Three’s a Crowd

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Arbitration is a product of contract: parties agree in writing that any dispute arising from an agreement will, instead of being heard in a public court, be referred to an arbitral tribunal comprising of one or three arbitrators who will hear the matter and issue a final and binding award. As such it is a process firmly grounded in the consent of the parties.

However it is often the case that third parties, who are not signatories to the contract, either have an interest in the dispute and its resolution, or wish to bring legal action themselves arising out of the same facts. In such circumstances, it would be more efficient to have the third party’s claim heard at the same time. Similarly, there are occasions where a number of arbitrations have commenced which involve similar parties and issues, and it may be considered convenient to consolidate the claims into one action. This would save costs and avoid the possibility of conflicting awards being issued.

This article examines how a third party not privy to a contract may nonetheless become a party to an arbitration arising from it. The article also considers under what circumstances it may be possible to consolidate separate arbitral proceedings into one.

Rules governing arbitration
When considering what is or is not possible in an arbitration, it must be remembered that arbitrations are governed by at least two sets of rules:

- The law of the state in which the arbitration is being held (the arbitral “seat” or “place” of arbitration).
- The rules of the arbitral institution that is administering the arbitration (or where it is an ad hoc arbitration, the rules that the parties have agreed upon).

A review of all the different state laws on arbitration, and of all the different institutional rules, is beyond the scope of this article, which instead will focus on UAE law and the rules of the most prominent arbitral institutions used in the UAE (the Dubai International Arbitration Centre; the Abu Dhabi Commercial Conciliation & Arbitration Centre; the DIFC-LCIA; and the ICC).

Where there is consent
One of the benefits of arbitration is that it is highly flexible, and if all the parties consent then almost anything is possible. So if all the parties, including the third party, agree that the third party should be joined, then the tribunal will usually allow this unless to do so would compromise the arbitration in someway. Similarly, if all the parties to a number of arbitrations wish to consolidate them, then this can be done.

Issues can, however, arise. For example, one of the key benefits of arbitration is that the parties choose who will be the arbitrators forming the tribunal. When a third party is joined, or if cases are consolidated, this will usually occur after the tribunal has been appointed, meaning that if these new parties wish to be involved they will have to accept being subject to the will of a tribunal they have not chosen. Although the parties could agree to abandon the existing arbitration and reconstitute an arbitral tribunal with the input of the new parties, this would result in delay and wasted expense.

With regards to consolidation, if many cases are joined then this can result in a slower, more complicated,

and less efficient arbitral process. There may also be issues if the different agreements contain arbitral clauses that are inconsistent (i.e. which call for different laws to be applied to the dispute).

However, provided these procedural matters can be properly handled, then the joining of third parties and the consolidating of cases can be an effective tool in enabling a number of parties to resolve all the issues between them by the use of one set of arbitral proceedings.

Where there is no consent
In keeping with the fact that arbitration is grounded in the consent of the contracting parties, if all the parties involved do not consent then it is generally not possible to join a third party or to consolidate cases, no matter how powerful or compelling the reasons for doing so may be.

In the event a tribunal imposes such measures without the consent of all the parties, this may be a ground for having the award annulled. For example, when enforcement is sought abroad under the New York Convention of 1958 (an international treaty signed by 142 states (including the UAE) that governs how signatory states are to enforce foreign arbitral awards), one ground for refusing enforcement is if "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties" (Art.V(I)(d)).

However if the law of the state in which the arbitration takes place permits the local court or the arbitral tribunal to consolidate cases or include third parties against the wishes of the parties, then it may be argued that by choosing to have the arbitration in that state the parties have consented to be subject to such measures. Similarly, if the rules of the arbitral institution allow for such steps to be taken, then again the parties are likely to be deemed to have consented to them by virtue of choosing that institution. It is therefore important that parties consider carefully before choosing the seat of the arbitration and the institution that will be administering it.

National laws
Many national laws do not address the issue of third parties and the consolidation of cases. This is usually because they have been based on the model law created by UNCITRAL (the United Nations Commission on International Trade Law), which does not address these issues.

Those national laws that do address these matters usually only allow them to occur on the condition that all the parties involved consent (as is the case under Dutch, Belgium, and Iranian law). Hong Kong is unusual in that it is possible in certain situations for the courts to order separate arbitrations to be consolidated against the wishes of the parties involved.

The UAE does not yet have a separate arbitration law, though one is currently being prepared. The present law is found in articles 203 – 218 of the Civil Procedure Law (Federal Law No.11 of 1992), but it does not address the issues of third parties and the consolidation of cases. It remains to be seen if the new law will change this, though a preliminary draft circulated in 2010 suggests that it will not.

Institutions
Most arbitrations are run through an arbitral institution, whose role is to provide administrative support to the parties and the Tribunal. Each institution has its own set of rules that the parties agree to be subject to. The rules of many institutions (such as the Dubai International Arbitration Centre; the Abu Dhabi Commercial Conciliation & Arbitration Centre; and the ICC) do not explicitly address the issues of third party intervention and the consolidation of cases, though they often have provisions addressing how tribunals are to be formed where there are multiple parties (DIAC Rules Art.11; ICC Rules Art.10), and allowing for the consolidation of cases between the same parties (ICC Rules Art.4(6)).

The DIFC-LCIA has perhaps the most progressive rules of any arbitral institution in the region. Under its rules (which are based on those of its parent institution, the London Court of International Arbitration (LCIA)), the Tribunal has the power to join third parties even if one of the parties does not consent, provided the third party wishes to be joined and one of the parties to the arbitration makes the application

(Art.22(h)). This can often come as a surprise to the non-consenting party, who may object to the inclusion of the third party for legitimate reasons such as a desire to keep confidential information from the third party.

Solutions
If it is not possible to consolidate arbitrations or include a third party, then there is the unfortunate prospect of multiple arbitrations having to be conducted. This is expensive, time consuming, and may result in inconsistent awards.

There are however some methods which can be deployed to alleviate these problems. For example, the same tribunal can be appointed in both cases, thereby avoiding the prospect of inconsistent awards. The tribunal can also order that the evidence in one arbitration (including a transcript of the oral evidence) be made available in the other arbitration, subject to issues of confidentiality.|

The problem of having multiple arbitrations can also be avoided before any disputes arise. If a project involves multiple parties with interlinking responsibilities, then the parties should consider drafting their contracts so that they reference each other and explicitly allow for the consolidation of arbitrations or for the joining of third parties in the appropriate circumstances.

Conclusion
We have seen that although the general position is that it is not possible to involve third parties or consolidate arbitrations against the will of the parties, there are exceptions to this and each case needs to be considered in light of the law of the seat of the arbitration and the rules of the arbitral institution that is administering it.

It can be said to be a weakness of arbitration generally that, unlike court litigation, there is no central authority with the power to join cases and involve third parties so as to avoid the waste of having multiple hearings regarding the same issues. However to have it otherwise would deprive arbitration of its most fundamental and attractive aspect – the freedom it allows contracting parties in deciding how their dispute is to be resolved, no matter how the parties choose to exercise that freedom.