International Commercial Arbitration

Multiple parties and multiple contracts in Arbitration

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**Abbreviations**

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<tr>
<td>CEPANI</td>
<td>Belgian Center for Arbitration and Mediation</td>
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<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
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<tr>
<td>LCIA</td>
<td>London Court of International Arbitration</td>
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<td>UNCTIRAL</td>
<td>United Nations Commission on International Trade Law</td>
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Introduction

Commercial Arbitration for centuries has been chosen by disputing parties to be a preferred mean for resolving their commercial disputes, this reflection of preference demonstrated by businesses for arbitration, as a mean for resolving their international disputes, has become more evident in the past several decades, as the international trade, commercial transactions and investments have experienced a boom. Business contractual parties’ inclination is to agree to have their dispute settled through arbitration mean, because they are reluctant to subject themselves to the jurisdiction of the courts of the other party’s home country and this usually comes as a result of the fear that the procedural law of the foreign countries will be unfamiliar to them.

Parties decide to go for arbitration to resolve their disputes because of the benefits enshrined in the arbitration process; the neutrality of the forum, where one party is able not to be subject of the other party’s court and the possibility of enforcing their final arbitral awards, by virtue of New York Convention, a treaty of 140 signatory countries. The enforcement of arbitral awards is more effective than the enforcement of foreign court judgments which depend heavily on bilateral conventions. Neutrality is another palatable element perceived by parties in commercial arbitration, given the fact that the tribunal can be established in a country which neither party has any connection, where arbitrators can be selected from different countries and different nationalities, which it can avoid direct national influence and giving arbitration an independence and loyalty toward parties.

In litigation, proceedings are usually developed publicly – this is a fundamental notion of every court procedure, something that every businessman wants to avoid, due to its reluctance of having balance sheets published and accessible for a range number of people, patents or other sensitive trade secrets, parties in their contractual clause choose arbitration because in arbitration it is a different scenario, where parties can handle this procedure with a strict confidence. In order to subject their dispute to arbitration, parties must clearly indicate this in the clause at the conclusion of their contract. Today, due to the increase of the international commercial transactions’ complexity, we face situations where multiple parties and multiple contracts are involved in arbitration process. The difficulties in multi-party arbitrations result due to the fact that there are several parties in one contract and several contracts with different parties that are at certain point affected by the outcome of the matters in dispute. The situation involving several

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5 *Id.*
6 Klaus P. Berger, *Id.*
parties in one contract commonly occurs in international trade and commerce, individuals, corporations or state agencies join together in a joint venture, consortium or other legal relationship, in order to enter into a contract with other party/parties.  

High complexity of modern international trade and commerce is frequently characterized with involvement of several contracts with different/same parties. A typical international construction project is likely to involve not only the employer and the main contractor, but also specialized suppliers and sub-contractors, each of the operating under different contracts. Multiparty controversies can also arise over a variety of domestic and international commercial relationships, including sales contracts, licensing or distributorship arrangements, investment contracts, building and construction contracts.

As discussed at the preceding paragraphs, the classic scenario of one claimant against one respondent does not reflect the commercial reality anymore. Today we are experiencing the International transactions graduating into a higher level of complexity; where often requiring participation of several companies in the implementation of a single project. A typical construction project will usually involve – apart from a client and a main contractor – an engineer or an architect, several subcontractors, suppliers, financiers, and possibly additional commercial parties and this contractual relationship is spread out in numerous contracts, hence, the possibility for a dispute to rise among this multitude of parties who have built up their cooperation based on several contracts is unquestionably high. Consequently, disputes may arise between multiple parties, but also on the basis of multiple contracts. From the complexity of the disputes involving multiple parties and multiple contracts stems several issues with respect to the appointment of arbitrator(s) that deserve our attention.

In the perspective of dispute resolution, the most common problem emerging from a constellation of a multi-party and multi-contract arbitration is the risk of parallel proceedings, whereby more than one set of proceedings is commenced involving the same parties and/or the same disputed issues, rendering several arbitral awards for several parties delivering a project or for several claims arising from different contracts lead to contradicting arbitral awards, time-consuming process and costly as well for parties’ representation in the arbitral proceedings. Another problem that pops out is the appointment of the arbitral tribunal, in the situation of a sole arbitrator, the agreement of all the parties must be reached, but where the tribunal of three arbitrators needs to be convened problems arises as to the modality – how several respondents should appoint their arbitrator.

The practice of the commercial arbitration has devised instruments endeavoring to better approach the issue of the multiple parties and multiple contracts in arbitration. Consolidation is widely used to unite several proceedings that are pending between two parties, or bring together

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10 R Alan and others, supra note 9, at 169
11 Id 170.
disputes involving a number of different parties. The problem frequently encountered in the case of consolidation is whether separate, but related, arbitration proceedings can be united. Joinder and Intervention jointly deal with the introduction of a third party to an existing arbitral proceeding; in the case of joinder, an existing party to the arbitration attempts to bring a third party into the proceedings, whereas in the case of intervention, it is the third party itself that is seeking to participate in the arbitration proceedings.

**Purpose and Methodology**

The purpose of this thesis is to examine the complexity of the multiple parties and multiple contracts in commercial arbitration; obstacles and difficulties emerged by multi-claim proceedings in arbitration, situations involving several contracts in a disputed issue. It will also tackle problems encountered by parties in initiating arbitral proceedings in the multi-claim proceedings, in addition to the pressings issues with respect to multiple parties and multiple contracts highlighted, this thesis will analyze the widely used instruments in commercial arbitration; consolidation, Joinder and Intervention, which serve as remedy to the obstacles and difficulties faced in the multiple parties and multiple contracts arbitration. This investigation will be conducted from different perspectives and by using different methods: Normative law, case law analyze and comparative methods.

**Outline**

The first chapter of the thesis will proceed with the investigation of the pressing problems that rise up in the arbitration proceedings involving more than two parties and dealing with several claims stemming from the multiplicity of contracts concluded by the same or different parties, furthermore discussing various actions initiated by several parties which are rooted in several contracts. This chapter will discuss the concept of Consolidation of several arbitral proceedings into one case, advantages and disadvantages of consolidation debated by the scholars in the commercial arbitration field and also the impact of some significant court judgments on this matter. It will also tackle the question of forced consolidation by courts and the consolidation consented by the parties, and whether scope of the agreement encompass this and the problem of procedural nature encountered in arbitration of multi-parties and multi-contract - the appointment of the arbitral tribunal.

The second chapter of the thesis will analyze two other frequently used procedural instruments in multi-party arbitration: Joinder and Intervention, whether the application of these two instruments has proved to be effective indeed, less costly and less time-consuming, or it complicates more arbitral proceedings initiated by the original parties, and it adds extra costs to the representation of the parties in the hearings. This chapter will also explore and discuss some of the most wide used doctrines by the courts to enable the third parties non-signatory of the arbitration clause join the existing parties in the arbitral proceedings and including other claims emerging from other contractual agreements concluded by the parties. It will go further discussing these instruments from the practical perspective by incorporating case, focusing on

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15 T Schwarz & W Konard, *Id.*
16 Appel & Beechey, *Id.*
landmark cases which have empowered the necessity to apply these instruments to remedy the complex nature of the multi-party and multi-contract arbitrations.

The third chapter will cover the multi-party and multi-contract issues from the institutional perspective of some of the most prominent arbitration institutions studying multiparty proceedings devised by Arbitration Rules. It will analyze the approach taken by some of the leading international commercial arbitration institutions towards issues derived from multiple parties and multiple contracts, the latest initiatives from these institutions to revise their arbitration rules aiming at addressing these problems more effectively, smoothly and in line with the recent developments in international commercial transactions. This chapter will tackle this problem with a considerable emphasis on the newly revised ICC arbitration rules entered into force in 2012, UNCITRAL Rules of Arbitration revised in 2010, encompassing multiple parties and multiple contracts in arbitration, changes and novelties brought by these rules with respect to procedures devoted to the arbitrations involving multiple parties and multiple contracts.

1. Consolidation

The reality of today’s international commercial transactions does not always occur with disputes between a claimant and a respondent, but also situation involving several parties in a dispute, this complexity has also extended to circumstances of disputes arising based on multiple contracts.\(^{18}\)

The initiation of several parallel arbitration proceedings derived from several contracts will likely lead to duplication of proceedings, namely with respect to experts’ opinions and the hearing of witnesses – what it usually results in the increase of costs and inevitably contradicting decisions rendered by arbitral tribunals.\(^{19}\) Dispute resolution today employs various tools to decide collectively, rather than in parallel on claims arising out several contracts or different commercial relationships related to a project with the purpose of reducing legal representation costs, avoiding contradictory nature of several decisions rendered for the same commercial relationship dispute and allow these separate claims to be handled jointly.\(^{20}\)

Consolidation in international commercial arbitration is known as a “procedural mechanism” of bringing two or more separate pending arbitration proceedings together into one case.\(^{21}\) Consolidation is more frequently conducted in those circumstances where the performance of one contract depends on one or more other contracts and often it does not necessarily have to be a commercial relationship between the same parties.\(^{22}\)

The application of consolidation as a process of “uniting several arbitration proceedings” into one case does not go always smoothly obstacles come up starting from the clause of the arbitration agreement. Those not in favor of the consolidation support their view by putting arguments relying on the contractual nature of arbitration, claiming that this would not be in

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\(^{18}\)T Schwarz & W Konard, * supra note 13*, at 332.


compliance with the principle of contractual nature of arbitration, the other argument put forward is the significance of confidentiality in arbitration, which would be compromised by multi-party proceedings.\textsuperscript{23} The number of authors who think that the arbitration agreement should not be extended to non-signatory parties is high and the participation of the third party is heavily opposed, insisting that arbitration can be initiated only by parties who directly or impliedly agreed to it.\textsuperscript{24}

\textbf{1.1 Scope of arbitration agreement}

The arbitration agreement stipulated by parties and incorporated into the substantive contract covers prospective disputes which may arise between the parties engaged in a contractual commercial relationship, in addition the arbitration agreement sometimes may be initiated after the dispute has arisen and it exclusively encompasses the identified dispute. An arbitration agreement commonly covers disputes occurred between parties during the course of the contract and sometimes after its termination.\textsuperscript{25}

In the multi-claim disputes the question whether the possibility to consolidate the separate proceedings falls within the realm of the arbitration agreement clause has become inevitably complex question to give an answer. This situation comes up due to the fact that arbitration is perceived as a contractual relationship, where a party cannot submit a dispute for arbitration for which he has not previously agreed to do so.\textsuperscript{26} In the commercial arbitration practice cases where an arbitration agreement encompasses any dispute which may arise between parties occur quite rarely, this agreement usually encompasses arbitration disputes arising from a particular commercial relationship, where at the most of the cases it is embedded to the substantive contract of the parties.\textsuperscript{27}

As discussed above in circumstances where commercial relationship activities involve several parties and while their commercial relationship is legally founded in several contracts, consolidation of these disputes in a single arbitration is unquestionably more convenient.\textsuperscript{28} Parties entering in relationships of this constellation should consider a specific provision for consolidation in their arbitration agreement, as an effective tool, which would cover not limited to one contract but also extending to other related contracts between the parties, as a good possibility to ensure a more functional and less complex process of consolidation for the forthcoming disputes.\textsuperscript{29}

\begin{footnotesize}
\begin{enumerate}
\item Poudret and others, \textit{Id} at 197.
\item S. Rau, \textit{Consent to Arbitral Jurisdiction: Disputes with Non - Signatories}, edited by the Permanent Court of Arbitration (Oxford University Press 2009) p 69.
\item M. Pryles & J. Waincymer, \textit{Id} at 4.
\item T Schwarz and W Konard, \textit{supra note 9} at 334.
\item \textit{Id}.
\end{enumerate}
\end{footnotesize}
The possibility to indicate clearly or impliedly consolidation of several claims in the arbitration agreement clause it avoids parties to have the same facts of their claims disputed repeatedly, such situation would undoubtedly result in a time-consuming process and a situation where the final results derived from the adjudication of disputed claims end up to be of a contradictory nature.  

