

Multiple Claims in Arbitrations Between the Same Parties

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Introduction

When a dispute arises between parties there may be a multitude of claims which are made. International commercial relations are becoming ever more complex. Often there are long term relationships involved, perhaps with framework and ancillary contracts. More than one might give rise to disputes. At times there are differing contracts relating to trade and investment on the one hand and payment and guarantees on the other. Within any contract there may also be multiple claims flowing backwards and forwards as to the performance of each party.¹ At times these may be non-contractual claims that nevertheless relate to the central transaction. Where the parties have agreed to arbitrate disputes a question therefore arises as to whether all the claims between them, or only some, can be referred to the arbitral tribunal which has been constituted. It is thus of fundamental importance to consider how arbitration can or should deal with the entire range of multiple claims that might be brought between the same parties.

These questions are interesting and complex and not yet fully explored on a comprehensive basis, with the bulk of the analysis to date relating to specific sub-elements such as counterclaims, set-off, consolidation or the proper treatment of ensemble contracts. These discrete but related questions should be distinguished from the problems posed by multiparty arbitrations, which has attracted more attention in the literature. This paper is confined to multiple claims in arbitrations between the same parties. This conference has a parallel session in relation to multi-party arbitration. While we are not exploring those issues, it is ultimately important to consider whether the same principles or challenges apply in that context.² We thus invite participants to consider whether there is or ought to be consistency of approach in the treatment of each distinct topic.

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¹ Some commentators describe claims flowing in both directions between claimant and respondent as “cross-claims”. We refrain from using this term as others limit it to the quite discrete question of whether one respondent is able to bring separate claims as against other existing respondents or third parties. See for example Eduardo Silva-Romero, “Brief Report on Counterclaims and Cross-Claims: The ICC Perspective” in *Arbitral Procedure at the Dawn of the New Millennium: Reports of the International Colloquium of CEPANI*, 15 October 2004, p 73.

² We note for example that Bernard Hanotiau, who has done significant work on the topic of multi-party arbitration, footnoted a major article by saying that while that problem area is generally referred to as multi-party arbitration, his work “adopts a slightly different perspective in as much as it examines the various problems raised by the resolution of disputes originating from a network of contracts.” In his view, “(t)he subject is more general, as well as being more specific”: Bernard Hanotiau, *Complex Arbitrations: Multi-Party, Multi-Contract, Multi-Issue and Class Actions* (1998) footnote 1. Similarly, the Committee on International Commercial Arbitration of the International Law Association, considered all of these issues under the heading of “Complex Arbitrations”.

Returning to the discrete question of multiple claims between the same parties, claims will be asserted by the claimant and frequently also by the respondent in a counterclaim or set-off. The various claims may arise from:

- a single contract;
- several contracts; or
- ex-contractual claims.

When an arbitration is commenced between two parties a number of discrete questions can therefore arise:

- (i) Which claims can be put forward by the claimant?
- (ii) Which claims can be put forward by the respondent?
- (iii) Can the claimant and the respondent subsequently add new claims?
- (iv) If separate proceedings are commenced between the same parties (a second arbitration or litigation), can the two proceedings be consolidated or otherwise harmonised?

The questions posed presume that the parties are not in agreement, as they may of course agree between themselves to allow or bar claims or consolidated tribunal hearings. Where instead arbitrators are asked to decide on such disputed preliminary questions, there is a need to identify the principles by which such determinations should be made. At times, arbitrators are given some discretionary leeway, in which case they will naturally consider the practical ramifications of their decisions. It is immediately obvious that if not all claims are dealt with in one arbitration between the two parties, and if two or more proceedings are commenced, there may be much less efficiency in terms of expense and time as well as the risk of inconsistent decisions. On the other hand, if distinct claims are brought together against the wishes of one party, this might offend against the very foundations of consent as the basis of arbitration. It may also lead to a tribunal dealing with an issue in situations better suited to a differently constituted tribunal.

Even if the different claims ought to be heard before different dispute resolution bodies, each tribunal might then have additional procedural decisions it must make in order to promote the greatest fairness and efficiency between the matter before it and the parallel or sequential proceedings. At the very least, each tribunal cannot ignore as a matter of course, the existence and procedural implications of parallel proceedings.

While we have identified a number of discrete questions for consideration, our methodology seeks to combine general and specific analysis. We begin by examining principles of jurisdiction in general as a precursor to the examination of the discrete questions. We then address the existing rules, cases and scholarly opinions which have in the past addressed each distinct issue. We then seek to bring the various discrete questions together to see if it is possible to identify broad policy considerations which should guide answers to each of these questions and then consider the various solutions which may be adopted. We then draw attention to some of the proposals for revised arbitral rules to resolve these questions which

various institutions and groups, in particular the United Nations Commission on International Trade Law (“UNCITRAL”) Working Group, are being asked to consider. The paper also briefly addresses some procedural choices that tribunals might face, both where multiple claims are allowed and where they are denied.

In aiming to discern whether there are some common principles that might apply, we have sought to identify the various methods and criteria that have been applied in the case-law or which are recommended by commentators to resolve the approach which should be taken to multiple claims.. We note that some authors follow a conflicts methodology; some are primarily concerned with identifying efficient solutions, while others are concerned to limit themselves to questions of consent. Our overall thesis is that while there are a number of theories that are relevant, the starting point should always be a question of consent. What did the parties agree to? Conflicts and efficiency analyses should best be seen as elements of a determination of consent rather than alternative paradigms. We will also seek to show why better guidance is needed from the parties themselves, either via the drafting of their arbitration clause or via selection of institutional rules that carefully articulate admissibility criteria. Where the latter is concerned, we canvass various options for institutional reforms that might better articulate fair and efficient principles upon which multiple claims ought to be allowed.

General Principles of Jurisdiction

Leaving aside the special case of arbitrations mandated by treaty or legislation, it is a trite principle that arbitration is dependent on the existence of an agreement between the disputant parties, and that the terms of the arbitration agreement define and therefore limit arbitral jurisdiction. This is a reflection of the role of consent as the basis of arbitration. Because of the potential importance of questions of consent to our topic, we feel that before examining the admissibility of claims, counterclaims, set-off and the possible consolidation of multiple proceedings, it will be useful to recall general principles of jurisdiction which limit and will therefore guide questions of claim admissibility.

There are in fact two separate questions:

- Which matters can be or must be referred to arbitration? and
- Following the commencement of an arbitration, which matters have been properly referred to that arbitration?

The two questions are separate and should not be confused. Generally an arbitration agreement provides for the arbitration of future disputes which may arise between the parties and is included in their substantive contract. In other cases, an arbitration agreement is sometimes entered into after a dispute has arisen and is solely confined to the arbitration of that identified dispute ("submission"). In the more common case of an arbitration agreement covering future disputes, it will apply to disputes which arise between the parties during the currency of their contract and sometimes after the contract has terminated.

In some cases, it can deal with disputes about precontractual negotiations. In each of these situations, the clause is a continuing one which is capable of application to more than one dispute which may arise between the parties. On the other hand once a dispute has arisen and a tribunal has been appointed, that tribunal is authorised to resolve the matter referred to it but not necessarily any matter which may subsequently arise between the parties even if it is encompassed within the arbitration agreement. An arbitral tribunal is not a standing body empowered to hear any dispute which arises between parties during the currency of a contract but is empowered to hear a particular dispute or disputes.

In relation to the first question, we first turn to a consideration of the scope of matters that may be referred to arbitration under the arbitration agreement.

Scope of Arbitration Agreement

If the primary way to consider the admissibility of multiple claims is through the paradigm of consent, it is natural to turn to the arbitration agreement itself which is the gateway to consent to arbitrate. Thus, rather than working from particular instances such as claims, counterclaims, set-off and applications for consolidation, one might instead naturally begin by identifying the scope of the arbitration agreement to try and see what if anything can be discerned about the parties' intent as to multiple claims.³

It is rare for an arbitration agreement to provide for the arbitration of any disputes which may arise between the parties. Typically the agreement will provide for the arbitration of disputes arising from a particular relationship, usually the substantive contract in which it is embedded. Indeed the definition of an arbitration agreement contained in Article II (1) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 ("New York Convention") refers to an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them "in respect of a defined legal relationship, whether contractual or not....". Article 7(1) of the UNCITRAL Model Law ("Model Law") is in similar terms. Thus an arbitration agreement providing for the arbitration of disputes "arising under this contract" would not, prima facie, appear to apply to the arbitration of disputes relating to another contract. At one time it was thought that such an agreement would not apply to the arbitration of ex-contractual claims such as those based on tort or founded on statute. However now it is accepted that such claims fall within an arbitration clause provided that they bear a sufficient nexus to the contractual relationship established between the parties. Similarly, earlier views that an arbitral tribunal cannot determine the initial validity of a contract have now largely been abandoned.⁴

³ Indeed Poudret and Besson address "the particular case of set off" in the section of their work dealing with the scope of the arbitration agreement *ratione materiae*: Jean-Francois Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (2nd ed, 2007).

⁴ See, for example, Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard Goldman on International Commercial Arbitration* (1999) 210 – 11 ('Fouchard, Gaillard, Goldman').

When interpreting the scope of an arbitration agreement, it will often be necessary to consider the applicable law, including the proper approaches to interpretation. It has long been recognised that under the doctrine of separability, an arbitration agreement may have a different applicable law to the balance of any contract within which it is found. Mark Blessing has noted nine possible laws that could apply in such circumstances.⁵ Some scholars suggest that the normal position is to apply the *lex arbitri*. This might be justified on the basis that this is the law expressly referred to in Article V(1)(a) of the New York Convention in the context of one of the discretionary bases for refusing enforcement. Another possible justification is that the place most closely connected to an agreement to arbitrate would be the seat of arbitration, where such a closest connection conflicts rule is seen as most applicable. Others such as Julian Lew⁶ and Redfern and Hunter⁷ suggest that the law governing the subject matter might best apply, an option provided for by Article 178(2) of the Swiss statute on Private International Law.⁸

At the very least, we should be aware that problematic questions of consent will often be bound up with equally complex conflict of laws questions. For example, complexities may arise if a set-off emanates from a different arbitration agreement which in turn could call for a different applicable law. Even where the set-off emanates from the same agreement, if the conflict approach adopted is to look for the law most closely connected to the individual claim, that may differ between claims and various forms of counterclaims. Some legal systems draw a distinction between counterclaim and set-off and link the substantive law of the set-off to the law of the primary claim on the basis that the law of a defence should follow the law of the claim. We address this further below. At this stage we merely wish to highlight the potential interplay between conflicts methodology and determinations of the scope of the arbitration agreement. Others eschew a strict conflicts approach, preferring a broader ranging factual analysis. Blessing invites a consideration of all salient factors with a view to determining what is “objectively fair and subjectively reasonable” in all the circumstances.⁹ We return to consider these alternative methodologies in our concluding analysis.

Particular Reference

Once a dispute falling within the terms of the arbitration agreement arises, a party may refer it to arbitration. The tribunal, once constituted, is not empowered to continue indefinitely, or at least for the

⁵ Mark Blessing, ‘The Law Applicable to the Arbitral Clause and Arbitrability: Academic Solutions versus Practice and “Real Life”’ (1999) 9 *ICA Congress Series* 168.

⁶ Julian Lew, Loukas Mistelis and Stefan Kroll, *International Commercial Arbitration* (2003).

⁷ Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration* (4th ed, 2004).

⁸ *Federal Code on Private International Law* of 18 December 1987.

⁹ Blessing, above n 5.

duration of the contract, and hear any and all disputes which arise throughout the duration of the contract. The jurisdiction conferred on the arbitrator is dependent on the matters referred to him or her for decision.

The English texts generally refer to the need for a dispute and define the arbitrators' jurisdiction in terms of the dispute which has been referred to him or her. In the opinion of Mustill and Boyd¹⁰ the need for a dispute is not a rule of law but arises simply because in the great majority of cases that is what the arbitration agreement says. Sometimes, however, arbitration agreements refer to "claims" or "differences" in lieu of or in addition to a dispute.

Mustill and Boyd also state that an arbitrator has no jurisdiction over disputes which were not in existence when the appointment was made.¹¹ However it does not logically follow that an arbitrator has jurisdiction over all disputes which exist at the time of his or her appointment. The parties may only refer one or some of the disputes to the arbitrator and not others.¹²

In an ad hoc arbitration the dispute will generally be that identified in the notice of arbitration served by the claimant, although it is arguable that the respondent's response or defence is also relevant in clarifying the ambit of the dispute.

In an ad hoc arbitration under the UNCITRAL Arbitration Rules, the arbitration is commenced by a Notice of Arbitration. The Notice of Arbitration may but does not have to contain the statement of claim.¹³ If it does not, it would still seem that the Notice of Arbitration would have to give some details of the dispute to be referred to arbitration. It would unlikely be adequate for a Notice of Arbitration simply to refer existing disputes that have arisen to arbitration. In this regard it should be noted that Article 21 of the UNCITRAL Model Law states that:

"Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

The reference to "that dispute" suggests a specified and identified dispute.

In an International Chamber of Commerce ("ICC") arbitration the claimant initiates the proceedings by filing a Request for Arbitration under Article 4 of the ICC Rules of Arbitration with the Secretariat of the ICC International Court of Arbitration. The Request must contain, inter alia, "a description of the nature and circumstances of the dispute giving rise to the claim(s)" and "a statement of the relief sought". The

¹⁰ Michael Mustill and Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed, 1989) 129.

¹¹ It could of course be possible to expressly authorise an arbitrator to have such jurisdiction, for example through nominating a particular construction referee to deal with allowances claims. That may not be desirable if the unavailability of the arbitrator could render the agreement pathological: *Ibid*.

¹² The need to define a dispute for the purposes of determining the arbitrator's jurisdiction is well recognised in the English cases. See for example *Kawasaki Kisen Kaisha, Ltd v Government of Ceylon* [1962] 1 Lloyd's Rep 424.

¹³ *UNCITRAL Arbitration Rules*, Art 18(1).

respondent is then required to file an Answer which may contain counterclaims. This is done prior to the constitution and establishment of the tribunal. It is certainly arguable, therefore, that in ICC arbitrations the initial ambit of the dispute is determined by both the Request for Arbitration and the Answer to the Request, and the claimant's reply to any counterclaim filed in accordance with Article 5(6) of the ICC Rules of Arbitration. Thereafter the ambit of the dispute referred to arbitration is more particularly defined in the Terms of Reference, made in accordance with Article 18 of the ICC Rules, and which might be seen as constituting a new arbitration agreement at least if signed by both parties.¹⁴ Other leading institutional rules would lead to similar conclusions.

The paper now proceeds to examine the existing nature, rules and differences in view as to each particular type of claim; those of the claimant, counterclaims and set-offs by respondent and the related question of consolidation of proceedings.

Claimant's Claims

It is, of course, for the claimant to formulate the claims which it seeks to put forward in an arbitration. The claimant will be limited by the terms of the arbitration agreement which will define matters which the parties have agreed can be referred to arbitration. This usually can be done by reference to a particular contract and by specifying the relationship which the claims must possess to that legal relationship.

Even if the claims bear the necessary connection with the defined legal relationship and therefore prima facie fall within the jurisdiction of the tribunal, it is sometimes contended that the claims cannot be put forward because there is no "dispute" between the parties. For example if a claim is made for payment of monies due under a contract and it is clear that the respondent has no defence and seeks to raise no defence other than its impecuniosity, is there a "dispute" which can be referred to arbitration? In our opinion there is a dispute because the claim has been made and has not been satisfied. In any event such esoteric arguments can be avoided by drafting an arbitration clause to include a "claim" and a "difference" as well as a "dispute". Well drafted clauses allow for all disputes which could conceivably flow from the contract between the parties. Nothing should turn on the distinction between terms such as "dispute" and "difference".¹⁵

It might also be contended that an arbitrator has no jurisdiction with respect to a claim concerning a difference of opinion as to the future performance of a contract. However we submit that a sufficiently widely drawn arbitration agreement should enable a party to seek a declaration as to the meaning of a contract which is relevant for its future performance.

¹⁴ *Commonwealth Development Corporation v Montague* [2000] QCA 252.

¹⁵ Fouchard, Gaillard and Goldman, above n 4, 299 (fn 248).

The more significant limitation to the jurisdiction of an arbitral tribunal, and the claims which can be put forward, is by reference to the subject matter of the claim. It is to this matter that we now turn.

Until recently English courts adopted a pedantic approach to the construction of an arbitration agreement. They focused on the words employed and drew fine distinctions between the terms used. Thus some judges took the view that a clause referring disputes "arising under" a contract was narrower than a clause referring disputes "arising out of" a contract¹⁶ and it was commonly accepted that a clause referring disputes "in relation to" or "in connection with" a contract was broader and therefore conferred a more extensive jurisdiction on the arbitral tribunal. These fine distinctions were particularly relevant in relation to the question of whether an arbitral tribunal had jurisdiction to hear disputes concerning pre-contractual representations¹⁷, rectification¹⁸ and claims founded on statute for misleading and deceptive conduct or for breach of competition law.¹⁹

In contrast to the strict and pedantic construction of arbitration clauses adopted in many common law jurisdictions, civil law jurisdictions are often more liberal and tend to construe arbitration agreements in a broader way. However it seems that the difference between the classic common law approach and the more liberal civil law approaches may now have disappeared. The recent decision of the House of Lords in *Premium Nafta Products Limited v Fili Shipping Company Limited*²⁰ marks a change in the position adopted in the United Kingdom. In that case the House was concerned with arbitration clauses in 8 charterparties. The relevant clause gave each party an election to refer "any dispute arising under this charter..." to arbitration in London. One of the questions for determination was whether the clause was, as a matter of construction, broad enough to cover the question of whether the contract was procured by bribery. Lord Hoffmann observed:

"Both of these defences raise the same fundamental question about the attitude of the courts to arbitration. Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have

¹⁶ *Heyman v Darwins Ltd* [1942] AC 359, 399.

¹⁷ See the decision of the Supreme Court of South Australia in *Main Electrical Pty Ltd v Civil & Civic Pty Ltd* [1978] 19 SASR 34.

¹⁸ See *Printing Machinery Co Ltd v Linotype and Machinery Ltd* [1912] 1Ch 566

¹⁹ There are many Australian cases examining whether claims under the *Trade Practices Act 1974* (Cth) are arbitrable. See for example the early decision in *White Industries v Trammel* (1983) 51 ALR 779 and *Allergan Pharmaceuticals Inc v Bausch and Lomb Inc* (1985) ATPR 40-636. Compare the more recent approach in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 238 ALR 457. As to claims involving breach of competition laws see the liberal decisions of the United States Supreme Court in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614 (1984) and the decision of the High Court of New Zealand in *Attorney-General v Mobil Oil NZ Ltd* [1989] 2 NZLR 649 are instructive.

²⁰ [2007] UKHL 40

entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.

.....

If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have question of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention."

Having regard to these considerations, Lord Hoffmann said that the court was required to give effect, so far as the language used by the parties would permit, to the commercial purpose of the arbitration clause. He then referred to earlier English decisions and further observed, with considerable frankness, that the fine distinctions drawn in these cases "reflect no credit upon English commercial law". He then stated the new approach which should hence forth be adopted:

"In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."

Lord Hoffmann concluded that the language of the arbitration clause contained nothing to exclude disputes about the validity of the contract, whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else.

In summary, an appropriately drafted arbitration clause will enable a claimant to put forward claims concerning the contract itself and in respect of pre-contractual representations, associated claims in tort and statutory claims (including competition law matters) concerning the conduct attendant upon the negotiations and conclusion of the contract and its effect.

An interesting question which has arisen is whether a claimant is confined to putting forward claims with respect to the contract that is referred to in the arbitration agreement or can also put forward claims with respect to other contracts. This matter has been analysed, primarily from the perspective of French law, in an interesting and informative article by Philippe Leboulanger.²¹ This matter is also addressed by Bernard Hanotiau in a very detailed article published in 2001.²² We briefly address their comments in the context

²¹ Phillippe Leboulanger. 'Multi-contract Arbitration' (1996) 13 *Journal of International Arbitration* 43.

²² Bernard Hanotiau, 'Problems raised by complex arbitrations involving multiple contracts, parties and issues: An analysis' (2001) 18 *Journal of International Arbitration* 253.

of additional claims of Claimant but return to the question of multiple contracts in a discrete section below where we examine the rationale for allowing both claims and counterclaims from distinct contracts. We examine competing justifications based on consent, efficiency and conflicts methodology. At this stage we analyse the issue in the context of the claimant's claims alone.

