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September 2007

Online at <https://mpra.ub.uni-muenchen.de/9839/>
MPRA Paper No. 9839, posted 14 Aug 2008 03:02 UTC

Gamesmanship, third parties and arbitration: reflecting on the paradigm of PPP disputes

Dimitrios Athanasakis (*)

Synopsis

Disputes occurring in PPP projects pervade three interfacing levels of agreements: internal, downstream, and peripheral. PPP disputes have been free from arbitral dispute resolution and their legal environment is uncertain and deregulated. While project partners appear to have a natural monopoly of joining parties in the supply chain to their pending disputes, their decision is often driven by diversified expectations and conflict agendas. Analysis will investigate parameters of risk exposure as a business imperative of the parties' choice of multiparty arbitration. Emphasis throughout is put on the game-playing capabilities of original and third project parties and the concomitant formulation of pairs, prior to their participation in a single arbitral setting. The impact of their synergistic interplay on the outcome of multiparty arbitration is also explored. The aim is to test the responsiveness of English law and institutionalised practice to the idiosyncrasies of PPP disputes. The results of this study seek to conceptualise multiparty arbitration as part of the parties' informed business plans and alert legal researchers and industry practitioners to workable institutional arrangements.

Keywords: joinder, multiparty arbitration, risk.

I. Introduction

Multiparty arbitration for PPP (Public Private Partnerships) disputes is an area of emergent practice interest. The set up of new contracting SPV (Special Purpose Vehicle) schemes has necessitated dynamic corporate choices regarding risk allocation and cashflow returns. But very little academic attention has been paid to the legal framework of the ensuing disputes. While claims which concern multiple parties increase with a depressing regularity, multiparty arbitration is treated by project parties with great circumspection. Part of the reason is that the competitive advantages at the varying project phases are not readily identifiable. Moreover, legal academics have overrated the importance of consensualism and underestimated the business imperatives of this procedural mechanism.

The following analysis addresses this scholarly gap with a view to pursuing two interwoven objectives. First, focus is shed on the perception of risk in its multi-faceted legal, economic, market, and political aspects. This paper advocates that this perception impresses upon the parties' decision to invite third parties to enter

* dim.athanasakis@gmail.com; Advocate LLM, Thessaloniki. This Article has been prepared in commemoration and loving memory of Theios Yiannis Andreadis. I have learnt from him wonderful and insightful things about the legal science, more than I could have learnt from books. Special thanks are due to His Honour Judge Humphrey Lloyd QC for his unreserved support, critical appreciations and resourceful supervision of my research project at the Centre for Commercial Law Studies, School of Law, Queen Mary University of London.

into an arbitration setting. Second, the 'game-playing' theory is conducive to the formulation of synergies among parties and the arbitrator's level-playing field. This theory distils the idiosyncratic and reactive features of arbitration. Therefore, discussion concentrates on the essence of the economics and business decisions, as an indicator of success, other than the parties' request for legal remedies and fairness. Indeed, project parties will be geared towards using multiparty arbitration where payment mechanisms proved weak in the currency of the construction project, or where they seek to gain some economic benefit. Analysis does not extensively touch upon the procedural bounds and the law on joinder.

Research on the paradigm of PPP disputes will conclude that arbitration encapsulates some legitimate synergistic interplay. Parties in large projects are faced with decisions and consistent use of multiparty arbitration is the ultimate proposition. Legal and construction researchers and practitioners now venturing in the field will benefit from insightful topical observations that reflect upon the merits and demerits of joinder. They can then energise legal and institutional draftsmen to re-invent joinder as a positive agent for large-scale disputes.

II. Overview of PPP contractual arrangements

The set up of PPPs is indicative of an extroverted investment environment, where the State and private parties are joint developers for public works projects. Their alliance has created a unique blend of contractual arrangements with a plethora of legal, regulatory and political elements considered therein. In this institutional framework, strong negotiation and entrepreneurial capabilities are needed in order to integrate sponsorship, construction and operating risks and interests. The market take-up and competition amongst private developers has resulted in the upgrade of the State's game-playing role.

Private and public sector are under extreme pressure to make dynamic choices regarding contractual, corporate and dispute resolution instrumentalities. With an increase of the number of players in the economy, construction consortia are parochial to face up to the new risk profile and the symptomatic rivalries and tensions. In modern engineering projects, the project company/ SPV (Special Purpose Vehicle) is a centralised contractual and corporate planner with 'generalisable' features. This sets out to promote efficiency within a contractual, legal and regulatory framework. In essence, this is a financial and marketing device where the upstream concession agreement, downstream interface construction and operation contracts, and peripheral financial agreements converge. In law, the SPV can be an unincorporated joint venture or a société anonyme for civil law jurisdictions, with a pre-defined contractual life i.e. its dissolution will occur at the expiration of the concession agreement at the latest. Further to this, there are no 'back to back' and mutually enforceable obligations between the Grantor and third parties. Contractors, sub-contractors and operators are kept at arm's length from the SPV.

In modern project management, the SPV is an integrated and attitudinal structure. Engineering and consulting companies, syndicate of investment banks (financiers), state agencies are horizontally integrated in the SPV, in order to co-ordinate project-phases, the division of works, and the management of arising disputes. The lack of a binding structural and risk-division framework denotes that the parties' responsibilities will remain integral, no matter who bears the risk. Therefore, there

is a binding risk assumption and undertaking. If there is a cost overrun or underrun, then all partners share this.