1.2 The issue of the forced Consolidation

The widely used practice in terms of consolidation of different arbitral proceedings initiated based on several contracts occurred due to the complex commercial relationships of these days is that modality already foreseen and agreed by the parties in the original arbitral agreement clause or eventually stipulated in a subsequent contract. Consolidation in the multi – party arbitration is not always simple, on contrary its path presents obstacles and difficulties, particularly in those circumstances where the procedure of different arbitral proceedings aimed to be consolidated is in different stages of the procedure, one more advanced than the other.

The power of the courts to force consolidation without the consent of the parties incorporated into the arbitral arbitration agreement has been frequently used in United States. A case representing the view of U.S. towards consolidating arbitral proceedings compulsorily is the case in the field of maritime law Compania Espanola de Petroleos S.A. v. Nereus Shipping S.A., in this case the Nereus Shipping, S.A., a shipowner, chartered its vessel to a Venezuelan corporation, HDECA which was guaranteed by the Compania Espanola de Petroleos. The charter party and the shipowner have signed the arbitration agreement clause, where it explicitly reflects the agreement of the parties to arbitrate in difficulties or on future disputes. the Espanola is not a signatory of any arbitration agreement, but in the guarantee contract the Espanola as a guarantor agreed that “should HIDECA (the charterer) default in payment or performance of its obligations under the Charter Party, we will perform the balance of contract and assume the rights and obligations of HIDECA on the same terms and conditions as contained in the Charter Party”. When dispute arose, Nereus and HIDECA applied for arbitration, Nereus insisted that the Espanola should be a party in arbitration, but this requirement was opposed persistently by the Guarantor claiming that it has no signed any arbitration agreement. Furthermore the guarantor referred this issue to the U.S district court requiring the judge declaration to support its view that it did not sign the arbitration agreement, at the same time required an injection to keep the Nereus not moving forward with arbitration. The relief measure was rejected and the court reasoned that the separate proceedings would inevitably result in a contradicting outcome and in this spirit the court held that the arbitrations between three parties to be consolidated. This part of the judge’s ruling was not accepted by the guarantor who decided to appeal. The Court of Appeals upheld the ruling rendered by the district court judge stating that “whether a guarantor is bound by an arbitration agreement clause in the original clause depends on the language of guaranty”.

30 M. Pair & P. Frankenstein, supra note 20, at 1063.
33 Id.
35 Dore, supra note 12, at 3
36 Id.
37 See Schwartz & Mathew Id at 351
The U.S. courts dealing with multi-party arbitration have not ruled uniformly regarding the matter of consolidation of arbitration, this has been reflected from the case law of the federal circuit courts, where the second circuit has ruled that it has authority to compel consolidation of arbitration in those cases having common facts, but on the other hand other courts do not rule on consolidation of arbitration, unless already agreed by the parties.\textsuperscript{38} “Notwithstanding this split, the practice of requiring party consent to consolidation gives priority to party autonomy, or choice, and reflects the fundamental international belief that the mechanism of arbitration should be promoted as an avenue for consensual dispute resolution”.\textsuperscript{39} This lack of uniformed approach by the U.S. courts toward consolidation can be illustrated by THE BOEING CASE\textsuperscript{40} (U.S. SECOND CIRCUIT), the facts of the case are as follows: the UK Government is in contractual relationship with Textron Inc, a company designing devices for military helicopters and with Boeing helicopter manufacturer, an accident occurred during the test run of the electric fuel control device manufactured by Textron Inc, which was installed in the military helicopter manufactured by Boeing. The UK Government has two separate long-term contracts with Boeing and Textron Inc. for development of the military projects, these contracts contain similar provisions subjected to the AAA arbitration rules.

The UK Government after two years of the accident filed arbitration with AAA against these two companies asking damages, before filing the arbitration and afterwards the UK Government asked the two companies to go for consolidation, this was not accepted by Boeing insisting that the cost would increase. The AAA informed the UK Government that it would consolidate arbitration if parties have agreed on it and the UK Government in its agreements with Textron Inc. and Boeing, none of them contained provisions on consolidation of arbitration. The UK Government recourse to the U.S. District Court for the Southern District of New York to ask consolidation of arbitration, the District Court admitted the filing based on the case law of the Second Circuit and Federal Rules of Civil Procedure. This case went to the Court of Second Circuit, where the court scrutinized the precedent of the Second Circuit, but also relied on the precedent of other Circuits and ruled that the district court may not consolidate arbitration in the lack of an arbitral arbitration agreement expressing the willingness of the parties for consolidation.

The approach of the courts to force consolidation of different tribunals even though the consent of the parties in the commercial relationship is not reflected in the arbitration agreement would gravely harm the party autonomy principle in arbitration, which is one of indispensable features that attract parties to choose arbitration over litigation.\textsuperscript{41} The approach taken by U.S. courts as above illustrated by the Boeing case where certain courts ruled on forcing consolidation remains an attitude towards domestic arbitration and should not necessarily be conceived as influence which would affect international commercial arbitration too, moreover, situations of forced

consolidation by U.S. courts targeted limited areas of commercial relationships like maritime arbitration and construction projects.\textsuperscript{42}

From the perspective of the European Countries practice it is noteworthy the example of the Netherland legislation, which gives power to the president of the First Instance Court to consolidate two arbitration proceedings with similar facts upon the request of one of the parties and with the condition of being filed in Netherlands, this condition is fulfilled by the fact that the seat is to be considered as the connecting factor under the Dutch law.\textsuperscript{43} The power of the President of the First Instance Court is manifested in those scenarios where the parties do not reach an agreement regarding the choice of arbitrators and the procedure to be followed in the consolidated arbitration, if that is the case then these matters are to be determined under the judge discretion.\textsuperscript{44}

In the arbitral procedural matter regarding the imposition of consolidation by the courts, there are opposing opinions against forcing consolidation by the courts, these opponents state that the imposed consolidation by the courts impairs inevitably the party-autonomy principle, which is a cornerstone in arbitration and consequently this procedural measure exercised by courts violates basic contractual rights of the parties embedded in their arbitration agreement.\textsuperscript{45}

\textbf{1.3 The appointment of arbitral tribunal in consolidated proceedings}

The consensual nature of arbitration and traditionally arbitration of disputes involving two parties is not the sole scenario occurred in commercial arbitration these days.\textsuperscript{46} The complex nature of multiparty contracts brings up obstacles and difficulties in composition of arbitral tribunal in commercial disputes involving more than two parties and several contracts regulating this multiparty contractual relationship. Questions arise on the appointment of an arbitral tribunal of three, what modalities need to be chased taking into account the constellation of multiparty arbitration involving several respondents.\textsuperscript{47} Arbitrators in the practice of the commercial arbitration frequently find themselves dealing with disputes which arise between more than two parties where the arbitration agreement signed by the parties requires for a three – member arbitral tribunal, and multiple parties who supposedly designate an arbitrator jointly cannot find the compromise to do that and instead they insist in their right to designate an arbitrator each. The key issue in this respect is how we can have an arbitral tribunal constituted in line with parties intentions reflected by the arbitration agreement and at the same time meting the principle of fair treatment for the disputing parties at the stage of the designation of the arbitral tribunal.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} F Poudret and others, \textit{supra note 19}, at 205
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} Schwarz & Mathew, \textit{supra note 34}, at 341.
\item \textsuperscript{46} Ugarte & Bevilacqua, \textit{infra note 48}, at 9
\item \textsuperscript{47} Aapple & Beechey, \textit{supra note 14}, at 40.
\end{itemize}
The serious consequences that may rise up after the constitutions of the arbitral tribunal in multiparty arbitration may be well illustrated in the Dutco case, a landmark case of 1992, the French Cour de cassation in the case of BKMI v. Dutco, rendered a ruling which has tremendously affected the issue of constituting arbitral tribunals in multi-party arbitration proceedings and paved the path for further revisions of the arbitration rules among most notable arbitration institutions purporting to address this pressing issue more constructively.\(^{49}\) The facts in the Dutco Case \(^{50}\) (FRENCH COUR DE CASSATION): BKMI is a German company which contracted contraction of a cement production plant in Oman, and formed a consortium with DUTCO, UAE, and Siemens, Germany, to perform the work jointly. In the consortium arbitration agreement clause parties stipulated that all disputes arising within the ambit of the agreement and which cannot be settled amicably should be settled under the ICC arbitration rules, by three arbitrators and Paris to be seat of arbitration.

