

# Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules

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*A number of leading arbitral institutions, recognizing the significant benefits of joinder and consolidation provisions, and reflecting parties' demand, have recently amended their arbitral rules either to include joinder and/or consolidation provisions for the first time, or enhance the scope of their existing provisions. The author discusses in this article the benefits of joinder and consolidation, the mechanisms available to parties in international arbitration for joinder and consolidation, the joinder and consolidation provisions contained in leading arbitral rules, and assesses the key similarities and differences among the rules.*

## 1 INTRODUCTION

Arbitral proceedings are a creature of contract, and as such, absence agreement of all parties, it is not possible to join third parties to arbitration proceedings, or to consolidate two or more arbitration proceedings in the same way as in litigation proceedings in most jurisdictions.<sup>1</sup> The difficulty usually arises in two situations, first, where there are several parties to a single contract, or secondly, where there are several parties to several contracts, all of which are related to the subject matter of a dispute.

The author discusses in this article the benefits of joinder and consolidation, the mechanisms available in international arbitration for joinder and consolidation, the joinder and consolidation provisions contained in leading arbitral rules, and assesses the key similarities and differences among the rules.

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<sup>1</sup> The author refers to 'joinder' as being when a party to the arbitration agreement is joined as a party to existing arbitration proceedings, either by the intervention of the additional party itself, or by an application by a participant party in the existing arbitration proceedings. The author adopts the meaning of 'consolidation' referred to by Philippe Gilieron & Luc Pittet, who define the term as 'the act or process of uniting into one case several independent proceedings that are pending or have been initiated', *Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties in Swiss Rules of International Arbitration: Commentary* 36–37 (Tobias Zuberbuhler, Christoph Muller, & Philipp Habegger eds 2005).

## 2 BENEFITS OF JOINDER AND CONSOLIDATION

The characteristics of modern international commerce are complex, often involving multiple parties to contracts, and multiple contracts relating to a single commercial transaction, and consequently, solutions for joinder and consolidation of arbitration proceedings are desirable. 43% of the International Chamber of Commerce (ICC) arbitration workload now involves multiparty arbitrations,<sup>2</sup> and it has been estimated that approximately 40% of arbitration cases worldwide now involve more than two parties.<sup>3</sup>

There are obvious advantages to joinder of parties to arbitration proceedings or consolidation of two or more arbitration proceedings where disputes involve similar subject matter, common facts, and common issues of law, such as preventing inconsistent or conflicting decisions, tribunals having a fuller view of a transaction, and usually savings of time and cost.

Whilst joinder or consolidation is likely to increase the efficiency of the overall arbitration process, the benefits of joinder or consolidation will vary amongst the parties. For some parties, it may be more efficient and cost-effective to conduct arbitration proceedings solely with an opposing party, rather than being joined into a more complex arbitration among multiple parties involving multiple issues.

The arguments against joinder and consolidation involve lack of party autonomy arising from the lack of consent to joinder or consolidation, and the method of appointing the arbitral tribunal in multiparty arbitral proceedings, issues which are discussed below.

## 3 MECHANISMS FOR JOINDER AND CONSOLIDATION

There are three mechanisms by which a party may be joined to arbitral proceedings or for proceedings to be consolidated:<sup>4</sup> first, by parties agreeing bespoke provisions in their

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<sup>2</sup> See Abhinav Bhushan's presentation entitled, *Arbitration in the Gas, Energy, Resources and Projects Sectors*, 5th International Arbitration Conference (Perth: Australia 21 Nov. 2017), and to Mary Paralika and Alexander Fessas earlier paper, *Joinder, Multiple Parties, Multiple Contracts and Consolidation Under the ICC Rules*, a presentation made at the ICC Conference *New Trends in ICC Arbitration and Mediation* (Nicosia: Cyprus 29 Apr. 2014), in which the authors refer to 30% ICC multiparty arbitrations at the relevant time (<http://www.ccci.org.cy/wp-content/uploads/2014/05/Multi-Joinder-Consolidation.pdf>).

<sup>3</sup> Nathalie Voser, *Multi-Party Disputes and Joinder of Third Parties in 50 Years of the New York Convention*, *ICC International Arbitration Conference*, 14 ICCA Congress Series 343–410, 343 (Albert Van der Berg ed. 2009).

<sup>4</sup> This excludes the means by which non-signatories to an arbitration agreement may be considered a party to the arbitration agreement by the application of principles such as agency, piercing the corporate veil, alter ego, estoppel, and group of companies doctrine. Such principles continue to apply in the context of joinder provisions under the various arbitral rules, which refer to a 'party to an arbitration agreement' and can be signatories or non-signatories. See William W Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*, in *Multiple Parties in International Arbitration* (Oxford 2009).

arbitration agreements in the underlying commercial agreements; secondly, under the terms of the *lex arbitri* at the seat of the arbitration; and thirdly, indirectly by parties agreeing arbitral rules which contain joinder and/or consolidation provisions.<sup>5</sup>

With respect to the first mechanism, contractual provisions for joinder and consolidation can involve challenging drafting to ensure parties' intentions are reflected in the provisions, but they have the advantage of being tailored to the parties' respective roles in a commercial transaction, the characteristics of the transaction, and the disputes which are likely to arise.

With respect to the second mechanism, joinder and consolidation provisions have not generally been accepted as desirable for inclusion in states' *lex arbitri*, and only a limited number of jurisdictions have enacted consolidation provisions.<sup>6</sup> Notwithstanding that such provisions may only apply by express agreement, there remains debate amongst commentators as to whether such provisions offend against the principle of party autonomy.<sup>7</sup>

The United Nations Commission on International Trade Law (UNCITRAL) Model Law does not contain joinder or consolidation provisions. In the UNCITRAL first working group reports in the 1980s, there was general agreement that the Model Law should not deal with problems of consolidation in multiparty disputes.<sup>8</sup>

With respect to the third mechanism, a number of arbitral institutions, recognizing the significant benefits of joinder and consolidation provisions, and reflecting parties' demand, have recently amended their arbitral rules either to include joinder and/or consolidation provisions for the first time, or enhance the scope of their existing provisions. It is this third mechanism which offers the most comprehensive and reliable solution to joinder and consolidation.

