THE MULTIPLE ISSUES RAISED BY MULTIPARTY – MULTICONTRACT ARBITRATIONS RELATING TO M&A TRANSACTIONS

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• Multiparty – multi-contract arbitrations represent approximately one third of all arbitrations. They cover all types of economic sectors including disputes in relation to corporate disputes. They raise a multiplicity of issues:

1) Who is party to the arbitration agreement?
2) May a non-signatory to the arbitration agreement be considered a party to it by application of theories such as agency and representation, third party beneficiary, incorporation by reference, universal or individual transfer, estoppel, implied consent, community of rights and obligations, *alter ego* and piercing the corporate veil?
3) To what extent can one bring to a single arbitration proceeding the various parties who have participated in a single economic transaction through several contracts?
4) Can a non-party to the arbitration proceedings join the arbitration once it has been initiated?
5) Can a party to arbitration proceedings join a third party against which the arbitration has not been initiated?
6) To what extent may two arbitration proceedings be consolidated?
7) Can a defendant in arbitration proceedings bring a claim against another defendant?
8) When there are several defendants who have divergent interests and do not want to appoint the same arbitrator, how does one go about constituting the arbitral panel?
9) How to minimize the difficulties that can arise from separately conducted parallel arbitration proceedings?
10) Do multiparty – multi-contract awards raise specific difficulties at the level of enforcement?
11) And finally, to what extent should an arbitral tribunal take into consideration an arbitral award rendered in a connected arbitration arising from the same project?

Consolidation

- Authorised by most arbitration rules on the basis of similar conditions: if
  - the parties agree to it, or
  - the claims are made under the same arbitration agreement or agreements, or
  - the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship and the arbitration agreements are compatible.

- Several institutional rules authorise that two arbitrations that cannot be formally consolidated be conducted concurrently.

Joinder

- Two scenarios:
  - a party to the arbitration wants to join a third party. Many arbitration rules contain provisions on this issue but sometimes differ concerning the conditions to be fulfilled.
  - a non-party to the proceedings wants to join the proceedings. Very few institutional rules authorise such a joinder.

Appointment of the Tribunal when there are multiple claimants and/or multiple respondents

- All institutional rules contain the same provision (since the *Dutco* decision of the French Supreme Court of 7 January 1992):

  – either the multiple claimants or the multiple respondents agree to appoint their respective arbitrator;
  – either they do not have the same interest and disagree. In this case, the whole arbitral tribunal will be applied by the institution.

Res judicata

- The factual scenario: A, party to an M&A transaction starts an arbitration against B and C, the other parties to the transaction, claiming damages for breach of one of their contractual obligations and loses; and starts another arbitration against the same parties on the basis of a specific tort. Will there be *res judicata* preventing the second arbitration to proceed?

- The common law: very broad concepts of claim preclusion and issue preclusion:
  - Cause of action estoppel prevents a party from asserting or denying the existence of a particular cause of action when its existence or non-existence has been determined in previous litigation between the same parties.
  - Issue estoppel: covers those matters which the previous judicial or arbitral decision necessarily established as a legal foundation for its conclusion.
  - Abuse of process (*Henderson v. Henderson)* requires the parties to a litigation to bring their whole case before the court so that all aspects of it may be finally decided once and for all.

- Civil law countries: triple identity test: same parties, same claim, same legal foundation,

- Tendency to adopt a much broader approach:
  - Not only the formal pronouncements in the dispositive part of the award are *res judicata* but also the secondary issues that have necessarily been resolved by the Court and which would deprive the decision of its logical basis if they were to be denied.
  - Doctrinal and jurisprudential evolution toward an obligation to concentrate all your claims in one procedure. 2006 ILA Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration: *res judicata* preclusion extends to "*the further arbitral proceedings as to a claim, cause of action or issue of fact or law, which could have been raised, but was not, in the proceedings resulting in the award, provided that the raising of any such new claim, cause of action or new issue of fact or law amounts to procedural unfairness or abuse.*"

The jurisprudence on multiparty - multi-contract cases relating to M&A transactions

- Concerns two main issues:
  - To what extent an individual or a company which is not a signatory of the arbitration agreement can be a party to arbitration proceedings initiated under that agreement?
  - And, on the other hand, when an arbitration is initiated under various agreements, to what extent the tribunal has jurisdiction to decide issues arising under these various agreements?

