JOINDER, MULTIPLE PARTIES, MULTIPLE CONTRACTS
AND CONSOLIDATION UNDER THE ICC RULES

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International commercial transactions are frequently multi-party in nature

• Due to growing commercial, financial and technological specialization.

The multi-party character of international business transactions makes it likely that international commercial disputes will also be multi-party in nature

• Multi-party disputes are common in construction, insurance, maritime, energy and sales contexts
1. Identifying the problem
   • Change in number and demographic of ICC Arbitration
   • Increase of multi-party arbitrations: 30% of total caseload

2. Identifying the solution
   • Development of practices
   • Crystalizing practices into transparent rules

3. Implementing the solution
   • Specific provisions dealing with complex procedural issues
   • Comprehensive and simple provisions
JOINDER

Where an additional party is added to an already pending arbitration

Parties on equal footing: both Claimant and Respondent may join

No limitation to number of additional parties that may be joined
JOINDER

- Party files a Request for Joinder
- Party must file **claims** against the additional party

- Joinder is **automatic**, *i.e.* no Court decision allowed

- Additional party has the **same rights and obligations** as any other party:
  - Submits an Answer;
  - Raises jurisdictional objections;
  - Files claims;
  - Requests joinder of additional parties
JOINDER: LIMITS

Limit: Joinder not possible after confirmation or appointment of an arbitrator

UNLESS: All parties (inlc. the additional party) agree

Secretariat fixes time limit for Request for Joinder

Parties informed that steps will be taken towards the constitution of the Arbitral Tribunal

If no Request for Joinder is made: Arbitral Tribunal constituted
Each side nominates a co-arbitrator

Additional party nominates jointly with Claimant or Respondent

Co-arbitrators nominate the president

Parties nominate the president

Parties agree on other method of constitution of Arbitral Tribunal

If parties are unable to agree: Court may appoint all three members of the Arbitral Tribunal
CLAIMS BETWEEN MULTIPLE PARTIES
MULTI-PARTY: HOW DOES A CASE PROCEED?

Article 6(4)(i)

“where there are more than two parties to the arbitration, the arbitration shall proceed between those parties, including any additional parties joined pursuant to Article 7, with respect to which the Court is prima facie satisfied that an arbitration agreement under the Rules that binds them all may exist”.

Article 6(3)

“[i]f any party against which a claim has been made does not submit an Answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4)”. 
WHEN?
- Respondent fails to file Answer; OR
- Plea on existence(validity)/scope of the arbitration agreement
  is raised; OR
- Pleas on whether all claims may be determined together

Case will go forward if all parties are participating and no plea
has been raised

As a plea can be raised by any party, the mechanism is not
restricted to Respondents and may be applied by the Court to
Claimants, Respondents or Additional Parties
Fairly low threshold: *does exist* "*may*" exist

The matter will generally proceed to the extent that evidence indicates that an arbitration agreement that binds all parties *may* exist

A mere allegation that 6(4) conditions are met will *not* suffice
MULTI-PARTY: ARTICLE 6(4)

Court takes decisions on a case-by-case basis

Court’s decisions based on information provided by the parties: no separate investigation carried out by the Court itself

Terminology:
positive 6(4); negative 6(4); partially negative 6(4)
MULTI-PARTY: ARTICLE 6(4) PROCEDURE

- Time limit for Answer expires / pleas under Article 6 are made
- Provisional advance must have been paid
- Secretary General takes decision under Article 6(3)
- If the matter is referred to the Court: comments invited
- Court takes decision
MULTI-PARTY: WHEN DOES THE CASE PROCEED?

1. Contract on which the claims are brought contains an arbitration agreement.
2. Arbitration agreement provides for arbitration under the ICC Rules.
3. Contract containing the arbitration agreement is signed by all parties.
4. Case proceeds.
MULTI-PARTY: WHEN DOES THE CASE PROCEED?

contract containing arbitration agreement **not signed** by all parties and:

- the non-signatory party/ies participated in the **negotiation** of the contract **OR**
- the non-signatory party/ies participated in the **execution** of the contract **OR**
- the non-signatory party/ies participated in the **performance or termination** of the contract **OR**

**case proceeds**
MYLTI-PARTY: TYPOLOGY

1. The non-signatory appears to have been involved in the negotiation, performance or termination of the contract; documentary evidence exists to that effect and expressly refers to the non-signatory.

2. The non-signatory is the successor, assignee, or has been subrogated into the rights of a signatory party.

3. The non-signatory is a member of a consortium or joint venture which has signed the contract.

4. The non-signatory is a beneficiary or trustee of a signatory party.
Multi-Party: Typology

5. The non-signatory is a guarantor and (i) the contract obliges the guarantor, (ii) the purported arbitration agreement refers to or incorporates the guarantee, or (iii) there are allegations that the applicable law binds the guarantor.

6. The non-signatory is an affiliate of a signatory and there is an indication in the purported arbitration agreement or contract that purports to bind such affiliate.