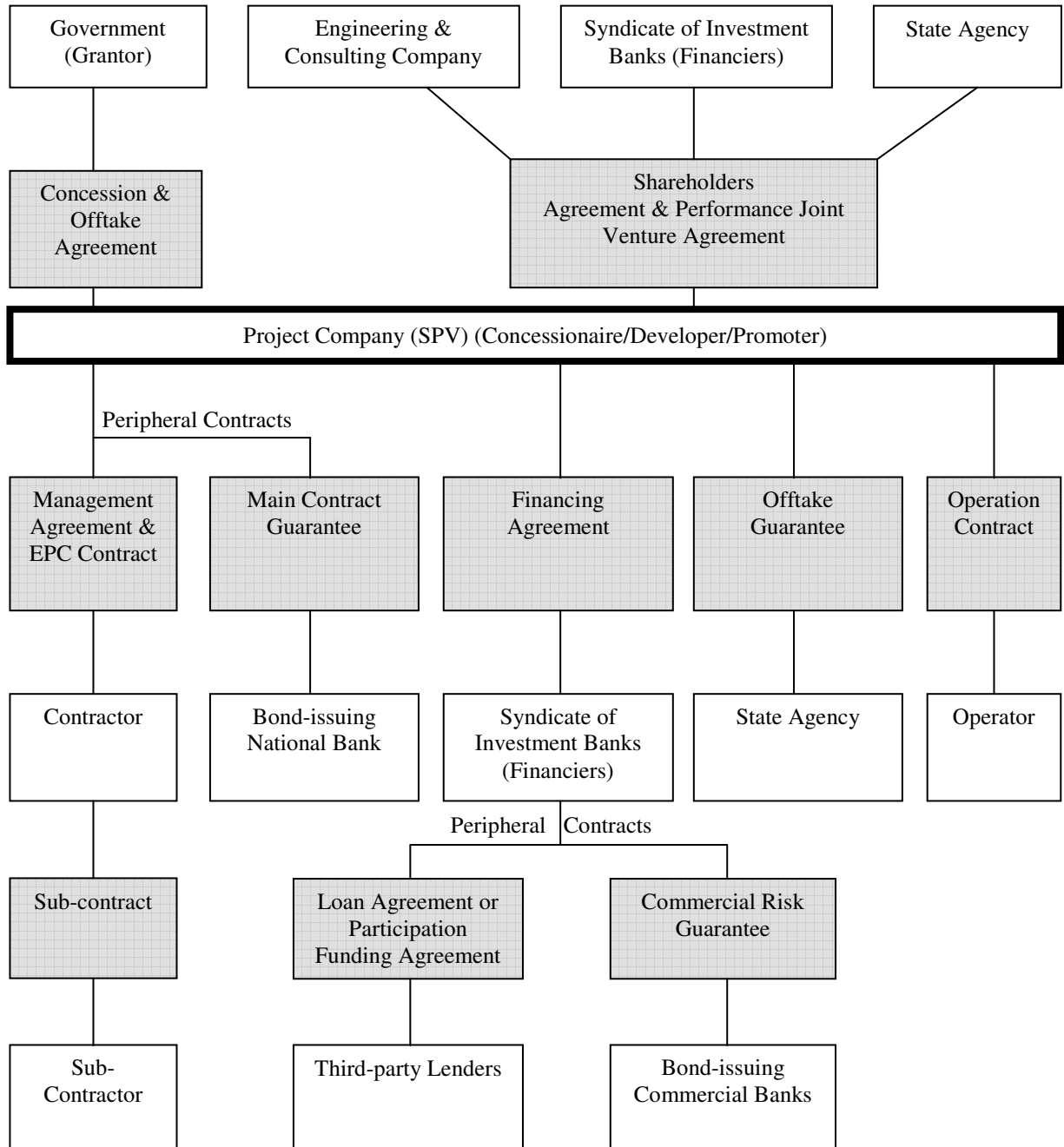


Figure 1: Indicative diagram displaying possible PPP contractual arrangements

The modern business dimension of the SPV impacting on dispute resolution is ‘relational contracting’. Current market forces favour elimination of transaction and project management costs. Relational contracting features a “win-win” decision model which suggests that dispute resolution procedures should be de-formalised. Therefore, arbitration for intra-SPV disputes, as well as for disputes with upstream

or downstream parties should be avoided. The underlying ethos is that it will be difficult for project parties to re-establish a relationship, once a partner has resorted to arbitration. And parties should not include arbitration or joinder of third parties provisions in their contracts. In the spirit of partnership and ongoing business relationship, parties should be 'reasonably collaborative' and adopt early warning procedures, re-negotiation and periodical or extraordinary review processes.¹ The impact of this protectionist legal and regulatory framework is that project parties will be prevented from setting forth claims against each other. This controlled environment also offers sufficient comfort and protection to the Grantor for not being faced with all sorts of claims.

Relational contracting serves a specific game-playing concept: the number of players in risk management and dispute resolution must be limited. Players should anticipate that the behaviour of other players is based on a similar rationality to their own and that the actions of one player impact on other players.² Therefore, it is very rare that discussions between Grantor and SPV will include the participation of downstream or third parties.

