Multiparties and Multicontracts In ICC arbitration

Submitted By

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The growing complexity of international arbitration is well known to the members of this audience here today. Multiparty and multicontract arbitration clearly are among the areas where that growing complexity can be seen. The purpose of my presentation today is to discuss multiparty and multicontract arbitration from the ICC International Court of Arbitration perspective.

Starting with multiparty arbitration,

The ICC Court has seen a significant increase in number of multiparty cases over recent years. If we look ten years ago (1997) = approximately 1/5 of cases were multiparty. Last year, in 2007, 1/3 of cases were multiparty.

And when we speak of multiparty arbitration, we don't necessarily mean just three parties. Many of you know may be about the famous Arthur Andersen case that is now public record and which was filed at the ICC with over 100 respondents.

Other examples:

21 claimants against 43 respondents;

34 claimants against 1 respondent

1 claimant against 81 respondents

Two very recent cases 47 and 25 respondents respectively.

The number of multicontract arbitrations is taking place at the ICC is showing a similar increase to that of multiparty.

The issues raised by these cases have brought certain changes in the practice of the ICC Court. The revision of the 1998 Rules, several modifications were introduced to deal with multiparty and multicontract arbitration.

What are the questions that the Court must address in these areas?

I will start by speaking to you about the following two aspects of multiparty arbitration in the ICC system:

- the setting in motion of the procedure
- the constitution of the arbitral tribunal

Following that I will briefly highlight certain aspect of multicontract under the ICC Rules.

Starting now with the

Setting in motion of multiparty procedures

In the ICC system, if a respondent does not submit an answer to the Request for arbitration or if there is an objection concerning the arbitration clause, the ICC Court must apply article 6(2) of the Rules, by which the ICC Court carries out a prima facia analysis to see if it is satisfied that an arbitration agreement under the ICC rules may exit.

In many multiparty ICC arbitrations, the Court is required to apply article 6(2) in order to determine on a prima facia basis who will be the parties to the ICC arbitration. Indeed, in 2005, there were article 6(2) decisions taken by ICC Court in 47% of cases; although not all multiparty cases, clearly multiparty area where most 6(2) decisions being taken, and also clearly area were most negative 6(2) decisions being made, meaning that the Court decided that either the case would be not go forward or the case would go forward but not with all of the parties.

In the multiparty cases, the Court must very often consider article 6(2) objections concerning non-signatories. The arguments that are presented for including the non-signatories often concern theories of agency law, assignment, succession of companies, and group of companies or alter ego.

Sometimes the arguments are based on the participation of the non-signatories in the negotiation, performance or termination of the contract containing the arbitration clause.

The decision taken by the Court will depend upon the elements of each case. If the Court decides that the arbitration will take place, then according to the Rules, it is to the arbitral tribunal to decide on its own jurisdiction.

Examples of positive 6(2) decisions in multiparty settings when the case goes forward:

Two claimants introduced request against four respondents. Claimants alleged that all four respondents were members of the same group of companies and they should be included even though only two had signed the arbitration agreement. The Court found that the Claimants had demonstrated on a prima facia basis that the non-signatories had participated in the negotiation and the performance of the agreement. The matter proceeded against all four respondents.

By contrast, arguing the group of companies' theory is not sufficient to allow multiple respondents to be pulled in.

<u>Example:</u>

Claimant filed a request for arbitration against 2 respondents. Only respondent 1 ad signed the agreement. Claimant alleged that respondent 1 was a subsidiary of respondent 2. There was no other reference to respondent 2 in the request. No evidence that respondent 2 was involved in the negotiation, execution or the performance of the contract. The Court decided that the case would not go forward with respondent 2.

State parties: interesting questions for non-signatories. The fact that a state participated in financing of a project is not enough to bind a state = 6(2) negative.

Another example of negative 6(2) in a multiparty setting:

- Claimant introduced a request for arbitration against three respondents. Respondents 1 had signed the agreement. Respondents 2 and 3 were the managing directors of Respondents 1. Claimant argued that respondents 2 and 3 should be included as parties to the arbitration on the grounds

that they had authority to direct the activities of respondent 1 and under the applicable law, in their capacities as managing directors, there were liable for all unlawful acts for respondent 1. Respondent 2 and 3 were not referred to in any way in the agreement. Also Claimant did not assert that respondents 2 and 3 aver acted beyond their roles as managing directors. The Court decided that the matter would only proceed with respondent 1.

It is Interesting to note that 6(2) decisions are being taken with regards to both claimants and Respondents.

In several cases, the Court refused the setting in motion with regards to one or more claimants, while letting the procedure go forward with the other parties.

Thee claimants introduced a request against one respondent; respondent raised jurisdictional objections on the ground that claimant 3 was not party to the agreement; claimants alleged that they all belonged to the same group of companies and that they were all located to the same address,; they argued that respondent would not be prejudiced by the inclusion of claimant 3 in the proceedings.

The Court decided that Claimant 3 should be dismissed from the proceedings, as it had not signed the agreement, not participated in its negotiation, execution, performance or termination, the matter went forward between claimants 1 and 2 only and respondent.

An area where we see more and more need for the Court to take decisions up front as to who will be the parties to the arbitration involves the request for joinder of parties by respondents.

Traditionally, always considered that it was for the claimant to identify the parties to the arbitration; usually done in the request.

Traditional approach for claimant can be argued that:

- gives advantage to the party commencing the proceedings.

- may make it necessary to initiate multiple proceedings – detriment of procedural efficiency and cost.

- joining of a signatory may be considered to respect the parties' intention as expressed in their agreement.

