

**THE PROBLEM OF ARBITRATION AND
MULTI-PARTY/MULTI-CONTRACT DISPUTES:
IS COURT-ORDERED CONSOLIDATION AN
ADEQUATE RESPONSE?**



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ABSTRACT: *The principle that every arbitration depends on the consent of the parties to it is a well established one, accepted all over the world. Where there are two parties to a dispute, a claimant and a respondent, establishing an agreement between the parties as the basis for arbitration is in most cases quite straight forward. The same cannot be said however when a dispute involves multiple parties or multiple contracts. Under such circumstances the result may be a series of arbitrations all relating to the same dispute with a likelihood of resulting in inconsistent decisions. One way that various jurisdictions have attempted to deal with this problem is through the adoption of court-ordered consolidation. This paper would identify the shortcomings of arbitration in relation to multi-party contractual disputes and would assess the adequacy of court-ordered consolidation as a solution to the problem.*

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ICC	INTERNATIONAL CHAMBER OF COMMERCE
JVA	JOINT VENTURE AGREEMENT
LNG	LIQUIFIED NATURAL GAS
UNCITRAL	UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AAA	AMERICAN ARBITRATION ASSOCIATION
FAA	FEDERAL ARBITRATION ACT

1. INTRODUCTION

Traditionally, arbitration has been perceived as an arrangement between two parties who have agreed to it as a method of resolving disputes arising out of some contractual or other relationship between them. This simplified view of arbitration, while it may hold true for many arbitration proceedings, is not always the case.¹

Many international business transactions in actual fact involve a more complex maze of contracts either between the same parties or different parties. These different contracts would each have a specified dispute resolution mechanism which could be different from that contained in the other contracts.

The result of the above is the possibility of a series of concurrent arbitrations and court actions all in relation to the same or similar issues arising out of one underlying transaction. The implication of this in terms of cost and time as well as complexities regarding the enforcement of what could be conflicting decisions is all but unimaginable.

In order to avoid the above problems, it would be best if all these related disputes arising out of a single event could be resolved together in a single arbitration. A number of methods have been adopted to achieve these multi-party/multi-contract arbitrations. These methods include “string” arbitrations, concurrent hearings (with the same arbitrator for all the different arbitrations), court-ordered consolidation, consolidation by consent, as well as some mechanisms adopted by some arbitral institutions to deal with the problem.²

This paper identifies certain problems with arbitration in relation to multi-party/multi-contractual disputes and focuses on court-ordered consolidation as a way of overcoming these shortcomings, to see how adequate this method is as a solution.

¹ Lew, J., et al, Comparative International Commercial Arbitration (The Hague: Kluwer Law International, 2003)

² Redfern, A., Hunter, M., Law and Practice of International Commercial Arbitration (4th Ed.) (Sweet & Maxwell).

In chapter two, the writer looks at both angles of the problem, i.e. the situation where the dispute involves several parties to one contract and the situation where the dispute involves several contracts with different parties.

Chapter three introduces court-ordered consolidation as a solution to the problems of multi-party arbitration, while in chapter four the writer assesses its adequacy as a solution to the problem.

The paper concludes that though court-ordered consolidation is a great solution to the problem of inconsistent awards arising under multi-party arbitration, it may not in all cases be quick, efficient and cost effective. Also, that enforceability of awards may be questionable, as the idea of compulsion in arbitration flies right in the face of the principle of party autonomy.

2. MULTI-PARTY & MULTI-CONTRACT DISPUTES

A multi-party arbitration may arise under one of two circumstances. The first is where there are several parties to a single contract and the second is where there are several parties to several contracts all related to the subject of the dispute.³ Each of these situations is described in turn below.

