On international construction project contracts and dispute resolution in international construction arbitration

Lapin yliopisto
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Tiivistelmä:

Tässä maisteritutkielmassa tarkastellaan kansainvälisiä rakennusurakkaprojekteja ja niiden riidanratkaisua kansainvälisessä välimiesmenettelyssä oikeustieteellisestä ja erityisesti *lainopillisesta eli oikeusdogmaattisesta* näkökulmasta. Tutkimuskohteena on voimassaolevan kansainvälisen oikeuden mukainen tilanne rakennusurakkasopimusten ja niiden riidanratkaisun osalta kansainvälisessä välimiesmenettelyssä. Yleisenä kysymyksenä on voimassaolevien kansainvälisten oikeuslähteiden kanta ongelmaan huomioida rakennusurakkasopimuksia ja niihin liittyviä riitoja koskeva monimutkaisuus ja erityispiirteet. Oikeusdogmatiikkaan liittyvän tulkintatehtävän lisäksi tutkielmassa ajankohtaistuu ennen kaikkea systematisointityö siitä, mikä on kansainvälisen tason sääntely kansainvälisten rakennusurakkasopimusten ja riidanratkaisun osalta kansainvälisessä välimiesmenettelyssä.

Systematisointinäkökulman kannalta keskeisessä asemassa ovat kansainvälisen oikeuden *yleiset opit*, mukaan lukien rakennusurakkasopimuksissa laajalti omaksutut FIDIC:n tarjoamat yleiset sopimusehdot ja rakennusurakoihin liittyvä kansainvälinen kauppalaki, *lex constructionis*. Yleiset opit ovat kansainvälisten rakennusurakkasopimusten ja välimiesmenettelyn taustalla olevia ajasta ja paikasta riippumattomia oppeja, joissa ajankohtaistuu oikeustilan ja yhteiskunnallisten odotusten suhde. Asiantuntijakirjoituksilla on tässä tutkimuksessa olennainen rooli julkisesti saatavilla olevien välitystuomioiden minimaalisuuden vuoksi. Kansainväliseen rakennusurakoita koskevaan riidanratkaisuun välimiesmenettelyssä liittyvät läheisesti myös oikeushistorian ja kaupallisen välimiesmenettelyn kansainvälisen tason näkökulmat, jotka auttavat ymmärtämään sitä, mikä on lainsäädännön tila nyt, miksi yleiset opit ovat tarpeen ja kuinka lainsäädäntöä tulisi kehittää.

Olennaisessa osassa tutkielmassa on *projektinhallinta*, joka luo perustan kansainvälisille rakennusurakkaprojekteille. Rakennusurakkaprojekteja koskeva käytäntö on siinä määrin monimutkaista, että urakkamallit ja läpi projektin jatkuva hallinta ovat tarpeellisia projektien menestymiseksi. Projektinhallinta luo lisäksi näkökulmia kansainvälisen välimiesmenettelyn puoltamiselle ja toisaalta myös ongelmakohdille rakennusurakkasopimuksia koskevia riitatilanteita ratkaistaessa kansainvälisessä rakennusurakoihin perehtyneessä välimiesmenettelyssä.

Avainsanat: rakennusurakkasopimukset, kansainvälinen välimiesmenettely, projektinhallinta

Muita tietoja:

Suostun tutkielman luovuttamiseen Rovaniemen hovioikeuden käyttöön X
Suostun tutkielman luovuttamiseen kirjastossa käytettäväksi X
Suostun tutkielman luovuttamiseen Lapin maakuntakirjastossa käytettäväksi__
(vain Lappia koskevat)

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Lupa Lapin yliopiston pro gradu -tutkielman saattamisesta verkkokäyttöön

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Tutkielman tekijä

ON INTERNATIONAL CONSTRUCTION PROJECT CONTRACTS AND DISPUTE RESOLUTION IN INTERNATIONAL CONSTRUCTION ARBITRATION

Tutkielman nimi

1. Annan Lapin korkeakoulukirjastolle

a) luvan asettaa sähköisen tutkielmani korvauksetta julkisesti saataville verkkoon Lapin yliopiston avoimeen (Open Access) Doria-julkaisuarkistoon X rastita

tai

b) luvan asettaa sähköisen tutkielmani korvauksetta saataville Lapin yliopiston rajoitettuun Doria-julkaisuarkistoon, joka on käytettävissä vain Lapin yliopiston kirjastossa _ rastita

sekä kummassakin tapauksessa oikeuden ottaa tutkielmastani tarvittava määrä varmuuskopioita tiedonsiirron ja säilytyksen mahdollistamiseksi.

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- verkkokäyttöön saattamista varten luovutettu pro gradu -tutkielmani on yhtäpitävä Lapin yliopiston asianomaisen tiedekunnan hyväksymän tutkielman kanssa.

3. Voin peruuttaa Lapin korkeakoulukirjastolle myöntämäni luvan tutkielmani avoimeen verkkokäyttöön saattamisesta ilmoittamalla siitä kirjallisesti kirjastolle jonka jälkeen kirjasto siirtää työn saataville Lapin yliopiston rajoitettuun Doria-julkaisuarkistoon, joka on käytettävissä vain Lapin yliopiston kirjastossa.

4. Sitoudun noudattamaan Lapin korkeakoulukirjaston antamia tutkielman luovutusta koskevia ohjeita.
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Aika ja paikka

Ennamaria Kärkkäinen

Tutkielman tekijän allekirjoitus

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INDEX OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
AG	Aktiengesellschaft (Corporation)
AIA	American Institute of Architects
Arch	Architect
CDB	Combined Dispute Board
Co.	Corporation
CPSC	Client-Purchased Side Contract
CPSU	Client-Purchased Supplier Contract
DAB	Dispute Adjudication Board
DC	Design and Construct Contract
DCM	Design, Construct and Maintain Contract
DRB	Dispute Review Board
ENAA	Engineering Advancement Association of Japan
Elect	Electrician
EPC	Engineer, Procurement, Construction Contract
European Convention	European Convention on International Commercial Arbitration
FIEC	International European Construction Federation
FIDIC	International Federation of Consulting Engineers (Fédération Internationale des Ingénieurs-Conseils)
FIDIC Contracts	Guide International Federation of Consulting Engineers Contracts Guide
FIDIC General	Conditions International Federation of Consulting Engineers Conditions of Contract for Construction
Geneva Convention	Geneva Convention on the Execution of Foreign Arbitral Awards
Geneva Protocol	Geneva Protocol on Arbitration Clauses
GDC	Guided Design and Construct Contract
GmbH	Gesellschaft mit beschränkter Haftung (Company with limited liability)
HVAC	Heating, Ventilation and Air Conditioning Engineer

IACAC	Inter-American Commercial Arbitration Commission
IBA	International Bar Association
ICE	English Institution of Civil Engineers
ICC	International Chamber of Commerce
ICC Arbitration Rules	International Chamber of Commerce Rules of Arbitration
ICSID Convention	Settlement of Investment Disputes Between States and Nationals of Other States
i.e.	id est (that is)
INCOTERMS	International Rules for the Interpretation of Trade Terms
IT	Information Technology
Ltd.	Private Limited Company
Mech.	Mechanical Engineer
Model Law	United Nations Commission on International Trade Law Model Law
NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Panama Convention	Inter-American Convention on International Commercial Arbitration
SC	Subcontract
SCC	Arbitration Institute of Stockholm Chamber of Commerce
Struct.	Structural Engineer
SU	Supplier
TK	Turnkey Contracts
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT	Principles International Institute for the Unification of Private Law Principles of International Commercial Contracts

1. INTRODUCTION

1.1 The problem and objects of study

"Failure to plan is to plan for failure." *Winston Churchill*[1]

"In arbitration, fairness requires some measure of efficiency, since justice too long delayed becomes justice denied. Likewise, without fairness an arbitral proceeding would hardly be efficient, since it would fail to deliver a key element of desired product: a sense that justice had been respected." *William W. Park*[2]

Undertaking an international construction project business involves a high level of risk requiring specific expertise and knowledge concerning the planning and management of several contracts interrelated with multiple parties in order to reach a desired end result. Despite efforts to mitigate the risks underlying the project plan expressed within a construction contract, it is vital to plan for the event of a failure. By agreeing to arbitrate, the parties of a construction project indicate their intent to settle disputes in international arbitration instead of through national court litigation. Dispute resolution of controversies related to construction project contracts in international arbitration is a widely supported method certified in international practice under specific skills of expertise.

When the parties desire to solve disputes in international arbitration, it is essential that the parties are familiar with special features and circumstances concerning international construction project disputes in relation to assuring efficient proceedings. The cornerstone of international arbitration is the settlement of disputes according to the parties' intent adopting fairness in the proceedings and eventually resulting in a final and enforceable award. Construction projects are performed under several contracts consisting of multiple parties and often performed under a tight schedule. Under such circumstances, the question remains whether to proceed in multi-party arbitration compared to multiple single proceedings. In order to proceed efficiently in multi-party

[1] Ottosson 2013, 70
[2] Park 2012, 635

arbitration the parties need to take into account by expressing it in an arbitration clause, otherwise justice may be too long delayed and result in denial of the proceedings, and followed by an uncompleted project. However, in instances where the parties succeed in designing a successful agreement to arbitrate even with multiple parties at the same time and by addressing the complex features of construction contracts, even challenging disputes may be solved in an amicable atmosphere bringing about a continuity of business relations with a sense of respectable justice.

The object of this study is to discuss the questions related to international construction project contracts, and, explore current practices for resolving contractual controversies relating to construction projects in international arbitration. Specific expectations for construction project contracts accompany the examination of different types of contract patterns to adopt when constructing such as matters for the parties to consider when drafting an arbitration agreement especially in light of multi-party arbitration, and, resolving disputes in international arbitration with a focus on consolidating and joining non-signatory parties to proceedings. In relation to different contractual types, arbitration agreements and international arbitration contain specific features of construction business analyses within only a narrow sphere of international construction contracts and dispute resolution in international construction arbitration related dilemmas. Therefore, a large number of different approaches beyond the sphere of this study should be taken into account. However, drafting a construction contract is a starting point for a construction project that usually encompasses parties to solve disputes in international arbitration. A valid and efficient arbitration agreement is a stepping stone for the parties to proceed toward the arbitration indicating a plan if execution of contractual obligations and rights of a construction project fails. Ultimately, the intent of the study is to examine how an explicitly drafted arbitration agreement may result in the successful conduct of an international arbitration and take into consideration a special character of links between several construction contracts pertinent to an international construction project for consolidating and joining parties to arbitral proceedings.

The outcome of this study is not to establish an obscure report on the issues pertinent to international construction contracts and dispute resolution in international arbitration,

but rather to outline specific requirements for a construction project business when observing dilemmas relating to contracts and international arbitration from the contractual point of view. In this study, the principal importance is given to all chapters to allow the reader to fully comprehend the complexities related to a construction project business and how to conduct disputes successfully in international construction arbitration. If a dilemma relating to resolving construction disputes in international multi-party arbitration was discussed without embracing international construction project contract patterns and interrelated contracts with multiple parties first, it would have been impossible to adequately understand the drafting process of a valid and efficient arbitration agreement finally resulting to arbitrate. Likely it is essential to examine general acknowledgements on international commercial arbitration in order to create a sufficient frame for comprehending special characters of international construction arbitration.

Concepts *"arbitration agreement"* and *"arbitration clause"* are given the same intent in the study as an agreement expressing the parties mutual consent to arbitrate upon controversies occurring between them. Such an interpretation encompasses a *"submission agreement",* yet a separate examination is conducted under the study. The concept of *"international construction arbitration"* adopted within this study is not necessarily followed and generally acknowledged in the literature. At the same time, the term international construction arbitration has been favoured in expertise materials illustrating the need for uniformity within international construction businesses and as such the concept has been adopted in the study. The concept international construction arbitration may be used in instances where there are at least one disputing party acting outside the state of origin and/or foreign legal sources govern the construction contract. *"Multi-party arbitration"* refers to arbitration containing multiple parties as claimants and/or respondents although a more detailed examination is provided in the course of the study.

International arbitration is only one type of alternative dispute resolution mechanism to govern the parties' construction contract. In international construction disputes, the parties may choose to rely on *mediation* and *negotiation* at least as a primary phase of solving controversies between them. Also the use of an *engineer* consultant or *dispute*

boards with non-binding decisions is an alternative for saving costs and time of international arbitration procedure. Such alternative dispute resolution methods will be briefly discussed in a sphere of multi-tiered dispute resolution clauses. However, a more detailed examination on multiple alternative dispute resolution mechanisms provided in addition to construction related arbitration is not emphasized within the frame of this study.

1.2 The structure and references of study

This study is presented within five chapters. The second chapter offers a discussion of the character of international commercial projects focusing on interrelated construction project contracts with multiple parties. Additionally, considerations on different contractual patterns adopted in the international field of construction are to be indicated, as well as, dealing with major contract models provided by the FIDIC, the International Federation of Consulting Engineers. The purpose of the third chapter is to concentrate on international arbitration agreements in regard to special features linked into the construction project contracts and related agreements to arbitrate. The third chapter will explain the elements that the parties of distinct construction contracts need to take into account in order to litigate in multi-party arbitration. Specific attention will be paid to the dispute resolution clauses under the FIDIC Conditions of Contract for Construction. The fourth chapter observes international construction arbitration related complexities commencing speculation with basic features of international commercial arbitration and moving to the specific concept of international construction arbitration. Detailed importance is given to consolidation and joining non-signatories to arbitration and in light of harmonisation of legal sources of the construction field *lex constructionis* is to be analysed. The fifth chapter reveals conclusions resulted from the journey travelled in the sphere of international construction project contracts and dispute resolution in international construction arbitration within this study.

Foreign legal material is highlighted in this study. The single national author of Finland having published guidance in English related to the subject of this study is advocate Kurkela in the oeuvre “On International Construction and Project Export Contracts” in 1982. Foreign literature contains multiple, recently published, comprehensive guides to

international construction contracts and dispute resolution of controversies in international construction arbitration, however, with limited access to the writer of the thesis.

Examination of an international construction project business requires detailed materials on construction project management and are mainly provided by Pilcher and Ottosson in the frame of references of the study. In the field of international commercial and construction, related arbitration leading authors and practitioners providing comprehensive guides, including Born, Park, Moses, Redfern and Hunter, are favoured in the study containing some variations in approaching the subject.

A significant relevance within the references of study has been a verification with expert articles on international construction project business from all around the world in order to fully comprehend issues that concern international construction projects and disputes solved in international arbitration under interrelated the construction contracts, as authors become from different judicial systems and backgrounds ensuring somewhat distinct approaches.

Taking into account non-publicity concerning international arbitration awards and rare adaptation of multi-party arbitration in international construction disputes results consequently in a lack of uniform practice. Therefore, only a few cases are introduced in detail within the references to assist in comprehending the issues from the practical point of view. Therefore, the greatest value within the references to study has been to address the expertise literature in order to understand international construction project business in light of contracts and litigating in international construction arbitration. Such an adaptation is to point out the need for observing beyond legal sources within arbitrating in a specific field of business. For such a reason, examination by hypothesizing risky circumstances which may allow conflicting consequences for the construction projects are pertinent to the study. In addition, guidance provided by the International Federation of Consulting Engineers (the FIDIC) has been emphasized within the frame of this study.

2. INTERNATIONAL CONSTRUCTION PROJECTS AND FIDIC CONTRACTS

2.1 International construction projects

Globalisation has changed business in general and brought new impacts in the construction business. Among globalized construction businesses, international construction projects have become a new trend in the scope of market for foreign firms.[3]

In order to understand international construction projects, an adequate definition for the concept must be met. *A project* for the purpose of this study should be interpreted as a planned set of interrelated tasks in order to create a unique product, service or result, within a fixed period of time and a specific cost and, in addition, other limitations. A distinction between a project and *a product* is necessary to clarify as well. A product is the result, in the form of routine, new organization, building or equipment that is created by the project.[4]

An international construction project involves parties, namely the employer, the contractor, the consultant and the engineer, from a different state of origin, of which, at least one is working outside home field. The execution of the project is often rapidly scheduled and, therefore, project planning and interrelations with multiple parties need to be specifically defined.[5]

Special features concerning international construction projects, such as international construction opportunities, government policies, legal issues, country practices, foreign employment, the distinct view due to different legal systems, and language, challenge the contracting parties.[6] Many countries lack specified legal rules in the area of

[3] Chan & Suen 2005, 291
[4] Ottosson 2013, 29 - 30; Business Dictionary; Merriam-Webster Dictionary
[5] Chan & Suen 2005, 292; Ottosson 2013, 13 - 14; Pilcher 1992, 26 - 27
[6] Liuksiala 2004, 259 - 260; Chan & Suen 2005, 292 - 293

construction. For such reason trade organizations have created their own specific standard conditions, including the International General Conditions by FIDIC (The International Federation of Consulting Engineers).[7]

2.2 Contractual interrelationships in international construction projects

2.2.1 General aspects

International construction projects have several possibilities for execution. A general premise is the impossibility of a contractor to survive on its own with a large construction project, and, therefore, collaboration of other participants with a variety of skills is necessary. As a result, a complex feature of such projects is that they usually involve more than two parties or more in one contract. That is because multiple parties are in contractual interrelationships through a chain of different contracts that concern a single construction project.[8] Interrelationships that concern international construction contracts are examined below.

2.2.2 Interrelations between the parties in construction contracts

2.2.2.1 The parties

In order to establish an international construction project, it is essential to collect multiple acting parties together in contractual relationships. Consequently, the technical and/or financial responsibilities, as well as, the interrelations between the parties must be pointed out specifically.[9]

An introduction of the usual parties in construction contracts is offered at this point of the study. The *owner* or the *employer (Fr. le propriétaire, le maître de l'ouvrage)*

[7] Liuksiala 2004, 259; Ottosson 2013, 16 - 17
[8] Kurkela 1982, 10; Draetta 2011, 69
[9] Pilcher 1992, 26

(within this study owner is used) is the customer of the construction project purchasing a specific product, service or result.[10] A *contractor (l'entrepreneur)* is an individual or a company, therefore, a contractor is simply known as a construction firm, responsible for the construction works. In the case of a single contractor for the project, the contractor is appointed as the *main contractor*. *Subcontractors*, on the other hand, are so called secondary contractors working for a contractor/main contractor, instead of the owner. Subcontractors have a specific knowledge, experience and equipment, and for this reason, they are used to perform some or all a contractor's obligations, which may concern, for instance, the scope of work, costs, risks and coordination of the project.[11]

Other significant parties include a *supplier,* also known as vendor, who is a party delivering goods or services. *Consultants,* or, the *design team* generally refer to advisers, who are experienced professionals with expert knowledge and providing advisory for a fee. Consultants within the construction projects have usually special skills in areas such as engineering, architecture and project management.[12]

2.2.2.2 The interrelations between the parties

The interrelationships between the parties, including need for specific expertise and such, are depending on the end result desired by the owner. Hence, an appropriate type of contract for each project must be defined with information concerning the parties' specified product, performance and commitments, likewise, conditions for execution and the compensation issues.[13] Five basic types of contracts will be introduced in a following.

Despite the construction contract type, one contractual relationship is preferably seen as an individual contract between only two parties of the project. Thus, *(1) the main contract* between the owner and the main contractor is a separate contact, which does not have interrelationship in regard to other participants of the project. Consequently,

[10] Ottosson 2013, 5; Draetta 2011, 69; Pilcher 1992, 26
[11] Pilcher 1992, 27; Draetta 2011, 69; Ottosson 2013, 21; Business Dictionary
[12] Pilcher 1992, 27; Business Dictionary
[13] Pilcher 1992, 27; Ottosson 2013, 16; Liuksiala 2004, 41

the main contractor is responsible for the whole project. Such a responsibility concerns all the breaches of the main contract claimed by the owner, regardless of the breach occurring due to the main contractor or another parties' actions. On the other hand, if an employer breaches the main contract, damages may result to the other parties of the project. However, since the other parties do not have a contractual interrelationship with the owner, claims can be addressed only through the main contractor's sphere of obligation.[14]

At the same time, there is one exception, namely, *(2) an owner-architect or owner-engineer agreement*. Such contract is binding the owner and an architect/engineer who is responsible for the design of the project and the contract is usually free-standing from the main contract. Hence, those contracts are not interrelated with other parties of the project.[15]

(3) Supplier contracts bind the main contractor and suppliers in order to provide standard goods for a certain performance in the project. A project involves one or more bilateral supplier contract, which concerns *(4) subcontracts*, as well. Subcontracts are made between the main contractor and subcontractors to point out specific fields, including the scope of work, time, cost, risks and coordination, of the main contractor's obligations on the project to be completed by the subcontractor.[16]

It is common for a construction project to include *(5) a consortium agreement or a joint venture agreement* in order to cooperate among all the participants in the project in light of sharing work, liability and risks. Such agreements, which guarantee mutual benefit, define for each party a certain field to undertake the works, which are in interrelation between the parties concerning responsibilities in the technical and economic view and interconnections in allocating the risks. An additional twist to interrelations in construction projects is caused by *financial institutions,* which require the employer to provide knowledge about performance of the project in regard to fixed period of time to secure the payment of the project.[17]

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[14] Draetta 2011, 69 - 70
[15] Ibid.
[16] Draetta 2011, 70; Ottosson 2013, 21
[17] Draetta 2011, 70; Business Dictionary; Kurkela 1982, 14 - 15; Haapio & Sipilä 2013, 380

With respect to interrelations between the parties in construction contracts, it is essential to know that each of the contracts is, in fact, formally an independent contract. However, all of the contracts are in functional interrelationship while heading to the same goal of fulfilling the project. In addition to such functional interconnections some linked, although separate, contracts follow the same contractual content. A common contractual link is the attribution of legal relevance in one contract to legal or factual elements referring to some other interrelated contracts. Such issues relate to dispute resolution as multi-party arbitration questions, as well as, joinder and consolidation which need a separate examination.[18] Those complex issues are discussed in a later phase of this study.