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<sup>5</sup> E.g. the House of Lords held in *Lafarge Redland Aggregates Ltd. v. Shephard Hill Civil Engineering Ltd.* [2000] 1 W.L.R. 1621, that an institutional rule, applying when disputes arising under more than one contract were concerned with the same subject-matter and were to be dealt with by the same arbitrator, empowered the arbitrator to order that they be heard together.

<sup>6</sup> Netherlands Arbitration Act, Art. 1046 is one of the few *lex arbitri* which permits consolidation by allowing a third party, the President of the District Court of Amsterdam, to decide on a party's request to consolidate Netherlands seated arbitral proceedings. In Asia-Pacific, Australia, New Zealand, and Hong Kong are the only three jurisdictions which have adopted limited consolidation provisions in their respective *lex arbitri*, the International Arbitration Act 1974 (Cth), the Arbitration Act 1996 (NZ), and the Arbitration Ordinance (Cap. 609), respectively. In each case, the provisions apply to international arbitrations only if parties expressly agree. The English Arbitration Act 1996 does not contain a consolidation provision, but s. 35(1) regulates consolidation of arbitral proceedings by stipulating that the parties are free to agree that the arbitral proceedings shall be consolidated with other arbitral proceedings, or that concurrent hearings shall be held.

<sup>7</sup> Nana Adjoa Hackman, *The Problem of Arbitration and Multi-Party/Multi-Contract Disputes: Is Court-Ordered Consolidation an Adequate Response?*, Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee.

<sup>8</sup> See *The UNCITRAL Model Law After Twenty-Five Years: Global Perspectives on International Commercial Arbitration* 9 (Frederic Bachand & Fabien Gelinat eds, Juris Publishing, Inc 2013).

The International Chamber of Commerce Rules of Arbitration ('ICC Rules'), the Swiss Rules of International Arbitration ('Swiss Rules'), the Arbitration Institute of the Stockholm Chamber of Commerce Rules (SCC Rules), the London Court of International Arbitration Rules (LCIA Rules), the Singapore International Arbitration Centre Rules (SIAC Rules), the Hong Kong International Arbitration Centre Rules (HKIAC Rules), and the Australian Centre for International Commercial Arbitration Rules (ACICA Rules) all contain relatively new provisions for joinder and/or consolidation. The UNCITRAL also added a joinder provision in the 2010 edition of its rules ('UNCITRAL Rules').

Parties, by agreeing to institutional arbitral rules in their arbitration agreement, are taken to have impliedly consented to the joinder and consolidation provisions contained in the rules, together with the consequences arising from their operation. Since parties are often unwilling to consent to joinder or consolidation after a dispute arises, arbitral rules provide a means by which the efficiency and efficacy of the arbitration proceedings can be managed. Concerns regarding party autonomy with respect to consent to joinder or consolidation, and participation in constitution of the arbitral tribunal, being the main criticisms of joinder and consolidation provisions, are arguably addressed by the parties agreeing to the arbitral rules.

#### 4 PRINCIPLES APPLICABLE TO JOINDER AND CONSOLIDATION PROVISIONS

In considering the effect and scope of joinder and consolidation provisions, there are a number of matters which the provisions should address, as follows:

- Which party or parties can apply for joinder of an additional party or consolidation of proceedings?
- In the case of joinder, which party may be joined as an additional party?
- What consents are required for joinder of an additional party or consolidation of proceedings?
- At what stage can a party apply for joinder of an additional party or consolidation of proceedings?
- Which tribunal or body decides the application for joinder or consolidation?
- What are the requirements for the content of the application?
- What factors does the decision-maker take into account in deciding whether to join an additional party to the existing proceedings or consolidate proceedings?
- When does the arbitration with the additional party or consolidated proceedings commence?
- In the case of consolidation, which arbitral tribunal hears the consolidation proceedings, and how is the tribunal constituted?

## 5 JOINDER AND CONSOLIDATION UNDER LEADING ARBITRAL RULES

### 5.1 INTRODUCTION

As noted in section 3 above, a number of the leading arbitral institutions have recently amended their arbitral rules either to include joinder and/or consolidation provisions for the first time, or to enhance the scope of their existing provisions. There is wide variation among leading arbitral rules on matters such as consents required for joinder or consolidation, the circumstances as to which party may be joined or arbitrations consolidated, and the identity of the decision-maker, reflecting differing philosophies on intrusion into party autonomy. The author outlines below the joinder and/or consolidation provisions in a number of selected leading arbitral rules, namely, the ICC, Swiss, SCC, LCIA, SIAC, HKIAC, ACICA, and UNCITRAL Rules, before assessing in section 6 below the key similarities and differences among the rules.

### 5.2 ICC RULES

The ICC introduced its joinder and consolidation provisions in Articles 7 and 10, respectively, and a multiple contract provision in Article 9, in its edition of the ICC Rules effective from 1 January 2012, and these provisions remain unchanged in the ICC's latest edition of the ICC Rules, effective from 1 March 2017.

Article 10 of the ICC Rules permits consolidation by the International Court of Arbitration of the ICC ('ICC Court') of two or more arbitrations pending under the ICC Rules at the request of a party, provided one of three situations exist: (1) the parties have agreed to consolidation; (2) all claims are made under the same arbitration agreement; or (3) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the arbitration agreements are 'compatible'.<sup>9</sup> In deciding whether to consolidate, the ICC Court may take into account 'any circumstances it considers to be relevant', including whether one or more arbitrators have been confirmed or appointed, and if so, whether the same or different persons have been confirmed or appointed. Arbitrations are consolidated into the arbitration that commenced first, unless the parties agree otherwise.

Article 10 therefore permits consolidation in the case of two or more proceedings involving multiple parties to a single agreement under paragraph (b), and the same parties under multiple agreements arising 'in connection with the

<sup>9</sup> See the discussion in s. 6.3 below on the meaning of 'compatible' arbitration agreements in the context of the SIAC Rules case study.

same legal relationship' under paragraph (c). In both cases, consents are not required from the opposing party to the applicant party, or parties (if different) to the other proceedings. However, in the absence of agreement, Article 10 does not permit consolidation involving multiple parties to multiple agreements, for example, in a construction context involving proceedings between the owner and main contractor at head contract level, and between the main contractor and subcontractor at subcontract level.

