



COMPLEX ARBITRATIONS: MULTIPARTY AND MULTICONTRACT DISPUTES

Dr. Galina Zukova
International Arbitration Practice, Paris
Riga Graduate School of Law

Presentation plan

- 1. Overview of the problem**
- 2. Examples of transactions involving multiple parties and multiple contracts**
- 3. Issues arising in multi-party and multi-contract arbitrations**
 1. Multiple parties
 - a. From the outset
 - b. Joinder of additional parties
 - c. As a result of consolidation of cases
 2. Multiple contracts
 - a. From the outset (Request/Answer(s))
 - b. As a result of consolidation of cases
 3. Joinder / consolidation / constitution of the Arbitral Tribunal / costs
 4. Enforcement issues

Overview of the problem

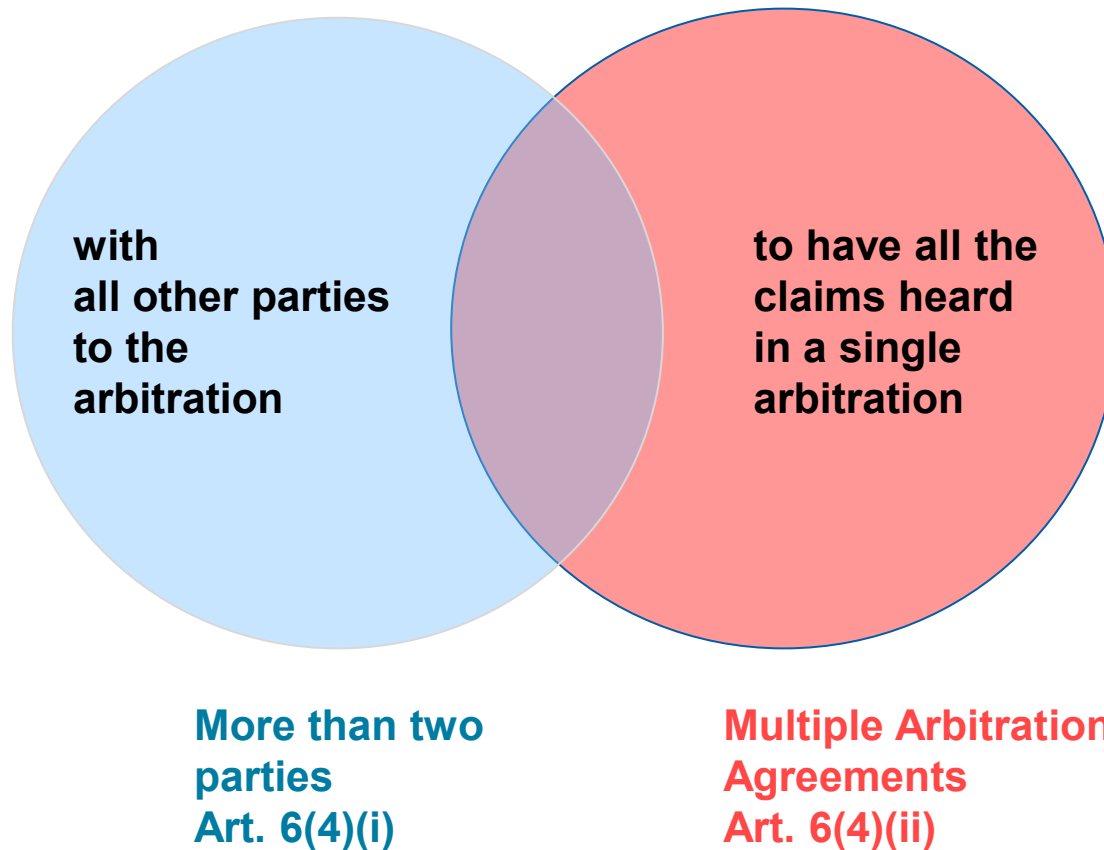
- **Is there a need for a special regulation?**
- **ICC Court's statistics (2013):**
 - New cases: 767
 - Number of parties: 2 120
 - => Approximately 1/3 of cases: multiple parties
 - One case filed in 2007 had 28 different parties!
- **2012 changes to the ICC Rules of Arbitration**
- **Other Rules follow**