A successful project is created through interrelations between the parties discussed above (1) the main contract, (2) an owner-architect or owner-engineer agreement and (3) supplier contracts are usually independent and free-standing contracts with no interrelations to other contracts. (4) Subcontracts and (5) a consortium agreement or a joint venture agreement, on the other hand, increasingly have contractual relations with the main contract. This is in order to allocate the risks from the main contract to *the second-tier participant*, which the subcontractor, the consortium partner or the joint venture partner is appointed.[19]

2.2.3 Construction contract types in international projects

Knowledge of basic interrelationships between the contractual parties leads to an examination of different types of contracts in international projects. An adequate concept of a *construction contract* for the purpose of this study is defined in a literature as *"a binding agreement, enforceable in law, containing the conditions under which the construction of a facility will take place. It results from an undertaking made by one party to another, for a consideration, to construct the works that are the subject of the contract."*[20] Traditionally construction project contracts are divided into organizational

[18] Draetta 2011, 70
[19] Ibid.; Kurkela 1982, 10
[20] Pilcher 1992, 30

contractual relationships or classification among the financing of the project.[21] Within the scope of this study only organizational contracts will be examined.

An international construction project established by organizational contracts contains the bidding document and production basis concept contracts, and, contracts favourable in terms of desired function or performance. Concept contracts may concern a question of how to organize on a building site to achieve certain artistic design for a building, for instance. In such regard contracts may be based on the documents for design, construct and maintain (DCM), design and construct (DC) or turnkey (TK) contracts. Functional and performance contracts are classified as: (*1) design, construct and maintain contracts*, *(2) design and construct contracts*, *(3) turnkey contracts*, *(4) guided design construct contract* and *(5) design-bid-construct or engineer, procurement, construction (EPC) contracts*, which are introduced below.[22]

2.2.3.1 Design, construct and maintain contracts

In design, construct and maintain contracts, the owner is in a contractual relationship with a contractor, who is liable for the design, production and functionality of the desired product. The contractor maintains the project, or at least part of it, and is the one contracting with the design team. The contractor is also bound by the contracts between suppliers and subcontractors, for instance metal workers, plumbers and electricians. Since designing and production is granted by the contractor, attention can be paid to execution of the works and project expenses, which usually results in cost-savings. On the other hand, it is vital to take into account in the project documents not only the functional description of the project, but also schedule regular functional controls in order to complete the desired facility. In a functional/performance contract, the contractor is in extended liability compared to a design construct contract.[23]

A DCM project may include owner work and owner-purchased side contracts, i.e. subcontracts and supplier contracts. The owner may, for instance, purchase machinery

[21] Pilcher 1992, 27, 32; Liuksiala 2004, 41, 47; Ottosson 2013, 17
[22] Ottosson 2013, 17 - 18, 20; Business Dictionary
[23] Ottosson 2013, 18; Liuksiala 2004, 41 - 42

and is, hence, responsible for performing and coordinating the work with the main contractor's scope of work.[24]

2.2.3.2 Design and construction contracts

In design and construction contracts, the owner is in a contractual relationship with a contractor who is responsible for the design and constructing of the planned facility. The owner may contract with a consultant when needing specific skills for the assignment. The main contractor is in charge of the design, whether using a team or not, for the owner. The main contractor, lacking knowledge on its own organization, may contract with suppliers and subcontractors, for instance electricians, plumbing and painting works, however, under its own responsibility. FIDIC assists with contractual support for DC contracts in the "Conditions of Contract for Plant and Design-Build".[25]

2.2.3.3 Turnkey contracts

A turnkey contract is generally interpreted as a project aiming to a specified facility which will be ready to use within a certain cost on a fixed date. A turnkey contract is a DCM or DC contract with a larger delivery as the idea is to get the "key", walk in and immediately start to use the facility for intended purpose. FIDIC offers general conditions for such contracts in the form of "Conditions of Contract for EPC/Turnkey Projects".[26]

In order to visualize the contractual organization of the functional and performance contracts, DCM, DC and TK contracts are connected under the following pattern by Ottosson:

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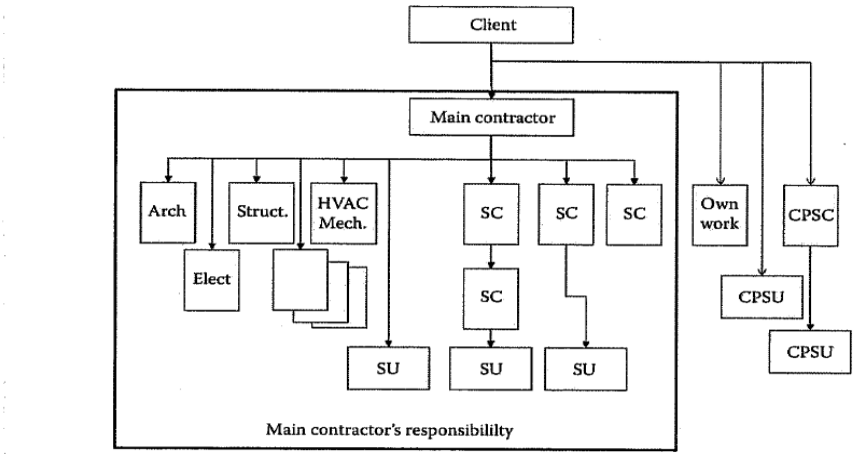
[24] Ibid.; Ibid., 40
[25] Ottosson 2013, 18 - 19; Liuksiala 2004, 43; Pilcher 1992, 28
[26] Ottosson 2013, 18; Cazalet 2011, 17; Business Dictionary



The main contractor's sphere of responsibility is addressed by the darker line, whereas, the owner's (client in the pattern refers to the owner of the project) work and owner-purchased side contracts are a distinct institution with regard to coordination.[27]

2.2.3.4 Guided DC (GDC) contract or a develop, design, construct contract (DDC)

A guided DC contract is designed by the owner, usually transferred to the consultants, and purchased as a DC, DCM or TK contract. In a GDC contract, the owner is involved within design of the building and installation systems among other details, however, the risk of defects is passed, when legally agreed, to the main contractor by purchasing a DC, DCM or TK contract. In the GDC contracts the owner has a hand over contractor's sphere of using such as special equipment or skills.[28]

2.2.3.5 Design, bid, construct or engineering, procurement and construct (EPC) or design-to-build contracts

A design, bid, construct contract is a traditional contracting method involving design and construction phases bid and executed under owner-consultant and owner-contractor contracts. The owner is responsible for the design of the project and owner-consultant contract is providing the specific assistance of the consultants. The project documents, such as drawings, specifications and document for measuring the work completed for valuation are provided by the owner and consultants. The consultants are usually

[27] Ottosson 2013, 19
[28] Ottosson 2013, 19

independent practisers without expected benefit concerning the complement of the project facility. The owner-contractor relationship obligates the contractor to function accordingly to the detailed requirements of the contract. Such requirements may include specifications concerning subcontracts and supply contracts that the contractor is expected to conclude in respect of owner's (and consultants') wishes. The contractor may, as well, be bound by self-arranged subcontracts and supply contracts, however, by acceptance of the owner's consultant specialized in the engineering or architecture.[29]

Design, bid, construct contracts contain two different types which of more common is (1) general construction contract, and, the second type being (2) coordinated general construction contract. The function of such contract types is introduced as follows:

2.2.3.5.1 General construction contracts

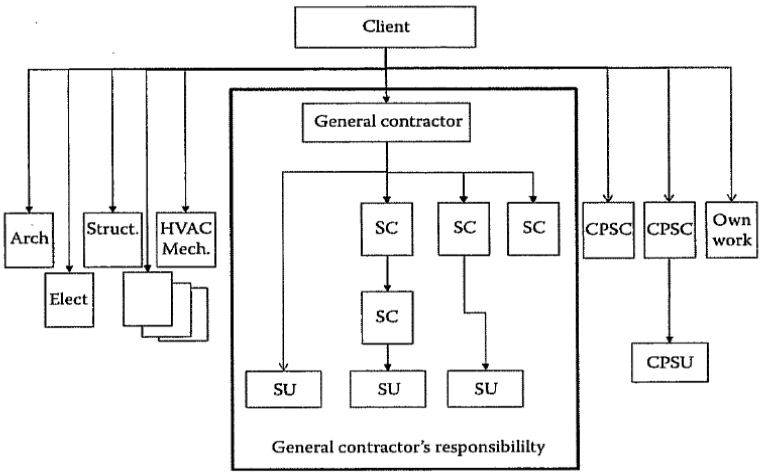
General construction contracts are those which obligate the main contractor responsible for the whole project. The main contractor may, however, involve subcontractors and suppliers in the project in order to fulfil owner's, assisted by consultant, requirements on design and description concerning the project. FIDIC grants contractual samples for these contracts in the form of "Conditions of Contract for Construction."[30]

2.2.3.5.2 Coordinated general construction contract

In the coordinated general construction contracts, the main contractor is hired to supervise the owner's work, including owner-purchased subcontracts and supplier contracts, which function the owner is able to determine. In addition to the main contractor's responsibility for the risks and establishment of the owner-purchased side contracts, liability of the main contractor focuses on the work provided by its own operations.[31]

Ottosson provides the pattern below with regard to the organization for general construction:

[29] Ottosson 2013, 19 - 20; Pilcher 1992, 27 - 28; Business Dictionary
[30] Ottosson, 2013, 20; Business Dictionary
[31] Ottosson 2013, 20



It is vital to recognize the responsibility sphere of the general contractor, and, on the other hand, the non-coordinated function of the consultants and owner-purchased contracts.[32]

2.3 FIDIC contracts for major works

2.3.1 General aspects of interrelated contract and project management

In order to fulfil a successful international construction project there are multiple aspects demanding specific consideration starting from the point of view of choosing contracting parties. Effective construction contracts require interrelated cooperation between several practitioners with multiple skills and special knowledge. Interrelated contract and project management involve different fields that need to be taken into account, including technical aspect, implementation, financing, and, legal aspect. Such linked elements may result in a successfully completed construction project dealing with specified needs of the parties. At the same time it is essential to know that interrelations between such elements result in taking into account any changes that may concern execution of the project at hand requiring adaptation and reconsideration in all relations. For instance, despite the fact that general conditions for contract are provided

[32] Ibid.

by institutions they may not govern as such special needs required by the project at hand.[33]

Which are the elements that a successful project management should be governed by in several fields of knowledge? There should be an answer to at least what, how, when and who questions for a specified project at hand with regard to public authority contracts, coordination and decision making, scope of work definition and events of changes in the project. Additional considerations include environmental issues, quality assurance, time and costs, resources, communication and information, management of risks, procurement consisting administration of contract agreements and delivery acceptance. In order to fulfil such areas in questions, different strategies and tactics must be developed. A project strategy assists on a long term basis to achieve the project goals and needs to be accepted by the parties. Expressly drafted strategies concluded in an early phase of the project may contain the project's technical and architectural concepts, for instance, supporting ecological development in building, specifying environmental policies and taking into account financial risks in the sphere of company's tolerance levels and the type of contract agreement. Tactically, a construction project management relates to a simple element of trust between the parties. Trust has been considered to follow from elements including, respect, consideration, confidence and cooperation.[34]

In regard to interrelated contract and project management a major contract conditions provided by FIDIC will be examined in the scope of this study. Is adopting the FIDIC major contract conditions in a construction contract eventually a desired assistance and facilitation in the construction project field? Or do FIDIC general conditions for construction bring additional complexities in managing construction contracts and projects?

[33] Haapio & Sipilä 2013, 33
[34] Ottosson 2013, 51 - 54, 56 - 57

2.3.2 General aspects of the FIDIC

FIDIC follows from the French acronym Fédération Internationale des Ingénieurs-Conseils (the International Federation of Consulting Engineers) and represents the global voice for the engineering consulting industry. The need for independent expert consultants in the international sphere actualized for the World Fair Exhibitions in 1913 and an appointment between consulting engineers lead to the establishment of the FIDIC. The founding countries of the Federation consist of Belgium, France and Switzerland. International growth of the FIDIC met challenges due the World Wars and other major political dilemmas. Finally, in 1959 the Federation received a truly international character as the new member countries included Australia, Canada, South Africa and the U.S.[35]

What has maintained the success of the FIDIC in the field of the construction industry since 1913? The Federation's basic principles of quality, integrity and sustainability from over 100 years ago still form a leading role in the function of the FIDIC. The current objectives of the FIDIC consists of (1) represent the consulting engineering industry globally, (2) enhance the image of consulting engineers, (3) be the authority on issues relating to business practice, (4) promote the development of a global and viable consulting engineering industry, (5) promote quality, (6) actively promote conformance to a code of ethics and to business integrity and (7) promote commitment to sustainable development.[36]

2.3.3 Contract models for major works

The latest publication of the contract models provided by the FIDIC occurred in 1999 emphasising standards of good engineering practice in regard to the structure, language and layout of the contracts. The major construction projects are governed by three contract conditions, including *(1) the Conditions of Contract for Construction* (1st edition 1999, Red Book), *(2) the Conditions of Contract for Plant and Design-Build* (1st

[35] www.fidic.org
[36] www.fidic.org; FIDIC Statutes and By-Laws, Article 2. Available at http://fidic.org/sites/default/files/statutes_en_2011.pdf. Last visited: 29.04.2014.

edition 1999, Yellow Book), and, *(3) the Conditions of Contract for EPC Turnkey Projects* (1st edition 1999, Silver Book).[37] Applicability of the contract models in international practice will be examined in the following section.

Firstly, (1) the Conditions of Contract for Construction are recommended for building and engineering works in instances where most of the works are designed by the project owner, or by a mandated representative. Therefore, a contractor may be involved in design of the product only partially, and, the main scope of contractor's work is to execute the project accorded in a contract according to the engineer's advises. Secondly, (2) the Conditions of Contract for Plant and Design-Build are recommended for the provision of electrical and/or mechanical plant, and, for building and engineering works. Such types of contracts are usually governed by the contractor being responsible for the design and executing work under requirements from a project owner. Thirdly, (3) the Conditions of Contract for EPC Turnkey Projects may be suitable for a process or power plant, a factory or similar facility, or, alternatively, for a infrastructure project or even other kind of development consisting a requirement of (i) a higher degree of certainty of final price and time, and, (ii) the contractor is liable for designing and completing the project. Under such setup the contractors is relied total responsibility on engineering, procurement and construction (EPC) resulting in a fully-equipped facility that is ready for utilize in a mere turn of the key.[38]

3. INTERNATIONAL ARBITRATION AGREEMENTS AND DISPUTES UNDER FIDIC CONTRACTS

3.1 International arbitration agreement

An agreement to arbitrate expressed in an arbitration clause *(la clause compromissoire)* by the parties is an essential element and a foundation to international arbitration.

[37] Reilly & Tweeddale 2000, 187 - 188; The FIDIC Contracts Guide 2000, 1
[38] Ibid., 188; Ibid., 4; The FIDIC Contracts Guide, 4: See in Appendix I: Comparison of the main features of the three Books.

Arbitration clauses should be, therefore, explicitly tailor-made taking into account a criteria of a specific case, including the type of disputes that are likely to rise, interrelations between the parties and the laws adopted to govern the dispute at hand. Drafting process of an arbitration agreement, as well as, arbitration may be considered as an art analysing the relevant factors that need to be taken into account.[39]

The relevance given to the tailored arbitration clauses, despite the significant role upon the dispute at hand, has not been adopted, unfortunately, since the arbitration clauses tend to follow a cut-and-paste pattern. Such practice has been suggested to follow from regarding arbitration clause as a mere technicality, which does not require much time or founds. As soon as the parties have concluded significant terms and conditions of their business deal in the contract, an arbitration clause has been considered as a footnote. Park has expressed such a concept in a pertinent way as discussing about divorce at the wedding feast.[40]

On the other hand, in the context of international arbitration agreement there has been discussion on a recognized dilemma, lack of predictability, when drafting an arbitration clause. In light of the lack in predictability, it has been interpreted to be the main issue in both, international arbitration and international construction specified disputes.[41] Therefore, examination of arbitration agreements within this study deals with general acknowledgements on drafting arbitration agreements in international sphere, and, follows with more specialized observation in construction project disputes, keeping an eye on contractual conditions affirmed by the FIDIC.

3.1.1 The validity of an arbitration agreement

Examination of the validity of an arbitration agreement is essential at this point of the study for understanding the complex issues joining non-signatory parties and consolidation to arbitration in a later phase.

[39] Bishop 2000, 16
[40] Park 2012, 501
[41] Draetta 2011, 73

A valid arbitration agreement is a corner stone and a basic element in order to resolve disputes in desired mechanism outside national courts, in international arbitration. A significant relevance in regard to drafting arbitration agreements is given to the will of the parties, *l'autonomie de la volonté.* Indeed, the parties' mutual consent is a prerequisite in the sense of a voluntary character of international arbitration as dispute resolution mechanism.[42] Essential aspects on drafting a valid and efficient arbitration agreement are considered in the following.

3.1.1.1 General aspects of a valid arbitration agreement

In regard to formal validity of an arbitration agreement, a commonly supported manner in drafting is an agreement *in writing*. An effective arbitration clause displaces a power of national courts given the jurisdiction on disputes that may arise between the parties contractual relations to be solved in international arbitration.[43]

The New York Convention adopted the concept of a written arbitration agreement provided in Article II(2) as stated below:

> "The term *'agreement in writing'* shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

Written form requirement of the NY Convention has been considered as a widely adopted standard form in international arbitration despite the fact that national courts have given variations in conducting the concept. Born has asserted that the wording of Article II(2) of the NY Convention does not expressly state arbitration agreements to be in written form, but rather signed by the parties, or, consisting an exchange of letters or telegrams. The interpretation replaces oral agreements, oral acceptation of a written document and agreements lacking signature. A mere written agreement is not sufficient as a signature or an exchange of communications is a necessity. In regard to such writing requirements certain internationally adopted principles will be introduced

[42] Redfern & Hunter 2009, 85 - 86
[43] Ibid., 89 - 90

herein.[44] Relevance is given to the principles that may actualize in determining access to arbitration underlying international construction project contract and commonly related dilemmas of consolidation and joining non-signatory parties to arbitration.