2.1 SEVERAL PARTIES TO A SINGLE CONTRACT

These are very common in the commercial world where several parties may come together to contribute to financing a project or to share the risks involved therein.⁴

The situation envisaged is one typical of joint ventures, partnerships and consortia. In all these situations, a number of entities come together in a business relationship governed by one contract.⁵

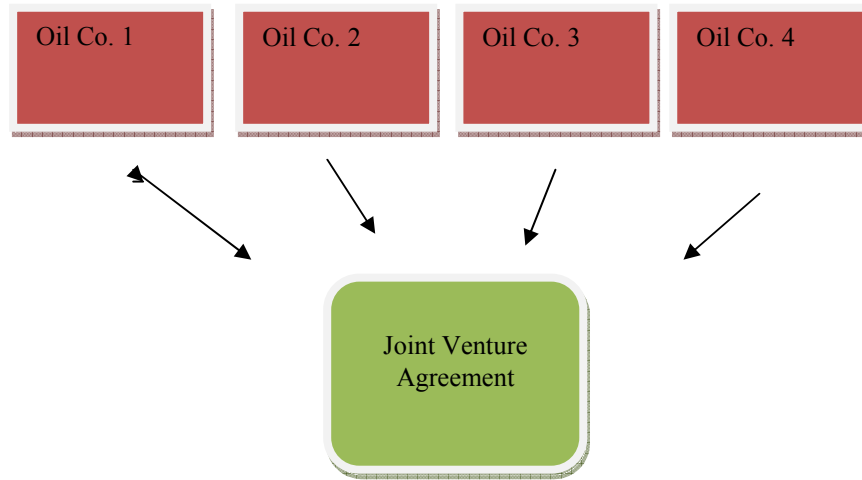
³ *Ibid.*

⁴ See Lew *supra* note 1 at 379.

⁵ *Ibid.*

Figure 1

Source: Author



In the situation illustrated in figure 1 above, there would be a single arbitration clause in the Joint Venture Agreement (JVA), governing the resolution of disputes among the four joint venturers.

One practical problem that arises under this scenario has got to do with the appointment of an arbitral tribunal. This problem would not arise in litigation where there is no issue of party autonomy and parties to a case have no say in the selection of a judge to preside over their case.

Ideally, in arbitration with a panel of three, each party would want to appoint its own arbitrator, leaving the choice of the third either to the two arbitrators or to an arbitral institution.⁶

The opportunity to choose an arbitrator gives a party a feeling of confidence that the arbitral panel would be balanced in its workings. However, where there are multiple parties to the arbitration it would be ridiculous to allow each party to choose its preferred arbitrator.

⁶ E.g. International Chamber of Commerce (ICC) Arbitration Rules 1998 (entered into force 1 January 1998).

Even where the arbitration is one to be presided over by a sole arbitrator, it would be very difficult to get all the parties to agree on the choice of one arbitrator. This issue is however a serious one because it could lead to the challenge and annulment of the arbitration award.

In **Siemens AG/BKMI v Ducto Construction Company**⁷, Ducto had commenced arbitration proceedings against Siemens and BKMI under the International chamber of Commerce (ICC) Arbitration Rules. Each of the two respondents wanted to choose its own arbitrator. This request was not granted by the ICC, which instead asked the two companies to jointly appoint an arbitrator. The respondents went ahead to make the joint appointment but later challenged the award of the ICC on the basis that they had not been given equal opportunities with the claimant in the appointment of the tribunal. The Cour de Cassation in France held in favour of the respondents, annulling the award on the ground of inequality in the appointment of the tribunal.

2.2 SEVERAL PARTIES TO SEVERAL CONTRACTS

This is the situation where several entities have entered into various interrelated contracts. It is very common particularly with large construction projects.⁸

The employer usually enters into a construction contract with the main contractor, who in turn enters into several other contracts with suppliers and sub contractors. In terms of liability, these contracts would tend to have a back to back effect on each other, as they are all linked to one project. However, it is more than likely that they would each have a different set of provisions in relation to dispute resolution, choice of law etc.⁹

