K. MULTI-CONTRACT ARBITRATION ARISING FROM CONTRACTS AND SUBCONTRACTS: WHERE TO SET THE THRESHOLD FOR FINDING CONSENT?

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I. Introduction

Transactions and projects are increasingly complex and often structured by a plurality of contracts. This can be clearly seen e.g. in the construction industry in which general contractors outsource parts of the project to specialized subcontractors and suppliers. In such multi-layered projects, when a dispute arises it is likely that it will concern more than two parties.[1] Nevertheless, contrary to state courts, arbitral tribunals do not have powers to order additional parties to join the proceedings and to decide on disputes outside their jurisdiction. Hence, multi-contract arbitrations encompassing disputes arising from a main contract and a subcontract will face their main obstacle in the private character of arbitration.

In general, both the subjective and objective scope of the arbitration agreement have been interpreted in a broader and flexible way. However, this approach is not the most suitable for all contractual circumstances, especially when it comes to vertical structures consisting of contracts and subcontracts, where a restrictive analysis tends to be more consistent with the parties' intent and common practice.

Whilst the requirements for multi-contract arbitration are basically the same irrespective of the contractual set-up, the particularity of scenarios involving contracts and subcontracts lies in the threshold for ascertaining consent. In the absence of express provisions towards multi-contract arbitration in the main agreement and subcontracts, even though arbitrators and courts may still find that there was implied consent, the threshold is considerably high.

Therefore, this article addresses the requirement and the assessment of consent in scenarios involving contracts and subcontracts, in particular the high threshold regarding the consent requirement that has to be met for multi-contract arbitrations to be possible.

II. Multi-party or multi-contract arbitration?

This is a question that may sound artificial at first, since disputes relating to main agreements and subcontracts will invariably involve more than two parties and at least two contracts. In fact, most authors will put multi-party and multi-contract issues in the same basket. However, even though this methodological distinction may seem to be subtle, it is of utmost importance for a proper analysis of the scope of the arbitration agreements.

By drawing a line between multi-party and multi-contract arbitration disputes, it is easier to see that the relevant question is not whether the clause of the main contract may extend to the subcontractor, or conversely, whether the employer may be bound by the arbitration clause in the subcontract. Rather, the deciding question is whether disputes arising from different contracts may be decided together. Accordingly, the focus is therefore placed on the objective scope of the arbitration agreements and the interplay between both contracts instead of on the intervention of a third party in the execution of an agreement that it has not formally concluded.

III. Scope of the arbitration agreement and the consensual nature of arbitration

Given the consensual nature of arbitration, the jurisdiction of the arbitral tribunal derives from, and is limited by, the arbitration agreement. The arbitrators' jurisdiction is hardly an issue where a dispute involves only two parties and derives

from only one agreement. After all, arbitration was originally designed and developed as a means of dispute resolution for bi-polar disputes. It is therefore natural that the contours of the arbitral jurisdiction become problematic in scenarios involving multiple parties and multiple contracts, when they are not all linked by a single dispute resolution provision. In this case, the arbitrators will have to ascertain the parties' intent to assess the scope of their jurisdiction.

The increase in the number of multi-party and multi-contract arbitrations has significantly impacted the way consent is interpreted. A restrictive and formalistic approach is at dissonance with current complex transactions that end up in arbitration and has consequently given way to a more flexible assessment of the consent requirement.

Nowadays, it is widely accepted that the fact that contracts are formally independent from each other is not per se an obstacle to multi-contract arbitration, even where they do not contain express references to each other or where not all agreements have their own arbitration clauses.[2] This because implied consent has come to play a crucial role in determining the extent of consent in multi-contract arbitrations.

IV. Prerequisites for multi-contract arbitration

A multi-contract arbitration is only possible when two requirements are met: parties' consent and compatibility of arbitration clauses. [3]

As to consent, as explained above, it remains the cornerstone of the arbitration. The fact that the contracts are part of the same economic transaction or that there is an economic link between them is not sufficient to justify a single arbitration if the parties have not consented to it. If that were the case, all disputes arising from main agreements and related subcontracts would invariably be decided together and this is incorrect. This is not to say that economic considerations are not important and shall be disregarded. Indeed, they may not supersede the intent of the parties, but they may be relevant for the assessment of the parties' intent. Express consent to multi-contract arbitration is not required. The consent requirement is considered fulfilled if the arbitrators or courts find that there is one arbitration clause covering disputes of all contracts or find that the parties intended that disputes arising from compatible arbitration clauses should be decided together even if this was not spelled out in the arbitration agreements in so many words.

