Joint venture disputes

Resolving deadlock through arbitration

Illustration: Getty Images

When parties to a joint venture disagree, arbitration may be the best way to resolve the dispute. **Jane Player** and **Claire Morel de Westgaver** of **Bird and Bird** report on this growing area.

The globalisation of international business relationships has led to a proliferation of international ***joint ventures*** (*see Glossary*) and multi-party collaboration agreements. Inevitably, disputes will arise. ***Arbitration*** is the natural dispute resolution method for international disputes, especially joint venture disputes. (*For further information on joint ventures, see feature article "Joint ventures: an overview", www.practicallaw.com/7-200-8251. For further information on arbitration, see feature article "Arbitration: litigation by another name?", www.practicallaw.com/9-208-6993.*)

This article examines:

- The benefits of arbitration in joint venture disputes, particularly in the case of international joint ventures.
- Arbitrability: whether the dispute is capable of being resolved by arbitration.
- Scope of the arbitration agreement: this often determines whether the arbitrators have jurisdiction over the dispute.
- Remedies: arbitration can offer many types of relief. Arbitrators' powers can extend to ordering a sale of shares or terminating the joint venture agreement itself.
- Multi-party arbitrations: many joint venture agreements involve more than two parties (for example, not only all the business partners or shareholders of the joint venture company, but also the joint venture company itself). (*See also box "State party arbitrations".*)

BENEFITS

The advantages of arbitration are especially relevant to joint venture disputes. In some situations, such as multi-party undertakings or due to project complexity, arbitration may be the only acceptable alternative to litigation (*see box "ADR"*). The particular benefits of arbitration for joint venture disputes are:

Neutrality

Arbitration permits international disputes to be resolved in a neutral forum by independent decision-makers. By picking a neutral jurisdiction as the ***arbitration seat***, the joint venture partners can avoid litigating in courts of a country where:

- One of the parties is based.
- There are shortcomings in terms of time, costs or outcome.
- There are concerns regarding unknown legal systems, foreign languages and possibly unsympathetic foreign courts.

In selecting the location for arbitration, some ***forum shopping*** may be required.

Privacy

In most cases, arbitration allows parties to resolve disagreements in private. This benefit is even more crucial in cases where the project is still ongoing and the joint venture partners are attempting to maintain a "business as usual" attitude. If a dispute becomes public, this can not only damage the reputation of the business but also ruin the viability of the project/joint venture.

Expertise of tribunal

For technical disputes within a particular industry, appointing arbitrators with sector-specific expertise provides both a significant advantage and greater predictability. The arbitration clause can stipulate the requisite qualifications of the arbitration panel. However, it is often better to leave this issue open until a dispute arises. Once you know the nature of the dispute as well as the strategy you wish to adopt, you can make a more informed decision regarding the background and capabilities of the panel.

State party arbitrations

As a vehicle for foreign investment, joint venture agreements may involve public bodies or publicly-owned companies. This may raise a number of issues (which are outside the scope of this article) including:

- Joinder of the non-signatory state to the proceedings.
- State immunity.
- Changes in the law of the state.
- State aid.
- Bribery.

Final and enforceable decision

Investment projects are often operated on an international basis with business partners and/or joint venture companies located in different countries. Thanks to the New York Convention 1958 and its ratification by over 140 countries (*www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html*), a foreign arbitral award is more easily enforced overseas than a judgment delivered by a domestic court. In addition, joint venture partners are normally keen to resolve their dispute quickly so they can decide the future of their joint venture, if it still exists and/or is viable. As a result, parties driven by business priorities and cost control are increasingly attracted to arbitration because of the lack of (or restricted) right to appeal and limited grounds to challenge the award.

ARBITRABILITY

The New York Convention 1958 as well as most of the international arbitration regimes apply only to disputes capable of settlement by arbitration. This excludes the types of disputes that, for public policy reasons, belong exclusively to the domain of the court under the relevant domestic law. The following factors are likely to be relevant in determining whether a dispute is arbitrable:

- The ***lex arbitri*** (usually the law of the seat).
- The law applicable to the substance of the dispute.
- The law of the place of enforcement.