The setback of relational contracting is that it is a performance management system which can constrain decision flexibility and sap the commitment of partners, as there is no duty of good faith or trust. Relational contracting at the SPV level is also inconsistent with the structure of downstream substantive construction and operation contracts, which rarely incorporate a provision for relational contracting. Lack of dispute resolution procedures may backfire for SPV partners, because there is no straightforward provision as to whether there are enforceable and direct rights among partners or from partners to downstream contractors. Parties in the supply chain are often divorced from the dispute resolution process and final outcome of an intra-SPV arbitration. As a result, the dispute resolution process remains fragmented. Certainly, where disputes arise, partners will wish to push risks in all different directions but share them. Still, if they have suffered substantial financial downfall, a multipartite dispute resolution process may offer alternative sources of financial recovery. In essence, unresolved conflict among partners will taint the work environment and protract the adversarial nature of the industry.

III. Blurred lines: risk profile and project control

Multiparty arbitration goes beyond typical appreciations of contract conditions, applicable law and the parties' selected arbitration rules. The decision to join third parties is suggestive of the project parties' perception of risk in a legal and regulatory context. The institutional and strategic arrangements on risks are a far greater determinant for the success or failure of dispute resolution, when losses occur. Losses stemming from PPP disputes are difficult to pin down with precision, because parties fail to adequately price their risks. The most prominent areas of disputes derive from inappropriate study, identification and accessory pricing of financial risks at the project implementation phase. Construction risks rank second in the overall PPP risk profile.

¹ See Bröchner J, Josephson P E & Alte J, "Identifying management research priorities", 23 *Construction Management and Economics* 793 (2005), 795.

² See Gruneberg, S & Hughes, W (2004), "Construction Consortia: Do they serve any real purpose?", In: Khosrowshahi, F (Ed.), *20th Annual ARCOM Conference*, 1-3 September 2004, Herriot Watt University. Association of Researchers in Construction Management, Vol.1, 343-352.

Financial risks have ample third-party effects and are rarely seized on the intra-SPV level. Throughout the project-cycle phases, SPV partners, their financial backers and third parties operate under different and sometimes conflicting policy bounds. As a general illustration of the situation, co-venturers must have adequate and consistent financing arrangements allowing a simultaneous flow of funds. Where the funding levels are not periodically reviewed, there will be no efficient and economic level of costs conforming to the threshold of each partners' risk. There will be a substantial shortfall in the performance of the remaining project phases if a partner is unable to fully provide its share. Unfortunately, financing and re-financing risks recur and may lead to lack of guarantees. Inability of the debt service will amount to additional guarantees, stricter supervision measures, higher interest rates and possible bankruptcy of a partner. Nevertheless, the remaining partners must cover up his share of contribution to the SPV income. Furthermore, lack of appropriate benchmarking will lead to adjustment of payments to the SPV by third-party lenders. Such financial implications will affect the level of competitiveness and business value of the project. The macro-economic environment will weigh upon the third-party lenders expectations of large cashflow returns and future project marketability; especially where buy out groups which are in speculation of taking over the business are involved.

At the project construction phase, the incidence of financial risks will trigger construction risks, which are high impact risks. These occur once, they generate payment disputes and upset the valuation procedures under the construction contracts. A further manifestation of the breakdown of the payment mechanism is that the SPV, as Employer of the project, may cease advance payments and be faced with subsequent disputes with contractors at the expense of the Grantor's interests, as costs and delivery time accrue. Amidst SPV-Contractors disputes, the Grantor's remedies under the concession agreement are of much less value. For fear of having to pay back excessive sums plus interests to the lenders, if contractors go bankrupt, SPV partners will take a hard line with contractors, through securities packages e.g. bonds. In reverse, the SPV may become bankrupt and cause the subsequent step-in of third-party lenders and contractors.

The Grantor's interventionist actions can trigger the occurrence of further financial risks. A feature of these is where it unilaterally alters the approval procedures at the expense of contractors. Individual contractors may not have the capacity to undertake work of substantial size and complexity. When the workload exceeds the contractors' capacity, and their original pricing of risks, then all sorts of risks may occur. Additional risks and variations will push project costs up, and lead contractors to seek re-negotiation of their contracts or drop out. In reverse, unilaterally amending the contracts and placing additional risks on contractors can be detrimental on SPV partners and Grantor; especially where the Contractor has taken on the project on a turnkey basis. He will be incentivised to price extra risks and activities on an autonomous basis. This re-pricing will be of potential economic benefit for third-party lenders who will push up their interest rates.

The incidence of financial risks due to inadequate pricing mechanisms is more imminent at the operation and maintenance phases. A false use of the demand/revenue ratio combined with non-anticipated changes will affect the Grantor's cashflow projections. Subsequently, he may make payment deductions against the SPV during the operations for lack of reaching a target-level of performance. Driven by a 'sovereign' incentive, the Grantor may impose restrictions on the rate

of return, if the SPV's profits are higher than anticipated. However, the Government cannot have the monopoly power in re-pricing these contracts. The lack of clear lines of responsibility and presence of over-regulation or under-regulation of contractual schemes affect all project parties. These will be the first who will seek to ensure that risks are appropriately borne by parties involved in the project. Therefore, the selection of arbitration is also symptomatic of a systematic review of the projects.

Risks occurring at the intra-SPV level are linked with the downstream and peripheral third-party risks. Disputes regarding causation and liability are mainly founded on false perceptions about risk and bearing of losses. Ascertainment of losses and economic gain cannot be addressed internally at the SPV level, because it touches upon essential fact-finding questions derived from interfacing third-party arrangements. These create a common decisional thread. In particular, the link between SPV income issues, expenditure projections, performance revenues and construction costs may not be explicit, however its impact on the parties' substantive rights is huge. A strong legal framework through the presence of joinder mechanisms will work as a fall-back and reliable recovery mechanism for parties who are left with the majority of financial windfall. The main risk affecting dispute resolution in PPP disputes is the potential problem of inconsistent liability up and down the contractual chain.