Dutco lodged a claim against to German companies stating that the latter ones are not performing in line with contract drafted under the ICC arbitration rules and claimed separate payments from each company. BKMI and Siemens were against a single arbitration procedure insisting in separate proceedings. The ICC decided to proceed with a single arbitral tribunal composed of three arbitrators, one of them selected by Dutco, one by BKMI and Siemens jointly and the third one appointed by the ICC President. BKMI and Siemens attacked the award in the Cour d’Appel of Paris and asked to set aside the arbitral award, questioning the composition of the arbitral tribunal, and claimed that the recognition and enforcement of the award were against the international public policy.\(^{51}\)

The Court of Appeal in Paris dismissed the filing, ruling that the composition of the arbitral tribunal was made properly. The plaintiff BKMI not satisfied with the ruling of the Cour d’Appel decided to appeal at the Cour de Cassation (the Supreme Court), the court through its scrutiny of the arbitration clause held that the “principle of equality of the parties” consisting in the possibility of the parties to select the arbitrator falls within the realm of the “public policy” and it could be waived only after the dispute has arisen, hence in its ruling reversed the Cour d’Appel decision on this matter.\(^{52}\) The ruling of the French court has been intensively discussed by the arbitration commentators, this decision was not considered to be in line with the practice laid down up then by the French Supreme Court, another dissenting opinion regarding the verdict of the French Cour de Cassation that emerged from a group of authors claiming that the impact of this decision could possibly spread a misleading interpretation that “every arbitral party has right under French law to designate its own arbitrator or French law requires that all arbitrators be designated in the same manner”.\(^{53}\) The final verdict in Dutco case was also criticized by the ICC, perceiving it as a frustrating factor affecting further promotion of multiparty arbitration.\(^{54}\)

\(^{49}\) *Id.*


\(^{52}\) F Poudret and others, supra note 19, at 214

\(^{53}\) R. Ugarte & Th. Bevilacqua, supra note 48, at 11

\(^{54}\) O. Kazutake, supra note 38, at 200.
2. Joinder and Intervention

The new era of the commercial transactions affected also by the recent trends of globalization has increased the business transactions in the international level, and this has resulted in an extremely complex environment of doing business, frequently requiring the participation of several parties in delivering high profile projects. This scenario is typically present in building projects often involving the employer and the main contractor, besides the main contractor an engineer or an architect. This commercial setting employing several parties in a project also reveals the need to give the possibility of third parties to protect their interests if any dispute which may arise in the future. In order to remedy this problem, a high number of national civil procedures have developed respective mechanisms to give third parties the opportunity to participate in two-party proceedings in order to better advocate their interests in the arbitral proceedings.

In the commercial arbitration these mechanisms enabling third parties to defend their interests are known as Joinder and Intervention. The joinder is characterized with the process of a contractual party, where in the case of dispute to attempt in making part of the arbitration hearings a third party and to subject its interests to the outcome emerged from the arbitral proceedings, whereas the concept of Intervention encompasses the endeavoring attempts of the third party itself to be part and have a say in the commenced arbitration proceedings.

The application of the Joinder and Intervention in commercial arbitration is not a generally supported approach by arbitrators, this is challenged with the justification that application of joinder and intervention would result in a time-consuming process and increase the representation and other related costs to the original parties. In the arena of commercial arbitration there are other concerns revealed, inter alia contractual nature of arbitration agreement, where the participation of another party not bound to the contract would undermine this principle and compromising the confidentiality is another issue addressed by those who are not in favor of Joinder and Intervention. The arbitral tribunal in situations dealing with persistence for joinder or prospective intervening party needs to take into account the fact whether the third party intending to participate in the arbitral proceedings is subject to the arbitration agreement, or whether existing parties in the arbitral proceedings are willing to consent participation of the third party in the arbitral proceedings.

When the consent of the existing parties in the arbitral proceedings for allowing the new party to participate in arbitration is needed this quite often cause troubles to the arbitral institution to scrutinize whether the consent (if it is already given by the existing parties in the arbitral proceedings) is suffice to proceed with allowing the new party’s participation in the arbitral proceedings.

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55 S. Brekoulakis, supra note 23, at 1167.
56 Id.
57 S Greenberg, Ch Kee & J R Weeramantry, supra note 17, at 175.
58 Dore, supra note 12, at 41.
59 S. Brekoulakis, supra note 23, at 1171.
60 Isak Dore, Id.
Given the reality of the party–autonomy principle embedded in arbitration, a Joinder needs to seek the consent of the existing parties in the arbitral proceedings, this consent may be clearly indicated in the relevant provisions stipulated in the arbitration agreement, or impliedly referred to the arbitration rules administering future disputes. From the procedural standpoint, this consent can be made known at the time when the request for Joinder is addressed, or as discussed above at the time the contract is stipulated.61 Despite the fact that the approach of arbitration agreements and the rules of arbitration may be not be firmed towards the issue of Joinder, the power conferred to arbitral tribunal enables the later one to decide on the matter of Joinder, this power derives from the wide spread known doctrine of “competence – competence”.62

2.1. Non-Signatories in Commercial Arbitration

The widely discussed matter amongst arbitrators is the issue of non-signatories in commercial arbitration proceedings. This problem inevitably comes up more often as a result of the recent developments and novelties in the sphere of the commercial transactions making the practice of this field more complex and harder to deal with.63 The complexity of international commercial disputes can be explained with the diversity of parties who commonly come from different countries and these parties are involved in multi-party ventures to deliver a project, these parties are engaged in this type of cooperation through one or more contractual agreements, therefore the dispute arises from several agreements and frequently these agreements do not contain arbitration clauses to integrate those agreements.64 “Furthermore, the parties may not even have the same interests at stake or want the same arbitrators to resolve their disputes. Ordinarily, a party’s ability or obligation to arbitrate an international dispute arises from consent as a signatory to a contract that contains an arbitration clause”.65

This complexity accompanied with certain economic reasons presents a scenario where national/international group of companies signatories of the arbitration agreement do not have a connection with other individuals or companies involved in delivering the project. “Nevertheless, arbitrators do hear cases involving entities and individuals that never signed an arbitration clause. Continental scholars sometimes refer to extending the arbitration clause. Lawyers in Anglo-American traditions tend to speak of joining non-signatories”.66 This mechanism utilized by the Joinder to include in the existing arbitral proceedings other parties which are not signatories of the arbitration agreement, or parties who have not given their consent at the stage of the stipulation of the arbitration agreement to join the arbitral proceedings will probably result in uncertainties with respect to jurisdiction of arbitration and potential risks to challenge the award rendered by the arbitral tribunal.67

61 T Schwarz and W Konard, supra note 9, at 338.
62 S Greenberg, Ch Kee & J R Weeramantry, supra note 17, at 176.
63 Bernard Hanotiau, Multiple Parties and Multiple Contracts in International Arbitration, edited by the Permanent Court of Arbitration (Oxford University Press 2009) p 35.
64 Lamm & Aqua, supra note 39, at 711.
65 Id.
67 T Schwarz and W Konard, supra note 9, at 340.
This fact brings arbitral tribunal and national courts to the question whether the arbitration agreement clause can be extended to the non-signatory individuals or entities introduced as the upcoming claimants or respondents in the commenced arbitral proceedings.  

2.2 Methods of Extending the Arbitration Agreement Clause to Non-signatories

The standpoint taken towards the extension of the arbitration agreement clause is commonly perceived as a possibility to extend its scope to the parties which are not signatory of the arbitration agreement clause and besides this, the way the arbitration agreement clause is written does not imply any reference to the parties which have not signed this agreement. Application of this concept as described above is considered by many authors as a misleading one, in practice in many cases the arbitral tribunals and courts are driven to decide on this matter by ascertaining and analyzing the intention and the consent of the parties from the wording of the arbitration agreement clause. Another misleading fact is argued by authors with respect to application of extension is the effect between signatory and non-signatory parties in the arbitration agreement clause. This argument comes up from the practice of the commercial arbitration and international trade usages, lately domestic laws largely have diminished the requirement to have the signatures of the parties and remain satisfied with a written text.

Although the requirement of signature is not being considered recently as a decisive factor in determining parties which are affected or parties bound to the arbitration agreement clause, the written text of the arbitration agreement plays an important role to decide on this matter. This requirement occurs particularly in those cases where the name of the party which has not signed the agreement is there, in these circumstances the capacity of the party whose name is in the arbitration agreement needs to be interpreted.

Due to the fact that the extension of the arbitration agreement clause to the parties that have not signed it may be conceived as misleading, judges trying to avoid this problem are usually inclined to decide on the issue that who is bound by the arbitration agreement based on the guidance standards developed by their respective national jurisdictions and rely on the principles which determine the validity of the contract. At the national level the problem of extension of the arbitration agreement to the non-signatories seems to be handled more gracefully, in international arbitration, situation is a bit more complicated given the complexity of international commercial transactions and various usages developed by the international trade over the years. At this stage arbitrator face the question whether should be followed the same rules applied in the civil and commercial cases, or it is necessary to tackle this issue from a different point of view.

68 Hanotiau, Id.
69 F Poudret and others, supra note 19, at 211.
70 Bernard Hanotiau, Multiple Parties and Multiple Contracts in International Arbitration, supra note 63 at 37.
71 F Poudret and others, supra note 19, at 211.
72 Id.
73 Park, supra note 66, at 5
74 Bernard Hanotiau Id.
Notwithstanding the significant emphasis on consent, in the commercial arbitration there are situations in which the non-signatory party of the arbitration agreement clause may become party of the arbitral proceedings under several doctrines developed in the realm of the commercial arbitration, these doctrines include; the “group of companies doctrine”, “estoppel”, “piercing the corporate veil and alter ego doctrine”, “Principles of Agency and Assumption”.  

2.3. The Group of Companies Doctrine

The “group of companies” doctrine originates from commercial arbitration practice in France and it is well accepted and fully-fledged there, but in other countries this doctrine has not been extensively accepted as it is the case with France. With the application of this doctrine, a non-signatory company of the arbitration agreement manages to be bound by the arbitration agreement by taking the advantage of being in the same group with another company that has already signed the arbitration agreement clause. In this scenario when one company which is not signatory of the arbitration agreement purports to be bound by the arbitration agreement based on the circumstances of being in the same group with another company that has signed the agreement, in the arbitration practice known as the group of companies doctrine makes it necessary for the arbitral tribunal to decide on its jurisdiction. Application of this doctrine may dislocate the focus of the arbitral tribunal from assessing the law applicable to the arbitration agreement into ascertaining the intention of the parties.

Despite the fact that the group of companies doctrine is generally known as a possibility for a non-signatory company to be bound to the arbitration agreement exclusively on the grounds of being in the same group with another company that has signed the arbitration agreement. This connecting element drawn by those in favor of this doctrine is not similarly seen by dissenting authors of this doctrine, according to their opinion … “the existence of a group of companies is not a sufficient element per se to allow the extension to a non-signatory company of an arbitration agreement concluded by another member of the group”.

In the commercial arbitration discourse there is a wide spread opinion shared among authors that the group of companies doctrine has been purportedly invoked by the arbitral tribunals, more frequently by those arbitral tribunals constituted under the ICC rules of arbitration to decide on extension of the scope of the arbitration agreement clause to the non-signatory companies delivering the project jointly with another company, which is signatory of the agreement. In addition another reason for the arbitral tribunal to invoke the group of companies doctrine is to grant itself jurisdiction over the non-signatory companies as well.

