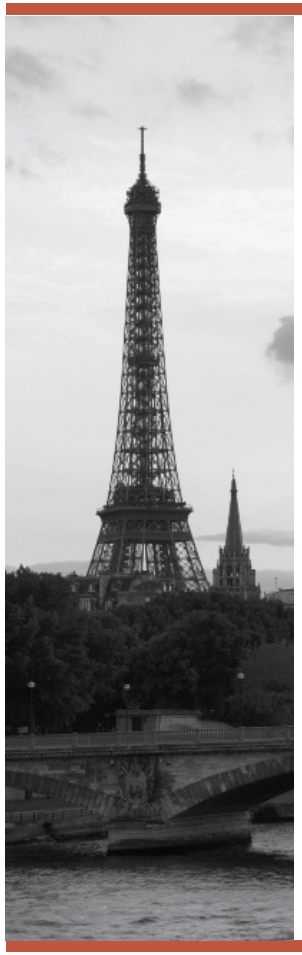


LAZAREFF LE BARS

Multiparty and multicontract disputes and the impact of the new International Chamber of Commerce (ICC) Rules

Explanatory notes for attendees

27 November 2012

INTRODUCTION

- The 2012 ICC Arbitration Rules (the "2012 Rules") serve to codify and clarify the ICC Court's existing practice, to make arbitration easier for the end-users, to refine procedure, and to reduce the time and costs of proceedings.

- The key characteristics of ICC arbitration have been maintained, such as the Court's surveillance role, the Terms of Reference and the Court's scrutiny of the award.

- Some of the most important innovations in the 2012 Rules are those provisions concerning multiparty and multicontract arbitrations, which often raise complex procedural issues, and which are the focus of this presentation.

STRUCTURE OF PRESENTATION

- The impact of the new ICC Rules in relation to **multiparty** disputes:
  - Who are the parties to the arbitration?
  - What is the effect of the arbitration agreement?
  - Can a join other defendants to an arbitration?
  - Can a defendant bring a claim against another defendant?
  - The consequences of multiparty arbitration on the ICC's decision on the advance on costs
- The impact of the new ICC Rules in relation to **multicontract** disputes:
  - Initiation of multicontract arbitration
  - Consolidation of arbitrations
- The impact on the enforceability of an ICC award in a complex arbitration

MULTIPARTY ARBITRATIONS

- International business **transactions** increasingly involve multiple parties. International commercial **disputes** thus also increasingly involve multiple parties.

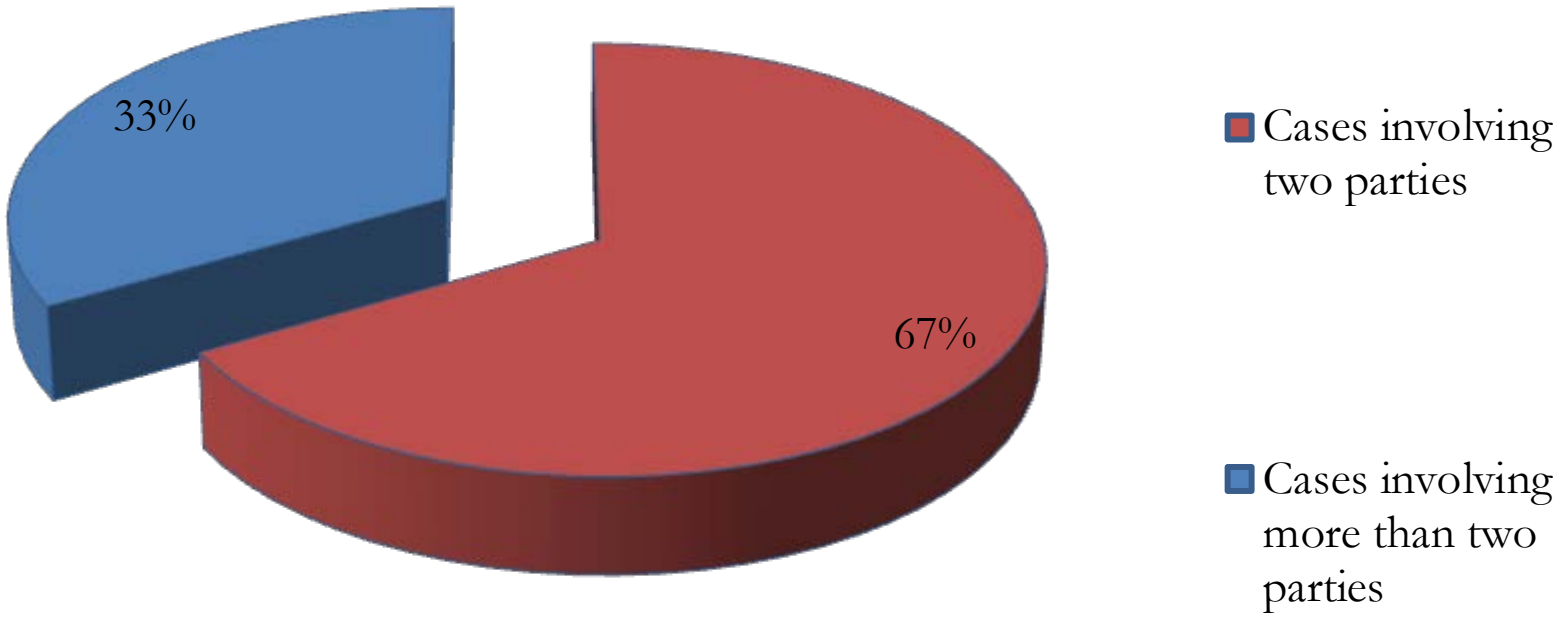
- This is especially true in construction cases, where parties can include owners, architects, engineers and prime contractors, as well as multiple subcontractors.

