Analysing the Concept of Court – Ordered Consolidation in Multi – Party / Multi – Contract Arbitrations

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Abstract

At present, arbitration is one of the popular and trusted methods of dispute resolution in the commercial realm. The level of party-autonomy and the comparative simplicity of the proceedings make the parties fond of this mode of dispute settlement. However, even arbitration is not free from issues and problems. One such issue pertains to the multi-party/multi-contract arbitrations. Arbitrations are simpler only where it involves two or three parties. But when the numbers increase, the level of complexity also escalates. Likewise, in a situation where multiple contracts are involved between multiple parties in a single business transaction (say construction) a single dispute can lead to a whole maze of disputes. In such cases, separate arbitrations in each dispute can lead to some serious issues like conflicting awards, enforcement of such awards, loss of time and money etc. Different arbitral institutions have come up with their own rules governing the problem. However, in ad-hoc arbitration, parties confronting such situations are left in utmost chaos. Thus, to resolve this situation, various methods have been adopted. One such method is court-ordered consolidation. Though the concept is gradually losing its girth on the issue, it is still significant concept in the arbitration jurisprudence. Multi-party/Multi-contract arbitration is an issue addressed by many but hardly a few have analysed the concept of court-ordered consolidation as a prospective solution to this issue. Moreover, the level of complexity of such analyses makes it difficult for a beginner to understand the issue. This manuscript aims at analysing the concept of court-ordered consolidation in multi-party/multi-contract arbitrations and the issues attached to it in a fairly lucid manner.

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1. INTRODUCTION

Globally, the Alternative Dispute resolution (ADR) jurisprudence has recognised the principle that an agreement (or the consent of the parties) is a prerequisite to an arbitration proceeding. The contractual nature of arbitration affords the parties greater control over the choice of the arbitrator(s) and the procedural adjustments depending upon the nature and pith of the dispute.[1] This flexibility is one of the major reasons why parties often resort their disputes to arbitration. Generally stating, arriving at an agreement to refer the dispute to arbitration is quite straightforward, when there are only two parties involved in a dispute. Both the claimant and respondent can forthrightly arrive at a mutual settlement to resort the matter to arbitration in case of an existing or a future dispute. However, this fascinating 'simplified angle' of arbitration, while it may hold to be true in many disputes, is not always the case.[2]

Things change a little in the disputes involving more than two parties and/or more than one contract. The actual international business setups today, involve a complex maze ofcontracts, be it only between two parties or more than two parties. The premise lies in the fact that today, the majority of business entities perform multiple operations. These multiple operations, in turn, are backed by a proper legal setup in the form of contracts. Thus, there can also be no denial of the fact that a business setupcan involve multiple contracts with multiple parties for one task. For a simple instance, take a hypothetical example of a simple construction contract, where a cliententers into a contract with a builder for constructing a multiplex in the heart of a city. The builder, in turn, makes several contracts with the sub-contractors, who in turn can have even more contracts with (say) the suppliers of the concrete, labourers, and so on.Even this small hypothetical example involves numerous contracts between numerous parties for a single subject matteri.e. construction of a multiplex. In the actual sense, as we shall see in the upcoming sections, there can be even more complex

[1]Gary Born, *International Commercial Arbitration: Commentary And Materials*1 (Transnational Publishers, 2nd ed.,2001).

[2]Julian David, Mathew Lew,*et. al.*, *Comparative International Commercial Arbitration*3 (Kluwer Law International, 2003).

contractual arrangements in a business. These different contracts may each have a specified clause for dispute resolution mechanism (either an ADR mechanism or traditional litigation), which could obviously be different from that contained in other contracts.

Such a situation can lead to a complex situation involving a lot of concurrent arbitrations and litigations all relating to the same subject matter or the similar issues arising out of a dispute. The consequences of such a farrago involve high costs in terms of both money and times, loss of business, and most importantly the complexities involving the enforcement of 'conflicting decisions' coming out of these concurrent arbitrations and court actions.