Firstly, *an arbitration clause in a signed contract* has been considered to be fulfilled when both parties have signed a contract, which of an arbitration clause is contained. An accepted alternative method is signing a submission agreement by the parties when the dispute has already arisen. Secondly, a less obvious interpretation concerns *an arbitration clause in contract not signed by all parties*, therefore, adapting different approaches is necessary. Explicit wording of the Convention requires an agreement to be signed by the parties, not a single party. On the other hand, such doctrines as piercing corporate veil or group of companies, which will be discussed precisely later, accept that an agreement signed by one party has judicial power to bind another party to arbitration. Thirdly, *an arbitration agreement in an exchange of letters* has not been, in most cases, regarded to require a manual signature by parties, especially taking into consideration the era of electronic communications. The fourth principle concerns *express versus implied arbitration agreements*. A traditional adaptation is to reject tacit arbitration agreements that follow from admissible consent of the party. At the same time, such an interpretation displaces a role of implied consent, which can be reasoned underlying national substantive laws, international commercial practice and commonly adopted principle of good faith in conducting contract performance. As Article II(2) does not assert that an express written agreement is a perquisite, accepting implied consent grounds has not been interpreted to violate the article at hand, but rather outline widely adopted national and international legal practice.[45]

Yet given the great importance for uniform international interpretation under the NY Convention it needs to be taken into account that there has been a relevant revolution in methods of communication since the NY Convention adopted in 1958. Therefore, a revised content of the Model Law in 2006 is necessary to discuss with respect to validity of an arbitration agreement including modernized approach to the writing requirement.[46]

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[44] Born 2009, 588 - 589
[45] Ibid., 589 - 596
[46] Redfern & Hunter 2009, 90

In 2006 revisions to the UNCITRAL Model Law two approaches were adopted for article 7 and written requirement. Option II of Article 7 contains brief concept for the issue stating that *"an arbitration agreement is an agreement to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."* Resulting from Option II any written form requirement is acceptable and actualizing dilemmas are the substantive issues of the consent of the parties.[47]

Moreover, Option I is looking beyond substance compared to Option II requiring written form by affirming substantially exempted concept for stipulation to be in writing.[48] The Model Law Option I Article 7(3) provides:

> "An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means."

Resulting from Option I, if a party is willing to be involved in arbitration without contesting the existence of an agreement to arbitrate, implied consent is regarded to be sufficient to access arbitration.[49] Such revision of the Model Law is relevant especially in regard to consolidating construction project contracts in arbitration, which relates to implied consent requirement.

3.1.1.2 Pathological arbitration clauses

A problem relating to pathological arbitration clauses *(la clause compromissoire pathologique)* is that such clauses lack unambiguous drafting, and, as a result, cause a dispute on interpreting the parties' agreement to arbitrate. Such disputed clauses may result in the failure of an arbitration clause, or, even though the arbitral proceedings are held the award may not be enforceable.[50]

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[47] Born 2009, 605 - 606
[48] Ibid., 606
[49] Redfern & Hunter 2009, 91
[50] Bishop 2000, 21

Pathological arbitration clauses may include dilemmas such as, whether there is an intent to proceed in arbitration, nominating an arbitrator who is not able to proceed or refuses to be mandated, nominating a named institution or an arbitrator of a named institution that never existed in a clause, or, denies to be mandated. Additionally, the arbitrators may not be provided sufficient time to proceed, the qualifications required for an arbitrator to be mandated may be too specific, or, dilemmas may occur due conflicting or unclear definitions on the procedure.[51]

In a case where the parties' original intent was to access arbitration, an interpretation for curing the pathological arbitration clause is at hand. The first opinion is to examine the pathological arbitration clause through general principles of interpreting contractual vagueness. Therefore parties' intent to go to arbitration is to be constructed through such general principles. Another choice is examination of general gap-filling methods in determining the parties' will to arbitrate. Firstly, the good faith principle and secondly, the protection of the parties' legitimate expectations when entering into an agreement must be taken into account especially in common law jurisdictions.[52]

In the aspect of general international commercial principles, the intent of the parties is to be defined under UNIDROIT Principles of International Commercial Contracts. Chapter 4 of the UNIDROIT Principles refers to the common intention of the parties and the standard of the reasonable man in the same situation. In addition to general gap-filling methods, the principle of good faith is also emphasized in the international commercial principles. Article 1.7 of the UNIDROIT Principles requires parties to act *"in accordance with good faith and fair dealing in international trade".*[53]

In accordance with interpretation stated above, there are several methods on interpreting the parties' intention. However, the first step may be taken by focusing on the substance, the wording, of the arbitration clause, and, secondly the common intent of

[51] Bishop 2000, 21 - 22
[52] Boyer & Cohen 2011, 55 - 56
[53] Ibid., 56 - 57

the parties may be considered. An alternative solution is finally to rely on generally accepted principles of interpretation.[54]

3.1.2 The parties to an arbitration agreement

A general assumption on binding rights and obligations under arbitration agreement relates to principle of privacy of contract supported by both civil and common law jurisdictions affirming applicability to only parties to such agreement. An arbitration agreement to bind only parties to it has been expressed in international conventions, including the New York Convention Article II(1)[55] and Article 7(1)[56] of the UNCITRAL Model Law, as well.[57]

The most straightforward manner is to direct signatories to an arbitration agreement adapting express formality requirement in determining the status of the parties. Going beyond expressly formed arbitration agreement by the parties actualizes an issue of legal basis for binding non-signatories to the arbitration agreement. A number of different doctrines have been created in reasoning non-signatories, especially entities, to be parties to an arbitration agreement. Such doctrines that concern international construction project contracts consists, in majority of cases, of implied consent, piercing corporate veil and group of companies theory. The issues related to such doctrines concern parties' intentions to be bound by an arbitration agreement, and, moreover, how to mandate parties' that did not conclude mutual agreement to arbitrate to be bound by an arbitration agreement signed by or behalf of all parties.[58]

In regard to consensual character of arbitration, accessing non-signatory parties to arbitration has been analysed as exceptional. In regard to consensual dispute resolution mechanism of arbitration the parties have intent to arbitrate on appointed disputes with distinct counter-parties. For such reason signatory parties to arbitration do not have

[54] Ibid., 57
[55] The NY Convention, Article II(1) provides: "Contracting states shall recognize an agreement in writing under which the parties undertake to submit their disputes to arbitration"
[56] The UNCITRAL Model Law, Article 7(1) states: "An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them"
[57] Born 2009, 1133 - 1134
[58] Ibid., 1136 - 1137, 1140

accounts to arbitrate with non-signatory parties, unless a judicial aspect have been affirmed.[59] The issues of legal grounds for consolidating and joining non-signatories to arbitration in regard to international construction project disputes will be discussed in more detail in a later phase.

3.1.3 An analysis of an arbitration agreement

3.1.3.1 Classification between an arbitration clause and a submission agreement

Arbitration agreements are classified in two ways: first an arbitration clause and second, the submission agreement. An arbitration clause is drafted in a sense of predicting future disputes, whereas, a submission agreement relates to a moment when the dispute has already arisen, and, therefore, has been interpreted to look in the past. As an arbitration clause regards the future with no detailed information of the controversies that may arise, it has been usually drafted with a short length, often adapting a model clause provided by an arbitral institution. On the other hand, the submission agreement actualizes when the dispute has already risen with detailed information of the circumstances present at the dispute, and, may be tailor-made to meet the expectations at hand.[60]

One of the most significant theories of international arbitration concerning an arbitration clause, the *separability* of an arbitration clause, needs to be described within this context. The separability doctrine concludes a theory of an arbitration clause to be considered as a separate and autonomous agreement from the underlying contract which it has been drafted, surviving termination of such contract. An autonomous arbitration clause has been resulted to overcome the claims on null arbitration clause in regard to termination of the main contract. At the same time, another method analysing an arbitration clause is to consider existing two distinct contracts, one being the main contract governing the commercial rights and obligations of the parties, and, another

[59] Ibid., 1141
[60] Redfern & Hunter 2009, 86

one resulting any disputes determined in arbitration due commercial interrelation between the parties.[61]

In classification of an arbitration clause and a submission agreement it is necessary to point out the different position of the parties and their legal advisers in drafting a submission agreement. In the drafting process of a submission agreement, the dispute has already arisen and may contain a hostile atmosphere in regard to the parties' interrelations. In technical aspect the parties' legal advisers desire an efficient process of arbitration in regard to facts of the case. In addition, the parties may have conflicting interest in the dispute at hand as claiming party usually wishes a rapid resolution for the controversies, and, conversely, the respondent may regard delay of the process in its own benefit. Such characters may result in a time-consuming drafting process for a submission agreement, whereas, an arbitration clause is usually considered as "a midnight clause" in the last phase including inevitable elements in order to fulfil the contract negotiations.[62]

3.1.3.2 Analytical aspect of an arbitration clause

Analysing validity and effectiveness of an arbitration clause requires a framework within the evaluation. Considered functions that needs to be addressed in an arbitration clause conclude creating a mandatory sphere for the parties and displace involvement of national courts in the parties' dispute at hand. In addition, it is relevant to establish judicial power for the arbitrators to conduct the dispute in arbitration, and, to express a procedural sphere concerning the resolution of the dispute. These basic elements suggest a general field for success to commence an arbitral process, however, a more detailed examination is relevant at this point to articulate drafting of a valid and efficient arbitration clause.[63]

In order to analyse arbitration clauses, discussed classification for comprehending arbitration clauses is provided by the literature. According to the suggested division

[61] Ibid., 117
[62] Ibid., 86 - 87, 121
[63] Bishop 2000, 23

arbitral clauses are classified into *(1) basic clauses, (2) general clauses*, and, *(3) complex arbitration clauses*. (1) Basic clauses have been listed to contain only the essential basic provisions in order to validate an agreement to arbitrate. Basic clauses comprehend model clauses provided by institutions and may contain other provisions, as well. Such provisions may consist of illustrating the choice of arbitration as a dispute resolution mechanism, agree on a final and binding award, address whether an institutional or *ad hoc* arbitration is at hand, the number and appointment method of arbitrators, and, the place, the language and the law of arbitration, for instance. Basic arbitration clauses govern usually a routine commercial transactions, for instance in oil sales and shipping, when the parties do not have time or agreement discussing on further elements.[64]

The most common class is a (2) general arbitration clause in significantly greater transactions containing in addition to above mentioned provisions certain amount of optional provisions improving efficiency of the clause. Such additional provisions may consist of ADR provisions, which require negotiation as a first phase of dispute resolution, special qualifications and conduct of the arbitrators, excluding punitive and consequential damages, and, mention on costs and attorneys' fees. General clauses are usually adopted in larger commercial transactions, usually projects, including power plant construction agreements as an example. Adopting optional provisions beyond basic ones is necessary in case the parties determine to avoid risks of derogating from institutional rules, violations on applicable law governing the dispute, or, on other grounds where the parties' mutual consent would not be present.[65]

(3) Complex arbitration clauses are pertinent to the international construction projects as such clauses concern major projects consisting large sums of money, and, transactions consisting government or state-owned companies as parties. Complex clauses provide even more tailor-made clause compared to above introduced clauses, containing rare provisions, which take into account competence of a clause in relevant jurisdiction. Such unusual provisions may be unimportant in many transactions to parties, but especially in large construction projects with a significant value. In addition to basic and general clause provisions complex arbitration clauses should contain provisions such as

[64] Bishop 2000, 23
[65] Ibid.

determining on confidentiality, multi-party arbitration, consolidation, expert determination, or, a way conducting contract and possible related gap-filling issues that may arise.[66]

In conclusion, dividing arbitration clauses in different categories is a useful tool for analysing special needs of arbitration agreements in certain types of transactions. Nevertheless, such categorization is not practical as each transaction is unique of nature demanding combinations of different provisions in multiple and exceptional ways.[67] However, introduced division of different types of arbitration clauses herein is relevant in emphasizing the complex and special needs of international construction project contracts.

3.1.3.3 Considerable elements of an agreement to arbitrate and a model clause

Legal authors give importance to different elements that are necessary to take into account in the drafting process of an agreement to arbitrate. The key elements considered to govern an arbitration agreement in one authors' opinion consist of a valid arbitration agreement, the number of arbitrators, constitution of an arbitral tribunal, whether conducting in *ad hoc* or institutional arbitration, manner of filling vacancies in the tribunal (when replacing arbitrators), place of arbitration, governing law, default clauses of institutions, language, multi-tier clauses and other procedural matters.[68]

In the drafting process of a submission agreement, additional characters may be pointed out due detailed awareness of a dispute. Such elements may contain a substance of a dispute at hand, provisions for a site inspection in construction project disputes, conduct of appointing experts by the arbitral tribunal, provisions for interim awards, detailed provision on the costs of arbitration, and, a provision certifying that the arbitral award will be final and binding the disputing parties.[69]

[66] Ibid.
[67] Ibid.
[68] Redfern & Hunter 2009, 112 - 116
[69] Ibid., 121

Introduced key elements of an agreement to arbitrate may be considered even when a standard clause provided by an institution has been adopted to govern any disputes that may arise. At this point, a standard clause to arbitration composed by the International Chamber of Commerce is represented below:

> All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.[70]

It is necessary to point out in this context that the ICC has adopted a presumption of using an emergency arbitrator in revised 2012 Arbitration Rules, and, therefore, the parties are required to expressly opt out from the emergency arbitrator provision if they wish to conduct straight in arbitration:[71]

> All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The Emergency Arbitrator Provisions shall not apply.[72]

To conclude, drafting process of a valid and efficient arbitration agreement is a challenging task with multiple different perspectives, especially, if designing a tailor-made arbitration clause before a dispute has arisen. Additional complexities become current in the event of multiple contractual links between different parties to one single project to be fulfilled under multiple contacts. Such dispute resolution clauses that concern multi-party arbitrations are examined in more detail below.

3.1.4 Dispute resolution clauses in regard to consolidation, joinder and multi-party arbitrations

Dispute resolution clauses that concern consolidation and joining non-signatory parties in multi-party arbitration are considered as complex arbitration clauses. Indeed, such

[70] The ICC Arbitration Rules, 78
[71] Ibid., 79
[72] Ibid., 78

clauses between interrelated parties demand taking into account specific drafting techniques and have been expressed on their own terms of classification.

3.1.4.1 “Push” or “pull” arbitration clauses

In instances where a dispute arises pertinent to factual or legal controversies in a project, consolidation of arbitration would make sense in avoiding conflicting awards. In regard to consolidating arbitration upon the parties mutual consent an agreement to arbitration is a necessity. Completing a functional agreement to consolidate arbitration is a complex task and takes place in rare situations in international practice. Even though the institutional clauses provide regulation on consolidation of arbitration, the parties guarantee an efficient consolidation by expressly stating essential elements, such as venue and language, of arbitration. Arbitration practice has followed two manners in expressing the will of consolidated arbitration proceedings for the parties’ dispute at hand.[73]

First of all “push” or “pull” arbitration clauses consist of a chain where A conducts an agreement with B, B again enters into agreement with C, D, E, F and so on. Each agreement has a provision adopted with a mutual consent of the parties concerning any disputes under that agreement to be consolidated to arbitration with any related disputes under the other agreements i.e. *push* disputes into joined arbitration proceeding. Evitable way, such agreement is demanded to allow disputes under other agreements to be proceeded at the same time with disputes pertinent to the agreement at hand i.e. *pull* disputes into joined arbitration proceedings. In order to succeed in consolidation such interrelated arbitration agreements require similar provisions on key elements of arbitration, including similar adaptation in such as seat, language and governing law of arbitration. A successful drafting of push or pull arbitration clauses allow pushing disputes into other arbitration, or, pull other disputes into the arbitration underlying the agreement which adopted consolidation of disputes, containing a supportive character of not demanding the parties consent at the same time.[74]

[73] Jenkins & Stebbings 2006, 153
[74] Ibid., 153 - 154

Second option in consolidating or joining arbitral proceedings is based in a “master” or “umbrella” agreement, which will be examined in the following section.

3.1.4.2 “Master” or “umbrella” arbitration agreement

Major construction projects are interrelated between multiple parties by several contracts in order to fulfil the performance under the main project contract. In order to avoid variations in layout of the language the parties can adopt, upon their will, the same arbitration clause in several linked agreements by negotiating a single master/umbrella arbitration agreement. Such master arbitration agreement can be incorporated to each different contract by a reference, including the exact language of the master arbitration agreement. Moreover, discretion of exact wording of a master arbitration agreement can be exempted by adopting additions or deletions demanded by specific contracts, and, still a master arbitration agreement can be adopted to govern such contracts.[75]

A master arbitration agreement is a distinct and self-standing agreement establishing interrelated disputes to be heard at the same time, or, consolidating disputes with similar interests. In determining interrelations or similar interest between the disputes the right can be addressed to the parties, or, waived to the arbitral tribunal to confirm upon their consideration. On the other hand, the parties should take into account that all the disputes may not arise at the same time, and, therefore, allow for an arbitral tribunal discretion not to consolidate proceedings. Such discretion may be adequate concerning one proceeding that has been nearly conducted in the end when another one commences, and, consolidating the proceeding at hand would solely result in additional costs and consume extra time. It is necessary to point out that applying a master agreement requires separate negotiations concerning each interrelated contract. At the same time a master agreement provides consolidation or joinder for such contracts that have been already negotiated despite the conclusion of founder provisions and ascertains differing provisions confronting distinct needs for interrelated contracts.[76]

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[75] Bishop 2000, 19
[76] Jenkins & Stebbings 2006, 154

3.1.4.3 “Push” or “pull” arbitration clauses and “master” or “umbrella” arbitration agreements in international construction contracts practice

Taking into account the character of international construction projects with multiple interrelated contracts tied in a single project to be completed is a complex task when verifying a “perfect” arbitration clause for disputes that may arise between linked parties. Additional challenge occurs from an international composition related to such projects, but also such project agreements are entering into at different time sphere. Despite the parties mutual consent to arbitration intent of the parties has been to arbitrate under different procedures.[77]

A classification of arbitration clauses concluded in regard to consolidation and joinder of arbitration has been a valuable step, which, nonetheless, has not received a great success in international construction contracts practice. Firstly, a problematic aspect is that multiple interrelated contracts are entered into at different times by the parties. Secondly, it is necessary to take into account that the owner of the project rather expects claims from a single source, the main contractor, than being involved in the disputes occurring between the main contractor and subcontractors relations. Moreover, thirdly, the subcontractor merely assumes to be involved with dispute resolution concerning the main contract claims in a large scale of performing the desired product of the contract. Fourthly, all the parties to interrelated contracts may not be given equal importance in the contract negotiations in regard to drafting an arbitration clause. The owner of the construction project may expressly state desired elements in an arbitration clause, however, such elements may not be admissible for the second-tier participants to the project at hand.[78]

Lack of success of “push” or “pull” arbitration clauses and “master” or “umbrella” arbitration agreements in international construction contract practice has been reasoned with fear of unawareness in the field and need for predictability that has been generally related to arbitration agreements. Even though above discussed challenges may be exceeded concept of a “perfect” arbitration clause for international construction project disputes may be regarded as an illusion. Drafting a perfectly governable arbitration

[77] Ibid., 153 - 154
[78] Draetta 2011, 72 - 73

clause would insist predictability in the sense of knowledge of the types of the disputes that may arise between the parties' interrelations, and, whether the drafter of the clause is in a role of claimant or respondent at the time of the dispute at hand. Additional expectations consist of awareness whether multiple disputes would arise at the same time, and, above all, whether joinder or consolidation is advantageous for the drafter of the clause.[79]

In conclusion, the ability to draft a "perfect" arbitration clause comprehending an international construction project deals with predicting the future, and, accordingly has been interpreted to be an impossible task to fulfil. Therefore, a large amount of construction project contracts including the interrelated contracts are governed with separately and diversely drafted arbitration agreements. As a result, consolidation and joinder have been rarely adopted in international construction arbitration practice.[80]

3.1.4.4 Appointment of arbitrators in multi-party arbitrations

In many cases special feature concerning multi-party arbitrations is that of appointing arbitrators as all the parties wish to appoint their own arbitrator resulting that practice for nominating arbitrators should be explicitly informed in an arbitration clause. In cases where an arbitration clause provides each party to be entitled to nominate its own arbitrator, and, the third arbitrator would be selected by these two, would result in a defective arbitration clause in instances where there were more than two parties to it. In light of such an arbitration clause, arbitral proceedings would be likely to split in separate proceedings consisting two parties instead of multi-party arbitration.[81]

A significant corner stone related to parties' equal rights to nominate arbitrators in multi-party arbitration was a *Siemens AG and BKMI Industrienlagen GmbH v. Dutco Construction Co.* case, which will be examined in detail when discussing joining non-signatories to arbitration. The *Dutco* case resulted in the need for revising institutional

[79] Ibid., 73
[80] Ibid.
[81] Bishop 2000, 31

arbitration rules in regard to the parties' right to be involved in appointing arbitrators when constituting an arbitral tribunal.[82]

An explicit expression on appointment method by the parties is desirable in case they fail nominating arbitrators under mutual consent. International institutions provide rules on appointing arbitrators in multi-party arbitrations when parties' lack agreement on joint appointment method. Considerable elements in adopting such rules consist of number of the parties to arbitration, whether the parties can be grouped together to jointly appoint an arbitrator, and, is there a relevant importance for each of the parties to nominate their own arbitrators.[83]