- The maximum number of parties involved in a reported arbitration appears to be in an ICC arbitration that was initiated by 44 member firms of Arthur Andersen's Business Unit against 97 members firms of Andersen's Consultant Business Unit. Here, a sole arbitrator ruled that he had jurisdiction over all 141 parties, a decision that was also upheld when challenged before Swiss courts.

- Of 817 new cases in 2009 (the latest year for which comprehensive figures are available), 33% involved more than 2 parties (see following slides).

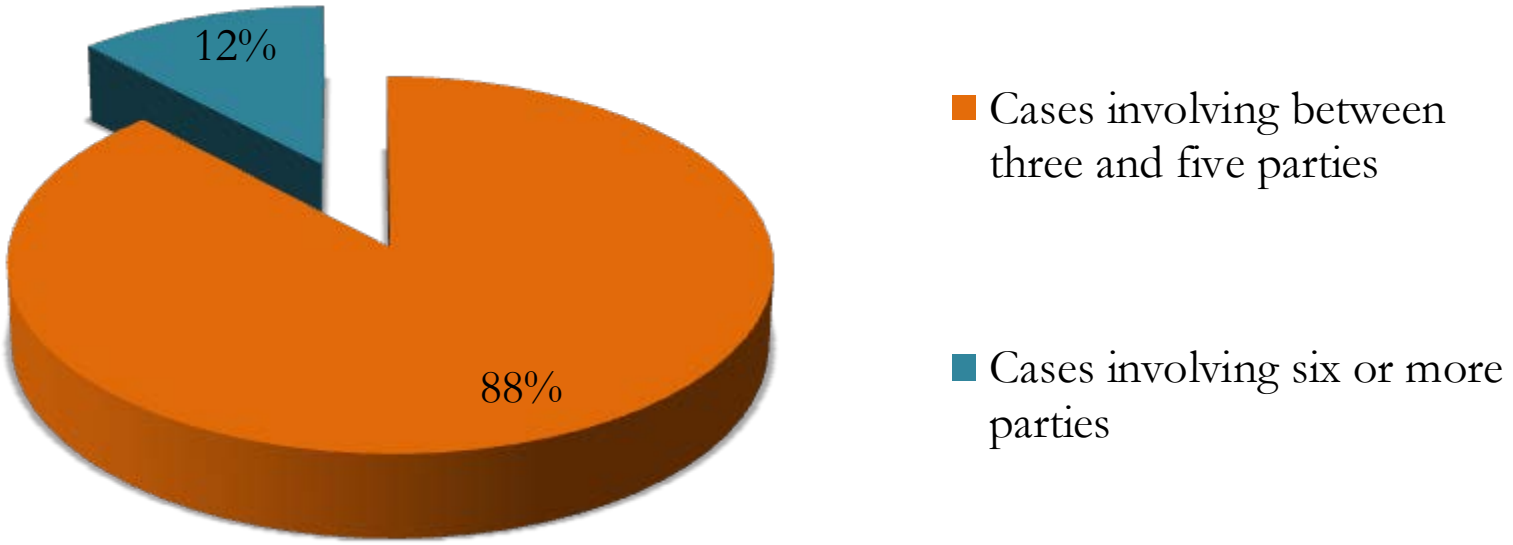
- Given the prevalence of multiparty (i.e. more than 2 parties) arbitration, the ICC's revision of its arbitration rules (specifically concerning complex arbitrations) is timely.

Proportion of multiparty cases (2009)



Source: ICC International Court of Arbitration Bulletin. Vol 21/No. 1 - 2010

Number of parties in multiparty cases (2009)



Source: ICC International Court of Arbitration Bulletin. Vol 22/No. 1 - 2011

WHO ARE THE PARTIES ? THE EFFECT OF THE ARBITRATION AGREEMENT (1)

- It is important to identify who the correct parties to the arbitration are.