The civil litigationmechanism in almost all countries provide for ample provisions to deal with multi-party/multi-contract situations. These include joinder of parties, consolidation, joinder of claims, intervention, interpleader, impleader, class action etc. These devices are, generally, not as easily available in case of arbitration. It is for this reason why it is generally said that multi-party/multi-contract disputes are best resolved in traditional courts.[3]

Focusing solely on arbitration, many arbitral institutions have developed certain mechanisms to deal with the above situation.[4] However, the parties are left at a difficult and a complex juncture in case of ad-hoc arbitration. In such cases the best solution can be arrived at, if all the matter arising out of a single subject matter can be resolved together in a single arbitration rather than being subjected to numerous dispute resolution boards. A number of methods have been adopted worldwide to accommodate these multi-party/multi-contract arbitrations. These methods include:[5]

1. String Arbitration;
2. Court-ordered Consolidation;
3. Concurrent hearings (with the same arbitrator for all the separate arbitrations);&
4. Consolidation by Consent

[3]Richard Garnett,*A Practical Guide To International Commercial Arbitration* 15 (Oceania Publication Inc., 2nd ed.,2000).
[4]*Id*. at 19.
[5]Alan Redfern, *Law and Practice of International Commercial Arbitration* 315 (Sweet & Maxwell, London, 4th ed., 2004).

However, despite all this, there are a series of problems associated with the ad-hoc arbitration in multi-party/multi-contract situation. This paper aims at analysing some of these problems and the adequacy of 'court-ordered consolidation' as a method for resolving these problems.

Section two of the paper deals with the research approach (methodology) adopted by the author. This section also discusses the scope to which this article extents. Section three provides an understanding of the concept of Multi-Party and Multi-contract disputes. This section also provides for some diagrammatic illustrations of the respective concepts. Section four of the paper deals with the concept of court-ordered consolidation to provide a glace of the concept to the reader. Some major issues and problems that arise in the case of court-ordered consolidation are discussed in section five. Then, section six provides for the Indian stand on the issue of court-ordered consolidation. The paper finally concludes in section seven that the concept of court-ordered consolidation is a good solution to the problems that usually arise in multi-party/multi-contract disputes though the issues that arise with it must be paid attention to while consolidating the arbitrations.

2. RESEARCH APPROACH& SCOPE

In the instant article, the author has analysed the concept of court-ordered consolidation as a solution to multi-party/multi-contract arbitrations. Multiple arbitrations pertaining to same or similar issues in one subject-matter can have serious repercussions. To avoid these repercussions, court-ordered consolidation is one of the modes adopted worldwide. This article is a theoretical study based on literature and internet study. Multi-party/multi-contract dispute are the matters of utmost complexity and are equally intriguing. Thus, to avoid such complexity, this article does not include all the issues pertaining to the concept. The author has only touched the major issues that arise in the court ordered consolidation. Various arbitral institutions worldwide have come up with their own rules to tackle the problems in multi-party/multi-contract disputes. However, ad-hoc arbitration still faces a lot of problem when it comes to disputes involving a maze of parties and contracts in a single business transaction. Except for where it is otherwise mentioned, the article does not deal with the approach of different institutions towards multi-party/multi-contract dispute. The article only focuses on ad-hoc arbitration.

3. MULTI-PARTYAND MULTI-CONTRACT DISPUTES

Multi-party arbitration can arise in a situation involving more than two parties to a dispute. The International Chamber of Commerce, in 2012, reported that more than one-third of arbitrations, worldwide, involve more than two parties.Such disputes, generally stating, can arise in two circumstances, *viz.*, first, involving more than two parties to a single contract, and second, involving several parties to several contracts,all relating to the same subject matter of the dispute.[6]Here it becomes imperative to analyse each of these circumstances in some detail.

3.1 More than two parties to a single contract

In our day to day commercial environment, we come across many such instances where more than two parties are involved in a single agreement. Joint-venture agreements are a common example, where two and mostly more than two parties come together in a business relationship dealing with the same subject matter. Partnerships can be another prominent example of this kind. Fig. 1 is a diagrammatic illustration of the abovementioned arrangement.