In many jurisdictions, the boundaries of arbitrability have been pushed further and further. Depending on the nature of the issues involved, most disputes arising out of, or in relation to, joint venture agreements are arbitrable, including issues relating to:

- Breach of the joint venture agreement.
- Competition law.
- Intellectual property rights (IPRs) (although in some jurisdictions such as France, Spain and Brazil, issues relating to the validity of registered IPRs are deemed unarbitrable).

Issues usually considered unarbitrable include:

- Bankruptcy.
- Shareholder statutory claims; that is, all claims relating to shareholder statutory rights such as an unfair prejudice claim (*see box "Arbitrability of shareholder statutory claims"*). These are typically provided for by company legislation in the jurisdiction where the joint venture company is incorporated. This jurisdiction does not necessarily correspond to either the arbitration seat or the applicable law.

The winding up of the joint venture company (for example, resulting from the termination of the joint venture agreement) may also raise arbitrability issues. Whether the arbitral panel can dissolve the company, if it is felt that the company's shareholders are otherwise unable to resolve the dispute, may vary according to the relevant legal system (*see "Remedies" below*).

SCOPE

Subject to their arbitrability, disputes covered by a standard arbitration clause containing the common expression "arising out of or in relation to" include not only contractual but also tort and statutory claims. The arbitration clause can be included in the letter of intent, joint venture or co-operation agreements as well as the joint venture company's articles of association. The scope of the arbitration clause tends to be a relevant issue in joint venture disputes, depending mostly on the contract containing it, the entities party to it and its wording. In some circumstances particular to joint venture disputes, the scope of the arbitration clause may be extended *ratione materiae* (that is, in terms of the disputes covered) and/or *ratione personae* (that is, in terms of the parties involved).

Ratione materiae

The scope of the arbitration clause included in the joint venture agreement may be extended to other contracts which do not have an arbitration clause (usually an implementing contract or a contract subsequently negotiated in the context of the joint venture), provided there is:

- No conflicting clause in the other contract.
- A substantial link between the two contracts, whether economic (*International Chamber of Commerce (ICC) Arbitration No. 7929, Yearbook (XXY) 2000, p. 312*) or structural (for example, one contract is complementary to the other or refers to the performance of the other).

In one arbitration case, the arbitrator based his reasoning for linking the joint venture agreement and the implementing agreements on the theory of "group of contracts" (*ICC Arbitration No. 8342 in 1996*). In other words, given that both the joint venture agreement and the implementing agreements were part of the execution of a single project, a breach of an implementing agreement amounted to a breach of the joint venture agreement. The scope of the arbitration clause contained in the joint venture agreement could therefore be extended to this implementing agreement.

Ratione personae

The scope *ratione personae* relates to who can/should be party to arbitral proceedings. The contractual nature of arbitration means that only parties who undertook to submit their disputes to arbitration can be party to it. Effectively it often means that there can be no joinder of a third party unless that third party as well as all current parties to the arbitral proceedings consent to it.

This mechanism is reflected in the London Court of International Arbitration (LCIA) Rules, which empower the tribunal to allow joinder of a third party on application of one party provided the third party as well as the applicant party consent to it (*article 22*). This power of the tribunal replaces the need of the other parties' consent and therefore facilitates joinders of this kind.

Under the Rules of Arbitration of the ICC (ICC Rules), if the respondent does not file an answer or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the ICC Court may decide that the arbitration will proceed if it is *prima facie* satisfied that an arbitration agreement may exist (*article 6(2)*). When the claimant files its request for arbitration against multiple respondents of whom one or more is a non-signatory, the ICC Court uses this power to determine whether the matter can proceed against all the respondents.