- Parties to an arbitration are generally considered to be those that have explicitly consented to arbitration by virtue of their execution of a contract containing the agreement to arbitrate.

- In disputes where multiple parties are involved in the same underlying transaction or project, a party will often want to include in the arbitration a party with whom it does not necessarily have an express arbitration agreement, but which is nonetheless involved in the underlying transaction/project.

- Accordingly, a number of legal theories may be invoked to justify **extending** the arbitration agreement (e.g. the "group of companies" doctrine, whereby a company has participated in the negotiation, performance or termination of a contract entered into between another company within the same corporate group and a third party, and is therefore deemed to be party to the arbitration agreement.

- In essence, parties which are not necessarily signatories to an arbitration agreement might be involved in multiparty arbitrations.

WHO ARE THE PARTIES? THE EXTENSION OF THE ARBITRATION AGREEMENT (1)

- The 2012 Rules clarify the circumstances in which multiparty arbitrations may proceed.

- As recalled above, claims may be instigated against parties that are not obviously parties to an arbitration agreement, or at least not at first glance.

- The ICC shall therefore decide whether such claims can proceed **with respect to certain parties**:

  - **Article 6(4)(i) –** "*Where there are more than two parties to the arbitration, the arbitration shall proceed between those of the parties, including any additional parties joined pursuant to Article 7, with respect to which the court is prime facie satisfied that an arbitration agreement under the Rules that binds them all may exist.*" (emphasis added)

- This provision confirms the Court's previous practice.

CAN A PARTY JOIN OTHER PARTIES TO THE ARBITRATION? (1)

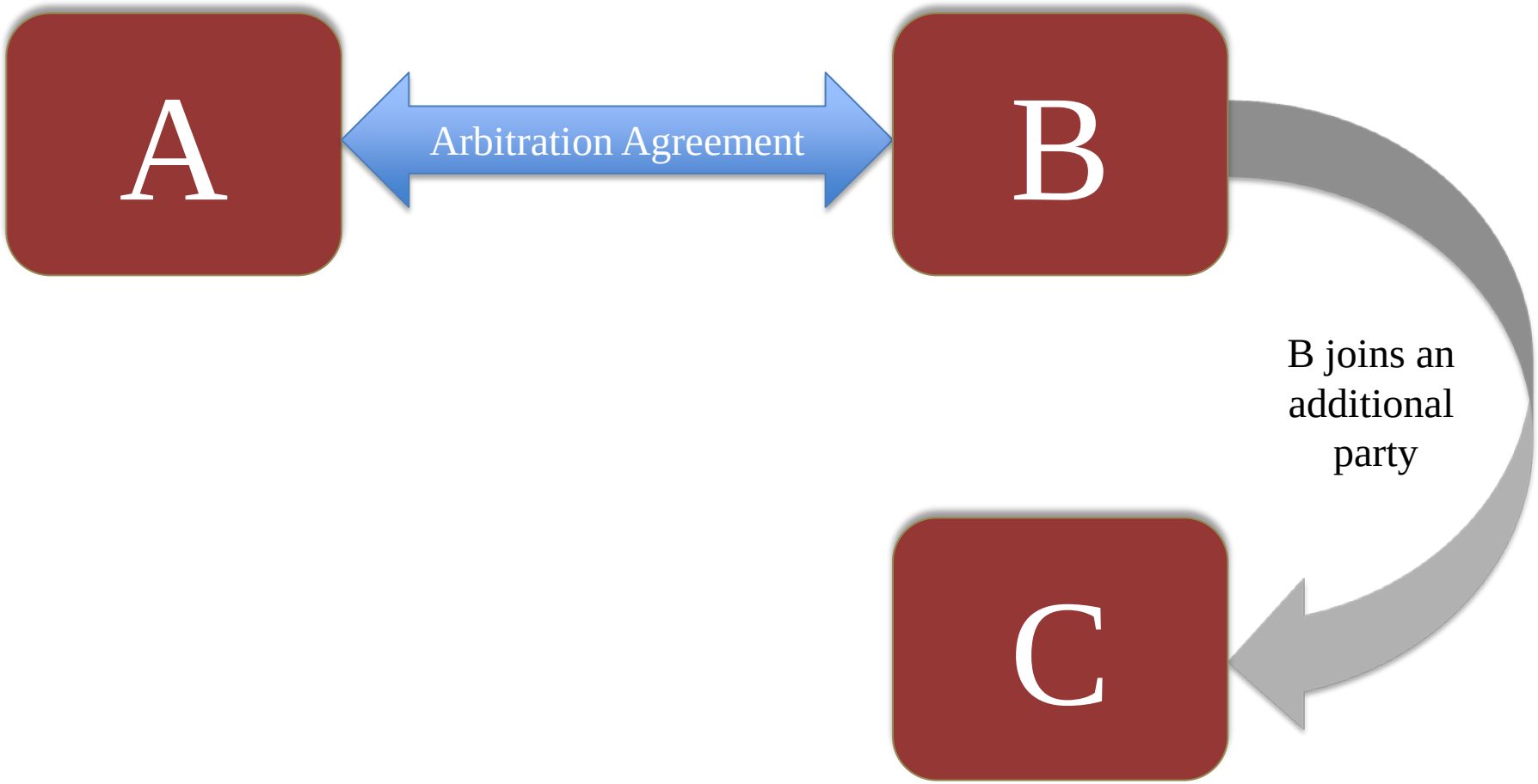
- Joinder refers to a situation where there is already an arbitration pending under the Rules and one of the parties to that arbitration seeks to add a new party to the arbitration, that is to say a party that was not named as such in the original request for arbitration.

