



Chartered
Institute of
Arbitrators

CIArb

Practice Guideline 15: Guidelines for Arbitrators on how to approach issues relating to Multi-Party Arbitrations

1. Introduction

1.1 From time to time arbitrators will encounter problems in dealing with multi-party situations. Such problems can arise in any type of arbitration but they are particularly common in maritime, construction and sale of goods cases where it is normal that if a dispute arises it will affect more than one contract. In a chain contract (for example in the sale and re-sale of goods or the chartering and sub-chartering of a ship), if one party in the chain makes a claim against its contractual partner, the latter will seek to pass on liability to a third, who could be its supplier in a sale of goods case or the head charterer in a charterparty case. Similarly a dispute between the building owner and main contractor could result in either party seeking to bring a sub-contractor or the architect or structural engineer into the dispute so as to pass on liability or so as to pursue an alternative remedy.

1.2 Arbitration is not well-adapted to deal with such situations. If separate arbitrations are conducted under each of the related contracts, there is a risk that different tribunals may be appointed under each contract or that the evidence or arguments may differ in each with the result that separate tribunals may reach different conclusions on common questions of fact or law. But in a multi-party situation the parties normally need a single ruling on common issues which can then be applied so as to produce consistent results in all the related contracts. In this way liability can be passed “up or down the line” and the risk can be avoided of an intermediate party bearing the whole loss where it has contracted under two “back-to-back” contracts. Similarly, consistent results can be achieved where a claimant has a choice of two alternative remedies against different respondents or where for some other reason there are related transactions.

1.3 Neither English law nor the law in force in most other jurisdictions provides an arbitral tribunal or the Court with a general power to ensure that, in a multi-party situation, two or more arbitrations will be considered by the same tribunal either at the same hearing or at immediately succeeding hearings to avoid the danger of inconsistent awards. The main reason for this is the principle of party autonomy. Arbitration is a consensual method of resolving commercial disputes. There is in general no justification for any intervention by the

Court to require the dispute to be determined otherwise than in accordance with the parties' agreement. The second reason for this is the principle of the confidentiality, or privacy, of arbitration proceedings. By ordering the consolidation of two or more arbitrations or allowing a third party to one arbitration to be present at the arbitration at the same time as the parties to that arbitration, the principle of confidentiality, applying as between the parties to the arbitration, may be said to be infringed; on a practical level parties who do not wish to share sensitive information about a commercial situation may be forced to do so with companies with whom they have not contracted.

1.4 In the discussions which led to the passing of the Arbitration Act 1996 the Departmental Advisory Committee (DAC) was pressed with the need to find a pragmatic solution. It was urged that there should be a discretion vested in the Court to order the concurrent hearings of two or more arbitrations where necessary to avoid inconsistent conclusions of fact or law. Other similar solutions were advanced. The view was taken however that the existence of any legislative power to order concurrent hearings would be seen as an unattractive element of intervention by the Court in the arbitration process, would constitute a risk to the confidentiality of that process, would depart from the UNCITRAL Model Law and could even endanger the enforceability of the award under the New York Convention. The DAC saw no objection to an arbitral tribunal ordering two or more arbitrations to be consolidated or heard concurrently provided that the parties had so agreed. It was not in favour of allowing an arbitral tribunal to do this where there was no such agreement.

2. Arbitration Act 1996, Section 35

2.1 Section 35 provides:

“(1) The parties are free to agree—

(a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or

(b) that concurrent hearings shall be held, on such terms as may be agreed.

(2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.”

As the wording of the section makes clear, Section 35 is not a mandatory provision.

2.2 The concepts of “consolidation” and “concurrent hearings” are not defined in the Act. Consolidation involves turning or combining all the related disputes into a single arbitration. It may result in the arbitral tribunal having the right to issue a single award determining all the issues which have arisen between the different parties involved. The holding of concurrent hearings involves hearing the evidence and legal submissions arising in one arbitration at the same time as hearing the evidence and legal submissions in a different arbitration. Otherwise the two arbitrations proceed separately and the tribunal issues separate awards.

2.3 An arbitration may be held partially concurrently with another arbitration. Where common issues of fact or law arise, it may be appropriate, where the parties have so agreed, that the tribunal should hear the evidence and submissions on that issue concurrently and that on other issues the two arbitrations should continue separately. This is sometimes called partial joinder and may be useful.

3. The Position in Other Jurisdictions

3.1 It is comparatively rare that a Court in any jurisdiction has the power to order consolidation or concurrent hearings in the absence of agreement by the parties. Courts in the Netherlands, in Hong Kong (in domestic cases) and in some United States jurisdictions have the power to do so. Where this exceptional power exists, the parties may be able to exclude the power by agreement.

4. Agreement to Consolidation or Concurrent Hearings

4.1 Section 35 does not limit the circumstances in which the parties are free to agree that the arbitral proceedings shall be consolidated or that concurrent hearings shall be held.