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76 T Schwarz and W Konard, supra note 9, at 353.
79 Bernard Hanotiau, Multiple Parties and Multiple Contracts in International Arbitration, supra note 63 at 38.
80 Gaffney Id.
The landmark case which is considered as an inception of the case law where the group of companies doctrine served as referring point for arbitral tribunal to determine on the case is the Dow Chemical France v. Isover Saint Gobain ("Dow Chemical") case. Dow Chemical a company incorporated in USA owned directly or indirectly Dow Chemical (Venezuela), Dow Chemical AG, Dow Chemical Europe and Dow Chemical France. Dow Chemical (Venezuela) in 1965 signed a contract with a French company to distribute thermal isolation equipment in France. In the course of the delivering the project a claim was filed by the signatory companies of the arbitration agreement, but initiator of the claim was their parent company and a French company belonging to the same group.

The dispute arose from two separate contracts signed by two Dow companies with separate French companies. the Dow group requested the commencement of arbitration against Isover Saint Gobain, the claimants in this dispute were Dow Chemical Co, the US incorporated parent, Dow Chemical AG and Dow Chemical Europe, the Dow Chemical France, the subsidiary under the effect of the of the contract. the composition of claimants signatory companies and of companies which had not signed the arbitration agreement was not accepted by the Isover Saint Gobain, consequently challenged the arbitral tribunal’ jurisdiction to try the case based on the facts that Dow Chemical and Dow Chemical France had not signed the arbitration agreement.

The Isover Saint Gobain challenge was rejected by the arbitral tribunal and afterwards the tribunal proceeded with issuing an interim award and allowed the Dow Chemical Co and Dow Chemical France to become party of the arbitration agreement. The tribunal stated that “a group of companies has, despite the distinct legal personality of each company, an economic reality which the arbitral tribunal must take into account”. Furthermore the arbitral tribunal in regard with the concern for contradicting the any principle or rule within the realm of the international public policy found that its decision on allowing the non-signatory companies to be bound by the arbitration agreement was not in contradiction with this principle.

The interim award rendered by the arbitral tribunal was attacked by the defendant in the French Courts. The Court of Appeal in Paris found inadmissible the claim that the arbitral tribunal lacked jurisdiction to hear this case. the Court confirmed the findings and justifications of the arbitral tribunal, which gave an autonomous interpretation of the arbitration agreement and decided in light with the intention shared by all companies that non-signatory companies were party to the agreement and the these companies were affected by the scope of the arbitration agreement.

The judgment on the Dow Chemical case has caused the inception of debates among scholars who have commented that” the issue of consent may take a special dimension when one company to a complex transactions is a member of a group of companies, given the nature of the

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81 F Poudret and others, supra note 19, at 217.
82 Gary B. Born, supra note 1, at 654.
84 F Poudret and others, supra note 19, at 217.
85 Gaffney, Id.
86 Winston, supra note 75, at 5
relationships which exist between companies of such group”. 87 Hanotiau goes further with his comment and adds that “consent to arbitrate may sometimes be implied from the conduct of a company of the group – although it did not sign the relevant arbitration agreement – by reason of its implication in the negotiation and / or the performance and/ or the termination of the agreement containing the arbitration clause and to which one or more members of its group are a party” 88

With the initiation of the Dow Chemical case, the significance and the applicability of the group of companies doctrine has reached a higher level, notwithstanding the difficulties that may come up in applying this doctrine due to the fact that it has been introduced in the commercial arbitration practice relatively late. The doctrine derived from the Dow Chemical case prudently paid attention to the … “non-signatory’s control over the signatory company, and also on a non-signatory’s participation in the negotiation and performance of the contract” 89 As the doctrine was developed continuously and the number of cases increased, the issue of consent became more puzzling, instead of concentrating the duty on the party seeking extension to ascertain and prove the non-signatories’ consent, the approach of the French courts resulted in creating a legal presumption of consent, arising from a party’s participation in a contract with knowledge of the existence of an arbitration clause. In the course of various novelties attributed to the doctrine, this doctrine abandoned the “group entity” requirement and basically applied the doctrine to any person who participated in the negotiation or performance of the contract containing an arbitration clause. This approach leads to a … “no longer a group of companies doctrine, but instead a much more general theory”. 90

There might have been new developments after the Dow Chemical case era in the French case law, however evaluating the current situation in this respect seems not to be an easy task. The recent wave of cases addressed to the French courts employ non – signatory companies, who besides being associated in the same company they actively participated in performing the work as contemplated in the contract. 91 In this scenario the significance of the element belonging to a single company is being left aside repeatedly and “the emphasis is placed on the fact of the performance of the contract, whether by a company belonging to a group, or by totally independent person, such as sub-contractor, as carrier and so on” 92 It is noteworthy to make efforts to give the answer of the question about the number of cases when the application of the “group of companies” doctrine by the arbitral tribunal and consideration of this principle by the national courts lead to the final intended goal of this doctrine – to joinder in practice. The answer is not that encouraging and this is at certain point supported by the… “two leading Swiss scholars examined a random sample of arbitrators in which the “group of companies” criteria were considered. In only a quarter (twenty-five per cent) of the surveyed cases did the tribunal extended the arbitration clause to non- signatories”. 93

88 Id.
89 F Poudret, Sebastian & Others supra note 19, at 219
90 Id.
92 Id.
93 Park, supra note 66, at 25.
2.4. Estoppel

The impact of the judgment of the French courts in the Dow Chemical case resulted in revealing the companies doctrine, which is considered more to be attributed to the civil law concept, jurisdictions in the common law system, particularly the US jurisdiction have developed a different mechanism to make the arbitration agreement binding to the non-signatory parties as well and this is managed through the doctrine, which is more familiar to common law jurists as the doctrine of estoppel.94

It is general rule that parties will go for arbitration upon their consent to do so and they cannot be forced to do that, but there are some exceptions to this rule, where a party in a dispute can be compelled to arbitrate based on an agreement which it has not signed and this is done through the principles of estoppel, one of the cases where the estoppel was applied is the leading case International paper Co.v. Schwabedissen Maschinen & Analagen GMBH95, parties in this case International Paper and its predecessor in interest the Westinghouse purchased an industrial saw from the Wood System Incorporated, a U.S. distributor. The U.S. distributor signed a sales contract with Schabedissen, a German company who manufactured the saw. Westinghouse is not a signatory party of the sales contract between the U.S. distributor and the German manufacturer, this contract contained various warranties and it also contemplated arbitration in future disputes that may arise.96

When the saw’s defects came up, and the U.S. distributor bankrupted, international paper filed several claims directly against the German manufacturer, grounded on the warranties contained the sales contract signed by the U.S. distributor and the manufacturer.97 The German manufacturer decided to refer the case to the federal court in South Carolina, and stayed the proceedings pending arbitration. The court granted the stay, reasoning that international paper was subject to the arbitration provision in the sales contract between the manufacture and the U.S. distributor. International paper was not satisfied with the court’s ruling and filed a request for arbitration before the international court of arbitration in Geneva.98

The arbitrators of the Geneva arbitral tribunal ruled that there is no contract between Westinghouse and the German manufacturer, and that Westinghouse was not a third – party beneficiary of the sales contract between the manufacture and the U.S. distributor. On that basis, the arbitrators ruled against international paper and awarded costs to the German manufacturer. After international paper refused to pay the manufacture’s costs on the grounds that it should not have been required to arbitrate, the manufacture sought enforcement of the award in the district court in South Carolina. The district court granted the manufacture’s motion to enforce the arbitration award. International paper appealed.99

94 Brinsmead, supra note 80, at 10
95 International Paper Co. v Schwabedissen Maschinen & Analagen GMBH 206 F. 3d 411
96 Id., at par 7 - 9
97 Id., at par 11
98 Id., at par 16
99 Id., at par 17
The court of Appeals for the Fourth Circuit held that “in the arbitration context, the doctrine of equitable estoppel recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him”. Scholars draw distinctions between different types of applications of estoppel, which is important to avoid misapplication of this doctrine, Park states that “Arbitral estoppel remains distinct from promissory estoppel( promises induce action so as to cause injustice if not binding), equitable estoppel ( preclusion from asserting rights against one who justifiably relied on conduct), and collateral estoppel ( issue preclusion whereby a matter decided in one action cannot be litigated again in another suit involving the same parties”).

The estoppel principles have considerably occupied a significant place in the doctrine of commercial arbitration. However, the final goal of the estoppel principles to extend the scope of the arbitration clause to the third parties who have not signed it is mainly accomplished by the American courts. This reality at certain point relate the significance of these principles in the international commercial arena with the fact whether the seat of arbitration is chosen in the United States, giving the tribunal to apply the American law to give the answer on the question whether the arbitration clause is binding on the third party which is not signatory of that clause.

2.5. Pierce of Corporate Veil

In the spirit of the globalized economy, corporations are restlessly endeavoring to expand their economic activities transcending national frontiers and developing various governing structures to accomplish their economic goals. One type of this constellation is operation of the parent company and its subsidiary, in principle the parent company will not be affected by the subsidiary’s actions due to the fact that the subsidiary is an independent legal entity and the commercial relationship between the parent company and the subsidiary per se ‘is not sufficient to bind a non-signatory to an arbitration agreement’.

When the dispute arises and an arbitral award has been rendered on the disputing matter, this award will affect only the parent company which has previously agreed to refer the dispute to arbitration, however this does not necessary imply that the subsidiary will not be deprived to take part in arbitration solely on the grounds of not being signatory of the arbitration agreement clause calling for arbitration.