- The 2012 Rules explicitly provide for joinder, (whereas no equivalent provision existed under the old Rules):

  - **Article 7 –** "*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 Article 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.*"

- A party may be deemed by the Court to be a party upon a Request for Joinder being filed, be it a signatory to the arbitration agreement or otherwise. (Once again, an arbitration agreement may be **extended** to a non-signatory party joined to the proceedings.)

Joinder



CAN A PARTY JOIN OTHER PARTIES TO THE ARBITRATION? (2)

- In the instance illustrated on the previous slide, B would have to establish that C is a party to the arbitration agreement either on the grounds that C has expressly consented to arbitration, or by arguing that the arbitration agreement should be extended to C as a result, for example, of C's participation in the negotiation, performance or termination of the contract in question.

- No additional joinder may be permitted *after the constitution of the arbitral tribunal* under the 2012 Rules unless all parties agree to it, as all parties must be given an equal opportunity to take part in the constitution of the arbitral tribunal.

- The joinder provision is especially useful for defendants, as they can identify the parties that they wish to include in the arbitration (the claimant party being having initiated the arbitration against the party or parties **it** wished to include.)

- The new ICC Rules do not provide for the possibility of a third party voluntarily intervening in an arbitration proceeding.

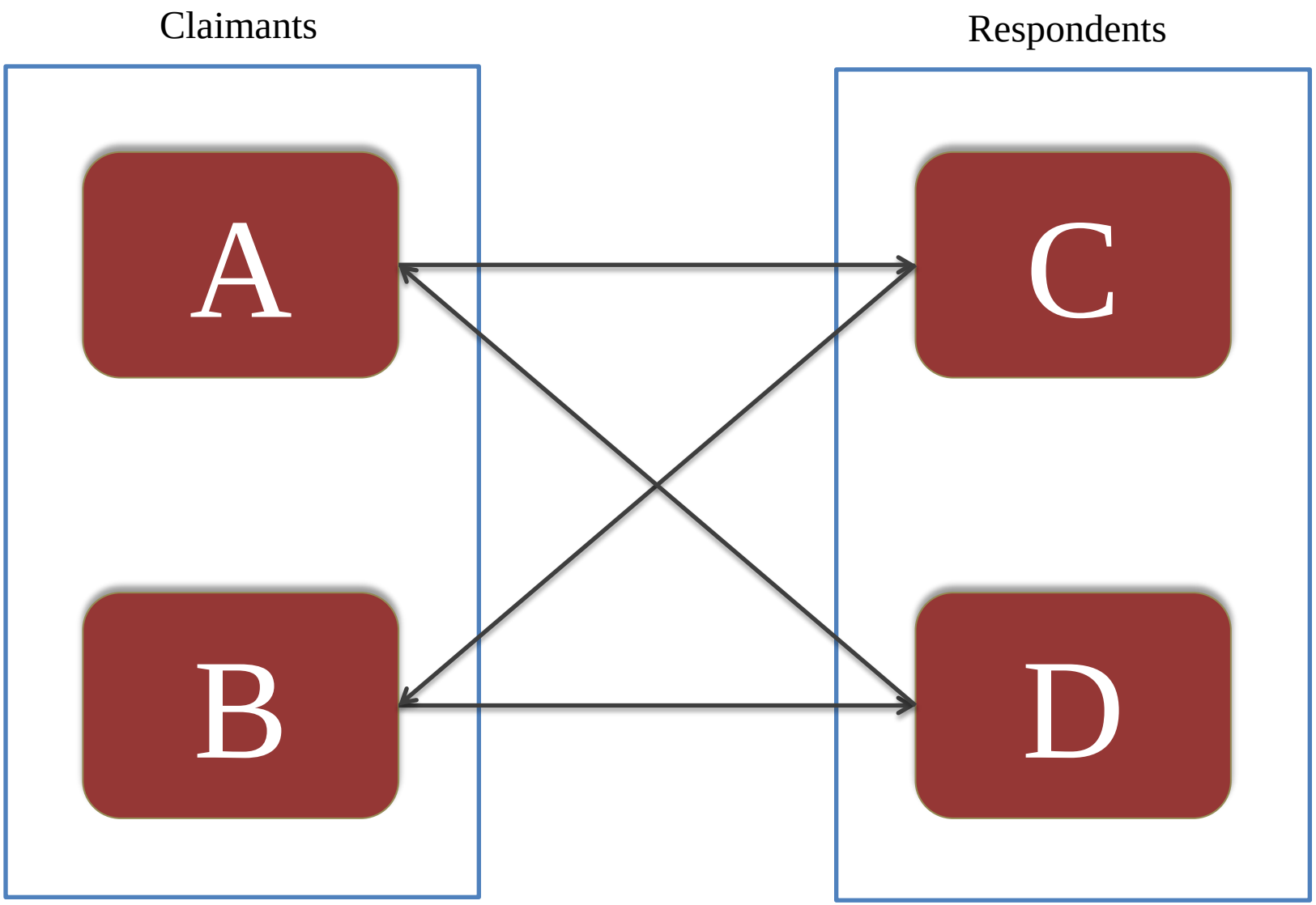
PARTIES WITH DIVERGENT INTERESTS: WHO CAN BRING CLAIMS AND AGAINST WHOM? (1)

