

# **JOINDER OF MULTIPLE DISPUTES BETWEEN THE SAME PARTIES: ISSUE OF SINGLE ARBITRATION**

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## **ABSTRACT**

International commercial arbitration is alternative dispute resolution mechanism that is based on the parties' agreement. Joinder is a special tool of complex arbitration that allows joining separate disputes arising out of interrelated contracts. This paper analyzes the nature of joinder, its features and preconditions. It provides with overview of possibility to join different disputes in a single set of proceedings. Such possibility is connected with expressed or implied consent of the party for joinder. This work summarizes the indicators of the parties' intent, which were developed by the case law and scholars' works. Moreover, special attention is given to ensuring the parties' rights in case of the joinder.

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## CHAPTER 1: INTRODUCTION

The practice shows that complex arbitration proceedings became a “*norm in present day international commerce*”<sup>1</sup> and the quantity of these proceedings are increasing from year to year.<sup>2</sup> Some authors are even saying that this is not less than a *revolution* in international commercial arbitration.<sup>3</sup> Complex arbitration involves multi-party, multiple contract situation and counterclaim proceedings. The most prominent tools which are used in complex arbitration are joinder, amendments of claims, counterclaim, set of, interpleader and impleader. The usage of these tools is possible in various combinations depending on the nature of relationship between the parties (for example, multiple parties to one contract, two parties to multiple contracts, multiple parties to multiple contracts etc.).

Joinder of multiple disputes between the same parties is one of the integral and essential issues of complex arbitration proceedings. However, the theoretical and practical backgrounds of the joinder face numerous problems and need further development. In particular, only recently and only some rules of arbitration and national statutes start to address directly the issues of joinder of multiple disputes in the respective provisions. Besides, the scholars do not pay enough attention to the issues and problems of joinder of different disputes within the single set of the proceedings. The negligence of the parties of international transaction also complicates practical

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<sup>1</sup> Horacio A. Grigera Naon, ed., Committee on International Commercial Arbitration, “*Complex Arbitrations (Multi-Issue, Multi-Party, Multi-Contract): First Interim Report*”, (paper presented at the Sixty-Sixth Conference of the International Law Association, Buenos Aires Conference 1994): 690.

<sup>2</sup> Martin Platte, “When Should an Arbitrator Join Cases?,” *Arbitration International* 18, no. 1 (2002).

<sup>3</sup> Karim Youssef, “The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration” (n.d.): 103.

solution of complex arbitration issues. For example, Platte stresses out that: “the dispute resolution clauses of otherwise really detailed contract usually do not provide more details about arbitration proceedings than standard arbitration clause.”<sup>4</sup> This situation creates a gap between law, practice and the needs of complex arbitration settings. The gap especially could be seen on the background of largely uniform arbitration law based on the universal reach of New York Convention<sup>5</sup> and widespread implication of UNCITRAL Model Law<sup>6</sup>. In turn this gap causes uncertainty in the arbitral process. Therefore, the topic of the work, *joinder of multiple disputes between the same parties, in particular the issue of single arbitration*, is especially relevant in today’s international commercial arbitration.

This work will, particularly, address the possibilities and problems of *joinder of multiple disputes between the same parties*. It is ought to be mentioned that complex arbitration actively began to develop since the state courts realize the limits of their own powers and the US Supreme Court developed the doctrine of necessity of international arbitration in international transactions.<sup>7</sup> International commercial arbitration is inseparable part of today’s international commerce. In turn international commercial relationship are often complicated and involved the scheme with multiple parties and multiple contracts. That’s why the disputes, which are based on such contracts, are often complex. This creates the necessity to find better solution and new procedural legal tools in order to serve the nowadays need of international commerce. One of such tools is joinder, which will be analyzed in detail in the following chapters.

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<sup>4</sup> Platte, “When Should an Arbitrator Join Cases?”.

<sup>5</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38.

<sup>6</sup> UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

<sup>7</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270, Fed. Sec. L. Rep. (CCH) P 94593 (1974);

Different perspective towards the joinder of multiple disputes in one set of proceedings would be analyzed. The main goal of the work is indication of nature of joinder of multiple disputes between the same parties and main practical and theoretical problems that could arise during the respective proceedings. In particular, the issues of complex arbitration and joinder as integral part of the latter will be addressed. This starts with the definition of the joinder, its types and the condition that should be met in order to join multiple disputes within a single set of proceedings. The special emphasis should be made regarding the intent of the parties to join their dispute using single arbitration mechanism as well as the possibilities for the above-mentioned joinder without parties' consent.

The situation with joinder is less difficult if parties reached a clear expressed agreement to join their dispute and none of the parties objects against. However, in practice, it is more important to solve the situation when there is no clear and unquestionable indication for joinder. That is why there is a need to see whether the parties implicitly consented to arbitrate their disputes in a single set of proceedings. Theory and practice of international commercial arbitration came up with different indicators of such consent.

Moreover, the joinder of multiple disputes within a single set of proceedings is closely connected with parties' rights to present the case and form arbitral tribunal. Additionally, the issue of equal treatment and principle of good faith should be inspected by the arbitral tribunal. That's why, arbitrators should be careful with the joinder of different cases avoiding the violation of any parties rights.

In order to reach the above-mentioned tasks different methodology will be used. It is ought to noted that practical application regarding the rules for joinder of multiple disputes within a single set of proceedings is primarily based on decision of national courts and arbitral awards. The rules

of arbitration and procedural law also play important role. Therefore, first of all the primary legal sources as well as relevant court and arbitration practice should be analyzed. Special attention will be given also to the provisions of the rules of arbitration, which allow the joinder of multiple disputes in a single set of proceedings. Overall, the scholarly works and their approach towards joinder will be analyzed as well.

The work is divided into five chapters, being the first and the last the introduction and the conclusion respectively. The Chapter 2 will analyze the nature of the single arbitration and its place within the tools of complex arbitration. The definition and respective litigation experience will be paid attention to. Besides, the present work will analyze the benefits of joinder for the purposes of international commercial arbitration. Furthermore, this Chapter will deal with the parties' intent to hear multiple disputes in a single set of proceedings and its role for such joinder.

The Chapter 3, in turn, will concentrate on the most important practical challengers of joinder. What it involves here is implicit intent of the parties to hear their disputes in a single set of proceedings. The Chapter will concentrate on the situation when it is not clear enough whether the parties have consented for joinder or not. In order to answer for this question case law and scholarly works will be processed.

Finally, the Chapter 4 will address the concerns arising in cases when multiple disputes are joined in a single set of proceedings. This is primarily connected with protection of parties' rights and disadvantages that joinder may bring to the respective proceedings. That's why first of all the answer will be given to the question of whether the joinder is in compliance with the respective provision of New York Convention, in particular, regarding the rights to form arbitral tribunal



and to present the case. Furthermore, the Chapter will approach with the issues of confidentiality, possible losses in efficiency and legal uncertainty which joinder may cause.

## **CHAPTER 2: GENERAL OVERVIEW OF THE SINGLE ARBITRATION ISSUE: CHARACTERISTICS AND PRECONDITION**

This Chapter will analyze the nature of joinder, its peculiarities and place within the complex arbitration procedural tools. This Chapter is divided into three subchapters and in turn will address the general overview of the single arbitration issue (2.1), the procedural efficiencies it aims to reach (2.2) and the issue of parties' consent to hear the disputes together (2.3).

Special attention will be paid regarding the different approach to the definition of the joinder and the way how this tool of joining multiple disputes in a single set of proceedings will be addressed in the work (2.1.1). Furthermore, the applicable solution of litigation will be analyzed in order to show procedural goals, which could be achieved by the joinder (2.1.2).

The benefits of the joinder will be addressed individually (2.2). This is done, in particular, to show in which ways the mentioned tool is able to facilitate and promote international commercial arbitration as the major dispute resolution mechanism in international commerce.

Lastly, this Chapter will deal with the place and role of parties' intention to join their disputes in a single set of proceedings. First of all, the ways of how the tribunal could indicate that the parties intended to hear their disputes in a single set of proceedings will be addressed (2.3.1).

The particular care will be given to the wording of arbitration agreement and its ability to reveal the true intention of the parties (2.3.2). Furthermore, the Chapter will analyze the possibility of joinder without parties' consent for it and a special role of national statutes and court practice regarding this issue (2.3.3).

## 2.1 The Nature and Place of Joinder within Complex Arbitration

Current level of development of international commercial arbitration provides with the variety of different procedural tools that enable to hear disputes collectively rather than in separate parallel or consequent two-party proceedings.<sup>8</sup> As it was mentioned in the introduction, the most prominent of them are joinder, amendments of claims, counterclaim, set of, interpleader and impleader.<sup>9</sup> Each of the mentioned tools could be used under different circumstances. *Joinder* comes into place in case of interrelatedness of different disputes because such disputes affects one another. In other words, in case of related disputes, if only one dispute is decided at a time issues of other dispute(s) may not be taken into consideration. Therefore, influences of other disputes would not be perceptible. This could result in situations when the arbitrators are missing important details of the case, not spotting the bigger picture or in inconsistent decisions.

One of the necessities that lead to implementation of joinder within the international commercial arbitration is promotion of all possible and effective instruments that could be found in litigation. The main reason for such decision is achieving good administration of justice and equity, which are quite developed within court proceedings.<sup>10</sup> This promotion is mostly held by case law.<sup>11</sup> However, the rules of arbitration, statutes and scholar works also provide important influence, which will be described in detail in the following chapters.

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<sup>8</sup> Lara M Pair and Paul Frankenstein, “New ICC Rule on Consolidation: Progress or Change, The,” *Emory Int’l L. Rev.* 25 (2011): 1061.

<sup>9</sup> Ibid.

<sup>10</sup> Hanotiau Bernard, “Complex Arbitrations—Multiparty, Multicontract, Multi-Issue and Class Actions” (The Hague: Kluwer, 2006), 8.

<sup>11</sup> Karim Youssef, “The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration,” 114–115.

### 2.1.1. Definition of Joinder (Issue of Single Arbitration)

The joinder of multiple disputes in a single arbitration is relatively new trend of arbitration practice. That is why there is no common definition of the joinder within the doctrine. However, analysis of scholars' works shows that with the improvement and spread of arbitration the questions of complex arbitration proceedings, in particular, issues of single arbitration have been researched.

For the purposes of this thesis, the term “*joinder*” will be compared with other parallel terminology that could be used to describe the joining of multiple disputes between the same parties such as consolidation and the single arbitration. *Consolidation* means that several arbitration proceedings: “which are pending or initiated [are united] into a single set of proceedings before the same tribunal [or an arbitrator] ”.<sup>12</sup> *Single arbitration* is a term which is used in some arbitration rules and means the possibility to make claims arising out of different contracts in one proceeding.<sup>13</sup> *Joinder* is used in two situations.<sup>14</sup> The first one concerns the cases when a party that is not a party to the arbitration agreement (third party) is joined as a party to the arbitration proceedings themselves. At the same time, the second situation happens in case of joinder of separate disputes in one (single) proceeding. According to Platte, *joinder* is a process or an act that refers to uniting several arbitration proceedings that: “are pending or

<sup>12</sup> Julian D M Lew, Loukas A Mistelis, and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), 389.

<sup>13</sup> See, for example, the Article 10 of CEPANI Rules (Rules of arbitration of Belgian Centre for Arbitration and Mediation).