With the application of the corporate veil piercing doctrine in international arbitration agreements the effects of the arbitration agreement clause will be binding for the subsidiary as well for the mere reason that the core meaning of the corporate veil piercing is to consider the relationship between the parent company and its subsidiary creating a single legal entity, so the liability of the subsidiary cannot inevitably detached the parent company. This rule of legally connecting the parent company and its subsidiary is proliferated in different countries, but with certain variations in name and wording. “Anglo – American lawyers speak of piercing or lifting the veil between shareholder and corporation, French speakers tend to refer abus de droit,

100 Id, at par 24
102 Brinsmead, supra note 75, at 10
103 Anne Hui, infra note 118, at 723
104 Id, at 18
105 T Schwarz and W Konard, supra note 9, at 349
permitting claims against controlling shareholders for abuse of their ownership rights and German authorities invoke notions of Durchgriff, or seizing through the corporation”.106

Given the frequency of application of the “Piercing the Corporate Veil” concept in commercial arbitration, inevitably, situations occur when this concept is inappropriately applied.107 Hence, in the view of this concern, this concept “will be applied only where the owners had exercised complete control over the corporation with respect to the transactions at issue and where such control was used to commit a fraud or wrong that injured the party that is seeking to pierce the veil”.108 Application of this doctrine is significantly rooted in the American contract and corporate law making it an indispensable factor in ascertaining whether the arbitration agreement clause can be extended to non–signatory and makes the latter one be bound to it.109 From the practice of the U.S. courts judges tend to pierce the corporate veil in order to compel a parent company to arbitrate once it is obvious that the parent company exercise a significant control and domination on the subsidiary, the rationale behind this is that it is perceived that the parent company signed the arbitration clause, disregarding the fact that the arbitration clause has been technically signed by the subsidiary.110

2.6. Incorporation by Reference

Another theory developed by the commercial arbitration practice to bind non–signatories to arbitration agreement is “incorporation by reference”. This theory is applied in those situations where a venture or the agreement for business cooperation stems from different contracts and other documents signed by parties to perform a project, but one of the contracts or the main contract does not explicitly contain the arbitration agreement clause reflecting the parties willingness to go to arbitration in case a future dispute arise. Nonetheless, by applying the incorporation by reference theory, the contractual agreement lacking the arbitration clause can be incorporated by reference to the other contract or terms of an earlier agreement containing the arbitration agreement clause and compel the non–signatory party to arbitrate, despite the fact that it has not signed the contract containing the arbitration agreement.111 “Incorporation by reference frequently occurs in contracts involving standard conditions, trading commodities, bills of lading, and other types of shipping agreements”.

In the U.S. case law judges in their rulings have been notably positive and applied incorporation by reference of the arbitral clause from a different contract or relatedly agreement between the parties. Besides the U.S. courts, from the standpoint of the international arbitral tribunals the incorporation by reference theory is an effective mechanism to extend the arbitration agreement clause to the non–signatory parties, since the application of this mechanism is in line with the

106 Park at 18
107 Bernard Hanotiau, *Multiple Parties and Multiple Contracts in International Arbitration*, supra note 63 at 40.
108 Hanotiau *Id.*
109 Anne Hui, *infra note 118*, at 724
110 *Id.*
112 Lamm & Aqua, *supra note 39*, at 727.
New York Convention writing requirements. In applying the incorporation by reference theory the most pressing problems encountered are those dealing with the ascertaining process of the intent of the parties in the various terms of agreements between the parties, “some of the more complex issues that arise as to the arbitration agreement incorporated and circumstances where the arbitration agreement incorporated is in some way inconsistent with the contract to which it allegedly applies”.

Extending the arbitration clause to a non–signatory through incorporation by reference is accompanied with another concern with respect to “Separability doctrine”. This doctrine in the contract law practice recognizes the severability of the original contract and the later contract, in the view of this doctrine “courts should not impose on the parties any obligations they did not clearly intend to assume, in light of the requirement that the existence of arbitration clauses be strictly construed”.

In applying the incorporation by reference theory parties should pay attention at the negotiation stage of the contract, prudently scrutinize the details of the current contract which are being incorporated to the previous contract through the reference, given the parties’ consensual freedom to negotiate the contract elements to be incorporated by reference, once the arbitration clause is incorporated by reference from a previous contract containing such a clause, then the party who has done the incorporation by reference will be bound to that arbitration clause and cannot deny the effect of that.

2.7. Agency

In commercial arbitration we have application of the general principles of contract and agency purporting to intensify application of the general contract law of the domestic legal systems in arbitration agreements to ascertain the rights and obligations of the third parties that derive from the concluded arbitration agreements. In the view of the general principles of agency law principals are commonly affected by arbitration agreements prepared and stipulated by their agents, usually “…binding a non-signatory principal to an arbitration agreement when the signatory agent acted within the principal’s actual, implied, or apparent authority.” However, “agents who execute agreements on behalf of a disclosed principal will not be individually bound to the terms of the agreement without clear evidence of the agent’s intention to bind himself instead or in addition to the principal”.

In the practice of the U.S. courts, the agency theory is not uniformly applied, some courts have ruled that agents of a signatory can be bound by the arbitration agreement clause together with its employees and representative and on the other hand, judges from other courts in their judgments held that “an agent or employee of a party is not privileged to enforce an arbitration clause, unless the parties specifically intended for the clause to reach to these non-signatories”.

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114 Hosking, supra note 111, at 544
116 Anne Hui, infra note 118, at 722
117 Hosking at 113
118 Aalexandra Anne Hui ‘Equitable Estoppel and the Compulsion of Arbitration’ VANDERBILT LAW REVIEW, Vol. 60 Is.2, at 723.
119 Lamm & Aqua, supra note 39, at 723.
120 Bymes & Pollman Id, at 5.
The fact that a principal who has not signed the arbitration agreement clause will be bound by that clause merely because the contract containing the arbitration clause was signed by his agent on his behalf is generally received as a surprise, but the power of the agent to extend the arbitration clause to the principal stems from the ‘manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by other to do so’. If we follow this logic, a principal who has not signed the arbitration agreement clause may be compelled to join the arbitration when his agent, acting on behalf of the principal enters in a contractual agreement containing the arbitration clause. Nevertheless, extending the arbitration clause to the principal based on the consent that the principal has given to the agent to conclude the contract on his behalf may not be enough “without some more structured framework within which to assess the extent of third party rights and obligations to arbitrate”.

2.8 Assumption

The binding effect of the arbitration clause may be extended to the non-signatory in the case the latter one’s subsequent conduct gives the indication that it has assumed the obligation to arbitrate. Application of the assumption theory and consequently obtaining an arbitral award resulting from the usage of this theory without referring to any written agreement calling for arbitration, such an award may not be in compliance with the New York Convention, due to the convention requirement for a written agreement, notwithstanding the fact that the party might have clearly manifested its intention to be bound by that agreement is not a non-signatory.

Regarding the assumption theory there are opposing opinions claiming that the application of the assumption theory is not in line with traditional contract principles, however … “if the non-signatory does not desire arbitration, then it needs to make that objectively clear … contract principles do not presume min-reading abilities, and if the parties subjectively intend one result, then it is their responsibility to manifest that intent on the objective level”. The decision of the court to apply the assumption theory leaves room to be perceived from two different perspectives with respect to the contract principles, … “allowing assumption may permit a party to slip unknowingly and unintentionally into purported agreement to arbitrate despite the absence of a meeting of the minds, whereas… refusing to recognize assumption makes parties susceptible to relying on an opposing party’s bad faith indication of willingness to participate in arbitration”.

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121 Anne Hui, supra note 118, at 722
122 Id.
123 Hosking, at 112.
124 Anne Hui Id.
125 Lamm & Aqua, supra note 39, at 724.
126 Anne Hui Id, at 722-723
127 Byrnside & Pollman, supra note 113, at 5.
3 Multiple Parties and Multiple Contracts from the Institutional Perspective

3.1. The ICC International Court of Arbitration

The ICC is among the oldest and most prominent dispute resolution institutions. The ICC International Court of Arbitration and its Secretariat began working in 1923 with the purpose to offer a smoother and more convenient dispute resolution environment for disputes arising among commercial entities operating in the cross-border commerce.128 The ICC case load reports show that the volume of case administered by this institution kept increasing in the recent years; in 2010 the ICC received 793 requests for arbitration and 2011 the number went up to 796.129 Given the present complex situation in the international commercial transactions, which has largely affected the international arbitration, making the latter one more challenging for those actively involved in it. Due to this fact, the ICC recently has witnessed an increase in the number of disputes derived from several contracts and employing more than two parties. This is also reflected lately in the ICC cases, “out of 186 multiparty cases filed to the ICC Court in 2007, 14.5% involved multiple claimants and respondents, 21% involved multiple claimants, and 64.5% involved multiple respondents”.130

Aiming at improving the 1998 Arbitration Rules and making these rules more efficient and flexible for the parties, which decide to refer their disputes to be administered by ICC, the latter established a task force in 2008 to work on revising the 1998 arbitration rules. This task force was comprised of 175 members coming from forty-one countries, their work culminated with the tenth revision of the ICC Arbitration Rules, published in September 2011, the newly revised rules entered into force as of January 1st, 2012.131 The amendments incorporated in the newly revised arbitration rules of the ICC were drafted purporting to be in line with the recent developments emerged from the practice of the arbitration field and have the arbitrations conducted more efficiently and less costly.132 Some of the provisions introduced in the new ICC Arbitration Rules are those provisions related to Multiparty Arbitration, these provisions have reportedly generated hot debate among members of the task force, since the new drafting of these provisions required a clear, simplified and pragmatic approach and also an embodying spirit with the practice built up by the ICC arbitrations over the years.133

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128 M Pair and p Frankenstein, supra note 20, at 1062
133 Id. at 8.
3.1.1 Joinder of Additional Parties under 2012 ICC Rules of Arbitration

The ICC revised arbitration rules which entered into force as per January 2012 for the first time cover more specifically the issue of joinder of an additional party who is not yet a party to arbitration. The 1998 ICC Rules of Arbitration did not contain any provision dealing exclusively with a joinder of additional parties. The ICC 1998 Rules of Arbitration, respectively article 4 (6) provides that the Court has to decide whether a third party may join the arbitration proceedings. Under the newly revised ICC Rules of Arbitration, the Joinder of additional parties is encompassed by article 7 of these rules.

“A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the “Request for Joinder”) to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such joinder shall be subject to the provisions of Articles 6(3)–6(7) and 9. No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The Secretariat may fix a time limit for the submission of a Request for Joinder.”

Article 7 foresees the a mechanism for enabling a third party, who is not yet party of the arbitration proceedings to join the arbitration by submitting a “Request for Joinder” to the Secretariat. This request for Joinder can be addressed by any existing party to the arbitration proceedings at any time before the confirmation of the appointment of any arbitrator has been done by the ICC court.

Existing Arbitration

    JOINDER

B wants to join an additional party “C” and file a claim against it

A v B  

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A+ C v B  

(C joins A’s)

Or

A v B v C  

(Now three “sides”)

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134 Verbist, supra note 76, at 8.
136 Id.
Although an additional party may join the arbitration proceedings, this does not necessarily per se confer jurisdiction on the arbitral tribunal towards that party that has become member of the arbitration proceedings. There is still maneuvering room for additional party to contest, for instance the additional party may argue incapability of the arbitration agreement clause to keep the additional party bound to it.  