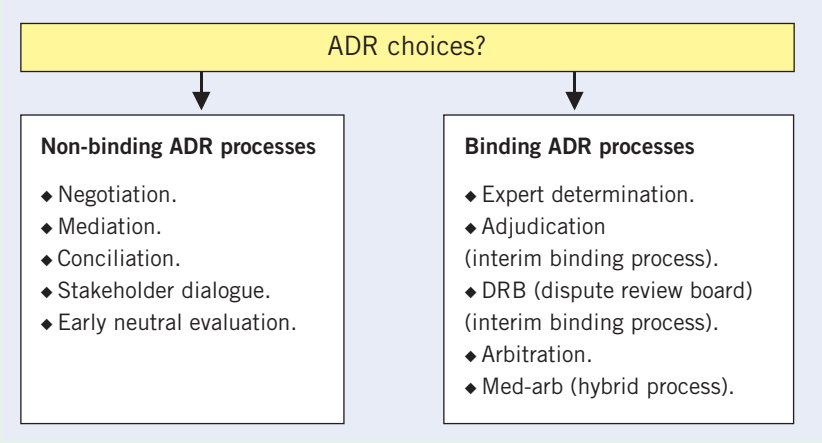
Assignment. In cases where the joint venture agreement can be assigned or a third party can buy shares in the company, the question arises of whether the

ADR

Alternative dispute resolution (ADR) is a generic name for a number of non-adversarial procedures by which parties seek to reach a negotiated resolution of their disputes, without recourse to litigation, either with or without the assistance of an independent third party. As a type of binding ADR process, arbitration is an alternative to resolving disputes through litigation, which still provides an enforceable decision given by a third party in accordance with established legal principles. With non-binding ADR processes, any agreement reached is embodied, normally in a mutually agreed contract which in itself becomes enforceable.

Non-binding ADR processes are "without prejudice". This means that statements made during the procedures, orally or in writing, cannot be given in evidence in later proceedings (litigation or arbitration), except where the only issue in dispute is whether or not negotiations did in fact result in a binding agreement.

There are a number of ADR mechanisms available to parties to a dispute, as shown below:



Arbitrability of shareholder statutory claims

Under English law, the arbitrability of shareholder statutory claims appears uncertain in relation to petitions under section 459 of the Companies Act 1985 (section 459 petition) (now replaced by section 994 of the Companies Act 2006), which offers unfairly prejudiced members of a company the right to apply to court for an order.

A section 459 petition has been held capable of being referred to arbitration and judicial proceedings initiated under this provision were stayed (*Re Vocam Europe Ltd [1998] BCC 396*). In contrast, another case held that statutory rights conferred on shareholders to apply for relief were inalienable and that such disputes were not arbitrable (*Exeter City AFC Ltd v Football Conference Ltd and another [2004] EWHC 2304 (Ch)*). The judge in the *Exeter City* case relied heavily on an Australian case (*A Best Floor Sanding Party Ltd [1999] VSC 170*).

The position in other jurisdictions varies, for example:

Australia. The court has held that matters arising under the Corporations Act can generally be submitted to arbitration, but only if they do not concern the parties' rights stemming from the statute, instead of the contract (*ACD Tridon Inc. v Tridon Australia Pty Ltd [2002] NSWSC 896*).

India. The prohibition seems broader in India where unfair prejudice and mismanagement claims are not arbitrable, whether based on alleged violation of the Companies Act 1956 or the articles of association of the company (*Griesheim GmbH v Goyal MG Gases Pvt Ltd, (2004) 62 CLA; Sudershan Chopra v CLB, (2004) 64 CLA 214 (P&H)*).

Hong Kong. The position is unclear as both the Arbitration Ordinance and section 168A of the Companies Ordinance are silent as to whether the statutory claims provided in this legislation are arbitrable, and courts have not yet been required to give judicial guidance.

Ireland. The Supreme Court has ruled that operating the arbitration clause (contained in a shareholder agreement) in a manner which deprived a party of its statutory right to have an oppressive allegation claim determined by the High Court is not contrary to public policy (*In Re Via Net Works Ireland Limited, Supreme Court, Keane C.J. April 23, 2002 [2003] Part 4 Case 4 [SCIre]*).

France. The general rule is that, with regard to international joint ventures, limitations on arbitrability of disputes imposed by French law are not applicable in international arbitration (*Cass. 1ère civ., 20/12/1993 - Bulletin 1993 I N° 372 p. 258*).

Sweden. The articles of association of a Swedish company limited by shares may provide that certain corporate disputes (between shareholders, the company, the board of directors, a director, the managing director or a liquidator) are be resolved by arbitration. Such provision constitutes a valid arbitration agreement. In addition, under Swedish law all disputes concerning the existence of a buy-out right or obligation or the amount of the purchase price for the buy-out must be determined by a panel of arbitrators (*chapter 22, Companies Act 2005*). This is the most important example of statutory arbitration (that is, arbitration based on law and not on an agreement).

