

Case Summaries on
Multi-Party and Multi-Contract
Disputes in International
Arbitration¹

I. BKMI Industrieanlagen GmbH, Siemens AG v. Dutco Construction Co. (Private Limited)

By a turn-key contract dated 21 February 1981, BKMI contracted to build a cement factory for an Omani company. Subsequently, BKMI entered into a “silent consortium agreement” with Siemens and Dutco. The three companies were to perform different parts of the construction work, while BKMI would be responsible towards the Omani party. The agreement contained a clause referring all disputes to ICC arbitration.

On 17 December 1986, Dutco, alleging several failures by its German counterparts in the performance of the contract, filed a joint request for arbitration against them with the Court of Arbitration of the ICC. BKMI and Siemens objected to the joint proceedings. Nonetheless, the ICC Court confirmed the arbitrator nominated by the claimant (Dutco) and requested the respondents (BKMI and Siemens) to jointly nominate an arbitrator. In case the respondents should not reach an agreement, the ICC Court announced it would appoint an arbitrator on their behalf while the claimant’s appointment would remain valid. Eventually, BKMI and Siemens jointly appointed their arbitrator under protest, and the tribunal was constituted.

On 19 May 1988, the arbitral tribunal rendered an interim award on its own jurisdiction, finding that the arbitral proceedings could be pursued in the form of a multi-party arbitration. BKMI and Siemens initiated an action for setting aside the interim award before the Court of Appeal.

1. Cour d’Appel, 5 May 1989 (YB Commercial Arbitration 1990 – volume XV)

The Court of Appeal dismissed the request reasoning as follows.

First, the Court held that multi-party arbitration was generally admissible in this case since the arbitration clause constituted an integral part of the consortium agreement among the three companies and unequivocally expressed the common intention of the

¹ Prepared by Jennifer Wolf, associate in the arbitration team of CMS Hasche Sigle in Cologne, on the basis of cases *inter alia* kindly provided by Elizabeth Ryan and Sitpah Selvaratnam.

parties to submit all disputes arising under their agreement to three arbitrators. Thus, it necessarily ensued from the multilateral nature of the agreement that the parties foresaw the possibility of requesting one tribunal composed of three arbitrators to decide a dispute opposing the three parties.

Second, the Court ruled that the appointment procedure had not violated public policy, particularly the Respondents' right to equal treatment. The reference to the ICC Rules, which provided that each party should appoint an arbitrator to be confirmed by the Court of Arbitration, had to be interpreted to mean that the three parties to the arbitration clause accepted that the two arbitrators to be appointed by each of the parties would be appointed respectively by the claimant or claimants, and by the defendant or defendants

2. Cour de Cassation, 7 January 1992

The decision of the Court d'Appel was subsequently annulled by the Cour de Cassation. The annulment was based on the appointment procedure.

The Cour de Cassation held that the appointment procedure had violated French public policy. According to the court, the appointment of the arbitral tribunal was unfair because it afforded Dutco a better position to influence the final outcome of the arbitration. The court considered that the parties could not waive the right to equal treatment through their arbitration agreement and their submission to the ICC Rules prior to the dispute arising because all parties to an arbitration agreement should have the same right to contribute to the constitution of the arbitral tribunal.

II. ABC v XY, Procedural Directives of the Arbitral Tribunal, 20 June 1994

Claimant initiated proceedings against two Respondents under the Swiss Rules of Arbitration in Switzerland. Claimant and Respondent 1 had signed a purchase agreement containing an arbitration clause. The Respondents were both party to a "Reprise de Dette", an assumption of debt, which contained the identical arbitration clause but which was not signed by Claimant. Claimant requested the constitution of an identical three member arbitral tribunal for and the consolidation of the proceedings against the two Respondents and appointed its arbitrator. Next, the President of the Zurich Chamber of Commerce appointed the chairman of the arbitral tribunal and invited Respondents to appoint their arbitrator jointly pursuant to the procedure in Art. 12 (3) of the Swiss Rules of Arbitration. However, Respondents wanted the disputes to

be decided in two separate proceedings and thus each appointed their own arbitrator. The Respondents were subsequently unable to find an amicable solution regarding the constitution of the Tribunal.

The tribunal held that the decision on consolidation of the two proceedings was subject to three requirements: (1) the two Respondents needed to be bound vis-à-vis the Claimant by the same or by identical arbitration clauses; (2) such clauses had to allow, or at least must not prohibit, multi-party arbitration and (3) multi-party arbitration (and consolidation of the proceedings) had to be justified and adequate in the instant case. It considered all of these requirements to be fulfilled and granted the request for consolidation.