There are however two main types of agreement. The first is where the terms of the contract or of the arbitration clause specifically empower the arbitral tribunal to order consolidation or concurrent hearings. The second arises where, in the course of a current reference, the parties reach an ad hoc procedural agreement that the proceedings shall be consolidated with another arbitration or that the hearings of both arbitrations shall proceed concurrently whether wholly or in part.

4.2 Contractual Terms And Rules

4.2.1 Arbitrators need to be aware of the relevant provisions of the rules that they are operating under. Some arbitration institutions have no provision allowing the tribunal or the

organisation to consolidate or hold concurrent hearings in the absence of the parties' agreement. The ICC is an example of this. At the other extreme, Rule 7 of GAFTA Form 125's Arbitration Rules and Rule 6(c) of FOSFA Rules of Arbitration and Appeal provide that, in a dispute about quality or condition of goods sold under a string of contracts where the agreements are materially identical except as to price or delivery date, the arbitration can take place between the first seller and the last buyer in the string as if the contract had taken place between them. The resulting award binds all the parties in the string. This essentially entitles the parties to ignore the lack of a contractual relationship between the end-buyer and the original vendor of the goods.

4.2.2 Clause 18(10)(b) of the CECA form of Sub-Contract, usually known as the Blue Form, allows the Contractor to serve a notice on the sub-contractor requiring any subcontract dispute to be resolved along with a matter raised in an arbitration under the main Contract so long as it is of the opinion that the two disputes have a connection with each other. The new Swiss International Rules give the Chamber of Commerce handling the case the power to consolidate cases covered by an agreement submitting the relevant disputes to the same rules. If a third party wants to participate in a case otherwise, the tribunal has a discretion in the matter.

4.2.3 LCIA Rule 22.1(h) allows a party, in the absence of any agreement to the contrary, to ask the tribunal for an order joining a third party to the arbitration if the third party has agreed to this. The respondent's wishes can effectively be overruled by the tribunal. It will, though, have the right to make representations on the subject. The effect of the tribunal's decision can either be to consolidate the two disputes into one arbitration or to hold hearings concurrently. The Chartered Institute of Arbitrators Rules, the Construction Industry Model Arbitration Rules (CIMAR) and the ICE rules all enable a tribunal appointed in the same case to order concurrent hearings with the Chartered Institute, but not the other two, giving the tribunal the power to consolidate.

4.2.4 Article 7.3 of the Chartered Institute of Arbitrators Rules provides that where the same tribunal is appointed under the rules in two or more cases that appear to raise common issues, regardless of whether they involve the same parties, the tribunal can direct either the consolidation or concurrent hearing of the arbitrations as a whole or any specific claims or issues. Under Article 7.7, the tribunal can subsequently revoke such an order. The CIMAR insist that anyone required to appoint an arbitrator where two or more related

proceedings on the same project fall under separate arbitration agreements give due consideration to whether they should not appoint the same arbitrator for both (Rule 2.6).

The fact that someone has already been appointed is a factor that must be considered (Rule 2.7). After this, Rule 3.7 entitles an arbitrator appointed in two or more related proceedings on the same project each of which involves a common issue to order the concurrent hearing of any two cases or issues. In contrast to the Chartered Institute rules, the arbitrator has no power to impose consolidation on the parties (Rule 3.9). Where that agreement is forthcoming, the arbitrator still retains a discretion in the matter. As with the Chartered Institute Rules, the order can be revoked at any time.

4.2.5 Rule 9 of the Institute of Civil Engineers Arbitration Procedure enables an arbitrator who has been appointed to determine more than one dispute concerned wholly or mainly with the same subject matter, to order concurrent hearings if one of the parties, being a party to all the contracts concerned, asks for it or the parties agree. As with CIMAR, separate awards, though, must be rendered. In a similar way, Article 14(b) of the LMAA Terms gives the arbitral tribunal the power to order concurrent hearings where two or more cases appear to raise common issues. This provision makes it clear that the tribunal can issue directions about documents disclosed in one case being made available to the parties in the other cases. Equally, the panel can order that the evidence given in one case can be heard in the others subject to everyone having a reasonable opportunity to comment on it. Article 1.11 of Scottish Arbitration Code (1999), says: "Where the same arbitral tribunal is appointed in two or more arbitral proceedings relating to the same project, each of which involves some common issue whether or not involving the same parties, the arbitral tribunal may if it considers it appropriate order the concurrent hearing of any such proceedings, or of any claim or issue arising in such proceedings upon such term or terms as it considers appropriate in all the circumstances." Under the proposed Arbitration (Scotland) Bill, which will cover domestic cases, the parties are assumed, in the absence of agreement to the contrary, to have agreed to the Code's application.

5. Practice Guidance

5.1 Problems with multiparty arbitrations are always best resolved by agreement between the parties. While arbitrators may make suggestions as to how to deal with the type of questions discussed in this guideline, it is vital that they do not make orders for consolidation or concurrent hearings unless the arbitration agreement (including any rules

incorporated in it) permits this. Arbitrators should be very wary of making any order in this area that the parties have not expressly requested. If an issue of this kind arises, arbitrators should first explore the possibility of agreement before going further.