The ICC also introduced in Article 9 a provision which allows claims arising out of or in connection with more than one contract to be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the rules, subject to the ICC Court being 'prima facie' satisfied (1) that the arbitration agreements under which the claims are made may be compatible; and (2) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.<sup>10</sup>

Pursuant to Article 7(1), a party can file a request for joinder against an additional party, either before an arbitrator is appointed, or after the confirmation or appointment of any arbitrator, but in the latter case, only if all the parties, including the additional party, agree. In both cases, consolidation is only possible if there is an arbitration agreement under the ICC Rules that binds all the parties, and the ICC Court determines all applications.

The date on which the request is received by the ICC shall be deemed to be the commencement of arbitration against the additional party.

Article 7(1) therefore represents a departure from the principle of party autonomy since it compels an additional party to be joined to an existing arbitration in a multiparty contract situation without either the additional party's consent, or the consent of the opposing party in the existing arbitration.<sup>11</sup> An additional party has no right to apply to be joined to existing proceedings, sometimes referred to as 'intervention'. Articles 7(2) and 7(4), respectively set out the requirements for the content of the request for joinder and an answer to the request for joinder from the additional party. There are no express provisions which allow the opposing party to comment on the request for joinder, or the circumstances which the ICC Court take into account in deciding the request for joinder.

Article 7(1) should be read with Article 6(4)(i) of the ICC Rules, which relates to the ICC Court being 'prima facie' satisfied that an arbitration agreement binding all parties may exist, and also Article 12(7) and (8), which deal with the constitution of the arbitral tribunal in case of joinder of an additional party.

<sup>10</sup> ICC Rules, Art. 6(4).

<sup>11</sup> The author refers to 'party autonomy' in the context of an express agreement in relation to joinder and/or consolidation, as distinct from the parties agreed arbitral rules, which in the strict meaning of the term, reflect party autonomy.

Article 7(1) contains a temporal limitation since a party to an existing arbitration can make an application to compel an additional party to be joined without the agreement of all parties only if no arbitrator has been appointed. This provision also ensures that the additional party's right to participate in the constitution of the arbitral tribunal is protected.

### 5.3 SWISS RULES

The latest edition of the Swiss Rules, effective from 1 June 2012, contains joinder and consolidation provisions of wide scope in Articles 4.2 and 4.1, respectively.

Pursuant to Article 4.1, the Swiss Arbitration Court (SAC) has the power to consolidate two or more arbitrations without the consent of any party, and without any application by a party. The SAC's power to consolidate includes situations where the parties in the two arbitrations are not identical, which covers situations of both multiple parties to a single contract, and multiple parties to multiple contracts.

Article 4.1 obliges the SAC, in deciding to consolidate, after consulting with the parties and any confirmed arbitrator in all proceedings, to take into account all relevant circumstances, including 'the links between the cases', and 'the progress already made in the pending arbitral proceedings'. The former is likely to include matters such as any common questions of law or fact, and whether the reliefs claimed arise out of the same transaction or series of transactions, and the latter is likely to include an assessment of the stage of the pending proceedings, such as exchanges of pleadings, witness statements, expert reports, etc.

Article 4.1 provides that, in the case of consolidation, the parties shall be deemed to have waived their right to designate an arbitrator, and the SAC may revoke the appointment of any arbitrator, and apply the provisions of section II of the Swiss Rules, which includes in Article 8 a procedure for the appointment of arbitrators in multiparty proceedings where the parties have not agreed a procedure.

Article 4.2 allows both an additional party to request to participate in a pending arbitration, and any party to a pending arbitration to request an additional party to participate in the arbitration. The arbitral tribunal is obliged to decide the request, after consulting with all of the parties, including the additional party, 'taking into account all relevant circumstances'.

Article 4.2 therefore represents a departure from the principle of party autonomy since it compels an additional party to be joined to an existing arbitration in a multiparty contract situation without either the additional party's consent, or the consent of the opposing party in the existing arbitration, and allows an additional party to be joined without the consent of either party to the existing arbitration.

#### 5.4 SCC RULES

The Arbitration Institute of the SCC recently issued its amended SCC Rules, effective from 1 January 2017, by enhancing its consolidation provision in Article 15, and including for the first time both a joinder provision in Article 13, and a multiple contract provision in Article 14.

Pursuant to Article 15(1) of the SCC Rules, at the request of a party, the SCC Board has the power to consolidate a newly commenced arbitration with a pending arbitration if (1) the parties agree; (2) all claims are made under the same arbitration agreement; or (3) where the claims are made under more than one arbitration agreement, the relief sought arises out of the same transaction or series of transactions, and the SCC Board considers the arbitration agreements to be compatible.

Article 15(2) obliges the SCC Board to consult with the parties and the arbitral tribunal, and have regard to (1) the stage of the pending arbitration; (2) the efficiency and expeditiousness of the proceedings; and (3) any other relevant circumstances. Pursuant to Article 15(3), where the SCC Board decides to consolidate, it may release any arbitrator already appointed.

The SCC Board's power to consolidate includes situations where the parties in the two arbitrations are not identical, which covers situations of both multiple parties to a single contract under paragraph (ii), and multiple parties to multiple contracts under paragraph (iii).

Article 14(1) permits a party to make claims arising out of or in connection with more than one contract in a single arbitration. Pursuant to Article 14(2), if any party raises any objections as to whether all of the claims made against it may be determined in a single arbitration, the claims may proceed in a single arbitration provided that the SCC does not manifestly lack jurisdiction over the dispute between the parties.

Pursuant to Article 14(3), in deciding whether the claims shall proceed in a single arbitration, the SCC Board is obliged to consult with the parties and to have regard to (1) whether the arbitration agreements under which the claims are made are compatible; (2) whether the relief sought arises out of the same transaction or series of transactions; (3) the efficiency and expeditiousness of the proceedings; and (4) any other relevant circumstances.