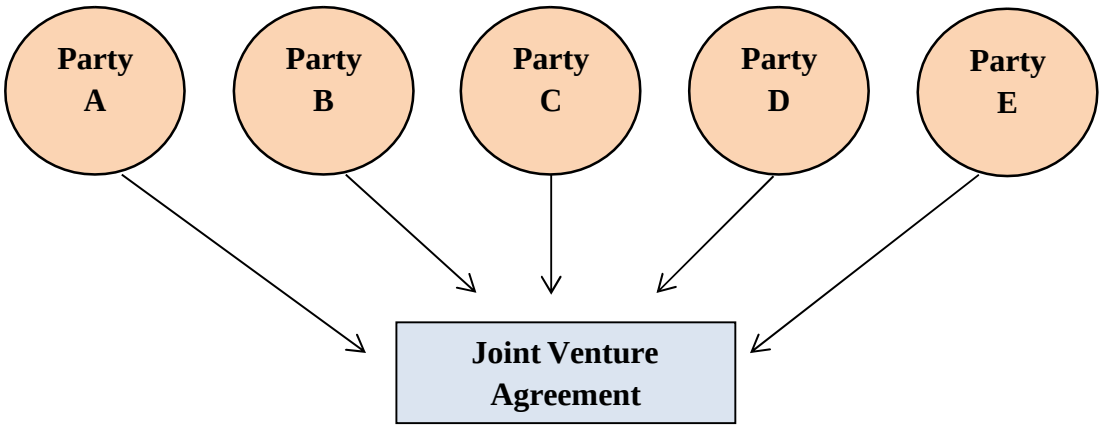


Figure 1:Diagrammatic illustration of several parties to one contract arrangement

In the illustration provided above, there would be a single arbitration clause in the joint venture agreement itself governing a dispute amongst all the five parties to the agreement. Normally, such agreements are comparatively easily dealt with in case of arbitration. Since

[6]*Id.* at 16.

there is only one clause governing all the parties to the dispute, the situation does not turn out to that complex as it happens in the other case, as we shall see next.

However, even such an arrangement faces some problems in the practical sense. A widely known problem is the one of appointment of the arbitrators. Such a problem does not arise in case of litigation where there is, usually, no party autonomy and parties have no say in the appointment of a judge to hear the matter.

Each party would want to nominate/appoint its own arbitrator in a panel comprising of three arbitrators, leaving the choice of the third arbitrator either on the two chosen arbitrators or on some arbitral institution. No party would be generally willing to 'let go' the opportunity of choosing an arbitrator for the panel, since it gives the party a sort of confidence that the working of the panel would be neutral. However in the situations, as diagrammatically illustrated above, it would be outrageously complex to allow all the parties to choose its own preferred arbitrator. It would be highly impractical in the situation involving even more parties, say ten or fifteen. Even where the arbitration is one to be presided over by a sole arbitrator, it would be practically very difficult to get all the parties to agree to one party's choice of arbitrator, as would generate a sense of partiality in the minds of other parties.[7] The absence of any express provision in this regard in the agreement itself can cost the parties a lot.

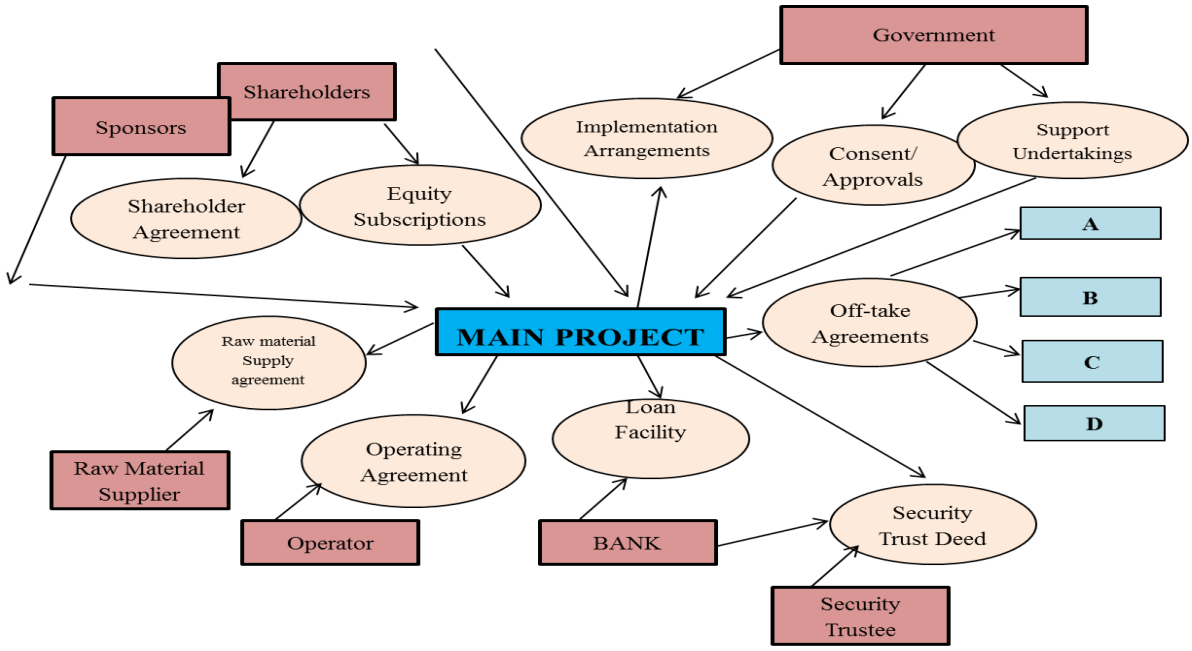
The gravity of the matter can be identified from the fact that such situation can lead to the challenge and incidental annulment of the arbitration award coming out of such arrangement on the ground of inequality in the appointment of the tribunal.[8]

