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INTRODUCTION

The increase in large-scale international projects, particularly in the construction field, has led to the International Chamber of Commerce (ICC) Court of Arbitration dealing more and more frequently with cases involving more than one claimant and/or defendant.

Three typical situations can be discerned in these "multi-party" disputes. The first involves a situation where the owner of the works has made a contract with a main supplier, who has in turn made a contract with a supplier. This subcontractor may have in turn contracted with a sub-subcontractor, and so forth. A second situation is where an owner makes separate contracts with individual suppliers for different parts of the project. The third situation exists where the supplier is a consortium or joint venture composed of several companies, who concludes the deal with the owner of the works. Subcontracts may have been entered into between the joint venture and a third party or between one of the joint venture members and the third party.

Multi-party situations are not limited to building construction or the installation of industrial complexes. Examples of the diverse fields utilizing multi-party arbitration include consortium agreements among groups of shareholders for the ownership and management of a company, areas of shipping, insurance and reinsurance, and loans and credit facilities involving guarantee undertakings from a number of companies and financial institutions.

The common feature in these situations is that the contracts involved relate to the completion of a single project. To the extent that all the contracts for a single project have been signed, the settlement of one point in dispute through arbitration may well involve not only parties to a single contract, but other participants in the project not in privity with those parties. Unsatisfactory performance of an agreement may therefore involve the subcontractors of the principal contractor. It may even involve the principals of separate agreements entered into with the same customer and project. When disputes arise in connection with a single project, they are to be submitted to international com-

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mercial arbitration. Many times the parties wish to have all disputes decided by one arbitral tribunal in a single comprehensive proceeding.

Another situation where the disputing parties may be interested in a multi-party arbitration, despite the lack of a common project, is where similar facts relate to a number of independent contracts. For example where a long dry period, such as occurred in Central Europe in the summer of 1985, caused the water level to fall and made water transport more difficult. This drought in turn led to an increase in road transport to meet demand. Where transportation costs increase beyond the influence of a party, standard form contracts may entitle a party to be reimbursed. To decide whether the dry period actually fulfilled the conditions set out in the standard forms of agreements, a single arbitration panel may be set up. This would be more economically efficient than having a large number of different arbitrators decide the same question in several proceedings.

I. ADVANTAGES AND DISADVANTAGES WITH MULTI-PARTY ARBITRATION

The resolution of all major disputes arising in connection with a single project in a comprehensive arbitration proceeding presents several advantages. The danger of inconsistent results, always present where related disputes are resolved in separate arbitration or state court proceedings, is avoided since all of the relevant evidence is made available to the tribunal arbitrating the various disputes. In addition, the cost of resolving all the disputes connected with a single project in multi-party arbitration can be significantly lower than the cost of engaging in a series of separate or distinct proceedings.

There are, however, disadvantages to multi-party arbitration. If all the disputes are treated together, each party must disclose his contractual relationships with the other parties. A party may not be willing to have his relationship with another revealed. Information of a confidential character, such as that regarding inventions, know-how, marketing, cost margins and financial information are sensitive areas that parties may not desire to reveal to all the parties to the arbitration proceeding.

II. POSSIBLE SOLUTIONS

There is a problem, however, in presuming that it is desirable to have the several claims relating to one project settled in a single arbitration proceeding and having it result in an award binding and enforceable with respect to all participating parties or those having an opportunity to participate. The obstacle lies in the nature of the proceeding itself, since it is one that presupposes agreement between the parties to submit to it, *i.e.* it is consensual. Only those parties who have

agreed to arbitrate can be forced to accept an arbitration procedure, and the award granted by the proceeding will only be binding on them. Arbitrators hold their powers solely by virtue of the will of the parties involved and they cannot force an unwilling third party to join in arbitration involving two other parties.

One solution is to appoint the same arbitrator in two separate arbitrations. This avoids inconsistent findings, but does not necessarily reduce the costs of the procedure to the same extent as a single multi-party proceeding. If more than one proceeding occurs, arbitrators appointed in both arbitrations may, at an early stage, have a pretrial conference to segregate the issues for both arbitrations. The possibility of appointing the same arbitrator will exist only under specific conditions, notably when the courts are seized with two cases in the early stages, and when the courts have jurisdiction over all the parties by virtue of their choice of procedural law, arbitration rules, place of arbitration or otherwise. A number of favorable circumstances must coincide to make this option work.