- Where there are multiple parties, any party may assert claims against any other party:

  - **Article 8(1) –** "*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)-(7) and 9 and provided that no new claims be made after the Terms of Reference are signed or approved by the Court* **[…]**"

- Article 8 is an entirely new rule, but it was already the established practice of the Court to allow parties to make claims against one another. It therefore serves to confirm the Court's practice.

Article 8 (cross-claims)



PARTIES WITH DIVERGENT INTERESTS: WHO CAN BRING CLAIMS AND AGAINST WHOM? (2)

- Article 8 only allows **existing parties** to an arbitration to make claims against other existing parties to the arbitration – claims against a person or entity not already party to the arbitration must therefore be made pursuant to Article 7(Joinder of additional parties).

- Any cross-claim may be subject to the Court's *prima facie* assessment of jurisdiction under Articles 6(3)-6(7).

- All claims must be made **before the signing of the Terms of Reference** (unless the parties obtain the arbitral tribunal's authorization to introduce a cross-claim at a later date, which in practice many arbitrators will provide).

- **All potential cross-claims (for instance against sub-contractors by the contractor) must be examined at the outset of the arbitration.**

WHO PAYS THE COSTS IN MULTIPARTY ARBITRATIONS?

- Traditionally, the advance on costs in ICC arbitration proceedings is to be shared by claimant and defendant. However, in multiparty arbitrations, it is less easy to identify 'sides' for the purpose of deciding who is to contribute to each half of the advance on costs.

- The Court may now fix separate advances on costs payable by the parties as it deems fit:
  - **Article 36(4) –** "*Where claims are made under Article 7 or 8, the Court shall fix one or more advance on costs that shall be payable by the parties as decided by the Court. Where the Court has previously fixed any advance on costs pursuant to this Article 36, any such advance shall be replaced by the advance(s) fixed pursuant to this Article 36(4), and the amount of any advance previously paid by any party will be considered as a partial payment by such party of its share of the advance(s) on costs as fixed by the Court pursuant to this Article 36(4).*"

- The costs of ICC arbitration are still calculated on the basis of the amount in dispute (see cost calculator on the ICC website.)

- The advance on costs remains an **advance** and not a reflection of the arbitral tribunal's ultimate decision on which party will bear the costs of the arbitration or in what proportion they shall be borne by the parties.

WHEN MAY MULTICONTRACT ICC ARBITRATIONS BE INITIATED? (1)

- An owner, contractor and sub-contractor involved in the construction of a project may wish to resolve a dispute in the same arbitration rather than in separate arbitrations, despite the fact that the contracts between them contain different arbitration clauses.

  - Resolving arbitrations based on multiple contracts at once is more efficient and therefore less expensive for the parties.

  - It also ensures that there will be no risk of conflicting decisions in related disputes concerning the project.

- The 2012 Rules explicitly permit such multicontract arbitrations, (which was not the case under the old Rules).