3.2 Several Parties to Several Contracts

Such type of arrangement is majorly encountered in big business endeavours. Parties rarely take into consideration, while negotiating an agreement, the impact that the dispute resolution mechanism can have because of subsequent agreements with new parties.[9] This results in the

[7]Volodymyr Rog, "Joinder of Multiple Disputes between same parties: Issue of single arbitration",*available at:* http://www.etd.ceu.hu/2014/rog_volodymyr.pdf (last visitedon July 06, 2021).
[8]*Siemens AG/BKMI v.Ducto Construction Company*, XVII YBCA 140 (Cour 'd appel France 1993).
[9]AnchitOswal, "Consolidation of Arbitration-Where is India Headed?",*Kluwer Arbitration Blog*, December 1, 2017,*available at:* https://rb.gy/hkwzr2 (last visited on July 06, 2021).

complex problem of multiple dispute resolution clauses between different parties. Construction projects can be the best example. In large construction projects, a number of parties come together and enter into a number of different contracts with each other. These numbers increase even further in the international business setups. Being linked to one subject-matter, these contracts often tend to have a back-to-back effect on each other in terms of liability.[10] The problems would turn out to be even more complex if each of these contracts has a separate dispute resolution clause. That is to say, if there are, say, fifteen contracts between thirty parties relating to a small construction project, each of these fifteen contracts may have fifteen different dispute resolution clauses, which can obviously be different from the others. Some contracts may have an arbitration clause, others may, at the same time, have resorted to traditional litigation. In the event of a dispute, all the fifteen contractual relationships will resort to their individual dispute resolution clauses. Such arrangement results into what we call Conflicting decisions of different dispute resolution forums. Even if we imagine that all the parties would have included an arbitration clause in their respective contracts, it may, as aforesaid, result in conflicting awards coming out of different arbitrations over same the subject matter.



[10] *Supra* note 5, at 321.

Figure 2: Diagrammatic illustration of Several Parties to Several Contracts arrangement

Fig. 2 illustrates such a maze of several-parties to several contracts arrangement. The above illustration is a hypothetical arrangement involving multiple parties and multiple contracts between them relating to one 'Main Project'.

In such circumstances, there is a high probability that each of these several contracts could contain separate arbitration clauses resulting in multiple arbitrations on same or similar issues and eventually resulting in conflicting awards. These awards could be inconsistent to each other, which ultimately gives rise to another problem of enforceability of inconsistent awards. Such problems can be avoided at the best where all the matters arising out of one subject can be addressed and resolved together, and not separately, in one arbitration proceeding.