Jurisdictional disputes often arise in connection with requests for joinder of third parties and consolidation of proceedings. In this regard, it is important to note that institutional provisions on joinder and consolidation do not relate to jurisdiction in itself, but they are procedural mechanisms relating to the admissibility of claims or parties in the arbitration over which the arbitral tribunal has jurisdiction. That is, they do not change the need for consent.[4] If there is no consent, additional parties cannot be joined and different proceedings cannot be merged.

With regard to the compatibility of the arbitration agreements, they do not need to have the same wording to be considered compatible. By negative definition, compatible agreements are those which do not contain discrepancies with respect to their fundamental elements, such as arbitral institution and seat of the arbitration.[5] Furthermore, even if the arbitration agreements are identical, this does not automatically mean that the parties envisaged a multi-contract arbitration, albeit this might be an element to be considered when examining the parties' implied consent, particularly if the agreements were narrowly drafted.

Importantly, the risk of having inconsistent awards does not justify multi-contract arbitration per se, as it does not override the consent requirement. In international arbitration there is no system of binding precedents and therefore arbitral tribunals may reach different conclusions when confronted with similar facts.[6] Decisions by arbitrators and courts shall therefore not be based on considerations of equity and good administration of justice, but rather on a clear analysis of the parties' intent.[7]

V. Assessment of the parties' intent

When all contracts are somehow linked by the same arbitration agreement, the parties' intent are clear and therefore there is less room for jurisdictional disputes. Multi-contract issues arise mainly where there is no express consent and therefore the parties' implied consent or lack thereof must be ascertained. It is possible to say that the analysis of the scope of the arbitration agreement in this context is a matter of assessing the parties' implied consent. Their intention shall be assessed case-by-case on the basis of factual circumstances.

Arbitrators and courts tend to follow a two-step approach in order to ascertain consent in multi-party and multi-contract contexts. First, the parties' true intent shall be sought, the so-called subjective interpretation.[8] If it is not possible to ascertain the true intent of the parties, it is then necessary to determine their presumed intent in accordance with the principle of good faith.[9] One has to interpret the wording of the agreements and the parties' statements from an objective perspective to establish what reasonable parties would mean and expect when they entered into the contracts, i.e. the so-called objective interpretation.[10]

Courts and arbitrators very often have to turn to the analysis of consent on an objective basis, as the parties when negotiating agreements rarely embark on a detailed analysis of all implications of an arbitration agreement.[11] The parties rather confine their discussions to a basic level, partly because the contracts are in general not drafted by arbitration specialists and partly because parties want to avoid disputes regarding the arbitration clause when they have more substantive issues to discuss, especially at a stage when a dispute is very abstract. Accordingly, arbitration clauses are quite often standard and formulaic.[12]

It should be also noted that the scope of the arbitration agreement is a matter of consent rather than of form.[13] Therefore,

when examining the reach of an arbitration agreement, the arbitral tribunal should refrain from finding that a multi-contract arbitration is not possible only because there is no reference between the arbitration agreements. The form requirement is normally fulfilled at the moment that there is an arbitration agreement in writing and from this point on the arbitration clause may extend to other contracts and bind third parties if the consent requirement is met.[14] Since the question as to whether claims with origin in different contracts may be adjudicated together is a matter that comes down to the substantive validity of the arbitration agreement, the applicable law to decide multi-contract issues is the law applicable to the arbitration agreement. It will be basically used as a benchmark to assess consent.[15]

VI. High threshold for finding consent

Whilst multi-contract arbitration may arise from a wide variety of scenarios, the requirements for extending the arbitration agreement from one contract to others are the same irrespective of the contractual structure. In all scenarios, the consent requirement plays a decisive role. Likewise, the two-step approach to assess the parties' true or putative intent is invariably the same. Nevertheless, the threshold to be met for finding the existence of implied consent varies depending on the type of the contractual structure.