Such ideas have allowed for the moderated approach adopted by the Court, in a very limited number of cases, the Court has accepted the joining of a third party in the procedure upon a respondent's request.

The Court has generally required two conditions:

- the party to be joined must have signed the arbitration clause on which the arbitration is based.

- Second, the respondent must have raised claims against such party.

Of course, the joinder of a party without the agreement of everyone requires that the arbitral tribunal is not yet constituted in order to allow all parties to participate in the choice of the arbitrators.

Recent decisions on joinder:

In its answer, respondent sought the joinder of claimant's parent on the basis of the contract in the request but also wanted to add a new contract. The Court refused the joinder because the two clauses were inconsistent regarding the place of arbitration and the constitution of the arbitral tribunal.

Another recent case:

An agreement was signed by claimant and respondent; respondent requested the joinder of claimant's parent company which had not signed the original agreement; however an MOU was signed by all three subsequent to the agreement provided that the governing lawn and dispute provisions in the agreement shall also apply to the MOU. The Court allowed joining claimant's parent company.

Constitution of the arbitral tribunal in multiparty arbitrations

In multiparty settings, often then parties include provisions in their contract concerning how the arbitral tribunal should be constituted.

Article 7(6) of the Rules allow the parties to agree on a method for constituting a tribunal other than the method set in articles 8, 9 and 10 of the Rules.

In multiparty settings, the parties often do take advantage of this provision and foresee how the arbitral tribunal will be constituted.

In the absence of agreement, there were problems in the past with the constitution of the tribunal. One of the major modifications of ICC Rules in 1998 was the incorporation of article 10 which deals with the constitution of the arbitral tribunal with three members in multiparty cases.

Article 10(2) provides that if the claimants jointly or the respondents jointly do not nominate an arbitrator and if the parties are unable to agree on a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as chairman.

The Court does not apply article 10(2) in all cases where there has not been a joint nomination.

Article 10(2) is applied in situations where there may be a question as to the equality of treatment of the parties. The Court takes into account the law at the place of arbitration and the possible places of enforcement.

It should be mentioned that often when the Court threatens to apply article 10(2à, the parties make a joint nomination.

Examples of cases where the Court decided to apply article 10(2) and appoint all three:

In a case with place of arbitration in London, one claimant and 5 respondents; two of respondents did not agree to the arbitrator jointly nominated by the other three respondents and requested the application of article 10(2). The Court decided to appoint all three and thus did not appoint the arbitrator proposed by claimant in the request.

However; the Court does not always appoint all three:

In a case with an the place of arbitration in Tunisia and an arbitration clause providing three member tribunal, claimant nominated its arbitrator, two respondents did not nominate jointly their arbitrator. Indeed, respondent 1 indicated that it objected to the jurisdiction and did not wish to participate in the proceedings.

It was clear from the facts that 80% of respondent's share capital owned by respondent 2.

The Court considered that there was no problem of diverging interest here and considered that respondents had been given an opportunity to nominate jointly an arbitrator. The Court confirmed Claimant's nominated arbitrator and appointed an arbitrator on behalf of respondents and appointed the chairman.

Multicontract

Turning now briefly to multicontract. There are two different situations in which multi contract multicontract cases may arise.

Either, a single request is introduced on the basis of two or more contracts or several requests for arbitration for arbitration are presented and there is a request for consolidation of the proceedings.

In the case of a single request, according to the current ICC practice, three conditions are necessary for the case to go forward:

- the contacts must be signed by the same parties
- they must involve the same economic transaction
- the dispute resolution provisions must be compatible

For the situation where there are several requests followed by a request for consolidation of the procedures, the 1998 Rules added article 4(6):

Four conditions must exist for the Court to accept the consolidation of procedures:

- the consolidation must be requested by a party.
- the parties must be the same in the two cases.
- the two cases must concern the same legal relationship which seems to mean the same economic transaction.
- the consolidation must be requested before the establishment of the Terms of Reference.

Very often, the parties agree on the consolidation and in such a case it not necessary for the Court to decide.

If there is no consolidation pursuant to article 4(6), the question of the constitution of the arbitral tribunal in related cases becomes very important.

In several cases, for various reasons and among them for procedural economic efficiency, the parties did not agree to consolidate the cases but they chose to have the same arbitral tribunal. In reality, the different proceedings run together.

But if the parties don't agree to have the same tribunal, and on side decides to nominate an arbitrator already acting in a related matter, the Court must decide whether to confirm the arbitrator or not.

In deciding upon the confirmation of arbitrators, the Court will consider access to information and the stage that the two proceedings have reached in order to ensure that a decision taken in one case will not lead one of the arbitrators to prejudge the related case. Each case is assessed on its own facts and the decisions go both for and against confirmation.

Conclusion

The ICC Court has gained a great deal of experience with multiparty and multicontract arbitration, new questions arising, personal point of view, clearly in the area of multiparty and multicontract arbitration where modifications will probably be necessary when the next version of the ICC Rules is adopted in order to take into account the evolutions taking place in the practice.

The example of joinder of parties, the question as to where do we put these parties on our bipolar system. If they are joined by respondent an there are only cross claims against them, they do not belong on the side of claimant. They do not belong on the side of respondent. The Rules don't foresee specifically dealing with such situation. Then the question becomes, how do you constitute the arbitral tribunal? The ICC rules provide that in multiparty cases, claimants jointly and respondents jointly are supposed to nominate their respective arbitrators. But what if this party is neither a claimant nor a respondent?

The ICC's experience in the multiparty and multicontract areas clearly demonstrates the essential role that an institution can play in helping parties to deal with the more and more complex questions that are arising in international arbitration.