Another solution to the problem is the consolidated arbitration. This is a judge-made device whereby parties to admittedly separate arbitration agreements can be compelled by court order to have all of their disputes heard before the same panel of arbitrators. Consolidated arbitration is now a well-established feature of arbitration cases in New York. This method, however, has not yet been adopted by foreign systems or other United States jurisdictions. One may, however, have serious doubts about the validity of consolidation of cases because of arbitration's consensual nature. If consolidation of arbitration cases has become a fixture in New York, and therefore parties who have agreed to arbitrate there have implicitly agreed to the possibility of consolidation, then one must consider this risk or possibility when fixing a place of arbitration. It becomes an important feature when assessing the merits of New York as a place of arbitration. In a case where two arbitration panels are consolidated on a court's order, there remains the danger that the award will be challenged under the New York Convention[1] on the ground that the composition of the tribunal was not in accordance with the parties' agreement.

III. The Heart of the Problem

To be on safe ground, any solution to the difficulties inherent in multi-party dispute situations should respect the will of the parties. This maintains the traditional consensual approach, which permits an

1. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

agreement to be reached between all parties concerned once a dispute arises. If they then think it preferable to settle the dispute in a single arbitration although not previously provided for, they only have to draw up and sign a "compromis" for that purpose.

Unfortunately, the parties concerned often will not be able to reach an agreement at this stage. When the dispute arises, each party usually looks after its own interest and will not be easily persuaded to negotiate a complex multi-party agreement with its opponents. Agreement on anything will be a difficult achievement when differing opinions develop.

Most of these problems should be solved when the various contracts are drafted. Although divergent interests may already exist between the parties at this stage, negotiation of a multilateral arbitration clause is easier than when the dispute materializes. It will not always be possible or advisable, however, for all participants to sign or insert a uniform clause in all the contracts to the multi-party agreement. This is because the contracts for a large international project are rarely concluded at the same time and place. It may be difficult for certain enterprises coming into the project at a later stage to accept the multi-party agreements made by the other parties. It may also be difficult for the initial parties to accept automatic eligibility for any later contracts to a multi-party dispute involving themselves.

Whether entered into at the beginning of a project or later, the following rights and obligations of the parties should be considered in a multi-party agreement:

1) The right of party A, having contracted with B, to pursue a claim against C, who has a contract relating to the project with B, but not A. The obligation of B to be joined as defendant by A and the obligation of C to accept that B is joined upon A's request.
2) The right of A to intervene in an arbitration between B and C.
3) The right of A to intervene in arbitrations further down the contractual chain with parties whom A has no contractual relations with.
4) A's obligation to be joined into arbitration between B and C, or even between C and D on the request of B or C.
5) The right in a consortium or joint venture, for one of the parties to start an arbitration proceeding against the adversary party to the contract without asking the permission of the other member(s) of the consortium/joint venture.

Experience has shown that a multi-party arbitration situation may usefully be foreseen, and the parties' rights and obligations regulated, in the case where there are several signatories to the same contract

containing the arbitration clause. Were one of the parties to a contract commences arbitration against another party to the same contract, it is not evident that any of the parties may further join parties to the arbitration. In other words, a contract between more than two parties involving multiple rights and obligations among all signatories is one thing; an arbitration proceeding started by one party against another is a different matter. The latter creates a new legal situation between only those two for the purpose of the settlement of a defined dispute. Access to such a proceeding may not be granted to a further party to the contract unless agreed upon by all parties concerned.

IV. Difficulties of Implementation

Multi-party situations raise a number of problems that require discussion. On the basis of the ICC Court's experience, they include, *inter alia*, the following:

1) deciding who may be a party to a multi-party dispute;
2) the number of arbitrators;
3) how the arbitrators are to be appointed;
4) the administration of the proceedings in order to guarantee all parties involved an equal treatment while assuring speed and efficiency;
5) the severance of cases where it turns out that there is not a sufficient nexus between the disputed contracts;
6) the calculation and payment of an advance of fees and costs, and;
7) whether one or several awards shall be made.