Regarding the first condition, the tribunal decided that Claimant could invoke the arbitration clause of the Reprise against Respondent 2 because the wording of the Reprise indicated that Claimant was not only a third party beneficiary but a direct party to the agreement, though it had not signed it itself.

In relation to the second requirement, the tribunal held that since the arbitration clause of the Reprise was identical to the one contained in the purchase agreement between Claimant and Respondent, it had full liberty to admit multi-party arbitration against the two Respondents as they were joint and several debtors under the Reprise and thus could be sued as a “passive einfache Streitgenossenschaft”.

Concerning the last requirement, the tribunal found multi-party arbitration to be adequate in this case because Claimant alleged each Respondent to be (jointly and severally) liable for the same amount and on the same grounds.

When making its decision as to the correct procedure for the appointment of the tribunal, the tribunal relied on the *Dutco* decision of the Cour de Cassation as well as on Art. 12 (3) of the Swiss Rules, which stated that

“If the parties did not provide that they would appoint arbitrators, or, in multi-party arbitration, the Chairman of the Arbitral Tribunal appoints his co-arbitrators from a list of four or more names submitted to him by the President of the Chamber of Commerce”.

Accordingly, it decided that due to the lack of Respondent’s joint nomination of an arbitrator, the chairman of the tribunal should appoint his two co-arbitrators from a list submitted to him by the President of the Chamber of Commerce.

III. Sea Lane Bahamas Ltd v. Europa Cruises Corporation, Europa Cruise Line Ltd, US Court of Appeals on 17 September 1999

This case relates to an agreement whereby a ship-owner chartered a commercial vessel to a charterer. In due course, disputes arose under the charter contract that were settled in an agreement including a clause providing for arbitration. The ship-owner successfully moved a US District Court to compel arbitration pursuant to the settlement agreement. The charterer raised the defense that the ship-owner was not the real party in interest based on the fact that he had sold the vessel to another company. In the arbitration hearing, the tribunal determined that it should not decide whether a party must be or could be added, feeling that it was not the proper forum to do so. Instead, it directed the ship-owner to seek leave to amend its complaint to the District Court so as to join the buyer as a party plaintiff, so the District Court could either resolve the real party in interest-issue or send the case back to the tribunal. The District Court denied a corresponding motion of the ship-owner.

In its appeal, the ship-owner argued that the court's order determined the rights and liabilities of the parties to this case because the arbitral tribunal would not proceed without a determination of whether the buyer must be joined as a party plaintiff. The Court dismissed the appeal for want of jurisdiction. The Court held that the ship-owner did not demonstrate that the Court's order precluded all avenues of relief. Nothing established that the arbitral tribunal would not proceed absent the District Court's determination of whether the buyer must be joined. In any event, neither the settlement agreement nor the order compelling arbitration precluded the tribunal from determining whether the buyer was the real party in interest. The real party in interest-defense was central to the merits of the case and as such, that defense should be decided by the arbitral tribunal.

IV. Lafarge Redlands Aggregates Ltd (formerly Redland Aggregates Ltd) v. Shepard Hill Civil Engineering Ltd, House of Lords, 27 July 2000

In this case, a contractor concluded two contracts in relation to the construction of a motorway: one with the employer (the "main contract") and another one with the sub-contractor (the "sub-contract"). The main contract contained an arbitration agreement in clause 66 which provided for arbitration under the Institution of Civil Engineers Arbitration Procedure. Clause 18 (1) of the sub-contract also stipulated arbitration under the Institution of Civil Engineers Arbitration Procedure. In case disputes arose under

both contracts and if they concerned the same subject matter, clause 18 (2) said that the contractor was entitled to require that any such dispute under the sub-contract shall be dealt with jointly with the dispute under the main contract in accordance with the provisions of clause 66 thereof. However, neither the main contract nor any other contract contained an obligation of the employer to participate in joint proceedings.

In due course, disputes arose under both contracts. While the contractor and the employer were still involved in negotiations for a settlement agreement, the sub-contractor wanted to refer its dispute with the contractor to arbitration immediately. The contractor sought to compel the sub-contractor to follow the procedure under clause 18 (2) of the sub-contract and to wait for a composite hearing concerning both disputes, although he had no intention of initiating arbitration proceedings against the employer at the time.

The House of Lords held that the contractor could not seek to delay the arbitration with the sub-contractor while trying to reach a settlement with the employer. In its reasoning, the Court held that there is an implied condition to exercise the power under clause 18 (2) that the contractor intends to initiate arbitral proceedings against the employer under the main contract within a reasonable period of time. Since the contractor did not do so, it was barred from relying on clause 18 (2) and was therefore not in a position to resist the sub-contractor's request for arbitration under clause 18 (1).