Accordingly to Leboulanger, the classic theory of contract holds that each individual agreement within a group of contracts is a completely independent agreement. But he goes on to say that this traditional notion does not correspond to current contractual practice. He says that whenever there is an economic link between contracts, ensuing from the contracts' nature and mutual function, these agreements should not be regarded as autonomous agreements but should be analysed together with all the other related contracts. He makes reference to French doctrine and case law and also to decisions of certain arbitral tribunals. As an example he refers to the ICSID award delivered in *Klockner v Cameroon*.²³ There the tribunal adopted a "commercial reality" analysis and, applying the law of the Republic of Cameroon, considered that the reciprocal obligations constituted a single legal relationship despite the existence of separate and successive instruments governing the rights and obligations of the parties. In another arbitration²⁴ an arbitral tribunal, applying the law of Luxembourg, did not consider two agreements as a single legal relationship because "both the intentions of the parties and the language of the relevant legal instruments do not permit such an application".

Leboulanger proceeds to provide guidelines for determining whether multi-contract situations should be treated as a whole. The first criterion is to see whether the agreements make up one single business transaction in the sense that the obligations are undertaken for the accomplishment of a single goal and are economically inter-dependent. A second criterion is the wording of the contracts concerned. He says that agreements may be considered to be inter-related when they were concluded on the same date, for the same duration, for the same purpose. Another indication of inter-relationship is the presence of a master agreement outlining the obligations undertaken by the parties which are more particularly described in ancillary agreements. Sometimes the recitals to an agreement will refer to other agreements and thereby establish their inter-dependence. Essentially, Leboulanger is addressing the evidentiary factors on which a tribunal might accept that there was consent to multiple claims. One possibility is an inference of consent to arbitrate disputes based on one contract under an arbitration agreement in another contract. Alternatively, there might be a finding of consent to add disputes under the contract without an arbitration agreement, to disputes raised under the contract with such an agreement.

Hanotiau examines a number of French cases where the courts have uniformly considered that if two agreements between the same parties are closely connected and one finds its origin in the other or is the complement or implementation of the other, the absence of an arbitration clause in one of the contracts

²³ Award of 21 October 1983 (1986) 2 ICSID Reports 9

²⁴ ICC Award No 6829 of 1992.

does not prevent disputes arising from the two agreements being submitted to an arbitral tribunal and being decided together. Among the cases referred to by Hanotiau is the decision of the French Supreme Court on 14 May 1996 which he explains as follows:

In a case which was decided by the French Supreme Court on 14 May 1996, an exclusive distribution agreement had been concluded by two companies and contained an arbitration clause providing that any dispute resulting from the agreement or its termination or relating thereto would be decided through arbitration. A dispute had arisen and the parties had concluded an additional agreement providing for the payment of commission to the distributor for sales performed outside the scope of the distribution agreement. This second agreement did not contain any arbitration or jurisdiction clause. It generated a new dispute and the distributor started an action before the Commerce Court of Bobigny which upheld its jurisdiction considering that the second agreement was not an accessory of the first one since they concerned different types of transactions and also the fact that the absence of any explicit reference to the arbitration clause in the second agreement excluded any acceptance of the said clause in the context of this second agreement. The French Supreme Court decided that the decision was wrong since it resulted from the decision that the second agreement found its origin in the breach of the first one and was its complement, with the consequence that it fell within the scope of the arbitration clause contained in the first contract.²⁵

The question is then if the two contracts are inter-connected and may be regarded as forming one legal relationship, when can a claimant put forward claims with respect to each of the contracts in the one arbitration proceeding? In this regard it is necessary to distinguish a number of situations. The first case is where one contract contains an arbitration agreement and the second does not contain any dispute resolution agreement. In this situation French theory would appear to hold that the claimant may put forward claims founded on both agreements in the one arbitration. The lack of an arbitration agreement in the other contract is presumably seen as more of an oversight or explained on the basis that repetition was unnecessary given the intended closeness of the contracts, rather than evidence that the parties prefer litigation over arbitration for disputes arising under it.

If each agreement contains an arbitration clause in identical terms the traditional view is that the claimant can commence an arbitration and put forward claims based on both agreements in the one arbitration. Leboulanger says that it is reasonable to infer that the parties intention was to consider the two agreements as one unified and indivisible transaction "and this is the reason why the arbitration clause was repeated, in identical terms, in each one of the agreements".²⁶

Where the two agreements contain differing arbitration or jurisdictional clauses the traditional view is that it is unlikely that claims founded on both agreements can be put forward in the same arbitration.²⁷ The practice of the ICC International Court of Arbitration is explained by Anne-Marie Whitesell and Eduardo

²⁵ Hanotiau, above n 22, 311.

²⁶ Leboulanger, above n 21, 77.

²⁷ Hanotiau, above n 22, 328.

Silva-Romero in a recent paper.²⁸ Whitesell and Silva-Romero observe that for the ICC Court to decide that a single arbitration shall proceed on the basis of multiple contracts, three criteria must be fulfilled. The first is that all contracts must have been signed by the same parties. The second is that all contracts must relate to the same economic transaction. Thirdly the dispute resolution clauses contained in the contracts must be compatible. The authors referred to a recent case where the Court decided that a single arbitration would not proceed on the basis of two contracts, given that one of the contracts contained an ICC arbitration clause and the other submitted disputes to the jurisdiction of the Paris courts. In another case the Court decided that a single arbitration would not proceed on the basis of two arbitration agreements contained in different contracts, one of which referred to Paris and the other to Geneva as the place of arbitration. The Court also decided that a single arbitration could not proceed on the basis of two arbitration agreements referring to different methods for constituting the arbitral tribunal. The authors explain that when making such decisions the Court endeavours to respect and follow the parties' intentions as expressed in their arbitration agreements. They note that there was one arbitration which the court allowed to proceed on the basis of multiple contracts, despite the fact that the contracts provided for different applicable substantive laws.

A more expansive approach might be based on a view that where there are differing dispute resolution clauses, it is at least arguable that the intent of each was simply to explain what to do with *single* claims but not multiple claims. Clear evidence that the parties want single disputes to be in different fora is not necessarily conclusive evidence that they would not want that matter raised in a different forum as a joint claim. We do not seek to refute the traditional presumption, but instead point to the desirability of a more nuanced analysis. We address this further in a section below dealing more comprehensively with multi-contract situations.

Respondent's Claims

Introduction to Claims by Respondents

We address the treatment of respondent's claims by first separately considering counterclaims and set-off defences. We then seek to integrate that analysis with the consideration of claimant's claims and consolidation of multiple hearings with a view to determining whether common principles might apply to each.

A *counterclaim* is usually seen as a claim brought by a respondent in a civil suit against the claimant that is independent of the primary claim. The term is used in contradistinction to a *set-off* which is seen as a defence to the primary claim. Because it is not simply a defence, a counterclaim leads to a separate judgment which may be in excess of the judgment under the primary claim. Furthermore, the counterclaim remains alive even if the initial claim is withdrawn. Thus it is truly a reverse claim and not a

²⁸ Anne Marie Whitesell and Eduardo Silva-Romero, 'Multiparty and Multi-contract Arbitration: Recent ICC Experience' in *ICC International Commercial Arbitration Bulletin Special Supplement* (2003) 7.

defence as such. Because a counterclaim remains alive even if the primary claim is withdrawn or invalid, it must be based on its own independent evidence of consent. As always, such consent should be found to emanate from the arbitration agreement itself, either directly or through **to** a *lex arbitri* that expressly allows for counterclaims. Even then the counterclaim should be linked to the original arbitration agreement. Numerous scholars support this view.²⁹

While a counterclaim is normally a distinct action, at times it might be raised on a conditional basis, that is to say, the tribunal might only be asked to consider it should it find prima facie liability under the primary claim.³⁰ This would not alter its distinct nature, however.

Civilian systems describe set-off claims in differing ways, the essential meaning of which is *compensation*.³¹ The case of set-off in international economic arbitration was comprehensively analysed by Klaus Peter Berger in 1999.³² As his important contribution shows, the proper treatment of set-off claims is far more complex and controversial than that of counterclaims. Berger notes the particular problem facing international commercial arbitration. On the one hand, given that there is no harmonised view as to the nature and ambit of set-off within domestic legal systems, arbitral rules would be reluctant to be too prescriptive. On the other hand, these very complexities together with the lack of prescription forces arbitrators to try to find a justifiable methodology for the treatment of such claims.

For our purposes, the distinction between set-off and counterclaim is important in terms of finding evidence of consent to admissibility. As we will discuss below in relation to set-off defences, the consent based logic that some commentators employ is to the effect that parties must have intended that all relevant defences can be raised against claims. It is suggested that a contrary position would offend against due process and principles of fairness. Thus there is a presumption in allowing set-off defences to be admissible.

While we explain below why we believe that those presumptions need more careful consideration, a different analysis is required with counterclaims. It is to this that we now turn.

²⁹ Vladimir Pavić, *Counterclaim and Set-Off in International Commercial Arbitration* (2006) 104; Gary Born, *International Commercial Arbitration* (2nd ed, 2001) 298; Fouchard, Gaillard and Goldman, above n 4, 660 – 1; Redfern et al, above n 7, 295.

³⁰ Final Award in ICC Case No 7314 of 1995 (1998) 23 Yearbook Comm Arbn 49.

³¹ Descriptions in other languages include “Compensación”, “compensazione”, “Aufrechnung”, “Verrechnung”, and “Verrekening”.

³² Klaus Peter Berger, ‘Setoff in International Economic Arbitration’ (1999) 15 *Arbitration International* 53.

Admissibility of counterclaims

As noted, a counterclaim must find a jurisdictional basis within the arbitration agreement that supported the primary claim, although that could emanate from a finding that multiple contracts only some of which contain arbitration clauses are sufficiently connected to allow this to occur.

A properly drawn agreement would allow for both claims and counterclaims under the contract that contains the arbitration clause. It is the connection to the contract and not who makes the claim that matters, although there can still be consent issues as to the constitution of the tribunal which should hear the case. We noted at the outset that tribunals are not standing dispute settlement bodies. Thus a counterclaim that only arises after a tribunal is constituted would not fit within the particular reference to arbitration, unless permitted under the arbitration agreement or the institutional rules.³³

Even where the events giving rise to the counterclaim arose before the constitution of the tribunal, there may still be fairness considerations, particularly as to tribunal composition and particularly as counterclaims under some procedural systems do not need to be notified prior to tribunal composition. In such circumstances if one party's concern is raised as a claim, the other party sees the contention in the Notice of Arbitration and can select an arbitrator with the issues in dispute in mind. Conversely, where a counterclaim is notified after the constitution of the tribunal, there can be a legitimate question as to whether the parties have consented to *that* tribunal hearing a reverse claim that was unknown to at least one of the parties when the initial arbitration was commenced. This issue might not be a problem where the clause expressly refers to counterclaims, as parties may consent to that imbalanced situation.

There are other strategic concerns. Most commentators also see a counterclaim as one that can only be brought by a respondent as against the claimant. Thus a respondent cannot raise claims against other respondents or against third parties under any express permission to raise counterclaims.³⁴ Critics point to the strategic corollary that this leaves the claimant with the sole right to designate the parties to the arbitration. Not only does that suggest some due process imbalance, but this may also be an economic incentive to bring claims so as to take the preferred position as claimant.³⁵

There are a number of other permutations that arise in multicontract situations. The basic question concerns a counterclaim arising under the same arbitration agreement. Another would be a counterclaim based on a different arbitration agreement. A third is a counterclaim on a matter on which there is no

³³ cf Art 19 ICC Rules.

³⁴ If claims between respondents or joinder of third parties can be allowed under the notion of counterclaims, this would raise significant problems in terms of consent overall and in terms of key logistical questions such as appointment of the tribunal: Michael Bühler and Thomas Webster, *Handbook of ICC Arbitration* (1st ed, 2005) 77. These and other challenging issues in multiparty arbitration are being dealt with in a parallel session.

³⁵ *Ibid.*

arbitration agreement. A fourth possibility is a counterclaim on a matter subject to a forum agreement.³⁶ The permutations were already alluded to in the previous section on claimant's claims and arise again in the context of set-off. We have noted that we will deal with these permutations in a section below that considers the interplay between differing contracts and dispute settlement clauses as they might apply to all of the claims and reverse claims covered in this article.

Before leaving this question, however, we again wish to point out the complex consent questions that these permutations throw up and caution against simplistic presumptions. There are a number of possible ways of dealing with these scenarios, with different presumptions of consent. The strict view is that different clauses show an intent to have the other disputes only heard in the other place. Hence the first tribunal rejects the counterclaim. A second option is to not consider the counterclaim but wait until the outcome of the other forum to decide whether there is indeed a net amount that should be ordered to be paid between one party and the other.

A third approach is to interpret the second dispute settlement clause to see if it was showing *exclusive* intent about disputes regardless of whether they arose by way of claim or counterclaim, or instead, whether the only intent was in relation to *primary* claims. The latter argument suggests that where parties say that certain claims will be brought in one forum, they are only speaking of the obligations of the *claimant* in commencing an action. Such clauses, the argument proceeds, say nothing about when and why that same issue could instead be brought as a counterclaim in a matter already brought elsewhere. Even if this view is appealing, it does not presume that there is automatic jurisdiction to hear the counterclaim under the first clause. All it says is there is no presumptive evidence of a lack of intent to allow this to occur.

As always, the parties could resolve these ambiguities by carefully delineating in their arbitration agreement which counterclaims, if any, are permitted. In the absence of a clear delineation in their agreement, guidance may be found within the arbitral rules which might apply. It is to this that we now turn.

Counterclaims and arbitral rules

In the absence of express agreement by the parties in their arbitration clause to the allowance of counterclaims, the next possibility is that they have indicated a similar choice through their selection of a seat and its attendant *lex arbitri* and/or their selection of arbitral rules.

The various *lex arbitri* and procedural models fall into two broad categories. One group simply states that counterclaims may be brought or identifies the time limits within which they can be brought. This category does not seek to identify the degree of connection required for the counterclaim to be admissible. An example of this arises in Article 9 of the the Swiss Rules of International Arbitration ('the Swiss

³⁶ Ibid.

Rules’).³⁷ Within this category a distinction should also be drawn between rules expressed in the form of the Swiss Rules and those which, while not defining the degree of connection required for a counterclaim to be admissible, refer to ‘any counterclaim’ brought by a respondent. Rules which provide for counterclaim in this way include the following: Article 4 (1) of the Singapore International Arbitration Centre (“SIAC”) Rules,³⁸ Article 5 (3) of the Australian Centre for International Commercial Arbitration (“ACICA”) Rules,³⁹ Article 13 (1) of the China International Economic and Trade Arbitration Commission (“CIETAC”) Rules,⁴⁰ Article 2(b) of the London Court of International Arbitration (“LCIA”) Rules,⁴¹ Article 36(b) of the World Intellectual Property Organisation (“WIPO”) Expedited Arbitration Rules,⁴² and Article 5(b) of the HKIAC Short Form Arbitration Rules.⁴³ Whether the use of the word ‘any’ instead of ‘a’ to qualify the class of counterclaim has the significance of broadening the class of admissible counterclaims is a matter for further consideration.

A similar result is provided by Article 2(f) of the UNCITRAL Model Law which simply states that the provisions of the law apply to a counterclaim.⁴⁴ An indirect reference is found in ICC Rule 30(5) which clarifies the inclusion of counterclaim and set-off amounts in the advance on costs.⁴⁵

³⁷ ‘Any counterclaim or set-off defence shall in principle be raised with the Respondent’s Answer to the Notice of Arbitration.’

³⁸ ‘The Respondent shall send a Response within 14 days of receipt of the Notice of Arbitration which shall contain: (b) a brief statement of the nature, circumstances and quantification, if any, of any *envisaged* counterclaims...’ (emphasis added)

³⁹ ‘The Answer to Notice of Arbitration may also include: any counterclaim...’

⁴⁰ ‘Within forty-five (45) days from the date of receipt of the Notice of Arbitration, the Respondent shall file with the CIETAC its counterclaim in writing, if any.’

⁴¹ Within 30 days of service of the Request on the Respondent, (or such lesser period fixed by the LCIA Court), the Respondent shall send to the Registrar a written response to the Request (“the Response”), containing or accompanied by:... (b) a brief statement describing the nature and circumstances of any counterclaims advanced by the Respondent against the Claimant.’

⁴² ‘Any counter-claim or set-off by the Respondent shall be made or asserted in the Statement of Defense...’

⁴³ ‘Within 14 days of receipt of the Claimant’s Statement of Claim case file, the Respondent shall submit to the Arbitrator and to the Claimant a Statement of Defence containing:... (b) any counterclaim, together with a brief statement of the remedies sought...’ However, the purview of the WIPO Rules generally may be understood to envisage a wider scope for the arbitrability of counterclaims when provisions allowing for counterclaim are read alongside Article 70(d) of the Arbitration Rules: ‘Where the amount of the counter-claim greatly exceeds the amount of the claim or *involves the examination of significantly different matters*,..., the Center in its discretion may establish two separate deposits on account of claim and counter-claim.’ (emphasis added)

⁴⁴ ‘For the purposes of this Law:... (f) where a provision of this Law, other than in articles 25(a) and 32(2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.’

⁴⁵ ‘If one of the parties claims a right to a set-off with regard to either claims or counterclaims, such set-off shall be taken into account in determining the advance to cover the costs of arbitration in the same way as a separate claim insofar as it may require the Arbitral Tribunal to consider additional matters.’

Other rules seek to define the linkage required for admissibility. One group takes a conservative approach, limiting admissibility to counterclaims from the same contract. For example, UNICTRAL Arbitration Rules (UAR) Arts 19(2) and (3) speak of counterclaims “arising out of the same contract”. Under UAR, if it is from the same contract, the accepted view is that it does not need to be limited to contractual claims. The test might be broader if it referred to counterclaims “relating to” the same contract, a view alluded to by Christopher Kee in his article addressing this topic.⁴⁶ There is no equivalent in the Model Law although the working group suggested the Model Law should be interpreted with a similar restrictiveness to UAR.⁴⁷ Thus, Article 22(3) of the ACICA Rules is worded to give effect to a broader formulation: ‘...the Respondent may in its Statement of Defence,..., make a counterclaim or claim for the purpose of a set-off, *arising out of, relating to or in connection with* the contract’ (emphasis added).

Another group takes a different approach to the linkage test and draws attention to the same arbitration agreement or the same relationship rather than the contract per se. See for example Article 3(2) of the National Arbitration Rules of the American Arbitration Association (“AAA”) and Article 7(a) of the Rules of Arbitration and Conciliation of the Vienna Arbitration Centre. Similarly the AAA International Arbitration Rules provide that ‘a respondent may make counterclaims or assert set-offs as to any claim *covered by the agreement to arbitrate,*’⁴⁸ and that ‘[a] party may not amend or supplement a claim or counterclaim if the amendment or supplement would *fall outside the scope of the agreement to arbitrate*’⁴⁹ (emphasis added). This is shared to a degree by the ICSID Rules of Arbitration, Article 40(1) of which provides that ‘a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of [ICSID]’.⁵⁰

Theories with respect to counterclaims

There does not appear to be controversy with respect to the need for distinct consent to underlie a counterclaim. The key difference in view is based on the evidentiary standards and methods of determining consent. This will either involve interpretation of the arbitration agreement or the *lex arbitri* and procedural rules. The more broadly the tests are drafted, the easier it is to allow a counterclaim. The biggest problem is with rules that simply allude to the procedural steps required, without attempting to

⁴⁶ Kee C, “Setoff in International Arbitration – What Can the Asian Region Learn?” *Asian International Arbitration Journal* 1/2005, 148.

⁴⁷ Berger, above n 32, 64.

⁴⁸ AAA International Arbitration Rules, Article 3(2).

⁴⁹ AAA International Arbitration Rules, Article 4.

⁵⁰ ICSID Rules of Procedure for Arbitration Disputes, Article 40(1).

define an admissibility standard. Even rules that have attempted such a definition have rarely dealt with the question with enough precision to guarantee certainty and consistency.

A “same relationship” test obviously allows for at least some multi-contract situations but is also likely to lead to differing responses from Tribunals, with some looking to an expansive interpretation, while others might take a more circumspect approach to controversial fact situations.

Even with a broader formulation, admissibility under multi-contract situations would still need to be linked back to an agreement to arbitrate found within one contract that is held because of the integrated nature of the various contracts to be broad enough to encompass claims under distinct contracts.

Introduction to *set-off*

As noted above, the term counterclaim is used to describe an independent claim that is not in the nature of a defence. Set-off on the other hand, is seen as a defence.

If the set-off is allowed and established, it has a number of implications. Because the set-off is limited in amount to the totality of the original claim, there can be no monetary award in favour of a person raising it. Furthermore there is no need for separate awards on claim and set-off defence. The other corollary of this is that if the claim is not made out or is withdrawn, there is no need to adjudicate upon the set-off. A set-off merely provides a defence to the claim. Hence it operates “as a shield, not as a sword.”⁵¹

From the time that an adjudicator finds in favour of the set-off right, it will either operate retrospectively or prospectively depending upon whether the applicable law provides for automatic application or application from the time of the notice or perhaps even the time of judgment. This can affect rights to interest and measurement of damages. It might also often have different costs implications to counterclaims, although costs will of course be a discretionary matter. By way of example, if a set-off is a full defence, a tribunal might order costs in favour of a respondent who has succeeded in entirely blocking the claim. On the other hand, a successful set-off that only partially reduces the primary claim, might still see the claimant successful on costs to the extent of the net amount. Conversely, where both a claim and counterclaim are successful, each successful party might anticipate costs on their successful element.