Pursuant to Article 13(1), a party to an existing arbitration may request that the SCC Board join one or more additional parties to the arbitration. A party requesting joinder is required to submit a request for joinder as early as possible, and there is a temporal restriction in Article 13(2), which provides that a request for joinder made after submission of an answer shall not be considered, unless the SCC Board decides otherwise. Pursuant to Article 13(6), in deciding to join one or more additional



parties, the SCC Board is obliged to consult with the parties, and shall have regard to the same standard as for multiple contracts set out in Article 14(3).

Article 13(1) therefore represents a departure from the principle of party autonomy since it compels an additional party to be joined to an existing arbitration without either the additional party's consent, or the consent of the opposing party in the existing arbitration. An additional party has no right to intervene in the existing proceedings.

Pursuant to Article 14(8), where the additional party does not agree to any arbitrator already appointed, the SCC Board may release the arbitrators and appoint the entire arbitral tribunal, unless all parties, including the additional party, agree on a different procedure for the appointment of the arbitral tribunal.

## 5.5 LCIA RULES

The LCIA introduced a limited joinder provision in its 1998 revision of its rules, and in its latest revision of the LCIA Rules, effective from 1 October 2014, introduced consolidation provisions.

Articles 22.1(ix) and (x) of the LCIA Rules permit the arbitral tribunal to consolidate arbitrations in two situations: first, pursuant to Article 22.1(ix), where the parties agree in writing, and with the approval of the LCIA Court; and secondly, pursuant to Article 22.1(x), where multiple arbitrations have been commenced under the same arbitration agreement, or under compatible arbitration agreements, between the same parties, provided that the arbitral tribunal has not been formed for the other arbitration(s), or if already formed, that such tribunal is composed of the same arbitrators. Article 22.6 grants a similar power to consolidate proceedings to the LCIA Court where no tribunal has yet been constituted.

Article 22.1(x) therefore restricts consolidation to two or more proceedings involving the same parties, and, absent agreement of the parties, the LCIA Rules do not permit consolidation of two or more proceedings involving one or more different parties.

Article 22.1(viii) of the LCIA Rules permits joinder of an additional party to the arbitration upon the application of a party, subject to the consent of the additional party and the applicant party. Article 22.1(viii) represents a departure from the principle of party autonomy since it allows an additional party to be joined to an existing arbitration in a multiparty contract situation without the consent of the opposing party in the existing arbitration. However, Article 22.1(viii) is in narrower terms than the other Rules considered in this article, since it requires the consent of the additional party, and intervention by an additional party is not permitted.

## 5.6 SIAC RULES

SIAC has significantly expanded the limited joinder mechanism in Rule 24(b) of the fifth edition of the SIAC Rules in its latest edition effective from 1 August 2016, by including a new joinder provision of wide scope in Rule 7, and a new consolidation provision in Rule 8, in addition to Rule 6, which allows a claimant to commence arbitration proceedings in disputes involving multiple contracts and parties. Rules 6, 7, and 8 extend joinder and consolidation significantly further than most institutional rules.

The consolidation provisions themselves are contained in Rule 8, which must be read with Rule 6. The two provisions together allow a claimant either to apply to consolidate two or more arbitrations in filing its notice or notice(s) of arbitration, pursuant to Rule 6, or any party to apply for consolidation of two or more arbitrations, pursuant to Rule 8, after commencement of the arbitrations.

Rule 6.1 allows a claimant, where there are disputes arising out of or in connection with more than one contract, *either* to file a notice of arbitration in respect of each arbitration agreement, and concurrently submit an application to consolidate the arbitrations pursuant to Rule 8.1 (discussed below),<sup>12</sup> *or*, file a single notice of arbitration in respect of all arbitration agreements, which must include a statement identifying each contract and arbitration agreement invoked and a description of how the applicable criteria under Rule 8.1 (discussed below) are satisfied.<sup>13</sup>

A party seeking consolidation of two or more arbitrations has two options. First, it may file an application with the registrar under Rule 8.1 for the SIAC Court under Rule 8.4 to grant consolidation prior to constitution of any of the tribunals in the arbitrations sought to be consolidated; or secondly, await constitution of the arbitral tribunal and apply to the arbitral tribunal for consolidation under Rule 8.7. Note however, a party's failed application to the SIAC Court under Rule 8.1 does not preclude the party from applying for consolidation again to the arbitral tribunal, once constituted, under Rule 8.7.

The ability to make two applications for consolidation, first to the SIAC Court, and in the event of a failed application, secondly, to the arbitral tribunal is unique to the SIAC Rules.<sup>14</sup> All other arbitral institution rules contemplate only a single application to a single body.<sup>15</sup>

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<sup>12</sup> Pursuant to Rule 6.1(a).

<sup>13</sup> Pursuant to Rule 6.1(b).

<sup>14</sup> Please refer to the author's comments in s. 6 below that there is no express prohibition in either the HKIAC or the ACICA Rules in a party applying for joinder again to the arbitral tribunal after a failed application to the arbitral institution.

<sup>15</sup> With the exception of Art. 4 of the Swiss Rules, which does not expressly refer to an application by a party.

With respect to the first option, a party, pursuant to Rule 8.1, prior to constitution of any of the tribunals in the arbitrations sought to be consolidated, may file an application with the registrar to consolidate two or more arbitrations pending under the Rules into a single arbitration, provided one of the following three criteria is satisfied:

- all parties have agreed to the consolidation;<sup>16</sup> or
- all the claims in the arbitrations are made under the same arbitration agreement;<sup>17</sup> or
- the arbitration agreements are compatible, and (1) the disputes arise out of the same legal relationship(s); (2) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or (3) the disputes arise out of the same transaction or series of transactions.<sup>18</sup>

Pursuant to Rule 8.4, the SIAC Court shall, ‘after considering the views of all parties’, and having regard to the circumstances of the case, decide whether to grant, in whole or in part, any application for consolidation under Rule 8.1, without prejudice to either the tribunal’s power to subsequently decide any question as to its jurisdiction arising from such decision, or any party’s right to file an application with the tribunal to consolidate the arbitrations pursuant to Rule 8.7 (discussed below).