In general aspect as construction disputes are generally complex disputes with high value an arbitral tribunal is regarded to consist of three arbitrators in most cases. On the other hand, the proceedings become more expensive and time-consuming, which, however, usually finds support in complex matters to be solved by three arbitrators obtaining different perspective to the equal resolution. In regard to international construction contracts the parties become originally from different judicial systems and the parties may wish to have an arbitrator understanding their own legal culture and system. Additionally, considerations on the specific characteristics of arbitrators actualize when drafting arbitration clauses in regard to appointing arbitrators in construction disputes as the parties may require special knowledge in the field and ability to speak certain language.[84]

3.1.5 Multi-tiered dispute resolution clauses

3.1.5.1 General aspects of multi-tiered dispute resolution clauses

Multi-tiered dispute resolution clauses (also known as escalating clauses) relate to construction project contracts and are briefly speculated within the frame of this study. A multi-tiered dispute resolution clause is a matter of combining different ADR

[82] Ibid.
[83] Ibid.
[84] Moses 2012, 47

techniques in multiple steps in single dispute resolution clause. Such clause may demand as a first step the parties to commence resolution of the dispute by negotiation. If negotiation fails, the second step is adopting mediation as a dispute resolution mechanism. Eventually, the last step is a commencement of arbitration if a resolution cannot be met by prior attempts. Several arbitral institutions provide clauses in order to establish an efficient multistep procedure.[85]

Dispute resolution under multi-tiered clauses has received negative approaches in literature as a "courtesy trap". Requirement of negotiation and mediation is rarely executed successfully if the parties obtain a hostile atmosphere and do not have a genuine interest in such mechanisms, but rather results in consuming time from a successful dispute resolution. Nonetheless, even hostile parties have concluded settlement through mediation. Regardless of possibility to conciliate in the first steps of a multi-tiered arbitration clause, short time frames should be explicitly addressed in such clause in order to avoid unnecessary delay of the proceedings, especially taking into account that such phases will not result in a binding resolution between the parties.[86]

Given the importance of special characteristics of construction contracts, similar wording of multi-tiered clauses is a necessity to have accounts for an efficient clause. Recently supported renovation in international construction related multi-tiered clauses is adopting a dispute board as a pre-phase dispute resolution operator. Dispute boards comprehend a panel consisting impartial and independent members in cooperation with technical experts and lawyers, existing the time of the contract duration. Dispute boards' role encompasses functioning as an adviser for the parties during the completion of contractual rights and obligations within a rapid time period by resolving controversies between them either by non-binding recommendations, provided by a Dispute Review Board (DRB), or, contractually binding decisions by Dispute Adjudication Boards (DAB). It needs to be noted that the members of a dispute board are not arbitrators, neither can the recommendations nor contractually binding decisions become enforceable under the New York Convention. Also, a clause authorising a dispute board

[85] Moses 2012, 51 - 52
[86] Ibid., 52

cannot be the only dispute resolution clause governing the construction contract, but addressing intent to arbitrate (or entering national courts) is required.[87]

A leader in the use of dispute boards has been the FIDIC adapting the use of such in the 1966 FIDIC Rules. Dispute boards were publicly presented in 1995 by the World Bank confirming the use of them in their contracts. Recent progress in regard to disputes boards was establishing the ICC Dispute Board Rules in September 2004 providing three types of dispute boards. In addition to above introduced Dispute Review Board and Dispute Adjudication Board the parties may choose a Combined Dispute Board (CDB), which in general grounds indicates recommendations on the disputes, but may announce contractually binding decisions upon parties' request.[88] As conducting proceeding into arbitration as a next tier depends on the parties will to be bound by dispute board's decision. The adaptation of dispute boards has been regarded as an alternative to neutral expert determination specifically taking into account special needs of international construction contracts.[89]

In regard to considered advantages of adopting dispute boards consisting of their determinations given in a relatively rapid stage of the contract implementation with recently drafted contract information in mind, the panel is also familiar with the contract implementation of such contracts, and, conducting dispute resolution in dispute board is a less hostile environment within a decently amicable atmosphere. In addition, as determination is a result from independent technical experts being involved, further proceedings may be avoided. On the other hand, approving dispute boards as a pre-phase in dispute resolution contains certain characters regarded as disadvantages. Constitution of a dispute board is a complex and expensive process, which may be established in vain. Non-enforceable determinations by dispute boards may eventually require binding and enforceable resolution to process, where adaptation of a dispute board lengths the final result. Additionally, in regard to interrelated construction contracts the same dispute board should be nominated in each linked contract in order to provide efficiency.[90]

[87] Draetta 2011, 80
[88] Ibid., 81
[89] Cairns & Madalena 2005, 44
[90] Draetta 2011, 81

As a result, the parties need to examine whether a dispute board can provide an efficient method of dispute resolution, at least as a pre attempt to arbitration, during their contractual term. In order to receive the best possible benefit for conducting contractual controversies under dispute board, addressing their power is an essential element of contract drafting, especially taking into account elements of complex and interrelated construction contracts.

3.1.5.2 Multi-tiered dispute resolution clauses in international practice

The use of multi-tiered dispute resolution clauses have been illustrated in a literature as a "filter" mechanism prior or after the commencement of the arbitration process. Traditional first tier requirement for mediation in multi-tiered clauses suggests a negotiated settlement by a neutral third party conducted in the proceeding speculated as voluntary of a nature. The ultimate benefit of mediation, especially in international commercial context, has been regarded to consist of a chance given to the parties to settle their controversies governing the most complex and high-valuable disputes in an amicable way, thus, avoiding expenses of a costly and time-consuming arbitration process.[91]

In the *Jack-up rig* petroleum-related mediation in Singapore between the owner, a Norwegian drilling company, and the contractor, the Singapore company, a resolution for the dispute was reached by the late evening in the third day of mediation. The parties concluded a three stage multi-tier clause stating in a second tier *"an ADR procedure if negotiation had not resolved the dispute within 30 days"*, and, the third tier was *"finally, arbitration if the ARD process failed within 60 days"*. For this reason, the parties avoided commencing arbitration stage related to legal arguments on interpretation of the contract, factual evidence from witnesses on matters related to extensions of time and delay, and, an expert evidence related issue.[92]

Conversely, in the *North Sea sub-sea oil-drilling structures* related case consenting large sums of money, the claimant commenced arbitration, however, during the

[91] Connerty 2013, 120 - 121, 124
[92] Ibid., 129 - 131

proceedings the parties accorded solving their dispute in mediation. The parties approved two days for mediation lacking a mutual consent on a disputed matter, and, consequently, the arbitral procedure continued.[93]

In light of international practice of adopting multi-tiered procedure, the parties seem to accord on trial of resolving disputes in an amicable way even in high-value disputes involving large sums of money. Indeed, such an outcome is favourable for continuity of business relations. Despite such a fact, a great importance given to limit the time frame for allowing non-binding procedures in international commercial practice may be reasonable.

3.2 Disputes under FIDIC contracts

3.2.1 Adopting general conditions to the parties contract

An efficient construction contract is a result of a successful management process in contract drafting expressing a desired will of the parties. Therefore, a drafting phase of a construction contract may be related to *"meeting of the minds"* -principle, which aims to benefit both of the parties resulting from a successful execution and end-result of a construction project contract. In a construction project business, several parties are required to perform together in order to receive such goal by benefiting from interrelations, such as subcontracts and joint ventures. Therefore, in order to succeed in linked business contracts, the parties' interest need to be taken into account, especially in the event of conflicts, and, each party must acknowledge their areas of risks, obligations and rights.[94] A question arises whether such requirements may be supported by adopting the FIDIC's general contracts conditions to govern the parties' construction contract?

[93] Ibid., 131 - 133
[94] Kurkela 2003, 61

The parties may govern their construction contract adopting the general conditions established by the FIDIC. A mere intent to follow such rules is not, nevertheless, sufficient as parties are specifically required to refer to the FIDIC contract conditions in order to be bound by them. In instances where the parties have not explicitly expressed to follow the FIDIC contract conditions, or, only one party has made a reference to such rules, ambiguous expression follows by contractual interpretation, and, may result in additional disputes between the parties.[95]

Adopting the FIDIC general conditions to the parties' contract may deal with complex issues such as *battle of forms* in case the parties have referred to different contract conditions in their construction contract. Managing *battle of forms* dilemma relates to one of the most complicated issues pertinent to lack of precise uniformity on international construction contracts as the two legal systems have adopted different approaches. Civil law approach is usually favouring to choose standard conditions by a party who first referred to them in an offer *(first shot)*, whereas, common law practice is to adopt such conditions that the party made a reference in a latest terms and conditions *(last shot)*.[96]

In regard to battle of forms dilemma, it needs to be pointed out that adopting the FIDIC's standard conditions to govern the parties construction contract is an ambiguous task. Therefore, it is vital to ensure that both parties have adopted the same general conditions to govern their contract. Such notice would also result completing *meeting of the minds* -principle in the contract drafting. At the same time, it is necessary to keep in mind the role of the FIDIC standard conditions harmonising construction contract business, and, therefore, it is essential that the parties desire to follow such conditions adopting unambiguous expressions.

3.2.2 Amendments to conditions of contract for construction

Standard form conditions provided by the FIDIC are one of the most significant tools in sense of harmonisation of international construction contracts. Nevertheless, the future

[95] Haapio & Sipilä 2013, 254
[96] Ibid., 254 - 255

of construction contracts is still under development in regard to creating a common language and law for the field. Inconsistency in terminology actualizes when interpreting contractual provisions of international construction contracts from the view of two different legal systems underlying distinct local practices and trade customs. Interpretation and expectations of the parties may face unexpected controversies and different approaches even when adopting the FIDIC general conditions to govern the construction contract. Some dilemmas may be adherent or provoked especially if the parties desire to draft amendments to the standard conditions of contract. Such controversies may concern penalty clause in comparison to liquidated damages clause, and, concept of responsibilities of contractors and engineers in regard to permanent works. Additionally, it is likely that there are misconceptions in contractual obligations due to variations in levels of English skills, and, problematic aspects may relate to responsibility for changes linked to national legislation and institutional rules.[97]

At the same time there may be variable perceptions on matters such as validity of a dispute resolution clause and the rights of the disputing parties. Lack of identical terminology and contract interpretation in international construction supports different techniques of drafting. The parties from common law countries are in a habit of explicitly addressing in a detailed way their rights in the provisions of the contract, whereas, parties from civil law culture are not favouring such detailed drafting but rather the intent of the parties at the time of entering into the contract and expressing the basic principles to follow. In order to avoid national interpretation of contracts by arbitrators in local courts, dispute resolution in international arbitration adopting international institutional rules may be a stepping stone in solving such dilemmas. Arbitrators ruling on international construction disputes are usually demanded to expertise in practice of international contracts with discretion unattached from national interpretation, resulting to function in circumstances where harmonisation of international construction projects is given importance.[98]

[97] Chan & Suen 2005, 302 - 303
[98] Ibid., 303 - 304

3.2.3 Considerations on Arbitration Clause 20 of general conditions

In regard to international arbitration, the FIDIC general conditions for major projects provide in the Arbitration sub-clause 20.6[99] settlement of disputes under the Rules of Arbitration of the International Chamber of Commerce (ICC). Such procedure has been followed since the first edition of the Red Book established in 1957. However, it needs to be noted that the parties may, upon their will, to choose an alternative dispute resolution method from a distinct system of arbitration in order to fulfil their wishes.[100]

It is necessary to point out that the FIDIC conducts dispute settlements adopting multi-tier dispute resolution, providing an engineer as a first option, following as a second tier a determination of a dispute board, and, finally, as a third tier relying on arbitration.[101] Therefore, there are few special characters related to revisions of arbitration sub-clause 20.6 to be discussed. First, when commencing arbitration either of the parties shall not be bound by the evidence or arguments, neither the position adopted in front of dispute board, hence, any arguments and evidence is available for the parties in an arbitral procedure.[102]

> **Sub-Clause 20.6**: "Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision or to the reasons for dissatisfaction given in its notice of dissatisfaction".

A second element to be noted from 1999 renovated Sub-Clause 20.6 is that *"any decision of the DAB shall be admissible in evidence in the arbitration"*. Resulting from such provision the party suggesting arbitration must establish valid reasoning for challenging DAB's decision in the arbitral proceedings. Such argumentation may be a complex task as parties have usually expressed their satisfaction on the members of the DAB being mandated as independent actors of the parties with technical skills and acknowledging the details of the project.[103]

In this context, relevance must be paid to the FIDIC Contracts Guide with detailed guidance on using the first editions of FIDIC's for major projects. Sub-clause 20.6 of

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[99] The FIDIC Conditions of Contract 1999, 61. See in appendix II: Arbitration sub-clause 20.6
[100] Seppala 2001, 11
[101] The FIDIC Conditions of Contract 1999, 58 - 62
[102] Seppala 2001, 11
[103] Ibid., 12

arbitration has been addressed *"not to provide for multiparty arbitration, to deal with the possibility of similar disputes between Employer-Contractor and Contractor-Subcontractor"*. Moreover, the Contracts Guide points out that *"if multi-party arbitration is to be anticipated in the Contract, it is advisable for the Contract to specify suitable rules, which are acceptable to the Employer, Contractor and Subcontractor"*.[104]

Following from the lack of provisions in the FIDIC Conditions of Contract for proceeding in multi-party arbitration parties must pay specific attention to expressing their will to multi-party dispute resolution in arbitration, preferably at the drafting point of construction contract. The parties may establish "push" or "pull" arbitration clause, or, "master" or "umbrella" arbitration agreement as speculated in an earlier stage of this study in order to arbitrate successfully in multi-party proceedings.

4. INTERNATIONAL CONSTRUCTION ARBITRATION

4.1 International commercial arbitration

4.1.1 A historical view

In a historical view it is necessary to note that international commercial arbitration has existed over thousands of years. Therefore, creating a uniform concept of general history of arbitration is a complex task, since, all the sources around the world, including libraries, universities, court texts and historical records, should be taken into account.[105] The roots of arbitration can be found already in the ancient mythology, where disputes were settled on the basis of impartiality.[106]

Arbitration is considered to be a rudimentary way of dispute settlement, since it is directed to common individuals with expectation of being chosen and given the dispute

[104] FIDIC Contracts Guide 2000, 316
[105] Redfern & Hunter 2009, 4
[106] Born 2009, 8

resolution power by the parties. Rudimentary in historical aspect is simply visualized as two merchants disputing the price or quality of goods delivered, would appoint a trusted third individual to solve the dispute and the parties agree to be bound by such decision.[107]

4.1.2 What is international commercial arbitration?

4.1.2.1 General aspects

International arbitration has become the principle method of dispute resolution between the states, individuals and corporations in respect of international trade, commerce and investment.[108] Parties to arbitration have agreed to resolve the dispute in a private way, outside any specific judicial system. Arbitration is a party autonomy based institution concerning the decision makers i.e. arbitrators, the kind of arbitration (*ad hoc* or institutional), the applicable rules of arbitration, likewise, the place and language of arbitration.[109]

To visualise international commercial arbitration, there are considered to exist six essential elements that should be pointed out. The first key element is *(1) the agreement to arbitrate* and the second is *(2) the need for a dispute*. The third key element, which, in fact, starts the arbitration is *(3) the appointment of an arbitral tribunal.* The fourth essential element is moving to *(4) the arbitral proceedings* and fifth, *(5) the decision of the tribunal.* The final and sixth essential element in international arbitration is *(6) enforcement of the award*.[110]

(1) The agreement to arbitrate is the foundation element for international arbitration as parties have a mutual agreement to solve arising disputes in arbitration. In order to arbitrate, a valid arbitration agreement is a necessity as explained in more detail in an earlier stage of the study. Firstly, an arbitration agreement can be *an arbitration clause* in a contract. An arbitration clause is drafted shortly and precisely for the purpose of

[107] Redfern & Hunter 2009, 5
[108] Redfern & Hunter 2009, 1; Moses 2012, 1
[109] Moses 2012, 1
[110] Redfern & Hunter 2009, 14

future possible dispute between the parties. Secondly, an arbitration agreement can be in a form of *submission agreement* after the dispute has already arisen. Such agreements are usually drafted in more detail compared to arbitration clauses, due to more specific awareness of the character of dispute.[111]

(2) The need for a dispute may reflect to exist automatically. However, certain distinctions concerning such a matter are essential to take into account. First distinction is made between existing and future disputes, especially in regards to international conventions[112] on arbitration. Such conventions may refer the contracting states recognising the validity of an arbitration agreement whether it concerns already existing or future differences between them. Secondly, even if the dispute exists, certain matters are not able to arbitrate. The issue of arbitrability may concern, for example, a dispute over matrimonial status where dispute can be solved only by the national law of certain state, not being permitted solving in arbitration.[113]

In order to start the arbitration, the arbitral tribunal must be appointed (3). First of all, a notice in some form (depending on the kind of arbitration, namely, *ad hoc* or institutional arbitration) has to be given to the other party. From the point that notice has been given, an arbitral tribunal will be constituted in the basis of arbitrating parties' freedom to choose the tribunal with suitable arbitrators. When moving to the arbitral proceedings (4) it is notable that there is no code of civil procedure to govern the conduct of international arbitration. The rules governing international arbitration are the mandatory provisions of the *lex arbitri* (the law of the place of arbitration) and the rules that parties may have chosen to govern the proceedings (for example those of the ICC). The essential element that concerns arbitral proceedings is that of guaranteed flexibility for the tribunal and the parties to design an appropriate procedure for the need of dispute in hand.[114]

The parties have entrusted an arbitral tribunal the power to conclude a decision (5) that will bind both parties and, in such sense, is similar to the function of the court. The

[111] Redfern & Hunter 2009, 15, 18 - 19
[112] 1923 Geneva Protocol; the New York Convention
[113] Redfern & Hunter 2009, 23 -24
[114] Ibid., 24 - 27

power of the tribunal to make a binding decision is of a fundamental character, given the fact that it distinguishes arbitration as a dispute resolution method from other procedures, such as mediation and conciliation, aiming at negotiated settlement. The award of the tribunal completes the function of the selected arbitral tribunal. However, the award itself effects among the parties despite of the private character of arbitration and the non-public tribunal. The arbitral award is a binding decision between the parties involved in the dispute and it is enforceable (6) by legal proceedings, both nationally and internationally.[115]

4.1.2.2 Interpretation of ’international’ and ‘commercial’

Meaning of ‘international’ in regard to the concept of international commercial arbitration exists to contrast the difference between international and domestic arbitrations. In fact, all arbitrations can be interpreted as a national arbitration due to place of arbitration in a certain country and often the application of rules of such country. Parties of international arbitration, however, do not have any connection to the seat of arbitration, since the place is usually chosen by the neutrality basis. A major difference is also that parties to international arbitration are often corporations, states or state entities, whereas domestic arbitration usually occurs between private individuals. Additionally, international arbitrations usually involve larger amounts of money compared to those in the domestic field.[116]

Reference to ‘commercial’ is originally based on the distinction concerning civil law countries contracts to those of commercial character and those which are not. Background for such division is due to ability to arbitrate only the disputes arising from the commercial contracts. However, in international arbitration practice the concept ‘commercial’ is usually interpreted diverse way concerning every aspects of international business.[117]

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[115] Ibid., 27 - 29
[116] Redfern & Hunter 2009, 8 - 9
[117] Redfern & Hunter 2009, 13 - 14

4.1.3 Advantages and disadvantages of international commercial arbitration

4.1.3.1 Considered advantages

The main advantages of international commercial arbitration are considered to be firstly, *neutrality* and secondly, *enforcement*. International arbitration being party-autonomy based institution guarantees parties to choose a neutral place for dispute resolution (neutral *forum*) without so called home field advantage to either party. Additionally, both disputing parties have a possibility to choose a neutral, competent and central tribunal. The main goal of international arbitration is the final, enforceable, award. Such an award is not only enforceable against the losing party in the place of arbitration, but also in an international view due international convention's[118] recognition provisions.[119]

Additional reasons to favour arbitration are *flexibility, confidentiality* and *commercial competence and expertise of the tribunal*. Flexibility of arbitration refers to the tailored feature of arbitration in regards to the arbitral process. Such procedural freedom is guaranteed by equal treatment of the parties in respect of their wishes instead of following specific rules provided in a civil procedure. Also special features of each case are considered in arbitration, as a result, the parties save time and money, likewise, prospects for a prudent award are granted. Confidentiality is another main attraction to favour arbitration, since companies may avoid the publicity of existence of the dispute in general, as well as, the parties of the dispute and trade secrets due privacy of the proceedings and final award. An essential element concerning arbitration is the competent and expert dispute resolution mechanism offered. It is vital to wholly comprehend the business context of the parties' dispute which usually the national legal systems lack. In terms of international construction business, knowledge of complex commercial matters is an essence to guarantee an efficient and qualified dispute resolution process.[120]