While a set-off is normally raised by a respondent, it could also be raised by a claimant against a counterclaim brought by a respondent.⁵² On the other hand, one set-off cannot be brought as against another set-off.

⁵¹ *Stooke v Taylor* [1880] 5 QB 569, 575 as cited in Berger, above n 32, 60.

⁵² See for example ICC Award No 3540 of 1980, reprinted in Michel Jarvis and Yves Derains (eds), *Collection of ICC Arbitral Awards (1974 - 1985)* (1990) 105, 112, 399, 402.

While these propositions are clear, much of the law of set-off is contentious and varies greatly between different legal families. This makes it difficult to determine what the general treatment of them should be under international arbitration. For this reason, we turn now to a consideration of the differences in views between legal families as to the nature of set-off in the context of considering admissibility factors within international arbitration.

The substantive nature of set-off

For an arbitrator, there are both procedural questions as to admissibility, and substantive questions as to the inherent nature of set-off. One of the complexities in dealing with set-off is that some legal systems treat it as substantive while others treat it as procedural. Even within some legal systems different types of set-off fall into each category.⁵³ Berger notes that the long-standing dispute as to whether set-off was procedural or substantive in nature under civil law was decided in favour of the latter view.⁵⁴ For the purposes of this paper the more it is seen as substantive, the more it might be argued to inherently undermine the claim and hence be admissible. The more it is procedural, the more it is seen as an efficiency measure that simply aims to reduce total transaction costs in resolving multiple claims.⁵⁵

As is discussed below, even this distinction does not necessarily lead to differing outcomes as many see efficiency factors as key guides to implied consent. As we suggest below, efficiency arguments are more justifiable when linked to consent. Efficiency factors might then apply indiscriminately to both procedural and substantive reverse claims. This concern to discern the intent of the parties on a case by case basis cautions against automatic transplanting of domestic litigation notions of set-off into the field of international commercial arbitration. The aim of avoiding multiplicity of litigation underlying common law allowance of set-off rights is in the main about efficient use of the courts and allocation of taxpayers' money, not about the original intent of the litigants.⁵⁶ The point is simply that the consent logic differs greatly depending on which view of set-off we begin with.

⁵³ Berger, above n 32, 54.

⁵⁴ Ibid, 55.

⁵⁵ In some domestic legal systems efficiency arguments even mean that some counterclaims, where sufficiently linked to the primary claim, must be pleaded or they will be lost under principles of *res judicata*, eg Rule 13 of the United States Federal Rules of Civil Procedure (2007) which distinguishes between compulsory and permissive counterclaims. Aeberli notes that the distinction in arbitration has become blurred because it emanated from domestic legal systems but has been reduced in significance in some jurisdictions because of procedural reforms: Peter Aeberli, 'Abatements, Setoff and Counterclaims in Arbitration Proceedings' (1992) 3 *Arbitration and Dispute Resolution Law Journal* 1, 2.

⁵⁶ The history of the establishment of statutory setoff shows other reasons why it has little direct relevance for arbitral matters. Aeberli notes that the legislation sought to remove the potential injustice if a defendant might be imprisoned for non-payment of debts when in fact money was owed in the other direction: Ibid, 4, citing *Stoke v Taylor* (1880) 5 QBD 569; *Green v Farmer* (1786) 4 BURR 2214. A statutory remedy was required to deal with this as equity had only established setoff rights for connected transactions.

As noted above, Professor Klaus Peter Berger has made a major study of set-off in international arbitration.⁵⁷ As to substantive issues, Professor Berger has also noted and analysed a recent attempt to articulate harmonised principles of set-off through the 2004 edition of the UNIDROIT Principles of International Commercial Contracts (UPICC).⁵⁸ Article 8.1 UPICC states:

“(1) Where two parties owe each other money or other performances of the same kind, either of them (‘the first party’) may set off this obligation against that of its obliger (‘the other party’) if at the time of set-off, (a) the first party is entitled to perform its obligation; (b) the other party’s obligation is ascertained as to its existence and amount and performance is due.

(2) If the obligations of both parties arise from the same contract, the first party may also set off its obligation against an obligation of the other party which is not ascertained as to its existence or to its amount.”⁵⁹

There are also similar rules on set off in Part III of the Principles of European Contract Law (PECL) published in 2003.⁶⁰ Case law has articulated similar principles. For example ICC Award No 3540 suggested that:

“according to the general principles of law, non-contractual set-off is subject to four cumulative conditions: similarity and reciprocity of the subjects, performances of an identical nature, the claims should be certain and liquid, and finally maturity of the claims (ie, not subject to a time limit).”

Like most harmonisation exercises, the UNIDROIT draft or such arbitral articulations of principle must either express a preference for the views of one legal family over others, or find some compromise point between each. Compromises are often sub-optimal, often papering over remaining differences in view between negotiators. Such negotiating fora might seek a compromise simply in order to further the cause of harmonisation, leaving it to later jurisprudence to make some key refinements.

In such instances, arbitrators stating a preference for one theory of set-off might do so because they see a preferred uniform policy position or because they adopt a conflicts methodology and follow this to the legal family from which particular principles are identified. The purpose of this paper is not to analyse set-off per se via a consideration of all of these factors. It is instead to determine the admissibility of multiple claims between parties within the field of international commercial arbitration. Hence a

⁵⁷ Berger, above n 32, 53.

⁵⁸ Klaus Peter Berger, ‘Setoff’ in *ICC International Commercial Arbitration Bulletin Special Supplement* (2005) 17.

⁵⁹ *Principles of European Contract Law*, reprinted in O Lando, E Clive, A Prüm and R Zimmermann (eds) *Principles of European Contract Law* (2003) Arts 13:101 and 13:102(1). Similar principles have been articulated by arbitral tribunals.

⁶⁰ *Ibid*, 59ff.

comparative analysis of differences between legal systems and the principles articulated by UNIDROIT should be looked at primarily in helping us decide whether set-off should be allowed as of right and if not, by what other principle should admissibility be determined on a case by case basis.

Berger suggests rightly that the historical perspective may help us understand the different concepts of set-off. In most contentious issues of legal policy, we are faced with potential conflicts between fairness and efficiency and the subsidiary elements of certainty versus flexibility. Hence, Roman law saw the establishment of the right of set-off as an exception to the historical procedural formalism of classical Roman law which did not initially even allow reverse claims arising from the same contract.⁶¹ From an early equitable basis, the right expanded to claims arising out of the same contract to then encompass claims outside of that contract. That progression in Roman law led civilian legal systems to develop the right using notions contemplating either set-off or the alternative description, compensation.⁶² Where the common law is concerned, it also began with the notion of equitable set-off in relation to claims that were sufficiently connected.

Set-off as performance

Perhaps the fundamental difference in the development of the laws of set-off in different legal families is between those that see set-off as not simply a reverse claim but instead as a means of performance. On this view, where a claim is made and a respondent declares a set-off, the respondent is saying that even if the primary claim is made out, it has fully performed its obligations as a result of the declared set-off. When articulated in that manner it can be argued to be a direct response to the claim and hence an integral part of an assessment of the continuing validity of that claim by the tribunal. In our view, one of the difficulties with this analysis is that it puts all set-off defences within the one category, regardless of the degree to which the facts relate to the primary claim and indeed the degree to which those facts might come within the original arbitration clause.

The second conceptual problem is that this doctrinal perspective fails to distinguish adequately between the *establishment* by a tribunal of contested legal rights and the determination of the *remedies* that flow from breach of those rights. For example, if a contested claim is fully made out in law at the same time as a set-off is made out on unrelated facts, one could argue conceptually that the set-off merely explains why there will be no remedy by way of an order of payment of money. One could still say that the primary claim is discretely made out in full. Different legal cultures have certainly taken different views on this issue. Once again we are not seeking to recommend harmonised principles of substantive set-off law. We are instead concerned with the different articulations and theoretical opinions on set-off and their impact

⁶¹ Berger, above n 32, 55.

⁶² “Compensation”, “compensación”, “compensazione”, “aufrechnung”, “verrechnung”, “verrekening”.

upon a consent based approach to admissibility questions. In doing so, we further explore some aspects of the law of set-off and then return to the question of presumptions as to consent.⁶³

There are a number of different factual permutations that deserve separate analysis. Where debts are connected, a cross entitlement is often a pure defence and does not even need to be treated as a set-off. Consider for example, a case of a buyer and seller who have an ongoing two way commercial relationship with regular two way payment obligations. The supplier sues the buyer for outstanding payment but the buyer says the claim fails to take into account agreed allowances for faulty goods. This need not be separately pleaded as a set-off if the claimant is only entitled to a net amount under their agreement. It is simply an allegation that the net position as claimed is wrong. This is at times described as contractual set-off. If it is expressly or impliedly agreed to in this way it would easily fall within any arbitration agreement covering the primary claim.

Liquidated and unliquidated claims and rights to set-off

In most legal systems, more general set-off is not available for unliquidated damages. It essentially deals with mutual debts. That already raises an issue for us as arbitration agreements are not so limited. PECL has moved away from other legal systems on this issue by not requiring that the set-off must be ascertained as to existence and amount.⁶⁴ Article 13:102(1) PECL provides adjudicators with discretion to allow a set-off of an unascertained amount where it “will not prejudice the interests of the other party.” Such a test begs the question before us as to arbitral jurisdiction, as admissibility in the face of objections would at least be argued to be such prejudice. On the other hand, if admissibility is justifiable via consent, then such an argument should not succeed as it is initial consent that matters, not consent at the time of dispute.

The common law has also seen a tempering of this rule as to unliquidated damages. *Hanak v Green*⁶⁵ saw the English Court of Appeal allowing an unliquidated claim by way of equitable set-off against a damages claim for defective workmanship. There might also be situations where the reverse claim, while unascertained, is sufficiently high so that one can be certain that it exceeds the principal claim. In these circumstances it would be sufficiently ascertained to support set-off of the entire claim.⁶⁶

Berger suggests that the requirement of an ascertained and existing cross-obligation “can be explained by the function of set-off as a means of private enforcement of the cross-claim of the party declaring the set-

⁶³ For a more detailed analysis of the comparative position see Berger, above n 32, 55; Philip Wood, *English and International Setoff* (1989); S Rory Derham, *Setoff* (2nd ed, 1996); Pavić, above n 29, 101.

⁶⁴ Berger, above n 58, 20.

⁶⁵ [1958] 2 QB 9.

⁶⁶ Berger, above n 58, 20.

off.”⁶⁷ Unfortunately, this policy justification would also not resolve the issue of arbitral treatment. If that is the essence of the right then it is more in the nature of a distinct remedy rather than a true defence to the original claim. Furthermore, to describe it as a means of private enforcement says nothing about the appropriate dispute resolution forum for determining whether such private enforcement was valid or not.

Automatic application versus claims as to set-off

There is also the distinct question as to whether a set-off operates automatically (*ipso iure*) or whether it requires a declaration by one of the parties. The latter distinction would have little relevance to arbitration. If the entitlement is not within the reference and is not pleaded it cannot be dealt with by a tribunal.⁶⁸ Berger indeed criticises the development of the *ipso iure* effect of set-off. Articles 8.3 and 8.4 UPICC now indicate that set-off is effected by notice and does not operate automatically. We agree with Berger that this solution better accords with the legal certainty that is of particular importance in international business.⁶⁹ Yet this arguably removes some of the strength in the argument in favour of automatic admissibility of set-off. The more it applies automatically to undermine a claim, the more one could argue that it is an inherent element of a just determination of the ambit and validity of such a claim. Conversely, if it is a unilateral right of self-execution, the ability to legally evaluate that self-execution still must be based on mutual consent if the forum is to be an arbitral one.

Independent and equitable set-off

In different legal systems, it is further classified into independent or equitable set-off. In our view, this distinction is particularly important for the purposes of this paper as it alludes to the degree of factual connection between the claim and set-off. If the first and perhaps essential question as to admissibility is consent, then the degree of connection between primary claim and set-off defence may be relevant to that determination.

An independent set-off at common law is allowed for where it is capable of being ascertained with suitable precision, described as liquidated. This would also include some damages claims, for example, where they arise out of an express contractual provision setting up a damages formula, such as in the case of late performance in construction contracts.

Such an independent set-off need not arise out of related transactions and is seen as purely procedural, requiring the imprimatur of legal proceedings. As such it cannot be invoked unilaterally. It is sometimes described as statutory set-off.⁷⁰ Aeberli notes and criticises an English Court of Appeal decision that a

⁶⁷ Ibid.

⁶⁸ Berger also notes that in litigation the same procedural issue applies. Berger, above n 32, 56.

⁶⁹ Berger, above n 58, 21.

⁷⁰ Derham, above n 63, 56.

statutory set-off can be raised against a claim for specific performance. He supports the dissenting judgment of Kerr LJ that at most the cross-debt is relevant to the equity of granting specific performance.⁷¹ Aeberli provides a strong argument that statutory set-off never acquired the characteristics of a substantive defence and criticises the contrary assertion by Mustill and Boyd.⁷²

Conversely, Berger notes that where equitable or transaction set-off is concerned it operates as “a true, substantive defence against the respondent’s liability to pay a debt otherwise due. It may be invoked independently of the order of a court or arbitral tribunal.”⁷³ To be characterised as an equitable set-off the cross-claims must be “inseparably connected with the transaction giving rise to the claim so that the title of the plaintiff at law to prosecute his demand is impeached.”⁷⁴ The cases suggest that the set-off need not necessarily arise out of the same contract. Aeberli also argues that at common law, an equitable set-off has the characteristics of a substantive rather than a procedural defence. He takes issue with the suggestion by Mustill and Boyd that equitable set-off is a procedural defence and must therefore come within an express submission to arbitration.⁷⁵

Aeberli notes a number of older common law cases which dealt with unliquidated damages and which appear to have held that the only matter to establish for equitable set-off is the simple fact whether the reverse was inseparably connected with the dealings and transactions which gave rise to the claim. After criticising those cases, Aeberli suggests that equitable set-off in common law should be seen as applicable “where the cross-claim alleges matters which can be identified as depriving the defendant of the benefit for which the plaintiff was demanding payment, or hinder or prejudice the defendant in enjoyment of that benefit.”⁷⁶

Even if this is an accurate reflection of the position at common law, it does not give a clear indication of how a tribunal should proceed. If the test is that it needs to be so inseparably connected so as to impeach the title of the plaintiff, how else could this be so if the cross-claim does not otherwise come within the arbitration agreement or is otherwise founded on the consent of the parties? Even if it arises out of the same contract, if it is not within the initial reference to arbitration, by what principles of consent ought it to be nevertheless included? In our view, this is the nub of the question where set-off admissibility is

⁷¹ Aeberli, above n 55, 5 citing *Bicc v Burndy* [1985] 1 All ER 417.

⁷² Aeberli, above n 55, 6 citing Mustill and Boyd, above n 10, 130.

⁷³ Berger, above n 32, 58 citing *AWA Ltd v Exicom Australia Pty Ltd* [1990] NSWLR 705 and ‘*The Kostas Melas*’ [1981] 1 Lloyd’s Rep 18.

⁷⁴ *The Angelic Grace* [1981] 1 Lloyd’s Rep 288. See also *National Westminster Bank Plc v Skelton* [1993] 1 WLR 72.

⁷⁵ Mustill and Boyd, above n 10, 130.

⁷⁶ Aeberli, above n 55,10.

concerned. Because it is so complex and uncertain it is unfortunately the case that whichever way a tribunal goes on these issues, there might be challenges to its determination and/or enforcement.

As we discuss below, even if a tribunal considers that a set-off cannot be brought before it, the mere presence of such a claim may be relevant to the tribunal's decisions on the timing of the proceedings and application of the award and other procedural matters. Parties could be presumed to intend that arbitrators make such discretionary decisions with an eye on all relevant surrounding circumstances and not treat the instant dispute as occurring in a vacuum. On the other hand, arbitrators should not seek to resolve the *implications* of those external circumstances unless they are directly within jurisdiction.

Even under the common law, an equitable set-off does not apply automatically. Its equitable basis simply means that it is unconscionable for the creditor to consider the debtor being in default where an equitable set-off is sufficient to counter the primary claim.⁷⁷ Thus in *Aires Tanker Corporation v Total Transport Ltd* the House of Lords considered that a set-off which had been previously notified, but which was not pleaded in any suit within a statutory time period, was lost and did not negate the primary claim.

An alternative view of the nature of substantive set-off under the common law is provided by Wood.⁷⁸ He describes equitable or transaction set-off as a “self-help” remedy. A debtor might unilaterally rely on the remedy or alternatively, may exercise the right by relying on it as a defence in judicial proceedings. In the latter case the judgment has a retroactive effect from the point in time at which it accrued. Derham takes issue with this formulation⁷⁹ although it is not necessary for our purposes to resolve that doctrinal debate. As suggested throughout, differences between legal families and doctrinal differences within those families are unlikely to be a sensible gateway for arbitrators to resolve these questions.

Derham also notes situations where a truly substantive set-off defence may have other significant contractual consequences for the claimant's rights. He cites examples where one party is entitled to take a particular course of action only where the other party fails to make a payment as and when due. If, however, the latter has an equitable basis for refusing to make the payment, then the express options provided for the benefit of the creditor should not be seen as coming into play.⁸⁰

In his article on Set-off under UPICC, Berger suggests that “(s)et-off is based on the idea that performance of claims existing reciprocally between two parties must be simplified and that therefore, whenever equity ... requires, the setting off of mutual claims should be allowed.”⁸¹ It is suggested that it

⁷⁷ Derham, above n 63, 57-8.

⁷⁸ Wood, above n 63, 111-2.

⁷⁹ Derham, above n 63, 57-8.

⁸⁰ *Ibid*, 62 – 3.

⁸¹ Berger, above n 58, 19.

would be against good faith to ask each party to perform its obligations separately. One could readily envisage circumstances where that would be so, but much is dependent on the facts of each case and whether the set-off has merit or not or is instead used as a delaying tactic. There is also no inherent logical link between saying that it is not in good faith to claim money when you know you have an equal payment obligation in reverse and in then saying that such logic must always impose itself upon the claimant no matter what permutation of dispute resolution clauses apply in relation to each. Most importantly, good faith notions ought to apply differently depending on the degree to which the claimant is either aware of the set-off or accepts its validity. If the claimant does not believe that the cross-claim has merit, then the good faith based initial premise simply does not hold. Thus we are again suggesting that determining admissibility based on some *inherent* notion of set-off as a distinct legal concept, particularly when this varies so much between legal families, is not an ideal way for the arbitral world to move forward on this issue.

Berger also notes a number of authors who find great similarity between set-off and counterclaim where as is usual in international commercial arbitration, money claims are at stake.⁸² For example, Bühler and Webster find the distinction between counterclaims and set-off to be “difficult to see”.⁸³ They argue that in most systems, the adjudicator must find a claim in a certain amount and that it arose in a context where a party is entitled to a set-off. They suggest that if this is an accurate assessment of the law, the first step is really demonstrating that there is a counterclaim of some nature while the second step shows that it has a sufficient connection to the primary claim. On the other hand, Berger also suggests that in spite of similarities, set-off and counterclaims “have to be distinguished sharply from each other”.⁸⁴

We return to these questions in our concluding sections where we try and consider the consent framework in the context of all types of claims concurrently. At this stage we merely wish to reiterate that there is no simple solution to the question of admissibility of set-off claims. It should not automatically be allowed simply because all legal families entitle them as “defences”. A conflicts methodology that simply leads to this position is less than ideal although we explore this further below. From a consent logic, there are *a priori* presumptions either way which will be affected by variations in facts on a case by case basis. As with counterclaims, one important question is whether the set-off arises under a different contract with its own dispute resolution clause. As noted, we also address these permutations more fully in a section below.

⁸² Berger, above n 32, 58.

⁸³ Bühler and Webster, above n 34, 76.

⁸⁴ Berger, above n 32, 59.

Procedural rules dealing with setoff

Similar to the spread of procedural arbitration rules with respect to counterclaims, rules allowing for setoff fall into a number of different permutations in terms of wording, and by implication, in terms of variations in the broadness/narrowness of the conditions for admissibility of claims of setoff.

Article 19(3) of UNCITRAL Arbitration Rules provides for a similarly narrow scope as its counterclaim provision, contingent on a connection with the same contract as the one forming the basis of the original claim. A respondent may thus ‘rely on a claim arising out of the same contract for the purpose of a set-off.’