3.1.2 Claims between Multiple Parties in ICC Rules of Arbitration

In the new ICC Rules of Arbitration article 8 provides the roadmap with respect to any party intending to bring a claim against another part but this article also cover the so called “Cross – claims” raised in the commercial transactions environment employing more than two parties;

“In an arbitration with multiple parties, claims may be made by any party against any other party, subject to the provisions of Articles 6(3)–6(7) and 9 and provided that no new claims may be made after the Terms of Reference are signed or approved by the Court without the authorization of the arbitral tribunal pursuant to Article 23(4).”

Under this article new claims can be brought e.g. claims initiated by a respondent against another, or claims raised by a claimant against another claimant these claims can be addressed to the arbitral tribunal before the Terms of Reference have been signed and exceptionally after the moment, but only upon the arbitral tribunal discretion.

3.1.3 Multiple Contracts

Claims arising out of a contractual commercial relationship spread in several contracts and consequently stipulated into several arbitration agreement can be proceeded in a single arbitration proceeding.

“Subject to the provisions of Articles 6(3)–6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.”

Circumstances which commonly occur under the multiple contracts are those in a two-party arbitration where claim stem from several contracts signed by the same parties. In addition, in a multiparty arbitration the scenario is characterized with a claimant submitting claims against several respondents by grounding its claims on a multiplicity of contracts signed by the parties in dispute.

In order to put this in more simple terms - in this type of complex arbitrations where claims can be brought under more than one contract a claimant wants to bring claims in a single arbitration based on more than one contract or a respondent wants to bring a counterclaim based on a

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140 Verbist, supra note 76, at 9.
different contract. Claims can also be brought between parties who are on the same side in arbitration, called “cross claims” as discussed above.\textsuperscript{141} Although the claims which have arisen out of more than one contract and were brought together in a single arbitration, parties will still have the possibility to raise objections of a jurisdictional nature leading to the Court \textit{prima facie} jurisdictional control to assess whether the compatibility of the arbitration agreements is met and the consensus of the parties which have signed the arbitration agreement has been reached.\textsuperscript{142}

3.1.4 Consolidation

Due to the complex nature that commercial transactions have been recently portrayed with, employing several parties in delivering one project has inevitably brought commercial disputes spread out in several independently initiated proceedings, aiming at bringing these separate arbitration proceedings in one case parties refer to a procedural mechanism for doing this, which is known in the international commercial arbitration as Consolidation.\textsuperscript{143} In the revised 2012 ICC Rules of Arbitration a significant position has been granted to consolidation comparing to previous 1998 ICC Rules of Arbitration, a separate article is dedicated to consolidation and consequently making significant changes to the ICC Rules.\textsuperscript{144} In the 2012 ICC Rules new Article on consolidation provides:

\textit{The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:}
\begin{itemize}
\item[a)] the parties have agreed to consolidation; or \\
\item[b)] all of the claims in the arbitrations are made under the same arbitration agreement; or \\
\item[c)] where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.
\end{itemize}

\textit{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. When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.}\textsuperscript{145}

This article confers to the ICC Court the power to consolidate two or more ICC arbitrations into a single arbitration upon the request of the party wishing to do so. The Court may proceed with the consolidation of several arbitration proceedings in circumstances where a) the parties have given their consent to move with consolidation; or b) all the claims arise in the separate arbitration proceedings derive from the same arbitration agreement and c) claims are made under different arbitration agreements as long as the arbitrations occur between the same parties, the

\textsuperscript{141} See 2012 ICC Rules of Arbitration, Art 8(1).
\textsuperscript{142} See 2012 ICC Rules of Arbitration, Art 6(4) (ii) (a), (b).
\textsuperscript{143} M. Pair and P. Frankenstein, \textit{supra note 20}, at 1063
\textsuperscript{144} Id, at 1065
\textsuperscript{145} 2012 ICC Rules of Arbitration, Art 10.
disputes arise in connection with the same legal relationship and the Court ascertains that exists the compatibility of the arbitration agreements. In the old ICC rules of arbitration, Article 4(6), one of the typical reasons from the ICC Court to reject an application for consolidation was the unsatisfied requirement to have the identical parties in both cases. However, with Article 10(b) of the 2012 revised ICC rules, when situations occur with the same contract and arbitration clause, these are considered to be sufficient connecting elements for the arbitrations to be consolidated.

Another requirement provided under Article 10(c) is compatibility of arbitration clauses and this requirement was not clearly indicated by the 1998 ICC rules, although in the practice of the ICC Court, arbitration clauses were required to be compatible in order to proceed with the consolidation of the arbitration proceedings. In the practice of commercial arbitration, incompatibility of the arbitration clauses does not occur in cases of a single arbitration agreement, whereas in the multi-contract constellation there is always the need to assess whether the arbitration clauses are compatible, this need comes due to the nature of these cases involving more than one arbitration clause, the problem of ascertaining this fact is less complex in scenarios occurring with arbitration agreements providing with the same language.

3.1.5 Appointment of Arbitrators in Multi-party Disputes

When we come to the stage of appointing arbitrators, this becomes a hot debated issue when we deal with cases where consolidation is required, under the 2012 ICC Rules Arbitration provides with Article 12 paragraphs:

“6) Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 13.
7) Where an additional party has been joined, and where the dispute is to be referred to three arbitrators, the additional party may, jointly with the claimant(s) or with the respondent(s), nominate an arbitrator for confirmation pursuant to Article 13.
8) In the absence of a joint nomination pursuant to Articles 12(6) or 12(7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 13 when it considers this appropriate”.

146 Id.
148 M. Pair and P. Frankenstein, *supra note 20*, at 1074.
149 M. Pair and P. Frankenstein *Id.*, at 1076.
150 *Id.*
As it is indicated in the article 12 of the 2012 ICC rules, this article regulates the three member arbitral tribunal in cases involving multi-party disputes, where several claimants or respondents jointly nominate one arbitrator. When the additional party has become party into arbitration, this party jointly with respondents or claimants nominate an arbitrator, when the consent is not reached by the parties to nominate the arbitrator jointly, the ICC Court may appoint each member of the arbitral tribunal.  

The discretion of the ICC Court to appoint three arbitrators in multi-party disputes as foreseen in article 12(8) is exercised in those circumstances where the concern of the equally treatment of the parties may come up, as the commercial arbitration practice shows, the exercise of the power conferred to the ICC Court to appoint arbitrators is not that well accepted fact, frequently the warning the ICC Court to use this power make the parties to reach the consensus in order to nominate the arbitrators jointly.

3.2 London Court of International Arbitration (‘LCIA’)

The increased intensity of the complex nature that has characterized commercial activities recently has inevitably affected in multiplying the number of cases involving more than two parties, companies or commercial entities in delivering a single project. Due to participation of several parties in a certain joint venture projects has caused the increasing of the frequency of commercial disputes with the involvement of multiple parties to be addressed for administration by the LCIA. The LCIA arbitration rules have been widely chosen by the parties for administration of their future disputes for the mere fact that...“the LCIA arbitration rules represent a perfect combination of civil and common law rules, which makes it highly desirable to the parties”.

The number of arbitrations commenced by the London Court of International Arbitration (“LCIA”) in 2006 amounted to quarter of the total of arbitrations commenced at the premises of this institution in the same year, where the arbitrations initiated based on a single request, meanwhile referring to more than one arbitration agreement contract were almost 10 per cent. This percentage of arbitrations involving multiple parties kept increasing in the following year 2007 too, reaching 20 percent of the total number of cases administered under auspices of LCIA.

3.2.1 Appointment of Arbitrators

In the LCIA Rules like in other institutional rules the process of appointing the arbitrators in multiparty constellation is fragile and often leading to unpleasant situations for participating parties in arbitration and arbitration institutions itself, particularly in the scenario when the arbitration clause does not clearly enough roadmap for the modality to be followed by the disputing parties in order to reach the consensus needed to have the arbitral tribunal arbitrators

152 Id.
153 Whitesell, supra note 143, at 208.
154 Adrian Winstanley, Multiple Problems: A View from the London Court of International Arbitration (Permanent Court of Arbitration ed., 2009) p.213.
156 Id.
appointed collectively as foreseen by the LCIA arbitration rules.\textsuperscript{157} In the absence of a collective agreement among parties, notwithstanding any potential nomination made by the individual party, the LCIA Rules provide for the appointment of the entire arbitral tribunal by the institution itself.\textsuperscript{158}

The Article 8 of the LCIA Rules provides:

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8.1 Where the Arbitration Agreement entitles each party howsoever to nominate an arbitrator, the parties to the dispute number more than two and such parties have not all agreed in writing that the disputant parties represent two separate sides for the formation of the Arbitral Tribunal as Claimant and Respondent respectively, the LCIA Court shall appoint the Arbitral Tribunal without regard to any party's nomination.
8.2 In such circumstances, the Arbitration Agreement shall be treated for all purposes as a written agreement by the parties for the appointment of the Arbitral Tribunal by the LCIA Court. 
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The rationale behind the Article 8(2) is to serve as an antidote to the criticism raised against the institutional arbitration rules for conflict with the party autonomy subjected in the arbitration agreements referring for the appointment of arbitrators by parties and the circumstances in some cases where the appointment of arbitrators, a process entrusted to parties by the institutional arbitration rules is passed to the institutional body.\textsuperscript{160} On the other hand, a group of authors do not see any concerning affects coming up by this conflict, from the standpoint of the authors Lew, Mistelis and Kroll "[T]hese concerns are not justified. The perceived conflict does not exist. By agreeing to arbitrate under the rules of an institution providing for special appointment procedure in a multiparty situation this procedure becomes part of the parties agreement".\textsuperscript{161}

### 3.2.2 Joinder under LCIA Rules

In order for a new party to join the arbitral proceedings which have already commenced, it is required the consent expressed by the third party purporting to join the proceedings, but also the will of the party submitting the application for a Joinder, disregarding the objection of another existing party which has already consented on the composition of the arbitral tribunal\textsuperscript{162}, as provided under the LCIA Rules, Article 22(1) (h):

**Additional Powers of the Arbitral Tribunal**

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22.1 Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views:
(h)
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\textsuperscript{157} Id., at 216.
\textsuperscript{159} LCIA Rules of Arbitration, article 8(1) & (2)
\textsuperscript{160} R. Ugarte & Th. Bevilacqua, supra note 48, at 22.
\textsuperscript{161} Lew, Mistelis & Kröll, supra note 4, at 382
\textsuperscript{162} T Schwarz & W Konard, supra note 13, at 340
to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration".  163