In effect, the arbitrator's response to these disputes is to assert if risks were properly priced and managed. The arbitrator seems to have exclusive substantive law powers. He may make contractual adjustments and ancillary directions in amending payment certificates, re-pricing contracts etc. Further determinations relate to adjustments of returns or consideration of old and new equity. Therefore, selection of arbitration is synonymous to request for relief. Still, some parties seek remedies, while others try to insulate themselves from potential liability. In this context, multiparty arbitration will re-address the intended balances of incentives and risk-bearing between parties.

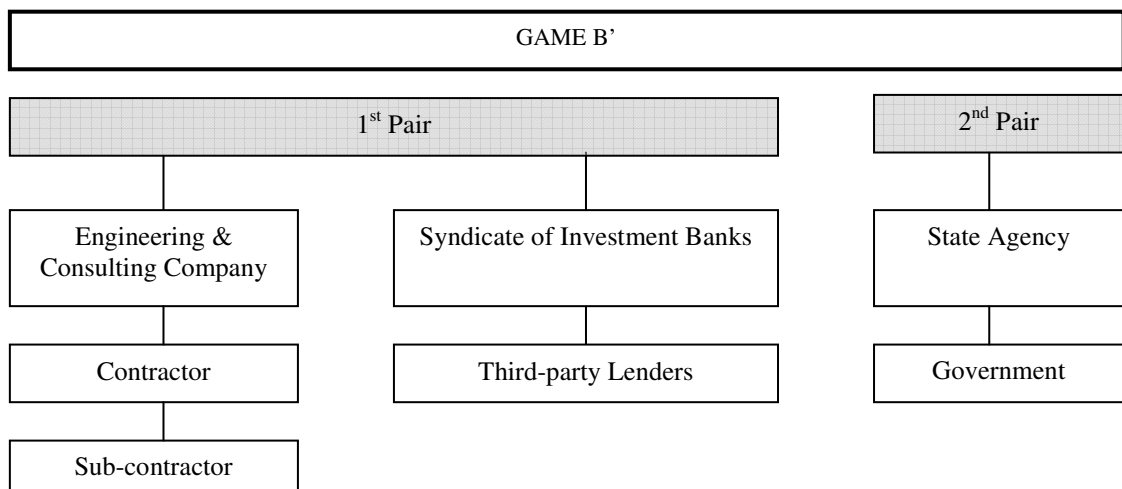
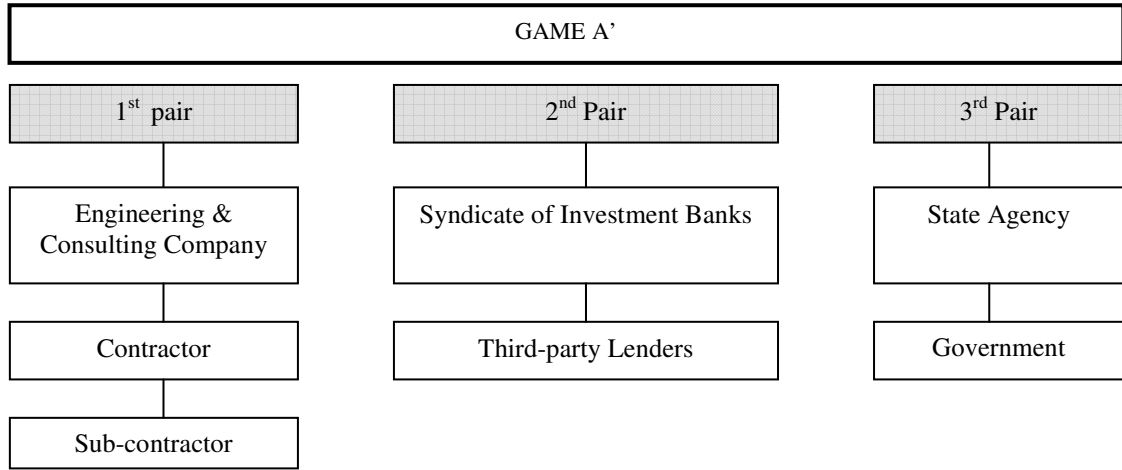
IV. Game-playing and pairing in international arbitration

Multiparty arbitration is a bespoke regime, a business model, where parties working in high-risk areas meet head on. The level-playing field is implicated by a pre-existing environment of complex contracting arrangements, corporate structures and risk perceptions. Distrust among parties is strong, coupled with justified uncertainty about the course to follow and the final outcome. Therefore, it is not peradventently clear who is definitely playing the game, i.e. who has control over the reference. In this hawk-dove scenario, this is dictated by a "reserved discretion" by parties with greater financial powers. In the face of law and institutional rules it seems to be the party who requests that third parties should be joined. However, the question of control broaches a more insightful observation of synergistic interplay.