<sup>14</sup> Julian D M Lew, Loukas A Mistelis, and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), 389.

initiated into single set of proceedings before the same [arbitrator or] arbitral tribunal.”<sup>15</sup> The same approach is taken also by other scholars.<sup>16</sup>

It should be noted that joinder should not be necessarily between the multiple parties but can also take place between the same two parties. It is a situation when two or more proceedings are or were initiated under different contracts, concluded by the same parties, therefore, such proceedings are also called *multi-contract*.<sup>17</sup> However, in this case the term multi-contract arbitration should not be confused with *multi-party arbitration*, which is often a result of several contracts. The main difference between these two types of arbitration is that multi-contract one always includes only two parties. In other words, it is more correctly to call the disputes, which involve multiple parties, respectively multi-party dispute or add that the dispute is also multiple contract. Whether a party can be compelled to participate in a single multiparty arbitration depends on the provisions in the various contracts, the chosen arbitration rules and the applicable law. They may allow joinder of a party or provide for consolidation of different arbitration proceedings, which will be discussed in the following paragraphs (2.3.3).

To conclude, for the purposes of this work, **joinder** should be understood as the procedural tool to join separate disputes arising out of various contracts<sup>18</sup> in a single set of proceedings before the same arbitral tribunal or arbitrator. As it was stated before, the present work will concentrate on the joinder between the same parties.

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<sup>15</sup> Platte, “When Should an Arbitrator Join Cases?”.

<sup>16</sup> Philippe Gilliéron & Luc Pittet, *Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties, in Swiss Rules of International Arbitration: Commentary*, (Tobias Zuberbühler, Christoph Müller & Philipp Habegger eds., 2005), 36-37.

<sup>17</sup> Platte, “When Should an Arbitrator Join Cases?”.

<sup>18</sup> For the purposes of this work the terms contract and agreement will be used in the following way. Term contract will be used in order to describe an agreement between the parties on substantive matters. At the same time, term agreement will be used to address first of all arbitration agreement.

### 2.1.2. The Experience of Litigation Proceedings

Joinder of closely connected proceedings could be found in procedural laws of many countries. For example, the Article 130 of Arbitrazh Procedure Code of Russian Federation<sup>19</sup> regulates the questions of joinder of interrelated disputes. The joinder is possible if disputes are related by the bases for the origin of parties' relationship or by introduced evidences. The law clearly indicates that the court should rely on procedural efficiency when it decides to join or to separate the cases. The same procedure for joinder is provided by the Article 58 of Commercial Procedural Code of Ukraine.<sup>20</sup> Rule 18 of Federal Rules on Civil procedure of the USA also stipulates the possibility of joinder of different claims in one proceeding.<sup>21</sup>

The main reasons for joinder in the litigation proceedings are preclusion of inconsistent judgments<sup>22</sup> and procedural efficiency, which allows to save time and money.<sup>23</sup> Therefore, joinder in general improves the good administration of the justice.<sup>24</sup> Arbitration proceedings are

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<sup>19</sup> Russian Federation, Arbitrazh Procedure Code approved by Federal Law as of 24 July, 2002 No 95-Φ3.

<sup>20</sup> Ukraine, Commercial Procedural Code approved by Decree of Supreme Council as of 6 November, 1991 No 1799-XII.

<sup>21</sup> United States of America, Federal Rules on Civil procedure.

<sup>22</sup> Redfern Alan et al., "Law and Practice of International Commercial Arbitration" (Sweet & Maxwell, London, 1999), 174.

<sup>23</sup> Philippe Leboulanger, "Multi-Contract Arbitration," *Journal of International Arbitration* 13 (1996): 54–55.

<sup>24</sup> Ibid.

constructed in a way closest to civil and commercial litigation proceedings and nowadays have become recognized transnational system of justice.<sup>25</sup>

That's why, many scholars argues that the same efficiency development should be reached during the arbitral proceedings, which will be discussed in detail in the next paragraphs.

## 2.2. Efficiency of Joinder

Arbitration proceedings are known for their efficiency benefits. Redfren, Hunter and King argue that joinder of several claims under one proceeding fosters the efficient *administration of justice* and it prevents *inconsistent* awards, saves *time* and *money*, and therefore it is procedurally effective.<sup>26</sup> In other words, the main benefits of single arbitration are saving of time, lowering of the cost, preventing of inconsistent session and other procedural efficiencies. Lew at al. especially underline that efficiencies of the hearing of complex dispute in a single set of proceedings is *generally* more efficient comparing with having several separate arbitration decisions.<sup>27</sup>

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<sup>25</sup> Karim Youssef, "The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration," 103.

<sup>26</sup> Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (Oxford Univ Pr, 2009), 174.; D Brian King, "Consistency of Awards in Cases of Parallel Proceedings Concerning Related Subject Matters," *Towards a Uniform International Arbitration Law* 293 (2005): 293.

<sup>27</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 378.

First of all, as it was previously stated, the scholars agree that the hearing of multiple connected claims is *time* efficient.<sup>28</sup> This is true mainly because of the following reasons. Every step of the arbitration proceedings such as formation of arbitral tribunal, submission and familiarization with evidences, hearing of evidence and parties' submission consume time. At the same time, as long as the cases are related to one another single arbitration will help to avoid doubling of the same procedures during the respective arbitral proceedings. The mentioned, in particular, means that only one tribunal shall be formed. Moreover, such tribunal would not have to inspect the same evidence and hear the witnesses twice.

The second point of single arbitration efficiencies is *cost* saving.<sup>29</sup> This without doubt depends on concrete facts of the case. However, the majority of arbitral institutions provides the scales of cost for arbitration.<sup>30</sup> These scales show that the cost of arbitration first of all depends on the value of particular claim. However, each scale contains minimum and maximum amounts that should be paid with respect to the value of the claim. In such situation, even if the value of different claims is smaller comparing with the value for joint proceedings the cost of the separate proceedings would be higher due to minimum payment requirement.

Thirdly, the other risk that single arbitration could eliminate is *inconsistency* of the different arbitration awards which deals with the connected to each other issues. In multiple contracts situation the risk of contradictory decision is especially high with respect of both facts and

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<sup>28</sup> Blackaby et al., *Redfern and Hunter on International Arbitration*, 174.; King, "Consistency of Awards in Cases of Parallel Proceedings Concerning Related Subject Matters," 293.

<sup>29</sup> Ibid.

<sup>30</sup> Scale of arbitration costs for CEPANI could be found at <http://www.cepani.be/sites/default/files/files/reglement2013-en-arbitrage-1.pdf>; for HKIAC - <http://www.hkiac.org/index.php/en/fees>; for ICC - <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/cost-and-payment/costs-and-payment-of-costs/>; for LCIA - [http://www.lcia.org/Dispute\\_Resolution\\_Services/schedule-of-costs.aspx](http://www.lcia.org/Dispute_Resolution_Services/schedule-of-costs.aspx);



application of the governing law if the disputes arising out of such contracts are heard in separate arbitral proceedings.<sup>31</sup> Consequently, if the different tribunal would reach different conclusions regarding the same questions of facts or law leading to inconsistent results it would violate the party right to obtain just decision.<sup>32</sup> In turn, this will undermine the benefits of arbitration and complicate the procedure of enforcement of the respective arbitral award.

Moreover, the joinder of the different disputes and claims within them will allow for a better understanding of the facts of the case.<sup>33</sup> In other words, the arbitrator in joint proceeding would be able to see *bigger picture* of parties' relationship and in such manner better understand the fact of the case. Consequently, the joint hearing of multiple connected disputes will increase the probability of adoption of just decision in the respective dispute.

As an example, efficiencies of the joinder could be found in many cases when: "the same parties may have entered into a number of contracts all providing for arbitration, in particular, where these contracts are part of a single venture it may be advisable to settle all disputes between the parties in one arbitration, instead of having several separate arbitration proceedings."<sup>34</sup>

Overall, it should be noted that scholars *positively* remark on joinder is due to the fact that it is a tool to improve efficiency and fairness.<sup>35</sup> Therefore, hearing of the complex disputes in a single

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<sup>31</sup> Leboulanger, "Multi-Contract Arbitration," 53.; Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2012), 220.

<sup>32</sup> Pair and Frankenstein, "New ICC Rule on Consolidation: Progress or Change, The," 1063.

<sup>33</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 378.

<sup>34</sup> Ibid.

<sup>35</sup> Robert G Bone, *Civil Procedure: The Economics of Civil Procedure* (Foundation Pr, 2003), 146.; Gary Born, *International Commercial Arbitration*, vol. 1 (Kluwer Law International, 2009), 2069.; John W Cooley and Steven Lubet, *Arbitration Advocacy* (Ntl Inst for Trial Advocacy, 2003), 49.; Adolf Baumbach et al., "Zivilprozessordnung, 67. Aufl" (München, 2009), 737–739.; Bernard Hanotiau, "Complex–Multicontract–Multiparty–Arbitrations," *Arbitration International* 14, no. 4 (1998): 369, 391.

set of proceedings may be beneficial for the quality and fairness of proceedings as well as for the parties of such disputes.

### **2.3 The Intent of the Parties to Hear Their Disputes Jointly within the Single Set of Proceedings**

It is commonly known that *consent* is the basic fundament of all arbitration process, including complex arbitration regardless of the form of extension or the fact setting.<sup>36</sup> Therefore, the question of the parties consent is vital for any arbitration proceedings. In the multi-contract disputes one of the main questions is whether it is possible to consolidate or join the different disputes issue in one proceeding.<sup>37</sup> The possibility of such joinder is primary a question of the parties' consent.<sup>38</sup> In case of the express agreement between the parties to multi-contract dispute to hear the later in a single set of proceedings, either the appointing authority or the arbitral tribunal should join the cases. The parties could reach the above-mentioned agreement to hear disputes jointly before or after dispute has arisen.<sup>39</sup> There is a higher chance that the tribunal will join the cases also if multiple disputes were submitted together at the very beginning of arbitral proceedings.<sup>40</sup>

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<sup>36</sup> Philippe Fouchard et al., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer law international, 1999), 253.

<sup>37</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 378.

<sup>38</sup> Ibid.

<sup>39</sup> Platte, "When Should an Arbitrator Join Cases?"

<sup>40</sup> William Laurence Craig, William W Park, and Jan Paulsson, *International Chamber of Commerce Arbitration*, vol. 1 (2000), 183.

The indicators of consent to hear multiple disputes within a single set of proceedings are clear the most when the disputes arose between the same parties. This is primarily true because the multi-party issues do not complicate the situation. At the same, it should be noted that the arbitral tribunal is competent to decide whether to allow the joinder of multiple disputes or not regardless the presence of the parties consent to do so.<sup>41</sup>

Arbitral proceedings are based on parties' agreement to solve their cases within international commercial arbitration as alternative to litigation dispute resolution mechanism.<sup>42</sup> Moreover, the corner stone of any arbitration proceedings is parties' autonomy.<sup>43</sup> The question of parties consent is especially important because legal environment within arbitration, in particular, enforcement of arbitral awards is often taking consent *protective* and *formal approach*.<sup>44</sup>

That is why, Huleatt-James and Gould argue that two or more disputes should not be joined if the parties expressly disagree to such joinder.<sup>45</sup> In other words, in situation when all parties (both parties in case of two party dispute) expressly disagree to joint their disputes within the single set of proceedings, the arbitral tribunal or single arbitrator should not joint such disputes together.

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<sup>41</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 392.

<sup>42</sup> Fouchard et al., *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 253.