V. Bay Hotel & Resort Ltd and Zurich Indemnity Company of Canada v. Cavalier Construction Co. Ltd and Cavalier Construction Co. Ltd, UK Privy Council, 16 July 2001

The dispute related to a construction contract between The Bay Hotel & Resort Ltd (hereinafter "The Bay") as owner and Cavalier Construction Co. Ltd (hereinafter "Cavalier Bahamas") as contractor that was arbitrated under the Construction Industry Arbitration Rules of the American Arbitration Association. The contractor's work under the contract was in fact carried out by a company (Cavalier Construction Co. Ltd, hereinafter "Cavalier TCI") that was formed and entirely financed by the contractor. Therefore, it was argued that the real party in interest in the dispute was Cavalier TCI. Consequently, Cavalier Bahamas sought to add Cavalier TCI as a party. Although The Bay opposed the application, the arbitral tribunal granted the motion and added Cavalier TCI as a party to the arbitration.

Invoking the principle of party autonomy and the parties' consent, the Court held that arbitration could not be forced upon a party which did not consent to arbitrate with a non-signatory. In particular, jurisdiction could not be extracted from an article in the general conditions incorporated in the contract stipulating limitations on consolidation or joinder. The clause was not a source but a restriction of jurisdiction. From this restriction, the positive conferment of jurisdiction to add a party who is not a party to the arbitration agreement and to whose joinder a party to that agreement objects could not be extracted. The power to make Cavalier TCI a party to the arbitration must therefore be derived elsewhere. Since there was no such power in this case, the Court stated that the arbitral tribunal lacked jurisdiction to make a non-signatory a party to the arbitration without the parties' consent.

VI. Not indicated v. Not indicated, High Court of the Canton of Zurich, 11 September 2001, ASA Bull (2002, no. 4) pp. 694-701

In these arbitral proceedings, two shareholders filed a claim for liquidation of the company. The arbitration clause in the shareholder agreement provided for an arbitral tribunal to be comprised of three arbitrators. One of the Claimants argued that each party was allowed to appoint one arbitrator whereas the Respondent supported the view that the Claimants had to appoint one arbitrator jointly. Since the Claimants refused to do so, the Respondent applied to the High Court of the Canton of Zurich to have the Claimants' co-arbitrator appointed by the Court pursuant to Swiss Procedural Law.

The court held that each "party" was entitled to appoint the same number of arbitrators unless there was an agreement suggesting otherwise. Thus, the question was whether the term "party" referred to the procedural position or rather to each individual applicant. The court ruled that in case of two shareholders acting together in proceedings against the company, they constituted a typical example of a necessary joinder ("notwendige Streitgenossenschaft") pursuant to substantive law. Substantive law obliged necessarily joined parties to act together on a procedural level. Hence, they were also obliged to appoint an arbitrator jointly and because they had failed to do so, the Court proceeded to make the appointment on their behalf.

VII. Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), Hong Kong Court of First Instance, 27 March 2003,

The dispute concerned two claims arising out of two different contracts, each containing an arbitration agreement. The first one, a Joint Operation Contract (JOP) was concluded

between Karaha Body Company (KBC) and Pertamina. Its arbitration clause stipulated arbitration under the UNCITRAL Rules and that each party should appoint one arbitrator, who would then appoint the chairman. The second contract, an Energy Sales Contract (ESC), was concluded between KBC and Pertamina on one side and a company called PLN on the other. The arbitration clause said that in case of disputes, the KBC and Pertamina should jointly appoint one arbitrator and PLN the other and that the party-appointed arbitrators would then appoint the chairman.

The project came to a halt upon a decree issued by the Indonesian Government and consequently, a dispute arose. In due course, KBC initiated arbitration proceedings against Pertamina, PLN and the Government of Indonesia, the seat of arbitration being in Geneva. Since the Respondents failed to appoint an arbitrator, the Secretary General of ICSID did so on their behalf. The tribunal issued a preliminary award in favour of KBC. The Respondents resisted enforcement of the award in Hong Kong by arguing that there was neither a written agreement nor a provision in the UNCITRAL Arbitration Rules allowing claims against all three Respondents to be heard together in a single arbitration. Additionally, they were of the opinion that the tribunal had not been appointed in the correct manner described in the JOC and ESC.