WHEN MAY MULTICONTRACT ARBITRATIONS BE INITIATED? (2)

- **Article 6(4)(ii)** now clarifies that where claims arising out of or in connection with more than one contract are made under more than one arbitration agreement, the arbitration shall proceed if:

a) The agreements may be "*compatible*"; and
b) The parties may have **agreed** that the claims could be determined together in a "*single arbitration*".

- "*Compatible*" would normally mean that all the arbitration agreements invoked provide for arbitration under the same ICC Rules. **Differences regarding the method of appointment of the arbitrator(s) or regarding the seat of arbitration are not generally compatible, but a divergence on language or the applicable governing law may be compatible.**

- With regards agreeing to a "*single arbitration*", the Court's practice is to consider whether the parties to the different arbitration agreements are the same, and whether the dispute relates to the same underlying project or transaction.

WHEN MAY MULTICONTRACT ARBITRATIONS BE INITIATED? (3)

- The 2012 Rules confirm that claims may be brought under different contracts and different arbitration agreements in one and the same arbitration :

  - **Article 9 –** "*Subject to the provisions of Article 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.*"

- A claimant could commence arbitration by raising claims under two different contracts, each of which includes an arbitration agreement.

- Similarly, a defendant could bring a counterclaim under a different arbitration agreement to that which claimant relied upon to bring its claim(s).

MAY TWO SEPARATE ARBITRATIONS BE CONSOLIDATED INTO ONE ARBITRATION?

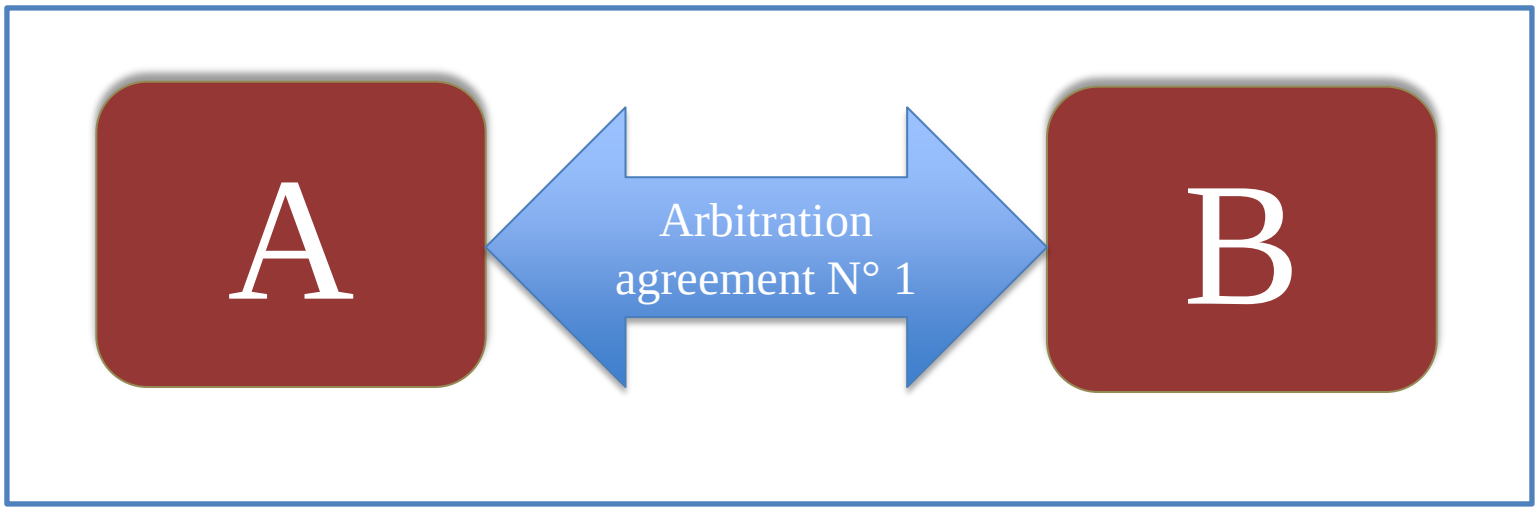
- Consolidation refers to a procedural mechanism whereby two or more pending arbitrations are merged into a single arbitration.

- The 2012 Rules aim to facilitate the consolidation of related matters so as to minimize time and costs.