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[118] International treaties such as the New York Convention
[119] Redfern & Hunter 2009, 31 - 32; Moses 2012, 3; Born 2009, 72 - 73, 76 - 77
[120] Redfern & Hunter 2009, 33 - 34; Moses 2012, 3 - 4; Born 2009, 82 - 83, 87, 78 - 79; Hemmo 2005, 372 - 373

4.1.3.2 Considered disadvantages

Possible disadvantages of international commercial arbitration are *the costs of arbitration*, *delay in the proceedings* and *the limited powers of the arbitrators*. The ultimate advantage of arbitration was for a long time the fact that it can be inexpensive and a rapid way of dispute resolution compared to national court proceedings. However, this is no longer the case since it must be taken into account that it is the parties who provide the fees and expenses of the arbitrators. In institutional arbitrations the parties have to govern the administrative fees of an arbitral institution, as well. The high amount of costs consists of legal advisers and specific expertise, which concerns especially the complex international construction disputes. Additional costs in arbitration include expenses of meeting and hearing rooms and travelling costs to the place of arbitration. International arbitration may not be less costly than national court proceeding, conversely, expenses of appeals to superior national courts will be avoided.[121]

The speed of arbitration is that of being criticised firstly, concerning the constitution of an arbitral tribunal and secondly, the time limitations concerning the final award in certain arbitral tribunals. The limitations of the arbitrator's powers may visualize in a situation where they lack relied power to force the witness to attend the proceedings under penalty. Such situation obviously delays the proceedings, as well. As a result, international construction arbitration is regarded to become even too costly and time-consuming in order to face tight construction project schedules. Hence, other dispute resolution mechanisms, such as dispute boards and mediation, would be preferable at resolving disputes at an early state, even before a construction project is completed.[122]

Discussed disadvantages of international commercial arbitration, which concern namely international construction disputes, are *multi-party arbitrations,* the *joinder of non-signatory parties*, *consolidation* and *third parties.* Multi-party arbitrations include two or more parties on each side, which are related to the dispute at hand in some way. In instances where arbitration agreement is designed to govern all disputing parties, the

[121] Redfern & Hunter 2009, 34 - 35; Born 2009, 84 - 86; Draetta 2011, 79; Hemmo 2005, 373
[122] Redfern & Hunter 2009, 35 - 36; Born 2009, 86; Draetta 2011, 79 - 80; Moses 2012, 5; Hemmo 2005, 373

leadership of such dispute is handed to nominated party. However, in cases where parties mutual agreement to arbitrate has failed, the arbitral tribunal usually has not powers to join the relevant parties to arbitration, hence, the process is lacking the efficiency that multi-party arbitration is planned to offer. Multi-party arbitration may concern, for instance, a construction project of a power plant, which is designed in Europe and constructed in Asia, adding a twist where the components would be manufactured in multiple places all around the world. In case of failure to meet the planned criteria for the project, the owner will be in a complex task to reach the liable actor for the failure.[123]

One issue that must be pointed out is that of non-signatory parties, also known as joinder of the parties. A non-signatory party refers to an individual or a legal entity which is not related to the arbitration agreement but is willing to join in the arbitration on claimant's side, or, unwillingly involved to respondent's side. Usually such cases concern arbitration where the claimant is willing to challenge the parent company instead of the subsidiary of the international corporation in order to succeed in its claim. Furthermore, in large construction disputes it would be significantly important to include all the parties into the arbitral proceedings. In a major construction project that would concern all the parties, namely, the owner, the engineers, a main contractor, as well as, the suppliers and subcontractors. As a result of joining such parties to an existing arbitration the risk of conflicting decisions would be minimized. Nevertheless, the main element of arbitration, the parties' mutual agreement to arbitrate, must not be avoided.[124]

A separate problem from joinder of the non-signatory parties is that of consolidation, which concerns multiple contracts with different parties who are in charge of matters concerning the arisen dispute. As contractual interrelationships of construction contracts were discussed in an earlier stage of this study, not only the owner and the main contractor are in a contractual relationship. Above that, contracts between suppliers and subcontractors are usually concluded, which may be governed by different law and arbitration clauses, despite the connection with the owner and the main contractor. Collecting all acting parties in the same proceedings is an advantage when the parties

[123] Redfern & Hunrer 2009, 36 - 38; Moses 2012, 5; Draetta 2011, 71
[124] Redfern & Hunter 2009, 38; Draetta 2011, 71

are the same or dispute concerns the same issue, however, consolidation being a more complex matter in arbitration than in the local court proceedings.[125]

In certain cases it is adherent to involve a third party into arbitral proceedings. For instance, such situation may occur if claimant discovers that intellectual property rights belong to a third party instead of respondent. Joining third parties to arbitration is depending, in addition to characters of a certain case, on the governing law and the rules of arbitration.[126] Multi-party arbitration, joinder of the non-signatory parties and consolidation being key issues of international construction arbitration will be discussed in more detail in a later stage of this study.

4.1.4 Ad hoc arbitration or institutional arbitration?

4.1.4.1 General aspects

An *ad hoc* arbitration is conducted under the rules selected by the parties or established set of procedural rules, however, without an administering institution. Parties are able to create a tailored procedure for the dispute at hand by selecting their own set of rules based on equality of the parties and an opportunity for both parties to present its case. Parties may, instead, select to conduct the arbitration by following the existing set of unified procedural rules, such as the UNCITRAL Arbitration Rules. *Ad hoc* arbitration is often favoured in regards to disputes involving a state by granting an opportunity to agree on flexible and special set of rules. Such a set of rules is usually drafted in detail in the submission to arbitration after the dispute has already arisen.[127]

An 'institutional' arbitration, instead, is administered by an institution providing arbitration services under its own set of arbitration rules. Such institutions are numerous and located in multiple countries, including one of the most common institutions, namely, the International Chamber of Commerce (ICC) located in Paris, France. Another regional and widely known institution, which is often favoured in international contracts involving the Nordic parties, is the Stockholm Chamber of Commerce

[125] Redfern & Hunter 2009, 39; Draetta 2011, 71
[126] Redfern & Hunter 2009, 39
[127] Redfern & Hunter 2009, 52 - 53; Moses 2012, 10; Born 2009, 149 - 150

Arbitration Institute (SCC) in Sweden. Arbitral institutions provide their own formulated rules that apply when the parties have agreed on following such rules, which are usually a part of the main contract as an arbitration clause. The asset of institutional arbitration rules is that they establish the procedural framework, as well as, timetable for the arbitral proceedings and additional disputes may be avoided.[128]

4.1.4.2 Advantages and disadvantages of ad hoc arbitration

A major advantage of *ad hoc* arbitration is the fact that it is designed to meet tailored wishes of the disputing parties, as well as, particular character of each dispute. In order to provide a successful and effective *ad hoc* arbitration, the cooperation of the parties and their adviser is an essential element, which is at the same time the distinct element from institutional arbitration. It is notable that *ad hoc* arbitration is favourable since the costs are lower than those of institutional arbitration, and administrative fees can be avoided. The advantageous flexibility guaranteed by *ad hoc* arbitration has provided a successful dispute resolution mechanism in several significant arbitrations involving a state party by meeting specific requirements of a state.[129]

On the other hand, *ad hoc* arbitration, being conducted by cooperation between the parties and their assistants, lack of mutual understanding would be a disadvantage. For instance a failure to appoint an arbitrator would delay the arbitral proceedings without mutually agreed rules by the parties. In such cases, assistance from the local court would be the sole solution for proceeding. Therefore, in order to succeed in *ad hoc* arbitration an existing arbitral tribunal and planned set of rules to govern the dispute should be agreed upon the parties.[130]

4.1.4.3 Advantages and disadvantages of institutional arbitration

An advantageous view of institutional arbitration is that of institution's function on administrative matters. Conducting arbitration in terms of established institutional rules

[128] Redfern & Hunter 2009, 54 - 55; Moses 2012, 9, Born 2009, 148 - 149; Hemmo 2005, 375 - 376
[129] Redfern & Hunter 2009, 53 - 54; Moses 2012, 10, Born 2009, 150
[130] Redfern & Hunter 2009, 54; Moses 2012, 10

provides that arbitrators are appointed in a timely manner, the arbitral proceedings move forward, and the fixed fees of arbitration are paid beforehand. Institutional arbitration rules are regarded to function in a practical view, they have been drafted in review of expertise of professionals, such rules adopt development of law, as well as, practical point of view of international arbitration. Furthermore, the award rendered under commonly known institutional set of rules guarantees credibility in international respect.[131]

In regard to disadvantages of institutional arbitration, the fixed fee that the parties pay in advance as the costs of arbitration turn institutional arbitration more expensive dispute resolution mechanism compared to that of *ad hoc* arbitration. It must be taken into account that the proceedings in institutional arbitration may delay due requirement to process specified phases of arbitral proceedings through the machinery of an arbitral institution and, consequently, despite of institution's time limits extensions may be needed.[132]

4.1.5 Legal framework for international commercial arbitration

At this point of the study it is important to examine the legal framework for international commercial arbitration. The legal framework is demonstrated by different levels of international commercial arbitration sources and significant legal sources will be introduced in detail. Observation of legal framework is supported by an inverted pyramid endorsed by Margaret Moses introduced herein[133]:

[131] Redfern & Hunter 2009, 55, 59; Moses 2012, 9; Born 2009, 150 - 151
[132] Redfern & Hunter 2009, 56 - 57; Born 2009, 150
[133] Moses 2012, 5 - 6

The foundation of a successful international arbitration process is a valid and effective *(1) arbitration agreement* between the parties. Secondly, the parties need to choose *(2) the arbitration rules* that govern the dispute. The third level is formed by *(3) national laws* implied to the dispute and in the next face *(4) international arbitration practice* is the applied source. Finally, at the top of the inverted pyramid are *(5) international treaties*, which are considered to hold an essential role in international commercial arbitration. These five steps of the inverted pyramid are defined in more detail in the following.

A valid (1) arbitration agreement is the basis for an international arbitration as lack of validity verifies that there is no legal basis for arbitration as a private dispute resolution method. Existence of an expressly valid arbitration agreement is, therefore, a primary stepping stone for solving the controversies between the parties in international arbitration. It needs to be pointed out that validity of arbitration agreement extends only to the sphere of conflicting parties.[134] The next step, as the parties choose the pertinent (2) arbitration rules, on the other hand, extends beyond the disputing parties at hand in terms of scope and adopting of legal framework. The parties have a primary choice to agree on particular matter by the rules regarded by them. However, if parties have chosen to follow certain institutional rules, mandatory rules of such arbitral institution rule over the parties' specific choice. Established rules of international arbitration include for instance those of the ICC and the UNCITRAL Rules.[135]

[134] Moses 2012, 6; Redfern & Hunter 2009, 89 - 90; Born 2009, 90
[135] Moses 2012, 6; Redfern & Hunter 2009, 78

Third level of the regulatory pyramid are (3) national laws, which consists of *lex arbitri* (the law of the seat of the arbitration) and substantive law (governing contract interpretation, merits of the dispute and other substantive issues) that are usually chosen from different national systems of law. There are many countries which have decided to apply the UNCITRAL Model Law on International Commercial Arbitration[136] as their arbitration law. The Model Law has is a uniform law highly supported in international arbitration as it governs the whole process of arbitration with harmonized regulations. The Model Law is also designed to support many arbitration rules creating a uniform process. It has to be pointed out that in the scope of international arbitration arbitrators often prefer to follow *lex mercatoria* (trade usages) instead of a national substantive law. In arbitrations that concern international construction projects there is a discussion of current interest on need and purpose for specialized *lex mercatoria*, which is recognized by authors as *lex constructionis*.[137] Background and meaning of *lex constructionis* requires more specific examination and will be illustrated in a later stage of this study.

The next step of the pyramid is (4) international practice, which provides useful tools for international arbitration process, since there are no fixed set of rules governing international arbitral procedure and each case is unique. International practice is also known as "soft law" as it is frequently followed as non-binding guidelines by arbitrators. International practice may concern evidence, conflicts of interest, ethics and the organization of arbitral proceedings. The International Bar Association (IBA) has provided the Rules on the Taking of Evidence and the Rules on Ethics. Additionally, the IBA has launched Guidelines on Conflicts of Interest for Arbitrators. Useful international practice includes also the UNCITRAL Notes on Organizing Arbitral Proceedings and the ICC Case Management Techniques of its new Arbitration Rules. An international arbitration being considered as a flexible way of dispute settlement, the goal is met as arbitrators are guaranteed to choose appropriate international practices to support the procedure of the dispute at hand.[138]

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[136] UNCITRAL (the United Nations Commission on International Trade Law) provides the original text of the 1985 UNCITRAL Model Law and the text with amendments as adopted in 2006 online. Status of the countries who have adopted the Model Law is also available at www.uncitral.org

[137] Moses 2012, 6 - 7; Park 2012, 553, 555; Draetta 2011, 79; Redfern & Hunter 2009, 75; Born 2009, 100, 115, 117

[138] Moses 2012, 7 - 8; Park 2012, 633 - 634; Redfern & Hunter 2009, 77, 79 - 80

(5) International treaties are at the top of inverted pyramid and play a significant role in international arbitration. The first essential stepping stones in the field of international arbitration are the 1923 Geneva Protocol and 1972 Geneva Convention providing especially uniform regulation on arbitration agreements and enforceability of the awards by arbitral proceedings instead of national courts. In 1958 a new key element of international arbitration, namely the New York Convention, was launched and still is a major treaty in executing international arbitral process. As the NY Convention governs the enforcement of the arbitration agreements and arbitral awards it replaces the 1923 Geneva Protocol concerning the states which have adopted both treaties. The 1972 Geneva Convention is replaced by states following the NY Convention, as well, since the NY Convention is regarded to guarantee more competent and explicitly considerable mechanism on the recognition and enforcement of the foreign arbitral awards, especially since so many countries are parties to the Convention.[139]

Conventions after 1958 are considered as an essential phase in creating a modern international arbitration and include three treaties that need to be discussed. At the same time it is worth mentioning that no convention after the NY Convention has played such a significant and leading role in international commercial arbitration. The European Convention on International Commercial Arbitration of 1961 is considered as one of the most important regional conventions while most European states (excluding Finland) and various non-EU states are parties to it. The European Convention recognizes three stages of international arbitration process, including arbitration agreement, arbitral procedure and arbitral awards. Regulation on arbitral awards is considered to supplement the NY Convention. The European Convention has been criticized of drafting method being rather theoretical than practical and lack of specific rules on recognition and enforcement of the award results only as a supplement in regard to NY Convention. Nevertheless, the European Convention has substantial value with regard to international arbitral doctrine. Such valuable impacts are considered to be arbitrators' *competence-competence* i.e. the arbitral tribunal's power to decide on its own jurisdiction. Significant contention is the limitations concerning the role of national

[139] Moses 2012, 8; Born 2009, 91; Redfern & Hunter 2009, 70 - 72

courts and waiving the autonomy to the parties and arbitrators in conducting the arbitration process.[140]

A second modern international arbitration convention was adopted by the United States and most South American nations in 1975. The Inter-American Convention on International Commercial Arbitration (known as the "Panama Convention") has a value in sense of enforcing the arbitral awards, however, in a similar way as the NY Convention. In addition to improving and favouring arbitration as a dispute resolution mechanism regionally in Latin American countries, the Panama Convention provides also revisions that are not met in the NY Convention. One of such innovations is a precaution on situations where the parties have not agreed on a particular set of arbitration rules, the rules of Inter-American Commercial Arbitration Commission (IACAC) should be adopted.[141]

The third treaty in the field of modern international arbitration is the Settlement of Investment Disputes between States and Nationals of other States (known as "Washington Convention" or "ICSID Convention") of 1965. The ICSID Convention was a creation of the World Bank's International Centre for Settlement of Investment Disputes (ICSID) with the original goal to support investors to consider investments in developing countries. The ICSID Convention applies to the investment disputes that the parties have determined to govern by the Convention and concern a contracting state or expressed state entity and a national from another member state of the Convention. Arbitration procedures applied by the ICSID Convention have exceptional conceptions compared to other conventions followed in international arbitration. For instance, ICSID awards are directly enforceable in member states regardless of examination by national court proceedings, whereas, according to the NY Convention arbitral awards are based on the idea of refutation of the award in the *lex arbitri* and non-recognition in other countries.[142]

As indicated above, with assistance from the inverted regulatory pyramid the foundation of the international arbitration process is a valid arbitration agreement between the

[140] Moses 2012, 8; Park 2009, 461; Born 92, 102 - 103; Redfern & Hunter 2009, 72 - 74
[141] Moses 2012, 8; Born 2009, 103 - 104;
[142] Moses 2012, 8 - 9; Born 2009, 105 - 107

parties that also governs the dispute at hand. When such an agreement between the disputing parties exists, other legal sources of international arbitration become adherent. The arbitration procedure is based on parties' choice of arbitral rules, weather explicit rules for a particular case or the arbitration rules provided by an arbitral institution. National laws concern *lex arbitri* and the substantive law of arbitration, which the UNCITRAL Model Law fulfils in many instances. The substantive law of international construction projects has a new trend and contemporary discussion of *lex constructionis*. The use of international practice as a legal source supports the principle of flexibility of arbitration. As to international treaties the New York Convention is in the leading role not only in the area of present international arbitration, but automatically guarantees an efficient element in executing arbitral awards international construction business as well.

4.2 International construction arbitration

4.2.1 Typical characters of construction disputes

Statistical data indicate that construction projects are among the riskiest business undertaken. Construction projects become larger, more expensive and grow in complexity, hence, the disputes are evitable way followed by same characters. International construction disputes are favourably solved in arbitration in regards to advantages of recognition and enforcement of the awards, which other dispute resolution mechanisms lack. At the same time, it is vital to guarantee the flexibility and expertise in arbitration which are of the essence in the construction field disputes.[143] Typical characters of construction disputes are (1) general *complexity* due construction project contract, (2) *extensive sums of money* involved and (3) special *expertise and knowledge* required.

(1) Construction disputes are of a complex character due to construction contracts with multiple contractual links and, therefore, several claims and counterclaims when dispute arises. In regard to the construction contract, it is essential to acknowledge that the

[143] Bunni 1999, 309

contractual relationship between the contractor and the employer of a project must be fulfilled despite of possible disturbing elements, such as accidents, within the scope of construction works. Construction projects require extensive sums of money guaranteed usually by banks, financial institutions and insurance companies who again demand guarantee of some kind for financing the project. Every single construction project is unique even though design and construction patterns are provided by institutions. Completing a construction project is time-consuming, hence, exposed by natural hazards, such as earthquake, flood and storm, due periodical frequency. It is common that construction projects are located in isolated areas with complex circumstances and exposed to natural hazards with uncertain results. One complex dilemma is that natural hazards are covered by insurance concerning the consequences, however, the loss of time is not insurable, which may establish additional claims. It is notable that due multiple parties in international construction projects cultivation of the risks is endangered. Also the staff needed, for instance in designing, financing, material supplying and repairing defects, is large amount with different kind of backgrounds in regard to state of origin and legal culture. At the same time contractors, suppliers and subcontractors are from several firms with their own business respects and aims, consequently, conflicts may arise. The construction business is prospected as fast developing and innovative business which results to the need of advanced and complex technological views in the project. On the other hand, a large number of construction disputes concern the application and interpretation of standard conditions and forms, therefore, agreement to follow such rules must be in the parties' knowledge.[144]

(2) Construction disputes require extensive sums of money, which creates certain challenges in regard to the parties and their legal advisers. One problematic view is that even tiniest defects are disputed though lacking rationality in respect of the costs. Delay and disruption of the proceedings increases the costs of arbitration, as well. (3) With regard to expertise and knowledge arbitrators must be specialised, in addition to their field of expertise, in the awareness of applied standard forms that the parties agreed to follow in their contract. Also consultants of the parties should have a special knowledge of the construction business, including technical information and legal expertise.[145]

[144] Bunni 1999, 310
[145] Ibid., 310 - 311

4.2.2 Interrelations between the construction disputes

Earlier discussed interrelations between the parties in construction contracts bring an additional twist and complexity to the construction disputes. It is typical for international construction disputes to include more than two parties or more than one contract, since multiple parties are in interrelations between each other through different, yet, linked contracts concerning a single construction project. In instances where only two parties are involved in a construction dispute, the dispute resolution may depend on legal and factual questions occurring from a contract that is different from the one that current dispute concerns in relation with such a dispute. Hence, two kinds of linked construction disputes under one project are adequate to examine in the scope this study. Firstly, dispute resolution proceedings may include interrelations between one of the linked contracts and similar proceedings under different contract *(multi-contract arbitration)*. On the other hand, dispute resolution proceedings may be in an interrelation with parties to some other linked contracts *(multi-party arbitration)*. Secondly, the issues may be in interrelations as one linked contractual issues are required to be resolved in order to dispute some of the other contractual differences *(multi-issue arbitration)*.[146]

The interrelations concerning construction disputes involve a wide list of complex issues related to multi-contract, multi-party and multi-issue arbitration. Among such complexities which of the parties are bound by the contract at hand and/or an arbitration clause related to it? May the arbitration clause be extended to joining non-signatory parties to arbitral proceedings? If the parties are joined to the proceedings considerations relate to possible differences of concepts such as, an implied consent of the parties and a group of companies. Does an arbitral tribunal have power to decide that a contract that has been principally disputed would result combining other linked contracts to the arbitration by the same parties? In case separate arbitral proceedings were started an arbitral tribunal's possibility to consolidate such proceedings into one arbitration should be considered including the grounds for consolidation. In addition, it is relevant to note what kind of speculations relate to the recognition and enforcement of

[146] Draetta 2011, 69, 70 - 71

the award under suggested arbitral proceedings.[147] Suggested complexities interrelated to the multiple parties involving construction disputes are discussed in more detail in the following.