<sup>43</sup> T Várady, J J Barcelo, and A T von Mehren, "International Commercial Arbitration-A Transnational Perspective" (2012): 533.

<sup>44</sup> Karim Youssef, "The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration," 104.

<sup>45</sup> Mark Huleatt-James and Nicholas Gould, "International Commercial Arbitration: A Handbook" (LLP (London and New York), 1996), 70.

### 2.3.1 Indicators of Intent of the Parties to Hear Their Disputes Jointly

It is important to note that the requirement of consent of the parties to hear the disputes jointly is the crucial difference between the joinder in arbitration and litigation proceedings. For example, Arbitration Law of Netherlands requires the consent of all parties for a joinder to be possible, that is why commentators argue that despite all criticism it is not comparable to the provisions allowing for a joinder in proceedings in the state courts.<sup>46</sup> In particular, it is essential to show that the parties have actually consented to this type of arbitration and that they are treated equally since the lack of consent as well as any unequal treatment of the parties are grounds of resisting enforcement under the New York Convention.<sup>47</sup>

Regarding the setting of time, the parties may consent to hear their disputes in a single set of proceedings before or after such disputes have arisen.<sup>48</sup> One of the few examples where the parties agreed on consolidation after the dispute had arisen is *ICC case no 6719 (1991)*.<sup>49</sup> However, it should be stressed out that such consent is *rare*.<sup>50</sup> This could be explained by the fact that the trust is declining between the parties when they have claims against each other and, therefore, it is unlikely for them to negotiate the procedure of hearing of their disputes in a single set of proceedings.

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<sup>46</sup> A J Berg, R van Delden, and H J Snijders, *Netherlands Arbitration Law* (Kluwer Law and Taxation Publishers (Deventer and Boston), 1993), 69.

<sup>47</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 378.

<sup>48</sup> Platte, “When Should an Arbitrator Join Cases?”.

<sup>49</sup> ICC case no 6719 (1991).

<sup>50</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 392.

In terms of the expression the consent of the parties to hear their disputes in a single set of proceedings, it could be either *expressed* or *implied*.<sup>51</sup> Expressed consent is found through clear wording of the arbitration agreement. For example, expressed consent should be found if the parties in clear language addressing this issue with additional reference to the Rules of Arbitration which allow joinder of multiple claims. In particular, the Article 10 of CEPANI Rules requires parties' consent to joint multiple cases in a single set of proceedings.<sup>52</sup> That is why, if parties clearly indicated that they would like to hear jointly disputes arising out of multiple contracts it shows expressed consent. The same example could be drawn out of another arbitrational rules, which will be analyzed in detail in the following chapters.

### **2.3.2 The Role of Wording as Indicator of Parties' Intent to Hear Disputes Jointly**

On the other hand, theory and practice of international commercial arbitration designed special mechanism for finding the consent of the parties if the wording of the agreement is not clear enough or silent. For example, the issue of *wording* of arbitration clauses as indication of parties' intent to arbitrate was analyzed by the Swiss Supreme Court.<sup>53</sup> This case involved multi-contract situation. Moreover, the wording of arbitration clauses was different. Nevertheless, sole arbitrator assumed jurisdiction over the disputes and heard the disputes together because of the parties' intention to be bound by one of arbitration clause. The Swiss Supreme Court confirmed

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<sup>51</sup> Platte, "When Should an Arbitrator Join Cases?"

<sup>52</sup> Rules of Arbitration of the Belgian Centre for Arbitration and Mediation in force as from 1 January, 2013.

<sup>53</sup> Switzerland, Supreme Court, 10 *Am Rev Int'l Arb* 459 (1999) 461 *et seq.*

the award and ruled out that principle of agency, incorporation by reference, waiver, estoppel and good faith could show that the parties intended to resolve their disputes in a single arbitration. However, Lew et al. argue that in *general* the differences in such substantial matters as the chosen seat or the applicable law usually exclude joinder of multiple disputes.<sup>54</sup> That is why, the respective analysis should be made on case-by-case basis.

Moreover, it should be noted that the majority of the US federal appellate courts addressing the issue of the intent of parties to join different proceedings have found that the *silence* of the parties regarding mentioned issue is not sufficient evidence of implied consent. Namely, the Second, Fifth, Sixth, Eighth, Ninth and Eleventh Appellate Courts have so held, the Third Circuit has suggested it shares this view in dicta, and the Tenth and District of Columbia Circuits have not reviewed the issue.<sup>55</sup>

Therefore, the wording and respective circumstances of the case could help to indicate the parties' consent to hear the disputes in a single set of proceedings. At the same time, it should be noted that the possibility of joinder without clear intent of the parties to do so will be discussed in the following paragraphs.

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<sup>54</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*.

<sup>55</sup> Rona G Shamoon and Irene M TenCate, "Absence of Consent Trumps Arbitral Economy: Consolidation of Arbitrations Under US Law," *Am. Rev. Int'l Arb.* 12 (2001): 337–338.

### 2.3.3. Joinder of Disputes without Consent of the Parties

As it was stated before, the agreement between parties to hear their disputes in a single set of proceedings is of particular importance for joinder. However, such joinder is even possible *without consent* of the parties if the state law, case law of the place of arbitration allowed it.<sup>56</sup>

The court practice shows the willingness of court to extend the jurisdiction towards arbitral tribunal using the provision of Art. VII of New York Convention.<sup>57</sup> Moreover, Reisman et al. stress that: “many national courts not only help international arbitration but appear anxious to externalize a larger amount of the disputes that are formally within their jurisdiction”<sup>58</sup> and, in particular, regardless the requirement of the parties’ consent. This is the case when part of the proceedings should be heard at the court as in case of multiple dispute under connected contracts. However, the court is willing to unite such parts of disputes, that should be heard by court, with other parts of the disputes which should be or are hearing within the arbitration proceedings. The reasons for such joinder beyond logical and conceptual limits of arbitration is favoring of arbitration and efficiency gain of the single hearing of multiple contract disputes within arbitration, which were discussed above.

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<sup>56</sup> Platte, “When Should an Arbitrator Join Cases?”.

<sup>57</sup> Karim Youssef, “The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration,” 112.

<sup>58</sup> William Michael Reisman et al., *International Commercial Arbitration: Cases, Materials, and Notes on the Resolution of International Business Disputes* (Foundation Press, 1997), lxxix.

Joinder of multiple disputes without consent of the parties is possible when national courts compel or accept compelling arbitration beyond or in absence of the consent's requirement.<sup>59</sup> The analysis of procedural law statutes shows that it is possible for compelling arbitration without the parties' consent especially in multiple contract case.

For example, the Article 125 of Swiss Code of Civil Procedure provides that the joinder of multiple disputes in arbitral proceedings as a tool the court potentially could use to streamline and simplify the litigation.<sup>60</sup> Thus, Swiss law enables joinder *sua sponte*<sup>61</sup> by the judge.

German court would react and could order the joinder of multiple disputes only if expressed consent of the parties for such intervention was reached by the parties of arbitration agreement or the law enable the court to act.<sup>62</sup> This strict approach could be explained by the provisions of § 1026 of the German Code of Civil Procedure (hereinafter - "GCCP"). This provision stipulates prohibition for court to intervene unless the tenth book of GCCP provides otherwise. The mentioned book refers in turn to arbitration and codifies the UNCITRAL Model Law. At the same time, under GCCP arbitrators should not have the discretion to order joinder if no prior consent was reached by the parties.<sup>63</sup>

US courts are willing to join disputes under multiple contracts if they contain *identical* arbitration clauses because inter alia: "efficient and speedy resolution of disputes was clearly

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<sup>59</sup> Karim Youssef, "The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration," 112.

<sup>60</sup> Switzerland, Code of Civil Procedure as of 19 December 2008.

<sup>61</sup> Pair and Frankenstein, "New ICC Rule on Consolidation: Progress or Change, The," 1076.

<sup>62</sup> Switzerland, Code of Private International Law as of 18 December, 1987, SR 291.

<sup>63</sup> Ibid.



among the desired effects of [the Arbitration Act]”<sup>64</sup>. However, it should be noted that identical wording of arbitration clauses in a multiple contracts is one of the indication of the implied consent of the parties for joinder<sup>65</sup>, which will be discussed in detail in the next chapter. That’s why, it may be concluded that US courts are looking at least for legal grounds for ordering consolidation.

French courts’ jurisdiction on issues of complex arbitration is based on the principle of *subsidiarity*.<sup>66</sup> This means that the national courts should assert jurisdiction and hear the case only if the arbitral tribunal do not have jurisdiction over all aspects of multiple dispute. For multi-contract situation it could be a case when the joinder of multiple disputes is impossible due to applicable mandatory norms, which give exclusive jurisdiction to the courts.

Slightly different approach is taken in the Netherlands. Lew at al. underline that Netherlands Arbitration Law provides special rule that allows the court to join the different disputes in a single set of proceedings.<sup>67</sup> In particular, the court should have power to order joinder on a request of one of the parties if the different proceedings are commenced before different arbitral tribunals in the Netherlands. The law of Netherlands stipulates that the subject matters of the proceedings should be connected to one another.<sup>68</sup> However, the law does not need parties consent to join the disputes. In other words, the court will have the power to order joinder unless all (both in two party disputes) expressly agreed not to join their disputes. Such joinder could be

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<sup>64</sup> *Sociedad Anonima De Navegacion Petrolera v. CIA. De Petroleos De Chile S.A.*, 634 F.Supp. 805, 1986 A.M.C. 1995 (S.D.N.Y. 1986).

<sup>65</sup> ICC case No 5989 (1989).

<sup>66</sup> Karim Youssef, “The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration,” 113.

<sup>67</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 399.

<sup>68</sup> *Ibid.*

full (of all disputes) or patricidal (only of the same disputes or their parts). In other words, in Netherlands the joinder of arbitration disputes through court is based rather on objective criteria (relatedness of the disputes) than on subjective (parties consent to join the disputes).

Lew at al. underline that the special provisions of Netherlands law could be explained by the development of the Dutch construction industry, which involves multiple level schemes and ultimately often use the provision for joinder.<sup>69</sup> Haersolte stresses that the request for joinder of arbitration proceedings before the court are usually granted.<sup>70</sup>

One should remember that in case of court involvement in joinder of arbitration disputes it would be the court that orders joinder, not the arbitral tribunal. And in some cases (like Netherlands one) the court would not need the parties consent to order the joinder. At the same time, it is well known that the parties' autonomy is a basic principle of international commercial arbitration.<sup>71</sup> In other words, the true intention of the party is important when the court is dealing with the question of the joinder. That is why, the analysis of the current approach of many jurisdictions regarding the joinder of different disputes shows that only some countries allow the courts to join arbitration disputes in a single set of proceedings. Moreover, statutory provision and court practice, which allow the court to order the joinder, provide for some requirement that should be fulfilled. It should be mentioned that these requirements are close to the indicators of implied consent of the parties to hear their disputes jointly, which will be discussed in detailed in next chapter.

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<sup>69</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*.

<sup>70</sup> Jacomijn J van Haersolte-van Hof, "Consolidation Under the English Arbitration Act 1996: A View from the Netherlands," *Arbitration International* 13, no. 4 (1997): 428.

<sup>71</sup> Várady, Barcelo, and von Mehren, "International Commercial Arbitration-A Transnational Perspective," 533.

