Multi-party contract and multi-party arbitration proceedings in Switzerland: What commercial users should know

In the best of all worlds, the contracts among these parties include identical, or at least parallel, dispute resolution clauses allowing one arbitral tribunal to resolve the dispute in an encompassing manner, thus ensuring that all aspects of the case are investigated and conflicting decisions are avoided. Experience shows, however, that the world is imperfect also in this context, which may render the adjudication of claims in a comprehensive fashion difficult and their enforcement onerous. It is therefore imperative to know the mechanics and pitfalls of potential multi-contract and multi-party disputes not only when they arise, but already at the negotiation and drafting stage. This article discusses the features of multi-contract and multi-party arbitration proceedings primarily under the Swiss Rules of International Arbitration and gives an overview of the corresponding ICC Arbitration Rules for arbitration proceedings having their seat in Switzerland.

1. Growing importance of multi-party disputes

During the last decade arbitration has become more complex because of an increasing number of multi-party and multi-contract disputes. Statistics published by the International Chamber of Commerce (ICC) show that in about 28% of the ICC arbitration cases more than two parties are involved. The importance of multi-party procedures is even more emphasised by the fact that many two-party disputes extend their effect to further parties, which also have an interest in the outcome of the case. Complex construction litigation or arbitration cases, for instance, regularly not only involve the general contractor and the owner of a power plant, of a production facility or of an office building, but also architects, engineers, subcontractors or sub-subcontractors. The same holds

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true, among others, for joint venture-related arbitrations or disputes resulting from corporate matters. The claims, as a rule, include direct compensation claims, counter-claims, cross-claims or recourse claims.

2. Adapted Institutional Arbitration Rules

The growing importance of multi-party disputes is not only reflected in the Swiss Code of Civil Procedure (“CPC”), which under certain conditions allows for the joinder of third parties and offers a new instrument in form of the third party action (“Streitverkündungsklage”; see art. 16 and 17 CPC), or the consolidation of related proceedings (for Swiss domestic arbitration, see also art. 376(1) CPC). In their revised versions, the 2012 ICC Rules as well as the 2012 Swiss Rules address various aspects of multi-contract and multi-party disputes, too. Questions of interpretation related thereto are governed by the law applicable to the arbitration agreement – the lex causae.

3. Joinder, intervention and consolidation

In the context of arbitration, the term "joinder" relates to the situation where, upon the request of an existing ("original") party to an arbitration, a third person not yet involved in this arbitration is ordered to participate in the proceeding, or where a third party is allowed to intervene into an existing proceeding ("intervention"). The "consolidation" of two proceedings, in contrast, allows two or more separate arbitrations, pending or to be initiated, to be merged into one single arbitration.

4. Joinder and intervention

Inspired by article 17(5) of the revised UNCITRAL Arbitration Rules of 2010, article 4(2) of the 2012 Swiss Rules provides that an arbitral tribunal may order the joinder or the intervention of one or more third persons either

(i) where a party to a pending arbitral proceeding requests that one or more third persons participate in the arbitration. This may be the case where the respondent in an arbitration wishes to file a counter-claim against the claimant and a third party, which is associated with the claimant, or which has contributed to the damage of respondent in another way. Example: the work owner files a claim against the general contractor, who, in return, files a counter-claim against the claimant and the civil engineer who was engaged by the claimant; or

(ii) where one or more third persons submit a formal application to participate in a pending arbitral proceeding ("intervention").