In applying the Article 22(1) (h) of the LCIA Rules, quite often a concern come up in light with the power of this article granting the right to all claimants on one side to have an arbitrator nominated jointly and all respondents on the other side to nominate the arbitrator, at the that point when the arbitration agreement provides that they can do so, albeit after the arbitral tribunal has been constituted. 164 The concerning matter is the fact that the new party joins the arbitral proceedings without having the chance to give its input in the process of constitution of the arbitral tribunal, nonetheless Article 22(1) (h) regarding the appointment of arbitrators requires not only the consent of the existing parties of the arbitration agreement but also in the process of constituting the arbitral tribunal the third party is required to give its consent as well. So in cases when the third party joins the proceedings after the appointment of arbitrators is done, it must be conceived that third party joining arbitral proceedings after the selection arbitrators has waived its right to be part of the selection process. 165

### 3.2.3 Consolidation under LCIA

The issue of consolidation is not explicitly addressed in the provisions of the LCIA Arbitration rules as it is the case with the issue of joinder and intervention. When scenarios with the application for arbitration having the request for consolidation incorporated in it occur, ‘the institution may appoint the same tribunal in related cases to facilitate consolidation, in the due course’. 166 Generally from the standpoint of the arbitration practice, where there is no reference on the arbitration agreement signed by parties on this matter and the provisions of the arbitration rules invoked to administer the dispute do not tackle this problem, then for the parties an alternative left is check whether the arbitration provisions of the seat of arbitration cover this issue. 167 When there is a lack of the arbitration agreement requiring the consolidation and this is not covered by the arbitration rules, parties attempts to ascertain relevant provisions from the arbitration acts in the seat of arbitration frequently end up unsuccessfully satisfied, due to the fact that many of the national arbitration acts do not contain the relevant provisions handling this problem, except some of them: arbitration provisions in Hong Kong, in the Netherlands and New Zealand. 168

Some concerns encountered at the stage when a new party is joined in the existing arbitral proceedings or when several arbitral claims are brought together through consolidation are those related to the costs; arbitration costs and other costs related to the parties’ legal representation in the arbitration. 169 The Article 24(1) for the LCIA Arbitration rules provides:

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163 LCIA Rules of Arbitration, article 22 (1).
164 Winstanely, supra note 150, at 218
165 Id.
166 Id., at 219.
168 Id.
169 Winstanely, supra note 150, at 219
“The LCIA Court may direct the parties, in such proportions as it thinks appropriate, to make one or several interim or final payments on account of the costs of the arbitration. Such deposits shall be made to and held by the LCIA and from time to time may be released by the LCIA Court to the arbitrator(s), any expert appointed by the Arbitral Tribunal and the LCIA itself as the arbitration progresses”.

In case of imbalances of the payment of advances occurred, given the fact that the existing parties may already have paid the initial advance for the arbitral tribunal administration fee, before the third party has joined the arbitration or the claims have been consolidated, the LCIA Court may request the parties to pay advances on the costs the possible imbalances on the payment between parties in the arbitral proceedings may be redressed.

3.3. Multiparty Arbitration under newly revised UNCITRAL Rules 2010

The UNCITRAL Rules were adopted in 1976 and no revision was made on these rules until 2010. During this 30 year period of time given the fact that things evolved in the sphere of commercial arbitration, restrictive capabilities of the original UNCITRAL rules to adapt the new developments unearthed. Aiming at being in line with the recent novelties in the commercial arbitration in 1999 UNCITRAL took under consideration the fact that the Rules need to be changed. In 2006 the United Nations Commission on International Trade Law (UNCITRAL) intensified the efforts in revising its Rules of Arbitration. This process was accompanied by a consensus progressing pretty slowly and coupled with the idea of having everyone agreed on the final outcome.

The work for revising the Rules was completed in 2010, and this process culminated in June 25th the Commission adopting the final text of the amended Rules and made their use available for arbitration of the prospective disputes arising from the international commercial activities. Parties which have stipulated the arbitration agreement clause after the 15 August 2010 are presumed to refer to the revised version of the UNCITRAL Rules 2010, but this does not necessarily mean that parties are deprived from using the 1976 version of the rules, this is upon their discretion to incorporate the 1976 Rules on their arbitration agreement clause.

3.3.1 Appointment of Arbitrators in Multi-party disputes under revised Rules

With the revision of the UNCITRAL Rules, the working group has taken into account the possibility of situations involving more than two parties either as a respondent or claimant in a dispute. In the revised Rules Article 10 tackles the issue of appointment of arbitrators in multi-party disputes, this Article 10(1) provides:

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170 LCIA Rules of Arbitration, article 24 (1).
171 Id.
174 Moenes & Trone, supra note 110, at 377
“For the purposes of article 9, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.”

As indicated in the Article 10(1), when there are circumstances involving a multitude of parties in the claimants’ side or respondents’ side, those parties according to this article appoint jointly an arbitrator. In cases having parties not agreed on appointing the arbitrator jointly, then the power to do constitute the arbitral tribunal entirely is conferred to the appointing authority, this is done purporting to omit a scenario where the parties cannot reach the agreement to appoint an arbitrator jointly. The appointing authority entitled to appoint the entire arbitral tribunal when there is no agreement among the parties to appoint their arbitrator jointly, may be a preference from the parties, if the parties do not agree on the appointing authority within 30 days, then one of the parties may request the Secretary – General of the Permanent Court of Arbitration to designate an appointing authority. This amendment regarding the appointment of arbitrators was incorporated in the revised Rules with the purpose to address the problem encountered in the Dutco case of the French Cour’ de Cassation, the original UNCITRAL Rules were incapable of tackling this problem properly and consequently the working group incorporated in the revised UNCITRAL Rules a provision:

10(3) “In the event of any failure to constitute the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal and, in doing so may revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator”.

As indicated in the Article 10(3), the appointing authority will have the power to appoint the entire arbitral tribunal and also revoking the previous appointment. “Another multi-party issue is that of joinder of third parties who were not parties to the original agreement, even if not all the parties consent to such a joinder”. In the spirit of the newly revised UNCITRAL Rules 2010 working group members have taken a different approach and incorporated amendments purporting to better adapt to the situations involving more than one claimant or more than one respondent in the disputed matter. The revised Rules Article 17(5) provides:

“The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all

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175 Revised UNCITRAL Rules 2010, Art 10(1).  
177 Revised UNCITRAL Rules 2010, Art 6(1) & 6(2).  
178 Moenes & Trone, supra note 110, at 379  
179 Revised UNCITRAL Rules 2010, Art 10(3).  
parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration”.

This Article allows the new party to join the existing parties in the arbitral proceedings which have already commenced, unless the new party intending to join the proceedings would cause prejudice to any of the parties. Sometimes the complex nature of multiple contracts is harder to be tackled than the multi-party issue particularly “where there are multiple disputes relating to the same set of facts and common legal questions arising out of transactions amongst the same sets of parties, it would sometimes be desirable to deal with disputes together before the same tribunal.” In the revised Rules the articles 23 and 3(1) which address the issue of bringing together a multiplicity of claimants or respondents into a single arbitration have been slightly changed as well and now these articles envisage the reality of the multi-party disputes.

### 3.4 Multiparty Arbitration under CEPANI Arbitration Rules

Observing the difficulties faced in the multiparty arbitration and the increasing necessity to have a better approach towards the pressing issues related arbitration involving more than two parties and claims deriving from several contracts the Belgian Centre for Mediation and Arbitration (CEPANI) decided to revise its rules, which took the effect as per 1\textsuperscript{st} of January 2005.

#### 3.4.1 Appointment of Arbitrators

The issue of appointment of arbitrators in situations where the dispute has arisen among a multitude of parties is contemplated by the revised CEPANI Arbitration rules as well. The governing provisions of the CEPANI on this matter take a pretty similar approach with the ICC Rules of Arbitration. This was also stated by the CEPANI’s chairman in a journal article issued after the 2005 rules entered into force that the provision regarding the appointment of arbitrators “is directly inspired by the Arbitration Rules of the ICC and respects on one hand the equality of the parties with regard to the appointment of the arbitrators and the rule of impartiality on the other, both of which principles are stipulated by the Belgian Judicial Code”

The Article 9(3) of the CEPANI rules provide:

“Where there are multiple parties, whether as Claimant or as Respondent, and where the dispute is referred to three arbitrators, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate one arbitrator for approval pursuant to the stipulations of the present article.

In the absence of such a joint nomination and where all parties are unable to agree on a method for the constitution of the Arbitral Tribunal, the Appointments

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181 Revised UNCITRAL Rules 2010, Art 17(5).
182 Revised UNCITRAL Rules Id.
183 Croft, supra note 113, at 18.
184 Ugarte & Bevilacqua, supra note 48, at p 16.
185 Ugarte & Bevilacqua, supra note 48, Id.
Committee or the Chairman may appoint each member of the Arbitral Tribunal and shall designate one of them to act as chairman”.187

The Article 9(3) of the CEPANI Rules confers on the multiples claimants or multiple respondents the possibility to designate an arbitrator jointly, but if the parties from either claimants’ site or respondents’ site do not manage to reach the agreement to designate the arbitrator jointly, then the trace will be paced for the institutional designation of all arbitrators.

3.4.2 Consolidation and Joinder under CEPANI Rules

The issue of Joinder and Consolidation in the CEPANI Rules is addressed in Article 12, which provides:

“When several contracts containing a CEPANI arbitration clause give rise to disputes that are closely related or indivisible, the Appointments Committee or the Chairman is empowered to order the joinder of the arbitration proceedings. This decision shall be taken either at the request of the Arbitral Tribunal, or, prior to any other issue, at the request of the parties or of the most diligent party, or upon CEPANI’s own motion.

Where the request is granted, the Appointments Committee or the Chairman shall appoint the Arbitral Tribunal that shall decide on the disputes that have been joined. If necessary, it shall increase the number of arbitrators to a maximum of five.

The Appointments Committee or the Chairman shall take its decision after having summoned the parties, and, if need be, the arbitrators who have already been appointed. They may not order the joinder of disputes in which an interim award or an award on admissibility or on the merits of the claim has already been rendered”.188

The Article 12 of the CEPANI Arbitration Rules states that the Appointments Committee or the chairman of CEPANI is the institutional resort with the power conferred by this Article to appoint the arbitral tribunal entitled to give its decision with respect to disputes that have eventually become part of the existing arbitration proceedings, when it is necessary the Appointments Committee can decide on increasing the number of arbitrators reaching a maximum of five. Those disputes where one interim award or a relatedly award on admissibility has been rendered on them cannot be joined.