### CHAPTER 3: IMPLIED CONSENT OF THE PARTIES TO HEAR CASES IN SINGLE ARBITRATION

As it was stated before, the inherent problems of joinder of multiple disputes in the same proceedings is the contractual nature of the arbitration and, consequently, the demand of parties' consent to hear the disputes arising out of different agreements in a single set of proceedings.

However, more detailed analysis of case law and scholar works reveals that there is different and more complicated mechanism in complex arbitration. In the modern world of highly developed modern commerce, arbitral tribunals are often faced with complex economic structures and realities that could not be ignored. At the same time, the cornerstone legal texts for international commercial arbitration (New York Convention and arbitration laws based on UNCITRAL Model Law) are *silent* on many issues of complex arbitration, in particular, on the issue of the single arbitration. Youssef mentions that: “traditional simplicity of a jurisdictional exercise conducted under the exclusive rule of consent has *faded*”.<sup>72</sup> Therefore, practice and theory of international commercial arbitration came up with a several solution of how to find consent of the parties to join multiple disputes. That is why, these solutions will be discussed in detail in this Chapter.

The Chapter 2 will analyze, in particular, the role of implied consent for joinder of multiple disputes (3.1) and possible indicators of such consent (3.2-3.4). The first issue is, primary, connected with the practical need of implied consent because in many situation the arbitration

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<sup>72</sup> Karim Youssef, “The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration,” 106.

agreement is not enough clear regarding the possibility to join multiple disputes and the parties after the dispute have arisen are not willing to agree on such joinder.

Furthermore, the Chapter 3 will address the respective provisions of the rules of arbitration which allow the joinder and approach of these rules towards the requirement for joinder of multiple dispute in a single set of proceedings (3.2). In particular, the issue whether the reference to the rules of arbitration is sufficient ground for the joinder will be discussed.

The next subchapter will deal with the question of relatedness of the multiple contracts with one another as the main indication of the parties' intent to hear the disputes together (3.3). Among other things, the disputes could be related to one another when the parties agree to cover their relationship with one major contract (3.3.1). In such situation the first contracts is called the master or umbrella contract, the other contracts are followings and subsequent towards the first one. Additionally, the situation of forming one economic transaction will be covered by this Chapter (3.3.1). This is particularly true when the group of the contracts in fact is just a mere legal form of one economic transaction. The latter also could indicate that the parties consented to hear all claims arising out of such contracts in a single set of proceedings.

As it was stated before (2.3.2), the wording of the arbitration agreement itself plays a special and unique role in abstraction of the true intention of the parties. Therefore, this Chapter will also analyze the role of the wording in spotting the implied intent of the parties to hear their dispute jointly (3.4).

Finally, the third Chapter will address the issue of compatibility of different arbitration clauses and its effect on the possibility of the joinder (3.5). Particularly, this subchapter will concentrate on the provisions of the arbitration agreements on place of arbitration, rules of arbitration and other characteristic of such agreements. Consequently, discussion will concentrate on the

question whether the joinder of disputes, which based on different arbitration agreements with different respective provisions, is possible.

### 3.1 The Role of Implied Consent for Joinder

In the previous Chapter the importance of the parties consent for joinder of multiple disputes was analyzed. Wherefore, it is ought to be mentioned that the situation could be especially difficult when the wording of arbitration agreement is *not clear enough* on question whether parties consented to hear their dispute jointly in a single set of proceedings. The practice shows that even the parties of complicated international contracts use often *just standard* arbitration clauses.<sup>73</sup> In other words, arbitration clause are usually not detailed enough even if the contract, which contain such clause, is otherwise very detailed. That is why, Youssef underlines that: “the classic simple yes-no question regarding existence of consent between the parties is often simplistic and fails to reflect the true complexity of the jurisdictional issues which arise in complex arbitrations”.<sup>74</sup> Therefore, the classic approach towards consent contradicts economic realities and, therefore, tribunal should find workable solutions to these challenges departing from *black-letter* law and traditional methods towards new solutions.<sup>75</sup>

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<sup>73</sup> Platte, “When Should an Arbitrator Join Cases?”.

<sup>74</sup> Karim Youssef, “The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration,” 106.

<sup>75</sup> Karim Youssef, “The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration,” 106-107.

The consent of the parties to hear cases within the single set of proceedings can be either *expressed*, *implicit* or by *reference* to the arbitration rules in the arbitration agreement.<sup>76</sup> The analysis of the rules of arbitration shows that recently the leading arbitral institutions give consideration to the issue of single arbitration.

At the same time, implicit consent is always *contextual* by nature and, therefore, the general context of the dispute should be taken into account in order to determinate the existence and scope of the mentioned consent.<sup>77</sup> That is why, dealing with the issue of single arbitration tribunal should analyze the terms and condition, previous relationship between the parties as well as a wording of arbitration agreement and the nature of arbitration agreement regarding the indication of implied consent of the parties to hear cases jointly within a single set of proceedings.

It is ought to be noticed that the practice of the last decades shows that the tribunals are more willing to differ from classical approach towards consent of the parties and use jurisdictional expertise and practice.<sup>78</sup> The latter involves high level of intellectual analysis of all subjective and objective elements including wordings, parties' intent, one economic transaction, master agreement. In any case, the decision to join multiple disputes must be justified in a legally acceptable fashion even if it was motivated by pragmatic consideration. That is why: "arbitrators

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<sup>76</sup> Bernard, "Complex Arbitrations–Multiparty, Multicontract, Multi-Issue and Class Actions," 107.; Platte, "When Should an Arbitrator Join Cases?"; Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012), 496.

<sup>77</sup> Karim Youssef, "The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration," 107.; Bernard Hanotiau, "Non-Signatories in International Arbitration: Lessons from Thirty Years of Case Law," *International Arbitration 2006: Back to Basics* (2007): 353.

<sup>78</sup> Karim Youssef, "The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration," 108.

must also justify their decision by reference to the legal framework of international commercial arbitration, although this framework would not necessarily support a decision to extend or a liberal approach to jurisdiction in the particular case”.<sup>79</sup>

### **3.2 Reference to the Rules of Arbitration which Allow Joinder**

As it was stated before (3.1), one of the indications, which shows the parties' intent to hear their multi-contract disputes within a single set of proceedings, is the reference to the arbitration rules that allow joinder<sup>80</sup> of multiple disputes.

One of the arbitral institutions that foresees the possibility of single arbitration is ICC<sup>81</sup>. In particular, the Article 9 of ICC Rules<sup>82</sup> is dedicated to the possibility to join disputes arising under multiple contracts in a single arbitration. Article 6 (3) of ICC Rules provide arbitral tribunal with authority to solve the question of whether different disputes could be heard within a single arbitration along with jurisdictional issues unless these questions will be addressed to the Court of ICC. The Tribunal should join the cases under multiple contracts if the respective arbitration agreements are compatible and parties may have agreed that those claims can be determined together in a single arbitration (the Art. 6 (4) of ICC Rules).

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<sup>79</sup> Ibid., 111.

<sup>80</sup> As it was stated before (2.1), some arbitration institution use term single arbitration to describe the joinder of multiple disputes in a single set of proceedings.

<sup>81</sup> International Chamber of Commerce.

<sup>82</sup> Arbitration and ADR Rules of International Court of Arbitration in force as from 1 January, 2012.

The special provisions regarding the single arbitration are also contained in CEPANI Rules.<sup>83</sup> According to the Article 10 of CEPANI Rules the disputes that arise from various contracts could be made in a single arbitration. At the same time there are two requirements for such joinder. Firstly, the parties should choose CEPANI Rules as the rules of arbitration (Art. 10 (1) (a) of CEPANI Rules). Secondly, the parties should have consented to hear their disputes within a single set of proceedings (Art. 10 (1) (b) of CEPANI Rules). Moreover, parts 2 and 3 of the Article 10 of CEPANI Rules provide the guidelines when the disputes should be heard jointly. Hence, the arbitration concern matters should be related and the arbitration agreement should be compatible.

At the same time, HKIAC Rules<sup>84</sup> have slightly different approach towards single arbitration. According to the provisions of the Article 29 of HKIAC Rules there are four requirements that should be made in order to join several disputes within a single set of proceedings. Firstly, all parties should be bound by each of arbitration agreement (the Article 29.1 (a) of HKIAC Rules). Secondly, a common question of law or fact arises under each arbitration agreement giving rise to the arbitration (the Article 29.1 (b) of HKIAC Rules). Thirdly, the rights to relief should be in respect of the same transaction or arise from a series of transactions (the Article 29.1 (c) of HKIAC Rules). Lastly, respective arbitration agreements should be compatible. In other words, HKIAC Rules provide with higher standard for joinder of multiple disputes in a single arbitration. However, HKIAC Rules expressly regulates the issue of waive of any objection regarding commencement of single arbitration (the Article 29.2 of HKIAC Rules).

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<sup>83</sup> Arbitration Rules of the Belgian Centre of Arbitration and Mediation (CEPANI) in force as from January 1, 2013.

<sup>84</sup> Administered Arbitration Rules of Hong Kong International Arbitration Centre in force as from 1 November, 2013.



To conclude, the reference to the arbitration rules usually does not mean that the tribunal would have *automatically* the right to join multiple disputes in a single arbitration because such rules of arbitration demands that the agreement for such joinder should be reached by the parties. Eventually, the question of joinder will result in analysis of the parties consent to hear multiple disputes within the single set of proceedings.

At the same time, the rules of arbitration may provide guidelines when arbitrators should join different disputes. Moreover, it should be noted that not all rules of arbitration provide the possibility for joinder of multiple claims on a stage of submitting the request for arbitration. For example, SCC Rules<sup>85</sup> of arbitration does not provide the possibility for pure single arbitration. At the same time, the Article 11 of the mentioned rules of arbitration contains the provision of consolidation of different disputes that were already filed to the arbitral institution. The arbitrator could then request the merger of the two proceedings if the applicable arbitration rules. Hence, in such way the positive effects of the joinder could be reached. It is especially relevant when the arbitration agreement itself is not clear enough on the issue of the single arbitration.

### 3.3 Relatedness of the Contracts

One of the basis for a presumption that the disputes arising out of two or more different contracts could be heard together in a single set of proceedings is relatedness of such contracts.<sup>86</sup> The

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<sup>85</sup> Arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce in force as from 1 January, 2010.

<sup>86</sup> Platte, “When Should an Arbitrator Join Cases?”.

relatedness could be seen in the presence of master agreement (3.3.1) and when the group of contracts form one economic transaction (3.3.2)

### 3.3.1 Presence of Master Contract

Contracts are related to one another in the presence of *master* or umbrella contract which is, particularly, covering or referring to the future relationship of the parties.<sup>87</sup>

First of all, one should see the difference between the construction of umbrella or master contract and umbrella arbitration agreement. The latter is a tool in a form of separate contract for covering multiple disputes under different contracts by one arbitration proceedings.<sup>88</sup> Unlike the standard arbitration clause which master contract contains, separate arbitration agreement is detailed enough to address the issues of the single arbitration.<sup>89</sup> In other words, if parties concluded separate umbrella arbitration *agreement* to cover multiple contract arbitration issues including the issue of single arbitration the consent of the parties to hear multiple disputes together will be *expressed*.

At the same time, the master *contract* could have the reference to the following contracts concluded by the parties or the arbitration clause of the master contract could indicate that the matters under following contracts would be covered by one arbitration clause.<sup>90</sup> All this could be

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<sup>87</sup> Bernard, “Complex Arbitrations–Multiparty, Multicontract, Multi-Issue and Class Actions,” 104.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid; Platte, “When Should an Arbitrator Join Cases?”.