Example: the civil engineer, without being a party to the arbitration, wishes to assist the work owner in his claim against the general contractor because of potential recourse claims. The term "persons" instead of "parties" makes clear that such person does not necessarily become a "full" party – a claimant or a respondent – to the arbitration at issue, but may partake in another form of third-party participation such as the Swiss "Nebenintervention" or the US amicus curiae briefs. It is for
the arbitral tribunal, upon consultation with all concerned parties including the person or persons to be joined, to decide on such request. For this purpose, the arbitral tribunal not only has to take into account jurisdictional issues (which are not separately addressed by the arbitration rules in this context), but also all other relevant circumstances, such as the status of a pending arbitration or the cost and time efficiency of a joinder or intervention. Because of the restrictive wording of art. 4(2) Swiss Rules as well as the consensual and confidential nature of arbitration, joining a third person to an arbitration without the consent of all involved parties is not permissible. Following the principles of contract interpretation under the lex arbitrii, i.e. in our setting, Swiss law, the consent may be explicit or implied. In case all parties are bound by the same contract and thus arbitration agreement, implicit consent will normally be affirmed if the third person(s) are full parties, i.e. claimants or respondents. This does not necessarily apply to other forms of participation such as the “Nebenintervention” or the submission of amicus curiae briefs, though, unless all parties come from jurisdictions where the participation at issue is admitted and, therefore, there is a consensus on such form of participation. In contrast, parties bound by different contracts and Swiss Rules arbitration agreements will, as a rule, not be deemed to have agreed to the consolidation of arbitration proceedings against their explicit will. This is all the more true for the third party or parties who, after the constitution of the arbitral tribunal, have no saying in the nomination of the arbitrators. In any event, the arbitral tribunal must examine whether a third party to be joined as a party to the arbitration is bound by the arbitration clause(s) forming the legal basis of the proceedings.

Although the Swiss Rules do not set any time limit for a request for joinder or intervention it is reasonable to assume that the more advanced the proceedings are, the less likely such request will be granted.

The ICC Rules of Arbitration provide for similar instruments: in its revised version of 2012, Art. 7 of the ICC Rules allows interested third parties to join a pending arbitration, provided they submit a formal request to the ICC Secretariat containing information on the arbitration agreement(s) under which the joinder is requested. Unless all involved parties agree otherwise, the joinder needs to take place before the confirmation or appointment of the arbitrators. In practice, a joinder under article 7 of the 2012 ICC Rules will most probably be used by the respondent: the claimant will file its claims against multiple respondents (if any) already in its Request for Arbitration. The additional party may file an answer to the Request for joinder containing cross-claims against any of the original parties to the arbitration and thus fully partake in the proceeding as a party (see art. 8(1) 2012 ICC Rules, subject to art. 6(3)-(7) 2012 ICC Rules).

Unlike article 4(2) of the 2012 Swiss Rules, article 7 of the 2012 ICC Rules does not permit a third party to join a pending ICC arbitration proceeding on its own motion (intervention) or to seek the joinder of a third party without the requirement of asserting a claim against it (e.g., as “third persons” or “Nebenparteien”).
It is further noteworthy that Swiss case law and the dominant doctrine reject the “group of companies” doctrine, i.e. do not assume the jurisdiction of an arbitral tribunal in a dispute involving company A based on its jurisdiction against company B which belongs to the same group of companies as company A.

5. Consolidation of multiple arbitrations

Article 4(1) of the 2012 Swiss Rules allows the consolidation of two or more arbitrations if the cases are linked, for instance because of connected facts or similar legal issues, even if the parties to these arbitration proceedings are not identical. Under the Swiss Rules, the Court decides on the consolidation of a newly initiated arbitration with a pending arbitration upon receipt of the Notice of Arbitration and in consultation with all involved parties as well as with the already confirmed arbitrators (if any). In deciding whether to refer a new arbitration to an arbitral tribunal constituted for another case, the Court takes into account all relevant circumstances, including the connection between the cases and the progress already made in the pending proceedings to avoid unreasonable delay. Also, consolidation under art. 4(1) is only possible where the two (or more) arbitrations are subject to the Swiss Rules and compatible in terms of the seat of the arbitration (in our view, the seats of various arbitrations should, at least, be in the same country), the number of arbitrators, and the language of the arbitration. In particular, complicating the pending proceeding by admitting consolidation should be avoided. Although it is disputed whether the consent of all parties is required for the consolidation of arbitral proceedings or whether by choosing the Swiss Rules, the parties are deemed to have agreed in advance that the Court may decide, in the appropriate circumstances, to consolidate future proceedings (as various prominent authors opine), the practice of the Swiss Chambers before introducing the revised 2012 Swiss Rules shows that the institution follows a restrictive approach when deciding on whether or not to admit consolidation, and consolidations without the consent of the parties are very rare. We may assume that this practice will continue to be followed under the 2012 Swiss Rules.

The Swiss Rules provide that when the Court decides to consolidate a new case with pending proceedings, the parties to all proceedings are deemed to have waived their right to designate an arbitrator, and the Court is entitled (but not bound) to revoke the appointment or confirmation of arbitrators to allow the arbitral tribunal to be newly constituted under sect. II. of the Swiss Rules. The power to revoke arbitrators in all concerned proceedings was established to grant the Court the right to appoint new arbitrators within the framework of the (consolidated) multi-party arbitration. This approach may make sense if the parties to the pending arbitration are not identical with the ones of the proceeding to be consolidated therewith.