4.2.2.1 Multi-contract and multi-party arbitration

Multi-party arbitrations are at hand when one or more disputes concern similar disagreement on factual or legal issues of the case and such disputes are examined in a dispute resolution mechanism at the same time or at different time sphere. More specifically multi-party arbitrations are divided in two kinds. First of all, multi-contract arbitration governs several contracts with different parties who have their own interests in the dispute and secondly, multi-party arbitration is what concerns several parties to one contract.[148]

Multi-contract and multi-party conflicts could be solved in distinct dispute resolution proceedings, however, in the sake of time and money saved and eliminating the risk of conflicting awards on the same legal or factual questions it would be desirable to resolve the disputes in the same proceedings. Such goal may be reached by multi-party arbitration by joining non-signatory parties, or, consolidating of the parties to a single arbitration instead of multiple several proceedings.[149]

4.2.2.1.1 Multi-contract arbitration: several contracts with different parties

A typical character of a multi-contract arbitration is that disputes are based on different contracts by different parties of the same project. Such a feature is emphasized in the construction business with multiple parties performing in one project under different contracts, differing choice-of-law and dispute resolution clauses. The owner and the main contractor of the project have concluded supplier contracts and subcontracts and the question arises whether such parties are entitled to join each other's proceedings. For instance, a main contractor would wish to waive its liability to the subcontractor by

[147] Hanotiau 2006, 3 - 4
[148] Draetta 2011, 71; Born 2009, 150
[149] Draetta 2011, 71; Redfern & Hunter 2009, 149

joining the proceedings. Also consolidation concerning different parties to several contracts is favourable in terms of saving time and money, as well as, avoiding conflicting awards.[150]

4.2.2.1.2 Multi-party arbitration: several parties to one contract

Multi-party arbitration is necessary when the contract may be the same multilateral contract, for instance a consortium or joint venture agreement between individuals or companies, however, dispute resolution proceedings concern more than one party of such contract. The parties may act as multiple parties in claimant's or defendant's side. Challenges concerning multi-party arbitration are those of nominating an arbitrator by each party since, for instance, changes in 2012 established the ICC Arbitration Rules amount of appointed arbitrators limited to three in a tribunal (Article 12). Such limitations may lead to public policy issues in regard of the principle of equality in appointing the arbitrators. The articles 12(6) and 12(7) of the ICC Arbitration Rules grants multiple parties a possibility to appoint an arbitrator upon mutual consensus, however, the right is waived in the absence of joint agreement under Article 12(8). It must be taken into account that if the tribunal is lacking the parties mutual consent, the recognition and enforcement issues of the award may arise in respect of the tribunal appointed for the parties, instead by the parties according to Article V(1)(d)[151] of the New York Convention and similar provision in the Model Law.[152] As indicated under relevant arbitration rules and international conventions, the multi-party arbitration may not necessarily result in a desired goal if the parties will, the basic element of arbitration, is dismissed. Therefore, the specific knowledge and professional skills are required to create a successful proceeding of multi-party arbitration.

[150] Draetta 2011, 71; Redfern & Hunter 2009, 152 - 153
[151] According to Article V(1)(d) recognition and enforcement of the award may be refused on proof that: "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."
[152] Draetta 2011, 71; Redfern & Hunter 2009, 150 - 152

4.2.2.2 Joinder of non-signatories

4.2.2.2.1 General aspects – traditional views and detailed acknowledgements on implied consent and disregarding corporate personality

Joining of non-signatories is an expression favoured within the Common law legal culture which may be misleading when interpreted literally since signature is not a necessary requirement for the consent of the parties to arbitrate. Therefore, the concept *extending the arbitration clause* used by Civil law scholars, which *"can suggest imposing a duty beyond the circle of those who have agreed to arbitrate"* is not as vulnerable to confuse.[153] Non-signatories can be referred as "less-than-obvious" parties to an arbitration clause as such individuals or companies never signed an agreement but under the circumstances of concerned contractual links they should be part of the arbitral proceedings.[154]

Traditional views of joining parties to arbitration include *agency relationship, apparent authority, alter ego/veil-piercing, estoppel* and *the group of companies doctrine,* however, the classifications vary from different legal systems and practices. The most conventional way of joining non-signatories is an agency relationship, where the non-signatory becomes part of the arbitral proceedings by a legally binding agreement drafted by an agent who functions as a representative. Apparent authority (also known as the principle of appearance) confirms joinder in cases where the alleged agent has acted on non-signatory's behalf in a considerable and trusted way to be mandated, under no authorization whatsoever. Under alter ego/veil-piercing a non-signatory party may be bound by the arbitration agreement being an "alter ego" of an entity that has agreed on arbitration in a binding agreement. Behind the alter ego/veil-piercing doctrine is a thought of a dominating party ruling on commercial relations of both, resulting that two entities are rather considered as a single company. For instance, legal bases, as to consent of the parties to arbitration are met if a parent company has agreed to be bound by contracts signed by its subsidiary. In regard to estoppel value is given principally in common law jurisdictions as a doctrine of preventing the parties attempts to avoid their involvement in the arbitration agreement at hand. Estoppel doctrine disregards parties'

[153] Park 2012, 297 - 298; Redfern & Hunter 2009, 105
[154] Park 2012, 300; Born 2009, 1142

trials to rely on principles of good faith and equity as their behaviour reveals the true intent of agreeing on arbitration agreement. The group of companies doctrine has similar grounds to alter ego doctrine being a matter of a company of a corporate group suggested to join arbitration by an agreement signed by its subsidiary and a company being a non-signatory to an agreement to arbitrate. A sufficient factor is parties' intention to be bound by such arbitration agreement. One notable factor in the group of companies doctrine is that some authors base it on a mere existence of a group of companies but others consider the parties' intensions to be involved with contracts of all the entities. The group of companies principle is the only doctrine introduced within this scope with a character of being created by arbitral means, originally in France. Notwithstanding the arbitral grounds, and conversely, in other authors opinion caused by the development and limitation to an arbitral sphere, the group of companies doctrine has not succeeded in practice. In instances where the group of companies doctrine has been considered to be based on the idea of a unity of the group lacking confirmation of a consent to arbitrate may endanger the enforcement of the award.[155] Additionally, the group of companies has been criticized in the literature of asserting such doctrine to govern misleadingly the dilemma of joining non-signatories.[156]

When joining non-signatories to arbitration, arbitrators usually make a division between "consenting non-signatories", as referring to the parties that are eager to join arbitral proceedings and "non-consenting non-signatories", considering the parties that have not accorded to join arbitration. Illustrated classification is not straightforward as a party with an explicit consent to arbitrate may not have accounts for joined arbitration in other grounds. Joining a non-signatory, on the other hand, may occur in case of specific consent if certain circumstances are met.[157] In regard to distinction on consent of the parties an emphasis is made within the frame of this study on two doctrines for joining non-signatory parties to arbitration, namely *the implied consent* and *disregard of corporate personality (*also interpreted in the literature as *piercing the corporate veil).*

[155] Born 2009, 1142 - 1143, 1148 - 1149, 1153 - 1154, 1193 - 1194, 1166 - 1167, 1172 - 1173; Park 2012, 306, 310 - 311
[156] Hanotiau 2006, 49
[157] Park 2012, 310

In examination of joining of non-signatories, the arbitrators base their conception on two conflicting principles. Firstly, the arbitrators need to observe the essential element of arbitration to be based on the parties mutual consensus and secondly, conversely, effectiveness of the award maximized by binding the linked individuals and entities. Such disputed ideas need to be discussed within the doctrines of *(1) implied consent* and *(2) disregard of corporate personality*, which are most commonly reasoned for joining non-signatories. In both cases there is an existing arbitration agreement, which is effecting beyond the sphere of named signatories. Going beyond original boundaries and limitations from the arbitration agreement may occur by acting of the parties as according the substance of the agreement by someone else, or, accepting crossing the corporate form of the signatory entity.[158]

An essential expectation in order to arbitrate is the agreement by the parties. In instances of (1) implied consent, arbitration is based on the obvious expectation of a non-signatory to be bound or benefit from an arbitration agreement drafted by a third party signatory. Implied consent doctrine does not lead disregarding parties consent to arbitrate in case of lack of explicit expression to arbitrate if their behaviour supports arbitration as a dispute resolution mechanism. The essential element is to consider the parties' true intentions to right and obligation of arbitration by contractual behaviour over the specified words. Although an emphasis is usually made on will of the non-signatory parties, in the principle of basic contractual rights the signatory parties intention to be bound with the same arbitration agreement with non-signatory parties must be taken into account, as well. For instance, the consent of a non-signatory party to arbitrate is not sufficient if a signatory party has a business practice of extending an arbitration agreement to only those who have expressly signed the agreement.[159]

Professor Park interprets related expression "unsigned agreements" as a toxic and misleading adage referring inexistence of a signature dismissing the validity of an arbitration agreement. Park emphasizes that specific requirement of an arbitration agreement existing in written form is not a key element for a successful arbitration. Not only certain countries have approved oral arbitration agreements, but also consistent of unsigned written provisions is considered as an agreement to arbitrate in international

[158] Park 2012, 298; Born 2009, 1150
[159] Park 2012, 298 - 299; Born 2009, 1150 - 1152

legal sources including the UNCITRAL Model law (Article 7) and the New York Convention (Article II(2)).[160] The NY Convention Article II (2) requires "an agreement in writing, which is signed by the parties *or contained in an exchange of letters or telegrams.*"

Other considerations pertinent to implied consent include related issues to governing law when another party alleges that an arbitration agreement was not mutually agreed. In national arbitration such issues relate to choice-of-law dilemmas as any questions concerning the formation of the contract, which should be governed by the law applicable to the arbitration agreement. International arbitration, nevertheless, is lacking such choice-of-law norms related to any national system and, therefore, assistance for matters concerning the validity of an arbitration agreement in regard to joinder is met in arbitral awards and supplemented by scholarly commentary writings.[161]

The author of this study is in the opinion that implied consent dramatically digresses from the traditional conception of parties' mutual assent to arbitrate addressed in an explicitly signed arbitration agreement. However, in instances where true intent can be assumed by parties' behaviour without any apprehension, and additionally, a signatory party had an intention to be involved in arbitration with non-signatory party, the arbitration should be considered as competent in sake of other advantages of joining parties to construction business arbitration, including cost-savings, time and possibility to avoid conflicting awards.

(2) Disregarding corporate personality is a matter of ignoring a corporate formed entity that originally signed an arbitration agreement and a shareholder becomes liable for the obligations and rights of the legal corporate entity. As the parties' consent to arbitrate is ignorant and a shareholder is liable under the signatory company, disregarding of corporate personality is considered to have roots in fraud or undercapitalization. A typical example is a situation based on undercapitalized corporate entity where a controlling shareholder is trying to expose a third party liable for its obligations. At the moment of repayment of the debt a controlling shareholder may rely on its limited obligations towards to the corporation holding a third party liable. However, by

[160] Park 2012, 300 - 301
[161] Park 2012, 302 - 303; Born 2009, 1153

disregarding the corporate personality the shareholder may be held liable for the entities' debts i.e. piercing of a corporate veil has occurred. The non-signatories of a disregard of corporate personality may involve parent companies, subsidiaries, private individuals, governmental entities and states that did not sign an arbitration agreement.[162] Disregard of corporate identity doctrine differs from implied consent especially in sense of neglecting the parties' true intentions and overriding the basic principles of equity and fairness to arbitration. Disregarding a corporate entity's legal form is entitled if a mere expected circumstances (fraud or undercapitalization) actualize despite the parties assent to arbitrate.[163]

Legal issues related to disregarding corporate identity are primary observed in accordance with the law of the place of entity at hand, the *lex societatis*. The basic idea in defining the scope of a corporate personality is relying and seeking assistance on the law behind the formation of legal entity.[164] A general complexity in international joined arbitration is that opinions on disregarding corporate personality vary from a tribunal to another. A common challenge concerning the awards related to piercing corporate veil based joinder is enforcing such awards under the NY Convention. The award against non-signatory may not be recognized and enforceable under any of the grounds mentioned in Article V (1)(a-e) of the Convention, especially if parties' mutual consensus was not present in an express agreement to arbitrate. For instance, a non-signatory company of an arbitration agreement is most likely speculated to lack a possibility to present its case on the grounds of Article V (1)(b) NY Convention.[165]

Based on the claims outlined above, disregarding corporate personality as ground for joined arbitration declares against fundamental elements of arbitration by dismissing parties' consensus and ruling over principles of equity and fairness of arbitration. Therefore, the author regards that the suggestion of joinder under piercing a corporate veil must have met solid grounds for fraudulent or undercapitalized circumstances. Especially in construction projects the timetable is tightly scheduled and for observing the budget there are obvious restrictions for arbitral proceedings that would eventually

[162] Park 2012, 299; Kryvoi 2011, 173
[163] Park 2012, 299; Born 2009, 1154 - 1155, 1159
[164] Park 2012, 307
[165] Kryvoi 2011, 174 - 176

result in denial of recognition and enforcement of the award if expected circumstances were not met in the first place.

To conclude the speculation of grounds for joining the non-signatory parties to arbitration there are certain characters that are usually at hand in instances of implied consent and disregard of corporate personality. Implied consent involves according to commentary literature based on arbitral awards firstly, a non-signatory being part of the contract formation process and secondly, a single contract impact has accounts in multiple contract relationship. Additionally, and, thirdly, an arbitration agreement has been endorsed by a non-signatory in a legal instance (arbitral forum at hand or some other forum). As to disregarding corporate personality firstly, absence of the corporate personality is pointed out and secondly, there is an indication of fraud related use of the corporate form.[166] Joining of non-signatories in international is a complex issue as there are no addressed rules unlike in national arbitration joinder has been discussed under choice-of-law issue, and, therefore, joinder needs more specific examination in the light of international arbitration practice.

4.2.2.2.2 Joining of non-signatories in regard of international arbitration practice – examination under the Dow Chemical case

At first, a converse fact needs to be pointed out as despite the fact of privacy of arbitral proceedings and the final award, which is considered to be an advantage of favouring arbitration, international practice is based on certain publicly available arbitral awards, or, at least abstracts of them. On the other hand, it is common that the parties to arbitration remain unknown. As international arbitration does not have obvious legal principles or legal sources in the proceedings, international practice, especially previous awards may function as a leader of the way. In the following, examination based on international practice will argue weather arbitrators may find support for the proceedings or even elaborate such concept.

[166] Park 2012, 302

With respect to joining non-signatories to arbitration, conceptual overlaps between different doctrines must be outlined. Due to the complex interrelations between different actors in construction projects, a practical example is provided by contractual interrelations in theories of joining non-signatories, especially focusing on the fact that parent company's attendance in contract negotiations may result in different conclusion from those regarded from the contractual performance's view. This can be demonstrated in a hypothetical case of a construction project involving the engineering firms, a main contractor and the other a subcontractor being bound by an arbitration agreement in their contract. The project fails and the subcontractor requires payment for work under alleged performance at the prime contractor's scope of responsibility. Arbitration is directed against the main contractor and a parent shareholder due the main contractor's bankruptcy. If the main contractor's controlling shareholder had been involved in the negotiation phase of the contract, financing the extra work by parent shareholder may be based on parties' true intent to act likely in a conflict situation. Additionally, the subcontractor must confess the reliance of the main contractor's financial ability to pay when concluding the agreement. Hypothesizing the parent shareholder of the main contractor being involved to the project after the contract has been signed, instead of having purchased the signatory subsidiary with questionable corporate acquisition, would no longer result in a parties' true intent based on contract negotiations nor credible reliance. Giving thought to contract performance mandated to the main contractor, the parent entity may be in an assisting role for the subsidiary in project management and technical issues. By implied consent bases the potential concept is that the parent entity would be bound by an earlier contract, including an agreement to arbitrate. However, if the parent would perform on fee basis, participating in the project would rarely result joining non-signatories in implied consent doctrine grounds.[167]

As to arbitral awards, one of the most famous awards concerning joining non-signatory parties to arbitration is the *Dow Chemical* award by the International Chamber of Commerce, which outlines the issue of conceptual overlaps, as well. In *Dow Chemical* proceedings, the arbitral tribunal concluded the parent companies to be claimants despite the fact that the arbitration clauses at hand were between the defendant and subsidiary companies of the same parent group. *Dow Chemical* case has been discussed

[167] Park 2012, 299 - 300

in literature in the light of disregarding corporate personality and group of companies doctrine.[168] Indeed, as the group of companies doctrine has not been implicated to succeed in practice of arbitration, the overview from other theory's point is necessary to take into account, even though the group of companies is often regarded to similar objectives to piercing a corporate veil.

Under the group of companies doctrine, relevant facts refer to jurisdiction of joining parties to arbitration as it is even undisputed that the parent company had an expressed control over its subsidiaries by signing the substantial contracts and participating the negotiations and their performance. The tribunal held that disregarding distinct legal identity of the entities, a group of involved companies affirms a single economic reality *(une réalité éqonomique unique)* and the arbitration agreement is binding both signatory and non-signatory parties of the company as it follows:[169]

> **ICC Interim Award No. 4131 of September 23, 1982.** "Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise."[170]

Considerations for disregarding corporate personality in *Dow Chemical* case relate to arbitrators confession to join consenting parties to arbitration under piercing a corporate veil, which differs from a usual concept of parties non-consent to arbitrate under such doctrine. Disregarding corporate personality is suggested on the grounds of parties' consensus to arbitrate under circumstances related to conclusion, performance and termination of the contract, an existence of a group of companies referring to the usage of international trade, and, additionally, declaring arbitrators to have jurisdiction on a matter based on a unity of a company (single entity theory).[171]

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[168] Park 2012, 308; Born 2009, 1167; Kryvoi 2011, 174
[169] ICC Interim Award No. 4131 of September 23, 1982, 136. Available at http://www.trans-lex.org/204131. Last visited: 29.4.2014.; Born 2009, 1168
[170] ICC Interim Award No. 4131, p. 136
[171] Kryvoi 2011, 174

As described within the frame of the *Dow Chemical* award joining of non-signatories may be based on different theories, actually, among conceptual interrelations, as disregarding corporate personality has similar grounds to implied consent in this case declaring a parties mutual consensus. Speculation under the group of companies theory is an essential part in this for such doctrine, however, the unfavorable feature of such doctrine supports having a wider point of view for joining non-signatory parties to arbitration. As a result, arbitral awards may act as a leading role creating new principles for international practice, nonetheless, such principles may not lead to wide support in the subsequent international practice of arbitration.