<sup>90</sup> Bernard, “Complex Arbitrations–Multiparty, Multicontract, Multi-Issue and Class Actions,” 104.

used as evidences of the implied consent to hear multiple disputes jointly. That is why, in this Chapter such issues of implied consent will be discussed.

In case of master contract it is enough that only master contract contains arbitration clause in order to join multiple disputes within a single set of proceedings.<sup>91</sup> It should be mentioned that Supreme Court of India reached similar conclusion that the presence of a master (umbrella) contract, a preamble or something to this effect are possible indicators of implied consent of the parties to hear the case in a single set of proceedings.<sup>92</sup>

Analysis of India decision could reveal that the question of single arbitration in the case of master (umbrella) contract could closely related to the scope of arbitration agreement. The issue in this situation is mainly whether the arbitral tribunal, which without doubt has the authority to hear disputes arising out of particular contract decided the issue arising out of other contracts related to the first one.

In *Olympus case*<sup>93</sup> parties entered into purchase contract of apartments. At the same time one of the arbitration clauses was present in the purchase contract. Afterwards, the parties entered into three more subsequent contracts regarding interior design. Each of the mentioned contracts had an arbitration clause of their own. The purchase contract was terminated before disputes at hand have arisen. The court indicated that one of the questions before arbitrator was whether: “the disputes under the interior design contracts were subject to their independent arbitration clauses or whether one and the same reference was permissible under the main contract.”<sup>94</sup> Respondent

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<sup>91</sup> Leboulanger, “Multi-Contract Arbitration,” 79–80.

<sup>92</sup> India, Supreme Court, *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and Ors* (2012); India, Supreme Court, *Olympus Superstructure Pvt. Ltd. v. Meena VIJAY KHETAN&Ors*. 5 SCC 651 (1999).

<sup>93</sup> India, Supreme Court, *Olympus Superstructure Pvt. Ltd. v. Meena VIJAY KHETAN&Ors*. 5 SCC 651 (1999).

<sup>94</sup> *Ibid*.

claimed that the court should set aside the award because: “the reference under clause of the main agreement could not permit the arbitrator to deal with the disputes relating to interior design agreements”.<sup>95</sup> The Supreme Court of India disagreed with these arguments and ruled out that sole arbitrator was empowered to decide matters under main and subsequent agreements in a single set of proceedings due to the following facts. Firstly, the parties entered into multiple contracts for a common object. Secondly, the broad wordings of arbitration clause "*other matters...connected with*" indicate the implied consent for the joinder.

The similar situation happened in *Chloro case*<sup>96</sup>, where the parties had entered into a joint venture through a principal shareholders' contract and various other contracts. The shareholders' contract contained an arbitration clause. However, the ancillary contracts did not. The Supreme Court of India stressed out that the intention of the parties and the wording of the contract should be inspected carefully in order to understand whether the arbitral tribunal should have the authority to solve the legal issues under all mentioned contracts together. According to the court's reasoning the joinder is possible where: "the agreements are consequential and in the nature of a *follow-up to the principal* or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or inter-dependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration".<sup>97</sup> In court's opinion, the principle of “*composite performance*” could be gathered in the following indicators. On one hand master and

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<sup>95</sup> Ibid.

<sup>96</sup> India, Supreme Court, *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and Ors* (2012).

<sup>97</sup> Ibid.

subsequent contracts should be paid attention to and on the other hand attention of the parties from the attendant circumstances. In the case at hand court accepted lawfulness of joinder because the other joint ventures agreements formed an integral part of the principal shareholders' agreement. Therefore, the Court reasoned that these agreements were interdependent for their performance and should be decided together.

The similar conclusion was reached by the Paris Court of Appeals, which came to the conclusion that the joinder of disputes under different contracts is possible if one of the contract is the follow-up and the consequence of another.<sup>98</sup> English court came up with a similar ruling in *Fletamentos Maritimos SA v. Effjohn International BV*.<sup>99</sup> In this case the parties concluded a cooperation contract to set up a cruise business, which contained arbitration clause. The parties concluded purchase contract of a vessel that did not contain arbitration clause. Dispute arose over the payment for the mentioned vessel and was submitted to the arbitration. The defendant challenged the jurisdiction of the arbitrators. The court concluded that the claim was made within the arbitrators' jurisdiction because the evidence showed that purchase of the vessel was within the context of the cooperation contract that had arbitration clause.

To conclude, the numerous court practices prove that the nature of the parties' relationship could be indication of the parties implied consent to hear the cases jointly. In particular, this is true when the parties entered in a number of contracts with one of them is main or master contract and another ones are subsequent contracts. The other indication of the mentioned consent is the situation when the multiple agreements of the parties construe a single economic transaction, which will be discussed in the following paragraphs.

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<sup>98</sup> France, Cour d'appel de Paris 2000 Rev. Arb. 501 and note by X-Y Li.

<sup>99</sup> *Fletamentos Maritimos SA v Effjohn International BV* [1997] APP.L.R. 02/12.

### 3.3.2 One Economic Transaction

As it was stated before, one of the evidence of parties' implied consent to hear different disputes jointly is the situation of relatedness of the contracts, in particular, when the dispute are arising from *one economic transaction*. There are few main ways to define one economic transaction. Leboulanger defines one economic transaction as a situation when "economic and operational unit "hidden" behind a multi-contract *facade*".<sup>100</sup> For Born one economic transaction is the situation when the disputes arising from the same legal relationship.<sup>101</sup> Hanotiau stresses that economically or functionally interrelated contracts could construe one economic transaction.<sup>102</sup> In other words, all mentioned scholars indicate that the relatedness of group of contracts could construe one economic transaction so that each contract within the group is tied to one another. In any case, while dealing with the issue whether the different disputes could be decided together in a single set of proceedings the tribunal should resort to the contract *interpretation*.<sup>103</sup> This could be explained by the following. First of all, the parties conducting business usually would not indicate that the different contracts, concluded by them, should construe the one economic transaction. Therefore, one economic transaction could be used to indicate only *implied* but not expressed consent to hear disputes under multiple contracts within a single set of proceedings. In other words one economic transaction approach in determination of the consent of the parties to

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<sup>100</sup> Leboulanger, "Multi-Contract Arbitration," 46.

<sup>101</sup> Born, *International Arbitration: Law and Practice*, 226.

<sup>102</sup> Bernard, "Complex Arbitrations—Multiparty, Multicontract, Multi-Issue and Class Actions." 101-102.

<sup>103</sup> Born, *International Arbitration: Law and Practice*, 224.

hear cases jointly tries to reflect reality in the parties' transactions rather than formal determination of such consent.

In order to spot the feature of one economic transaction the meaning of contracts should be analyzed carefully. One of the basis for the presumption that there was one economic transaction and, consequently, an agreement between the parties on single set of proceedings is available if arbitration agreements concern matters related to one another.<sup>104</sup> Hanotiau argues that contracts are related to one another in two major situations when they are united in a relation of economic or functional *dependence*.<sup>105</sup> Firstly, one economic transaction may be formed by the groups of contracts that coexist to reach *common goal* which put them in relation of economic dependence. This is, particularly, true when the parties concluded a framework contract and implementation contracts, a main contract and subcontracts, a main contract and an accessory agreement for the financing of the main transaction, or a group of contracts of equal importance united by a common cause or goal. Secondly, one economic transaction covers the contracts that are consisted of two successive agreements when the second contract impacts the first one to amend or terminate it. The examples of the second category could be the original agreement and a contract providing for its amicable termination, a novation or a settlement. Hanotiau stresses out that contracts that do not fall in either category are not related to one another.<sup>106</sup> This is the case, for example, when successive agreements of the same nature were concluded between the same parties.<sup>107</sup>

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<sup>104</sup> Bernard, "Complex Arbitrations—Multiparty, Multicontract, Multi-Issue and Class Actions," 101.

<sup>105</sup> Ibid.

<sup>106</sup> Bernard, "Complex Arbitrations—Multiparty, Multicontract, Multi-Issue and Class Actions.," 103.

<sup>107</sup> Ibid.

At the same time, French doctrine has slightly different approach. The latter indicates that one economic transaction could be found by analysis of *contractual structure* of the relationship between the parties.<sup>108</sup> Particularly, original contract and complementary contracts, original contract and successive contracts, main contract and subsequent or accessory contract construe one economic transaction. The latter could be used for the purposes of arbitration in order to join different disputes in a single set of proceedings.

Leboulanger stresses that facts such as conclusion of the contract on the same day, the same duration of the contracts and the same purpose are another indications of one economic transaction.<sup>109</sup> This could be explained by the fact that one transaction of the parties could be legally constructed by several separate agreements. However, parties could sign them the very same day and for very same purpose that could help arbitrators to find implied consent to hear cases jointly.

The analysis of the case law approves that the tribunals and courts mostly uphold this realistic approach.<sup>110</sup> Notably, in *Kaeuffer v. Bastuck and others case*<sup>111</sup>, French Supreme Court ruled that the link between agreements could provide that the arbitration clause of one of the contracts could provide for single arbitration for disputes arising out of both agreements. Italian arbitrators may use factual dependence argument in order to find one economic transaction in relationship between the parties. In the case *No 1491*, Arbitral Tribunal in Milan held that two contracts "must entail a *mutual* dependence and interdependence" to constitute one economic

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<sup>108</sup> Ibid., 102.

<sup>109</sup> Leboulanger, "Multi-Contract Arbitration," 52–53.

<sup>110</sup> See, for example, ICC award 122/85 and *Klöckner v. Cameroon* (quoted by Paulsson, 'The ICSID Klöckner v. Cameroon Award: The Duties of Parties in North-South Economic Development Agreements' in (1984) 1 J Int Arb 162); *Holiday Inn v. Morocco* (quoted by Laliev, 'The First World Bank Arbitration' in (1980) 51 BYBIL 159).

<sup>111</sup> France, Cour de cassation, *Kaeuffer v. Bastuck and others case* 18 ASA Bull. 381 (2000).



transaction.<sup>112</sup> In opinion of the tribunal, such dependence could be found when the event concerning one contract within the serious of the contracts concern the others as well.

On the other hand, one should always remember that contracts should be inspected especially careful to find out whether these contracts constitute one economic transaction or not. In particular, ICC tribunal confronting framework and ancillary agreements recognized that the cross-referencing of agreements is often not enough to constitute a single transaction, so “in some cases it is the tribunal’s duty to look beyond the specific contract brought before it and to take into account the economic or business realities behind the legal structure”.<sup>113</sup>

Another ICC tribunal in case *No. 4392* refused to consolidate claims for the following reasons.<sup>114</sup>

In the mentioned case a main agreement between two parties related to the construction of a plant to manufacture concrete beams, and a second agreement related to an order for an industrial saw that could be considered an accessory of the first contract the tribunal refused to combine the claims. Noting that arbitration clauses need to be restrictively construed, and must account for jurisdiction clauses, the tribunal pointed to a jurisdiction clause in the second agreement that gave authority to courts to hear claims. The tribunal therefore declined to hear any claims related to the second agreement.

At the same time, in some cases the absence of the arbitration clause in one of the contracts will not be an obstacle towards the single arbitration, if the contracts between the same parties are closely connected to each other.<sup>115</sup> In particular, this is true in following situations when one

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<sup>112</sup> Chamber of National and International Arbitration of Milan, Award No. 1491 (1992).