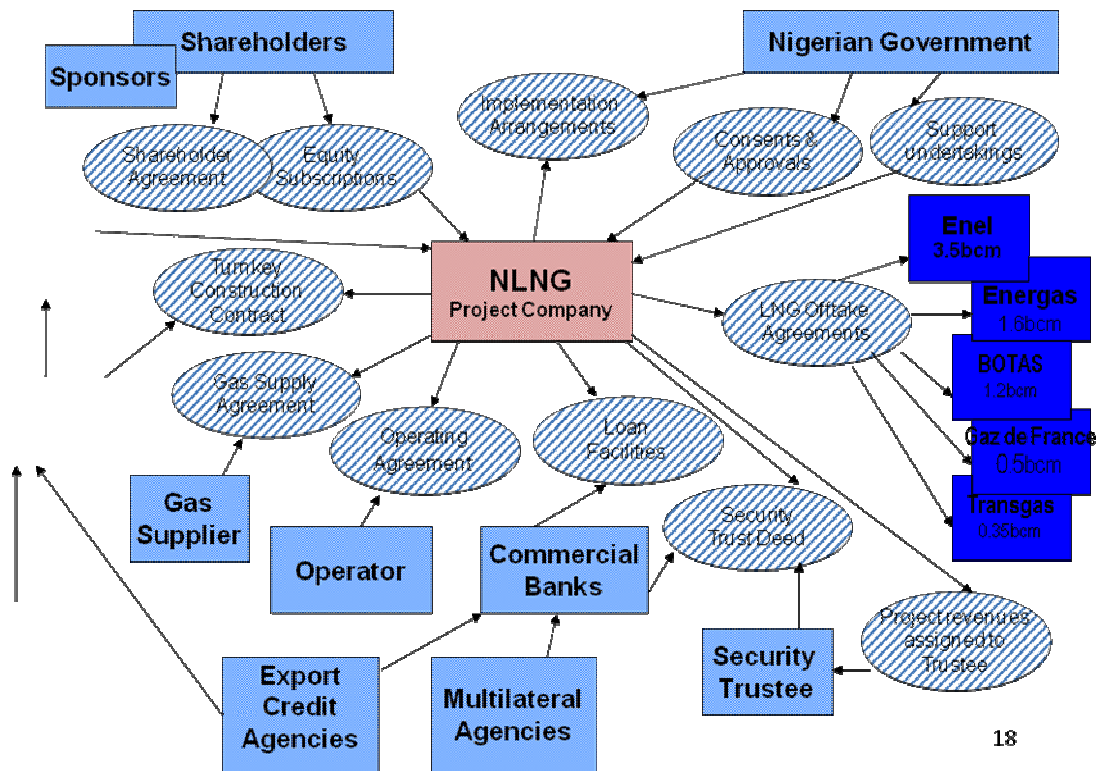
Apart from the above parties, in international contracts, there are likely to be even more parties and more contracts involved. Figure 2 below illustrates a complex maze of contracts involving the Nigerian government, various shareholders and sponsors, banks, contractors, suppliers and off takers all for the construction of a Liquefied Natural Gas (LNG) project in Nigeria.

⁷ XVII YBCA 140 (1993)

⁸ See Redfern *supra* note 2 at 202

⁹ *Ibid.*

Figure 2¹⁰



In such a scenario, there is a high probability of having different arbitrations between different parties, all bearing on the same or similar issues and resulting in inconsistent decisions that would present problems of enforcement. It is indeed desirable if possible, for all these issues to be resolved in one proceeding in order to guarantee some consistency, save time and cost.

The above situation was witnessed in **Abu Dhabi Gas Liquefaction Co Ltd v Eastern Bechtel Corp**¹¹. The Plaintiff in this case was the owner of an LNG producing plant in the Arabian Gulf. The plaintiff commenced arbitration proceedings in England against the main contractor under an international construction contract for

¹⁰ This matrix showing the commercial arrangements for LNG Train 3 Project in Nigeria was taken from Dow, S., *Issues in Petroleum Industry Finance* International Project Finance Lecture slides (CEPMLP, spring 2009). Available at <https://my.dundee.ac.uk/webappa/portal/frameset> (last visited on March 15, 2009)

¹¹ [1982] 2 Lloyd's Rep. 425

the construction of a defective tank. The main contractor denied liability alleging that any defects in the tank would be the fault of the sub-contractor, a Japanese firm. The main contractor therefore instituted a separate arbitration against the sub-contractor.