4.2.2.3 Consolidation

4.2.2.3.1 General aspects – parties' mutual agreement and compulsory consolidation

A consolidation of different arbitrations can be found in a *(1) parties' mutual agreement,* however, in certain cases *(2) compulsory consolidation* may take place. (1) Parties' mutual consensus to consolidate can occur under an arbitration agreement drafted by consent of all the parties, for instance in an interrelation between the owner – the main contractor – the subcontractor. In a consolidation sense, the arbitration clause is required to have the same choices on applicable law, the arbitration rules, language and the seat of arbitration, being able to succeed in consolidating the proceedings. Drafting such arbitration clauses is a precise and challenging task since it demands explicit comprehension of interrelations between the multiple parties of the construction project and, additionally, the type of disputes that may arise from such links should be predicted beforehand. Predicting the possible future disputes is quite a contradiction in terms from the beginning. It is considerable that consolidation may not be in advantage for the drafter of the arbitration clause in the first place. Further dilemmas concern the timing of consolidation of the arbitrations. In an ideal situation, separate arbitrations would have been commenced during a same period of time as consolidation of a subsequent arbitration to the one already existing may face some issues. In the case that

the arbitral tribunal for the anterior dispute has been composed, issues may concern situations such as the hearings that may have been already held.[172]

Consolidation of different arbitrations in a single arbitration based on the parties' mutual consent may result from the institutional arbitration rules chosen by the parties. The Model Law or the UNCITRAL Rules do not approve any regulation on consolidation of different arbitrations. Recently launched in 2012, the ICC Arbitration Rules provide consolidation of two or more arbitrations into single arbitration on demand of the party (Article 10). Additional requirements include firstly, the parties consent to consolidate, or secondly, that all claims concerning the arbitrations must be based on the same arbitration agreement or thirdly, in arbitrations where claims are based on differing arbitration clauses, the disputing parties are the same, and disputing matters concern the same legal issue, and, additionally, the ICC constituted arbitral tribunal considers that arbitration agreements have identical basis.[173]

(2) Compulsory consolidation of construction contracts concerns only a few jurisdictions, namely the United States, some provinces of Canada, Hong Kong and the Netherlands. Compulsory consolidation may occur due court order or legislative decree, thus, disregarding accord of the parties. Compulsory consolidation is considered as an asset in receiving a mutual conclusion on similar legal or factual issues by proceeding in single arbitral forum, however, certain practical and legal challenges are met. Pertaining contractual interrelations concerning construction contracts separate arbitration agreements cause complexities, such as concepts of number and methods in appointing arbitrators, applicable arbitration rules and law governing the legal matters of the dispute. Therefore the arbitration agreements must be rephrased in the case of consolidation.[174]

Other challenges of compulsory consolidation arise on enforcing and recognition of the award. In case the constitution of an arbitral forum or the arbitral procedure is lacking parties mutual consensus the enforcement and recognition of the award may be declined

[172] Redfern & Hunter 2009, 159 - 160; Draetta 2011, 71 - 73
[173] The ICC Arbitration Rules 2012, Article 10, Article 1
[174] Schwartz 1990, 341, 344, 365, 368 - 371; Redfern & Hunter 2009, 157 - 159

under the Article V(1)(d) of the New York Convention. Additionally, Article V(2)(b) may deny enforcement and recognition of compulsory consolidated awards in public policy grounds. Countries that do not approve consolidation based on court order or legislative decree may consider enforcement of the award as an insult for freedom of contract principle guaranteed for the parties in terms of public policy of such country. As compulsory consolidation requires rephrasing of the arbitration agreement against parties contractual rights some countries consider it as violation of the public policy. Such a scenario where an award cannot be recognized in certain jurisdiction results in additional litigation and, therefore, jeopardizes the goal of the New York convention to simplify the enforcement and recognition process of foreign arbitral awards.[175]

4.2.2.3.2 Consolidation in regard of international arbitration practice – examination under the Erith case and the Dutco case

In order to visualize consolidation in international construction business arbitration, a practical example needs to be noted. Hypothesized arbitration case may be at hand if the subcontractor is claiming against the main contractor on the grounds for an extension of a complete date of a project. Such arbitration reflects on an interrelation between the main contractor and the owner occurring from the main contract drafted by the parties. Consolidated arbitration may have accounts due the same legal and factual bases, nonetheless, the owner may refuse the proceedings pertinent to not being involved with an arbitration agreement with the subcontractor as a valid arbitration agreement concerns only disputes under the main contract in an interrelation between the main contractor and the owner. In order to complete a successful project, consolidation would result in one conclusion on asserted dilemmas, unlike separate arbitral proceedings would threaten such goal.[176]

As consolidation may follow from the parties' content or from the compulsory consolidation by certain countries, does the arbitrators approach consolidation of arbitration in international practice similar ways? Within the scope of consolidation in construction project related arbitration two founding arbitral cases must be

[175] Ibid.
[176] Kazutake 2003, 191

acknowledged. In the *Erith Contractors Ltd v. Costain Civil Engineering Ltd.* (the *Erith* case) by the UK High Court arbitration was filed due controversy concerning the fulfilment of an engineer subcontract of a construction project contract. The subcontractor filed against the main contractor for the delay in payment and collapse of land on the construction site, and, additionally, the owner was sued by the main contractor for an extension of time and additional payment. The main contract was underlying the terms contract of the Fifth Edition of the English Institution of Civil Engineers (ICE) and the subcontract also used the ICE terms for civil works. Therefore, the main contractor demanded the arbitrator (engineer) to rely on the main contract, which was designed to govern arbitration affairs.[177]

The common problem of nominating the arbitrators in consolidation actualizes the case at hand. According to the arbitration clause of the subcontract (Clause 18) a single arbitrator was chosen by the parties and in case the parties have no agreement on appointing such arbitrator, the Chairman of the ICE is the appointing authority of the arbitrator. The sub-clause of the arbitration clause 18 concluded:

> **Clause 18 of (the arbitration clause) of the subcontract, sub-clause**: "if *any dispute* arises *in connection with the main contract* and the contractor is of the opinion that such dispute touches or concerns the subcontract works, then provided that *an arbitrator has not already been agreed or appointed* in pursuance of the preceding sub-clause, the contractor may by notice in writing to the subcontractor require that *any such dispute under this subcontract shall be dealt with jointly with the dispute under the main contract* in accordance with the provisions of clause 66 thereof. In connection with such joint dispute the subcontractor shall be bound in like manner as the contractor by any decision of the engineer or any award by an arbitrator."

The contractor nominated an arbitrator upon agreement, however, the subcontractor demanded the Chairman of the ICE to appoint an arbitrator concerning the subcontract-related controversies. As the Chairman of the ICE refuse to nominate an arbitrator, the subcontractor was seeking appointment of an arbitrator and jurisdiction to rule in a matter from the High Court of the UK. The Court held that the dispute at hand was in interrelation to the main contract. The main contractor had expressed the dispute accordingly to clause 66 and demanded joining the dispute pursuant to the subcontract.

[177] Kazutake 2003, 194 - 195

As the arbitrator has not been nominated in conjunction with the controversy occurring from the subcontract, the Court reasoned that the contractor was justified to sue three-party arbitration concerning a dispute pertinent to the main contract in an interrelation to the subcontract. Consolidation regarding the multi-party arbitration was supported due appropriate notice under the contract.[178]

One of the leading arbitral cases in construction industry is the *Dutco* case, *Siemens AG & BKMI Industrienlagen GmbH v. Dutco Consortium Construction Co.,* which has been considered to revise the practice of the International Chamber of Commerce in appointing arbitrators and risking multi-party arbitrations in France at the time of the decision. In *Dutco* case the French Supreme Court (Cour de Cassation) overruled the ICC's practice in appointing arbitrators in the multi-party arbitrations, following that the effects may concern wide number of arbitral cases governed by French law or analysed by the French courts.[179]

The facts of the *Dutco* case conclude BKMI Industrienlagen GmbH, a German contractor, who entered into a turnkey contract for construction of a cement production plant in Oman, and, was interrelated in a consortium agreement basis with Dutco and Siemens (Germany) to divide the performance of the construction work. BKMI was in a contractual relation with the owner whereas Dutco and Siemens were silent partners. The arbitration clause adopted in the consortium agreement was stating that all disputes arising in connection with the agreement that were claimed in arbitration would be governed by the Rules of Arbitration of the International Chamber of Commerce (ICC) by three arbitrators appointed in accordance with the Rules. The place of arbitration was agreed to be Paris. Dutco commenced arbitration in the ICC against two German companies for breach of performance under the contract, relying on the arbitration clause, and, demanding separate payment from each company. However, BKMI and Siemens resisted a single arbitration procedure and were demanding separate proceedings referring, among other reasons, to the right to nominate an arbitrator as the claimant Dutco was entitled to do.[180]

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[178] Ibid., 195 - 196
[179] Seppala 3/1993, 33
[180] Ibid.; Kazutake 2003, 196

The ICC commenced arbitration in a single arbitration proceedings constituting a tribunal of three members of arbitrators based on the ICC practice, which of one of the arbitrators was selected by Dutco and one was nominated by BKMI's and Siemens' joint decision, regardless of the companies' mutual support. The third arbitrator was nominated by the ICC following the ICC Arbitration Rules. In the interim award the ICC pronounced that arbitral proceedings were initiated accordingly to proceed to consolidated multi-party arbitration.[181]

Later, BKMI and Siemens were challenging the ICC's arbitral award in the Court of Appeals *(Cour d'Appel)* of Paris referring to the irregularities in constituting the tribunal, and, given the importance to the international public policy practice in light of enforcement and recognition of the award. The Court of Appeals held that multi-party arbitration was justified due to the consortium relation between the parties, and, regarded that nominating own arbitrator by each party is essential practice following from the ICC Rules, nevertheless, it has not verified to be an absolute manner, nor was it against the equal treatment of the parties, neither the public policy grounds. Therefore, as the constitution of the tribunal did not violate the consensus of the parties and the ICC Rules had been followed, the Court argued that consolidation to multi-party arbitration was reasonable.[182]

The decision of the Court of Appeals was challenged and the Supreme Court *(the Cour de Cassation)* addressed a converse conclusion. The Supreme Court held that appointment of the arbitrators was against the public policy as *"equality of the parties in the appointment of arbitrators is a matter of public policy which can be waived only after the disputes has arisen"*.[183]

Nomination of arbitrators in multi-party arbitrations is principally based on a method of each multiple claimants or multiple respondents appointing one arbitrator, and, the presiding arbitrator (the chairman) to be appointed upon mutual agreement or a named

[181] Ibid.
[182] Kazutake 2003, 196 - 197
[183] Kazutake 2003, 197; Kröll 2010. Available at: http://kluwerarbitrationblog.com/blog/2010/10/15/siemens-%E2%80%93-dutco-revisited-balancing-party-autonomy-and-equality-of-the-parties-in-the-appointment-process-in-multiparty-cases/. Last visited: 29.04.2014.

appointing authority. As a result of the *Dutco* case, an alternative method was adapted as the appointing authority may nominate all of the arbitrators in case of lack in the parties' mutual consensus. Such a principle avoids instances where nomination by each party would allow cumbersome number of arbitrators or imbalance within the constitution of the tribunal with more respondents than claimants. Nevertheless, the nomination of arbitrators would follow from an appointing authority's actions the key element that desired characters are determined by the parties. The *Dutco* case resulted in revising contemporary Arbitral Rules at that time, including the ICC Rules of Arbitration.[184] The progress has continued ever since and the present ICC Arbitration Rules 2012 provide in conjunction with Article 12(8) an explicit regulation on such situations where the parties did not reach a mutual way of nominating the arbitrators in consolidation.[185] The current ICC Rules are discussed to expressly differ from the anterior Rules in indicating the number of arbitrators and identity of any pre-existing arbitrators that should be taken into account before making a decision on consolidation, which was a major dilemma present in the *Dutco* case. Pertinent to improvements in creating explicit, still flexible, ICC Rules of Arbitration on consolidated multi-party arbitration the negative atmosphere resulted from the *Dutco* case has been considered finally overtaken.[186] However, a foregoing challenge is that not all the institutions follow the same manner and, therefore, a lack of uniformity is still at hand in nominating the arbitrators in consolidation of arbitration.[187]

One of the world's leading lawyers, specialized in international commercial arbitration and international construction, Mr. Seppala anticipated that multi-party arbitration would be threatened in one of the home lands of international arbitration, France, due *Dutco* case and national court's involvement in the ICC manners. Indeed, conclusion of a *Dutco* case was astounding in regard of specifically a French national court overriding the ICC's practices considering also the foundation role of the ICC in international commercial arbitration, located in France. On the other hand, was the *Dutco* case a

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[184] Lew, Mistelis & Kröll 2003
[185] The ICC Arbitration Rules, Article 12(8): "In the absence of a joint nomination pursuant to Articles 12(6) or 12(7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 13 when it considered this appropriate."
[186] Pair & Frankenstein 2011, 1067, 1084
[187] Kröll 2010, ibid.

necessary cornerstone in a sense of shaking principles of international arbitration practice as indicating a need for revising such rules?

The *Dutco* case has established a wide discussion in the literature. Mr. Seppala has concluded that according to the ICC Arbitral Rules adopted in *Dutco*, independence of a selected arbitrator may be endangered. If one party has not been entitled to be part of appointment of an arbitrator, or, is lacking equal treatment compared to other party, the scope of first party's rights may be impaired in regard of lacking desired arbitrator's compassion. It needs to be pointed out that equal treatment in selecting arbitrators does not namely require each party to nominate each arbitrator, but rather being involved in constituting an arbitral tribunal. It is necessary to note that the restriction on equal treatment is in nature extremely severe in the *Dutco* case as regarded by French authors, and, additionally, jeopardizing the practice of the Supreme Court in establishing favourable practice for international commercial arbitration.[188]

As indicated previously in examination of the ICC Rules, *Dutco* has been, still twenty years later, playing a major role in revising the recently established ICC Arbitration Rules in 2012. By guaranteeing due process when consolidating arbitrations, *Dutco* was, indeed, a necessary stepping stone toward equal treatment of the parties' and requiring specifications in consolidation of arbitration.

In conclusion for consolidation in international arbitration practice, both the *Erith* case and the *Dutco* case suggest that implied content of the parties is rather valuated than overruling the parties' will by compulsory consolidation. Eventually, parties consent to arbitrate is a founding principle of arbitration and a clear advantage in favouring arbitration as a dispute resolution mechanism, and, therefore, parties' consent should be highly valuated in international practice of arbitration.

[188] Seppala 1993, 222

4.2.2.4 Multi-issue arbitrations

The legal and factual issues concerning one linked contract that are required to be resolved in order to dispute some of the other contractual differences *(multi-issue arbitration)* usually are pertinent to interrelations between the main contract on one side and consortium agreements, joint venture agreements and subcontracts on the other.[189] In observing contractual interrelations within a sphere of multi-issue arbitration a demonstration of a presumed dispute in a construction project is necessary.

Speculating a situation in which the main contractor has received (or has accounts for receiving) a claim from the owner, based on an alleged breach of the main contract, the alleged breach results in the owner's opinion from a defect in the works or delay in performing the project under the mutually drafted timetable. At the same time, the main contractor relies on a breach by subcontractor, as the defect at hand should have been fulfilled according to the designed scope of work of the subcontractor. Therefore, subcontractor's actions on failing to fulfil its obligations reflects to the interrelation between the main contractor and the owner, following, that the main contractor commences the arbitral proceedings against the subcontractor in protection sense towards to the claim directed from the owner.[190]

A converse occasion occurs from the subcontractor's proceedings against the main contractor, pertinent from an alleged breach for the main contractor to fulfil named obligations under the subcontract. Such breaches may contain, as an example, the payment of extra works or the compensation in force majeure matters. These breaches, nonetheless, result from the owner's fail to perform obligations under the main contract, including disclaiming the payment of extra works and identify the force majeure circumstances. In such an instance, the main contractor seeks arbitration against the owner relying on the main contract in order to illustrate the subcontractor that the defect is not due the main contractors' breach of obligations.[191]

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[189] Draetta 2011, 73
[190] Ibid., 73 - 74
[191] Ibid., 74

When conducting arbitral proceedings in multi-issue arbitration related to construction project disputes outlined above, the arbitrators deal with two particular dilemmas. The first step when commencing arbitration is to indicate the existence of the breach by the subcontractor's or the main contractor's sphere of obligation. Consequently, the contractual interrelations between the parties' contracts must be examined, and, visualize whether and what sort of relevance the dispute has over the subcontract, or, whether the legal and factual elements related to the main contract must be considered during the proceedings. As multi-issue arbitration in this context is based on issues concerning the subcontracts, alleging that the defect follows from the main contract would result the arbitrators to focus on different contract than from which the proceedings were originally initiated, based on a third party's (for instance the owner) behaviour. Thus, the second stage is to consider the dimensions of a third party's function to the case at hand.[192]

4.2.3 Need for renewal of international construction arbitration?

International construction arbitration has been discussed in a legal literature within the stage of English litigation in the middle of nineties prior to major reform in civil law litigation system.[193] Such a belief raises the question whether there is an urgent need for renewal concerning international construction arbitration.

International arbitration is a significant dispute resolution mechanism in the field of construction business compared to other alternative dispute resolution (ADR) mechanisms due finality of the award. International construction arbitration has been favoured in the accounts for informal, quick, good worth, flexible and amicable way of settling disputes. Nowadays, trends in construction arbitration, however, are leading in an opposite direction becoming a formalized manner of dispute settlement in a hostile atmosphere within arbitral proceedings of multiple years of time. Such a change has been reasoned in the literature on the grounds of an increase of pleadings and documentations attached to arbitral proceedings, lack in finding appropriate arbitrators in sense of time and experience, resemblance of court proceedings, including additional

[192] Ibid.
[193] Hobeck, Mahnken & Koebke 2008, 84

hearings and expert reports on irrelevant matters, resulting extensions on time and budget. In addition, one problematic view in international arbitration is the interpretation to be based in common law culture. Increasing costs of an arbitration results in avoiding arbitral proceedings. Such speculated disadvantages especially in the field of international construction arbitration have resulted in increasingly expensive, time-consuming, formal and hostile dispute resolution mechanism.[194]

On the other hand, undisputed advantages in regard to international construction arbitration have been maintaining business relations in regard to the parties receiving a binding award on extensive, complex and fundamental legal issues, such as terminating the contract. Other favourable aspects include innovative proceedings and variety of ADR instruments provided by arbitral institution, such as the ICC.[195] Advantages to international construction arbitration are presented by disadvantages, and, therefore, there is a need for suggestions on reforms.

Suggested reforms in international construction arbitration should be commenced in determining to combine strengths of both civil law and common law legal systems focusing on reforms and development conducted in both systems. Specific reform proposals conclude the arbitral tribunal as taking an active role with being mandated to be responsible of the case management, especially if the parties lack mutual consent. Such reform has not been considered to exceed the limits of the parties leading the process. Additionally, construction arbitration procedure requires special knowledge, and, therefore a need for arbitrators qualified with skills in the field of engineering and technical issues is significant. The time schedule should be discussed in a case management conference or an initial procedural hearing in the beginning of the proceedings. In the most complex construction proceedings, conduct of arbitration should commence with complicated issues containing high value at first, thus, prioritisation within the issues is necessary. In such regard the parties are likely to resolve less significant matters at the end of the arbitration as long as the main issues have been speculated and affirmed first. Expert determination in an early stage preferably in the case management conference, should discuss the issues that experts deal with, and, whether the determination will be conducted by the parties or the arbitral

[194] Ibid., 84, 87 - 89
[195] Ibid., 90 - 91

tribunal. Additionally, the use of IT should be highlighted in order to receive a speedy and efficient arbitral procedure.[196]

Arbitration of international construction business is constantly becoming more expensive, time-consuming in a sphere of hostility of proceedings, which clearly is not the aim of arbitration. In conjunction with special requirements concerning complex construction projects adopting suggested reforms would establish efficiency in regard to construction arbitration. Following the issue of renewing international construction arbitration, it is relevant to discuss the matter of specifically designed *lex mercatoria,* known as *lex constructionis,* within construction arbitration. Would *lex constructionis* be considered as a useful tool for renewal of construction arbitration?

4.2.4 Lex constructionis

Between authors specialized in international construction projects, there is an active discussion whether there is a need for specific context *lex mercatoria*, namely *lex constructionis*, for international construction project business. Therefore, within the frame of speculating specialized *lex constructionis,* observations on *lex mercatoria* are necessary. Firstly, a full description of the subject is presented.