<sup>113</sup> ICC Award No. 6829 (1992).

<sup>114</sup> ICC Award No. 4392 (1983).

<sup>115</sup> Bernard, “Complex Arbitrations–Multiparty, Multicontract, Multi-Issue and Class Actions,” 133.

finds its origin in the other, or is the complement or the implementation of the other, the absence of an arbitration clause in one of the contracts does not prevent disputes arising from the two agreements from being submitted to an arbitral tribunal and decided together<sup>116</sup>. French court came up with the term “*indivisible whole*” agreement.<sup>117</sup> The group of the contracts construe indivisible whole one “if each of the partial agreements exists only by the preceding and calls on the following; a will, unique in its aim, is expressed in a variety of complementary instruments. It is also the existence of a subordination that makes it possible to identify the group formed by a main contract and a sub-contract”.<sup>118</sup>

In conclusion, one economic transaction is one of the most difficult indicators of the parties’ intent to arbitrate their disputes in a single set of proceedings. This is mainly true because in this case the tribunal should take realistic approach and look carefully through the facts of the case in order to find the true intention of the parties. However, it should be noted that some tribunals are taking formalistic approach towards the nature of single arbitration and are denying in the joinder.

### 3.4 Wording of Arbitration Agreements

One of the way to determine whether the parties consented to hear their disputes in a single set of proceedings is the wording of the each arbitration clause of different contracts, concluded by the

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<sup>116</sup> Ibid.

<sup>117</sup> Bernard, “Complex Arbitrations–Multiparty, Multicontract, Multi-Issue and Class Actions.”

<sup>118</sup> Ibid.

parties. The *wording* of contracts could show mentioned parties' consent if they are concluded on the same date, for the same duration or for the same purposes, which is also could be used in defining one economic transaction through wording.<sup>119</sup>

For example, in *ICC case No 5989*<sup>120</sup> the tribunal found out that arbitration clauses of multiple contracts are drafted in *identical* terms. Therefore, the Tribunal reached a conclusion that it leads to the assumption that the parties to such contracts consented to submit one economic transaction, which was executed through different contracts, to one single arbitral tribunal.

However, this approach is not shared by all scholars. For instance, different wording of arbitration clauses preclude from the joinder of the disputes arising under such arbitration clauses.<sup>121</sup> Lastly, in *ICC award No 6829*<sup>122</sup> jurisdiction of the tribunal was analyzed in the situation when in a set of contracts not all respective contracts have arbitration clauses. The tribunal held that it does not have jurisdiction over the contracts that do not contain arbitration clauses. In other words, if only some of the contracts contain arbitration clause the set of such contracts cannot be submitted to one arbitral tribunal for hearings in a single arbitration. Polish Supreme Court took interesting position regarding the limits of jurisdiction of arbitral tribunal. It held that the jurisdiction is assessed on basis of an arbitration agreement and the arbitral tribunal should have the jurisdiction over all legal rights that are covered by such arbitration

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<sup>119</sup> Pryles M. & Waincymer J., *Multiple Claims in Arbitrations Between the Same Parties*, Kluwer Law International, 2009, 445.

<sup>120</sup> ICC case no. 5989 (1989).

<sup>121</sup> Fritz Nicklisch, "Multi-Party Arbitration and Dispute Resolution in Major Industrial Projects," *Journal of International Arbitration* 11, no. 4 (1994): 71.

<sup>122</sup> ICC Award No. 6829 (1992).

agreement.<sup>123</sup> In other words, the arbitral tribunal should have authority to decide the legal rights, which are covered by arbitration agreement, regardless, in particular, the quantity of contracts.

That is why, in order to join cases more detailed analysis of the contracts should be performed in order to determine whether the parties agreed to hear their disputes in a single set of proceedings. Moreover, the drafter of arbitration clause which allows joinder should be especially careful with the wording of the later. One of the ways how one economic transaction is influence the wording of the contract are the following. The wording of arbitration clause of different contracts are identical, which shows the consent of the parties to join disputes arising out of such contracts in a single set of proceedings.<sup>124</sup> However, in particular, Devolvé stresses out that the mere fact of identical wording should not be the only ground to allow joinder.<sup>125</sup>

Additionally, wording of the arbitration agreement should always come along with the context in which such agreement was discussed, concluded and executed.<sup>126</sup> In particular, arbitral tribunal should analyzed previous relationship between the parties, the negotiating process between them, the nature and goals of the transaction. Youssef underlines that: “tribunal or court may take these elements not merely as indication of consent, but as self-standing elements that feed, in their own right, the decision to extend or not to extend, within a larger context of complication of the process of ruling on jurisdiction.”<sup>127</sup> Hence, the wording of the arbitration agreement itself could revealed the implied intention of the parties to hear their disputes in a single set of proceedings.

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<sup>123</sup> Poland, Supreme Court, I CKN 822/97 (1998).

<sup>124</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 394.

<sup>125</sup> Devolvé, "Final Report on Multi-Party Arbitrations", 6(1) *ICC Bulletin* 26, 1995, 32.

<sup>126</sup> Karim Youssef, "The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration," 107.

<sup>127</sup> Ibid.

### 3.5 Compatibility of the Arbitration Agreements

As it was stated before, there are precedents when the disputes arising out of various contracts with different arbitration agreements or even if one of the contracts does not have arbitration clause at all. However, one should make sure that the arbitration agreements are compatible. For example, Swiss Federal Court, while deciding the case which involved a number of related contracts, made legal conclusion regarding compatibility of different arbitration agreements for joinder.<sup>128</sup> These contracts were concluded by the same parties. Each agreement contained its own incompatible arbitration clause, choosing different institution, seats and applicable law. Nevertheless, the tribunal united the disputes under the mentioned contracts in a single set of proceedings. Therefore, court ruled that: “the *inconsistencies* of the contracts between the same parties indicated that no consolidation was intended.”<sup>129</sup> In other words, the question of incompatibility of different arbitration agreements could be used as one of indicators of parties' intent to hear cases within a single set of proceedings. The same view is shared by a number of scholars such as Born<sup>130</sup> and Wolff.<sup>131</sup>

Pair underlines that not only difference in the constitution of arbitral tribunal and applicable procedure but also different seat in the same country could give rise to incompatibility.<sup>132</sup> In his

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<sup>128</sup> Switzerland, Tribunal federal, 4A.452/2007, (2008).

<sup>129</sup> Ibid.

<sup>130</sup> Born, *International Commercial Arbitration*, 1:2090.

<sup>131</sup> Reinmar Wolff, “Judicial Assistance by German Courts in Aid of International Arbitration,” *The American Review of International Arbitration (ARIA)* 19, no. 1 (2008): 877.

<sup>132</sup> Pair and Frankenstein, “New ICC Rule on Consolidation: Progress or Change, The,” 1077.

opinion, the difference in constitution of arbitral tribunal may arise from different numbers of arbitrators or when different qualifications of arbitrators is required or their selection differ.<sup>133</sup>

Blackaby et al. go even further arguing that: “in the multiple contract situations joinder by reference to institutional rules is suspended by the parties’ agreement in the following situations: incompatible seats, incompatible languages, incompatible choice of institution, incompatible choice of the procedure within the institutions, incompatible applicable law either on the merits or procedurally and different number, qualification or selection procedures for arbitrators.”<sup>134</sup> In other words, these scholars consider *incompatibility* of arbitration clause as an indicator that parties did not intend for joinder. That is why, there are more indicators of incompatibility than classical approach. The seat, rules of arbitration and constitution of arbitral tribunal should be defined for determination of the parties’ intent to hear their disputes jointly.

However, it should be noted that subsequent absence of the *wish* of one party to join the disputes in a single set of proceedings should not denote lack of foreseeability of consolidation at the conclusion of the contract.<sup>135</sup> Therefore, incompatibility of different arbitration clauses should be used, mainly, for extraction of parties’ intention for joinder rather than formal threshold for such joinder.

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<sup>133</sup> Ibid.

<sup>134</sup> Blackaby et al., *Redfern and Hunter on International Arbitration*, 195–199.

<sup>135</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 408.

## **CHAPTER 4: CONCERNS WHICH ARE RAISED WITHIN SINGLE ARBITRATION**

As it was stated before (Chapter 1, 2.1), the joinder as an invention of complex arbitration is a new tool in international commercial arbitration. Consequently, the methods and approaches which it uses may be contrary to already established principles and solutions. That is why, analysis of primary and case law as well as works of scholars shows the need to be cautious with the joinder of multiple disputes in a single set of proceedings.

This Chapter will analyze the concerns which joinder of multiple disputes in a single set of proceedings invokes. The Chapter will concentrate on Ensuring of the parties' rights to form tribunal and present the case (4.1) as well as issue of confidentiality (4.2), possible losses of efficiency (4.3) and other risks (4.4).

First of all, the Chapter 4 will address the issues of ensuring the parties' rights within the single arbitration. This includes the right to form arbitral tribunal (4.1.1) and equal possibility to present the case (4.1.2) with observing of the principle of good faith (4.1.3). The first and second issues connected with the provisions of New York Convention regarding the grounds to set arbitral award aside. That is why the respective provision of New York Convention will be analyzed in detail. Moreover, in any case the tribunal should examine whether the party, which objects against the joinder or asks for it, is acting in good faith.

The Chapter will deal with the main risks of arbitration proceedings which involve joinder (4.2). Among them, one should pay a special attention regarding the lack of legal certainty and problems with the enforcement of the arbitral award.

Furthermore, as it was stated before (2.2) the need of joinder could be explained by benefits it brings to arbitration proceedings. However, it should be analyzed in detail whether the joinder of the different proceedings will have opposite effect. In other words, the question of efficiency losses should be discussed (4.3).

Finally, it is well known that confidentiality is one of the major features of international commercial arbitration.<sup>136</sup> Therefore, the question whether the joinder of multiple process would violate this principle should be analyzed separately (4.4).

## 4.1 Ensuring Parties' Rights

Ensuring parties' rights within the single arbitration is especially *sensible* topic taking into consideration the provisions of the New York Convention. Under provisions of the Article IV (1) of the New York Convention the party seeking the enforcement of the award should provide the respective court, particularly, with arbitration agreement. At the same time, the New York Convention allows the court to refuse enforcement of the award if the party was unable to present its case (Article V (1) (b)) or composition of the tribunal or the procedure were not agreed (Article V (1) (d)). In other words, the enforcement proceedings will be always connected with the analysis of the arbitration agreement, under which the award was made, on ground whether the joinder influenced the parties' rights to present case and form arbitral tribunal.

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<sup>136</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 8.



Therefore, the tribunal should always make a record of the parties' agreement to joinder and ensure that the parties are treated equally.<sup>137</sup>

Born commented the possibility of enforcement of arbitral award in join case in the light of the provision of article V (1) (d) of the New York Convention in the following way.<sup>138</sup> The mentioned provision would not be offended if the joinder were based on the parties *implied* consent. This could be explained by the difference of the provisions of parts 1 and 2 of the Article V of the New York Convention, which stipulate the grounds for denial in recognition and enforcement. Party autonomy is limited only by the provisions of Article V (2) (a) and V (2) (b), which discuss *arbitrability* and *public policy* respectively.<sup>139</sup> So, the provision of the Article V (1) does not influence as much party's autonomy and, therefore, the violation of the Articles V (1) (b) and V (1) (d) of the New York Convention should not occur.<sup>140</sup> This position is also proved by the Federal Supreme Court of Switzerland.<sup>141</sup> In other words, if the consent of the parties was expressed, the probability of denial in enforcement of award in join case is even lower.