When the matter came before the English Court of Appeal regarding the appointment of an arbitrator, Lord Denning opined that it would have been appropriate for the two arbitrations to have been consolidated and heard as one in order to save time and money and also to avoid ending up with inconsistent awards. He however indicated that the court had no power to consolidate the separate arbitrations without the consent of the parties involved.

3. COURT- ORDERED CONSOLIDATION

One way that the problem of multi-party/multi-contract arbitration has been dealt with is for a national court to order for the consolidation of the different arbitral proceedings, where the cases border on common issues of law and fact.¹²

This arguably is an efficient, less costly and expedient way of resolving associated disputes in no more than one proceeding, while at the same time preventing the risk of inconsistent or contradictory awards.¹³

Whether or not this power of compulsion can be exercised is a jurisdictional issue. Some jurisdictions have enacted legislation allowing a national court to consolidate arbitrations.¹⁴ Where there is no such statute enabling consolidation, a different solution would have to be sought.

In Hong Kong for instance, compulsory consolidation of arbitrations by a court is permitted by statute.¹⁵ Article 6B of the Hong Kong Arbitration Ordinance is to the

¹² See Redfern *supra* note 2 at 205

¹³ Hoellering, M., *Consolidated Arbitration: will it result in increased efficiency or an affront to party autonomy?* Dispute Resolution Journal (January 1997) pages 41-49

¹⁴ Reisman et al, International Commercial Arbitration. Cases, Materials and Notes on the Resolution of International Business Disputes. (University Casebook Series, Foundation Press)

¹⁵ Hong Kong Arbitration Ordinance (1997) available at <http://www.hkllii.org/hk/legis/en/ord/341> (last visited on March 15, 2009).

effect that where there exist common questions of fact and law and the relief claimed is in respect of the same transaction or set of transactions, then “*the court may order those arbitration proceedings to be consolidated on such terms as it thinks just or may order them to be heard at the same time or one immediately after another, or may order any of them to be stayed until after the determination of any other of them.*”

This provision was applied in **Shui On Construction Co. Ltd v. Moon Yik Company**¹⁶ where the court appointed a single arbitrator to preside over separate arbitrations. Article 6B was applied similarly in **Ming Kee Shipping Service Co. Ltd. v. Autogain Limited**¹⁷ and **Dickson Construction Co. Ltd. v. Schindler Lifts (HK) Ltd.**¹⁸

In Colombia, under the 1989 decree on arbitration, the position is that where a dispute between two parties has an effect on a third party who refuses to be joined in the arbitration, that arbitration agreement is invalid. The effect of this is that the arbitration proceeding will be consolidated with any related court proceedings regardless of the lack of agreement by all the parties.¹⁹

Under Dutch law, this power of courts to order consolidation is implied into arbitration agreements where the parties have not expressly excluded it.²⁰ It should be noted that under the relevant section also, the parties may agree to exclude consolidation even after the dispute has already arisen. Court-ordered consolidation under Dutch law is only possible for arbitrations taking place within the Netherlands.²¹

¹⁶ [1987] 2 HKLR 1224

¹⁷ (30th April, 1992) unreported. Discussed in Fenn, P., et al Dispute Resolution and Conflict Management in Construction available at <http://books.google.co.uk/books> (last visited March 17, 2009)

¹⁸ [1993] 1 HKLR 45

¹⁹ Yannaca-Small, C., *Consolidation of Claims: A promising Avenue for Investment Arbitration?* International Investment Perspectives (2006 Ed.)

²⁰ Netherlands Arbitration Act (1986) Article 1046 available at <http://www.jus.uio.no/lm/netherlands.arbitration.act.1986/toc.html> (last visited March 15, 2009)

²¹ *Ibid.*

In the USA however, the Federal Arbitration Act (FAA) is silent on the issue and the position on whether compulsory consolidation is permitted differs from state to state.²² This is demonstrated in the cases discussed below.