Although the relational features of the SPV partnership import some reciprocal undertaking of protecting each other from being faced with claims brought by third parties, in reality PPP disputes will muddle the parties' roles. The underlying ethos of game-playing in PPP projects is indicative of the project parties capability of combining forces and exploiting their individual strengths.³ Therefore, once a SPV

³ See Bing, L, Akintoye, A, Edwards, P J & Hardcastle, C, "Critical success factors for PPP/PFI projects in the UK construction industry", 23 *Construction Management and Economics* (2005) 459, 463.

arbitration is underway, partners will seek to pair up with third parties to fight their case more competently. The following schematic game-playing scenarios are explicit of the essence of symbiotic relationships (pairs) between multiple project parties before and after joinder occurs:



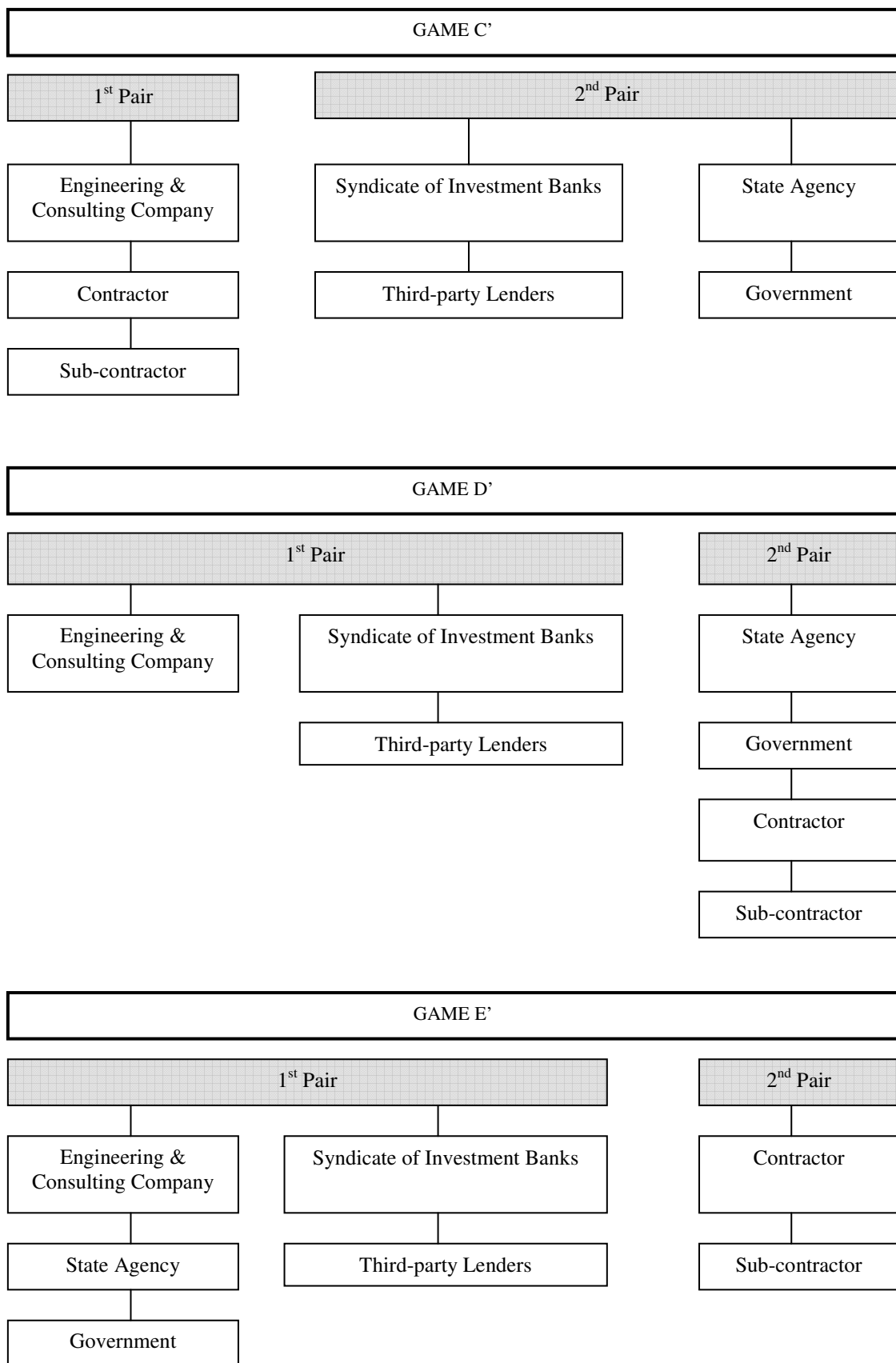


Figure 2: Game-playing scenarios with alternating pairs

Traditionally, the power to order multiparty arbitration has hinged on ‘common questions of law and/ or fact’. While this is the crux of the procedural foundations of the regime, its critical success factor is ‘commonality of interests’ among project partners. Indeed, there is a conventional view that SPV partners have common dispute resolution interests. For SPV partners, there is a certain gain to reach out to third parties. They cannot have greater liability to main contractors, sub-contractors, operators than their liability to the Grantor. Thus, the main reason that SPV partners open up the intra-SPV arbitration arena to third parties is that they may hold a liability which can be recovered from upstream or downstream parties. Therefore, SPV partners and third parties invited to be joined in PPP disputes will engage in a specific cost-benefit exercise: if joinder increases their chance of payment, compared to their expected profits from the capitalisation of the concession. If project construction-phase has been completed, parties may consider raising sums through operation profits and not multiparty arbitration. If, however, these gains are less than the ones anticipated in multiparty arbitration, then the decisional thread changes. This equation further reveals that project parties price their risks and make subsequent claims on an excessive basis, with a view to eliminating financial exposure or increasing their economic gains. The basis of calculating expected monetary value of claims is a key factor in construction disputes. Claims built on PPP disputes tend to be of excessive value.