Art. 10 of the 2012 ICC Rules follows a more limited approach: It allows the ICC Court to consolidate multiple related arbitrations (a) where all parties have agreed to it; (b) where all claims made in the arbitrations are made under the same arbitration agreement; or (c) where the claims are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship, and the ICC Court finds the arbitration agreements to be compatible. Unlike article 4(1) of the 2012 Swiss Rules, however, no
consolidation of multiple arbitrations will be ordered where the arbitrations are not between the same parties, unless consolidation is sought for claims made under the same arbitration agreement.

6. Claims arising out of multiple contracts

Although the Swiss Rules do not expressly cover the issue of claims arising out of multiple contracts, in the past, several arbitrations including multi-contract settings have been administered by the Swiss Chambers. Swiss law allows multi-contract proceedings if the ordinary jurisdictional prerequisites are fulfilled. In contrast, article 9 of the 2012 ICC Rules expressly allows claims arising out of several contracts and under several arbitration agreements to be brought in one proceeding, irrespective of whether such claims are made under one or more agreements under the ICC Rules.

7. Jurisdiction based on legal succession, cessation, transfer of contract and alike

Under Swiss case law, the jurisdiction of an arbitral tribunal to adjudicate a matter may not only be based on contractual agreement, be it direct (arbitration agreement) or indirect (by way of reference to arbitration rules, such as the Swiss Rules or the ICC Arbitration Rules), but also, among others, in case of succession, cessation, transfer of contract, or under the "piercing of the corporate veil" doctrine. In its decision FTD, 129 III 727, the Swiss Federal Tribunal furthermore held that a company which had been deeply involved in a project and was closely linked to the project owner was subject to the arbitration clause in the project contract.

8. Limits and opportunities of multi-party arbitration

The above considerations show that the arbitration rules chosen and the arbitration clauses drafted by the parties have a far-reaching effect on the question when and in which position third parties can be included into arbitration proceedings, and thus to the cost- and time-efficiency of such proceedings. In this context, the Swiss Rules of International Arbitration prove to be particularly flexible and well suited to serve as a dispute resolution setting for complex international multi-party or multi-contract disputes. Because of the Swiss Federal Tribunal’s user-friendly approach, the same holds true for Swiss venues.

All arbitration rules, however, set limits to third party participation in arbitration proceedings, which makes it all the more important to carefully draft arbitration clauses in the first place. To avoid dispute resolution and enforcement problems, multi-party and multi-contract settings need careful consideration and alignment of the dispute resolution clauses in terms of the choice of the arbitration rules, the seat and the language of the arbitration, e.g. in project contracts as well as in the contracts of the general contractor with sub-contractors, architects or engineers. Furthermore, certain forms of multi-party arbitration, such as the joinder, intervention and consolidation should explicitly be admitted.
To add further flexibility to the overall dispute resolution setting, the parties may, for instance, opt for arbitration in the international project contract and agree on state court jurisdiction in the national sub-contractor contract. Adding in the latter that in case of disputes between the project owner and the general contractor, third party claims, joinders or consolidations are admissible, however, would then align both dispute resolution clauses.

In the absence of the alignment of the dispute resolution proceedings, however, the uncertainty in terms of jurisdiction does not only affect claimants. As shown above, under certain circumstances, respondents involved in a project having opted for state court dispute resolution may be drawn into arbitration proceedings. In such cases, they need to consider carefully their strategic options: on the one hand side, they may engage in fundamental opposition against the arbitral proceeding and plead lack of jurisdiction, or "race to the court" to fix their jurisdiction before being involved in the arbitration, in particular under EU case law (see, e.g., the Folien F case EuGH, 25 October 2012 - C-133/11). Or they may attempt to negotiate the terms of their cooperation and full participation in the proceeding.

9. Conclusion

We may conclude that complex contracts often result in complex disputes. Careful drafting of the dispute resolution clauses in related contracts as well as a thorough analysis of the strategic options in case contractual conflicts arise at the horizon, however, allow resolving multi-party and multi-contract disputes by arbitration in a comprehensive and efficient way.