Italy. Italian legislation permits shareholder claims to be subject to arbitration, as long as arbitration is provided for by the (joint venture) company bye-laws and the rights which are going to be subject to arbitration can actually be disposed of by the shareholders (*D.Lgs 17.1.2003, n. 5*). Therefore, all disputes which involve the individual position of the shareholder can be subject to arbitration, whereas those disputes which involve subject matters which go beyond the sole interests of the parties and affect also the position of other shareholders or third parties may not be subject to arbitration.

Austria. The courts have taken a similar position to Italy, holding that unless the arbitral award affects third-party interests (for example, the creditors), disputes arising out of the corporate context, including pursuant to statutory rights, are arbitrable (*Austrian Supreme Court, 10 December 1998, 7 Ob 221/98 w, RdW 1999, 206 = ecolex 1999(106)*).

original arbitration agreement binds the third party. The answer depends on the validity of the assignment and the applicable provisions in the agreement. If the assignment is valid under the applicable law, it is generally accepted that the new party to the agreement is entitled to commence arbitration under the arbitration clause contained in the assigned agreement (*Cedrela Transport Ltd v Banque Cantonale Vaudoise, 67 F. Supp. 2d 353 (USDC, STNY 1999)*).

The trend in the US is for the courts to ensure (based on the arbitration provision and the assignment agreement) that it was intended by the parties that the contract assignee be bound by the arbitration agreement (*Arbitration International, Vol. 20 No. 3 (2004) at 290; Britton v Co-op Banking Group, 4 F.3d 742, 746 (9th Cir. 1993)*). In contrast, in France, in the context of international commerce, there is a presumption of automatic transfer of the arbitration agreement as part of the assignment of the contract.

It also appears that the ratification of the arbitration agreement by a third party can be implied from its participation in the performance of the joint venture agreement (*ICC Arbitration No. 8594*).

Groups. Although not universally recognised, the "group of companies" doctrine may be of assistance to join non-signatories to the arbitral proceeding. Under this doctrine, an arbitration clause expressly accepted by certain group companies binds the other companies in the group which (by virtue of their role in the conclusion, performance or termination of the contracts containing the relevant arbitration

clauses, and in accordance with the mutual intention of all parties to the proceedings) appear to have been true parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise (*Isover-Saint-Gobain v Dow Chemical France, Court of Appeal of Paris, 21 October 1983, Jurisprudence française, 1984, p. 99 (ICC Arbitration No. 4131)*).

However, the ruling in *Dow* has no counterpart in English law (*Peterson Farms Inc. v C&M Farming Ltd [2004] EWHC 121 (Comm), Langley J at paragraph 62*).

The alternative may therefore be for the arbitral panel to ***pierce the corporate veil*** of the entity party to the arbitration agreement in order to obtain jurisdiction against a non-signatory within the same group of that party. This, however, appears to be only possible in circumstances in which the defendant, by means of a corporate structure, attempts to evade mandatory legal provisions or the enforcement of existing third-party rights (*ICC Arbitration No. 7626, London, 1997, Yearbook, p. 132*).

In the US, it appears that if an entity within the same group proves to be the alter ago of a party to the arbitration agreement, the latter will be bound by it (*Meyer v WMCO-GP L.L.C., 211 SW3d 302, 305 (Tex. 2006); ARW Exploration Corp. v Aguirre, 45 F.3d 1455, 1461 (10th Cir. 1995)*).

Under English law, non-parties may be able to be joined to the arbitral proceedings through their parent or subsidiary by virtue of section 82(2) of the Arbitration Act 1996 (1996 Act), which provides that references in this Act to a "party to an arbitration agreement" include any person claiming "under or through a party to the agreement". This provision covers situations where the party to the agreement has acted as an agent of the non-party or where the contract was entered into for the express benefit of a third party within meaning of the Contracts (Rights of Third Parties) Act 1999 (1999 Act). Under section 8 of the 1999 Act, a person who is not a party to a contract may nevertheless enforce an arbitration provision contained in it if the contract expressly provides that he may do so, or alternatively, if it purports to confer a benefit on him. For that purpose, according to section 1(3) of the 1999 Act, a term which "purports to confer a benefit" on a third party may be found where the third party is expressly identified in the contract by name, as a member of a class or as answering a particular description.