Political reaction to multiparty arbitration may be intense. A Government would wish to avoid arbitration altogether for fear of becoming politically accountable. Its participation in multiparty arbitration may be viewed as a move to destroy domestic contractors involved in the project. It may seek re-negotiation of disputes in the alternative. Nevertheless, the counter-incentive for the Grantor is that there would be a single point of reference for claims and communications. It will further be presented with the opportunity to screen the ‘extended’ claims environment and resist the trial of frivolous and inappropriate claims. Furthermore, favourable awards stemming from joinder will be directly enforceable against downstream and third parties.

There is a wide range of interrelated issues and themes that cut across the PPP contractual decision and arising claims are plentiful. The determination of these issues will import legal arguments with a factual background which may wholly or partly substantiate a claim. Joinder of third parties will convey the necessary information quickly and effectively. Written communications and pleadings exchanged in the multiparty arbitration will be readily available to all parties. The third parties’ claims will add more compelling claims and cross-claims for SPV partners.

Therefore, parties often cause joinder in order to get a specific procedural advantage: amend their claims and bring these under a different contractual basis with a view to enhancing recovery. While, parties may ‘claim under’ different contracts, joinder has the added incentive that it prevents partners from ‘claiming over’ in separate arbitrations. Also, where their claims converge, they will benefit from proportionate allocation of advance on institutional costs. The challenge for multiparty arbitration is that legal, contractual and regulatory remedies will be sorted by a common and single arbitrator or tribunal. The game-playing feature of this is that contractual dispute resolution through international arbitration may invite considerations of remedies of ‘otherwise applicable law’ and the bringing in

of regulatory remedies, which were previously unavailable for some project parties. Therefore, the outcome of international arbitration can be materially different, when third parties are joined. Indeed, claims may be further substantiated by another contract, or statute [and applicable law] that governs another contract. Still, repetition of claims is avoided and unsubstantiated claims cannot succeed in other arbitration venues. Issues will not be re-opened and will be decided in a final and binding way.

Multiparty arbitration does not come clean off risks and game-playing may not be entirely consistent with the project. The joinder mechanism may naturally break down, following a settlement of a set of claims. Partners of the SPV, once multiparty arbitration is underway may rather compromise their claims with downstream contractors or other parties, if the cost-benefit equation shows that there will be excess gains from future operation of the project. Adverse financial market conditions may further push SPV partners to settle their cross-claims. Indeed, the threat of multiparty arbitration may can be turned into a creative opportunity for the resolution of disputes. But, where a pair of parties reach a settlement of their claims, the arbitrator is not entitled to use this in ascertaining liabilities and calculating losses under separate arbitrations.

Procedural fairness will become an issue in game-playing and how the level-playing field of arbitration can be less incumbent upon the above parties. But, parties will have different perceptions about procedural fairness. However, the delimitation is 'reasonableness'. All parties must be given a reasonable opportunity to set forth their views.⁴ Most institutional rules of international arbitration provide that the arbitrator must be satisfied that the parties have had a reasonable opportunity to present their case.⁵ If at the pre-joinder phase and during the conduct of multiparty arbitration the arbitrator has given parties time to make statements, exchange pleadings and answer to claims and cross-claims, then jurisdictional challenges under the New York Convention, Article V(2)(b) or the EAA, Section 68 will fail. Still, the proposition is that multiparty arbitration instils a grounded 'justice of arrangements' appertaining to the underlying legal and factual project issues.

V. Current trends & growing practice

(a) Responsiveness of law and institutionalised practice

There are few resources regarding multiparty dispute resolution for PPPs in England.⁶ So far, no court decisions or arbitral awards are known to have dealt with similar situations.⁷ The likely impact of the HGCRA (Housing Grants, Construction and Regeneration Act) 1996 on PPPs is solely on the adjudication provisions. However, the Greater London Authority Act 1999 is an indicator of regulatory change. This Act establishes a model scheme, the PPP Arbiter, which also treats multipartite issues in the London Underground PPP Agreements. The sole PPP

⁴ See EAA 1996, Section 33 (1)(a).

⁵ See ICC Rules of Arbitration 1998, Article 4. See also LCIA Arbitration Rules 1998, Article 22.1.

⁶ See HM Guidance on the Standardisation of PFI Contracts (SoPC 3), dated 29.03.2004. This establishes a multi-tiered procedure, providing for good faith negotiations, adjudication and finally arbitration.

⁷ See *Midland Expressway Ltd v Carillion Construction Ltd (No.1)*, [2005] EWHC 2810. This case explains the reticence about disputes arising out of SPVs. The outcome of this case is that domestic law is currently unsettled regarding these disputes and that some strong and concise legislative framework should be in place.

Arbiter is independent of the Government and of PPP parties. Its mainstream role is to review projects. But, the Arbiter gives only guidance and directions and not binding decisions. This means that aggrieved parties will either resort to English Courts or international arbitration thereafter.