The ICC Rules of Arbitration provision on setoff is contained in Article 30(5), the same provision which allows for counterclaims to be made by a respondent. That is, as with its provision for counterclaim, the admissibility of setoff *per se* is acknowledged, however, *conditions* of admissibility are not articulated any further.

Article 42(3) of the WIPO Arbitration Rules⁸⁵ falls into the category of provisions which provide for setoff by the use of the word ‘any’, and as discussed with reference to counterclaim provisions, the attendant implications of this wording should be born in mind in distinguishing such rules from a rule which provides for ‘a’ claim of setoff, which may designate a narrower category for the purposes of admissibility.

The Swiss Rules constitute yet another formulation for the admissibility of claims of setoff. Article 21(5) provides that ‘[t]he arbitral tribunal shall have jurisdiction to hear a set-off defence even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause.’ As such, this clause unreservedly provides for the widest ambit of admissible setoff claims. Schedule 2.1 of these rules, dealing with the calculation of the value of the dispute’s claims further provides that ‘[t]he value in dispute is further increased by the amount of set-off defenses of *non-connected claims* to be evaluated by the Arbitral Tribunal.’

The SIAC Arbitration Rules fall into a category which provides no explicit acknowledgement of setoff claims. Whether the wording of Article 24 implicitly provides a right to make setoff claims should be the subject of further analysis.⁸⁶

⁸⁵ ‘Any counter-claim or set-off by the Respondent shall be made or asserted in the Statement of Defense or, in exceptional circumstances, at a later stage in the arbitral proceedings if so determined by the Tribunal. Any such counter-claim or set-off shall contain the same particulars as those specified in Article 41(b) and (c).’

⁸⁶ SIAC Rules, Article 24: ‘In addition and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have the power to:...

(b) allow other parties to be joined in the arbitration with their express consent, and make a single final award *determining all disputes* among the parties to the arbitration...’(emphasis added).

Consolidation

Sometimes, after an arbitration has been commenced, a party to that arbitration will seek to start a second arbitration concerning the same or a related contract or legal relationship. It may be the Respondent in the first arbitration who seeks to put forward a claim in a second arbitration rather than by way of a counterclaim in the first arbitration. Alternatively the Claimant in the first arbitration may, for various reasons, put forward additional claims in a second arbitration. A question which then arises is whether the two sets of proceedings are desirable or whether they can and should be consolidated.

Consolidation can always occur if the parties agree to do so. But this is unlikely because one of the parties has taken a deliberate decision to commence a second arbitration. However consolidation may be possible if authorised by the relevant arbitral rules or if provided for by the *lex arbitri*.

Turning first to arbitration rules, Article 4(6) of the ICC Rules of Arbitration provide for consolidation as follows:

"When a party submits a Request in connection with a legal relationship in respect of which arbitration proceedings between the same parties are already pending under these Rules, the Court may, at the request of a party, decide to include the claims contained in the Request in the pending proceedings provided that the Terms of Reference have not been signed or approved by the Court. Once the Terms of Reference have been signed or approved by the Court, claims may only be included in the pending proceedings subject to the provisions of Article 19."

Schäfer, Verbist and Imhoos suggest that the discretion to consolidate goes against the principle of party autonomy but argue nevertheless that where there is a "genuine connection" between the cases, consolidation will result in more effective proceedings and risk divergent decisions.⁸⁷ In our view, if the parties have expressly selected the ICC Rules and if one concentrates on consent at the outset, one cannot necessarily view a decision by the ICC Court to consolidate as going against party autonomy.

There is also a debate as to whether the court has the sole power to rule on consolidation or whether in cases where the terms of reference have already been signed or approved, indirect joinder can be effected by a tribunal under Article 19, dealing with acceptance of late claims. On its plain meaning, Article 19 allows for such a discretion. A converse argument would be that such an application is in essence a consolidation application which should have been dealt with solely under Article 4(6). Schäfer, Verbist and Imhoos suggest that the tribunal might make a decision under Article 19 and then convey the decision to the parties and the court for the latter to rule on the matter.⁸⁸ It is not clear how that procedure can easily be derived from the express rules. If the tribunal does not have the power under Article 19, then all the court would be doing is determining that it has improperly applied Article 19. If it does have that

⁸⁷ Erik Schäfer, Maître Verbist and Christophe Imhoos, *Economica Verlag* (2000) 34.

⁸⁸ *Ibid.*

power, there is no express jurisdiction for the court to have supervisory jurisdiction over the tribunal's determination.

Hanotiau suggests that rather than considering the timing of the terms of reference as the key deadline, a better solution, if compatible with the rules, would be to allow consolidation as long as the case has not gone beyond the pleading stage.⁸⁹

Some rules provide for a discretion but give little guidance on the relevant factors. For example, article 12 of the Belgian Centre for Arbitration and Mediation ("CEPANI") Rules state:

"When several contracts containing the CEPANI arbitration clause give rise to disputes that are closely related or indivisible, the Appointments Committee or the Chairman of CEPANI is empowered to order the joinder of the arbitration proceedings. The Committee appoints the tribunal and may increase the number of arbitrators to a maximum of five."

A slight improvement on this is provided by the Swiss Rules. In Article 4, it is provided that consolidation may occur so long as in making their decision, the relevant Chambers and the Special Committee consult with the parties. Article 4, however, provides little guidance as to what must be considered by these bodies, save noting that the link between the cases in respect of which consolidation is proposed must be the subject of deliberation, as well as 'all circumstances' surrounding the disputes.⁹⁰

A unique provision on consolidation is contained in the NAFTA. The decision on consolidation is not taken by an administering body but by a separate tribunal established under Article 1126 to decide consolidation. Article 1126(2) of the NAFTA provides:

- "2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:
 - (b) assume jurisdiction over, and hear and determine together, all or part of the claims; or
 - (c) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others."

The procedure for appointing the Tribunal is dealt with in Article 1126(3 to 5) as follows:

⁸⁹ Hanotiau, above n 2, 379.

⁹⁰ 'Where a Notice of Arbitration is submitted between parties already involved in other arbitral proceedings pending under these Rules, the Chambers may decide, after consulting with the parties to all proceedings and the Special Committee, that the new case shall be referred to the arbitral tribunal already constituted for the existing proceedings. The Chambers may proceed likewise where a Notice of Arbitration is submitted between parties that are not identical to the parties in the existing arbitral proceedings. When rendering their decision, the Chambers shall take into account all circumstances, including the links between the two cases and the progress already made in the existing proceedings.'

3. A disputing party that seeks an order under paragraph 2 shall request the Secretary-General to establish a Tribunal and shall specify in the request:
 - (a) the name of the disputing Party or disputing investors against which the order is sought;
 - (b) the nature of the order sought; and
 - (c) the ground on which the order is sought.
4. The disputing party shall deliver to the disputing Party or disputing investors against which the order is sought a copy of the request.
5. Within 60 days of receipt of the request, the Secretary-General shall establish a Tribunal comprising three arbitrators. The Secretary-General shall appoint the presiding arbitrator from the roster referred to in Article 1124(4). In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator who is not a national of any of the Parties. The Secretary-General shall appoint the two other members from the roster referred to in Article 1124(4), and to the extent not available from that roster, from the ICSID Panel of Arbitrators, and to the extent not available from that Panel, in the discretion of the Secretary-General. One member shall be a national of the disputing Party and one member shall be a national of a Party of the disputing investors."

If a Tribunal established under 1126 assumes jurisdiction then other Tribunals previously established under Article 1120 cease to have jurisdiction with respect to the claim or part of the claim over which the Article 1126 Tribunal has established jurisdiction. The Article 1120 Tribunal will ordinarily adjourn its proceedings or they can be stayed by order of the Article 1126 Tribunal.

In addition to consolidation provided for in arbitral rules, the *lex arbitri* may make provision for consolidation either by court order or by the Tribunal. An example of the latter is section 24 of the *International Arbitration Act* 1974 of Australia. It provides as follows:

1. A party to the arbitral proceedings before an arbitral tribunal may apply to the tribunal for an order under this section in relation to those proceedings and other arbitral proceedings (whether before that tribunal or another tribunal or other tribunals) on the ground that:
 - (a) a common question of law or fact arises in all those proceedings;
 - (b) the rights to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions; or
 - (c) for some other reason specified in the application, it is desirable that an order be made under this section.
2. The following orders may be made under this section in relation to 2 or more arbitral proceedings:
 - (a) that the proceedings be consolidated on terms specified in the order;
 - (b) that the proceedings be heard at the same time or in a sequence specified in the order;
 - (c) that any of the proceedings be stayed pending the determination of any other of the proceedings.

3. Where an application has been made under subsection (1) in relation to 2 or more arbitral proceedings (in this section called the Related proceedings), the following provisions have effect.
4. If all the related proceedings are being heard by the same tribunal, the tribunal may make such order under this section as it thinks fit in relation to those proceedings and, if such an order is made, the proceedings shall be dealt with in accordance with the order.
5. If 2 or more arbitral tribunals are hearing the related proceedings:
 - (a) the tribunal that received the application shall communicate the substance of the application to the other tribunals concerned; and
 - (b) the tribunals shall, as soon as practicable, deliberate jointly on the application.
6. Where the tribunals agree, after deliberation on the application, that a particular order under this section should be made in relation to the related proceedings:
 - (a) the tribunals shall jointly make the order;
 - (b) the related proceedings shall be dealt with in accordance with the order; and
 - (c) if the order is that the related proceedings be consolidated - the arbitrator or arbitrators for the purposes of the consolidated proceedings shall be appointed, in accordance with Article 10 and 11 of the Model Law, from the members of the tribunals.
7. If the tribunals are unable to make an order under subsection (6), the related proceedings shall proceed as if no application has been made under subsection (1).
8. This section does not prevent the parties to related proceedings from agreeing to consolidate them and taking such steps as are necessary to effect that consolidation."

The operation of this provision is quite limited. In the first place section 24 is part of Division 3 of Part III of the International Arbitration Act. Part III gives effect, in Australia, to the UNCITRAL Model Law. Division 3 contains certain additional provisions which are optional.

Division 3 only applies if the parties to the arbitration agreement have agreed that the division applies. Moreover if there is more than one tribunal appointed, both tribunals must agree to the consolidation or else the application lapses (section 24(7)).

In Australia, the Uniform Commercial Arbitration Acts of the States and Territories govern those arbitrations which are not governed by the *International Arbitration Act 1974*. These are generally domestic arbitrations, however parties to international arbitrations can agree to have their arbitration governed by the domestic regime by excluding the Model Law. Consolidation is dealt with in Section 26 of the Commercial Arbitration Acts which provides as follows:

- "1. The following provisions of this subsection apply to arbitration proceedings all of which have the same arbitrator or umpire:
 - (a) the arbitrator or umpire may, on the application of a party in each of the arbitration proceedings, order -

- (i) those proceedings to be consolidated on such terms as the arbitrator or umpire thinks just;
 - (ii) those proceedings to be heard at the same time, or one immediately after the other; or
 - (iii) any of those proceedings to be stayed until after the determination of any of them;
- (b) if the arbitrator or umpire refuses or fails to make such an order, the Court may, on application by a party in any of the proceedings, make such an order as could have been made by the arbitrator or umpire.
2. The following provisions of this subsection apply to arbitration proceedings not all of which have the same arbitrator or umpire:
- (a) the arbitrator or umpire for any one of the arbitration proceedings may, on the application of a party in the proceeding, provisionally order -
 - (i) the proceeding to be consolidated with other arbitration proceedings on such terms as the arbitrator or umpire thinks just;
 - (ii) the proceeding to be heard at the same time as other arbitration proceedings, or one immediately after the other; or
 - (iii) any of those proceedings to be stayed until after the determination of any of them;
 - (b) an order ceases to be provisional when consistent provisional orders have been made for all of the arbitration proceedings concerned;
 - (c) the arbitrators or umpires for arbitration proceedings may communicate with each other for the purpose of conferring on the desirability of making orders under this subsection and of deciding on the terms of any such order;
 - (d) if a provisional order is made for at least one of the arbitration proceedings concerned, but the arbitrator or umpire for another of the proceedings refuses or fails to make such an order (having received an application from a party to make such an order), the Court may, on application by a party in any of the proceedings, make an order or orders that could have been made under this subsection;
 - (e) if inconsistent provisional orders are made for the arbitration proceedings, the Court may, on application by a party in any of the proceedings, alter the orders to make them consistent.
3. An order or a provisional order may not be made under this section unless it appears -
- (a) that some common question of law or fact arises in all of the arbitration proceedings;
 - (b) that the rights to relief claimed in all of the proceedings are in respect of or arise out of the same transaction or series of transactions; or
 - (c) that for some other reason it is desirable to make the order or provisional order.
4. When arbitration proceedings are to be consolidated under this section, the arbitrator or umpire for the consolidated proceedings shall be the person agreed on for the purpose by

all the parties to the individual proceedings, but, failing any such agreement, the Court may appoint an arbitrator or umpire for the consolidated proceedings.

5. Any proceedings before an arbitrator or umpire for the purposes of this section shall be taken to be part of the arbitration proceedings concerned.
6. Arbitration proceedings may be commenced or continued, notwithstanding that an application to consolidate them is pending under subsection (1) or (2) and notwithstanding that a provisional order has been made in relation to them under subsection (2).
7. Subsections (1) and (2) apply in relation to arbitration proceedings whether or not all or any of the parties are common to some or all of the proceedings.
8. Nothing in subsection (1) or (2) prevents the parties to 2 or more arbitration proceedings from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation."

Section 26(2) empowers arbitral tribunals to order consolidation of arbitral proceedings which satisfy the broad criteria set out in subsection (3). Sections 26(2)(d) and (e) and Section 26(4) provide for court oversight of the consolidation process. The power of consolidation under the Commercial Arbitration Acts is broader than that provided for under the International Arbitration Act 1974 as the Commercial Arbitration Acts do not require both tribunals to agree to the consolidation. Rather, Section 26(2)(e) allows the court intervene where the tribunals make inconsistent orders.

In Hong Kong consolidation in domestic arbitrations is dealt with in Section 6B of the Arbitration Ordinance (Cap. 341). Section 6B empowers the court to order consolidation in circumstances similar to those set out in Section 26(3) of the Uniform Commercial Arbitration Acts of Australia, which are discussed above.

Another law which empowers the court to order consolidation is Article 1046 of the Netherlands Arbitration Act. This Article allows the President of the District Court of Amsterdam to order consolidation upon request of any of the parties to the arbitrations. However unlike the Australian and Hong Kong provisions, this Article does not set out criteria to be satisfied, other than that the subject matter of the arbitrations must be "connected".

In the United States, paragraph 1281.3 of the Californian Code of Civil Procedure provides for consolidation of domestic arbitrations. However the criteria that must be satisfied before the court will order consolidation are stricter than those discussed above, as the disputes must arise from the same transactions or series of transactions, **and** there must be common issues of law or fact creating the possibility of conflicting rulings by the different tribunals.

Many of the institutional rules are silent on the issue of consolidation,⁹¹ others providing only implicit references to its possibility. The SIAC Arbitration Rules may provide the tribunal with a power to consolidate proceedings, but only on a broad interpretation of the wording of Article 24:

In addition and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have the power to:...

(b) allow other parties to be joined in the arbitration with their express consent, and make a single final award determining *all disputes among the parties* to the arbitration. (emphasis added).

The ZCC Rules, on a broad reading, may make implied provision for consolidation under similar conditions to the court of the ICC. That is, where all matters are subject to consent to arbitration under the ZCC rules, the tribunal may assume jurisdiction to hear consolidated claims.⁹²

The provisions discussed above can be compared with other regimes which require all parties to consent before the court will order consolidation. The courts in New York had, until recently, allowed the possibility of court-ordered consolidation of separate arbitral proceedings where they raised the same issues of law or fact. However in 1993 the position changed and consent is now necessary for consolidation. In *Government of the United Kingdom of Great Britain v The Boeing Company*⁹³, the Court of Appeals for the Second Circuit held that a District Court cannot order consolidation of arbitration proceedings arising from separate arbitration agreements, even where the proceedings involve the same questions of fact and law, unless the parties have consented to such consolidation. The requirement that all parties consent before consolidation will be ordered is also found in paragraph 684.12 of the Florida International Arbitration Act and Section 27(2) of the International Commercial Arbitration Act of British Columbia, Canada.

In the United Kingdom, the Parliamentary Advisory Committee to the revised Arbitration Act considered that granting a statutory power for consolidation to a tribunal or a court would negate party autonomy. That would certainly be so where there is a mandatory law that applies irrespective of the parties' agreement. The situation is less certain if the parties have expressly agreed to arbitrate under a particular *lex arbitri* knowing that it affords that power to an adjudicator. Section 35 of the Arbitration Act 1996 (UK) now provides:

"35.(1) The parties are free to agree -

(a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or

⁹¹ For example, the ACICA Rules, the AAA International Arbitration Rules,

⁹² ZCC Rules, Article 2: 'The Arbitral Tribunal has jurisdiction over arbitrable disputes between the parties. The management of the Zurich Chamber of Commerce investigates summarily whether there is a valid arbitration agreement between all parties that provides for Zurich Chamber of Commerce arbitration; when such an agreement is lacking it notifies the claimant that the arbitration cannot be conducted.'

⁹³ 998 F.2d 68 (1993)

(b) that concurrent hearings shall be held,

on such terms as may be agreed.

(2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings."

UNCITRAL is currently considering revision of its Arbitration Rules. One proposal is to include a provision on consolidation of cases. The Working Group on Arbitration and Conciliation, at its 45th session in Vienna, 11-15 September 2006 was divided on the desirability of including such a provision.

Paragraphs 79 and 80 of its report state as follows:

"79. The Working Group was informed that, in some cases, under the Rules, consolidation of cases was only possible where the parties specifically so agreed and proceeded to consider whether additional provisions on that matter should be added to the Rules. Some support was expressed for inclusion of such provisions based, for example, on the approach taken in article 4 (6) of the ICC Rules, which allowed consolidation when all proceedings related to the same "legal relationship" and subject to the consent of the parties to submit to rules that permitted such consolidation.

80. However, doubts were expressed as to the workability of such a provision given that the Rules often applied in non-administered cases. It was suggested that a number of issues raised by consolidation might be dealt with by other procedures such as set-off or joinder. In that respect, reference was made to article 22.1(h) of the LCIA Arbitration Rules."

A draft Article 15(4)(a) was prepared which provides:

"4. The arbitral tribunal may, on the application of any party:

(a) assume jurisdiction over any claim involving the same parties and arising out of the same legal relationship, provided that such claims are subject to arbitration under these Rules and that the arbitration proceedings in relation to those claims have not yet commenced"

It will be noted that this provision contains a number of qualifications. Consolidation can only be ordered where

- the parties are the same;
- the claims arise out of the same legal relationship;
- the consolidated claims are subject to arbitration under the UNCITRAL Rules; and
- proceedings in relation to the consolidated claims have not yet commenced.

The penultimate qualification might conceivably be met even though the consolidated claims arise under another, but interrelated contract, and do not contain an UNCITRAL arbitration clause provided that the Tribunal is of the opinion that the two contracts together can be considered as one.

Even if these conditions for consolidation were applicable and were fulfilled, the Tribunal would still possess a discretion and would not have to order consolidation. No indication is given as to the criteria or circumstances which the Tribunal may have regard to in exercising such a discretion.

At its 46th session held in New York on 5-9 February 2007, the Working Group on Arbitration and Conciliation again expressed conflicting views as to the desirability of such a provision. Its report states:

- "116. The Working Group noted that, in some cases, under the Rules, consolidation of cases was only possible where the parties specifically so agreed and proceeded to consider whether a provision on that matter should be added to the Rules, as proposed under document A/CN.9/WG.II/WP.145/Add.1.
117. Some support was expressed for inclusion of such a provision. It was said that such a provision could be useful in situations where several distinct disputes arose between the same parties under separate contracts (eg. related contracts or a chain of contracts) containing separate arbitration clauses or to avoid a situation where a party initiated a separate arbitration in respect of a distinct claim under the same contract in order to gain a tactical advantage. Consolidation in such situations might provide an efficient resolution of the disputes between the parties, and also might reduce the possibility of inconsistent awards in parallel arbitrations.
118. It was said however that such a provision should be carefully drafted in order to clarify that consolidation would only be possible if either the claim was already subject to UNCITRAL Arbitration Rules, or the parties expressly agreed that the claim should be subject to consolidation.
119. However, doubts were expressed as to the workability of such a provision particularly when the Rules applied in non-administered cases. As well, it was said that either the provision was intended to deal with new claims under the same contract, and that situation would be better dealt with under provisions on amendment of the statement of claim, or that provision was intended to cover several distinct disputes arising between the same parties under separate contracts containing separate arbitration clauses. In that latter situation, the application of the provision might subject parties to arbitration proceedings under terms, which differed from those, agreed in their arbitration agreement. It was said that that situation raised complex issues, and might result in unfair solutions.
120. After discussion, the Working Group agreed that it might not be necessary to provide for consolidation under the Rules and deleted subparagraph (a) (see below, paragraphs 157-160)."

