



Joinder of Parties in Multi-Party Arbitration



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I. Introduction

Given the complexity of modern legal traffic, complex economic structures are becoming a standard in today's business transactions. There is an increase in business activities which include a larger number of participants. Accordingly, disputes involving more than two subjects are occurring ever more often - especially on the international level. In light of this, the ICC International Court of Arbitration even noted an increase in multi-party arbitrations stating that one-third of ICC cases today involve multiple parties.

But is it necessary for all the parties to the dispute to be involved in arbitration from the beginning of the proceedings? Arbitration may involve multiple parties from the beginning or become multi-party at a later stage if an additional party joins the proceedings. Several proceedings which are not all between the same parties may also be joined. Considering the different forms of multi-party dispute resolution mechanisms, this article aims to explore the question of when and how the (third) parties involved in the same economic transaction intervene in an ongoing arbitration. This article further inquiry into different regulations governing the provisions of third-party joinder into an arbitration considering the selected arbitration rules with a focus on different issues which may arise for the parties and the tribunal.

II. Multi-party Arbitration

To understand the joinder mechanism in arbitration, we must first identify the principle of multi-party arbitration. Multi-party arbitration is generally referred to as an arbitration which involves more than one party to either side of the dispute. Multi-party arbitrations are on the other hand also defined as “disputes in which a third party intervenes in an arbitration either on the claimant’s or respondent’s side, as well as disputes involving more than two sides to the dispute, i.e. trilateral or multi-party disputes in which each party defends its own interests that differ from the interests of all other parties”

These disputes often include a multitude of contracts by which the parties are bound to arbitrate. This does not, however, mean that multi-party arbitration is limited to the case where there are multiple parties already at the time of the conclusion of the contract. Multi-party arbitration may be initiated between the multiple signatories to the contract, or, on the other hand, there may be an extension to non-signatories as additional parties to the original contract.

It should be noted that one of the main issues the multi-party arbitration may pose is the assessment of all the parties’ willingness to arbitrate, which shall be further discussed below.

III What is a Third-party Joinder?

Generally speaking, the joinder in arbitration describes a situation in which a non-party to the arbitration intervenes in the proceedings after they have been initiated, as well as the situation when a party to the arbitration joins a non-party during the proceedings.

In practice, a joinder in arbitration may be best described in a dispute between a contractor and an employer under a construction contract. In such a dispute, if a contractor should lose the case, he may assert a recovery claim against the subcontractor in the second proceedings.

Therefore, it may be beneficial for the subcontractor to intervene in the first proceedings between the contractor and the employer, as it would be hard for the subcontractor to claim that the first proceedings were decided incorrectly in the second proceedings. By intervening in the first proceedings, the subcontractor is able to undertake actions as a party and influence the course of the proceedings.

IV Joinder of third parties in court litigation and arbitration

Considering that the nature of arbitral proceedings may impose difficulties for a third-party joinder, it is important to note the differences between joinder in litigation and arbitration.

It is generally accepted that the rules regarding the intervention are less limited in litigation than in arbitration. The Civil Procedure Code of the Republic of Serbia prescribes that a “person who has a legal interest in one of the parties succeeding in a litigation between other persons may join this party.”

The Civil Procedure Code further stipulates that “the intervener may enter into litigation during the entire procedure until the decision on the claim becomes legally binding, as well as during the procedure continued by declaring an extraordinary legal remedy” Further, the Code describes that “A party can dispute the intervener’s right to participate in the proceedings and propose that the intervener be refused, and the court can also refuse the intervention’s participation without the parties’ statement if it determines that there is no legal interest of the intervener”

This demonstrates that the pre-determined set of rules prescribed by law (such as civil procedure codes) offers flexibility to the parties to intervene in the proceedings during the whole course of the proceedings. The parties may also propose for the intervention of a party to be refused, while the court has the final say.

On the other hand, the situation in arbitration is vastly different. Unlike the litigation before the state courts, the arbitral tribunal obtains its power from the private arbitration agreement concluded between the parties. As a result, different sets of arbitration rules regulate the joinder of parties in the following manner.

- **Who can request a joinder and join the arbitration proceedings?**

The principal question the parties face when opting to join an ongoing proceeding is regulated as follows.

The two arbitral institutions in the Republic of Serbia, the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia and the Belgrade Arbitration Center regulate the joinder of third parties in arbitration fairly similarly. Both rulebooks prescribe that “a person that has a legal interest to participate in the arbitral proceedings may join one of the parties only with consent of both parties” while the Rules of the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia also add “under the conditions and in the manner determined by the arbitral tribunal or the sole arbitrator.”

The ICC Rules of Arbitration prescribe that “a party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the Request for Joinder)”. The date of the receipt of such request for joinder shall then be regarded as the date of the commencement of arbitration against the additional party.

The UNCITRAL Arbitration Rules on the other hand provide that third persons may only join the given arbitration if such a person is a party to the arbitration agreement.

These rules demonstrate that due to the consensual nature of the arbitration agreement, joining an already ongoing arbitration proceeding requires the consent of all the parties, or in some cases even the condition of even being a signee to the arbitration agreement.

- **At what point in the arbitration can a joinder be requested?**

The answer to the question of when a joinder of third parties may be requested is reflected in one of the governing principles of arbitration – the equal treatment of the parties. The parties in arbitration have the ability to influence the constitution of the arbitral tribunal by appointing its arbitrators. The situation, however, might be different when more than two parties are involved.

While the Rules of the Serbian arbitral institutions are silent on the matter and describe only that the arbitral tribunal shall decide on the joinder, the UNCITRAL Arbitration Rules stipulate that an additional party may only join the arbitration after the constitution of the tribunal.

The ICC Rules govern the said subject in an interesting way by allowing the Request for joinder to be submitted before or after the constitution of the arbitral tribunal. If a Request for Joinder is made after the confirmation or appointment of any arbitrator, such request “shall be decided by the arbitral tribunal once constituted and shall be subject to the additional party accepting the constitution of the arbitral tribunal and agreeing to the Terms of Reference, where applicable” .

These rules, although regulating the joinder mechanism differently, demonstrate the importance of equality of treatment of parties in arbitration.

V. Conclusion

A third party intervening in an arbitration may have a legal interest and also exercise major influence on the proceedings. It is important to note, however, that third parties may also abuse such opportunity and further prolong the proceedings.

This is why the arbitral tribunal should always closely consider all the relevant facts of the case when deciding on the matter, such as the identity of an additional party and the parties involved in arbitration, the time a request for joinder is submitted, the consent of all the parties, and most importantly, the fairness of the proceedings and the principle of equality of treatment of parties in arbitration.

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