Importance of consent

- **Consent as an underlying notion in arbitration**
- **“Extension” of the arbitration agreement**

Jurisdiction in Multiparty and Multicontract Scenarios: Two Dimensions (ICC Rules)

Each party must have agreed to arbitrate:



Scenarios of multi-party and multi-contract arbitrations

- **Single contract with more than two parties**
 - SPA, STA
- **Single contract plus relevant non-signatories**
 - Agents and other representatives
 - Assignees
 - Third-party beneficiaries
 - Guarantors
 - Non-signatories within the same group of companies
- **Related contracts with the same parties**
- **Related contracts with different parties**
 - Construction
 - M&A Acquisition guarantor
 - Joint venture contracting with third party

Agency

- **2010 UNIDROIT Principles**

- *Article 2.2.3*

(1) Where an agent acts within the scope of its authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly affect the legal relations between the principal and the third party and no legal relation is created between the agent and the third party.

- **French Civil Code**

- *Article 1984*

An agency or power of attorney is a transaction by which a person gives to another the authority to do something for the principal and in his name. []

- *Article 1998*

A principal is bound to perform the undertakings contracted by the agent, in accordance with the authority granted to him. []

Assignment

- **2010 UNIDROIT Principles**

- *Article 9.1.1.*

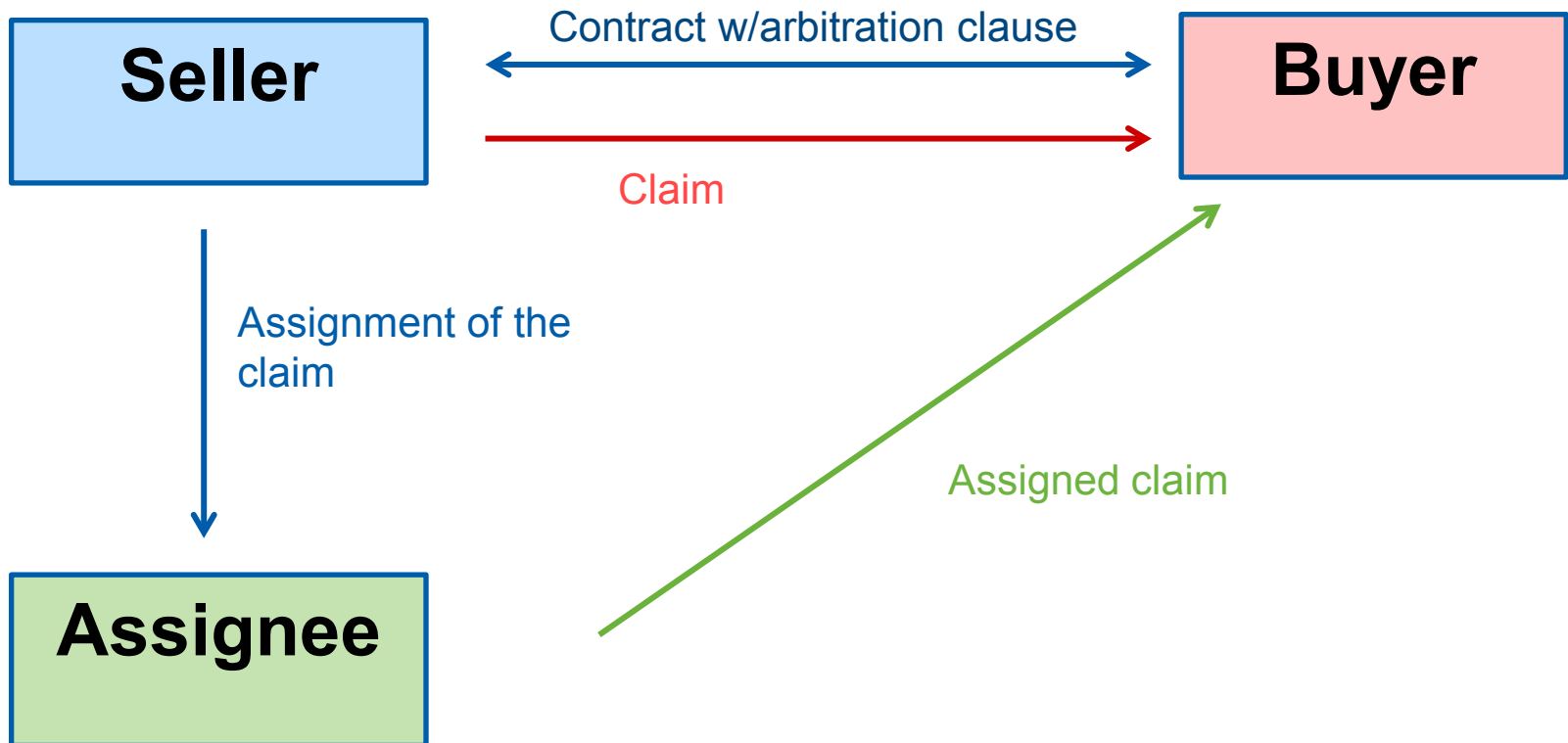
- “Assignment of a right” means the transfer by agreement from one person (the “assignor”) to another person (the “assignee”), including the transfer by way of security, of the assignor’s right to payment of a monetary sum or other performance from a third person (the “obligor”).