Pursuant to Rule 8.6, where an application for consolidation is granted under Rule 8.4, the SIAC Court may revoke the appointment of any arbitrators appointed prior to the decision on consolidation, and unless otherwise agreed by the parties, Rules 9 to 12 apply as appropriate to appointment of the tribunal, with the timelines running from the date of receipt of the SIAC Court’s decision under Rule 8.4. Since a party is not permitted to apply for consolidation under Rule 8.1 after constitution of any tribunal, revocation of the appointment of an arbitrator under Rule 8.6 can only apply to a party nominated or appointed arbitrator in a three person tribunal.

It is also implicit from the terms of Rule 8.1 that if a tribunal has already been constituted in any of the arbitrations sought to be consolidated, an application to the SIAC Court under Rule 8.1 is not permitted, and a party seeking consolidation of two or more arbitrations must apply to the arbitral tribunal under Rule 8.7.

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<sup>16</sup> Pursuant to Rule 8.1(a).

<sup>17</sup> Pursuant to Rule 8.1(b).

<sup>18</sup> Pursuant to Rule 8.1(c).

With respect to the second option, a party, pursuant to Rule 8.7, may apply to the tribunal to consolidate two or more arbitrations pending under the Rules into a single arbitration, provided one of the following three criteria is satisfied:

- all parties have agreed to consolidation;<sup>19</sup>
- all claims in the arbitrations are made under the same arbitration agreement, and the same tribunal has been constituted in each of the arbitrations or no tribunal has been constituted in the other arbitrations(s);<sup>20</sup>
- the arbitration agreements are compatible, the same tribunal has been constituted in each of the arbitrations or no tribunal has been constituted in the other arbitrations(s), and (1) the disputes arise out of the same legal relationship(s); (2) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or (3) the disputes arise out of the same transaction or series of transactions.<sup>21</sup>

Pursuant to Rule 8.9, the arbitral tribunal shall, after giving all parties the opportunity to be heard, and having regard to the circumstances of the case, decide whether to grant, in whole or in part, any application for consolidation under Rule 8.7, without prejudice to the tribunal's power subsequently to decide any question as to its jurisdiction arising from such decision, and any arbitrations that are not consolidated shall continue as separate arbitrations under the Rules.

Pursuant to Rule 8.10, where an application for consolidation is granted under Rule 8.9, the SIAC Court may revoke the appointment of any arbitrators appointed prior to the decision on consolidation.

The joinder provisions set out in Rule 7 of the SIAC Rules are similar in some respects to the procedure for consolidation under Rule 8. Similarly to the consolidation provisions, a party seeking to join an additional party to the arbitration proceedings, or an additional party to the arbitration proceedings seeking to be joined, has two options. First, it may file an application with the registrar under Rule 7.1 for the SIAC Court under Rule 7.4 to grant joinder prior to constitution of the tribunal; or secondly, await constitution of the tribunal and apply to the tribunal for joinder under Rule 7.8. Note, however, a party's failed application to the SIAC Court under Rule 7.1 does not preclude the party from applying again to the tribunal, once constituted, under Rule 7.8.

The criteria for joinder are identical under both Rule 7.1 and Rule 7.8, and are expressed in the following terms:

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<sup>19</sup> Pursuant to Rule 8.7(a).

<sup>20</sup> Pursuant to Rule 8.7(b).

<sup>21</sup> Pursuant to Rule 8.7(c).

- the additional party to be joined is prima facie bound by the arbitration agreement (Rules 7.1(a) and 7.8(a)); or
- all parties, including the additional party to be joined, have consented to the joinder (Rules 7.1(b) and 7.8(b)).

The SIAC Court's and the tribunal's power and obligation to consider the application for joinder under Rules 7.4 and 7.10, respectively, are in identical terms to Rules 8.4 and 8.9 of the consolidation provisions, and the comments above apply equally to the terms of Rules 7.4 and 7.10.

### 5.7 HKIAC RULES

The HKIAC introduced joinder and consolidation provisions in Articles 27 and 28, respectively, in its latest edition of its rules, which became effective on 1 November 2013.

Article 28.1 permits the HKIAC to consolidate two or more arbitrations pending under the HKIAC Rules at the request of a party, provided one of three situations exist: (1) the parties agree to consolidate; (2) all claims in the arbitrations are made under the same arbitration agreement; or (3) where the claims are made under more than one arbitration agreement, a common question of law or fact arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of the same transaction or series of transactions, and the HKIAC finds the arbitration agreements to be 'compatible'.

The HKIAC's power under Article 28.1 to consolidate two or more arbitrations includes situations where the parties in the two arbitrations are not identical, which covers situations of both multiple parties to a single contract, and multiple parties to multiple contracts.

Pursuant to Article 28.3, in deciding whether to consolidate, the HKIAC shall take into account the circumstances of the case. Relevant factors may include, but are not limited to, whether one or more arbitrators have been designated or confirmed in more than one of the arbitrations, and if so, whether the same or different arbitrators have been confirmed.

Pursuant to Article 28.5, where the HKIAC decides to consolidate two or more arbitrations, the arbitrations shall be consolidated into the arbitration that commenced first, unless all parties agree or the HKIAC decides otherwise, taking into account the circumstances of the case. The HKIAC is obliged to provide copies of such decisions to all parties, and to any confirmed arbitrators in all arbitrations.

There are two waivers in Article 28, a general waiver in similar terms to Article 27.13 relating to joinder, and an express waiver on designation of an

arbitrator, together with provision for the HKIAC to appoint the arbitral tribunal, in the following terms:

Where HKIAC decides to consolidate two or more arbitrations, the parties to all such arbitrations shall be deemed to have waived their right to designate an arbitrator, and HKIAC may revoke the appointment of any arbitrators already designated or confirmed. In these circumstances, HKIAC shall appoint the arbitral tribunal in respect of the consolidated proceedings.

The HKIAC has also published a *Practice Note on Consolidation of Arbitrations*, effective from 1 January 2013 ('Hong Kong Practice Note'), which sets out the requirements for content of the request for consolidation, and any comments on the request.