It remains to be seen whether the proposed Article 15(4)(a) will be adopted.

The rule and legislative based provisions on consolidation are predicated on the desirability of promoting efficiency and preventing incompatible results which could flow from separate proceedings. Some commentators criticise consolidation on the basis that it impairs party autonomy and the right of the party to commence a separate arbitration. However where the ability to consolidate arises under arbitral rules or a *lex arbitri* chosen by the parties, it is difficult to see that party autonomy is infringed by applying a provision agreed to by the parties, directly or indirectly.

In most cases the decision to order consolidation is discretionary. Many matters could be considered in the exercise of the discretion including:

- the degree to which the second case can be linked to the connecting test within the first arbitration agreement. Stated another way, to what extent could the separate action have instead been brought as an element of the primary claim

- the desire for efficiency and the avoidance of inconsistent results
- the nature of the two disputes and whether efficiency would in fact be served by hearing them together (for example if one dispute is much more complex than the other)
- whether the parties have provided for arbitration in different venues
- whether the *lex arbitri* and/or the *lex causae* in the two matters differ.

Addition of New Claims

After the arbitration has commenced, and the claimant and the respondent have put forward their respective claims, can the parties subsequently add new claims? Whether new claims can be introduced during the course of an arbitration is dependent on the ambit of the matters referred to the existing arbitration. The relevant arbitral rules and the *lex arbitri* may also be relevant.

A distinction should, however, be made between late claims where there is a debate as to whether they are within jurisdiction and late claims where a tribunal might nevertheless reject an otherwise valid claim simply because of the problems caused by its lateness. Where the latter is concerned, tribunals will give consideration to such factors as the reasons for lateness, the importance of the issues, the degree to which they are related to the primary claims, the implication of addressing new claims and facts at the later stage and whether it might undermine the utility of earlier findings. For example, if the new claims are put forward towards the conclusion of the first arbitration and, possibly, after the hearing has taken place, the introduction of new claims at this late stage could itself be regarded as inefficient and indeed unfair. For the purposes of this paper the first category is of more significance as it raises primary jurisdictional questions.

As was noted at the outset, there are two distinct questions. Is the claim capable of being brought within the arbitration agreement and is it within the scope of the actual reference to arbitration? Thus the fact that the new claims fall within the ambit of the arbitration agreement is not necessarily sufficient. It may be contended that the new claims go beyond the dispute or difference referred to the arbitration already commenced and thereby require the commencement of a new arbitration.

If consent is the determining factor, insufficient guidance is given by most procedural rules. This is because most arbitral rules simply refer to counterclaims and set-off in a procedural timing sense rather a jurisdictional sense. One point previously made is that procedural issues can also be confused with consent issues. We noted ICC Case 7237/1993⁹⁴ where a counterclaim was allowed even though the deadline stipulated in ICC Rule 5(5) was not complied with. We posed the question if the only evidence of consent to counterclaims and set-off is because of the adoption of a particular set of rules which mandates them within certain procedural time limits, how does a tribunal presume that there was an intent to even allow counterclaims where the procedural stipulations were not complied with? If consent is

⁹⁴ (1997) 8 *ICC Bulletin* 65 (May 1997).

simply based on the adoption of a particular procedural model and it stipulates exact time limits, then a claim made outside of those limits cannot be presumed to have been consented to, although the matter is more complicated if the tribunal is expressly given a discretion to allow late claims.

Aeberli suggests that when counterclaims are raised for the first time after the submission to arbitration there is no jurisdiction to hear them unless expressly referred to in the submission to arbitration.⁹⁵ That will depend, however, on the applicable rules as these are part of that express agreement.

Questions of timing can also be impacted upon by the type of claim. For example, can a set-off be raised if the events on which it is based only come about after the Notice of Arbitration? The argument against would be that it is not a true set-off. A set-off is something that normally exists prior to the claim which explains why all of the sum demanded was inaccurate. A set-off entitlement which arises afterwards is instead a new counterclaim.

Arbitral rules and new claims

We turn now to an examination of general procedural rules about amendments and late claims. Article 23(2) of the UNCITRAL Model Law provides:

"Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it."

This article is based on, but is not identical to, Article 20 of the UNCITRAL Arbitration Rules. The latter provides:

"During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement."

The differences between Article 23(2) of the UNCITRAL Model Law and Article 20 of the UNCITRAL Arbitration Rules concern the limits to the amendments permitted. Article 23(2) of the Model Law confines the arbitral tribunal's discretion to disallow an amendment or supplement to circumstances where it considers it "inappropriate to allow such amendment having regard to the delay in making it". The limitations prescribed by Article 20 of the UNCITRAL Arbitration Rules extend beyond delay and include "prejudice to the other party or any other circumstances". Article 23(2) of the UNCITRAL Model

⁹⁵ Aeberli, above n 55, 13.

Law is non-mandatory⁹⁶ and thus Article 20 of the UNCITRAL Arbitration Rules would prevail if the parties had provided for arbitration under those rules.

A second difference between the two sets of provisions is the express inclusion in Article 20 of the UNCITRAL Arbitration Rules of the limitation that "a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement". Holtzmann and Neuhaus consider that this limitation also applies under the UNCITRAL Model Law, although it is not expressly stated.⁹⁷ Such a position should be inferred in any event as jurisdiction under the Model Law is linked to disputes within the relevant arbitration agreement. If a party challenges a claim under a Model Law arbitration, the tribunal must rule upon it. If the parties agree to allow the new claim, then it is a new agreed submission to arbitrate the point although this could not technically bind the tribunal because it only entered into a contract to arbitrate the original dispute. An interesting question is also whether the phrase "amend or supplement" is broad enough to encompass "new" claims or whether it simply alludes to variations of existing claims.

The last sentence of Article 20 of the UNCITRAL Arbitration Rules is a reference to the scope of the arbitration clause. It does not refer to the particular disputes or differences which were referred to arbitration. In relation to this latter point, there are two possible constructions of the UNCITRAL provisions. One would allow a new claim, even if it does not fall within the disputes or differences referred to arbitration at the outset. A second, more restrictive construction would confine the making of an amendment to a claim which does fall within the dispute or differences referred to arbitration.

Even if the latter view were taken, the parties can by agreement expand the jurisdiction of the tribunal. They can confer broader jurisdiction than that prescribed in the arbitration clause and they can also expand or extend the disputes referred to a particular tribunal. In this regard Article 4 of the UNCITRAL Model Law is relevant. It provides:

"A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object."

Thus, in referring to the scope of the arbitration agreement, Holtzmann & Neuhaus observe:

"It should be noted, however, that the parties may expand the scope of the arbitration agreement under Article 7(2) by failing to raise a timely objection to the lack of an arbitration agreement. Thus, if a claimant amends its statement of claim to include a new claim that is otherwise outside the scope of the existing arbitration agreement, it may be that the

⁹⁶ Howard Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (1989) 648; Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (2005) 209.

⁹⁷ *Ibid*, 649.

respondent, by failing to object to the expansion in an amendment to its statement of defense, will thereby accede to the creation of a new arbitration agreement covering the expanded dispute."⁹⁸

In our view, this would only be an accurate statement if the tribunal accepts that such behaviour equals consent. The more problematic question is to decide whether unintentional actions which would nevertheless fit within concepts of estoppel and waiver in some legal systems, should be treated as akin to consent for the purposes of arbitral jurisdiction. We leave such questions for further discussion in our concluding remarks.

The ICC Rules of Arbitration also contain an express provision concerning new claims. Article 19 provides:

"After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral Tribunal, which shall consider the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances."

This provision freezes the parties claims and counterclaims as stated in the Terms of Reference. However new claims are permitted with the authority of the arbitral tribunal. It would seem, therefore, that an amendment to a claim or counterclaim does not require the consent of the arbitral tribunal unless it constitutes a new claim or counterclaim. It seems that in the past arbitral tribunals have taken differing approaches as to what constitutes a new claim. Derains & Schwartz state:

"Nevertheless, because of the different treatment reserved under Article 19, as under Article 16 of the former Rules, to claims falling inside or outside "the limits fixed by the Terms of Reference", the Arbitral Tribunal will be required to make a determination in this regard whenever a party wishes to introduce a new claim in the arbitration. Over the years, this is a matter as to which ICC Arbitral Tribunals have adopted widely varying approaches, depending on the circumstances, the meaning given to the word "claim" and the arbitrators' different conceptions of what falls "within the limits of" the Terms of Reference. Thus, for example, certain arbitrators have construed very expansively the Terms of Reference's scope so as to include any new claim based on the same facts or, if based on different facts, for the same relief, or otherwise "linked" directly or indirectly to the claims already before the Arbitral Tribunal. Other Tribunals, meanwhile, have taken a more restrictive approach and have, thus, treated as new claims outside the limits of the Terms of Reference claims based on the same facts, but on different legal grounds, or claims for the same relief, but based on different facts."⁹⁹

For example, in ICC Case No 7047 (1994), a principle was propounded whereby a claim would only be seen as being new and not within the limits of Article 16 of the ICC Rules if it raised issues of fact and of law which are completely new compared with the issue in dispute so far. If it is, however, a claim

⁹⁸ Ibid.

⁹⁹ Yves Derains and Eric Schwartz, *A Guide to the ICC Rules of Arbitration* (2nd ed, 2005) 268 – 9.

subsequently based on different reasoning, but still on the same facts, it is within the limits of Article 16 of the ICC Rules.¹⁰⁰

It might be contended that Article 19 only permits new claims to be made with the authorisation of the arbitral tribunal if these fall within the dispute or difference referred to arbitration. The wording of Article 19 suggests no basis for such a restrictive interpretation and confers authority on the arbitral tribunal to authorise new claims and counterclaims. However as a safeguard the arbitral tribunal is given a broad discretion and can disallow new claims having regard to the stage of the arbitration and other relevant circumstances. Once again, we see these issues being best resolved within a consent paradigm.

Synthesis and Analysis

Policy reasons behind admissibility

In previous sections we have outlined the nature, rules and key doctrinal debates about the different forms of inter-party claims, including synthesis of claims by way of consolidation. This section brings these categories back together to see what, if any, are the common principles and criteria that should be used to determine admissibility.

From a policy perspective key general reasons to allow multiple claims include efficiency (including cost savings), speed and the desirability of avoiding conflicting decisions or conflicting evidence and the avoidance of some of the pitfalls flowing from the composition of multiple tribunals where overlap may raise questions of prejudice or undue influence. Arguments against allowing multiple claims include the possibility that there was lack of real consent and the consequent negative implications for enforceability and the encouragement of spurious reverse claims to add to the costs of the initial hearing with a view to promoting more favourable settlement. In addition it cannot be presumed in all cases that involve multiple claims that consolidation will indeed be speedy and more efficient.

Scholars and practitioners have tended to either caution against multiple claims or advocate broad inclusion. Rather than contending for one school of thought over the other in terms of expansive versus restrictive admissibility, we aim instead to look at the kinds of factors and methods that should guide the analysis on a case by case basis. We have noted that procedural challenges in dispute resolution are inevitably about balancing certainty against flexibility and fairness against efficiency. We aspire to all four values but they will inevitably conflict. Hence trade-offs need to be made, ideally on some coherent and logical basis.

In terms of a logical approach, the differing methodologies that have been applied are a conflicts approach, an efficiency based approach or an approach based on a broad analysis of actual and implied consent. Our working hypothesis is to consider whether consistency would best be promoted by first

¹⁰⁰ See also ICC Case No 6223 (1991) (1997) 8 *ICC International Arbitration Bulletin* 62, 70.

analysing the issue as a question of consent. In this way, flexibility is allowed for by eschewing any strong evidentiary presumptions one way or another. A tribunal would instead look at all factors in any individual case to see how confident it can truly be as to the express or implied consent to admissibility. Consideration of questions of fairness and efficiency should in our view be seen as merely means by which consent can be implied, rather than a justification for a tribunal to ignore what it should at times accept as contradictory evidence of intent.

Before doing so, however, we first consider whether admissibility questions might instead best be resolved via a conflicts paradigm. Those supporting a conflicts approach are often seeking a scientific methodology that would hopefully lead to more consistent and predictable outcomes. As we seek to show in the next section, however, this is not likely to be the case where admissibility of multiple claims is concerned.

Choice of law approaches to admissibility

Fouchard, Gaillard and Goldman¹⁰¹ point to authors advocating a choice of law method for determining arbitral validity. A choice of law method would lead to interpretation of the arbitration agreement under the laws governing its existence and validity.¹⁰² On the other hand, courts and tribunals will often analyse the scope of an arbitration agreement without any reference to national laws, relying instead on transnational rules and trade usages. Fouchard, Gaillard and Goldman note the approach of the French courts to that effect.¹⁰³ The authors argue that it is preferable to apply such generally accepted principles and for courts to employ the rules they deem best suited to assess validity.¹⁰⁴ Both Fouchard, Gaillard and Goldman¹⁰⁵ and Poudret and Besson¹⁰⁶ also consider that general principles of interpretation are sufficiently similar under different national laws such that determination of applicable law will often not play a vital role in interpretation.

For the purposes of this paper it is worth considering one example of how a contrary choice of law approach might apply to see whether the results would be more scientific, certain and fair. We consider the particularly difficult question of set-off. This is an ideal test example as the differences between legal families are significant and hence a conflicts methodology might be one means of making choices between alternatives. Given that different legal families treat set-off either as procedural or substantive and also have differing views about the extent to which a set-off defence is inextricably linked to a claim

¹⁰¹ Fouchard, Gaillard and Goldman, above n 4, 308 – 9.

¹⁰² Ibid, 255 – 7 (fn 68).

¹⁰³ Ibid, (fn 71ff).

¹⁰⁴ Ibid, 308 – 9 (fn 285).

¹⁰⁵ Ibid, 255 – 6.

¹⁰⁶ Ibid, 152.

and hence more likely to be within the claim's jurisdictional ambit, the question is whether determinations as to admissibility might simply flow from the answers given by the law determined to be applicable to the set-off itself.

Here different legal systems diverge as to the proper law that should apply, in part as a result of differences in view about its essential nature as a defence. For example, should the law of the set-off follow the law of the primary claim, on the basis that it inherently undermines it, or should it be found to have its own governing law based upon the connecting factors to its own essential factual elements? Should these questions depend upon the timing of the claim for set-off? For example, where the set-off predates the claim, it might be thought to have some level of intrinsic merit based on the likely applicable law as and when it arose, although the level is not determined until dispute settlement. Yet even that is complicated. If the question is whether set-off is permissible or not in terms of whether the set-off entitlement is already due, that would normally be a question to be determined under the law applicable to that claim, which is normally the law applicable to the contract.¹⁰⁷ This is to be compared with the contrary view that the law of the set-off as a defence to the primary claim should follow the law of that claim.

These questions also raise issues of procedural justice. If the applicable law of a set-off follows the law of the primary claim and if the respondent could choose instead to raise its entitlement by way of a separate claim rather than as a set-off defence, it gives the respondent an effective choice over governing law, depending on where it seeks to raise the issue. Similar strategic questions might apply to the claimant if the law of set-off follows the law of the claim. Thus if a claimant could sue in tort or contract in relation to a commercial joint venture where a respondent has a separate contractual set-off and if the proper law of the tortious and contractual primary actions would be different, should the claimant's choice of how it frames its case affect the law applying to the set-off?

Berger notes that in France and Belgium a different conflicts principle is applied. He refers to a cumulative theory under which the set-off is only justified if both the personal laws of the debtor and creditor would declare it admissible.¹⁰⁸ Applying this rule to arbitration would make successful applications for admissibility stronger and more clearly anticipated by both parties. On the other hand, it would deny admissibility to potentially meritorious claims.

Berger suggests that this cumulative approach is also followed by arbitrators to add persuasiveness to their decisions where they would be justified under a range of applicable laws. In our view that is quite different to the more restrictive domestic approach that he identified. On the latter view, unless the set-off satisfies *both* laws it cannot be considered. Under the more traditional approach to cumulation by

¹⁰⁷ Berger notes Article 10(1)(b) Rome Convention which indicates that the law applicable to the contract governs all issues relating to the performance of the contract: Berger, above n 58, 22.

¹⁰⁸ Berger, above n 32, 63.

arbitrators, they are simply looking to be able to say that the more the same outcome would be mandated under alternative applicable laws, the more they are confident that their suggested outcome is a just one. More often than not, a cumulative approach is utilised to identify a false conflict and indicate that the same substantive principles will apply no matter what choice of law is made. In ICC Case No 5971, after considering that set-offs under related contracts were admissible, the tribunal turned to the governing law. The tribunal adopted a comparative approach with a view to seeing that if the various laws harmonised it might not be necessary to discuss the conflicts of laws principles which might apply.¹⁰⁹ The tribunal did find comparable principles under each of the potential legal systems that would apply under a conflicts methodology.

On balance, the dual compliance cumulative approach to set-off admissibility referred to by Berger ought not to be preferred in international arbitration as such a restrictive approach is unlikely to be consistent with presumed intent. Berger notes that the approach emanates from different domestic considerations, namely as a corollary of the *ex lege* effect of the compensation *légale* which historically did not call for a declaration by either party.¹¹⁰

Another question is whether an express selection by the parties of a broad substantive law which expressly allows for set-off, resolves the admissibility question in arbitration. Thus if parties agree to arbitrate claims under procedural rules which do not provide any indication of which set-offs may be allowed, but have their contractual arrangement subject to PECL, could the express right to set-off within that contract law regime be the basis of a finding of consent to jurisdiction? Could such an argument be supported by Article 13:107(a) PECL which provides that the parties can agree to exclude a right to set-off, thus suggesting that it is an opt out substantive law rather than an opt in model? This might readily apply in simple cases but other problems arise when UPICC tries to deal with a set-off in the face of multiple claims or conversely, multiple reverse claims against an individual claim. How should the set-off be allocated in each case? Article 8.4 provides discretion to the party declaring the set-off where it has more than one reverse claim. UPICC does not directly address the converse situation, although Article 13:105(2) PECL indicates that a set-off in response to multiple claims also allows for some choice.

Any articulation of substantive law rights as between parties in their business dealings does not necessarily reflect consent to provide similar choices in allocating set-off rights to different dispute settlement fora. If the set-off facts come within the arbitration clause, this would be easy in any event. If they do not, at most this selection of substantive law is valuable evidence pointing in the opposite direction to the clause itself, but it is once again a decision forced on a tribunal based on inadequate drafting.

¹⁰⁹ Para 138.

¹¹⁰ Berger, above n 32, 63 – 4.

If a conflicts methodology is to be used under a consent paradigm, a number of domestic principles might appear to be ill-suited to arbitration. For example in some countries it is not possible to set off claims made in different currencies. This does not seem to be a sensible presumption in the field of international commercial arbitration where in most cases, the two parties to the dispute naturally deal in different currencies. UPICC has also sought to temper this rule. Article 8.2 UPICC indicates that set-off may be exercised if both currencies are freely convertible and there is no stipulation that the payment by the party claiming set-off must be in a specified currency.¹¹¹

It might even be the case that the mutuality of claims called for under Article 8.1 of UPICC which encapsulate the established principle that reciprocal claims owing by separate corporate personalities are not generally eligible for set-off, should not automatically apply in arbitration. The consent-based paradigm at least allows for a group of companies theory to provide for jurisdiction in some circumstances at least.¹¹²

If a conflicts approach is utilised, the following list of questions might be a guide:

1. There are two distinct questions. Firstly, is the set-off allowed to be raised as a reverse claim? Secondly, if so, has it been made out? We are only concerned with the first question.
2. In considering admissibility there are four conflicts options to consider:
 - (a) the *lex causae* of the primary claim on the theory that it is a substantive defence.
 - (b) the *lex arbitri* on the basis that admissibility is a procedural issue.
 - (c) the personal laws of either or both of the parties.
 - (d) the law of closest connection, however that is to be determined.

This paper does not seek to resolve these conflicts issues as to set-off, a major topic in its own right. Instead it has used this complex example to show problems with undue reliance on conflicts approaches. There is no consensus as to which conflicts rule and no guarantee that this would lead either to consistent results or results that would meet the parties' legitimate expectations.

Perhaps a more thorough examination of the conflicts question might find a valuable solution. For example, would a better conflicts rule than the dual compliance cumulative method be one that is similar to the general contract conflicts rule in the Rome Convention which starts with a clear rule as to the domicile of the seller but allows it to be departed from where another law is clearly more appropriate? Thus a conflicts rule applicable to set-off might be that the law of the set off follows the law of the

¹¹¹ The stricter position in common law has also been criticized.

¹¹² See the parallel session on multi-party disputes.

primary claim unless another law is clearly more appropriate. Or would leaving it to the discretion of tribunals raise other problems?