Some of the problems concern the Court of Arbitration more than the arbitrator. For example, deciding prima facie if there exists a multi-party arbitration agreement, deciding the number and appointing the arbitrators failing an agreement by the parties and the calculation of an advance of fees. Other problems must be resolved by the arbitrators, notably their jurisdiction, finding an efficient way to handle the dispute, how to sever the cases that should be handled separately and how many awards should be made. Questions relating to the award concern which of the parties to the arbitration shall be entitled to appeal the award(s). A further question is whether the right of appeal can be severed or if all the parties to the dispute must be involved.

A. Administering Requests for Multi-Party Arbitration

One issue for any authority administering arbitrations in a multi-party context will be to determine how multi-party cases will be identi-

fied. Further, the authority must decide the degree of initiative it should exercise where an opportunity for multi-party arbitration exists, but where there is no evidence of a binding multi-party agreement.

When a request for arbitration is submitted to the authority, a study of the arbitration clause involved can make it clear that multi-party arbitration has been provided for. The authority must then apply routines not normally found in a normal bilateral case. For instance, the procedure for the appointment of arbitrators may be different, or the place of arbitration might be fixed after only hearing the opinions of all the parties to the multi-party proceedings. These considerations will lead to longer delays before the arbitration proceeding may commence.

In other cases, the authority may already have been seised with a request for arbitration regarding the performance of a particular project when it receives a request from a third party relating to the same project. The authority must decide to what extent it should draw the attention of the parties in the first and second cases to the existence of disputes relating to the same project. Conflicting policies require the authority to account for, on the one hand, the wish of the parties to be informed of related disputes, which could enable them to submit to a multi-party arbitration, and on the other hand, the strict confidentiality to be respected in any arbitration. A respect for confidentiality would prevent the authority from revealing the identity of parties in other cases submitted to it. Should the widely accepted norms concerning the duty to inform be respected or must any information provided be based solely on express party agreement? If the latter view prevails, one might consider changing the wording of standard arbitration clauses.

B. Who Are the Parties?

In a large project there are often more than three parties involved in one capacity or another. Where a consensus suggests the possibility of multi-party arbitration, one issue becomes defining and limiting the number of contract parties involved in order to avoid cumbersome and impracticable multi-party arbitration that will not serve its purpose.

Not every contracting party involved in a project must participate in an arbitration relating to the project. For example, the supplier of spoons for coffee cups to a new hotel must not necessarily be joined in a dispute between the hotel owner and the main contractor. Hence, it is necessary to agree in advance that any multi-party arbitration will be limited to only those who have a significant involvement in that part of the project. These parties may be determined by setting out the actors' identity in the contract clause, defining the degree of involve-

ment according to the contract amounts or the amount of the claim, or using other criteria. As a last resort, it may be advisable to agree to a maximum number of parties in any multi-party arbitration, in order to keep the procedure manageable.

C. Appointment of the Arbitrator(s)

The next fundamental issue involves determining how many and who the arbitrators will be. If the dispute concerns only the signatories of a single contract, and if that contract includes an arbitration clause, the fact that more than two parties may be involved does not necessarily raise a legal obstacle to the appointment of an arbitral tribunal in accordance with the terms set down in the contract's arbitration clause. In practice, however, if the clause makes no provisions for a joint proposal of an arbitrator, an impasse may result when parties with divergent interests are required to jointly appoint an arbitrator. This may be the case where an owner claims damage and the defendant is a joint venture consisting of several independent corporations. The claim directed against the joint venture often has as its origin a breach committed by one of the members of the joint venture. The individual members of the joint venture, therefore, have conflicting interests: a common interest against the claimant and a specific interest against one or all of the other members of the joint venture.

If the dispute concerns participants in the project not in privity with one another, it may be brought before a single arbitral tribunal only if the parties reach an agreement to that effect. Even if each party were bound by an arbitration clause in his own contract, that clause still would not be binding on the person who was not a party thereto.