In the 2004 case of **Seretta Construction Inc v. Great American Insurance Co.**²³, the Florida District court of Appeal over turned the decision of a Circuit Court to consolidate a construction arbitration brought by Seretta against Pertree Constructors Inc with a separate though related construction arbitration proceeding between Pertree and Five Arrows Inc.

The facts of the case were that Pertree as main contractor on a commercial park project subcontracted Seretta to erect concrete tilt-up walls. Pertree also subcontracted Five Arrows to paint the surfaces of the walls. Both sub contracts contained identical dispute resolution clauses providing for arbitration under the construction industry arbitration rules of the American Arbitration Association (AAA).

Seretta filed a suit against Pertree, followed by a demand for arbitration, claiming that it had not been paid fully for work done. Pertree counterclaimed and also initiated a third party arbitration claim against Five Arrows claiming that Seretta and / Five arrows had performed defective work, resulting in damages to Pertree. Upon Pertree's request that these separate but related proceedings be consolidated, the arbitrator obliged.

Five Arrows subsequently filed an indemnity cross-claim in the arbitration proceedings against Seretta. Seretta's response was to ask the trial court to order that the dispute between itself and Pertree be separated from that between Pertree and Five Arrows and that the Five Arrows indemnity claim be excluded from arbitration. The trial court refused, hence the appeal.

The appellate court in reaching its decision relied among other cases on **Higley South Inc. v. Park Shore Dev. Co. Inc**²⁴ which provides that a trial court's decision to

²² See Reisman *supra* note 13

²³ 869 So. 2d676 (Fla. 5th DCA 2004)

²⁴ 494 So.2d 227 (Fla. 2d DCA 1986).

consolidate arbitration proceedings must be based either on “statute, judicial policy or contract.” The Florida Arbitration Code did not provide for this, neither had it been provided for in the parties’ respective arbitration agreements.

The two cases discussed above are reflective of two other decisions of the United States courts: **United Kingdom of Great Britain v. Boeing Co.**²⁵ and **Glencore Ltd. v. Schnitzer Steel Products Co.**²⁶

Meanwhile, in **New England Energy Inc. v. Keystone Shipping Co.**²⁷ the US state Court of Appeals overturned the decision of a Massachusetts District Court refusing to order the consolidation of two related arbitrations.

The Appeal Court’s ruling was based on the ground that consolidation was permitted in Boston under the Massachusetts Arbitration Consolidation Statute. Therefore in as much as the parties had not expressly excluded the power of the court to consolidate in their respective arbitration agreements, the District Court was not precluded from exercising that power.

Recognizing the differences in approach of the various states, the AAA provides in rule R-7 of its Construction Industry Arbitration Rules²⁸ that if either the state law or the parties’ agreement provides for consolidation, then the parties would have to agree on a procedure to have it implemented. If the parties are unable to agree then the AAA will appoint one arbitrator to decide whether or not the related arbitrations should be consolidated and if so, the procedure for such consolidation.

Under English law, it is quite clear that compulsory consolidation of arbitration by a court is not allowed.²⁹ Respecting the concept of party autonomy, whether or not an English court can order the consolidation of two or more arbitrations depends on the parties. “*Unless the parties agree to confer such power on the tribunal, the tribunal*

²⁵ 998 F. 2d 68 (2nd Cir. 1993)

²⁶ 189 F. 3d 264 (2nd Cir. 1999)

²⁷ 855F.2d1 (First Cir. 1989)

²⁸ Available at <http://www.adr.org/sp.asp> (Last visited March 16, 2009)

²⁹ English Arbitration Act, (1996) Section 35

has no power to order consolidation of proceedings or concurrent hearings.”³⁰ The cases discussed below are illustrative of this.

In **City & General (Holborn) Ltd. V. AYH Plc (2005)**³¹, the plaintiff had entered into a contract with a company called Kier to do some refurbishment works in London. The plaintiff also contracted AYH as project manager and quantity surveyor for the project under two separate agreements.