The non-signatory issue

- M&A transaction between A and B. Dispute.
- Arbitration A against B and C (non-signatory).
- Can the non-signatory be considered a party to the arbitration clause and in the affirmative, on what basis?

Pau Court of Appeal, 26 November 1986, Société Sponsor A.B. v. Lestrade

- Negotiations between Sponsor AB – parent company of the Swedish group Sponsor – with French group Lestrade. Purpose : acquiring the control of two companies of the Lestrade group : Stereoscopes Lestrade & Cie and Sodilest.
- Signature of a protocol between Sponsor AB and company Lestrade for the setting up of a French subsidiary Sponsor SA that would hold the shares of the two target companies. No arbitration clause.
- Lestrade transfers to Sponsor SA 80% of the shares of the two target companies.
- The same day, Sponsor SA signs an irrevocable promise to purchase the 20% remaining shares of the two target companies. Arbitration clause.
- Four years later, Lestrade exercises the call option but Sponsor SA does not answer.
- Arbitration by Lestrade against Sponsor SA (signatory) and its parent company Sponsor AB (non-signatory). Default.
- Lestrade asks the appointment of an arbitrator for the two Defendants before a local court. The court appoints an arbitrator. Defendants appeal and object: the arbitration clause cannot be opposed to Sponsor AB.
- Confirmation of the decision by the Pau Court of Appeals on the basis of the role played by Sponsor AB in the conclusion and performance of the promise to purchase.

VIAC Case SCH-5176 (2012)

- Claimant and Respondent 2: binding timesheet for the sale of Claimant's business. Agreement that Respondent 2 would act through Respondent 1, a 99% indirectly owned subsidiary of Respondent 2. Expiration of the timesheet.

- Claimant and Respondent 1: Business Sales And Purchase Agreement (BSPA) governed by Romanian law. VIAC arbitration clause. Seat: Vienna.

- Guarantee for the performance of Respondent 1 issued by Respondent 2. No arbitration clause.

- Termination of the BSPA by Respondents.

- Arbitration Claimant against R1 and R2: claim for damages. Jurisdictional objection of R2.

- The tribunal analyses its jurisdiction on the basis of Romanian law and Austrian law.

- The tribunal accepts its jurisdiction on both Respondents. Reasoning: R2 guaranteed the payment obligations of R1 and had a significant role in the negotiation and performance of the BSPA.

Austrian Supreme Court decision of 30 March 2009, GmbH v. S Aktiengesellschaft

- Parties to an ICC arbitration: Company C GmbH (non-signatory Claimant) and Aktiengesellschaft (non-signatory Respondent).

- Aktiengesellschaft, that was seeking to obtain a 97% participation in Company V AG (Company V), had been authorised to do so by the EU authorities if it would sell Company V's power generation business.

- Company C AG incorporated Company C GmbH to participate in the tender for the sale of the business division.

- The directors of Company C AG entered into a confidentiality agreement with Company V for the due diligence. German law. ICC arbitration in Munich.

- Company C AG loses its bid to buy Company V power generation business. Company C GmbH (non-signatory) files a suit in the Vienna Commercial Court against Aktiengesellschaft (non-signatory). Objections to jurisdiction by Aktiengesellschaft.

- Decision of the Austrian Supreme Court: no jurisdiction on both companies.

- Reasoning: under both Austrian and German law, a party taking over a contract takes over the arbitration clause and the arbitration clause in a contract benefiting a third party is binding on that third party.