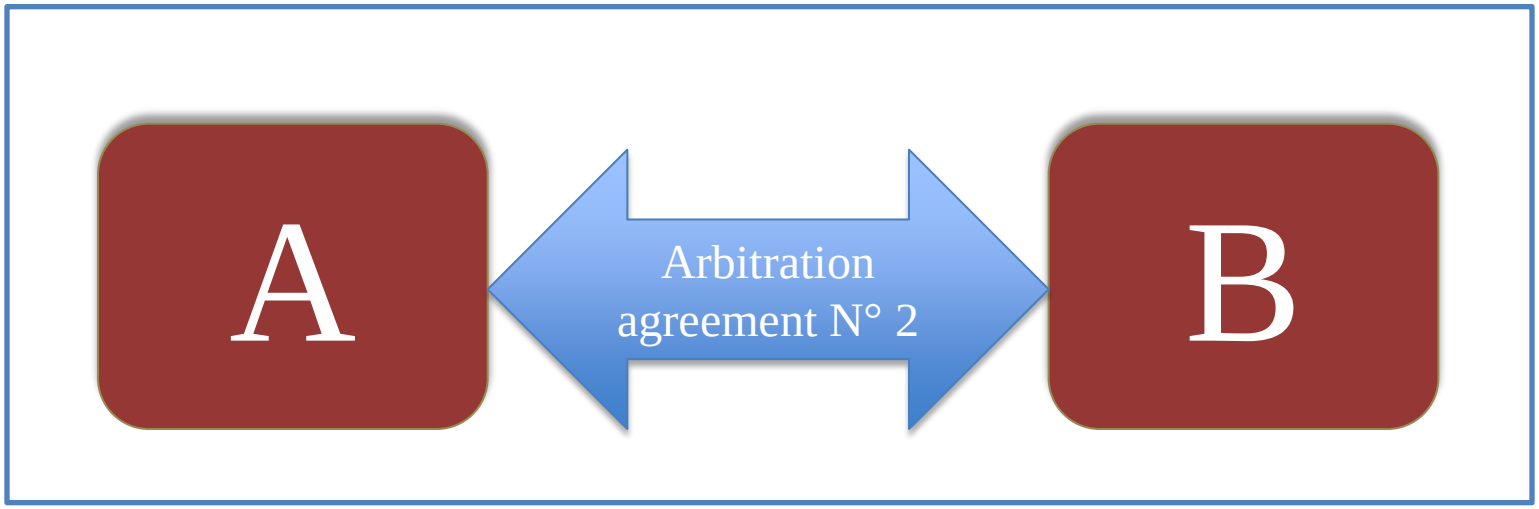
- This is a new provision in the 2012 Rules, although consolidation has previously been practiced at the Cour's discretion.

  - **Article 10 –** "*The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:*
    - *a) the parties have agreed to consolidation; or*
    - *b) all of the claims in the arbitrations are made under the same agreement; or*
    - *c) when the claims in the arbitrations are made under more than one 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.* […]"