- **French Civil Code**

- *Article 1689*

- In case of assignment of a claim, or of a right or of an action against a third party, delivery takes place between the assignor and the assignee by handing over the instrument of title.

Assignment



Third-Party Beneficiaries

- **2010 UNIDROIT Principles**

- *Article 5.2.1*

- (2) The existence and the content of the beneficiary's right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.

- **Swiss Code of Obligations**

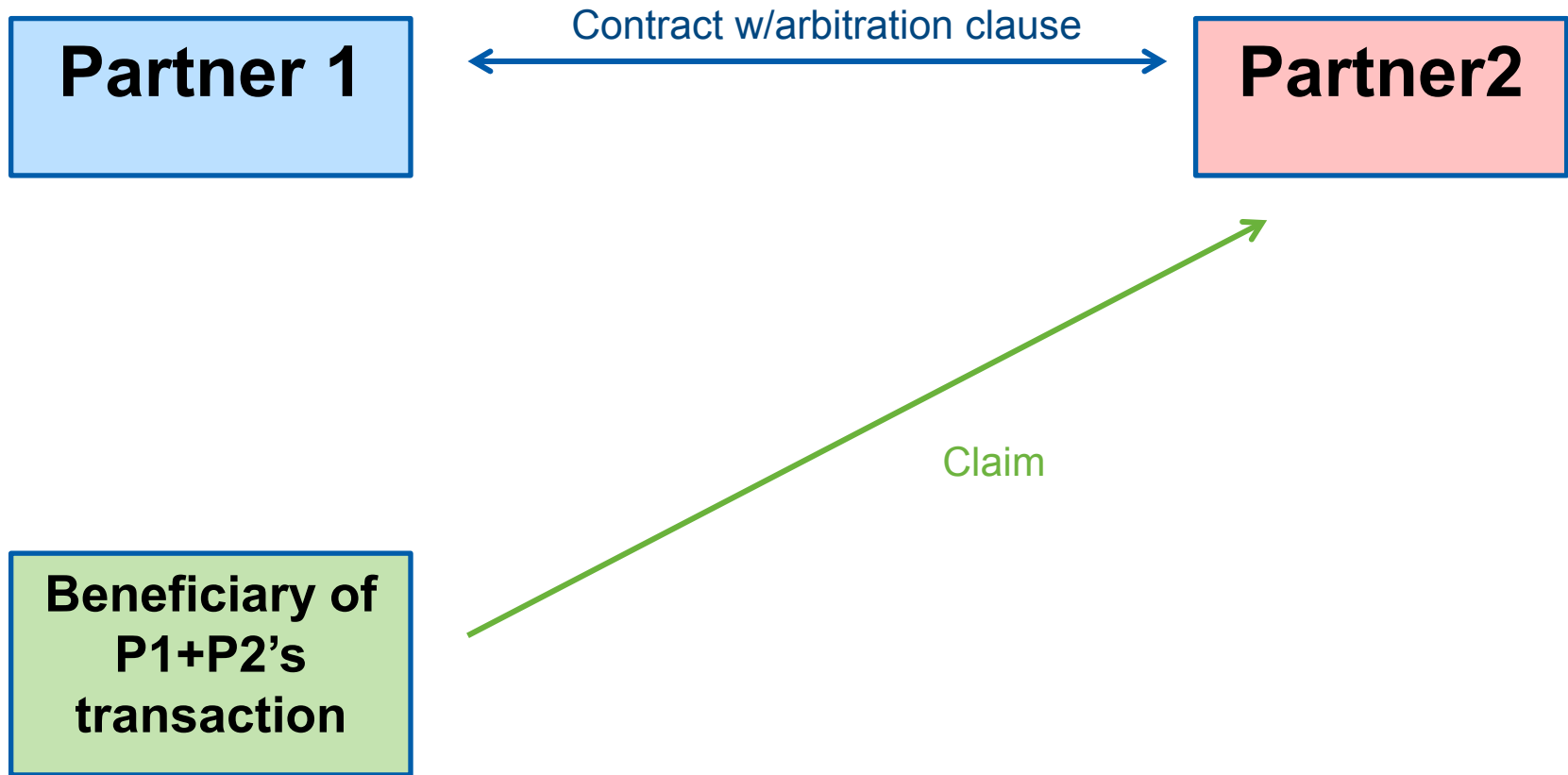
- *Article 112*

- "1 A person who, acting in his own name, has entered into a contract whereby performance is due to a third party is entitled to compel performance for the benefit of said third party.

- 2 The third party or his legal successors have the right to compel performance where that was the intention of the contracting parties or is the customary practice. []".**

- [emphasis added]

Third-Party Beneficiaries



Non-signatories

- **Players:**

- Other companies of the group
- Directors
- Shareholders
- Non-signatory members of the joint venture

- Piercing of corporate veil concept

- **Grounds:**

- Involvement in the conclusion or performance of the contract containing the arbitration clause

Non-signatories

- **(1) Dow Chemical France (France), (2) The Dow Chemical Company (USA), (3) Dow Chemical A.G. (Swiss), (4) Dow Chemical Europe (Swiss) vs ISOVER SAINT GOBAIN (France), ICC Award 4131 (1982)**

“Considering that it is indisputable — and in fact not disputed — that DOW CHEMICAL COMPANY (USA) has and exercises absolute control over its subsidiaries having either signed the relevant contracts or, like DOW CHEMICAL FRANCE, effectively and individually participated in their conclusion, their performance, and their termination;

Considering that irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (une réalité économique unique) of which the arbitral tribunal should take account when it rules on its own jurisdiction subject to Article 13 (1955 version) or Article 8 (1975 version) of the ICC Rules .

Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.” (emphasis added)

Non-signatories