UNCITRAL Interim Award of 31 August 2004

- Agreement between the National Property Fund of State X (NPF) and Company Y: sale and purchase of shares in Bank B, a bank of State X being privatized. UNCITRAL arbitration. Seat: Zurich.
- Y transfers its holding in Bank B to Company Z, its subsidiary.
- Non-compliance with the conditions of the sale. The Bank goes bankrupt.
- Arbitration by NPF and State X (non-signatory) against Company Y and Company Z (non-signatory).
- Objections to jurisdiction. Claimants invoke the role of Z in the negotiation and performance of the agreement and the theory of Durchgriff (piercing the corporate veil). The arbitral tribunal decision: it has no jurisdiction on Company Z:
  - It has never acted in such a way to appear as party to the agreement.
  - The Claimants have never been betrayed by alleged appearances created by Company Z;
  - The conditions for Durchgriff are not met, in particular inexistence of a total domination of Z by Y.
- On the other hand, the Tribunal decides that it has jurisdiction on State X that has been permanently involved in the negotiation, performance and termination of the Privatization Agreement.

Conclusions on this first issue

- The approach to the issue of non-signatories in multiparty corporate disputes is identical than in relation to other types of commercial transactions.

- The determination of whether an arbitral clause should be extended to other companies of a group or to its directors or shareholders is fact specific, more focused on facts than on law. Even if the arbitral tribunals determine the law applicable to the contracts and/or the arbitration agreement, that law does not necessary play a major role in their final determination of the non-signatory issues. Starting from the principle of autonomy of the arbitration clause, arbitrators generally feel free to determine their competence according to what they consider to be – on the basis of the facts of the case – the common intention of the parties, also taking into consideration the usages of international trade.

- There is also an agreement that the existence of a group of companies is not per se a sufficient element to allow the extension to a non-signatory of an arbitration agreement concluded by another member of the group.

- With certain variations depending upon the law in the jurisdiction concerned, there is a large consensus in relation to the involvement of a non-signatory in arbitration proceedings when the involvement is based on theories such as agency, third party beneficiary, incorporation by reference, assignment of contract, subrogation and even on the basis of the theory of piercing the corporate veil.

- The great difficulty concerns the theory of implied consent, that is, an extension to a non-signatory on the basis of the role it has played in the negotiation, performance and or termination of the agreement. The theory prevails in major arbitration jurisdictions like the United States, France, Switzerland and many other countries like India, the Philippines.

- On the other hand, many jurisdictions are much more restrictive, adhering strictly to the principle of privity of contracts: England, Germany, Holland, Russia, the Peoples' Republic of China.

- When they apply the theory of implied consent, courts and tribunals usually require proof of the existence of an intention at least implicit of all the parties that the non-signatories be parties to the underlying contract and its arbitration clause.

Multicontract cases

- They raise two may issues:
  - Is it possible under the rules of the relevant institution to start an arbitration to deal with disputes arising under the various agreements?
  - If such an arbitration is initiated, whether the arbitral tribunal has jurisdiction over these various agreements. The issue arises when:
    - the parties to the various disputed contracts are not all the same; and /or
    - one or several of them do not contain an arbitration clause, or contain one or more incompatible arbitration clauses and/or clauses giving jurisdiction to national courts.

French Supreme Court, 30 March 2000, Kaeuffer v. Bastuck and Others

- Share Purchase Agreement between a French businessman seller of his two companies and a German firm. Clause of price revision. Arbitration clause.

- Escrow agreement between buyer, seller and two French escrow agents who would jointly hold a certain sum in escrow and would pay the money to the seller after the price has been finally determined. No arbitration clause.

- Dispute between seller and buyer over the price. Seller asks French courts an order providing that the escrow agent should release the sums they were holding. Jurisdictional objection of the buyer.

- Decision of the Supreme Court: the courts did not have jurisdiction: the SPA referred to the escrow agreement by providing that the sum in escrow would only be released after the final determination of the price. Therefore, the arbitration clause contained in the first agreement applied to the escrow agreement.