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<sup>137</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*., 409.

<sup>138</sup> Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer Law International, 2001), 695.

<sup>139</sup> Herbert Kronke, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010), 284.

<sup>140</sup> *Ibid.*, 291.

<sup>141</sup> Switzerland, Supreme Court, 108/85, (1982).

### 4.1.1 Right to Form Arbitral Tribunal

As it was mentioned before complex arbitration tools like joinder invoke many question within traditional system of arbitration. Platte, in particular, draws attention to the possible problems of *composition* of arbitral tribunal in case of joinder of multiple disputes in a single set of proceedings.<sup>142</sup> The *equal* treatment of all parties of dispute is fundamental principle of international commercial arbitration.<sup>143</sup> On the other hand, as it was stated before (2.2) arbitral proceedings try to be as efficient as they could be and to observe that the parties are acting in a good faith. That is why Hanotiau indicates that the balance between different aspects of arbitration should be stroked.<sup>144</sup> In particular, if the arbitration agreement itself is not clear enough, parties' right to a fair trial as well as the duty of the parties to act in good faith should be analyzed closely.

The practice shows that, in complex arbitration situations, the problems with formation of arbitral tribunal mostly arise in multi-parties situations. For example, in *Siemens AG v. Dutco Construction Co. case*, which was *multiple party* dispute, all of the parties were deprived from the right to nominate their arbitrators.<sup>145</sup> However, Cour de cassation decided that the limitation or waiver of the party's right is not violation of such right as long as all the parties are treated in the same way. At the same time, Cour de cassation stressed out that the award should be

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<sup>142</sup> Platte, "When Should an Arbitrator Join Cases?".

<sup>143</sup> Ibid.

<sup>144</sup> Bernard, "Complex Arbitrations—Multiparty, Multicontract, Multi-Issue and Class Actions," 208.

<sup>145</sup> France, Cour de cassation, *Siemens AG/BKMI Industrieanlagen GmbH v Dutco Construction Company*, XVIII YBCA 140 (1993).

annulled in case of *inherent unfairness* of one party of the dispute having a greater influence on the composition of the tribunal than the others.<sup>146</sup>

At the same time situation is different when the complex disputes involve *only* multiple contracts but not parties. Lew et al. are underlining that in a two party situation equal treatment of the parties is promoted if: “each party would have the right to appoint its own arbitrator and to agree, if parties can, on the chairman”.<sup>147</sup> In the light of abovementioned it is clear that *Dutco case* standard will be satisfied in dispute, involved only two parties, because each such party will have the same *influence* on composition of arbitral tribunal.

However, such position is not shared by some scholars, which indicate that additional features of international commercial arbitration should be taken into account. For example, Kröll argues that the right to appoint an arbitrator is a significant advantage of arbitration, and is highly valued.<sup>148</sup> Platte underlines that this right of appointment is intrinsically tied to the fairness and independence of the arbitral proceedings on the whole.<sup>149</sup> In other words, arbitrators should be very careful with true interpretation of true parties’ intention regarding the reason why they chose arbitration as a dispute resolution mechanism in the first place.

It should be noted that in two-party and multiple contracts dispute: “both parties can still appoint an arbitrator of their choice and are only restricted in so far as they cannot appoint different

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<sup>146</sup> Ibid.

<sup>147</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 406.

<sup>148</sup> Stefan Kröll, *Siemens-Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases*, Kluwer Arbitration Blog, Oct. 15 2010 available at <http://kluwerarbitrationblog.com/blog/2010/10/15/siemens-%E2%80%93-dutco-revisited-balancing-party-autonomy-and-equality-of-the-parties-in-the-appointment-process-in-multiparty-cases/>.

<sup>149</sup> Platte, “When Should an Arbitrator Join Cases?”.

arbitrators for each arbitration.”<sup>150</sup> In other words, standard of *Dutco* case is met. Though, Lew et al. stress that: “there are situations where parties do not wish to appoint the same arbitrator for the two arbitrations.”<sup>151</sup> According to Waincymer different expertise of arbitrators could be one argument against the consolidation of multiple contract dispute because the need for different experts could lead to the situation when “parties might want very different arbitrators depending on which contract is involved.”<sup>152</sup> Hence, the limitation of parties’ right to appoint arbitrators with different expertise may be seen as a violation of construction of arbitral tribunal.

However, the question regarding the relevant expertise of the arbitrators in different disputes should be analyzed with special caution. This should be done in order to avoid abuse of parties’ right and acting in bad faith. For example, the relevant need for expertise of arbitrators was discussed in two following cases before Supreme Court of Justice of Mexico (Mexican case)<sup>153</sup> and Metropolitan Court of Budapest (Hungarian case)<sup>154</sup>.

In Mexican case parties to arbitration agreement specified that arbitrators to be appointed should have expertise in accounting and broadcasting. After rendering the award in the case, one of the parties sought annulment arguing that arbitrators were not certified experts. One of the critical issues of this case was whether the arbitrators were experts on the subject matter. Appellate court and Supreme Court of Justice of Mexico ruled in favor of the award.

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<sup>150</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 380.

<sup>151</sup> Ibid.

<sup>152</sup> Waincymer, *Procedure and Evidence in International Arbitration*, 550.

<sup>153</sup> United Mexican States, Supreme Court, No 2160/2009 (2010).

<sup>154</sup> Hungary, Metropolitan Court of Budapest, *Vertesi Eromu Zrt. v. Villamosenergia-kereskedelmi Zrt.* No9.Gpk.41.813/2009/4 (2007).

On the other hand, in Hungarian case the agreement were silent on experts' issues. However, the parties stipulated that chose Hungarian law as applicable law and Hungarian language as language of arbitration proceedings. At the same time, one of the arbitrators was foreign lawyer. One of the question before court was whether the parties implied expertise requirement and whether the mentioned arbitrator met such requirement. The court in this case ruled that the arbitrator with foreign education background should have no problem to decide case even if Hungarian law is applicable.

Hence, the analysis of these two cases shows that the choice of applicable law is not a requirement for the arbitrator to have legal background of the specific jurisdiction. Moreover, it could be concluded that the arbitrators should first of all be expert of law not of facts unless the parties expressly stipulates otherwise.

#### **4.1.2 Equal possibility to present case**

In case of complex arbitration proceedings it is necessary to ensure the parties' right for a fair trial and this right is: "closely related to the right of the parties to present their case in an equal position."<sup>155</sup> According to the principle of equality the parties' rights are not violated if the parties are treated in the same way.<sup>156</sup>

The provisions of the Model Law also draw attention to the problems regarding parties' ability to present its case fully and other rights of the parties. Under the Article of 18 of the UNCITRAL

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<sup>155</sup> Bernard, "Complex Arbitrations—Multiparty, Multicontract, Multi-Issue and Class Actions," 101.; Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 409.

<sup>156</sup> Platte, "When Should an Arbitrator Join Cases?".

Model Law “each party shall be given a full opportunity of presenting his case”. Croft underlines that in situations where a party seeks to delay arbitration proceedings it may rely on this provision to argue that it can present evidence and submissions no matter how costly, lengthy and unnecessary they may prove to be.<sup>157</sup>

The equality principle is also closely connected with the provisions of the Article V (2) (b) of the New York Convention that regulates the possibility of denial of the award on the ground of public policy. Procedural public policy, in particular, includes principles of equal treatment of the parties and the right to be heard.<sup>158</sup> In this case the certain level of severity in violation of the public policy is required.<sup>159</sup> In other words, the formal and minor violation of the party right to present its case would not amount to violation of respective article of the New York Convention and, subsequently, lead to denial in enforcement of the award.

Pair argues that: “equal treatment, at its core, require equal opportunities.”<sup>160</sup> This position corresponds with equal influence on the arbitral tribunal issues, which were mentioned in a previous paragraph. Furthermore, Pair considers that even joinder of cases in which different tribunals were already constituted would not amount to violation of parties’ rights.<sup>161</sup> Additionally, Leboulanger underlines that the tribunals mostly unwilling to hear multiple disputes in a single arbitration when the latter involves multiple parties and not only multiple

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<sup>157</sup> Croft Clyde, Appendix II: The Development of Australia as an Arbitral Seat – A Victorian Supreme Court Perspective in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years*, ICCA Congress Series, Volume 16, Kluwer Law International, 2012, 227 - 25.

<sup>158</sup> Pair and Frankenstein, “New ICC Rule on Consolidation: Progress or Change, The,” 1083.

<sup>159</sup> Otto Dirk & Elwan Omania, *Article V(2), in Recognition and Enforcement of Foreign Arbitral Awards: a Global Commentary on the New York Convention*, (Kronke et al. eds.), 2010, 345, 366.

<sup>160</sup> Pair and Frankenstein, “New ICC Rule on Consolidation: Progress or Change, The,” 1083.

<sup>161</sup> Platte, “When Should an Arbitrator Join Cases?”.

contracts.<sup>162</sup> In other words, the preserving of equality between the parties is much easier during the joinder of multiple contracts disputes that involved only two parties.

### 4.1.3 Observing of Good Faith

As it was stated in the previous paragraphs, Ensuring the parties' rights is one of the task of the arbitral tribunal. However, these rights are not absolute. It is established that one of the basic principle of international commercial arbitration is that the parties bear the duty to cooperate in good faith in the performance of their agreement as well as in arbitral proceedings, including, the part of constitution of the arbitral tribunal.<sup>163</sup> This means that each party of the arbitration process should not abuse their rights to the detriment of another party. That is why, it is a necessity to examine whether the parties, while arguing regarding the joinder, are acting in a good faith.

Such inspection involves investigation of the previous dealings between the parties and pre-contractual relationship. For example, the parties cannot contradict itself or hide the arguments for the future possible dispute.<sup>164</sup>

Moreover, the arbitral institution and arbitrators have a correlative obligation to make sure that the duty of good faith is respected by the parties.<sup>165</sup> In other words, the tribunal should always

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<sup>162</sup> Leboulanger, "Multi-Contract Arbitration," 43–44.

<sup>163</sup> Bernard, "Complex Arbitrations–Multiparty, Multicontract, Multi-Issue and Class Actions," 107.; Leboulanger, "Multi-Contract Arbitration," 91.

<sup>164</sup> Fouchard et al., *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 820.

<sup>165</sup> Bernard, "Complex Arbitrations–Multiparty, Multicontract, Multi-Issue and Class Actions," 108.

carefully analyze whether the claims of the respondent against the joinder of the multiple disputes were done in a good faith or not.

To conclude, the tribunal should inspect carefully whether the facts of the case showing that the party is not acting in a good faith, in particular, using the arguments of protection of its rights.

## 4.2 Lack of Legal Certainty

As it was stated before the complex arbitration is developing now with many new cases coming year by year. However, the level of uniformity within the complex arbitration is rather low especially comparing with the general body of arbitration law.<sup>166</sup> Moreover, the basic documents of international commercial arbitration – the New York Convention and UNCITRAL Model Law are staying silent on the issues of single arbitration. That is why regulation of single arbitration is largely depends on the position of national courts. The courts invented many new legal mechanisms to allow joinder of multiple parties.<sup>167</sup> However, such legal mechanisms are not uniform and could be applied only on case-by-case basis. In such situation, complex arbitration and, in particular, issue of single arbitration characterize by lack of centralization and certainty.