4.2.4.1 *Lex Mercatoria* in International Commercial Arbitration

4.2.4.1.1 Historical aspects of Lex Mercatoria

The Europe was in a renaissance phase in the field of commerce in the 11th and 12th centuries. The relevant actors in that evolution were the eastern markets that offered whole new opportunities to European commerce. A renaissance of commerce in Europe is also reasoned by political and economic progress in Europe. Such a phase led to creating a specific law, which was formed in the grounds of a class known as merchants. The law of merchants was created according to the Rhodes Maritime Law

[196] Ibid., 91 - 94

and *ius gentium* that is based on Roman and Greek laws. The key point is that such laws are generally based on customs and traditions. *Ius gentium* has been interpreted also as an autonomous source of law that was used in the economic relations *(commercium)* between citizens and foreigners.[197]

In most parts of Europe *ius commune* was a new law to fill the gaps in the regional laws. Therefore the status of ius commune was a co-existing law with regional laws rather than an independent jurisdiction. The modern term *lex mercatoria* is following from the *ius commune* and *law merchant,* and, therefore, having the same intent.[198]

4.2.4.1.2 Modern Lex Mercatoria

Nowadays definition for *lex mercatoria* varies and does not have a mutual consent. However the main characters suggested of *lex mercatoria* conclude that it is not based on any legal system, nor is it available on any international convention. Moreover, *lex mercatoria* is an international law system that has been applied by international merchants addressing influences of international commercial rules, general principles of law, model laws, general terms and conditions, standards and trade usages. *Lex mercatoria* contains as one of the most significant sources of public international law and the general principles of law. A significant element of *lex mercatoria* is the UNIDROIT Principles of International Commercial Contracts, as well as, the ICC's INCOTERMS (International Rules for the Interpretation of Trade Terms) that are commonly used in international trade contracts.[199]

Despite multiple variations on interpreting *lex mercatoria,* three concepts introduced by Professor Park should be noted. Firstly, and the most widely discussed concept, is the categorization of *lex mercatoria* as *"an autonomous legal order, created spontaneously by parties involved in international economic relations and existing independently of national legal orders".* The second option is to regard *lex mercatoria* as a comprehensive body of substantive rules governing the dispute at hand and functioning as an alternative to otherwise applicable national law. The third manner is implying *lex*

[197] Gücer 2009, 30 - 31; Redfern & Hunter 2009, 217
[198] Gücer 2009, 31
[199] Gücer 2009, 33 - 35; Redfern & Hunter 2009, 217, 222

mercatoria as completing the gaps in an otherwise applicable law by endorsing the usage and expectations accepted in international trade.[200]

4.2.4.1.3 Applicability of Lex Mercatoria

Lex mercatoria being a non-national legal system arises a question of whether it will be applied by arbitral tribunals. The legal literature states that applicability of *lex mercatoria* is depending firstly on the agreement of the parties, and, secondly on the provisions of the applicable law in the case at hand. Different approaches are supported by different states, whereas, France and Switzerland allow arbitrators to decide applicability by analysing the rules of law. Conversely, the Model Law (Article 28) relies on the parties' explicit choice on desired rules of law, and, in case the parties' lack mutual consent and the arbitral tribunal is to define such rules, decision is made by adopting the law resulted from the conflict of law rules which the tribunal regards appropriate.[201]

Some criticism is faced among applicability of *lex mercatoria* in the legal literature. Major drawbacks of *lex mercatoria* are that contract drafters prefer a law that is more accessible, clear and has already established jurisprudence to rely on the function of the law. However there are occasions where *lex mercatoria* is reasoned to be useful. Firstly, application of *lex mercatoria* comes in question in a situation where a contract is concluded by the states that do not want to apply the laws of any other country. Secondly, *lex mercatoria* is recommended in contracts between a state and a private company to avoid the disputes. In addition, *lex mercatoria* can be chosen by the parties as the law that governs their contract. An additional option is the case where no choice of law is made by the parties and the arbitral tribunal decides to apply the *lex mercatoria*. [202]

Modern *lex mercatoria* has been regarded as one of the most important improvements in the sphere of transnational law.[203] The continuous development of the construction

[200] Park 2012, 591
[201] Redfern & Hunter 2009, 226 - 227
[202] Moses, 2012, 64, 66
[203] Redfern & Hunter 2009, 217

industry, however, has been resulting in a discussion whether the *lex mercatoria* should be progressed even further by creating more precise concept of rules given the importance to the complexity of construction project business.

4.2.4.2 *Lex constructionis* in International Construction Arbitration

4.2.4.2.1 General aspects of Lex constructionis

The construction industry is one of the oldest fields of business remaining a founding economical role since the beginning of human civilization to the present. The construction business is establishing infrastructure in other fields of industry and, in addition, represents one of the largest single domains of economy on its own.[204] It needs to be noted that the world's construction business is in significant development[205] with the U.S. being in a leading role as the largest national construction market by 25 per cent of the world business. The Eastern markets have a next significant position affirmed by Japan and China. Recently significant growth has been faced in the construction business in developing countries, which of China and India have been developing construction markets by 8 per cent in annual basis.[206] Does such significant progress in the construction industry require specific rules? Are there special features that need to be taken into consideration regarding the growth in the developing countries?

Despite the commonly adapted definition of *international construction,* it is essential to acknowledge that the construction industry is traditionally understood as national business, and a reference international construction may be misleading yet expressed in international context.[207] For instance, complexities may follow from the parties of the project adopting standard form contracts supported by a trade association, and, at the same time, filling the gaps by applying domestic law. Similar issues may actualize due

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[204] Linarelli 2009, 168 - 169

[205] www.wto.org: World construction output grew by 3 per cent in 2007, to reach US$ 4.7 trillion, compared with almost 5 per cent growth in 2006. Available at: http://www.wto.org/english/tratop_e/serv_e/construction_e/construction_e.htm Last visited: 29.04.2014

[206] Ibid. Next in line are Korea, Brazil and Mexico. Growth is are also impressive in Russia and the United Arab Emirates.

[207] Douglas 2006, 383; Linarelli 2009, 169

to a state being the owner of the project. Eventually, the international character related to construction projects is an expression adapted in conjunction with such as performing the work outside of the contractor's home state or having international financing involved.[208]

Discussion of a specific *lex mercatoria* in construction business has been considered to be utilized in sense of a reference and aid in cases where the applicable law does not provide sufficient support or such law does not exist at all. In order to visualize construction business rather as a specific culture and a field requiring detailed *lex mercatoria* from other fields of industry, which have been regarded to follow routines, certain aspects need to be taken into account. There are three elements to be addressed in pointing out whether the construction business is its own field of industry with specific requirements. First of all, the construction projects are *unique* of the nature with special requirements in each case. Secondly, the specifications on *time* are an essential character that must be noted. Finally, and, thirdly, construction projects deal with *humanitarian aspects* that cannot be avoided to examine within the context of specialized judicial needs for construction industry.[209]

Firstly, addressing a uniqueness of a construction project complexities concerning the contractual interrelations between the multiple parties have been discussed in a large scale within the frame of this study. Additional notions of confessing a risky and unique construction business consist of language barriers in communication between the parties, variations concerning the availability, productivity and skill of labour, differing customs and practices in national sphere, unstable circumstances in politics and economics. Construction projects may also present dilemmas on uncertainties of weather and unexpected geologic conditions, variations in quality and suitability of building materials, currency related issues, unfamiliar forms of disease, plant, insect and animal life. In addition, challenges are met among different civil and criminal laws due unfamiliar legal systems, possible arbitrary regulation determined by the government, general challenges in executing contract rights and usual complexities related to duration, size and technical complexity of international construction projects.[210]

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[208] Linarelli 2009, 169
[209] Douglas 2006, 385 - 387
[210] Linarelli 2009, 169

Secondly, relevance given to the complexity that concerns the construction industry compared to standard commercial industry transactions is the long-term time frame that the construction projects are exposed to. Fulfilling, for instance a construction project of building a bridge or dam, demands several years to complete. Along long lasting projects increase of risks is at present. Especially, assuming that the construction project is situated in a developing country under unstable or hostile political regime, even more risks are cultivated within the construction firms fulfilling the project in long-term bases. Such circumstances differ widely from a traditional merchant where goods are delivered from a country to another.[211]

Thirdly, as discussed above, the increase of construction business is in guidance to developing countries, and, at the same time, involves a humanitarian interest. Such humanitarian interests are usually related to development and fundamental human necessities. Construction projects in developing countries consist of, for instance, water supply projects, transportation projects, such as bridges and tunnels, and, additionally, energy projects, including hydroelectric facilities such as dams. When human needs are in a major role and also public funds are involved there is a communitarian concern of completing construction projects in an efficient way.[212]

Given the importance to the specific characters of international construction projects actualizes a concern which sources of international practice would govern such special needs? Additionally, is the term *lex constructionis* entitled to be adapted within construction project business policy?

[211] Douglas 2006, 386
[212] Ibid., 386 - 387

4.2.4.2.2 Sources of Lex constructionis

With regard to sources adopted to govern *lex constructionis* standardized contracts, technical guidelines and arbitration awards are suggested to be significant. An emphasis is made underlying on standard contracts of trans-national construction projects.[213] Such standard form contracts are dominated by a limited number of well-organized private associations, which conclude the International Federation of Consulting Engineers (FIDIC), the International European Construction Federation (FIEC), the British Institution of Civil Engineers (ICE), the Engineering Advancement Association of Japan (ENAA), the American Institute of Architects (AIA). Additional contributors developing legal norms of the *lex constructionis* consist of the World Bank, the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT) and certain international law firms function as contributors, as well.[214]

Despite the importance of standard contracts and a global professional code of construction engineers resulting in the economic rationality in international construction business, the *lex constructionis* has been criticized as confronting the fundamental principles of international environmental law. Such conflicts have been jeopardizing human rights and environment protection regimes. Taken into account a basic element of international arbitration acting in a sphere of international law the key principle is to maintain the peace, which again relates to the human right visions. In a legal literature there are speculations that conflicts within rationalizing the global doctrines may result into a jurisdictional dead end.[215] Therefore a more specific analysis of the applicability of *lex constructionis* is necessary at this point.

[213] Linarelli 2009, 170
[214] Fischer-Lescano & Teubner 2004, 1034 - 1035; Sassen 2009, 565 - 596
[215] Somek 2007, 442

4.2.4.2.3 Applicability of Lex Constructionis

It is necessary to point out considerations on how *lex constructionis* may be applied in the practice of international construction related arbitration. Industry-specific *lex mercatoria*, i.e. *lex constructionis*, has been regarded to function as a gap-filler in instances where the applicable law does not provide a desired solution. Above that *lex constructionis* may be interpreted as a composite of trade usages and customs emphasized to govern specific nature of international construction industry. Trade usages and customs supporting construction industry are regarded to exist in most of the cases in the FIDIC Conditions for Contract, which are a co-operative model used within multiple national engineering association and contractors. In that sense endorsement of an international construction specific *lex mercatoria* has been supported in the literature.[216]

Major construction contracts have adopted in most cases substantial sets of contract terms and conditions as gap-filling mechanism. A divergent opinion has been expressed in regard to applying FIDIC Conditions for Contract, which developing country governments often adapt in major construction projects. Addressing the FIDIC Conditions for Contract to be considered as *lex constructionis* may be challenging in sense of need for explicitly agreed substantial terms and conditions in the construction contract. Therefore, the FIDIC is considered rather to provide standard terms and conditions in a political aspect, which should be given value as coordinating and supporting tools. In order that arbitrators follow the FIDIC Contract Conditions as *lex constructionis* they should be incorporated in the parties' contract with explicit agreement, and, additionally, FIDIC promulgation being essential such conditions should be recognized widely among different normative communities around the globe to be implied.[217]

Additional challenges in regard of applicability of *lex constructionis* relate to environmental issues that are in a significant role especially in the developing countries. A problematic view is a common practice of autonomous fields of industry

[216] Douglas 2006, 399
[217] Linarelli 2009, 205

externalizing the environmental legal responsibilities to the host state of a major construction project underlying the "compliance" provisions that are included in most of the standard contracts. Accounts for the best economic value of the contract base on sufficient risk-allocation system indicated to govern the expected challenges in executing the parties' contract. Such allocation of risks is achievable by directing the risks to the party that has best ability to manage them.[218] A question arises whether this is a case when coping of risks is asserted to a developing country who acts as a host state? Does such risk allocation serve human rights visions?

Non-dispositive nature of *lex constructionis* leads to examine considerations on creating specific practices in the construction specified field. In non-dispositive sense of *lex constructionis* the arbitral tribunals should adopt analysing beyond contractual limits in order to fulfil the environmental and human right expectations in construction specific *lex mercatoria*. Such extension of the parties' desire may be allowed in regard of truly international public policy, which relates to the sphere of *lex constructionis* rather than national public policy principles. It needs to be emphasized that truly international public policy can, indeed, displace certain parties' mutual agreements in international arbitration. An additional and converse dilemma relates to instances where the arbitrators disregard applying *lex constructionis* and there may be issues on enforcing the awards by national courts. Likewise the arbitral tribunals are mandated to apply binding laws. In this connection, however, *lex constructionis* does not create a specific practice yet in international arbitration. Therefore, it is unlikely that the parties' would challenge the arbitral tribunal in regard to above mentioned situations. As for adopting own practice of *lex constructionis* the arbitrators should, on the other hand, address such supported manners.[219]

International commercial arbitration is a private mechanism for settling disputes between the parties according to their will with judicial power. In the same sense *lex constructionis* has been argued to be a self-regulatory system in a major economic field of business conducted by a limited number of large firms.[220]

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[218] Sassen 2009, 596; Fischer-Lescano & Teubner 2004, 1035
[219] Fischer-Lescano & Teubner 2004, 1038 - 1039
[220] Sassen 2009, 596

With respect to the basic element of arbitration as the parties creating their own norms to be applied, *lex constructionis* would clearly support such an element. Still, visions on adapting such concept vary and the parties must explicitly consider following *lex constructionis* at the drafting point of the contract in order to receive desired results by arbitral proceedings. In regard to challenges within the context of *lex constructionis* truly international public policy may be entitled to disregard the parties' intent in order to fulfil environmental and human right requirements. Due to the uniqueness, time frame and humanitarian aspects related to the construction industry, a need for supporting such complexities within a uniform practice, acknowledging the environmental and human rights aspects as well, is a relevant issue at hand.

5. CONCLUSION

International construction arbitration may be regarded as a widely supported and effective dispute resolution trend in regard to international construction project disputes. Such trend comprehends international commercial arbitration via taking into consideration special needs of the international construction domain. Many national litigation systems lack consistency concerning construction related litigation and therefore advantages provided by dispute settlement in international arbitration have been given importance. Nonetheless, it needs to be noted that resolving construction disputes efficiently in international construction arbitration requires emphasizing specific features of construction project contracts and underlying disputes. In order to arbitrate effectively in international construction arbitration the parties need to address whether they desire to proceed in multi-party arbitration instead of multiple separate proceedings. A successful international construction arbitration will be established when taking multiple different factors into account whereas a valid and efficient arbitration agreement is a stepping stone to effectiveness in the proceedings. When the parties draft their arbitration agreement a valuable element is contain artistic view as benefiting from practitioners with expertise on construction business manners,

determining whether multi-party arbitration will be adopted, and, whether governing arbitration agreement with a multi-tiered dispute resolution clause would be advantageous for the parties, rather than considering an arbitration agreement as a mere necessary provision in their construction contract.

In order to understand international construction arbitration, it is essential to acknowledge the fundamental principles of the field of international commercial arbitration. A basic element of international commercial arbitration is to follow the parties' mutual consent from agreeing to conduct possible disputes in arbitration throughout the arbitral proceedings and finally be bound by an enforceable award. It needs to be noted that despite a valid and efficient arbitration agreement in expressing unwillingness to multi-party arbitration the parties may be joined to the multi-party proceedings under compulsory consolidation or certain doctrines justifying joining non-signatories to arbitration. Such action results questioning fairness and effectiveness of arbitration under the foundation principle of party autonomy. Also speculation on whether multi-party arbitration would eventually result achieving efficiency in arbitral proceedings is a considerable element to outline.

Examination of arbitral awards under the study indicates lack of uniformity in international construction related multi-party arbitration practice. At the same time, awards discussed in the study imply significance of cases as resulting even to revise institutional rules on multi-party arbitration. In the end, joinder and consolidation may establish an efficient multi-party arbitration especially if the parties manage to agree and predict on relevant matters pertinent to the dispute at hand in their arbitration agreement. On the other hand, as multi-party arbitration has not been mandated a significant impact on international construction arbitration practice, in order to create uniformity in the future practice a larger amount of disputing parties would need to be encouraged to take a first step towards harmonisation by adopting to conduct in multi-party arbitration. Proceeding in an effective multi-party arbitration would override the disadvantages of arbitration and ease the burden of general complexity and extensive sums of money related to the construction project disputes guaranteeing special expertise and knowledge of the proceedings with possibility to remain contractual interrelations between the parties under final and enforceable award.

Uses of the FIDIC standard contract models and examination on *lex constructionis* establish harmonisation of international construction arbitration as there is a need for renewal of such business. Despite referring to the environmental issues within the context of applicability of *lex constructionis,* it is necessary to point out that the future may be bright within a new trend of emphasizing construction methods such as environmentally friendly green building. Uniformly adopted practice of giving a greater value than mere guidelines for *lex constructionis,* and, the wide recognition for the FIDIC contract models would serve special expertise needed in construction business. Even if international construction arbitration would adopt a harmonised practice and regulation attention must be paid to the relevance of international arbitration functioning through national legal systems. Therefore, despite international construction arbitration following a distinct system of resolving international construction project disputes under harmonised rules, the parties need to acknowledge the ongoing interrelation between national law and international construction based regulation.

In my opinion, international construction arbitration should be a favourable mechanism in solving international construction project disputes over national litigation as providing significant expertise conditions for harmonisation of the field. In the end, an international construction project aims to deliver as a key element a desired product by the parties and similarly international construction arbitration is aiming to deliver as a key element fair and efficient justice that is a desired product by the parties.

APPENDIX

Appendix I

Comparison of the main features of the three Books

CONS: Conditions of Contract for Construction	P&DB: Conditions of Contract for Plant and Design-Build	EPCT: Conditions of Contract for EPC/Turnkey Projects
Recommended for building and engineering works if most (or all) of the works are to be designed by (or on behalf of) the Employer.	Recommended for the provision of electrical and/or mechanical plant and for building and engineering works if most (or all) of the works are to be designed by (or on behalf of) the Contractor.	Suitable for a process or power plant, a factory or similar facility, or an infrastructure project or other type of development, if (i) a higher degree of certainty of final price and time is required, and (ii) the Contractor takes total responsibility for the design and execution of the project.
The Contract typically becomes legally effective when the Employer issues the Letter of Acceptance to the Contractor.	The Contract typically becomes legally effective when the Employer issues the Letter of Acceptance to the Contractor.	The Contract typically becomes legally effective in accordance with the Contract Agreement.
Alternatively, there may be no such Letter, and the Contract becomes effective in accordance with the Contract Agreement.	Alternatively, there may be no such Letter, and the Contract becomes effective in accordance with the Contract Agreement.	The Letter of Tender may be worded so as to allow for the alternative of the Contract becoming effective when the Employer issues a Letter of Acceptance.
The Contract is administered by the Engineer who is appointed by the Employer. If disputes arise, they are referred to a DAB for its decisions.	The Contract is administered by the Engineer who is appointed by the Employer. If disputes arise, they are referred to a DAB for its decisions.	The Contract is administered by the Employer (unless he appoints an Employer's Representative) who endeavours to reach agreement with the Contractor on each claim.
Alternatively, Particular Conditions may specify Engineer's decisions on disputes, in lieu of a DAB.	Alternatively, Particular Conditions may specify Engineer's decisions on disputes, in lieu of a DAB.	If disputes arise, they are referred to a DAB for its decisions.
The Contractor designs (but only to the extent specified) and executes the works in accordance with the Contract (which includes the Specification and Drawings) and the Engineer's instructions.	The Contractor provides plant, and designs (except as specified) and executes the other works, all in accordance with the Contract, which includes his Proposal and the Employer's Requirements.	The Contractor provides plant, and designs and executes the other works, ready for operation in accordance with the Contract, which includes his Tender and the Employer's Requirements.
Interim and final payments are certified by the Engineer, typically determined by measurement of the actual quantities of the works and applying the rates and prices in the Bill of Quantities or other Schedules.	Interim and final payments are certified by the Engineer, typically determined by reference to a Schedule of Payments.	Interim and final payments are made without any certification: typically determined by reference to a Schedule of Payments.
Other valuation principles can be specified in Particular Conditions.	The alternative of measurement of the actual quantities of the works and applying the rates and prices in a Schedule of Prices can be specified in Particular Conditions.	The alternative of measurement of the actual quantities of the works and applying the rates and prices in a Schedule of Prices can be specified in Particular Conditions.

The General Conditions allocate the risks between the parties on a fair and equitable basis: taking account of such matters as insurability, sound principles of project management, and each party's ability to foresee, and mitigate the effect of, the circumstances relevant to each risk.	The General Conditions allocate the risks between the parties on a fair and equitable basis: taking account of such matters as insurability, sound principles of project management, and each party's ability to foresee, and mitigate the effect of, the circumstances relevant to each risk.	Disproportionately more risks are allocated to the Contractor under the General Conditions. Tenderers will require more data on hydrological, sub-surface and other conditions on the Site, to the extent that this data is relevant to the particular type of works, and more time to review the data and evaluate such risks.

Appendix II

20.6

Arbitration

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

(a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
(b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
(c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [*Law and Language*].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.