There is an ever-present need for English arbitration law to live up to the new PPP institutional and regulatory environment and retain its frontrunner position in international construction dispute resolution. The starting point for change is to fathom the lessons from past game-playing in arbitration. From a historical perspective, English Judges are the founders of a standardised multiparty arbitration practice. In the pre-EAA 1996 era, where the parties' contracts contained joinder provisions, and signatory parties refused to participate therein, a party could bring an action requesting the Official Referee to establish an alternative multipartite court procedure and block a pending biparty arbitration to which he was party.⁸ Normally, Judges would admit such requests; by analogous application of the judicial 'High Court third-party proceedings' mechanism. This practice reflected a systematic pre-1996 attitude to promote the basic integrity of the process and hold the parties to their agreements.⁹

The levels of judicial intervention in construction arbitrations were much higher than any other type of arbitration. Other than being explicit of the Judges' exclusive game-playing capabilities, these levels reveal that the standards for a more solid level-playing field in construction arbitrations are higher. While this Court attitude for domestic multiparty arbitrations was plausible, presumptions about the intentions of the parties' were far fetched. Yet the practice of multiparty arbitration worked well. A new generation of arbitration scholars has challenged the forcible powers of Judges in arbitration and advocated regulation of arbitration by the parties and not Judges or arbitrators.¹⁰ The conceptual framework of game-playing in joinder provisions has changed with the passing of the EAA 1996. The most prominent feature of modern English arbitration law is the exclusion of judicial supervision over domestic and international arbitration.¹¹

As the law currently stands, the exclusive game-players in the selection and set up of multiparty arbitration (consolidated or concurrent arbitral hearings) are the parties.¹² The current arbitral orthodoxy is "power to the people". However, the EAA is not entirely suitable for international arbitrations under PPP schemes. It does not address the terms of such consolidation to take place nor does it provide any fall-back de-consolidation mechanism in case multiparty arbitration collapses. Furthermore, no mention is made to alternative multipartite arrangements i.e. 'name-borrowing' of 'arbitration for the benefit of the sub-contractor' arbitrations which can be used for PPP dispute resolution.¹³ The arbitrator's powers are mentioned in a negative and not restorative way. Interestingly, domestic CIMAR (Construction Industry Model Arbitration Rules) 2005 give more credence to the arbitrator's powers. The arbitrator will order joinder, "if he considers it

⁸ See *Trafalgar House Construction (Regions) Ltd v Railtrack Plc*, 75 B.L.R. 55.

⁹ See *old* JCT 80 Building Contract, Article 5 and Clause 41B.

¹⁰ See Lew, J D M, *Contemporary Problems in International Arbitration*, (1986).

¹¹ See EAA, Section 1 (c).

¹² See EAA, Section 35.

¹³ For an insight into these arrangements see *Northern Regional Health Authority v. Derek Crouch Construction Co. Ltd.*, [1984] Q.B. 644 and *Mooney v Henry Boot Construction Limited*, [1996] 80 BLR 66.

appropriate”.¹⁴ The ICE (Institution of Civil Engineers) Arbitration Procedure 1997 (7th Edition) places an equal decisional weight to the arbitrator and the original parties.¹⁵ The LCIA Rules take a step further: the joinder request is automatically available to third parties.¹⁶ However, they do not foreclose gamesmanship of parallel actions. Also, they leave the essential question of time for joinder request untouched. Furthermore, the current structure of the ICC Rules of Arbitration 1998 implicates the users’ perceptions about the joinder mechanism. Especially, because these rules are tied to the concept of strictly two procedural camps: ‘claimant and respondent’. The ICC Rules do not contain any corresponding provision pertinent to the formulation of multiple pairs, as previous explicated in Figure 2, and leave the issue of multiparty arbitration entirely upon the parties’ choice, goodwill and co-operation. Nevertheless, in the absence of such co-operation parties will become entrenched.

There is a tricky compromise of decisional powers in the ICE and LCIA Rules. Yet, it is not entirely clear who is definitely playing the game. Nevertheless, the draftsman mindset is geared towards certainty of procedure, which is an explicit gain for the parties and arbitrator. Equalising the roles of parties and arbitrators in the joinder decision offers the added incentive that the number and scope of claims will be delimited and the organisational route will be agreed and straightforward. As a result, time, costs and effort are saved. The current legal and institutional landscape regarding the decisional weight of the parties and arbitrator’s pull for multiparty arbitration is unique, but unresponsive. While for parties and advocates this weeds out a deeper question of the ‘right’ selection of applicable rules, the above joinder provisions do not prod parties and arbitrators into timely action. This gap will allow opportunistic parties to bring subsequent jurisdictional challenges, where they anticipate that the progress and outcome of multiparty arbitration are likely to be unfavourable to them.

(b) Arbitration for PPP disputes & developing perspectives

The passing of the EAA 1996 established consistency of English arbitration law for domestic and international arbitration as well as alignment with counterpart developed laws. Unfortunately, the past fruits of multiparty arbitration are not reflected in the new statute. International arbitration in England and the new institutional challenge for PPP disputes can benefit from past court practice. Departing from the paradigm of PPP disputes, a deeper revision of the law and practice must be effectuated to be ahead of future developments.

Commensurately, greater clarity is needed in the joinder decision specifics. Some legal and institutional development should be directed to bestow the arbitrator with powers to decide which parties, amongst those named in the joinder request, should be joined. And some arrangements should be made, regarding the degree of proportionality of submitted claims. The challenge for joint dealing of disputes in PPP projects is that issues of legal, contractual political and regulatory character can be very difficult to separate. Indeed, there is a high commercial and legitimate pressure on the arbitrator regarding the link of disputes. The question is how much is enough? A portion? This gap in law could be bridged by provision for partial

¹⁴ See Rule 3.7.

¹⁵ See Article 9.1.