The consolidation of different arbitration proceedings between the same parties, also extended to several parties is allowed under CEPANI Rules as long as there is a close connectivity or indivisibility between the claims. The decision with respect to consolidation of arbitration proceedings can be taken upon arbitrators’ initiative or with the request of the parities, but also upon the CEPANI’s own motion.189 The CEPANI Rules provides to a large extend a flexible capability and effective modalities for the mechanism of consolidation to be performed, which has inspired other institutional arbitration rules. nevertheless the meaning of the closely related

189 F Poudret and others, supra note 19, at 208.
disputes is not provided under the Article 12 of the CEPANI Rules, but to remedy the potential confusion the Belgian Judicial Code contains: “[c]laims can be handled as connected claims when they are so closely related that it is desirable to consolidate them and judge them together, in order to avoid an outcome that would be incompatible, is said disputes would have been handled separately”.191

3.5 Swiss Arbitration Rules

Given the administrative organizational structure of Switzerland, institutional arbitrations were convened separately by the respective local chambers of commerce and Industry spread out in the different cities, including Basel, Geneva, Lausanne, Lugano, Neuchâtel and Zurich. This segregation of arbitral disputes administered by arbitration institutions established in several major cities in Switzerland ended in 2004, when these institutions decided to get merged and offer means of dispute resolution by applying the Swiss Rules of International Arbitration. Switzerland being as an neutral is a palatable is a significant venue for foreign individual to stipulate in the arbitration agreements this country as a seat of arbitration, due to this fact the substantive law of this country is frequently chosen as a law governing their contracts, even in those situations where there is no connecting element with this country, no transition, or other element related to this country. Taking into account these elements favorable by commercial contractual parties, Switzerland has managed to be a significant venue for administration of many arbitral proceedings and this has also been statistically presented.

In the beginning of 2012 Swiss Rules of International Arbitration has been revised aiming at addressing latest developments in the international arbitration arena more properly. The previous revision of the Swiss Arbitration Rules was adopted in 2004 and it was inspired by the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). One of the reasons behind the decision to revise the 2004 Rules was pretty much related with the latest revision done by the UNCITRAL in its Rules of Arbitration. The revision of the Swiss Rules was initiated purporting to “[f]urther enhance the efficiency of the arbitral processes, particularly in the time and cost, to give certain additional powers to the institution administering the proceedings and to preserve the flexibility of the proceedings and autonomy of the parties on hand and the arbitral tribunal on the other hand”. The revised Swiss Rules will come into force on 1 June 2012, starting from this date all prospective arbitrations will be commenced under the revised rules, if the parties in the arbitration agreements have agreed otherwise.

191 Id.
3.5.1 Appointment of Arbitrators in Multi-party Proceedings

In cases involving more than two parties, the Swiss Arbitration Rules provide for claimants to designate one arbitrator jointly and the same procedure to be followed by respondents as well. When parties cannot reach the agreement to designate an arbitrator as contemplated by the Swiss Rules, the power to designate all arbitrators is conferred to the Court, this power is also extended to the determining the presiding arbitrator. In the Swiss Arbitration Rules revised in 2012, Article 8 (3, 4 & 5) covers the appointment of arbitrators in arbitral proceedings involving more than two parties, this article provides:

“3. In multi-party proceedings, the arbitral tribunal shall be constituted in accordance with the parties' agreement.
4. If the parties have not agreed upon a procedure for the constitution of the arbitral tribunal in multi-party proceedings, the Court shall set an initial thirty-day time-limit for the Claimant or group of Claimants to designate an arbitrator, and set a subsequent thirty-day time-limit for the Respondent or group of Respondents to designate an arbitrator. If the party or group(s) of parties have each designated an arbitrator, Article 8(2) shall apply to the designation of the presiding arbitrator.
5. Where a party or group of parties fails to designate an arbitrator in multi-party proceedings, the Court may appoint all of the arbitrators, and shall specify the presiding arbitrator”.

3.5.2 Consolidation

In the revision of the Swiss Rules completed in 2012 some of the distinguishing elements from the established rules of 2004 were done on the provisions covering the issue of consolidation in arbitral proceedings deriving from multi-party and multi-contract disputes. This recent revision of the Swiss Rules has brought novelties as well in provisions addressing consolidation, in the revised version of Swiss Rules Article 4 (1) provides:

“Where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the Court may decide, after consulting with the parties and any confirmed arbitrator in all proceedings, that the new case shall be consolidated with the pending arbitral proceedings. The Court may proceed in the same way where a Notice of Arbitration is submitted between parties that are not identical to the parties in the pending arbitral proceedings. When rendering its decision, the Court shall take into account all relevant circumstances, including the links between the cases and the progress already made in the pending arbitral proceedings. Where the Court decides to consolidate the new case with the pending arbitral proceedings, the parties to all proceedings shall be deemed to have waived their right to designate an arbitrator, and the Court may revoke the appointment”.

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196 Swiss Rules of International Arbitration(Swiss Rules), art 8 in the revised 2012, available at www.swissarbitration.org
197 2012 Revised Swiss Arbitration Rules, Art. 8(3,4 &5).
198 2012 Revised Swiss Arbitration Rules, Art. 4(1).
With the revision of the Swiss Rules in 2012, some of the changes made to the provision regarding the consolidation were focused on the flexibility of the consolidation process reflected in the power conferred by this provision to the Court giving the latter on the power to revoke the appointment and confirmation of arbitrators and also the power to appoint arbitrators itself when it is required for the sake of having consolidation. So in cases where the Arbitration Court decides to consolidate a new case into pending arbitral proceedings, the parties are presumed to have waived their right to designate the arbitrator.

Basically the change from the previous Swiss Rules with respect to consolidation lays on the:(i) only the parties to the new case were deemed to have waived their right to designate an arbitrator, and (ii) the power to revoke a prior appointment was not explicitly stated in the previous Rules. If we draw a parallel between the ICC Rules and the Swiss Rules revised version of 2012, it is obvious that the latter one is more favorable towards consolidating the arbitral proceedings, since these Rules are more flexible with regard to prerequisites that need to be satisfied in order to grant a consolidation.199

### 3.5.3 Joinder

In the 2012 revision of the Swiss Rules minor changes are introduced on Joinder, Article 4 (2) of the revised Rules provides:

"Where one or more third persons request to participate in arbitral proceedings already pending under these Rules or where a party to pending arbitral proceedings under these Rules requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances".200

The provision of the Swiss Rules covering joinder wording changes were done “third parties” replaced with “third persons”, in light with wording changes the Rules give further clarification regarding this provision, where it states that this provision applies to persons who are not principal parties to the arbitral proceedings or become “full” parties in the arbitral proceedings, however, for these parties the provisions allows them to act as a secondary parties.201 The newly revised Swiss Rules’ allow for the participation of the third persons in arbitral proceedings without a claim being raised against such third party’ and these Rules offer more modalities with respect to Joinder than the provision dedicated to this matter under the ICC Rules, which … “do not allow for a third party to join proceedings on its own motion or to request the joinder of third party without filing a claim against it”.202

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200 Swiss Rules Art. 4(2).
201 Id.
202 Id.
4 Conclusion

Party autonomy, confidentiality of the proceedings, neutrality and the transnational enforcement convention, these are some of the key elements that have continuously defined the preference of the individuals, contractual parties and business entities to choose arbitration as a mean for resolving their upcoming disputes. Today commercial transactions, business collaborations and organizational structure of corporations are heavily sophisticated, requiring thorough and complex contractual agreements between parties purporting to regulate this collaboration in delivering a project. Contractual agreements in this complex commercial environment bring scenarios involving multiple parties and disputes arising from several contracts. When a dispute emerges from the complex nature of these contractual agreements, administration of these disputes for the arbitral tribunals will be a challenging reality to deal with. In the preceding paragraphs this paper has sought to analyze the pressing issues that accompany arbitration of disputes employing more than two parties and stemming from several different contracts.

The first chapter explored the issue of consolidation of several arbitration proceedings into one case, consolidation by consent or court ordered consolidation, notwithstanding the crucial importance of this process in terms of time-efficiency, cost reduction and avoidance of several arbitral awards rendered for separate initiated proceedings among parties, and avoiding the contradictory effect of these awards. Consolidation encounters serious obstacles with respect to opinions claiming that consolidation is not in line with the party autonomy principle and concerns that this would have negative effects on the confidentiality of arbitration proceedings. Although consolidation as a mechanism of bringing together several claims into one hearing is accompanied with many difficulties, pros and contras, this approach toward multi-claim disputes has its uncontested advantages. Uniformity of the law covering this issue would relieve parties from contradictory results of multi-dispute arbitration, albeit at this stage this uniformity is hard to be seen in the horizon in a near prospect. The problem whether consolidation should be done upon parties consent or forced by the court is troubling one, the tendency of leaving this on the arbitrators’ hands has increased significantly, but again this does not seem to resolve the problem. Another approach is consolidation by consent, which should be indicated explicitly in the arbitration agreement or revealing this intention when the dispute comes up.203

The second chapter targeted Joinder and Intervention pointing out the modalities of an existing party to make the third party participate in the arbitration proceedings, this chapter also discussed the possibilities, cases and doctrines enabling the third party which has not signed the arbitration agreement clause to be bound by the same one. Extending the arbitration proceedings to joinder and prospective intervener is often perceived as a time–consuming factor, increase of the costs in legal representation, compromising the confidentially and as an action that it would potentially undermine the contractual nature of the arbitration agreement.204

204 Brekoulakis, supra note 58, Id.
Notwithstanding the preceding concerns stressed by scholars, judges and arbitrators with respect to the joinder and intervention, the international trade usages, business entities and the imperative of the commercial transactions will pave the path the change through arbitration clauses stipulating their intention to deal with third party issues.\textsuperscript{205} In the daily practice of the commercial arbitration, non-signatories are sometime considered to be as unwilling subjects in the disputes of the existing parities, the courts have mastered the tests to come with an answer when the a non-signatory should or not be compelled with signatories in commercial arbitration, taking into account the New York Convention requirements, non-signatories should raise the issue of inclusion in the arbitral proceedings in the earliest convenient moment.\textsuperscript{206}

The third endeavored to reflect the approach of the main international arbitration bodies toward the multi-party and multi-contract arbitration, given the increasing number of cases involving a multiplicity of parties and disputes arising from several contracts. A new wave of revisions of the arbitration rules was undertaken by these notable arbitration bodies aiming at handling this complex issue in the practice of international commercial arbitration. However, before we decide to choose the tribunal and the forum, it is noteworthy the provisions covering the multiparty issue, what flexibility on multiparty scenarios they provide, expeditiousness and privacy during and after the arbitral proceedings, since these are the most decisive elements for a party to choose arbitration as a dispute resolution mean over the litigation.

\textsuperscript{205} Hosking, supra note 107, at 586
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