For the purpose of this paper, we merely need to note that a conflicts methodology under current domestic approaches will not solve our problems in a way that would be beyond debate. Given that tribunals are given broad discretions as to which conflicts rules to apply and given the extreme differences in approaches of domestic regimes, the outcome would not be clear and consistent and would often lead to substantive principles applying which are ill-suited to international arbitration.

Resolving admissibility via a consent based paradigm

Many of the differences in view as to admissibility of multiple claims can in our view be explained by differences in approach to a determination of consent. A tribunal that works from a strong albeit rebuttable presumption that parties would always want an efficient resolution of their disputes, is likely to find that admissibility is justified in most instances.¹¹³ Conversely, a tribunal that wants to see some express provision allowing for admissibility within the arbitration clause, the *lex arbitri* or the procedural rules selected by the parties would be less inclined to find admissibility in most instances. Between the extremes, different arbitrators might wish to see differing levels of direct or indirect evidence of actual intent before making conclusions either way.

An earlier section distinguished between disputes which *may* be brought, which involves an analysis of the scope of the arbitration agreement and the separate question as to which disputes *have* been brought, involving an analysis of the particular reference to arbitration. Each involves questions of intent, which in the event of disagreement between the parties, involves questions of construction by the tribunal. Such a process of construction is itself a determination as to the consent of the parties. This section seeks to provide a preliminary discussion as to the nature of consent and the means by which arbitrators make findings as to the presence or absence of consent and explain how the question of multiple claims might be seen to fit within that paradigm.

In resolving such questions, the tribunal is faced with important evidentiary choices that permeate and underlie many of arbitration's most challenging issues. By what evidence is consent determined? Should subjective as well as objective evidence be sought and utilised? Should the tribunal confine itself to express evidence of consent or should it also look for implied consent? Should it be based on presumptions of consent, perhaps after taking into account all of the actual evidence of the behaviour and relationship of the parties involved? What standard of proof is appropriate to a determination of arbitral consent? What inferences if any might the tribunal utilise?

¹¹³ This is the purpose behind the express mandate to bringing setoff claims under the Swiss Arbitration Rules, Art 21(5).

There are also fundamental questions of legal interpretation involved. Fouchard, Gaillard, Goldman make the important point that in ruling on the existence of consent when an issue is disputed, arbitrators are applying various principles of interpretation to the parties' statements and actions. That applies both to the question of whether there is any agreement to arbitrate at all and also as to the scope of that agreement.

Fouchard, Gaillard and Goldman also note that arbitrators need to consider the degree of certainty required for consent to be effective. The two questions are related. For example, a principle of interpretation in favour of validity does not demand a high degree of certainty. The converse is the case where a particularly strict interpretation is applied.

This paper does not seek to resolve these questions per se, as the question of consent in arbitration and how it is to be determined is a broader question and may best be answered after an inductive analysis of all contentious aspects of arbitration where consent is in issue. This would include cases where there is a dispute as to whether there was in fact any agreement to arbitrate or disputes about the meaning of potentially pathological arbitration clauses. Our aim is to illuminate the issues and provide a stepping stone on the way to such an inductive analysis.¹¹⁴

Interpretation of the arbitration agreement

In any consent paradigm, the starting position should be the words of the arbitration agreement itself. If there is more than one contract and arbitral clause, the interplay between each must also be considered.

At times the words of the arbitration agreement should be supplanted with the *lex arbitri* and arbitral rules derived through that agreement. This draws attention to the express comments made by the parties on the issue. Unfortunately in many instances, the drafting is less than perfect. It is important to understand that determinations of intent based solely on ambiguous drafting are dangerous. While this is an obvious proposition, it is particularly important when considering multi-contract situations and the interplay between differing permutations of dispute settlement provisions. We deal with this scenario in a separate section below.

Fouchard, Gaillard and Goldman analyse a number of principles of interpretation that ought to be considered by any tribunal when interpreting agreements to arbitrate. The first is the principle of interpretation in good faith. We agree that this principle should always apply but also agree with the authors caution against misapplying it. They note that merely challenging the validity or ambit of an arbitration clause is not presumptively an act of bad faith.

¹¹⁴ 'Because the basis for arbitration is the will of the parties, arbitrators can only hear disputes over issues which the parties have agreed to put before them.' Fouchard, Gaillard and Goldman, above n 4, 298 (fn 243 – 5). 'Without the agreement of all the parties, (an arbitrator) has no jurisdiction to consider other matters in dispute between the parties, even if this makes commercial sense or one of the parties wishes him to widen the reference.' Aeberli, above 55, 2.

This principle of interpretation invites the tribunal to look behind the declared intention for what could have been the true intention at the time of entering the arbitration agreement. This can be particularly relevant where multiple claims are concerned. At the time of negotiation of the arbitration agreement, parties hope that there will not be disputes, would usually not be aware whether they would be claimant or respondent in the event of any dispute and could in good faith be presumed to want their disputes resolved efficiently and amicably. Once a dispute has arisen, however, parties tend to think of their own best interests, which could include looking for the most tactically advantageous dispute settlement process. It is the initial intent and not the latter, which should be determinative.

Fouchard, Gaillard and Goldman go on to derive more specific rules of interpretation flowing from the obligation to interpret contracts in good faith. The tribunal must look for intention in context, taking into account the consequences which the parties reasonably and legitimately envisage.¹¹⁵ The authors also suggest that the attitude of the parties after signature and up until the time of the dispute arising should be taken into account as subsequent conduct confirming their original perceptions. They note that this is sometimes referred to as “practical and quasi-authentic interpretation” or “contemporary practical interpretation”, commonly applied in arbitral case law.¹¹⁶ The authors also note that this leads to a requirement that the agreement must be interpreted as a whole. For our purposes, while certainly an appropriate suggestion, it will still pose challenges of circularity. For example, in group of contract situations, what is the “whole” to be interpreted? The authors do see this as appropriate to such circumstances.

The authors then turn to the principle of effective interpretation. They note that this is a recognised element of most legal systems, sometimes described under the maxim *ut res magis valeat quam pereat*. It has also commonly been used in international law interpretation.¹¹⁷ While Fouchard, Gaillard and Goldman treat it separately to the principle of interpretation in good faith, both the ICJ and the ILC have in fact seen it as a subset of that concept.¹¹⁸

The principle applies readily to pathological clause situations but in our view, not necessarily so to multiple claims. Where pathological clauses are concerned the principle of effective interpretation salvages the true intent which was “distorted by the parties’ ignorance of the mechanics of arbitration.”¹¹⁹ No persons can be presumed in good faith to have wanted to expressly provide for arbitration in an

¹¹⁵ Fouchard, Gaillard and Goldman, above n 4, 256 – 8.

¹¹⁶ Ibid, 258 (fn 79).

¹¹⁷ See for example *Corfu Channel Case* 1949 ICJ Reports p 24.

¹¹⁸ Vitanyi (1983) p 60; *Ambatielof* [1953] ICJ Reports 10; *Case Concerning Rights of United States Nationals in Morocco* [1952] ICJ Reports 196; *Yearbook of the International Law Commission* (1966-II) 219 as cited in Ian Sinclair, *The Vienna Convention on the Law of Treaties* (1984) 118.

¹¹⁹ Fouchard, Gaillard and Goldman, above n 4, 266 – 8.

ineffective manner. Hence it is natural to add meaning to shift somewhere from the inadequate express clause, filling the gaps where possible or treating it as a nullity where the faults are irreparable. In multiple claims cases, however, there may not be a gap that needs filling, but instead simply limited evidence of the ambit of consent. Parties can often intend separate proceedings. The question is to properly determine when that is the case.

Fouchard, Gaillard and Goldman then draw attention to the principle of interpretation *contra proferentem*. At first sight this would appear to be an unusual principle to apply to the determination of the *common* intent of two parties, given that it directs a preference against the drafter of an arbitration clause. The authors direct attention to it in a more limited sense, namely that “the party responsible for drafting the ambiguous or obscure text should not be entitled to rely on that ambiguity or obscurity (in claiming, for example, that a particular disputed matter is not covered) ...”¹²⁰ It would be rare for this to apply to multiple claim cases. Most institutional clauses do not clearly deal with multiple claims, hence a party arguing for a limited coverage on the basis that all cross-claims must be sufficiently connected to the primary contract is hardly relying improperly on their own creation of ambiguities.

Fouchard, Gaillard and Goldman then proceed to reject two other potential and extreme principles. The first is that a strict interpretation would demand the clearest evidence of consent. Some have asserted that an arbitration agreement should be interpreted restrictively on the basis that parties should not lightly be seen to have given away their rights to national court jurisdiction. Examples include ICC Award No 2138,¹²¹ and ICC Award No 2321.¹²² At the other extreme is the principle of *in favorem validitatis* which equates to a presumption in favour of arbitration, as for example has been applied by an American court in *Moses H Cone Memorial Hospital v Mercury Construction Corp.*¹²³ We agree with their rejection of those two extreme presumptions. A principle of strict interpretation would imply that there could never be cross-claims flowing from a second contract with a distinct arbitration clause. *In favorem validitatis* would promote a contrary presumption. Strict interpretation of arbitration clauses is outmoded and hopefully died out alongside judicial paternalism and distrust of arbitration. The contrary presumption may well be still be supported by some in appropriate circumstances¹²⁴ but in our view does not apply to multiple claims. It could certainly be appropriate when determining the law governing the validity of the arbitration agreement. If the agreement would be valid under some laws but not others, that might well

¹²⁰ Ibid, 259 – 60.

¹²¹ JDI 1975, p 934.

¹²² JDI 1975, p 938.

¹²³ 460 US 1, 24-5, 1983, cited in Poudret and Besson, above n 3, ¶304.

¹²⁴ For example Article 178(2) of the Swiss statute on Private International Law which provides for interpretation of the arbitration agreement *in favorem validitatis*.

colour the tribunal's discretion as to applicable law. The authors point out however that interpreting consent is a different question.

All of our concerns with *effete utile* presumptions as stated above, apply even more strongly with *in favorem validitatis*. Presumptions of validity are in our view misapplied in multiple claim circumstances. Here it is not about validity of a particular agreement. It is about its scope. Such considerations are simply subsets of the overall approach to determination of the scope of arbitration agreements which may involve many questions besides that of multiple claims. In all cases the question is interpreting the intention of the parties. For the purposes of multiple claims, too expansive an interpretation would go against the true intent of the parties. Too narrow an interpretation would lead to additional proceedings and costs and the potential of contradictory judgments. None of the principles or presumptions can be looked at in isolation. They all are simply guides to determining the ultimate question, namely the intent of the parties.

Procedural rules as guides to consent

We have previously noted that if the primary question is that of consent, one must begin with the arbitration agreement as supplanted by the *lex arbitri* and any procedural rules agreed upon. Where the latter expressly deals with the admissibility question and where the parties have consented to those rules applying, evidence of consent is clear.¹²⁵

Unfortunately, if consent is the determining factor, insufficient guidance is given by most procedural rules. As noted above, this is because most arbitral rules simply refer to counterclaims and set-off in a procedural timing sense rather than identify the typology of cross-claims that can be brought.

In this way, mere procedural issues can often be confused with consent issues. For example, it is normally the case that legal systems will not block a party from raising a claim simply because it missed a procedural deadline, save where a statute of limitations is involved. An example is ICC Case 7237 of 1993¹²⁶ where a counterclaim was allowed even though the deadline stipulated in ICC Rule 5(5) was not complied with. While the general presumption that a party late with a procedure could simply be asked to pay costs and/or interest as from the delay, the situation is more complex when issues of consent to fundamental jurisdiction are involved. If the only evidence of consent to counterclaims and set-off is because of the adoption of a particular set of rules which mandates them within certain procedural time limits, how does a tribunal presume that there was intent to even allow reverse claims where the procedural stipulations were not complied with? A blanket rule either way might not suffice. Our observation is simply that adopting a normal rule in favour of allowances of late claims subject to appropriate compensation should not be applied without a preliminary consideration of the consent issues.

¹²⁵ Parties can also always agree to modifications and tribunals sometimes will invite agreement but cannot force it. An example of such an invitation was in the *Sofidis* case. Interim Award No 2 in ICC Case No 5124 (unpublished) cited Berger above n 32, 65 (fn 88).

¹²⁶ (1997) 8 *ICC Bulletin* 65.

We also note that the consent logic flowing from express references in the *lex arbitri*, varies significantly if an appointing authority selects the seat rather than the parties, as this is one step removed from the parties actual or implied consent. Even here, if the likely choices by the institution or tribunal would be known, inferences as to the parties legitimate expectations can still be contended for.

At times the choices made may have a fundamental impact on admissibility. For example, an appointing authority has a particular challenge where it has the discretion to nominate a seat and where it is aware that a party wishes to bring a set-off defence. Should one select a seat that is favourable to such cross-claims?

Finally, even where procedural rules are not clear, consent might be found through waiver or acquiescence for example, via a claimant not objecting to a claim by the respondent when it is pleaded. Consent could also be inferred if a party objects to a matter being raised in court on the basis of an allegation that it is subject to an arbitration clause. A tribunal already invested with jurisdiction under that clause might then consider that the assertion in court is effectively evidence of an agreement to arbitrate.¹²⁷

Implied consent to the raising of any and all defences

As noted above, many commentators and tribunals have tended to differentiate between counterclaims and set-off on the basis that the latter is considered to be a defence. It is suggested that it flows as a fundamental principle of justice that a respondent should be able to raise any available defence. In our view this approach can too easily fail to distinguish between different types of defences. It also fails to consider the way the concept and justification fit within a consent based arbitration paradigm.

Our previous analysis suggested that there is a significant difference between different forms of set-off. The mere description of all as “defences” fails to address the degree of connection between the set-off claim and primary claim, which we believe to be the key to deciding on the treatment of set-off within a consent paradigm.

There is also the problem of the interplay between the arbitration agreement, procedural rules and the nature of the set-off in an individual case. In looking at set-off, Berger invites separate consideration of the *lex loci arbitri* and the scope and interpretation of the arbitration agreement in deciding on procedural admissibility of a set-off defence. While these are certainly two distinct sources of relevant principles, these are both evidentiary aspects of consent. If the parties have expressly selected a seat that either expands or contracts the ability to plead such defences, they have provided express evidence in that regard. The same is true if they have selected arbitral rules that address the issue, or if they expressly cover the matter in their contractual arbitral agreement.

¹²⁷ ICC Case No 7453 of 1994 (1997) 124 Jnl du Droit Int'l (Clunet) 107.

Thus we believe that the mere nature of set-off claims as defences does not resolve the issue without broader consideration of all circumstances. Nevertheless, for the purposes of analysis it is appropriate to consider when and why a defence should be admitted as of right, absent any other factors that add to or detract from a finding of consent between the parties. In this context, we believe that it is important to consider different categories of defences. The first category involves defences that are inherent in the particular dispute and which any sophisticated legal system would say are part of the process by which the ultimate rights and obligations of the parties must be determined. Examples of such defences in the sphere of commercial contracts include the duty to mitigate loss and the obviating of damages in the face of force majeure or frustration. Other examples of the first category that permeate other areas of law include contributory negligence and abuse of rights under civilian principles.

All such defences go to tempering the ramifications of the claim within the four walls of its own fact situation. They directly relate to the claim as such and should therefore be included under any view of justice. In civil cases the proper measure of damages can only be identified after the claimant has set up its gross damages entitlement under the applicable law which will usually look at issues of foreseeability and causation. That figure then needs to be tempered in light of the abovementioned defences if and when they are made out.¹²⁸ Because they are inextricably linked to the facts of the claim, they will also have identical links to the relevant court or tribunal's jurisdictional mandate. There could not even be questions of statute of limitations or out of date counterclaims of this nature. It would also be highly unusual if the tribunal which had been selected as appropriately expert to deal with the primary claim, was not similarly expert to deal with the defence.¹²⁹

The same logic should apply to other similar defences which may vary in title and content from jurisdiction to jurisdiction. This paper does not seek to be a comprehensive analysis of all domestic concepts of defence. Nevertheless some examples are illustrative. Craig Park Paulsson note the related doctrine of *exception non adimpleti contractus*. Under this doctrine, one party's performance is excusable because of the failure of the other. The authors suggest that there is evidence that it is an autonomous rule of international arbitration.¹³⁰ While Craig Park Paulsson define *exceptio* broadly, Black's Law Dictionary, for example, defines it in narrower terms:

¹²⁸ Another simple situation that does not call for complex admissibility determinations is where a breach causes both benefit and detriment to the claimant and hence the damages caused are only the net amount: Berger, above n 32, 53 (fn 1).

¹²⁹ In the rare cases where this was not so, the respondent can at least consider these issues when recommending its choice of arbitrator, although we have noted that it is undesirable to allow for notification of defences after tribunal composition where this would disadvantage the claimant at the selection stage.

¹³⁰ ICC Case 2583 of 1976 1 ICC Awards 304; Case 3540 of 1980 1 ICC Awards 105, 399.

“An exception in a contract action involving mutual duties or obligations to the effect that the plaintiff may not sue if the plaintiff’s own obligations have not been performed.”¹³¹

ICC Case No 3540 Award made 3 October 1980¹³² described the *exceptio* doctrine as meaning that the plaintiff is not entitled to relief “because he has not performed his own part of the agreement.” It also considered that this principle was part of the general principles of law which form the *lex mercatoria*, which was the law they had chosen to apply when expressly empowered as *amiables compositeurs*.

Another example is that a right to claim *abatement* was initially an exception to the common law rule that counterclaims could not be raised as defences to an action but instead needed to be brought in separate proceedings.¹³³ Abatement at common law, akin to Article 50 of the CISG, flows from a doctrine of partial failure of consideration based on an allegation that fault of the plaintiff has led to the value of goods or services supplied being less than was contracted for.¹³⁴ If the primary claim is for failure to pay for the goods, then a claim as to abatement is obviously a direct substantive defence which would inevitably come within the four walls of the initial arbitration agreement.

At the other extreme are differences which do not affect the legal entitlement of the primary claim but deal instead with issues of cashflow and duplication. They are premised on the understanding that even if the claimant can make out its primary claim, the respondent has an equal or greater entitlement under a distinct right, which means that the claimant has no net right to any legal remedy.

A key policy reason underlying this aspect of the domestic law of set-off is in cases of potential insolvency. Treating the set-off as a means of identifying the true net figure if any to be passed between the parties, shields the respondent from the normal position of an unsecured creditor. Otherwise the respondent might be required to pay the full amount of the claim to a liquidator and then find that its set-off amount places it in a long list of unsecured creditors. Yet most legal systems provide separate rules for insolvency set-off and this category is not included in UPICC or PECL, so this cannot be a key factor for arbitrators deciding *a priori* intent.

The distinction between inherent defences and cash-flow situations does not mean that the second category should never be seen as admissible in arbitral proceedings. It is simply that where consent is used as a key to determining admissibility, the consent logic in the context of cashflow and duplication concerns inevitably differs significantly to the consent logic when one is discussing a defence integral to identifying the validity of the claim. Even that statement is contentious as we again acknowledge that in

¹³¹ Bryan Gardner (ed), *Black’s Law Dictionary* (8th ed, 2004) 603.

¹³² *Journal du Droit International* (Clunet) 1981, No 4, p 914.

¹³³ Aeberli, above n 55, 3.

¹³⁴ *Ibid*, citing *Allen v Cameron* (1833) 1 Cr & M 832; *Mondel v Steel* (1841) 8 M & W 858.

some legal systems and conflicts theories, there is no inherent bright line distinction between these two categories. At the very least, however, the fact that a particular domestic legal system describes such an entitlement as a defence should not be determinative in an arbitral situation.¹³⁵ Such a domestic legislative policy aims to minimise duplicate proceedings and save taxpayers costs. Again these are factors which might help a tribunal identify a presumed intent, but a mandatory rule of a government seeking to save its own court expenses is based on a quite distinct logic.¹³⁶

We have thus suggested that it is important to distinguish between different types of defences; on the one hand those that are truly inherent as responses to the primary claim and those which are more in the nature of defences to the cashflow implications of a final order in favour of the claimant. Because some set-off claims fit the first category but most do not, it does not advance the appropriate consideration of their place in arbitral proceedings by simply acknowledging that they are treated as defences in domestic litigation systems.

In our view, the ultimate question in all cases is whether the parties intended at the outset for there to be cross-performance of these obligations and whether there is a single dispute resolution body intended to analyse both elements of that cross-performance. Inherent defences would fall within the arbitration agreement in any event. Cash-flow defences call for additional presumptions as to intended efficiency to be justifiable and it is to this factor that we now turn.

Efficiency and implied consent

There are two important points we believe should be made. The first is that efficiency is simply one of a range of factors to be considered by tribunals that are faced with uncertain guidance from the arbitration agreement and the rules themselves. Secondly, it is important to understand how it should be utilised. It is right for tribunals to consider efficiency factors as a means of identifying a good faith *a priori* intent of the parties. It should not simply be that tribunals look at efficiency per se from their own post-dispute perspective, regardless of other evidence of parties intent.