Pursuant to Article 27.1, the arbitral tribunal shall have the power to allow an additional party to be joined to the arbitration provided that, prima facie, the additional party is bound by an arbitration agreement under the HKIAC Rules giving rise to the arbitration. Articles 27.3 and 27.6, respectively, set out the right for a party wishing to join an additional party, and an additional party wishing to be joined as an additional party, to submit a request to the HKIAC. Article 27.4 sets out the requirements for the content of the request, and Article 27.7 sets out the requirements for the content of comments on the request.

Article 27.1 therefore represents a departure from the principle of party autonomy since it compels an additional party to be joined to an existing arbitration in a multiparty contract situation without either the additional party's consent, or the consent of the opposing party in the existing arbitration, and allows an additional party to be joined without the consent of either party to the existing arbitration.

Pursuant to Article 27.8, if the HKIAC receives a request for joinder before the date on which the arbitral tribunal is confirmed, the HKIAC decides whether, prima facie, the additional party is bound by an arbitration agreement, and may join the additional party to the arbitration.

Pursuant to Article 27.11, where an additional party is joined to the arbitration before the date on which the arbitral tribunal is confirmed, all parties to the arbitration shall be deemed to have waived their right to designate an arbitrator, and the HKIAC may revoke the appointment of any arbitrators already designated or confirmed, and the HKIAC shall appoint the arbitral tribunal.

There is no equivalent express waiver as in the consolidation provisions (discussed above) in the case of a request for joinder made to the arbitral tribunal, but Article 27.13 contains a general waiver that the parties waive any objection, on the basis of any decision to join an additional party to the arbitration, to the validity and/or enforcement of any award made by the arbitral tribunal in the arbitration, in so far as such waiver can validly be made.

## 5.8 ACICA RULES

The ACICA introduced joinder and consolidation provisions in Articles 15 and 14, respectively, in its latest edition of the ACICA Rules, which became effective on 1 January 2016. However, pursuant to Article 2.5 of the ACICA Rules, the provisions in Articles 14 and 15 do not apply if the arbitration agreement was concluded before the date on which the new edition came into force, unless otherwise agreed by the parties.

Article 14.1 permits the ACICA to consolidate two or more arbitrations pending under the ACICA Rules at the request of a party, provided one of three situations exist: (1) the parties have agreed to the consolidation; (2) all claims in the arbitration are made under the same arbitration agreement; or (3) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, a common question of law or fact arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of the transaction or series of transactions, and the ACICA finds the arbitration agreements to be ‘compatible’.

The terms of Articles 14.1(a) and (b) are in almost identical terms to Articles 10(a) and (b) of the ICC Rules. Article 14.1(c) is in similar terms to Article 10(c) of the ICC Rules, except arguably it is narrower in scope, applying only where ‘a common question of law or fact arises in both or all of the arbitrations’ and ‘arise out of the transaction or series of transactions’, compared to ‘arise in connection with the same legal relationship’ in the ICC Rules.<sup>22</sup>

The ACICA provisions are in similar terms to the equivalent provisions in the HKIAC Rules, except that Article 14.1(c) is in narrower terms, applying only where the arbitrations are between the same parties, thereby precluding consolidation involving multiple parties to multiple agreements. The ACICA has also published, effective from 1 May 2017, a document entitled, *Protocol for Decisions on Applications for Consolidation and Joinder and Challenges to Arbitrators under the ACICA Rules 2016*, which sets out the details for the ACICA Council to decide applications for joinder and consolidation (‘ACICA Protocol’).

Pursuant to Article 15.1, the arbitral tribunal, upon request by a party or a third party, shall have the power to allow an additional party to be joined to the arbitration provided that, prima facie, the additional party is bound by the same arbitration agreement between the existing parties to the arbitration.

Article 15.1 represents a departure from the principle of party autonomy since it compels an additional party to be joined to an existing arbitration in a multiparty

<sup>22</sup> ICC interprets the phrase ‘the same legal relationship’ broadly. See the discussion of ICC cases in Lara M Pair & Paul Frankenstein, *The New ICC Rule on Consolidation: Progress or Change?*, 25 Emory Int’l L. Rev. 1061, 1075 (2011).

contract situation without the consent of the opposing party in the existing arbitration, and it compels an additional party to be joined upon application by the additional party without the consent of either party to the existing arbitration. Article 15.1 is therefore in wider terms than Article 7 of the ICC Rules, since it allows an additional party to intervene in an existing arbitration.

The reference in Article 15.1 to a prima facie test is a reference to the possibility that a non-signatory to the arbitration agreement may be bound by the arbitration agreement. Articles 15.2 to 15.9 of the ACICA Rules set out a detailed procedure for the application and responses from the parties.

Pursuant to Article 2.5, the provisions of Articles 14 and 15 apply only if the arbitration agreement was concluded before the new version of the Rules came into force, being 1 January 2016, unless otherwise agreed by the parties.

## 5.9 UNCITRAL RULES

UNCITRAL introduced a joinder provision in Article 17(5) in its edition of its Rules effective on 15 August 2010, and remains in its 2013 edition of the Rules. The UNCITRAL Rules do not contain a provision for consolidation of arbitral proceedings. The UNCITRAL working group discussed the issue of consolidation in some detail, and prepared a draft rule for consideration. However, the working group decided not to include a consolidation provision due to doubts as to the feasibility of applying the provision in the context of non-administered arbitration, and the scope of a consolidation provision.<sup>23</sup>

Pursuant to Article 17(5), only additional parties who are parties to the arbitration agreement may be joined. Both an existing party and an additional party can apply for an additional party to be joined. In the former case, consents of the opposing party and the additional party are not required, and in the latter case, consents of the existing parties are not required.

## 6 COMPARATIVE ANALYSIS OF JOINDER AND CONSOLIDATION PROVISIONS

### 6.1 INTRODUCTION

Whilst each of the ICC, Swiss, SCC, SIAC, LCIA, HKIAC, ACICA, and UNCITRAL Rules contain provisions for joinder and/or consolidation, there are significant differences among the Rules on the scope and operation of the

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<sup>23</sup> David D Caron & Lee M Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 58 (Oxford University Press 2012).



provisions. The author discusses in this section of the article the similarities and differences of the joinder and consolidation provisions among the Rules, applying the criteria listed in section 4 above.