Clause 17.2 of the deed of appointment stated that if any dispute arising under the deed was substantially related to or connected to issues raised in another related dispute, the dispute shall be referred to the arbitrator appointed to determine the related dispute.

Completion of the project was delayed for 80 weeks, and costs and expenses far exceeded initial estimates. City therefore commenced arbitration against Kier and sought to refer a claim against AYH for failure to exercise its duties of reasonable care and diligence as project manager and surveyor to the same arbitrator. AYH challenged this before the Technology and Construction court on the basis that the two disputes were not substantially related.

In ruling against AYH the judge reasoned that the purpose of the clause was to avoid multiple proceedings leading to high costs and the probability of inconsistent findings. That since a material portion of the issues in the two arbitrations were related, clause 17.2 would come into play. He therefore ordered that the dispute be dealt with by the same arbitrator handling the Kier dispute.

The same position was taken by the English House of Lords in **Lafarge Redland Aggregates Ltd v. Shepherd Hill Civil Engineering Ltd**³² where disputes arising under two separate contracts but related to the same construction project were allowed to be jointly heard by the same arbitrator in accordance with a provision in an institutional standard form of contract that the parties had adopted.

³⁰ Ibid

³¹ [2005] EWHC 2494 TCC

³² [2001] 1 WLR 1621

The situation was however different in the case of **Bay Hotel and Resort Limited v. Cavalier Construction Co. Ltd.**³³ In this case the Privy Council held that the parties in their arbitration agreement had not conferred jurisdiction on the tribunal to order a joinder or consolidation of disputes. The tribunal therefore lacked the authority to add an additional party (Cavalier TCI) to the arbitration on the request of Cavalier and to make an award jointly to Cavalier and the third party against Bay Hotel.

Like the UK, French law³⁴ also does not seem to recognize court-ordered consolidation. Indeed it has been reported that no case involving compulsory consolidated arbitration has ever been upheld in a French court.³⁵ The ICC in France itself has no specific provision on consolidation in its arbitration rules.³⁶

4. ISSUES ARISING

Court-ordered consolidation appears to be a very convenient way of dealing with the problems of multi party arbitration. Whether it provides an adequate solution is however questionable in the light of the fact that compulsory consolidation by courts in itself raises some challenges for arbitration. Some of these challenges relate to issues of consent, appointment of arbitrators, issues of procedure, and enforcement of the arbitration award.

4.1 CONSENT

The nature of arbitration is such that it thrives on the consent of the parties to it for its validity.³⁷ This is the essence of the principle of party autonomy. Therefore for a multi-party arbitration to be possible, all disputing parties must have agreed to it. This is very unlike the case in litigation, where parties can easily be joined in an action regardless of whether they agree to it or not.

³³ [2001] UKPC 34

³⁴ See France –Code of Civil Procedure- Book IV-Arbitration (1981) available at http://www.jus.uio.no/lm/arbitration/national_laws.html (last visited March 20, 2009)

³⁵ Schindler, P., Desai, S., *Compulsory Consolidation: The next step in International Construction Arbitration* available at <http://www.patrickschindler.com/pdf/compulsoryconsolidation> (last visited March 20, 2009)

³⁶ See ICC Arbitration Rules *supra* note 6

³⁷ Gerasimtchuk, E., *Multi-party Arbitration* available at www.uni.kiel.de/eastlaw/ws0102/semarbeiten (last visited March 17, 2009)

For a court therefore to order the consolidation of disputes in an arbitration without the consent of the parties as is possible under the Hong Kong Act, is to sin against the most fundamental principle of arbitration.