Where tribunals are properly using efficiency as one element of likely intent of the parties, this will inevitably need to be integrated with a range of other factors that we believe need to be taken into account. As we have noted, arguments in favour of admissibility or consolidation include general efficiency, reducing the transaction costs of parallel proceedings, overall timeliness, and the avoidance of some of the pitfalls flowing from the composition of multiple tribunals where overlap may raise questions of prejudice or undue influence. Countervailing factors include the concern that reverse claims might be brought on spurious grounds to actually delay proceedings, frighten the claimant into settlement and add

¹³⁵ US domestic civil procedure at times even demands that a set-off be raised lest this be lost for good.

¹³⁶ Whether something constitutes a defence may also be relevant under the applicable law of assignment. Under common law for example, an assignee of a debt generally takes subject to defences available to the debtor as against the assignor where they arose prior to the debtor receiving a notice of the assignment. (Derham, above n 63, 3)

immediate financial burdens through the arbitral advance on costs. In addition, admissibility or consolidation may raise questions as to the suitability of the tribunal to deal with all of the multiple claims and might provide undesirable tactical advantages in tribunal selection to the respondent. Presumptions based on general efficiency alone are only a small part of a commercially realistic response to all of these competing factors. All of these other elements, when considered in the context of the circumstances that existed between parties at the time they first agreed to arbitrate, may also lead to diverse inferences. While some authors and practitioners work from a presumption that business people intended to have efficient proceedings and efficient solutions to any jurisdictional questions, (a reasonable presumption in and of itself), that will at best be a rebuttable presumption.¹³⁷ To the extent that a tribunal is interested in considering subjective evidence the presumption is weaker as it presumes certain objective features of the parties that may not be evident in the instant case. Even if the entire analysis is to be limited to objective evidence and inferences, our key point is that an efficiency paradigm might be more complex than would at first appear to be the case. For example, would all parties simply wish to allow counterclaims and set-off on the basis of efficient resolution of the disputes between all parties and as a bar to duplicity of proceedings? One countervailing criterion is that by accepting a counterclaim or set-off, the amount in dispute and hence the costs of arbitration will increase. Most rule systems will add the amount of the claim and cross-claims together to determine the advance on costs unless they truly overlap in substance. This can be a particular concern if it is foreseeable that at times there will be inflated counterclaims that are tactically aimed at frightening the claimant into taking a reduced settlement. Berger notes the use of counterclaims as delaying tactics or as retaliatory devices. Ulmer notes the practical inspiration for many counterclaims to have something to bargain with and set parameters for arbitrators who might try and find mid-position solutions.¹³⁸ Craig, Park and Paulsson point out that the requirement to include this in the advance of costs can act as a deterrent to such strategic claims¹³⁹ although in our view, if there is enough in dispute, a costs advance obligation would have little deterrent effect, particularly where this might provide for differential hardship in cases where the parties are in vastly differing financial circumstances.

In addition to the costs implications of multiple claims there is also the question of tribunal composition, an issue we have alluded to throughout. Consider an extreme example where the primary claim is essentially about a complex question of law where the parties have selected a tribunal that is expert on such issues. Now envisage reverse claims that deal only with challenges as to the quality of professional building or engineering activities. The parties might prefer different experts for the latter claims. In some

¹³⁷ For example, if an arbitration clause provides that claims are to be brought in an arbitration where the respondent's country is to be the seat, should a cross-claim also have that seat or was the intent to have any defender of a claim to be at "home" during proceedings? Pavić, above n 29, 105.

¹³⁸ Nicholas Ulmer, 'Winning the Opening Stages of an ICC-Arbitration' (1991) 8 *Journal of International Arbitration* 33, 42; Fletcher, 'Unrealised Expectations – The Root of Procedural Confusion of International Arbitrations' (1988) 4 *Arbitration International* 1, 40, 42.

¹³⁹ Laurence Craig, William Park, Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd ed, 2000) 150.

cases arbitrators selected might be professional engineers, builders or architects who are not legally trained and thus may be unsuitable for the first dispute. While this is not necessarily so, the example simply highlights the fact that one cannot necessarily presume that the wish to bring finality to all disputes between the parties and the wish to avoid duplication in costs will necessarily mean that a tribunal can confidently presume implied intent to allow it to claim a mandate over a broad category of claims.

A realistic assessment of the likely thinking of the parties at the outset might raise some counter-intuitive hypotheses. Parties do not hope to have disputes from the outset. More often than not, if an individual party envisages the possibility of a future dispute it would most likely be envisaged as either one brought on reasonable grounds by it or one brought on unreasonable grounds by the other contracting party. This is because if the other party's claim was reasonable, the first party would believe it would honour it without the need for an adjudicated dispute. The contentious case, therefore, is to consider how each might have wished at the outset to defend against claims they do not agree with. In this event, there is at least a possible hypothesis that they might be presumed from the outset to want whatever strategic advantage that may be permissible to a defendant, subject to ethical and good faith duties. As Hanotiau has pointed out in the context of multi-contract multi-party arbitrations, "(t)he absence of co-ordination of dispute resolution clauses, therefore, is not necessarily pathological. It is sometimes intended deliberately. The same goes for the possible refusal to consolidate the proceedings."¹⁴⁰

Tribunals should thus be particularly careful not to stretch existing principles to try and promote efficiency in the face of some of arbitration's more intractable problems. Those problem areas may well be a small but important group of cases where parties might genuinely prefer litigation over arbitration or where these matters have to be raised and dealt with carefully in the parties agreement to arbitrate, particularly in multi-contract circumstances. It is naturally the case that courts have greater opportunity to allow counterclaims, consolidation or joinder than is the case for tribunals. That perspective, suggested by Leboulanger¹⁴¹ is supported by Poudret and Besson.¹⁴²

Having said this, much can be gained from a consideration of efficiency perspectives. Parties can certainly be presumed to want an efficient resolution of meritorious disputes from the outset. Even if some business people would not want this, arbitration ought to be built on good faith approaches. Hence if a party is trying to destabilise proceedings or promote inefficiency, perhaps in order to frustrate a claimant, such tactical endeavours in the face of a dispute should not colour the determination of implied good faith consent from the outset.

¹⁴⁰ Hanotiau, above n 2, 371.

¹⁴¹ Leboulanger, above n 21, 43.

¹⁴² Poudret and Besson, above n 3, ¶312.

We have said that attention should be focused on *a priori* implied consent rather than behaviour after the dispute has arisen, although the latter may help our understanding of ambiguous original intent. Where subsequent behaviour is concerned, in some legal systems there will be a further need to consider whether there has been an abuse of rights through a party either blocking or relying on an extension of the powers to cover multiple claims. Tribunals should not be quick to reach such conclusions. Many tactical considerations are perfectly reasonable and would not offend against notions of good faith.

Converse presumptions of intent include that if set-offs are not readily allowed, there may be additional expense, delay and even financial disaster for a party truly entitled to a net benefit in circumstances where they had paid out on one claim and the other party is insolvent before they can be forced to pay on the reverse claim. Craig Park Paulsson also note that in these circumstances there may be increased pressure on the respondent to settle for less than a reasonable amount.¹⁴³

Thus we support a concern to supplant the interpretation of the arbitration agreement, where necessary, with a careful assessment of all factors that might help a tribunal draw conclusions as to the likely *a priori* intent of the parties. Implied intent to promote efficient solutions is an important working hypothesis, as long as it is seen as one factor that needs to be looked at alongside others and within the paradigm of consent, not tribunal paternalism. We noted that integrating the terms of the agreement and efficiency and other presumptions of intent is particularly challenging where multiple contracts are involved and it is to this topic that we now turn.

Admissibility under related contracts

At times tribunals are asked to consider whether an arbitration clause in one contract can encompass a range of other contracts because the subject matter and the underlying facts are sufficiently similar to make it appropriate to do so. Similar arguments arise if claims are brought under contracts other than those expressly referred to in the Terms of Reference where the latter are utilised.¹⁴⁴

These issues were first addressed in the context of claimant's claims and were touched on again in the context of respondent's claims. In this section we combine the analysis but separate out the various permutations; namely where one contract with an arbitration clause is argued to be closely related to other contracts with no dispute resolution clauses; secondly where different contracts have identical arbitration clauses; thirdly where different contracts have differing arbitration clauses; and finally where different contracts have arbitration clauses in some cases and choice of forum clauses in others. We have divided the analysis in this way so that we can consider the implications as to consent in each of these permutations and then see how that would impact upon the treatment of discrete claims and counterclaims as well as consolidation applications.

¹⁴³ Craig et al, above n 139, 647.

¹⁴⁴ See for example ICC Case No 7184.

We believe that in addition to considering whether all claims should be allowed, tribunals must also consider how to conduct proceedings even if some claims are rejected. They must still consider the appropriate elements of due process within each arbitral process, at least with an eye to what is happening with the other. In either circumstance tribunals also have to consider the potential impact on enforceability of their decisions as to admissibility.¹⁴⁵

Claims under closely related contracts without their own dispute settlement clauses

Poudret and Besson note the developments in French law allowing extension of an arbitration agreement to a dispute arising from a group of contracts if there are sufficient economic links between the various agreements and also if the aspects of the dispute are “inseparable”, although the authors question whether the courts which articulated this standard were truly faced with facts that would ground such a test.¹⁴⁶

Where attention is given to the closeness of the relationship, this draws attention to principles such as *ensemble économique* and *ensemble légale*. Here there are again a number of permutations depending upon whether the second contract has its own dispute settlement clause or not and if so, whether it is arbitral or court based. In this section, we are presuming that there are no such clauses in the other contracts.

Where there is one overriding agreement, (a framework agreement or heads of agreement), which contains an arbitration clause and where there is no arbitration clause in related contracts emanating from the first, most would agree that the intent was to cover all disputes under the one arbitration agreement.¹⁴⁷ An example is the award of 1 October 1980.¹⁴⁸ In this case a set-off under a loan agreement was accepted in a claim under a sales contract that alone had an arbitration clause.

Similar issues are raised in multi-party situations where an arbitration agreement entered into by one member of a company group might be held to encompass other members of that group. While this is outside the scope of this paper, one situation raises questions as to whether we are dealing with multi-party or mere multi-contract situations. Groups of companies only raise questions of significance when they are separate legal entities. If one is merely a branch of another, it will come within an arbitration agreement entered into by the corporate entity.¹⁴⁹ Even where there are technically distinct legal entities, Fouchard, Gaillard and Goldman suggest that “the question is whether and to what extent the legal fiction

¹⁴⁵ Fouchard, Gaillard and Goldman, above n 4, 303 – 4 (fn 262).

¹⁴⁶ Poudret and Besson, above n 3, ¶309.

¹⁴⁷ Fouchard, Gaillard and Goldman, above n 4, 301 – 6 (fn 264 – 7). *Isover v Dow Chemical Co* (1984) Rev de l’Arb 137. It is also the basis for extending arbitration agreements from a legally independent state-owned entity to the state itself as per the *Pyramids* case. See Fouchard, Gaillard and Goldman, above n 4, 292 – 4 (fn 225).

¹⁴⁸ [1987] *Yearbook Commercial Arbitration* 84.

¹⁴⁹ Fouchard, Gaillard and Goldman, above n 4, 282 – 3.

of corporate personality must give way to the realities of human conduct and should no longer protect those who hide behind the corporate veil in order to promote their own interests at the expense of those who have dealt with the corporation.”¹⁵⁰

Another complex situation is where amendments are made from time to time to extend contracts. Are these variations of the original agreement, perhaps undermining an original arbitration clause; or are they separate promises not subject to an arbitration agreement; or are they merely contemplated steps to be taken in performance of the original contract and hence subject to its dispute settlement provisions. This should again be a question of determining *a priori* intent after a consideration of all relevant circumstances.

Admissibility of claims subject to contracts each with their own identical dispute settlement clause

Many commentators work from the presumption that if the same parties have two contracts with arbitration clauses in identical terms, they can be presumed from the outset to have wanted a global settlement of mutual claims. However, Fouchard, Gaillard and Goldman correctly note that “the answer depends on the interpretation of the parties’ intention at the outset.” Nevertheless, they suggest that it is “generally legitimate to presume” that the identical clauses signify an intent to submit the entire operation to a single tribunal.¹⁵¹ Even here such a presumption might readily be rebutted. Hanotiau cites ICC Award No 5989¹⁵² where the parties signed two related contracts on the same day. Conversely he notes the case of *Abu Dhabi Gas Liquefaction Co Ltd v Eastern Bechtel Corporation*.¹⁵³

One reason why the parties might nevertheless wish to have different tribunals under identical arbitration clauses relates to composition, a matter we have addressed above and which is simply a countervailing factor to a blanket efficiency presumption. For example, if the claimant was unaware of the potential respondent’s claim at the time of constituting the first tribunal and believed that it would have picked a different expert if that claim was known, from its perspective at least, there is no necessary intent to have the same tribunal deal with both. At most it is a question of the trade-off between efficiency and duplication on the one hand, against optimal tribunal composition on the other. If composition is a problem, the best solution might not be rejection of admissibility but instead, early notification of reverse claims to allow this to be taken into account at the time of tribunal selection as is the case with a number of institutional rules.

¹⁵⁰ Ibid, 284 – 6. See also *Isover v Dow Chemical Co* (1984) Rev de l’Arb 137.

¹⁵¹ Fouchard, Gaillard and Goldman, above n 4, 302 – 4 (fn 255).

¹⁵² [1990] *Yearbook of Commercial Arbitration* 74.

¹⁵³ (1983) Rev L’Arb 119. See also Paulsson and Veeder’s comments on “*The Vimiera*” in (1986) 2 *Arbitration International* 310; Hanotiau, above n 2, 274 – 5 (fn 22, 23).

Admissibility of claims subject to contracts each with similar but not identical dispute settlement clauses

This category deals with cases where the arbitration clauses are identical in most respects, but have some key differences. Examples might be differing seats for each and/or differing number of arbitrators. In such circumstances Hanotiau suggests that separate proceedings must be initiated. “Mere concern for the good administration of justice cannot prevail over the intent of the parties.”¹⁵⁴ Even here is it logical to presume conclusively that they would not have wanted consolidation in the event that claims and reverse claims were both brought? The parties’ identification of different seats may have been relevant on the presumption that there was only one claim, but the clause might still be capable of being interpreted to the effect that they have not given any indication of the preferred seat if there were multiple claims. For example, in a construction contract with a side loan agreement the parties might have selected a neutral and conveniently located seat for loan disputes but a different seat under the construction contract, being where the building work is taking place. This might have been simply to make it cheaper for the arbitrators to take a view of the physical building where appropriate or because that is the seat that is demanded by the host State of the building works. Even with such provisions, they may still have preferred from the outset that a claim under the loan would simply piggy back on the construction seat in the event of concurrent disputes. Our suggestion is not that arbitrators should always accept this logic but simply that irrebuttable presumptions to the contrary from inadequately drafted clauses make little sense within a consent paradigm.

Similarly if the two contracts call for differing numbers of arbitrators, perhaps because disputes under one were presumed to be likely to be dealing with bigger amounts than under the other, it might still be cheaper to consolidate the smaller claim in front of the panel of three rather than force one three person hearing and a separate single person hearing. This will not always be the case but to again presume a lack of consent as a matter of course flowing from a separate arbitration agreement would not be a presumption that one could confidently predict to be commercially sound in all circumstances. If consolidation would clearly save time and money and if the party arguing against cannot articulate any fairness or efficiency factors in its favour, that may be telling.

It is also possible to envisage cases where parties would not have intended differing arbitration clauses to automatically block reverse claims on essentially related matters. For example, differing clauses cannot wholly overcome the policy arguments in relation to true defences. Arguably the second clause is only a promise about what to do with respect to *primary* claims and not a waiver of a right to raise true defences as and when needed. As Fouchard, Gaillard and Goldman note, where cross claims are not allowed, fairness and efficiency arguments would also be complicated if a party in one arbitration claims that it refused to perform its obligations because of a breach by the other party in the matter being considered under a second arbitration. The same logic may apply with ensemble contracts where claims under one

¹⁵⁴ Hanotiau above n 2, 375.

contract still fit within the wording of different arbitration agreements in other contracts. For example, in ICC Case No 5971 a tribunal concluded that three separate agreements with differing arbitration clauses nevertheless all referred to the same purpose of the construction and operation of a new facility to be operated as a joint venture. They therefore formed a “*unité économique*”. As such, set-off claims arising in relation to the separate agreements could nevertheless come to be directly covered under the broad scope of the joint venture agreement. The only challenging conceptual question was in relation to set-off claims that exclusively arose from the other agreements.

The tribunal considered that because of the close interrelatedness of the three agreements, set-off claims arising under either one must be heard and considered by the tribunal under the principle *le juge de l'action est le juge de l'exception*. The tribunal did not pass on the conclusion it would have drawn if the set-off claims originated from a more “distant” contract. Because of the closeness, the tribunal felt it would have needed a clear indication that the parties had the real intention to keep the three agreements totally separate from each other if it was to rule against set-off claims.

Reverse claims with contracts combining arbitration clauses and jurisdiction clauses

While most authors treat the situation of differing arbitration clauses and jurisdiction clauses together, they need to be considered separately under an intent paradigm. We have suggested above that any presumptions flowing from differences in arbitration clauses should be rebuttable at most. The situation is different where arbitration and forum clauses are brought together. A separate contract with a jurisdiction clause indicates an intent to litigate and not arbitrate such disputes. The parties may simply be saying that for that type of dispute they want a completely different type of adjudicator, with a differing conflicts methodology and a different procedural model. For example, ICC Case No 4392 refused to extend an arbitration clause to a related agreement that had a jurisdiction clause.

Conclusions as to multiple contracts

We agree with Berger’s observations:

“Instead of treating the efficiency of the arbitration as a procedural value in and of itself, one should look at the very beginning, ie the meaning and doctrinal significance of the different forum clause covering the cross-claim. ... The arbitrators have to determine *the will of the parties* at the moment of conclusion of the arbitration agreement covering the main claim on the one side and the different clause covering the cross-claim on the other.”

We also agree that it is most important that one does not concentrate on end state efficiency but look at likely efficiencies in the context of original intent.¹⁵⁵ Potential efficiency can be relevant in identifying presumed intent. In the face of inadequate guidance in the arbitration agreement and/or procedural rules,

¹⁵⁵ Berger, above n 32, 74.

then the more that one could predict that sensible business people dealing with each other in good faith would have only intended a particular efficient model, the more one can justifiably imply such consent. Conversely, if no such inference is readily available but a tribunal believes that one procedural model would be more efficient now that the details of the claims and cross-claims are made known, such a determination is not truly one based on identifying consent and runs the risk of being seen as paternalistic.

Implications of enforceability to the question of admissibility

An award may be challenged in the seat when it is claimed that the tribunal has exceeded its jurisdiction or has failed to follow due process or the award is otherwise against public policy. If a tribunal is too quick to find for admissibility of set-off or counterclaims or to agree to consolidation, there is a greater probability of such challenges. On the other hand, arbitrators should simply seek to reach the most appropriate decision in the circumstances. They should certainly not be swayed in their analysis by threats as to challenges to enforcement.

The potential for annulment proceedings cannot wholly be ignored either. Aeberli suggests that while a statutory set-off should be accepted as a defence in an arbitration, it might be grounds for resisting enforcement if the cross-debt was payable prior to the commencement of the arbitration.¹⁵⁶ It is not clear why that should be the defining moment. If it arose before that date it is more relevant if it could have been raised as a defence to that action. The better view might be that the relevant date would be prior to the action for enforcement.

There is also the question of whether set-off defences can be raised in enforcement proceedings. The Oberlandesgericht Koblenz in a decision of 28 July 2005 concluded that in general this could be so although in the circumstances the defence should be dismissed because the respondent should have raised it during the arbitral proceedings.¹⁵⁷ The Oberlandesgericht Düsseldorf in a case on 19 January 2005 allowed a set-off defence as against a claim for enforcement because the claim had been accepted by the highest court of Romania and under Romanian law such a judgment could be raised as a set-off defence.¹⁵⁸

Harmonisation

If a second arbitration is instituted, and it is not possible to consolidate the two arbitrations, is some form of harmonisation or co-ordination between the two sets of proceedings possible and desirable?

¹⁵⁶ Aeberli, above n 55, 6.

¹⁵⁷ DIS Database www.dis-arb.de Digest Note by Hilmar Raeschke-Kessler.

¹⁵⁸ Ibid.

The most obvious way of achieving a degree of harmony between the two proceedings is to appoint the same persons to both tribunals. Philippe Leboulanger¹⁵⁹ describes this as "de facto consolidation". By way of illustration he refers to the decision of the English Court of Appeal which avoided the risk of contradicting awards by appointing the same arbitrator in two parallel proceedings. In *Abu Dhabi v Eastern Bechtel*¹⁶⁰ the parties referred to court the question of whether separate arbitrators or the same arbitrator should be appointed to the two arbitrations. The Court of Appeal held that it had power to appoint the same arbitrator to both arbitrations.

