractor, the tribunal conducted proceedings that, *a priori*, were not contemplated in the arbitration agreement, situation which has brought difficulties to the enforcement stage.

On the other hand, if the arbitration agreement is silent with regards to multi-party proceedings, though the selected rules and applicable law allow it, the situation will fall under the tribunal's or arbitral institution's discretion. For example, in a hypothetical scenario, a party would be prevented from opposing consolidation if the arbitration agreement's terms (i) did not state against that; and, (ii) ICC rules were selected.

⁸⁷ *Altain Khuder LLC v. IMC Aviation Solutions Pty Ltd.* Yearbook Commercial Arbitration 2011 - Volume XXXVI (2011).

As a result, in complex legal relationships, if a party, from the outset, does not intent to arbitrate future disputes with third parties, the arbitration agreement shall be drafted accordingly. The institutional rules and *lex arbitri* (usually the law of the seat of the arbitration) shall be analyzed before drafting the arbitration agreement. If the text provides for the court or tribunal volition, different rules and laws shall be chosen or, alternatively, the parties shall opt out of the particular provisions which allow multi-party proceedings.

Conclusion

In the light of the above, to hold arbitral proceedings with more than two parties involved or to administer two or more proceedings before the same tribunal can be highly recommended. Lowering the procedure's costs (hearings, expert, arbitrators' fee, lawyers' fee, travel expenses, etc.) and saving time have been one of the main concerns of the parties which contract arbitration. Depending on the circumstances, both goals may be achieved by holding multi-party proceedings.

Further, disputes arising from the same legal relationship may be understood in a global, consistent and more precise way if heard by the same tribunal. Therefore, the risk of incompatible decisions could be discarded.

The parties envisaging multi-party proceedings must seek advice from specialists while drafting the arbitration agreement. The arbitration agreement itself may regulate potential multi-party proceedings. However, it is a demanding task to elaborate an effective clause, hence, in practice; arbitration agreements hardly address the matter.

Multi-party proceedings (or its avoidance) may be also achieved through the selection of the institutional rules. A few institutions have revised their rules in order to support multi-party proceedings and, by selecting them, the parties will be bound by their terms.

In the absence of institutional rules, the parties have to rely on provisions of the procedural applicable law. Therefore, by selecting the procedural law, which is usually linked to the seat of the arbitration, the parties may benefit from multi-party proceedings. On the other hand, the parties may face a situation in which they have to arbitrate in consolidated proceedings even against their consent, *e.g.*, Dutch law. As a result, the selection of the seat of the arbitration may play an imperative role to whether multi-party proceedings might be held or not.

Finally, in addition to all previously analyzed, it is worth-noticing that the possibility to tailor the procedure according to the parties' needs is one of the arbitration's most appealing characteristics. Consequently, by reckon that some of the current legal relationships involve

several parties, with rights and obligations interrelated, the trend is towards an increasing number of proceedings being consolidated or having more than two parties involved.

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