Drafting Arbitration Clauses in Complex Transactions: Questions to ask when bringing claims arising out of joint venture arrangements

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Numerous parties (shareholders, project companies, financial institutions, insurers, subcontractors), numerous contracts (shareholder agreement, loan agreement, EPC agreement, guarantees) and numerous business interests (long term profits, quarterly results, market positioning) make transactions complex. Even if the parties draft a dispute resolution clause that reflects this commercial reality, how will the mechanics of filing a claim affect the resolution of the dispute?

In one type of complex transaction, a joint venture arrangement, two (or more) parties come together for a specific purpose for which their businesses are ideally suited. The parties sign the agreements convinced that their synergies will produce certain results sought by both of them. Generally, the joint venture agreements design two sets of rules : one that governs the relationship between the partners and the other that governs the actual business between them.

The first set of rules regarding the relationship between the parties will vary depending on whether the joint venture is contractual or corporate. In a contractual joint venture, the rules governing the relations between the parties are set out in a joint venture agreement, in which the parties allocate decision-making powers based upon the value of each party's contribution is valued by the partners. An equal share of powers between the partners is not uncommon in joint venture agreements. The corporate joint venture generally occupies a shareholder agreement, which will establish rules in a similar way as the first modality but is followed by the constitution of a corporation. This latter mechanism results in the creation of a third entity, while the former does not.

The parties establish the second set of rules governing the operation of the joint venture itselfin different agreements accessory to the main joint venture agreement. Examples include transfer of technology agreements, licensing agreements, and technical assistance agreements. It is common for joint venture arrangements that result in a corporation to include these agreements, since the corporation is oftentimes a party to –and/or beneficiary of– the different accessory agreements.

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[1] Principal at DJ Arbitraje, www.djarbitraje.com. Document presented at the *ICC International Arbitration in Latin America* conference, held in Miami, Florida in November 2011.

When parties are negotiating these agreements, they usually view them as part of a single economic transaction, or business. In this context, parties may well foresee that, should disputes arise between them, a mechanism that will result in a single arbitration for all disputes should be put in place.

However, when disputes actually arise, the claimant party will likely realize that the mechanism of bringing forth related claims is not so clear.

For example, if party A, one of the partners of joint venture AB (established for the production and sale of a special technological item), wants to bring a claim against his partner, party B, alleging that B breached certain provisions of the shareholders agreement. Some of the facts alleged by A also constitute a breach under the licensing agreement, which stipulates liquidated damages for X amount. Parties A and B executed the shareholders agreement, but the licensing agreement was entered into by A and AB.

Let us suppose that the arbitration clauses in the different agreements are the ICCC model clause with the following adaptations: in the joint venture agreement, the applicable law is that of country AA, while in the licensing agreement, the applicable law is that of country BB; in the former, the language of the arbitration is Spanish, while in the latter, the chosen language is English. Let us finally suppose that the claims are being prepared for submission before the ICC in January 2012.[2]

Three options exist for the filing of the claim:

- A brings claims against B and AB in a single proceeding; or
- A brings two separate claims and requests consolidation; or
- A brings a claim against B (or AB) and, once the arbitral tribunal is constituted but before the Terms of Reference are established, brings the claim against AB (or B)?

Which option will work best for A? The responses to this query depends on the answers to the questions established in Article 6(4)(ii) of the ICC Rules of Arbitration (2012) (the "Rules"), namely, whether "(a) [...] the arbitration agreements under which those claims are made [are] compatible, and (b) [...] all parties to the arbitration [...] have agreed that those claims can be determined together in a single arbitration."

[2] Per Article 6(1) of the ICC Rules of Arbitration (2012) (the "Rules"), "[w]here the parties have agreed to submit to arbitration under the Rules [of Arbitration of the ICC], they shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement." According to Article 4(1) of the Rules, Requests for Arbitration need not be sent to the ICC Court's Paris office, but may rather be sent to one of several worldwide offices, as indicated in the Internal Rules.

In this hypothetical case, claimant A will probably first analyze whether it prefers to proceed in a single arbitration or separate proceedings based on the merits (i.e., whether the applicable law and the language of the respective contracts make it wise to treat the dispute as a single breach or as two severable breaches, for both liability and damages). Secondly, once A determines the strategically best option , A should decide the mechanics of how to bring the claim. If it is better for A to bring a single claim against both parties, A should consider whether it can prove a) that the differences in the arbitration clauses do not make them incompatible, and b) that all parties involved, A, B, and AB, intended to settle all differences in the same proceedings? Does A control AB in such a way that A can decide on this issue for AB? Should the theory that A and B are the "real parties in interest" outweigh other considerations?

If the conditions under Article 6(4)(ii) are not met, it appears that A may not request a joinder under Article 7 of the Rules. Should A then bring a separate claim against AB and request for consolidation under Article 10(c) of the Rules? That would require that A prove to the ICC Court that A and B, on the one hand, and A and AB, on the other, are the "same parties". According to Article 10, the stage of the proceedings, in particular, the constitution of the arbitral tribunal, is also a factor that the ICC Court will take into account.

In that sense, and should A decide to bring separate claims, it will also need to plan on whether it appoints the same arbitrator in both cases. Will AB (or B) object to A having the same coarbitrator in both cases, or will AB (or B) see a benefit from having the same persons sit on the two arbitral tribunals? Should the latter be the case, will the ICC Court appoint the same president in both cases?

The answer to these questions regarding arbitrators have financial consequences for A , since each of the arbitration proceedings will have its own provision for costs. Whether double disbursements by A will be eventually compensated, reduced, or non-existing in the award will depend on whether there are parallel proceedings and, maybe, if so, whether there is an identity on the part of some or all of the arbitrators.

The issues just outlined are usually not brought up during the drafting phase of complex transactions. True, highly complex transactions typically involve sophisticated lawyers who are indeed aware of the problems that may arise in case of future disputes among the parties. But even so, are there structural barriers inherent to some of those transactions that make even the most consistent arbitration clauses partially ineffective?[3] If we are

[3] For an analysis in this sense, see Yves Derains, "The Limits of the Arbitration Agreement in Contracts Involving More Than Two Parties", in Special Supplement 2003 (ICA Bull): Complex Arbitrations: Perspectives on their Procedural Implications (2003), p. 25.

transitioning into a more tenuous form of consent when considering the consolidation or joinder of disputes resulting from complex transactions, how far are we stretching?[4] The answer to those questions probably is: "it depends on the case".

[4] For an interesting treatise on the subject, see Karim Youssef, CONSENT IN CONTEXT: FULFILLING THE PROMISE OF INTERNATIONAL ARBITRATION (MULTIPARTY, MULTI-CONTRACT AND NON-CONTRACT ARBITRATION), West, 2009.