Some have argued that by agreeing to submit a dispute for arbitration in a country that allows compulsory consolidation, the parties have indirectly agreed to a possible consolidation.³⁸ It is unclear how this would play out when it comes to enforcement of the award under the New York Convention³⁹. What if such an arbitration agreement is invalid under the law applicable to the contract, bearing in mind that this could be different from the law of the place of arbitration?⁴⁰ This would definitely be a stumbling block. Compulsory consolidation might then arguably only work effectively in the domestic setting and not for international arbitrations where enforcement may be sought in another jurisdiction.⁴¹

4.2 SELECTION OF ARBITRATORS

Here also, there could be practical problems with the appointment of the arbitral panel. Each of the arbitration agreements may have a different method provided for the number and appointment of the tribunal. Once a consolidation is ordered, there could be complications in deciding the number of arbitrators to be used and the method to be adopted in the appointment process.⁴²

The way this has been dealt with in some statutes are to state that if the parties are unable to agree on the appointment of arbitrators, the court ordering the consolidation would make the appointment for them. This is the position adopted under the Netherlands Arbitration Act.⁴³

³⁸ Davidson, F., *Arbitration* (Scottish Universities Law Institute, 2000)

³⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (entered into force 7th June 1959) available at <http://www.uncitral.org/pdf/english/texts/arbitration> (last visited March 22, 2009)

⁴⁰ See Redfern *supra* note 2

⁴¹ Second report of the Departmental Advisory Committee on Arbitration Law (DAC), May 1990 discussed in Davidson *supra* note 32

⁴² See Redfern *supra* note 2 at 206

⁴³ Article 1046 (3)

It could be argued that recognition and enforcement of an award made by a tribunal imposed on the parties may be refused under the New York Convention.⁴⁴

4.3 PROCEDURAL PROBLEMS

These relate to difficulties encountered during the actual conduct of the arbitration. An otherwise basic issue like the order of submission by parties could prove problematic in an arbitration involving a multiplicity of parties.⁴⁵

In the same vein, the question of how much time is to be allocated to each party can cause problems bearing in mind that it is a cardinal principle in arbitration that all parties must be treated equally.

*“if party autonomy is the first principle to be applied in relation to arbitral procedure, equality of treatment is the second-and it is of the same importance.”*⁴⁶

This requirement for equal treatment is expressed in Article 18 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law⁴⁷, and under the New York Convention⁴⁸, a failure to comply with the requirement could lead to a refusal to recognize or enforce an award.

Another problem would be how to ensure confidentiality during the course of the consolidated arbitration proceedings. In a commercial dispute, it is likely that some confidential information in the nature of trade secrets, data etc would be disclosed. Not all parties would be comfortable having parties not privy to certain sensitive information in the same arbitral proceeding.

Above all, though a strong argument made in favour of consolidation is the fact that it would save time and cost, the opposite could easily also be true. This is because of all the complexities that would come with having more than two parties in the same

⁴⁴ Article V.1 (d)

⁴⁵ See Lew *supra* note 1 at 388

⁴⁶ See Redfern *supra* note 2 at 317

⁴⁷ UNCITRAL Model Law on International Commercial Arbitration 1985(adopted on 21 June 1985)

⁴⁸ Article V.1(b)

arbitration and trying to ensure equal treatment to the satisfaction of all. Some parties may not cooperate and indeed it may be in their interest if they feel the arbitration would not go their way to frustrate the process.⁴⁹

It should be noted though that there have been very complex multiparty arbitration proceedings that have sailed through these problems to a successful end. A good example is the case of **Anderson Consulting v Arthur Andersen and Andersen Worldwide**⁵⁰, a dispute that involved 140 parties.

5. CONCLUSION

Court-ordered consolidation of arbitrations definitely addresses the problem of inconsistent awards in multi-party arbitration. It may also be wise in terms of cost and time, though in some cases, the writer believes that the opposite could be true. However, due to the uncertainties regarding the enforceability of arbitration awards where parties were compulsorily brought together in arbitration, it would seem to the writer that the more adequate approach is to allow consolidation, only with the consent or authorization of the parties involved. After all, arbitration as a dispute resolution mechanism is in the first place a creation of the will of the parties.

⁴⁹ See DAC Report *supra* note 35

⁵⁰ 10 Am Rev Int Arb 437 (1999) 442

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