Estoppel. Finally, in the US, some courts have applied the doctrine of estoppel to prevent a party to the arbitration agreement from resisting arbitration against a non-signatory when the former has treated the latter as a signatory (*Smith Enron Cogeneration Limited Partnership, Inc. v Smith Cogeneration International Inc. 198 F.3d 88 (2d Cir. 1999)*). There have also been cases in which estoppel has been applied to non-signatories claiming a benefit from the contract containing the arbitration clause (*Deloitte Noraudit A/S v Deloitte Haskins & Sells, US, 9 F.3d 88 (2d Cir. 1999)*).

Practical tips for drafting the joint venture contract

The contractual nature of arbitration allows great flexibility but, in some respects, limits its span and its applications. Most of the limitations of arbitration can be surmounted with appropriate contract drafting provided that possible future disputes are thought through at the outset and their consequences anticipated. Some of the key issues for parties to consider when drafting a joint venture agreement include:

- Consider choosing a neutral jurisdiction as the ***arbitration seat*** (*see Glossary*) (*see "Benefits" in the main text*).
- Set out in comprehensive detail what remedies will be available in case of breach or deadlock. This will reduce the tribunal's discretion and therefore provide greater certainty of outcome.
- Consider providing for exit clause(s) in the joint venture agreement.
- Consider whether the joint venture company should be a party to the arbitration clause. It will not be party to any arbitral proceedings, unless it was party to the arbitration clause or is subsequently joined.
- Make sure the dispute resolution mechanism encompasses disputes involving all the stakeholders in the project, otherwise there could be a considerable increase of arbitration and legal costs and the risk of inconsistent rulings. This is due to lack of certainty as to whether consolidation will be available (*see "Multi-party arbitration" in the main text*). This can be dealt with in a separate arbitration agreement for all the disputes arising out of the joint venture.
- Set out a procedure for tribunal constitution in the case of multi-party agreements.

REMEDIES

As a general principle, arbitrators have the powers granted to them by:

- Both the parties, whether directly in the arbitration clause or the ***submission agreement***; or indirectly in the arbitration rules adopted by the parties.
- The arbitration law applicable to the procedure.

As already mentioned (*see "Ratione personae" above*), arbitrators only have powers over parties to the arbitration agreement because of the contractual nature of arbitration. These restrictions

Drafting tip

An arbitration clause must cover the following critical elements:

- Scope (range of disputes/issues covered).
- Choice of seat.
- Rules (institutional vs ad hoc).
- Number of arbitrators.
- Language of the proceedings.
- Governing law.
- Confidentiality.

There is no single clause appropriate for use in every agreement: each transaction must be considered on its own merits. Consideration should be given to, among other things, the nationality of the parties, the likely country of enforcement of any award, the location of those who are likely to be witnesses should a dispute arise (and the location of evidence), whether disclosure will likely be wanted or resisted by the parties and the likely governing law.

Where the parties opt for institutional arbitration, a variety of options are available. The leading international arbitration institutions include but are not limited to, the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the American Arbitration Association (AAA) or the International Centre for Dispute Resolution (ICDR). Regional arbitration centres may also be attractive depending on the location and nationality of the parties (for example, the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC)). Finally, in technical disputes or those in which intellectual property is likely to be concerned, the parties can also consider more specialist rules including the World Intellectual Property Organization (WIPO) arbitration rules, and the various different commercial rules of the AAA. Once the institution has been selected, it is rarely, if ever, appropriate to deviate from the institution's model language as most institutional clauses have been tested in national courts and are periodically refined in consultation with leading practitioners around the world.

Examples of model clauses are included in all institutional websites.

obviously impact on the type and magnitude of relief capable of being granted by arbitral panels and the extent to which these are enforceable.

Parties can put themselves in a far better position in the event of a disagreement over the joint venture if they attempt to foresee contractual remedies from the outset when drafting the joint venture agreement. Parties can ensure greater predictability if they reduce the tribunal's discretion by providing in the contract for detailed and comprehensive rights exercisable in case of breach or deadlock (*see box "Practical tips for drafting the joint venture contract"*).