Consequently, the uncertainty and unpredictability create the effect of “sociological defect”.<sup>168</sup>

This defect undermines desirability of international arbitration. In particular, “sociological

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<sup>166</sup> Karim Youssef, “The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration,” 112–113.

<sup>167</sup> Ibid., 115.

<sup>168</sup> Ibid.



defect” encourages not enforcing arbitration awards voluntary.<sup>169</sup> This in turn undermines the benefits of arbitration proceedings which are known for their time saving.

The other risk that complex arbitration faces is the different approach that used in traditional and emerging jurisdiction. As it was stated before, the current development of the single arbitration issue is based rather on court practice than on universal standards of New Convention and UNCITRAL Model Law. In other words, the joinder of different disputes in a single set of proceedings is based on new liberal trends. Unsurprisingly, many national courts decline to apply recently adopted regulation, including the issues of single arbitration.<sup>170</sup> This undermines the efficiency that hearing of the multiple disputes within a single set of proceedings possesses.

That is why in the light of the duty of arbitrators to render enforceable award<sup>171</sup>, the tribunal should make comparative law analysis regarding the possibility of joinder in all jurisdictions with closest connection to arbitration proceedings.<sup>172</sup>

Therefore, as emerging tool of international commercial arbitration joinder is facing critics and concerns. The latter connected with the risk of rendering unenforceable award as well as dragging out the arbitration process.

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<sup>169</sup> Quentin Tannock, “Judging the Effectiveness of Arbitration through the Assessment of Compliance with and Enforcement of International Arbitration Awards,” *Transnational Dispute Management (TDM)* 3, no. 4 (2006): 76–77. Brower Charles and Sharpe Jeremy, “*The Coming Crisis in the Global Adjudication System*”, 19 *Arbitration International* (2003, no. 4), 418.

<sup>170</sup> Karim Youssef, “The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration.” 116.

<sup>171</sup> See, for example, the ICC Arbitration Rules Art. 35 “[T]he Court and the Arbitral Tribunal ... shall make every effort to make sure that the award is enforceable at law.”

<sup>172</sup> See, for example, ICC Case No. 5721, in Sigvard JARVIN, Yves DERAIS and Dominique HASCHER, eds., *Collection of ICC Arbitral Awards 1986-1990* (Kluwer/ICC Publishing 1994), p. 401 et seq.

### 4.3 Possible Losses in Efficiency

In the previous chapters it was mentioned that the joinder of the multiple disputes within a single set of proceedings promote the efficiency of arbitration. Therefore, this tool of the complex arbitration is becoming more spread nowadays.

On the other hand, this view is not shared by some scholars. For example, Waincymer argues that the proceedings which involve multi-party and multiple disputes issues, particularly, in case of consolidation may cause the losses in efficiencies of such proceedings.<sup>173</sup> Among the mentioned losses the most common are the following: problems with tribunal composition, greater difficulty in coordination of proceedings and due process generally. These losses may undermine the benefits of the joinder.

However, one should remember that efficiency benefits of the single arbitration are not enough for joinder of multiple disputes within single set of proceedings. In Waincymer's opinion: "consideration of questions of fairness and efficiency should be seen as merely means by which consent can be implied, rather than alternative paradigms."<sup>174</sup>

The similar position is also shared by court practice and Hanotiau. The latter underlines that the parties should consent to hear their disputes jointly at least implicitly because: "mere concern for the good administration of justice cannot prevail over the intent of the parties."<sup>175</sup> Moreover, in *Gyn't of United Kingdom v. Boeing Co* case Federal Court of Appeals ruled that: "[the] court is not permitted to interfere with private arbitration arrangements in order to impose its own view

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<sup>173</sup> Waincymer, *Procedure and Evidence in International Arbitration*. 496.

<sup>174</sup> *Ibid.*, 546.

<sup>175</sup> Bernard, "Complex Arbitrations—Multiparty, Multicontract, Multi-Issue and Class Actions." 375.

of speed and economy.”<sup>176</sup> In other words, on its own the efficiency could not be a strong argument for joinder of multiple disputes within a single set of proceedings even if state courts are involved. Therefore, the issue of the original parties’ intent to have a single arbitration is extremely relevant during arbitration proceedings. Moreover, the mentioned issue is especially valuable for practical approach.

Moreover, some authors argue that joinder is not a necessity.<sup>177</sup> In other words, without joinder all cases within a group could be decided separately and independent. However, this tool becomes necessity when the rights or obligation of the parties are indivisible.<sup>178</sup>

Therefore, it could be argued that in case the joinder of multiple disputes is not necessary and may have disadvantages comparing to having separate disputes.

#### 4.4 Joinder without Consent and Confidentiality

As it was mentioned before there is a possibility to join multiple disputes within a single set of proceedings without parties’ consent. However, such invokes another problem of confidentiality of the arbitration proceedings.<sup>179</sup>

In accordance with Strong’s position: “many parties choose to arbitrate their disputes rather than litigate them precisely because they do not want certain information, such as trade secrets,

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<sup>176</sup> Unites States of America, Second Circuit Federal Court of Appeal, *Gvn't of United Kingdom v. Boeing Co.*, 998 F.2d 68 (1993).

<sup>177</sup> Thomas Rüede and Reimer Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht: Nach Konkordat Und IPRG* (Schulthess Polygraphischer Verlag, 1993), 255.

<sup>178</sup> Pair and Frankenstein, “New ICC Rule on Consolidation: Progress or Change, The.” 1064.

<sup>179</sup> Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*. 401.

revenue, and other sensitive data, to become public”.<sup>180</sup> Many other scholars share the view that the private character of arbitration proceedings is a valid ground against the joinder of different proceedings in a single arbitration.<sup>181</sup> That is why the question of confidentiality should be analyzed separately for the purpose of joinder.

It should be noted that the confidentiality argument would not work in two party situation.<sup>182</sup> This is happening because the parties of joined proceedings are by definition are not public and, moreover, all information in two party situation would be available for any party to the agreement.

Besides, the case law shows that the courts might not be willing to protect parties’ confidentiality in the arbitral proceedings. For example, in *Eso Australia resources v. Plowman* the High Court of Australia ruled out that confidentiality is not inherent in the nature of the arbitration.<sup>183</sup> Therefore, it will be difficult to oppose joinder of arbitration proceedings solely on the grounds of the confidentiality.

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<sup>180</sup> S I Strong, “Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure,” *Vand. J. Transnat’l L.* 31 (1998): 915, 938.

<sup>181</sup> See Michael Collins, “Privacy and Confidentiality in Arbitration Proceedings,(1995),” *Arbitration International* 11, no. 3 (n.d.): 321–336.; Leboulanger, “Multi-Contract Arbitration.” 43, 65; Nicklisch, “Multi-Party Arbitration and Dispute Resolution in Major Industrial Projects.” 57, 69.

<sup>182</sup> Pair and Frankenstein, “New ICC Rule on Consolidation: Progress or Change, The.” 405.

<sup>183</sup> Commonwealth of Australia, High Court, *Eso Australia resources v. Plowman* (1995).

## CHAPTER 5: CONCLUSION

This paper has provided the overview of the phenomena of joinder and the most common features and concerns, which are connected with the joinder. Literature and case law do not provide with one clear-cut definition of this tool. However, the *joinder* could be defined as a tool of complex arbitration which allows to join several disputes arising out of multiple contracts in a single set of proceedings. This means that instead of the several separate proceedings and, consequently, arbitral tribunals dealing primary with the issues of one particular contract only one tribunal will be formed. Furthermore, this tribunal will hear all disputes together in one proceeding.

The joinder is becoming more popular nowadays. Firstly, this could be explained by spreading of international commercial arbitration in general. Secondly, special attention should be paid to the need of effective dispute resolution mechanism for complex international relationship, which, in particular, involves multiple contracts. In this regard the work analyzed the benefits of joinder. The most prominent of them are prevention of inconsistent decision, cost and time efficiency. This view is shared by many scholars (*Redfren, Hunter, King, Lew, Born and others*). They argue that all participants will benefit from formation of one tribunal to hear the issues arising out of various contracts together if such contracts are interrelated. One of the other major benefit is avoiding inconsistent decision because issues of all related contracts will be analyzed and decided together. The procedural efficiencies of the joinder especially could be seen in litigation proceedings. However, unlike the latter arbitration proceedings on the parties' consent. That is why it is a special duty of the tribunal to extract the true parties' intention to hear their dispute jointly. The clear consent of the parties for joinder could be indicating first of all in the wording

of the arbitration agreement. At the same time, it may be argued that the consent of the parties is not necessary if national statute or case law enable the joinder through court proceedings. However, the analysis of statutes and case law shows that even courts apply some requirements for joinder which are close to the indicators of implied consent to join the disputes.

Furthermore, the task of arbitral tribunal, whether to unite the disputes and hear them together, is not difficult when the wording of arbitration agreement is clear. However, in practice the most pressing question is whether it is possible to join the disputes if the respective arbitration agreement is not clear on this issue. This becomes, primarily, the question of the parties' consent. First of all, it should be mentioned that recourse to the arbitration rules, which allow joinder, is not a sufficient ground for such joinder. That is why other indicators of the parties implied consent to hear their disputes jointly should be found. Among them the present work concentrated on presence of *master contract*, *one economic transaction*, *wording* of the arbitration agreements and their *compatibility*. Landmark cases show that in situation when one contract is governing the subsequent ones parties implicitly agreed to have joinder. The ground for such solution is relatedness of the contract. The contracts are related to one another also in situation when they form one economic reality or transaction. The latter is merely represented by several separate contracts, which unlike in the "master contract" case could be of the same influence and importance. Besides, the most prominent way of interpretation of the implied consent of the parties is realizing through the wording of the arbitration agreement. For example, the implied consent for joinder could be found when all arbitration agreements in various contracts, concluded by the parties, are identical. At the same time, incompatibility of the arbitration agreement could be evidence that parties do not consent to hear their disputes jointly.

Additionally, one should remember that the joinder could result in violation of the parties' *rights to present the case and form arbitral tribunal*. Moreover, joinder could cause legal *uncertainty, efficiency losses* and infringement of *confidentiality* principle. The rights of the parties to form arbitral tribunal and present the case are guaranteed by the provisions of the New York Convention. Therefore, non-compliance with such rights may result in refusal of enforcement of the respective arbitral award. And, consequently, this may cause the lack of legal certainty that the award will be enforced. However, the above-mentioned rights should be preserved during any arbitration proceedings. In two-party situation joinder of the disputes should not automatically violate such rights if the equality of the parties preserved. Nevertheless, situation is different, in particular, when arbitration agreement expressly provides requirement of different expertise for the respective arbitrators. Some scholars (*Waincymer, Ruede*) disagree that joinder of the disputes is efficient solution in dispute resolution mechanism. They stress that efficiency could be lost in joinder and in any cases efficiency reasons by themselves could not be legal ground to join disputes. Furthermore, "confidentiality" issue of joinder is more relevant in multiple parties situation because if all disputes are raised out from the contracts concluded by the same parties they will have access to the documents in any way.

Lastly, what it has been shown in this paper is the diversity of the approaches towards the joinder taken by different scholars and case law. One should notice that although there is a tendency to allow joinder among many jurisdictions, the main arbitration statutes (New York Convention and UNCITRAL Model Law) are silent on this issue. That is why in practice arbitrators should be careful in a decision to join the disputes. In any case such decision should be based on the deep analysis of all facts of the case, which show expressed or implied consent of the parties to hear their disputes in a single set of proceedings.

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