Such a situation was once confronted by the English Court of Appeal in **Abu Dhabi Gas Liquefaction case**.[11] In this case, the gas plant owner (plaintiff) started arbitration proceedings against the plant constructor (main contractor) under an international construction contract for defective construction of a gas tank. The main contractor alleged that it was the fault of the sub-contractor, which in the case was a Japanese firm. Thus, he, in turn, initiated arbitration proceedings against the sub-contractor. The matter subsequently came before the English Court of Appeal regarding the appointment of an arbitrator. There, Lord Denning observed that in order to save time and money, it would be appropriate if the two arbitrations could be consolidated and heard together. This would even avoid the problem of conflicting awards. However, it must be noted here, that Lord Denning also indicated in this very case that court has no power to consolidate two separate arbitrations without the consent of the parties involved in the dispute.[12]

4. COURT-ORDER CONSOLIDATION

As discussed earlier, there are four possible measures adopted popularly to tackle the multi-party/multi-contract arbitrations. One of these measures is 'Court-Ordered Consolidation'. By

[11] *Abu Dhabi Gas Liquefaction Co Ltd v. Eastern Bechtel Corp*,(1982) 2 Lloyd's Rep. 425.
[12] *Ibid*.

consolidation is meant the act or process of uniting several pending arbitrations into one hearing before the same panel of arbitrators. Although the parties may not necessarily be the same, we do find the same or similar subject matter, common questions of law and fact, and substantially similar issues and defences.[13]Court-ordered consolidation, as the name suggests, refers to a scenario where national courts order consolidation of two or more separate arbitrations revolving around the same or similar issues of law and fact.[14] In a multi-party/multi-contract dispute parties often seek to resolve all the matters together, in a single arbitration only. Thus, in the absence of any contractual arrangement, parties often resort to tribunals or courts to decipher the intentions of the parties and allow consolidating multiple arbitration proceedings.[15] Consolidated arbitration is without a doubt a prominent way in resolving associated disputes in no more than one arbitral proceeding. This arguably saves time, money, and relationships of course.[16]

The sort of power of courts to consolidate arbitral proceedings is a jurisdictional issue. Some jurisdictions have express legislative provisions allowing such consolidation while others have no such express provision.[17] There are several countries where express provisions have been enacted in this regard.

In Hong Kong, the Hong Kong Arbitration Ordinance expressly permits the compulsory court-ordered consolidation in arbitrations, where there exist common issues of fact and law and the relief claimed is in respect of the same transaction.[18] In the Netherlands, the power of the courts to consolidate arbitral proceeding is implied in a contract which does not expressly excludes it.[19] In the United States of America, the Federal Arbitration Act is silent on the issue of compulsory consolidation.[20] Under English Law, the compulsory consolidation of

[13]Matthew D. Schwartz ,"Multiparty Disputes and Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma"22 Case Western Reserve Journal of International Law 342(1990).
[14]*Supra* note 5, at 325.
[15]*Supra* note 9.
[16]Niyati Ahuja, "Research guide on International Arbitration", *available at:* DOI: 10.13140/RG.2.2.16221.67047 (2019).
[17]W. Michael Reisman, *International Commercial Arbitration. Cases, Materials and Notes on the Resolution of International Business Disputes* (University Casebook Series, Foundation Press, 1997).
[18] Hong Kong Arbitration Ordinance, 2011, schedule 2, s. 2.
[19] Netherlands Arbitration Act, 2015,art. 1046.
[20]*Supra* note 17.

arbitration by courts is not allowed.[21] The English Statute clearly respects the party autonomy and the parties have been given the exclusive right to decide whether to resort to tribunals or courts to consolidate the proceeding or not. Similarly, French law does not seem to have recognized the court-ordered consolidation.[22]

Court-ordered consolidation may seem to be a prominent solution in multi-party/multi-contract arbitrations but there are a series of issues that arise with this seemingly fascinating concept.

5. PROBLEMSWITH COURT-ORDERED CONSOLIDATION

Where different parties to different contracts relating to the same subject-matter are struggling for resolving their dispute before multiple arbitrations, in the absence of an express clause in the respective contracts to consolidate such arbitration, resorting to the national-courts is one of the solutions to the complex problem. However, court-ordered consolidation may seem to be a convenient way of dealing with a maze of multi-party/multi-contract disputes, it does come with some serious issues. These issues are dealt with hereunder:

5.1 Consensual Nature of Arbitration in Conflict with Court-Order Consolidation

Arbitration is typically characterised as a creature of a contract.[23] The nature of arbitration as a dispute resolution mechanism is such that its validity derives its essence from the consent of the parties.[24] A fundamental objection to court-ordered consolidation of multi-party/multi-contract arbitrations is that it strikes the very basic element of arbitration, which is, party autonomy over the contract. Some authors even go to the extent of saying that where a statutory provision empowers a court to order consolidation of arbitrations, it contravenes the

[21] English Arbitration Act, 1996,s.35.