Consolidation

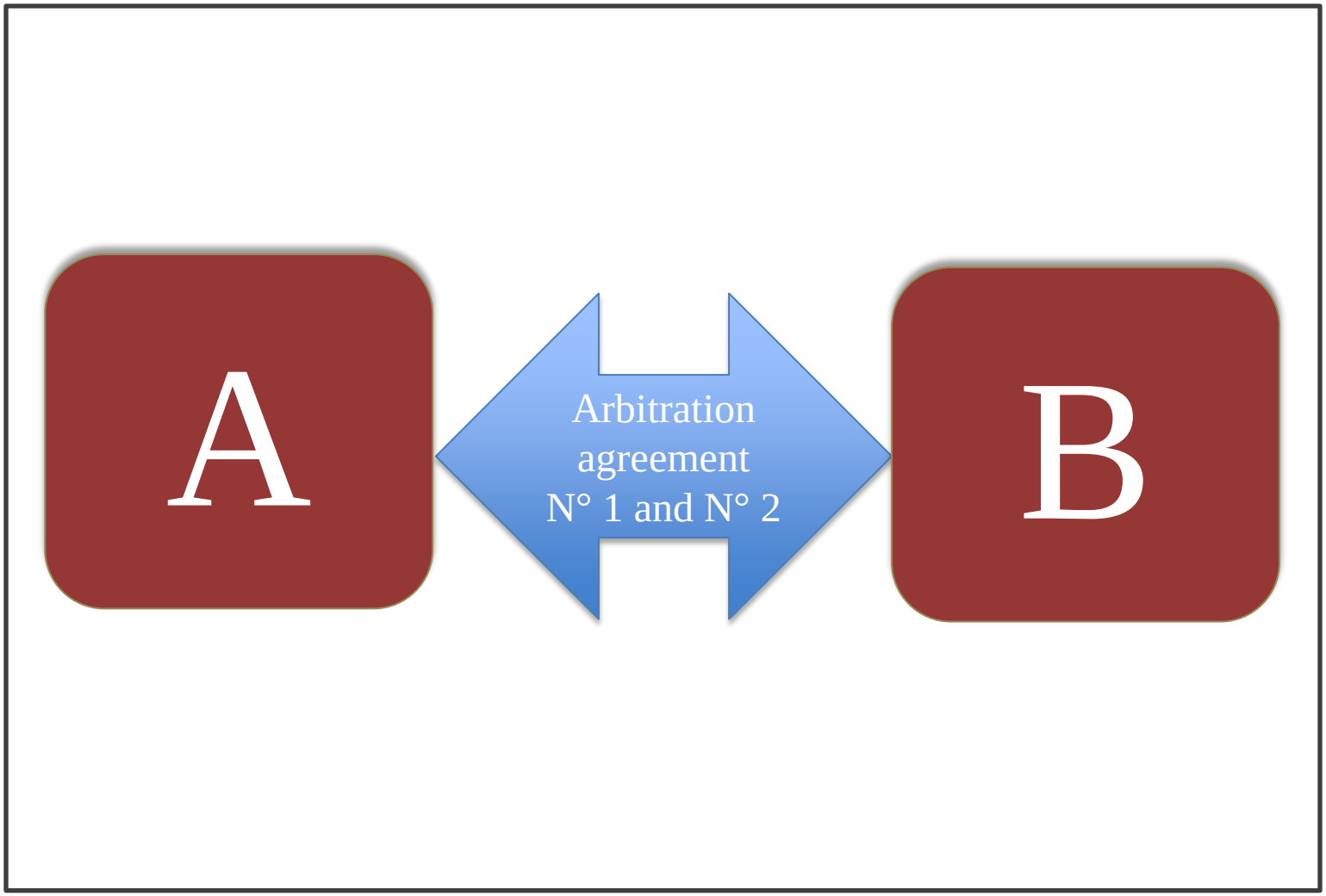


Arbitration N° 1



Arbitration N° 2

Consolidation



Arbitration N° 1

CONSOLIDATION (2)

- It is the Court that may order consolidation, and not the arbitral tribunal.
- The Court will only do so upon the request of a party.
- Only ICC proceedings will be consolidated.
- The Court "*may*" consolidate proceedings – it is not obliged to do so.
- There is now no time limit for consolidation however, in practice, **no consolidation will be possible where different arbitrators have already appointed**.
- The arbitration may proceed if the arbitration agreement binds all the parties and, where there are multiple contracts, if the parties have agreed that the claims can be determined in a single arbitration.
- Consolidating may have an impact on the enforceability of the award in some jurisdictions.

WHAT IS THE IMPACT ON THE ENFORCEABILITY OF AN AWARD WHERE THERE ARE MULTIPLE PARTIES AND MULTIPLE CONTRACTS? (1)

- It may be difficult to enforce an arbitral award rendered against multiple parties or based upon a series of contracts, if it is deemed to have violated the laws of the jurisdiction in which recognition and enforcement is sought or proceedings to set aside the ward are initiated.
- The New York Convention on the Recognition and Enforcement or Foreign Arbitral Awards (the "New York Convention") is the primary convention that governs the enforceability of an award.
- Article V.1.c provides that recognition and enforcement may be refused if "*the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration* […]."
- Article V.1.d provides that recognition and enforcement may be refused if "*the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties* […]." This might be invoked where, for instance, two arbitrations have been consolidated against the will of one of the parties.
- Article V.1.b also provides that recognition and enforcement may be refused if "*the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case.*" This situation arguably arises in the situation where a party has been forced to join an arbitration already underway.

CONCLUSIONS

- Parties to multiparty arbitration may either be signatories to the arbitration agreement or included in the arbitration by virtue of the **extension** of the arbitration clause. Under the 2012 Rules, the Court shall decide which of the multiple parties in the arbitration before it are 'true' parties.
- Joinder of any party bound by the arbitration agreement (whether or not a signatory) is now possible and all the claims can in principle be heard together in a single arbitration.
- Where claims are made under more than one arbitration agreement, it must be determined whether the arbitration agreements are compatible and whether they permit the claims to be heard in a single arbitration. Moreover, a claim can now be brought by any party against any other party.
- These are developments that should increase the efficiency of complex ICC arbitrations and reduce the parties' costs.
- It is possible that the new rules for arbitrations concerning multiple parties or multiple contracts, however, could pose problems of interpretation to arbitral tribunals, although this remains to be seen in practice.
- In encouraging multiparty and multicontract arbitration, these new provisions could also increase the number of awards that cannot be enforced, which is a danger that should not be ignored.

CONTACTS

- Paris

22, rue du Général Foy
75008 Paris
Tel : +33 (0)1 80 18 25 30
E-mail : contact@lazareff-lebars.com
www.lazareff-lebars.com

Associated offices

- New York

711 Third Avenue 20th Floor
New York, NY 10017
Tel : +1 212 867-1721
www.internationalarbitrationlaw.com

- San Francisco

801 California Street Suite 1400
San Francisco, CA 94108
Tel : +1 415 981-4800
www.internationalarbitrationlaw.com