¹⁶ See Article 22.1(h).

consolidation.¹⁷ But the decisional weight on the amount of disputes which should be submitted, must exclusively lie with the parties. The arbitrator is obligated by his mandate to deal with all claims set forth by the parties, irrespective of the needed workload, especially where his subsequent directions and awards must be reasoned. However, some time-limits must be in place, for otherwise multiparty arbitration could drag on interminably and subvert its underlying procedural economy ethos. The dealing with claims that arose after the set up of multiparty arbitration should rest with the arbitrator's sole judgment.¹⁸

At an organisational level, one of the most prominent features of PPP contracting is enhanced leadership and business judgment. The mastering of PPP disputes will require of the arbitrator such qualities. A 'structured approach' is desirable for the arbitrator's responsiveness to the parties' claims. The arbitrator should invite the parties at a pre-trial meeting to express their views and produce short statements regarding the joinder question and the issues to be resolved. In view of the information gathered, the arbitrator should produce a working programme. This information should be apposite to the questions of link of losses, claims and risks. At this stage, the appointment of a legal or technical expert is unnecessary. If there are any gaps in information, the arbitrator can request the parties' for further clarifications. If at a prolonged stage, parties have not progressed and still speculate on multiparty arbitration, the arbitrator should make directions approving or rejecting joinder. This may be by way of award on jurisdiction.

As an alternative working arrangement, modern contract negotiators should rethink the adoption of 'name-borrowing' provisions. The English Court precedent of name-borrowing arbitrations can be appropriated for an emerging multipartite practice. Where main contractor has a claim against the Grantor (or vice versa), he may borrow the 'name' of the SPV and claim against the Grantor. In exchange, he pays the SPV some monies as security. There are several striking points with this arrangement. The arbitrator in the Grantor-Main Contractor arbitration may find against the SPV and make orders against it. The backdrop of name-borrowing references is that the SPV has limited game-playing capabilities and control. However, it monitors the process and takes over where there is an imminent risk of derailment of the proceedings. The setback of this arrangement is that downstream parties could potentially obtain greater relief than the SPV is entitled from the Grantor. Also, they are not barred from bringing subsequent proceedings against the SPV.

Ultimately, in matter of contract drafting, a joinder provision should pin down a properly conceived escape hatch i.e. de-consolidation. Parties are often fearful of losing their margin to manoeuvre once joinder occurs. This is a fall-back mechanism for separate arbitrations, if parties so request. The set up of multiparty arbitration may take up more time, cost and effort than originally anticipated. Also disputes take time to crystallise and the parties' competitive advantages may change. But gamesmanship connotes that there should be some 'get out' route and flexibility for the arbitrator too. Provision should be made in the EAA and institutional provisions to allow the arbitrator to de-consolidate arbitrations.

¹⁷ See *Kier Regional Ltd v City & General (Holborn)*, [2006] BLR 315.

¹⁸ See ICC Rules of Arbitration 1998, Articles 18 and 19.

VI. Closing observations

There are two conceptual observations that flow directly from the previous discussion of gamesmanship and multiparty arbitration.

First, the paradigm of PPP disputes has helped explore the legitimate commercial pressure by third parties on original parties and vice-versa for multiparty arbitration. This is a dispute resolution regime where parties can practice their game-playing skills in a controlled way. Correspondingly, PPP disputes are high-profile disputes, where parties apply strong entrepreneurial skill and concentrate on keeping ahead of the game. The outcome of this rivalry may muddle the parties' positions: third parties can be the protagonists and original parties mere spectators. The further impact of this is that 'original' claims will subsequently encapsulate 'third-party' claims and expand the territoriality of the 'single-table' liability question. Therefore, parties must become more focused and serious with their claims and take appropriate action to tackle the decisional points at the right level-playing field. Game-playing is not play-acting. If their decision is based on the criterion of overcoming uncertainty, set up cost, and time-effective procedures, they are likely to succeed.

Second, arbitration scholars may be sceptical of the level-playing field as contravening procedural fairness. The concepts of fairness, justice, efficiency, consensualism and due process are often artificially inflated in international arbitration. And no reliable studies exist to debate their presumed prevalence over sound business arrangements. Often, these concepts serve to condemn the process in multipartite cases, where readily informed parties seek certain remedies at an accessible [multipartite] venue. There is, however, a concern that the level-playing field should give parties the advantage of playing on equal footing and not adversarial grounds. However, the proposition is that the level-playing field is level, even if it is not equal.¹⁹ There is no compelling reason why synergies between arbitration participants should be viewed as unfair. The game can still be played fairly. Especially where a resourceful and time-bound arbitrator adopts suitable working arrangements regarding the treatment of claims, the hearings and the award-making process.

VII. Conclusions

The recurrent industry messages are that international and domestic arbitration must meet the new PPP institutional challenges and provide concrete solutions on a larger scale. But, whatever the legal and institutional change, parties will not stop playing games. Although parties form synergies, it is not the way that they prefer to form coalitions. They do so because multiparty arbitrations are too large and complex for them to fight alone. There is a wide variation in the manner synergies are formed and determined by the competitive advantages and the attitudes of project parties. An effective multiparty arbitration needs a positive client attitude. Present discussion may, of course, give ground for a fresh concentration of academics and practitioners on business issues, rather than debates on overworked theoretical questions.

¹⁹ See Veeder V V , "The 2001 Goff Lecture-The Lawyer's Duty to Arbitrate in Good Faith", 18(4) *Arb Int'l* 431, 433.