For instance, as a general rule, it is understood that an arbitration clause in the main contract encompasses disputes arising from ancillary and connected agreements.[16] Especially if the contracts were entered into by the same parties. It is presumed that this was the intention of the parties when entering into the agreements, since all contracts have the same purpose. It is then for the party disputing a multi-contract arbitration to prove that the parties intended to agree otherwise.

Nevertheless, the arbitration clause between an employer and a main contractor will rarely be extended to the subcontract between the latter and the subcontractor.[17] Here the presumption is the opposite, i.e. the contracts do not share the same dispute resolution mechanism. This is also the approach adopted by the ICC Court when assessing whether and to what extent multi-party and multi-contract arbitrations shall proceed. When drafting Art. 6.4(ii)[18] in this regard, the drafters of the ICC Rules repeatedly discussed the issue of contracts and subcontracts and it was unmistakable that its test would not be met in the construction industry, in case of employer-contractor-subcontractor constellations.[19] In fact, Art. 6.4(ii) was drafted in a way to avoid recourse claims within the same arbitration proceedings.[20] The ICC Secretariat's Guide confirms that the ICC Court will more likely consider that disputes from contracts in a vertical chain should be adjudicated before separate arbitral tribunals unless the circumstances suggest that the parties have agreed otherwise.[21]

In general, the ICC's approach reflects the intention of the parties. Disputes arising from main contracts and subcontracts, e.g. in the construction industry, are predominantly bi-party procedures.[22] That is, parties tend to avoid proceedings with several parties and contracts, especially the employer and the subcontractor. For the employer, one of the main advantages of having a general contractor is to have only a single point of contact taking full responsibility. This also holds true for the subcontractor, which sees little advantage in taking part in a more complex dispute with the employer. That said, the contractor is usually the only one who might see an advantage in multi-contract disputes as it can arbitrate all issues before a single arbitral tribunal. Furthermore, it should be noted that the parties are aware of their respective roles in classic employer-contractor-subcontractor structures. In fact, this triad may be much more complex. For example, there may be several contractors and sub-subcontractors in addition to designers, engineers, guarantors, consultants and etc. The general practice is that parties want to avoid being involved in disputes with several parties, which will make the proceedings longer and much more expensive. Furthermore, the fragmentation of disputes was accentuated by the increasing popularity of pre-arbitration procedures, which are individually tailored and therefore hamper the joining of third parties. [23]

In a decision of December 2020, the Swiss Federal Court set aside an arbitral award on jurisdiction in which the arbitral tribunal held that the subcontractor was bound by the arbitration agreement in the main contract.[24] The Swiss Federal Court, however, overturned the arbitral tribunal's decision as it found that the factual elements on which the arbitral tribunal relied did not justify a presumption of implied consent.

In this case, the contractor entered into a main agreement with the purchasers for the design, procurement, construction and delivery of a power plant in Bangladesh. In addition, the contractor also entered into a subcontract with a subcontractor, whereby the latter undertook to supply diesel engines to be integrated into the power plant. When the contractor commenced arbitration proceedings against the purchasers, these requested the subcontractor to be joined. The arbitral tribunal granted the purchasers' request as it found that the subcontractor interfered in the conclusion and performance of the main agreement in such a way that its involvement could serve as evidence of implied consent in accordance with the principle of good faith. The arbitral tribunal based its decision on several factual circumstances, such as the (i) subcontractor's attendance to meetings with the employer, including a meeting before the main agreement was concluded, (ii) purchasers' attendance to preliminary tests at the subcontractor's facilities, (iii) subcontractor's repair works on site, (iv) direct correspondence between the purchasers and the subcontractor, including exchange of reports relating to defective engines, and (v) alignment between the main contract and subcontract with respect to guarantees and test performances.

The Swiss Federal Court, however, found that such circumstances did not evidence the subcontractor's implied consent. The court held that the parties were aware of their respective roles and that the subcontractor interfered

in the main contract within the limits of its subcontractor role. Furthermore, it was also pointed out that, given the importance of the diesel engines, it did not appear to be unusual for representatives of the purchasers to attend test runs and that repair works at the purchasers' premises fell also within the subcontractor's duties as such. According to the Swiss Federal Court, the purchasers must have been aware that the subcontractor was not a party to the main agreement and therefore, in the light of the principle of good faith, the subcontractor's involvement could not be seen as implied consent to the arbitration clause of the main agreement.