Is it contrary to the basic philosophy of arbitration to deny a party the right to appoint an arbitrator? Can an institution be empowered to appoint all the arbitrators in a multi-party arbitration? If each party has the right to appoint an arbitrator, there will be at least as many arbitrators as there are parties. If the panel becomes too large they risk becoming difficult to manage. Finding dates for hearings with three arbitrators is already a problem. One may just imagine the difficulties of bringing together five, seven or nine busy international lawyers from various parts of the world.

If the parties can agree to the same appointing authority, they will have equal rights because none of them appoints "his" arbitrator. This permits the use of a smaller more preferable arbitral tribunal consisting of one or three arbitrators. If no party has appointed an arbitrator personally and if all parties have entrusted the appointment to the same authority, the equal treatment of all parties is respected. The modalities vary, but the essential point is that all parties play an equal

role in setting up the arbitral tribunal.

D. Equal Treatment of All Parties

Each of the parties with a separate interest in the case must be entitled to participate personally and to be represented in the proceedings. This means that the party may have its own lawyer and review the memoranda and documents of all the other parties. The party should be able to "move" freely, in an autonomous way, during the proceedings by taking the initiative or by adopting the positions it deems suitable for the protection of its own interests:

> Thus, once a dispute arises, all clauses of consolidation by agreement should be accompanied by procedural measures effectively guaranteeing the autonomy and equality of all the parties in question. Initial consent to multilateral arbitration is not enough; the basic requirement of such arbitration—which cannot be over-stressed—is that the equality and the rights of defence of all the parties concerned should always be ensured until the proceedings have been completed.[2]

Further questions that must be answered relate to proper procedure. Is evidence presented by one party valid against all the other parties to the multi-party arbitration? Is A's lawyer entitled to cross-examine not only B's witnesses but also the witnesses of C and D? Can C attach the property of A with whom he has no contract?

The fundamental right of equality of treatment will itself regulate how many parties can be involved in a multi-party arbitration without making it too cumbersome. There must be an optimum number of parties for each type of dispute. Beyond this number, the benefit of consolidated proceedings will be doubtful.

E. Severance of Cases

A multi-party arbitration is based on the assumption that the two or more disputes consolidated are related. After penetrating the issues, the arbitrators may arrive at the conclusion that a relation does not exist or that any relation is not strong enough to justify a multi-party proceeding. The arbitrators may find that the cases should be handled separately, in the traditional way between two parties.

One issue, therefore, will be how to provide for the severance of cases that have been consolidated in a multi-party arbitration. If the cases are separated, one pertinent problem will be the arbitrators' ju-

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2. INTERNATIONAL CHAMBER OF COMMERCE, MULTIPARTY BUSINESS DISPUTES 65 (1980).

risdiction. Where all the arbitrators are appointed by an appointing authority to deal with a multi-party dispute, are the same arbitrators empowered to remain arbitrators for the severed disputes? In other words, when the conditions under which they were appointed fundamentally change, does their jurisdiction vanish? Second, will the parties consent to an independent appointment of an arbitrator now that the arbitration is a two-party affair? Should the appointed arbitrators declare that they lack jurisdiction from the moment they separate the cases, or should they leave it to the initiative of the parties to challenge them? Can and should these questions be provided for in an agreement between all the parties involved, such as in an arbitration clause in the contract? Where the parties have submitted to the administration of an institution, such as the ICC, what powers should be given to the institution to solve these problems?

CONCLUSION

For the resolution of international commercial disputes, arbitration offers a number of possibilities not offered by local courts or national jurisdictions. The rapid growth of international arbitration in recent years is proof hereof. Experience shows, however, that arbitration also has its shortcomings. Like a sensible instrument, it demands a higher degree of cooperation and professionalism from those who utilize it. When it comes to disputes where more than two parties are concerned, international arbitration may prove to be a formidable device for those who know to draft a balanced multi-party arbitration agreement. Important reductions in procedural costs may also result. In this area there is still much ground that has not yet been covered. This discussion has attempted to define some of the legal issues and difficulties involved in the setting up of a multi-party arbitration. Future experience will tell us whether multi-party arbitration will be acceptable to the practitioners of international business law.