[22] George M Vlavianos, Consolidation of International Commercial Arbitral Proceedings in the Energy Sector, *Lexology*, January 31, 2019,*available at:*https://www.lexology.com/library/detail.aspx?g=425d0485-ad65-44be-b679-916347209fad (last visited on July 06, 2021).

[23] Gary Born, *International Commercial Arbitration: Commentary And Materials*1 (Transnational Publishers, 2nd ed., 2001).

[24] Angela Carazo Gormley ,Institutional Approaches To Multi-Party And Multi-Contract Disputes In Arbitration, *Mondaq*, May 9, 2016,*available at:* https://www.mondaq.com/arbitration-dispute-resolution/489396/institutional-approaches-to-multi-party-and-multi-contract-disputes-in-arbitration (last visited on July 06, 2021).

contractual nature of the arbitration. Craig observes the above-mentioned issue in the following words:

> "…In view of the nature of arbitration as a contractual institution, the issue is whether the effect of the law at the place of arbitration, when it permits such consolidation, overcomes the lack of contractual intent on the grounds that the contractors must be deemed to have contracted in the knowledge of, and subject to, provisions of such law."[25]

It has also been argued that ordering consolidation by a court is, in a way, rewriting the governing agreement between the parties.[26] Many authors also argued that where the parties to a dispute agree to submit for arbitration in a country which has a statutory enactment allowing court-ordered consolidation (like the Netherlands), it should be deemed that the parties have tacitly submitted to the prospective court-ordered consolidation as well.[27] However, such international setups also come up with some significant difficulties, the foremost being the enforcement of the award under the New York Convention, and the inconsistency in the law applicable to the contracts where the contract was made and the law of the place of such consolidated arbitration.[28] Thus, in a way, court-order consolidations can work best only in the domestic atmosphere and not in the international setting.[29]

5.2 The Selection of Arbitral Tribunal

In a multi-part/multi-contract arrangement, there is generally seen that different agreements have different clauses for the appointment of the arbitral tribunals. Some agreement may provide 'x' number of arbitrators; some for 'y'; some of 'n'. Also, different agreements could have different modes of appointment of the arbitrator(s). When a court orders consolidation, it obviously would alter and interfere with the agreement between the parties, thereby, refining the argument that court-ordered consolidation contravenes the party autonomy over the

[25]Manjirao Chi, "The Fading of Compulsory Consolidation of Arbitration: A Fight between the Principles of Efficiency and Party Autonomy in International Commercial Arbitration", *Research Gate*, September 2008,*available at:* https://rb.gy/uaeeh7 (last visited on July 06, 2021).
[26]*Ibid.*
[27]Fraser Davidson, *Arbitration* (Scottish Universities Law Institute, 2000).
[28]*Supra* note 5, at 327.
[29]Second report of the Departmental Advisory Committee on Arbitration Law (DAC),May 1990.

agreement. Such consolidation leads to impediments in ascertaining the number and method of appointment of the arbitrators.[30]

However, there are certain statues which have dealt with the problem. Article 1046 (4) of the Netherland Arbitration Act, 2015[31] *inter alia* provides that where the parties could not reach on an agreement over the appointment of the arbitrator(s), the president of the District Court ordering consolidation (the concept of *third party* not touched for being beyond the scope of this article) would make an appointment for them. He can also fix procedural rules which shall apply to the consolidated proceedings. Section 11 of the Arbitration and Conciliation Act, 1996 (as amended in 2015) also contain similar provisions.[32]

5.3 Procedural Inconsistencies

The above two issues only relate to the pre-arbitration stage. Once the proceeding commences, some procedural irregularities and issues come to surface. Procedural aspects are, as such, relaxed in arbitral proceedings in comparison to traditional civil courts. However, the procedural leash starts to tighten when multiple parties are involved.

One such problem is one of ensuring confidentiality. International commercial disputes often engage such situations, where the parties have to disclose some of the confidential information before the arbitrators. However, where multiple parties are involved, it would be highly likely that some of the parties may not be comfortable in sharing their confidential information in relation to only, say, one party in front of all the parties. For instance, where some crucial data is involved in the matter between 'A' and 'B', disclosure of such data in front of 'C', 'D', 'K', 'X', etc. who, no doubt, are parties to the consolidated proceeding, can also take undue advantage of that disclosed data against 'A'. Thus, 'A' would not be comfortable in disclosing this information. But consolidated proceedings can turn out to be negative in this situation.