Notably, the circumstances upon which the arbitral tribunal constructed its reasoning might justify the extension of the arbitration agreement to a non-signatory party who intervenes in a contract or the extension to ancillary contracts. Nevertheless, as correctly pointed out by the Swiss Federal Court, these circumstances were neither uncommon nor unexpected in that case, such that they would have created an expectation that the subcontractor would be bound by the arbitration agreement included in the main contract.

It should be noted that the involvement of a party in the negotiation or performance of another contract, which is usually the main circumstance relied upon by arbitrators to find the existence of implied consent as to multi-party arbitration, must be analyzed with great caution in the context of contracts and subcontracts. This because what might be seen as an interference can merely be the subcontractor performing its obligations as such. Likewise, direct contact between employer and subcontractor is not uncommon. If courts and arbitrators do not apply a rigorous test, the arbitration agreement will almost invariably be extended to other contracts of this vertical chain and this will not be in line with what the parties intended to agree.

With regard to references between contracts, in a decision of 2019 the High Court of Hong Kong decided that the arbitration clause of a sub-contract had not been incorporated into a sub-sub-contract only because the latter referred to the former.[25] In this case, it was a global reference, i.e. not a specific reference to the arbitration clause, but a reference to the contract in general. In its reasoning, the Hong Kong High Court stated that the reference to the contract was intended to refer to specifications, standards and requirements relating to the works described in the sub-contract and not intended to incorporate each and every of its clauses, including the arbitration agreement. The court also quoted legal authorities, according to which doubtful or ambiguous references to main contracts or terms are much more likely to be aimed at the technical descriptions of the sub-contract work rather than at contractual provisions.[26]

VII. Conclusion

Scenarios involving disputes from main agreements and subcontracts reveal the tension between the need for an efficient means of dispute resolution and the consensual nature of arbitration. As a general rule, if the contractual structure is fragmented, then so will be the disputes resulting from it. Whilst arbitral institutions have been adopting a more flexible approach towards joinder of third parties and consolidation of proceedings, these are procedural mechanisms to deal with parties and contracts over which the arbitral tribunal has jurisdiction. Institutional provisions on joinder and consolidation do not create an autonomous basis for multi-party and multi-contract arbitration without consent. In fact, national laws and arbitral institutions have not yet introduced provisions that might deal effectively with multi-contractual arbitration arising from contracts and subcontracts. Even if this were the case, it is questionable whether parties would not prefer to opt out of such provisions, as they might see more advantages in separate proceedings – at least when concluding the agreements.

If parties to a vertical layered contractual structure intend to have a multi-contract arbitration in case of eventual disputes, they should not only include compatible arbitration clauses, but also expressly address it in the contracts. Even if a multi-contract arbitration arising from a main contract and a subcontract is indeed possible in the absence of express contractual arbitration provisions, the threshold for ascertaining the parties' implied consent is very high. Factual circumstances upon which arbitrators might rely to justify the extension of the arbitration agreement to a non-signatory or to ancillary contracts, such as the involvement in the performance of a contract that it has not formally signed, alignment between the contracts or cross-references between them are not rare when it comes to contracts and subcontracts. When faced with claims involving both agreements, arbitrators and courts shall depart from the assumption that they should be decided in different proceedings, as this is the common practice in such a contractual structure. This presumption can be overcome only if there are exceptional circumstances showing that the parties intended otherwise.