- ***Société Jaguar V 2000 v. Société Project XJ 220 ITD et autres*, Cour d'appel de Paris (1Ch. D), 7 December 1994:**

“In the law of international arbitration, the effects of the arbitration clause extend to parties which are directly implicated in the performance of the contract as long as their situation and their activities give rise to the presumption that they were aware of the existence and the scope of the arbitration clause so that all legal and economic aspects of the dispute are brought before the arbitrator.”

(English translation as cited in Karim Y. Youssef, *Consent in Context: Fulfilling the Promise of International Arbitration (Multiparty, Multi-Contract, and Non-Contract Arbitration)*, West Thomson, 2009, p. 150.

The Role of the ICC Court

- **Determination of *prima facie* existence of an arbitration agreement or arbitration agreements, Article 6(3) +**
 - Article 6(4)(chapeau): one arbitration agreement
 - Article 6(4)(i): one arbitration agreement and multiple parties
 - Article 6(4)(ii): multiple arbitration agreements (NB: => multiple contracts)
- **Constitution of the Arbitral Tribunal**
- **Fixing the costs**
- **Scrutiny of the draft Award**

Article 6(4)(i): one arbitration agreement and multiple parties

- The arbitration shall proceed between those of the parties with respect to which the Court is *prima facie* satisfied that an arbitration agreement under the Rules that binds them all may exist

- The threshold for the Court's decision :
 1. The contract on which the claims are based contains an arbitration clause
 2. The arbitration clause refers to arbitration under the auspices of the ICC
 3. The contract containing the arbitration clause is signed by all of the parties

OR

- If not signed by all the parties, the non-signatory party/ies participated in the negotiation, execution, performance or termination of the contract containing the arbitration clause

Multicontract Arbitration: Setting The Boundaries

- **When?**

- Claims arising out of or in connection with more than one contract
- Single arbitration
- One or more arbitration agreements under the Rules

- **Question to answer:**

- could all the parties have agreed to have their claims heard together in a single arbitration?