While this elegant solution largely avoids the risk of inconsistent decisions, it is still not as efficient as consolidating the arbitrations in one proceeding. However the Tribunal can, by appropriate orders, direct that hearings be held sequentially and therefore manage costs. In some cases courts may have the authority to order that proceedings in two arbitrations be heard together.¹⁶¹

In order to have the same personnel on two tribunals it is necessary for the parties, and sometimes the administering authority, to make identical appointments. This does not always happen. The second Tribunal may consist of different personnel or there may be some overlap of personnel between the two tribunals but not a complete identity. Anne-Marie Whitesell and Eduardo Silva-Romero¹⁶² discuss ICC practice. They say that where the parties have not agreed to have the same tribunal in parallel proceedings and one side decides to nominate an arbitrator already acting in a related matter, to which the opposing party objects, the Court must decide whether to confirm that arbitrator. The Court takes into account various factors including whether the parties, counsel and the issues to be decided are identical and the stage that the arbitral proceedings have reached. They say that the Court assesses whether the arbitrator would have access to information that would not be available to other members of the arbitral tribunal and also considers whether a decision has been rendered in one of the matters that might cause the arbitrator to prejudge the related case. Each case is evaluated separately and decisions can therefore go either way depending on the circumstances.

Whitesell and Silva-Romero give as an example a case where the Respondent nominated an arbitrator acting in a related case and the Claimant objected on the ground that the arbitrator would have access to information not available to other members of the arbitral tribunal. Counsel in both cases were the same, the claimants were the same and the respondents were related companies. No award had been rendered in the related case and there were no overlapping issues. The Court decided to confirm the co-arbitrator. In consequence the claimant changed its mind and decided to nominate the same co-arbitrator in the second case.

¹⁵⁹ Leboulanger, above n 21, 60.

¹⁶⁰ [1982] 2 Lloyds Law Reports 425.

¹⁶¹ Leboulanger, above n 21, citing the former Arbitration Ordinance 1982 of Hong Kong.

¹⁶² Whitesell and Silva-Romero, above n 28.

However in two more recent cases the Court decided not to confirm a co-arbitrator even though the parties and counsel were the same. The Court was influenced by the advance stage of the first proceedings and the possibility the co-arbitrator could obtain privileged information in the second proceedings.

Leboulanger¹⁶³ raises a question of good faith. He asks whether a party can be considered in good faith when, on the basis of the existence of two distinct but identical arbitration clauses contained in two inter-related agreements, it seeks the constitution of two distinct arbitral panels and thereby increases the costs and creates the risk of contradicting awards. He says that an arbitration clause is nothing but one of the clauses of an agreement and the principle of good faith should apply to the constitution of the arbitral tribunal, which corresponds to the performance of the obligations assumed under the arbitration clause. In his view a party who refuses to designate the same arbitrator in parallel arbitral proceedings might be considered in violation of its obligation to perform, in good faith, its undertakings assumed under the arbitration clause.

Where the two tribunals are not identical, the risk of inconsistent decisions may be reduced if there is an exchange of information or documentation between the two arbitrations. In one situation there were parallel ICSID and ICC arbitrations. The respondent in both cases was the same but the claimants differed. The claimant in the ICSID case was a shareholder of the claimant in the ICC case. The two tribunals were different and there was no common member. The Tribunal in the ICSID case ordered the respondent to produce all the documentation in the ICC case. The ICC tribunal issued a corresponding order requiring the respondent to produce all the documentation in the ICSID case.

The exchange of documentation in parallel arbitrations may raise questions of confidentiality, particularly where the parties in the two arbitrations are not identical. Even where the parties are the same, but the tribunals differ, and contain a common member, an interesting question may arise. Can the common arbitrator refer to or otherwise have regard to a document produced in arbitration A in arbitration B? If the arbitrator discloses it, is it a breach of a duty of confidentiality? As confidentiality belongs to the parties and as the parties are the same in both proceedings, it might be thought that there was no breach. But disclosure is being made to the other members of the Tribunal. Bernard Hanotiau¹⁶⁴ says that the principle of neutrality, independence and impartiality of the arbitrator is of paramount concern and the duty of confidentiality will lead the arbitrator in some cases to reach the conclusion that it is no longer possible to fulfil the arbitrator's duties in total independence or impartiality and may have to resign. However in other cases the arbitrator may simply make a full disclosure of the problem to the co-arbitrators and the parties.

¹⁶³ Leboulanger, above n 21, 90-91.

¹⁶⁴ Hanotiau, above n 22, 350.

Avenues of Management

We have noted that if the parties are in agreement at the outset, they can articulate the desired treatment of multiple claims in their arbitration agreement. For example the Model Arbitration Clause of the Netherlands Arbitration Institute encompasses “all disputes arising in connection with the present contract and further contracts resulting thereof.”¹⁶⁵ Where there are multiple contracts with differing dispute resolution clauses, another possible approach is to provide for a clear hierarchy between them.¹⁶⁶ If the arbitration clause does not cover this but they are in agreement at the time of the dispute, they can express agreement by way of a distinct compromise which would itself be a revised agreement to arbitrate.

The situation is quite different where an institutional or rule-based solution is proposed. The difficulty with any solution in institutional rules is that the solution must be drafted before disputes have arisen. Thus it must be of a general nature able to deal fairly and efficiently with all permutations of facts. Here the difficulty is that the drafter must consider what trade-offs would be appropriate between flexibility and certainty.

If issues of consent are to be resolved by express provisions either in statutes establishing the *lex arbitri* or institutional or ad hoc rules, there are three broad possibilities. The rules could be drafted on an opt in basis. They could indicate that the tribunal may deal with certain issues where the parties expressly agree. Such a provision adds nothing in terms of initial consent and would prevent inclusion if the parties could not agree once a dispute arose. A second approach would be to express the view that set-off and counterclaim rights would never be mandatory save where they are truly dealing with inherent defences central to the initial claim, in which case they fall within the arbitration agreement which underpins the initial claim. Hence they would in all other cases be subject to distinct consent of the parties on a case by case basis.

An alternative approach is an opt out provision which allows the tribunal to consider set-off and counterclaim except where the parties agree otherwise. Even if an opt out approach is adopted there is a need to consider just how to define counterclaims and set-off that are presumptively included. Should it be any form of counterclaim or set-off recognised by the applicable law or should it expressly be limited to claims that could be brought within the original arbitration agreement? Even in the latter event, should the tribunal be given a discretion not to include the reverse claim where the circumstances of the case suggest that the benefits of separate proceedings outweigh the savings of a consolidated hearing? Examples alluded to above would be where the tribunal as initially constituted may not have appropriate expertise to deal with the multiplicity of claims. Perhaps counterclaims or set-off rights should be notified prior to the composition of the tribunal so the claimant can turn its mind to similar considerations to the

¹⁶⁵ That may raise semantic debates about the difference between a contract that “relates” to another or which “results” from another.

¹⁶⁶ Poudret and Besson, above n 3, 268.

respondent in selecting the tribunal. Actual pleadings can be left to differing time limits. Respondents who refrain from giving such notification to try and gain tactical advantages would in most cases be found out in terms of when the likely counterclaim and set-off came to their attention.

At the other extreme, the rules might allow for the broadest category of reverse claims. An example is Article 21(5) of the Swiss Rules of International Arbitration which states:

“The arbitral tribunal shall have jurisdiction to hear a set-off defence where the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum selection clause.”¹⁶⁷

Pavić suggests that the drafters had procedural economy as their prime consideration.¹⁶⁸ Wolfgang Peter suggests instead that the justification for Article 21(5) is the right to defence.¹⁶⁹

One can readily note various advantages and disadvantages with an approach such as Article 21(5) of the Swiss Rules. An express rule of that nature removes most of the uncertainty and potential for costly debate about the admissibility or otherwise of set-off defences. That alone should reduce transaction costs significantly. In most cases it will further reduce transaction costs by removing a multiplicity of actions. A concern to find the appropriate net figure that a claimant is entitled to will remove problems arising from mutual payment obligations with attendant timing, cash-flow and in extreme cases insolvency problems. For those who would see certain types of set-off at least as inherent elements in identifying the true net amount payable between the parties, rules providing for set-off defences might thus be seen as an inherent part of a just legal system.

Conversely disadvantages of such a rule include its blanket nature, encompassing both set-offs that are described above as true defences, primarily equitable set-off, and those that are simply relating to cash-flow issues. Such a clearcut rule does not help to distinguish between these categories to the extent that one believes there are conceptual and policy reasons for doing so. It also does not help distinguish between valid and bona fide set-off claims on the one hand and those which are instead aimed at delaying payment and/or pressuring a claimant into settling for a reduced amount.

The articulation of the law also does not make it clear whether a tribunal has a discretion to consider these matters when a set-off defence is raised. For example, while the rule stipulates that the tribunal “shall” have jurisdiction over such set-off defences, where these are not part of the original arbitration agreement

¹⁶⁷ As from January 2004 arbitral institutions in Basel, Bern, Geneva, Lausanne, Lugano and Zurich adopted uniform rules to deal with international arbitration.

¹⁶⁸ Pavić implies that this at first glance goes against the will of the parties but it depends whether the express agreement to arbitrate under the Swiss Rules provides the necessary consent per medium of the Article itself: Pavić, above n 29, 108.

¹⁶⁹ Wolfgang Peter, ‘Some Observations on the New Swiss Rules of International Arbitration’ (2004) 22 *ASA Special Series* 1, 9.

it is not clear whether the tribunal must consider the defence or whether it instead has a discretion whether or not to do so.¹⁷⁰ To the extent that it is unclear whether the discretion exists, this will add transaction costs in individual disputes where this has to be debated. Because it is a fundamental procedural and jurisdictional question, uncertainty as to the tribunal's powers may be grounds for challenge of the award or enforcement proceedings.¹⁷¹ If there is no discretion, then the problems alluded to above from a blanket rule point to costs as well as benefits from such an initiative. If the rules do contain a discretion, there is a question as to whether different tribunals are likely to be able to apply such a discretion in a fair and consistent manner.

Even though the inclusionary power seems clear, there still may be uncertainty where there are clashes between contracts, particularly as this may give rise to interpretative challenges for the tribunal and complex questions of the interplay between courts and tribunals in some circumstances at least. As to the first, if two separate arbitrations were commenced, each with an Article 21(5) equivalent, could set-off from one be raised under the other? Could the provisions be used as a basis for seeking consolidation? Could a tribunal say that the contract later in time is intended to take precedence over the former one as the most recent indication of the intent of the parties? What if instead, an earlier contract referred to arbitration subject to Article 21(5) and a later related contract has a choice of forum clause? Would it be held to be a variation of the Article 21(5) entitlements because it is later in time? The tribunals might have to unravel issues of *lis pendens*, good faith and abuse of rights. Hopefully in most circumstances, the order of the procedural steps taken by the parties should indicate what would be a fair procedural determination in the circumstances.

What would happen if one contract referred to the Swiss Rules including Article 21(5) but a related contract expressly indicated that there are no rights to bring set-off defences? What if the second contract was earlier in time, concurrent or subsequent to the first contract? What if two institutions had a 21(5) equivalent and separate cases were brought to each?

At the very least, in a world where commercial entities can choose between different arbitral centres, it is a valuable option and indeed experiment to have a highly respected arbitral venue offering such a model.

At the extreme, a rule might also allow for all cross-claims including unrelated counterclaims on the grounds of an efficient resolution of all inter-party claims. Thus Pierre Karrer has even suggested that Article 21(5) could be applied to counterclaims notwithstanding that it only expressly refers to set-off.¹⁷²

¹⁷⁰ Pavić, above n 29, 108.

¹⁷¹ Ibid, 109.

¹⁷² Pierre Karrer, 'Arbitration Under the Swiss Rules of Arbitration in Switzerland and Elsewhere' (Paper presented at the 12th Croatian Arbitration Day, Zagreb, 2 December 2004) 6, cited in Pavić, above n 29, 111 (fn 35).

Fixed rules versus tribunal discretions

A more certain rule model would follow Article 21(5) of the Swiss Rules and always allow for set-off defences even if under a separate contract. A more flexible approach, such as that postulated by the UNCITRAL Working Group, is to leave it to the discretion of arbitrators.

The advantage of a clear rule is obviously certainty and a reduction of transaction costs in deciding whether any discretion should be exercised or not. The disadvantage is that it may allow matters to be brought in as multiple claims when the facts of the particular case might suggest that it was unjust to do so. For example, if a party brought a spurious set-off defence with a view to both delaying proceedings and putting undue pressure on an impecunious but deserving claimant to settle, that would not be an ideal outcome.

Providing a discretion for an institution or the tribunal overcomes this by affording flexibility to the decision-maker to consider all of the relevant factors on a case by case basis. That must be counterbalanced by the lack of certainty, the additional transaction costs in arguing in relation to the discretion, potential challenges to the tribunal in relation to the exercise of its discretion, possible inconsistency in approach between tribunals and the need to find at least some consistent criteria and a consistent methodology for various tribunals to employ so that their determinations are both fair and efficient.

In considering the relevant factors that a tribunal might take into account, the first and foremost is what the parties have said on the matter, either in the arbitration agreement or under the *lex arbitri* or rules selected via that agreement. In most cases this would say nothing more than that the discretion remains intact.

Other relevant factors would be those relating to fairness and efficiency. Key questions might include the following:

1. How closely are the two disputes linked in terms of their facts? Obviously if they are sufficiently linked, then the entitlement for reverse claims comes about directly under the arbitration clause and not via discretion of a tribunal, but even circumstances that do not fit directly into the agreement can have various degrees of connection to the primary claim.
2. In terms of efficiency, are there clear transaction cost savings to be made by having one tribunal?
3. Are there questions of evidence that would best be heard by a single tribunal, either to prevent inconsistency or to promote confidentiality?
4. Do the facts show that it would be both fair and efficient to try to find the net payment obligations if any between the parties rather than to separate these out through more than one

tribunal hearing? Could cash flows issues simply be dealt with via awards that are timed to allow netting out mutual payment obligations?

5. Is the tribunal composition adequate to deal with each of the matters both in terms of expertise and in terms of cost benefit as to number of arbitrators?

Conclusions

After beginning with an elaboration of the importance of looking to the agreement of the parties, we have traversed the discrete issues of claims by claimant, claims by respondent and consolidation applications. We then tied these topics together to see whether they could all be dealt with systematically under various paradigms, namely, a conflicts methodology, efficiency based logic, enforceability and an analysis of *a priori* consent. We have suggested that the primary focus should be to determine whether the key question should always be to identify the actual or likely *a priori* intent of the parties using all available evidence, in particular but not limited to the arbitration agreement, *lex arbitri* and arbitral rules, without being swayed by labels such as ‘defences’ or sweeping presumptions either way. We agree with Hanotiau’s observation in relation to multi-party arbitrations:

“It should however never be overlooked that the parties’ agreement is paramount: striking a balance between this agreement, the duty of the parties to act in good faith, their right to a fair trial, the latter being closely related to the right of the parties to present their case in an equal position, is therefore probably one of the most difficult challenges to which arbitrators and arbitral institutions are faced. It is their duty to solve it in the best possible way by all available means.”¹⁷³

In our view, differing theories about the approach to multiple claims merely tend to reflect different express or implied views as to the evidentiary bases and standards of finding consent, rather than differences in the conceptual nature of claims, counterclaims, set-off and applications for consolidation.

Our approach is to identify the various questions and checklists for consideration. We believe that the methodology should be uniform, with a view to discerning intent. Nevertheless the results can vary depending on the facts and inferences from those facts in individual cases. Any grand presumptive theory based on bad drafting is certainly problematic.

We suggest the following broad principles.

1. The first question is to consider *a priori* consent to multiple claims.
2. The starting point in discerning consent is always the arbitration agreement before the initial tribunal.

¹⁷³ Hanotiau, above n 2, 374.

3. Assuming there is only one contract involved, if it expressly provides for or denies the opportunity for additional claims, that is the end of the matter. If it permits extra claims by the claimant because these come within the arbitration clause, these should be allowed unless there are significant concerns about the constitution of the tribunal being inappropriate in the circumstances. That is unlikely to be the case. If the claimant was unaware of the additional claim at the time of the initial appointment, then there is no difference in its approach to that choice and the respondent's. If the claimant was aware of the future potential claim, it is still selecting an arbitrator it believes to be suitable. Here, however, the respondent did not have the same opportunity, nor did the two arbitrators in selecting the Chair.
4. Most model arbitration clauses do not resolve these issues adequately. The more parties are conducting business in a context where multiple claims can be contemplated, the more they might consider express drafting to deal with these issues.
5. If the arbitration clause is unclear, it should be interpreted in good faith but without presumptions either way. The tribunal should consider all relevant factors, including good faith *a priori* efficient intent, but not efficiency per se from the tribunal's post-dispute perspective, even if the two would usually be identical. In our view, presumptions such as *in favorem validitatis* or *effete utile* do not usually apply naturally to the question of multiple claims. Their natural utility is in relation to express indications of arbitral consent that are nevertheless flawed and need some recrafting. If the parties truly wanted some form of arbitration but they express themselves in a way which might render that choice invalid, they are presumed to have preferred validity over invalidity. Hence they are presumed to have wanted an arbitrator to try and find a better meaning of their express but flawed choice. Conversely, where multiple claims are concerned, even if there is some ambiguous reference in the arbitration agreement, it is often not a question of validity but simply a question of scope. The parties definitely wanted arbitration of primary claims. The question is whether they also wanted arbitration of reverse and additional claims. At the very least, a presumption of efficiency is a more honest articulation of likely intent than a presumption of validity.
6. Additional claims need to be sufficiently linked to the primary arbitration clause under which they are sought to be introduced. Merely calling some or all of them "defences", particularly as that term is viewed in domestic legal systems, or defining them as substantive as opposed to procedural rights, should not replace a careful analysis of the sufficiency of the linkage to the consent to arbitration. The challenge for those wishing to have a more expansive ambit of inclusion is to consider why we would countenance a link to a claim that is broader than any linkage that would naturally fit within the arbitration clause itself.
7. Interpretation and analysis of intent under an arbitration clause is at times impacted upon by the *lex arbitri* and the rules selected because these emanate from the agreement itself.

8. It is different in a consent-based paradigm if parties have selected the seat and the rules, or if instead an institution or other appointing authority does so. In the latter event, presumptions of intent one way or another based on statements within the *lex arbitri* and the rules would be more problematic.
9. If parties agree on rules which expressly address an issue, that is again clear evidence of consent. For example, adoption of the Swiss Rules and Article 21(5) is clear consent to allow a broad range of set-offs. Conversely, adoption of the LCIA Rules is express denial of consent to allow discretionary-based consolidation.
10. Rules which merely address process issues should not be taken to be providing clear jurisdictional tests. For example, rules which simply indicate the time periods within which counterclaims and set-offs are to be brought, notwithstanding that they refer to these concepts expressly, add little if anything to the above analysis as they do not purport to define the parameters within which such claims are permissible.
11. Turning to multiple contract situations, these raise a number of permutations that would profit by being addressed separately, simply because the consent logic differs, although all should be dealt with under the same methodology as outlined above. The added complication is merely that a true contextual approach to interpretation of one clause needs to consider what is being said in any other contractual arrangement between the parties. This not only involves all of the foregoing questions such as choice of interpretation method and the evidentiary basis of identifying consent, but also must take into account the particular articulation of rights and obligations between the differing contracts and the timing of each. It is typical in such interpretative conflicts that adjudicators might employ such additional presumptions as for example, that specific rules are normally presumed to override general rules and later rules can be taken to override earlier ones. Once again these should not be used as fixed presumptions but merely aids to try and discern the true intent from contradictory documentation.
12. Once again, clear drafting will resolve any problems in multi-contract situations.
13. In the absence of clear drafting, the inevitable ambiguities are a dangerous basis upon which to draw confident presumptions about the presence or lack of consent; either the presence of consent because of identical arbitration clauses or the lack of consent because of differences. As to the first, some cases may raise legitimate procedural justice concerns as to composition even where clauses are identical. Where there are different clauses, the historical drafting of model clauses simply leads to confusion. Such clauses may say nothing more than that *isolated* claims must go to different places. They may give no clear indication of what was intended for *concurrent* reverse claims.

14. In these circumstances, tribunals should analyse all of the factors, accepting that the differences in clauses are at least relevant and might require extra caution before allowing multiple claims that appear to go against a direction in favour of separate proceedings.
15. Principles of consolidation build upon similar issues, save that institutional rules may free the tribunal from having to separately identify the appropriate linkage test if such tests are articulated expressly within the institutional discretion.
16. It is desirable to continue consideration of potential modifications to arbitral rules to enhance guidance on these issues although it is a complex question as to whether fixed or discretionary rules should be included. Our preference is for the latter.