1 Uff, Arbitrating International Construction Disputes, *in:* Newman/Hill (eds.), Leading Arbitrators' Guide to International Arbitration, 3rd ed., 2014, p. 1013.
2 Welser/Molitoris, The Scope of Arbitration Clauses – Or "All Disputes Arising out of or in Connection with this Contract …", *in:* Austrian Yearbook on International Arbitration, 2012, p. 30.
3 Platte, When Should an Arbitrator Join Cases?, *in*: Arbitration International, 2002, Vol. 18(1), p. 72.
4 Secomb, Multi-party, Multi-contract Rules and the Arbitrators' Role in Finding Consent, *in*: Shaughnessy/Tung (eds.), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer, p. 337.
5 Berger/Kellerhals, International and Domestic Arbitration in Switzerland, 3rd. ed., 2015, para. 519.
6 Redfern et al., Redfern and Hunter on International Arbitration, 6th ed., 2015, para. 1.116.
7 Hanotiau, Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law, *in:* van den Berg (ed.), International Arbitration 2006: Back to Basics?, ICCA Congress Series, Vol. 13, 2007, p. 358.
8 Kaufmann-Kohler/Rigozzi, International Arbitration – Law and Practice in Switzerland, 2015, para. 3.120.
9 See e.g. Art. 18(1) of the Swiss Code of Obligations: "When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement". In addition, Section 133 of the German Civil Code reads as follows: "When a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration".
10 Kaufmann-Kohler/Rigozzi, International Arbitration – Law and Practice in Switzerland, 2015, para. 3.121; Welser/Molitoris, The Scope of Arbitration Clauses – Or "All Disputes Arising out of or in Connection with this Contract…", *in*: Austrian Yearbook on International Arbitration, 2012, p. 26; Hanotiau, Consent to Arbitration: Do we share a common vision?, *in:* Arbitration International, 2011, Vol. 27(4), p. 548. See also Art. 2 of the Swiss Civil Code: "Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations." and Art. 157 of the German Civil Code: "Contracts are to be interpreted as required by good faith, taking customary practice into consideration".
11 Secomb, Multi-party, Multi-contract Rules and the Arbitrators' Role in Finding Consent, *in:* Shaughnessy/Tung (eds.), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer, p. 328.
12 Born, International Commercial Arbitration, 3rd ed., 2020, p. 1431.
13 Girsberger/Voser, International Arbitration – Comparative and Swiss Perspectives, 3rd ed., 2016, para. 347.
14 See for example: Art. 178(1) of the Swiss Private International Law Act, Art. 5 of the English Arbitration Act 1996 and Art. 4, § 1º, of Brazilian Law 9.307/96.
15 Brekoulakis, Third Parties in International Commercial Arbitration, 2010, para. 5.58.
16 Kaufmann-Kohler/Rigozzi, International Arbitration – Law and Practice in Switzerland, 2015, para. 3.143.
17 Steingruber, Consent in International Arbitration, 2012, para. 9.70. Lew et al., Comparative International Commercial Arbitration, 2003, para. 7-47.
18 ICC Rules 2021, Art. 6.4(ii): "where claims pursuant to Article 9 are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is prima facie satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration". This provision was introduced in 2012, but it remained the same in the 2017 and 2021 revisions.
19 Voser, Overview of the Most Important Changes in the Revised ICC Arbitration Rules, *in:* ASA Bulletin 29, 2011(4), p. 792.
20 Voser, The Swiss Perspective on Parties in Arbitration: "Traditional Approach With a Twist regarding Abuse of Rights" or "Consent Theory Plus", *in:* Brekoulakis et al. (eds.), The Evolution and Future of International Arbitration, 2016, para. 9.5.
21 Fry/Greenberg/Mazza, The Secretariat's Guide to ICC Arbitration, 2012, para. 3-255.
22 Uff, Arbitrating International Construction Disputes, *in:* Newman/Hill (eds.), Leading Arbitrators' Guide to International Arbitration, 3rd ed., 2014, p. 1014.
23 Uff, Arbitrating International Construction Disputes, *in:* Newman/Hill (eds.), Leading Arbitrators' Guide to International Arbitration, 3rd ed., 2014, p. 1014.
24 Swiss Federal Court, 4A_124/2020, 13.11.2020.
25 Yun Kwan Construction Engineering Ltd v Shui Tai Construction Engineering Co Ltd, [2019] HKCFI 1841.
26 According to the High Court of Hong Kong, para 13: "As pointed out in Hudson's Building and Engineering Contracts (13th edition), §9-083, p 1078, in a passage applied by Reyes J in Sunbond Engineering Ltd v Konwall Construction & Engineering Co Ltd (unrep, HCCT 15/2003, 25 May 2004) at §61: "*As a matter of first principle and in the light of the usual real-life intentions of sub-contracting parties*, doubtful or ambiguous references to main contract documents or terms are much more likely to be aimed at the technical descriptions of the sub-contract work to be found in the drawings, specifications or bills of quantities of the main contract rather than at the contractual or legal provisions in the main contract documentation, it is submitted"'.