Another fundamental principle in international arbitration (even in domestic arbitrations for the matter being) that all the parties must be treated equally. Both the UNCITRAL Model

[30] *Supra* note 5, at 328.
[31] Netherlands Arbitration Act, 2015, art. 1046.
[32] Arbitration and Conciliation Act, 1996, s. 11.

Law and the New York Convention recognises the cardinal requirement of equal treatment in arbitrations. Enforcement of an award can be refused where such equality is not granted in a proceeding.[33] Thus, for instance, the question of how much time is to be granted to each party can lead to serious problems if inequality comes to picture.[34]

Along with this, another issue that can come to the surface is the 'opposite' of what is generally believed to be an advantage of consolidated proceedings. The supporters of court-ordered consolidation believe that such consolidation saves time and cost of the parties. However, the opposite can also be true. There are high chances where such proceedings can take even more time and cost due to high complexities involved. The benefits of the court-order consolidated arbitrations are often enjoyed by the big sharks over the expense of small fishes which just are involved in a minor issue. For these parties, the consolidated proceedings are even costlier than separate arbitration.[35]

Thus, it can be observed that court-ordered consolidation comes with a series of issues and problems which are more likely to affect the usefulness, as believed by the supporters, of the concept as a whole.

6. INDIANPOSITIONON COURT-ORDERED CONSOLIDATION- A BRIEF

The Arbitration and Conciliation Act, 1996 under the ambit of Section 11 provides for the provisions of court-ordered consolidation in India. Section 11, in general, deals with the 'Appointment of Arbitrators'. Sub-section (4) of the said section provides for a mechanism where the Supreme Court or, as the case may be, the High Court or any person or institution designated by such court, can make the appointment, on the request of a party, in two condition*viz.*, if the party fails to appoint an arbitrator within thirty days of receiving the request to do so from the other party; or where the two appointed arbitrators fail to agree on the third arbitrator within thirty days of their appointment. Likewise, sub-section (5) of the said section also provides that where the parties fail to appoint a sole arbitrator, the Supreme

[33] UNCITRAL Model Law on International Commercial Arbitration, 1985(adopted on 21 June 1985) and New York Convention, art. V 1(b).
[34]*Supra* note 5, at 325.
[35] B Ted Howes and Allison M Stowell,"The Consolidation Dilemma: Is There Finally a Pragmatic Solution?" 10 *Dispute Resolution International* 3 (2016).

Court or, as the case may be, the High Court or any person or institution designated by such court, can make the appointment. Further, sub-section (6), (6A), (6B), (7), (8), (9), (10), (11), (12), and (13) deal with the court's power to appoint arbitrator(s) on the request of a party to dispute. However, the Act does not expressly provide for the provisions concerning multi-party/multi-contract disputes.

However, time and again various High Courts and the Hon'ble Supreme Court have played predominant roles in consolidating multi-party/multi-contract disputes. One such case was the infamous **'Sukanya Holdings'** case in 2003.[36] Though the case was involving multiple domestic parties to the dispute, the Supreme Court built a strong observation in the consolidation jurisprudence in India. It was observed by the Apex Court that where the subject matter of the dispute can be covered both under arbitration and a traditional suit, which also involves non-signatory parties, the court is not empowered to bifurcate the cause of action and thus, cannot make only a 'partial reference' to arbitration. It was the view of the top court, before the amendments of 2015 in the Arbitration and conciliation Act, that the court cannot refer a suit to arbitration, without the consent of all the parties to such reference.[37]

Another case of reference can be the **Chloro Controls**case of 2013.[38] In this case, the Indian counterpart to the dispute filed a suit seeking an injunction order against two non-signatory parties. Relying upon the observation of the Supreme Court in **Sukanaya Holdings**[39]the plaintiff contended that the parties must not be referred to arbitration since they are non-signatories. Interestingly, the Supreme Court observed that all the multiple agreements involved in the case where parts of a single composite transaction. The court further said that all the agreements involved in the dispute, by and large, were supplementing the shareholders' agreement which was a 'parent agreement'. Thus, the court held that even a non-signatory can be referred to arbitration, provided, if it is proven that such party is claiming through a signatory party.