Article 6(4)(ii): Multiple arbitration agreements

- **The arbitration shall proceed as to those claims with respect to which the Court is *prima facie* satisfied**
 - that the arbitration agreements may be compatible
 - The Court considers:
 - Constitution of Arbitral Tribunal: number, method, time-limits
 - Place of arbitration
 - Language
 - Considerations of applicable law
- AND**
- that all the parties to the arbitration may have agreed that those claims can be determined together in a single arbitration
 - The Court considers:
 - Whether all parties are signatories to all contracts
 - The “group of companies” exception
 - The “at least one contract” exception
 - Same economic transaction considerations

Joinder of Additional Parties (Article 7 ICC Rules)

- **Terminology**
 - Joinder
 - Additional Parties
- **Equal treatment between the parties**
 - Right to identify parties without decision from the ICC Court
 - The Additional Party's agreement is necessary to modify the arbitration clause
 - Participation in the constitution of the arbitral tribunal
- **Time Limitation:** Constitution of the Arbitral Tribunal
- **Notion of Parties to the Proceedings:** Participation in a claim
- **Issues of jurisdiction subject to decision of Arbitral Tribunal and, as the case may be, *prima facie* jurisdiction control by the ICC Court**
 - Article 6(3)
 - Article 6(4)(i)

Consolidation

- **Administrative act by the Court not subject to reconsideration by the Arbitral Tribunal**
- **The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, in 3 instances:**
 1. The parties have agreed to consolidation; **or**
 2. All claims are made under the same arbitration agreement; **or**
 3. Where the claims in the arbitrations are made under more than one arbitration agreement,
 - the arbitrations are between the same parties, **and**,
 - the disputes arise in connection with the same legal relationship, **and**
 - the Court finds the arbitration agreements to be compatible.

Constitution of the Arbitral Tribunal

- **Participating in arbitral tribunal constitution is a fundamental right**
- **What happens when there are multiple parties?**

Constitution of the Arbitral Tribunal

- Participating in arbitral tribunal constitution is a fundamental right
- What happens when there are multiple parties?

Multiple claimants or respondents (Article 12(6) ICC Rules)

- Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, **the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation** pursuant to Article 13.

Additional parties (Article 12(7) Rules)

- Where an additional party has been joined, and where the dispute is to be referred to three arbitrators, **the additional party may, jointly with the claimant(s) or with the respondent(s), nominate an arbitrator for confirmation** pursuant to Article 13.

Constitution of the Arbitral Tribunal

- **What happens when the multiple parties failed to jointly nominate the arbitrator and agree on the constitution of the arbitral tribunal?**
- ***Dutco* case, Cass. Civ. 1re, 7 janvier 1992, pourvoi n°89-18708;89-18726, Bull. civ. 1992 I N° 2 p. 2**
 - French *Cour de Cassation* considered the principle of equality in the appointment of arbitrators as a matter of public policy

Constitution of the Arbitral Tribunal

Multiple claimants or respondents (Article 1453 French Decree)

- If there are more than two parties to the dispute and they fail to agree on the procedure for constituting the arbitral tribunal, the person responsible for administering the arbitration or, where there is no **such person, the judge acting in support of the arbitration, shall appoint the arbitrator(s).**

Article 12(8) of the ICC Rules: a reaction to *Dutco*

- In the absence of a joint nomination pursuant to Articles 12(6) or 12(7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, **the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president.** In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 13 when it considers this appropriate.

Costs (ICC Rules)

- **General rule:**
 - Advance on costs on the basis of the amount in disputes

- **Multiple claims: Article 36(4) of the ICC Rules:**
 - Where claims are made under Article 7 [joinder of additional parties] or 8 [claims between multiple parties], the Court shall fix one or more advances on costs that shall be payable by the parties as decided by the Court

Enforcement of the arbitral award

- **New York Convention**

- *Article V*

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: []

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration []

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties []

Enforcement of the arbitral award

- **French Decree**

- *Article 1520*

An award may only be set aside where:

- (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or
- (2) the arbitral tribunal was not properly constituted []