The Court rejected the Respondents' arguments. Regarding the first objection, the Court agreed with the tribunal that ordering consolidation of proceedings was permitted if the claims were connected and a single action was appropriate. In its reasoning, the tribunal had relied on a decision of the Swiss Federal Tribunal of 19 July 1988. The Court of First Instance of Hong Kong held that in the case at hand, the claims were connected since the ESC concluded that "*The terms of this Contract and the Joint Operation Contract constitute the entire agreement between the parties.*" Also, PLN and Pertamina were represented by the same lawyer in the arbitration proceedings, which demonstrated that the issue of confidentiality did not speak against consolidation.

Regarding the appointment procedure, the Court affirmed the tribunal's decision not to apply the mechanism of the ESC but the respective provision of the UNCITRAL Arbitration Rules. The provision in the ESC was clearly only meant to apply in cases where KBC and Pertamina were arguing on the same side against PLN. Since this was not the case, Art. 7 of the UNCITRAL Arbitration Rules applied, according to which each party should apply one arbitrator. In case one side was made up of more than one party, each group constituted a "party" in the sense of Art. 7. Although such regrouping

could be difficult in some cases due to clashing interests within the group, this was not an issue in this case. Since the parties had expressly permitted in the ESC that a group of parties, namely KBC and Pertamina would appoint an arbitrator together although they did not necessarily have the same interests, the same applied by analogy the joint appointment of Pertamina and PLN. Also, the Respondents had not declined to appoint an arbitrator on the rationale that they were asked to appoint one together but for other reasons. Moreover, they did not object to the arbitrator appointed by the ICSID Secretary General nor did they challenge the Preliminary Award on this basis.

VIII. Award on Third Person Notice, HKZ Case No. 12171, 7 April 2004

In arbitral proceedings held in Switzerland and governed by the Arbitration Rules of the ICC, one of the parties requested a third person to join the arbitration. Since the arbitration rules were silent on the issue of joinder, the tribunal referred to the arbitration law of Switzerland and ruled that in order for a third person to join, all parties to the proceedings must agree. It decided that the party not requesting the joinder had not granted its approval of the joinder and thus, the other party's request had to be denied.

IX. PT First Media TBK v Astro Nusantara International BV, Singapore Court of Appeal, 31 October 2013, [2013] SGCA 57

The dispute arose out of an intended joint venture between companies belonging to an Indonesian conglomerate ("the Lippo Group") on the one side, and certain companies within a Malaysian media group ("the Astro Group"). The appellant, PT First Media TBK ("FM"), is a member of the Lippo Group and was one of its guarantors in the joint venture. FM was also amongst the members of the Lippo Group who entered into a subscription and shareholders' agreement ("the SSA") with five companies belonging to the Astro Group ("the five Astro companies"), which contained the terms of the joint venture. Additionally, the SSA contained an arbitration clause referring all disputes to arbitration under the SIAC Rules.

Three subsidiaries of the Astro Group who were not party to the SSA ("the three subsidiaries"), provided funding and services to the joint venture in anticipation of its successful establishment. As it became apparent that the closing of the JV would not materialise, a dispute arose over the continued provision of funding.

In 2008, the five Astro companies as well as the three subsidiaries commenced arbitration proceedings pursuant to clause 17.4 of the SSA against the Lippo Group

companies. At the same time the notice of arbitration was filed, the five Astro companies filed an application to join the three subsidiaries as parties to the arbitration .

The arbitral tribunal ordered the joinder of the three subsidiaries based on Rule 24 (b) of the SIAC Rules 2007 over the objection of the Lippo Group. Rule 24 (b) read as follows:

*“...the Tribunal shall have the power ... to:
(c) allow other parties to be joined in the arbitration with their express consent, and make a single final award of determining all disputes between them...”*

The tribunal interpreted the phrase “*other parties*” to mean “parties outside of the arbitration agreement” and that only the outside party’s consent was required to allow the joinder. The consent of the original parties was not necessary in the tribunal’s opinion. This interpretation was rejected by the Court of Appeal of Singapore. It held that if only the consent of the third party was required, the tribunal could exercise unlimited jurisdiction over any dispute a non-party could have with a party to the arbitration. No set of rules could provide such unlimited jurisdiction, unless it was explicitly stated otherwise. It was also not possible to construe the FM’s implied consent by referring to its agreement to arbitration under the SIAC Rules. While the concept of implied consent in itself was in the Court’s view not objectionable, it did not suffice where a forced joinder was concerned. Regarding this drastic measure, the respective provision in the arbitration rules chosen by the parties must be unambiguous. Rule 24 (b) SICA Rules 2007 does not fulfil this requirement since its wording is not clear.