Arbitration Act 1996

Section 48 of the 1996 Act provides that, unless otherwise agreed by the parties, the tribunal has the power to:

- Grant declaratory relief.
- Order the payment of a sum of money, in any currency.

The tribunal also has the same powers as the court to order:

- A party to refrain from doing anything.
- Specific performance of a contract.
- Rectification, setting aside or cancellation of a deed or other documents.

It should be noted that the 1996 Act only applies where the seat of the arbitration is in England, Wales or Northern Ireland. Where enforcement is required outside of this jurisdiction, local advice should be sought as to the enforceability of an award comprising non-monetary relief, particularly of negative injunctive relief.

In the context of joint venture disputes, monetary compensation, specific performance and other injunctions are generally available. For example, a tribunal could order:

- A defaulting party to comply with its capital increase obligation.
- A joint venture partner to enter into an implementing contract.
- The respondent(s) to instruct the members of the board appointed by them to adopt the articles of association or appoint management as foreseen in the joint venture agreement.
- A sale or transfer of shares (*see "Transfer of shares" below*).
- The termination of the joint venture agreement and possibly the winding up of the company (*see "Winding up" below*).

Transfer of shares

Subject to relevant national law, arbitral tribunals generally have the power to order a transfer of shares which was specifically contemplated in the joint venture agreement.

This situation must be distinguished from ones where there is a deadlock or where some actions on the part of a

party have jeopardised the relationship. The tribunal may be unable to resolve a deadlock preventing the parties from working together. It cannot, however, substitute itself for the board of directors and the shareholders for the decision making. In some circumstances, the termination of the joint venture agreement is therefore the only solution and a remedy sought by at least one of the parties.

If there is an exit or termination clause in the joint venture agreement, the arbitral panel will apply the contractual procedure and remedies. On a party's request, the tribunal could declare that the clause requirements are met and order the failing party to participate in the procedure provided for in the agreement. If there is no exit clause in the joint venture agreement, granting of such remedy will be at the entire discretion of the tribunal and therefore uncertain.

The Indian Supreme Court recently reviewed an arbitral award directing one joint venture partner to transfer its entire shareholding in the Indian-registered joint venture company to its counterpart (*Venture Global Engineering v Satyam Computer Services, Supreme Court of India, 10 January 2008*). The dispute had arisen between the two joint venture partners under the shareholder agreement which contained an arbitration clause providing for arbitration under the LCIA Rules. Although the option to purchase the shares had been contemplated by the parties, the Indian Supreme Court indicated that such relief provided by the arbitral panel violated Indian law, that the award therefore conflicted with Indian public policy and had to be set aside.

This case shows how important selecting the arbitration venue can be, not only in relation to the seat of the arbitration which determines where the award will have to be challenged (as in the case above), but also as to the jurisdiction(s) where the award may potentially be sought to be enforced.

Winding up

Whether arbitrators have the powers to wind up a company will again depend on the relevant national law. In some jurisdictions, including the UK, only state courts have the power to grant such relief.

In *Re Magi Capital Partners LLP*, one party applied to stay the other party's petition for the winding up of their limited liability partnership (*[2003] EWHC 2790*). The court granted the stay on the basis that before it could make a winding-up order it had to be satisfied that it was just and equitable. In this respect, the court found that the allegations that were before the arbitrator could be material to the decision to be made on the hearing of the winding-up petition.

In its reasoning, the court indicated that if the partnership at stake had been an ordinary partnership as opposed to a limited liability partnership, the arbitral panel would have had jurisdiction and adequate power to wind up the partnership. However, a limited liability partnership is, like companies, a creature of statute. Accordingly, the court declared that parties cannot oust their statutory right (under section 122(1)(g) of the Insolvency Act 1986) to apply to have the statutory entity wound up by the court.

The same approach is adopted in France, Australia, Singapore, India and Hong Kong. On the other hand, under Belgian

Glossary

Arbitration. An alternative method of resolving disputes between parties. An arbitrator is appointed by the parties to make a binding decision from which there are very limited grounds of appeal. Arbitration may be either institutional (where the arbitration is conducted under the auspices of an arbitral institution) or ad hoc (where the arbitration is not conducted under the auspices of an arbitral institution) .