5.2 There are some cases where any order for consolidation or concurrent hearings is precluded by factors outside the tribunal's control, such as that different tribunals have already been appointed under separate and independent contracts by the time that the issue arises or even that the seat of the arbitration is different under each contract. Some international bodies have rules which provide for the replacement of the party-appointed arbitrators with a panel selected by the institution. The English Court has no power, in the absence of agreement, to replace arbitrators appointed by the parties with a single tribunal empowered to determine common issues of fact or law. In general, arbitrators should not attempt to overcome problems of this nature but where the party-appointed arbitrators are the same in two related contracts (for example, in two sale contracts in a "string" or in a head charter and a sub-charter) it can be sensible that they should appoint the same third arbitrator or umpire in each case so that, if it should later seem appropriate to order consolidation or concurrent hearings, this can be done without the tribunal becoming unwieldy.

5.3 If there is an issue as to whether the tribunal should consolidate two arbitrations or hold concurrent hearings, it should follow a two-stage process. First, it needs to consider whether it has the power to make the order, unless of course this is conceded. Second, it must decide whether, as a matter of discretion, it would assist the progress of the two arbitrations and be fair to the parties' legitimate interests to order consolidation or to hold concurrent hearings.

5.4 On the first point (the power to make the order) it should be borne in mind that if an order of this kind is made which is not authorised by the arbitration agreement or the rules incorporated in it, this can imperil the enforceability of any eventual award on the ground that the tribunal has exceeded its powers (Sections 67(1)(b) and 68(2)(b)) or that the procedure adopted did not follow the parties' agreement (Article V(1)(d) of the New York Convention). In some disputed cases it can be sensible to take the issue of the tribunal's powers as a preliminary point, to hear argument on it and subsequently to make a preliminary award on that issue. However, ordinarily it is preferable in the interests of saving time and expense to determine at the same time both whether the tribunal has the power

to order consolidation or concurrent hearings and also, as a matter of discretion, whether any such order (and, if so, what order) should be made.

5.5 When considering as a matter of discretion what order to make, a tribunal should normally give considerable weight to the desirability of ensuring that disputes involving common issues are resolved consistently either through consolidation or by means of concurrent hearings. However the tribunal should also give weight to any disadvantages that are likely to arise from joinder. These can include any or all of the following; that, if arbitrations are consolidated or heard together, the proceedings may become unwieldy or unduly prolonged; that it may become difficult to select hearing dates convenient to all affected parties and their legal representatives; that a claimant may suffer greater delay in enforcing its legal rights than if the dispute is decided on its own without considering related contracts; that one or more parties may incur higher legal costs than if no joinder takes place and these may not be recoverable; that a party who does not wish to share confidential information with a third-party to its contract may be forced to do so. The tribunal should attempt to balance the advantage of joinder against the disadvantages likely to result from it.

5.6 If there is to be any form of joinder, the tribunal should consider whether to hive off those parts of the dispute that do not concern all parties. This can save time and reduce the need for parties to attend hearings which are not relevant to them.

5.7 As far as possible arbitrators should attempt to resolve the key procedural questions at the start of the case. If any form of consolidation or combined hearing is to be ordered, they should decide what consequential orders should be made as regards pleadings, the disclosure of documents and other procedural issues.

5.8 In most multi-party situations it makes more sense to order concurrent hearings of separate arbitrations (whether of the whole arbitration or of common issues) rather than to order a full consolidation. An order for concurrent hearings introduces as a rule less interference with the procedure agreed by the parties than does consolidation and achieves the same purpose. It requires that separate awards be issued in each arbitration but where appropriate these can incorporate a common set of reasons.

5.9 Where there is any form of joinder, whether by consolidation or by means of concurrent hearings, the tribunal has to be careful to view each transaction separately since the existence of common issues of fact or law does not preclude the possibility that the

surrounding circumstances may differ in each context; that a breach of contract may have occurred on a different date in one contract from another; or that the loss suffered by a particular party in one arbitration may be entirely different from that sustained by the corresponding party in another arbitration.

5.10 Where concurrent hearings are ordered, each arbitration has to be viewed separately when allocating the recoverable costs of the proceeding. Normally the successful party in each arbitration will recover its costs of that arbitration from the losing party unless there are special circumstances which require the tribunal to depart from the principle that “costs follow the event.” The question may then arise, if an order is made in one arbitration that the successful party A should recover its costs from B, whether B in another arbitration can pass on its liability for those costs to C. This can only be done if those costs are recoverable as damages for a breach of contract committed by C. But if C has committed no breach of contract this is not possible. Thus, if C made the initial claim against B which has failed and, as a precautionary measure B attempted to pass on that claim to A, there is no basis for any order that C must bear the costs incurred by A which have been ordered to be reimbursed by B in the B v A arbitration