## 6.2 JOINDER PROVISIONS

### 6.2[a] *Which Party or Parties Can Apply for Joinder of an Additional Party?*

The Swiss, SIAC, HKIAC, ACICA, and UNCITRAL Rules all permit both joinder and intervention,<sup>24</sup> that is, a party to existing proceedings can request for an additional party to be joined to the proceedings, and an additional party can request to be joined, or intervene, in the proceedings.

In the case of an additional party's desire to submit an application to be joined to proceedings, in light of the confidential nature of arbitration proceedings, there may be practical difficulties as to whether the additional party has both knowledge of the existence of the proceedings, and the details of such proceedings, to decide whether to make an application, and if so, the content of its application.

The Rules are not clear on confidentiality of information disclosed during the application process. Notwithstanding that all parties will be parties to the same agreement, it would be prudent for parties to seek a separate agreement on confidentiality of the parties' submissions to the institution or tribunal, as the case may be, during the application process.

In contrast, the ICC, SCC, and the LCIA Rules restrict requests for joinder to a party to the existing proceedings, and do not permit intervention by an additional party.<sup>25</sup> As an alternative, an additional party under the ICC, SCC, and LCIA Rules may have the option of commencing separate arbitration proceedings against a party to the existing proceedings, and subsequently applying to consolidate the proceedings, sometimes referred to as 'indirect joinder'.

### 6.2[b] *Which Party May Be Joined as an Additional Party?*

The ICC, SCC, SIAC, HKIAC, and ACICA Rules all refer to one or more 'additional' parties to be joined to the arbitration,<sup>26</sup> and in each case, with the exception of the ICC and SCC Rules, the decision-maker, whether the relevant institution or an arbitral tribunal, is obliged to be 'prima facie' satisfied that the

<sup>24</sup> Swiss Rules, Art. 4.2; SIAC Rules, Rules 7.1 and 7.8; HKIAC Rules, Arts 27.1 and 27.8; ACICA Rules, Arts 15.1 and 15.8; and UNCITRAL Rules, Art. 17(5).

<sup>25</sup> ICC Rules, Art. 7(1); SCC Rules, Art. 13(1); and LCIA Rules, Art. 22.1(viii).

<sup>26</sup> ICC Rules, Art. 7(1); SCC Rules, Art. 13(5); SIAC Rules, Rules 7.1(a) and 7.8(a); HKIAC Rules, Arts 27.1 and 27.8; and ACICA Rules, Arts 15.1 and 15.8.

arbitration agreement binds all parties. In the case of the ICC Rules, Article 6(4)(i) refers to the ICC Court being ‘prima facie satisfied that an arbitration agreement under the Rules which binds them all may exist’, and in the case of the SCC Rules, Article 13(5) requires that the SCC must ‘not manifestly lack jurisdiction over the dispute between the parties, including any additional party’.

Article 4(2) of the Swiss Rules, in contrast, refers to one or more ‘third persons ... to participate in the arbitral proceedings’, and it has been suggested that this expression allows not only parties to an arbitration agreement to participate in the arbitration proceedings, but also allows parties who are not proper parties to the arbitration agreement to participate, such as in the form of an *amicus curiae*.<sup>27</sup>

Since Article 22.1(viii) of the LCIA Rules refers to the joining of ‘one or more third persons’, and requires consent of all parties for joinder, no jurisdiction issues arise, and as such, there is technically scope for non-parties to an arbitration agreement being joined by agreement.

The ‘prima facie’ test is a relatively low threshold, that is, it is sufficient that there is a ‘reasonable possibility’ that a common arbitration agreement ‘might be found to exist’ if the contested issues of fact and law are presented to the tribunal in more detail.<sup>28</sup>

As would be expected, the issue of jurisdiction involving the additional party is subject in all cases to a decision by the arbitral tribunal.<sup>29</sup>

#### 6.2[c] *What Consents Are Required for Joinder of an Additional Party?*

Pursuant to the Swiss, SIAC, HKIAC, ACICA, and UNCITRAL Rules, consents are not required from either the additional party or the opposing party to the arbitration proceedings in the case of an application by an existing party for an additional party to be joined, and consents are similarly not required from the existing parties in an application by an additional party to be joined to the proceedings.

As noted above, intervention by an additional party is not permitted under the ICC, SCC, or the LCIA Rules. Pursuant to the SCC Rules, in an application by an existing party, consents are not required from either the additional party or the opposing party to the arbitration proceedings. The ICC Rules are similar, but contain the additional restriction that no consents are required for joinder of an additional party prior to the appointment of an arbitrator, but consents of all parties are required after appointment of an arbitrator.

<sup>27</sup> See Tobias Zuberhuhler, Christopher Muller, Philipp Habegger, *Swiss Rules of International Arbitration* 253 (2d ed. 2013).

<sup>28</sup> See Andrea Meier, *Commentary on the ICC Rules, Introduction to Articles 7–10 ICC Rules*, in *Arbitration in Switzerland: The Practitioner’s Guide* (Manuel Arroyo ed., Kluwer Law International 2013).

<sup>29</sup> ICC Rules, Art. 6(3) and (5); SCC Rules, Art. 13(7); Swiss Rules, Art. 21(1); SIAC Rules, Rules 7.4 and 7.10; HKIAC Rules, Arts 27.2 and 27.8; and ACICA Rules, Arts 15.1 and 15.8.

The LCIA Rules are the most restrictive in requiring, in an application by an existing party, consent from the additional party, but not from the opposing party in the arbitration proceedings.

The differences among the Rules as to consents required for an additional party to be joined to the proceedings, and whether intervention should be permitted, reflect institutional differences in philosophy on the extent to which the rules should impinge upon party autonomy.