[36]*Sukanya Holdings (P) Ltd v. Jayesh H. Pandya*, (2003) 5 SCC 531.
[37]*Afcons Infrastructure Ltd v. Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24.
[38]*Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641.
[39]*Sukanya Holdings (P) Ltd v. Jayesh H. Pandya*, (2003) 5 SCC 531.

The judicial barricade constructed in the **Sukanya Holdings**[40]in referring non-signatories to arbitration was done away with the Arbitration and Conciliation (Amendment) Act, 2015. Post this amendment, even non-signatories, claiming through or under a signatory party, can seek reference of a dispute to the arbitration from the court in domestic arbitration. This is widely recognised as the 'through or under test'.

Recently, in **DuroFelguera, 2017**[41] a tricky situation was involved. The dispute involved multiple contracts and multiple parties having some contracts between an international (foreign) party and a domestic party and some more contracts between two domestic parties. This maze-like situation brought the dispute under the ambit of both domestic and international arbitration. DuroFelguera contended before the Supreme Court of India that all the agreements between the parties were separate agreements and each of these agreements contained a standalone arbitration clause and that the parties do not have any intention to consolidate arbitrations.[42]The resistance to the consolidation was based on the argument that such consolidation would amount to the consolidation of domestic and international arbitration and if that would be the case, the Indian Subsidiary of *Duro (DFSA)* i.e.*Felguera (FGI)* would lose the opportunity of challenging the award under Section 34 (2A) of the Arbitration and Conciliation Act, 1996. Section 34(2) states that:

> *"(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:*
>
> *Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence."*

This is a wide power provided by the Act, available only in domestic arbitration. The Supreme Court observed that being a combination of both domestic and international

[40]*Ibid.*
[41]*M/s DuroFelguera S.A. v M/s Gangavaram Port Ltd.*,2017 SCC OnLine SC 1233.
[42]*Supra* note 9.

arbitrations, 'a composite reference' of the dispute will not be proper.[43] The Supreme Court, thus, constituted six separate arbitration tribunal with common arbitrators out of which two were international arbitral tribunals and four were domestic arbitration tribunals.[44]

Recently in **Global Infonet, 2019, [45]** the Delhi High Court gave a significant judgement in context of consolidation of arbitration proceedings. The court observed that all the three arbitration agreements were the parts of three principal distribution agreements which altogether constituted a single transaction between multiple parties. The court, following the now settled law that a reference in case of non-signatories to all the arbitration agreements can be made, as discussed above, rejected all the objections. Further, the court consolidated the three potential arbitration proceedings into one single arbitration proceeding.[46]

7. CONCLUSION

After analysing the concept of multi-party/multi-contract arbitrations, it can be concluded that though the concept is a fascinating solution in tackling the multi-party/multi-contract disputes, it also has some issue connected with it. Deciding which dispute is suitable for consolidation and which is not is absolutely dependent on the facts and circumstances of each case. Merely consolidating the proceedings that have a same subject matter can cost the parties in long term. The court consolidating the proceeding must analyse certain questions, pertaining to the party-autonomy, need and necessity of such consolidation etc., before consolidating the arbitrations.

The approach of the world towards court-ordered consolidation has changed today. Where initially various countries had the provisions for'compulsory court-ordered consolidation', now such consolidation respect party autonomy and such consolidation initiates at the request of a party to dispute only. There is a significant need for a critical revaluation of the concept worldwide. The arbitral institutions are coming up with specific rules dealing with multi-party/multi-contract disputes. However, the parties resorting to ad-hoc arbitration have to face

[43] *Ibid.*
[44] *Ibid.*
[45] *Global Infonet v Lenovo*, CS(COMM) 658/2017.
[46] Vijayendra Pratap Singh *et. al*., Consolidation of Arbitration Proceedings- Global Infonet v. Lenovo and Ors, *AZB & Partners*, October 21, 2019,*available at:*https://rb.gy/smynaw (last visited on July 06, 2021).

a lot of trouble in dealing with the situation. Uniform rules must be formulated, internationally, that can govern such matters even in ad-hoc arbitrations for facilitate the smooth and efficacious functioning of arbitrations.

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