Arbitration seat. The legal place in which the arbitration is conducted. The seat is often defined in the arbitration agreement as a city rather than a country. The arbitration hearings may be physically conducted in a place other than the seat (though the choice of seat remains unaffected).

Forum shopping. This term describes the process of trying to bring your action in the courts of, or to submit it to arbitration sited in, a country with laws or procedures which are to your advantage.

Functus officio. Once the tribunal has made its award, its authority and competence to deal with any issues between the parties come to an end.

Joint venture. A commercial arrangement between two or more economically independent entities for the purpose of executing a particular business undertaking. It can take a number of legal forms and has no specific meaning in English law.

Lex arbitri. The law which governs the arbitration, and the procedure of the arbitration. The *lex arbitri* is almost always the same as the law of the seat of the arbitration. Since international arbitrations generally take place in a neutral forum, the *lex arbitri* is likely to differ from the law applicable to the substance of the dispute.

Piercing the corporate veil. This term describes a practice by which the court or arbitral tribunal decides that the subsidiary is a mere shell or alter ego of the parent company and that parent and subsidiary should be deemed to be a single economic entity, thereby placing the debts and liabilities of a subsidiary on its parent or shareholders.

Submission agreement. A contract which provides for disputes to be referred to arbitration, agreed between the parties after the dispute arises. It shares many of the same basic elements as an arbitration clause, but might also include a summary of the dispute and provisions specific to the claim.

law, a claim requesting the dissolution of a company can be subject to arbitration if the articles of association provide for an arbitration clause which is formulated in a fashion that gives it a wide scope and specifically refers to disputes between shareholders as well as disputes between shareholders and the company.

MULTI-PARTY ARBITRATION

The joint venture company may not be party to the arbitral proceedings unless it was party to the arbitration clause or is subsequently joined.

Issues inherent to multi-party arbitrations tend to be even more relevant in the context of joint venture disputes. These include:

Establishment of the tribunal. In *Siemens et al v Dutco*, three parties had entered into a consortium agreement for a construction project (*7 January 1992, Revue de l'arbitrage (1992) pp. 470-472*). Siemens and BKMI, both respondents in the proceedings, although they initially refused to do so, under protest appointed a single arbitrator with all due reservation. Siemens and BKMI claimed that they had distinct interests and should both have the right to appoint their own arbitrator. The French Cour de Cassation found that, as a matter of public policy, the principle of the equality of the parties in appointing arbitrators can be waived only after the dispute has arisen. In this instance, parties did not waive their right after the dispute had arisen, and had formally objected to jointly appointing one arbitrator and therefore reserved their rights to appoint separate arbitrators.

Following the *Dutco* decision, the ICC fundamentally reconsidered its approach on the constitution of tribunals in multi-party cases (see Article 10(2) of the ICC Rules, which gives broad discretion to the ICC Court to appoint each member of a three-party tribunal if the joint respondents/claimants are unable themselves to agree on their nomination).

Consolidation of two or more proceedings into one. The consensual nature of arbitration is an obstacle to the consolidation of disputes arising out of the same project but among parties who are not privy to a common agreement. We have examined how the scope of the arbitration agreement may be extended *ratione personae* (*see "Ratione personae" above*). Consolidation is a different device and can only be agreed on by all the parties to the proceeding to be consolidated as well as the tribunal. Although not excluded in principle, consolidation is far from guaranteed.

As a result, failure for the parties to contemplate a dispute resolution mechanism encompassing disputes involving all the stakeholders in the project could result in a considerable increase of arbitration and legal costs and the risk of inconsistent rulings. For instance, parties could agree that a tribunal constituted in accordance with the arbitration agreement will remain in existence until it declares itself to be ***functus officio***. In this way, any party to the arbitration agreement will be able to submit a "fresh dispute" within the scope of the arbitration agreement without the need of the consent of the tribunal and the parties to the pre-existing dispute(s).

Jane Player is a partner and Claire Morel de Westgaver is a foreign qualified lawyer (New York Attorney) at Bird and Bird.

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