Tjong Very Sumito and Ors v. Antig Investments Pte. Ltd., Court of Appeal of Singapore, 2009

- SPA between Appellants and Respondent. Arbitration clause.
- Four supplemental agreements between Appellants and Respondent, each one expressed to be supplemental to the SPA. No arbitration clause.
- Dispute as to whether a payment arrangement under the fourth supplemental agreement was subject to the arbitration clause in the SPA.
- Affirmative answer of the Court of Appeal: the fourth supplemental agreement could not exist independently without the SPA. Nor would it make sense on its own. The arbitration clause in the SPA extends to the fourth supplemental agreement.

Mount Lebanon Court of First Instance, 19 June 2007

- SPA between seller and buyer. ICC arbitration clause.

- On the same date, additional agreement between seller and buyer in which buyer undertook to pay a specific amount of money to be added to the amount determined in the SPA, payment to be made in accordance with the rules set forth in the SPA. No arbitration clause.

- Dispute under the additional agreement. Action by the heirs of the seller before the Mount Lebanon Court requesting the payment of the balance of the amounts due. Objection of the seller to the jurisdiction of the Court: the arbitration clause in the SPA applies to the disputes under the second agreement.

- The Court decides in favour of arbitration on the basis of the explicit intention of the parties for the following reasons:
  - Explicit reference of the second agreement to the first one.
  - Signature of the two agreements on the same date.
  - Provision in the second agreement that the additional payment had to take place in accordance with the conditions and time limits set forth in the SPA.
  - Interdependence of the two agreements.

Brussels District Court, 6 September 2007, M and Ors. v. S and Ors.

- Protocol of agreement in view of a merger between companies M and S. Arbitration clause.

- Additional agreements between M and S:

  – Agreement of temporary association: incompatible arbitration clause.
  – A subcontract and a loan agreement: clause attributing jurisdiction to national courts.

- Dispute under the various agreements. Arbitration is initiated by S against M on the basis of the arbitration clause contained in the protocol of agreement. Decision of the tribunal: the protocol of agreement is void. Condemnation of M to pay certain amounts to S. Action to set aside the award on the basis of lack of jurisdiction.

- Annulment: notwithstanding the fact that the agreements were part of one economic transaction, they all contained different dispute resolution clauses. Consequently, the tribunal could not base its jurisdiction on the arbitration clause contained in the protocol of agreement to decide claims based on the other contracts.

French Cour de Cassation, decision of 12 February 2014

- Partnership agreement between A and B: clause giving jurisdiction to a commerce court.
- Contract of transfer of shares between the same parties. Arbitration agreement.
- Dispute arising from the partnership agreement. Action before the Commerce Court.
- Decision in favour of jurisdiction, considering that the subject matter of the two contracts was different and that the parties had intended to distinguish them by contradictory jurisdictional clauses.

Conclusions on the second issue

- The approach of the tribunal in corporate disputes is the same than in any other economic sector.
- Awards and court decisions are based on a close analysis of the particular facts of the dispute.
- Courts and arbitral tribunals, in the absence of an agreement of the parties to that effect will generally refuse to unify in one proceeding under one arbitration clause all the disputes arising under various agreements, when they contain truly incompatible arbitration clauses or jurisdictional clauses unless it undoubtedly appears that all the disputes fall within the scope of the relevant arbitration clause.
- But even if the tribunal does not have jurisdiction to decide disputes under one contract, it may still take this contract into consideration as long as it does not decide disputes arising under that particular contract on which it does not have jurisdiction.
- If the various agreements of the group do contain the same arbitration clause or do not contain the same clause but at least do not contain incompatible arbitration or jurisdiction clauses, the will of the parties will be investigated to determine whether they conceived of the various contracts as one contractual entity, forming together one single economic transaction.
- The fact that the contracts form an indivisible whole, or are very closely connected, or that there is a close linkage of the reciprocal rights and obligations and in some cases that the parties belong to the same group, tends support the existence of such a will.
- The conclusion is easier to reach if the parties to the various contracts are the same. If they are not, courts and arbitral tribunals will more rarely decide that they have jurisdiction to hear all the disputes arising under the various agreements, unless they all contain identical arbitration clauses.

Thank you very much for your attention