7. The claims are filed on the basis of a law or treaty that refers disputes to ICC arbitration.
One Claimant, three Respondents;

Respondents 1 and 3 objected that Respondent 2 did not exist;

Claimants did not deny the above and failed to produce any evidence to the contrary.
One Claimant, two Respondents;

Respondents alleged Claimant was a non-signatory;

The original signatory was restructured in two entities, one of which was Claimant;

Claimant alleged it had succeeded in the original signatory’s rights and obligations;

Claimant adduced proof that Respondents had been notified of said restructuring.
MULTI-PARTY: EXAMPLES

• One Claimant, six Respondents;

• Claimant and Respondent 1 signatories;

• Respondents 2-4 affiliates of Respondent 1;

• Respondents 5 and 6 spouses, and shareholders and directors of Respondents 2-4;

• Contract ambiguous as to whether it provided for rights and duties with respect to Respondent 1 only, or certain or all of its affiliates as well;

• Respondent 2 owned certain trademarks used by Respondent 1;

• Respondents 3 and 4 invoiced customers and sold products of Respondent 1;

• Respondents 5 and 6 were allegedly “the controlling minds” of Respondent
MULTI-PARTY: EXAMPLES

• One Claimant (entity), four Respondents (natural persons); Respondent 4 was a non-signatory;

• Claimant alleged that Respondent 4 was “a secret participant” who “actually controlled the entire transaction behind the scenes”;

• The Court took a negative decision with regard to Respondent 4;

• The Court was invited to examine whether to reconsider its decision twice later, and decided not to do so in the absence of any new elements that would justify its so doing;

• Claimant initiated state court proceedings and eventually obtained judgment compelling arbitration against Respondent 4 in this case;

• By partial award, the Arbitral Tribunal found that it did not have jurisdiction over Respondent 4.
MULTI-CONTRACT ARBITRATION
MULTI-CONTRACT ARBITRATIONS

Claims brought on the basis of more than one contract, irrespective of whether they are brought under more than one arbitration agreements, are subject to the provisions of Article 6. If the Terms of Reference have been established, no new claims may be submitted without its authorization.
the Rules codify the test, previously established by the Court’s practice:

could all the parties have agreed to have their claims heard together in a single arbitration?

where claims pursuant to Article 9 are made under more than one arbitration agreement, such claims are subject to Articles 6(3) and (4)
MULTI-CONTRACT: ARTICLE 6(4)

“the arbitration shall proceed as to those claims with respect to which the Court is prima facie satisfied

(a) that the arbitration agreements under which those claims are made may be compatible, and

(b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration”
MULTI-CONTRACT: ARTICLE 6(4)

potential compatibility + potential intent = case proceeds

- dates of signatures
- same economic transaction?
- identical parties?
MULTI-CONTRACT: EXAMPLES

Claimant vs/Respondent

Claims brought under contract 1

Contract 1 provides for arbitration under the ICC Rules

Counterclaims brought under contract 2

Contract 2 provides for arbitration under the AAA
MULTI-CONTRACT: EXAMPLES

- 4 Claimants, 2 Respondents and two contracts
- Claimants 2-4 non-signatory
- Arbitration agreements compatible
- Pleas raised against Cs 2-4 (=Claimant 1’s subsidiaries)
- Contracts grant rights to C 1’s affiliates, allegedly unrelated to dispute and not exercised by Cs 2-4
- Cs 2-4 involved in the underlying transaction; no direct elements on participation in the negotiation or performance of the contracts
- Rs alleged that Cs 2-4 exercised domination and control over C 1
- One of the two contracts provided that all disputes may be brought by the parties, also “on behalf of” their affiliates
CONSOLIDATION
CONSOLIDATION

What is consolidation?

Where there are at least two separate ICC arbitrations pending and one or more parties to one of the arbitrations wants them to be merged into a single proceeding.
CONSOLIDATION

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, in 3 instances:

1. The parties have agreed to consolidation; or

2. All claims are made under the same arbitration agreement; or

3. Where the claims in the arbitrations are made under more than one arbitration agreement,
   • the arbitrations are between the same parties, and,
   • the disputes arise in connection with the same legal relationship, and
   • the Court finds the arbitration agreements to be compatible.
Claims under one arbitration agreement – Art. 10(b)
  • Different parties
  • Same legal relationship
  • Same arbitration agreement

Claims under several arbitration agreements – Art. 10(c)
  • Same parties
  • Same legal relationship
  • Compatible arbitration agreements
CONSOLIDATION

Where the two contracts contain different arbitration clauses, the Court might find arbitration agreements to be incompatible when:

- Place of arbitration is different
- Language is different
- Mechanism for selecting arbitrators is different
- Number of arbitrators is different

Consolidation under Article 10 is a final administrative decision that cannot be reversed by the arbitral tribunal.
CONSOLIDATION

In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant including:

- Whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so
- Whether the same or different persons have been confirmed or appointed
- Any circumstance it considers relevant
  - Procedural stage of the proceedings
  - Terms of Reference established
THANK YOU!