#### 6.2[d] *At What Stage Can a Party Apply for Joinder?*

With respect to the timing of a party's application for joinder, the SIAC, HKIAC, and ACICA Rules are the most flexible, allowing requests for joinder to be decided by the SIAC Court, the HKIAC, and the ACICA, respectively, pre-constitution of the arbitral tribunal, and requests for joinder to be determined by the arbitral tribunal post-constitution of the tribunal. The SIAC Rules expressly allow a party to apply again to the arbitral tribunal for joinder where the SIAC Court rejects an application for joinder.<sup>30</sup> Whilst neither the HKIAC nor the ACICA Rules expressly allow a further application to the arbitral tribunal in the case of a failed application to the HKIAC or ACICA, there is no prohibition on a further application.

There is no temporal restriction on a party's request for joinder under the Swiss, LCIA, SIAC, HKIAC, ACICA, or UNCITRAL Rules. The SCC Rules contain a temporal restriction that no request for joinder made after submission of the answer will be considered, unless the SCC Board considers otherwise.<sup>31</sup> In contrast, joinder is a pre-arbitrator appointment issue under the ICC Rules, to be determined by the ICC Court, and no additional party may be joined after confirmation or appointment of any arbitrator, unless all parties, including the additional party, agree otherwise.

#### 6.2[e] *Which Tribunal or Body Decides the Application for Joinder?*

As noted above, joinder is a pre-arbitrator appointment issue under the ICC Rules, and the ICC Court determines all applications for joinder. Pursuant to the Swiss, SCC, LCIA, and UNCITRAL Rules, respectively, joinder is a post-constitution of the arbitral tribunal issue, since in each case the arbitral tribunal decides all applications for joinder.

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<sup>30</sup> SIAC Rules, Rule 7.4.

<sup>31</sup> SCC Rules, Art. 13(2).

As noted above, under the SIAC, HKIAC, and ACICA Rules, the SIAC Court, HKIAC, and ACICA, respectively, determine joinder pre-constitution of the arbitral tribunal, and requests for joinder are determined by the arbitral tribunal post-constitution of the tribunal.

The SIAC Rules are unique in expressly allowing a party to apply for joinder to the SIAC Court pre-constitution of the arbitral tribunal, and if unsuccessful, apply again to the arbitral tribunal post-constitution of the arbitral tribunal.<sup>32</sup>

#### 6.2[f] *What Are the Requirements for the Content of the Application?*

The ICC, SCC, SIAC, HKIAC, and ACICA Rules all stipulate in some detail the requirements for the content of an application for joinder and an answer to the application, and in the case of the SIAC, HKIAC, and ACICA Rules, in respect of both an application by an existing party and an additional party.

The SIAC, HKIAC, and ACICA Rules are the only Rules which expressly provide for the applicant to submit a copy of the application for joinder to all other parties.<sup>33</sup> The ICC Rules provide for the ICC to distribute copies of an application to the other parties.<sup>34</sup>

Pursuant to Article 7(2) of the ICC Rules, the request for joinder shall contain (1) the case reference of the existing arbitration; (2) the names, description, address, and other contact details of all parties; and (3) the information specified in Article 4(3)(c), (d), (e), and (f), the request for arbitration provision, being a description of the nature and circumstances of the dispute, a statement of the relief sought, any relevant agreements, and an indication of the arbitration agreement under which each claim is made.

Pursuant to Article 7(4) of the ICC Rules, the additional party shall submit an answer to the request for joinder in accordance with Article 5(1) to (4), the answer to the request for arbitration provision. The key distinction between the procedure under the ICC Rules, and the procedure under the Swiss, SCC, SIAC, HKIAC, and ACICA Rules is that the ICC Rules only provide for submissions from the requesting party, and the party against whom the request is made, and not from the opposing party or parties to the arbitration proceedings.

Rules 7.4 and 7.10 of the SIAC Rules set out the requirements for the content of an application under Rule 7.1, to the SIAC Court, and Rule 7.8, to

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<sup>32</sup> Note, however, there is no prohibition in the HKIAC Rules and ACICA Rules, respectively, on submitting an application for joinder to the arbitral tribunal, once constituted, in the event that the HKIAC or ACICA reject an application.

<sup>33</sup> HKIAC Rules, Art. 27.4(j); ACICA Rules, Art. 15.4(j); and SIAC Rules, Rule 7.3.

<sup>34</sup> Pursuant to the joinder provision in ICC Rules, Art. 7(3), the terms of Art. 4(4) and (5) apply, which set out respectively the number of copies to be submitted and the ICC's obligation to issue the application to other parties.

the arbitral tribunal, respectively, and include the relevant case reference numbers, the contact details, if known, of all parties and their representatives, and any arbitrators who have been nominated or appointed.

Neither the Swiss nor the LCIA Rules contain any express procedure for a joinder application, thereby giving the arbitral tribunal wide discretion to determine a suitable procedure in individual cases.<sup>35</sup>

The ICC, HKIAC, and ACICA Rules do not expressly refer to a procedure for hearing the joinder application, other than the exchange of submissions referred to above, and a reference to the jurisdictional criteria discussed below. This may reflect the requirements in these rules for detailed content of the application and response.

Pursuant to Article 13(6) of the SCC Rules, in deciding whether to grant the request for joinder, the SCC Board ‘shall consult with the parties and shall have regard to subparagraphs (i)–(iv) in Article 14(3)’.

Article 4.1 of the Swiss Rules requires the arbitral tribunal to make a decision on a request for joinder, ‘after consulting with the parties and any confirmed arbitrator in all proceedings pending under these Rules’. Similarly, Article 22.1 (viii) of the LCIA Rules obliges the arbitral tribunal, in deciding whether to join a party, to do so ‘only after giving the parties a reasonable opportunity to state their views’. The Swiss and LCIA Rules therefore give the arbitral tribunal wide discretion to decide on its own procedure for the joinder application.

Rule 7.4 of the SIAC Rules, in the case of an application for joinder to the SIAC Court, obliges the SIAC Court to decide the application, ‘after considering the views of all parties, including the additional party’, and Rule 7.10 of the SIAC Rules, in the case of an application to the arbitral tribunal, obliges the tribunal to decide the application, ‘after giving all parties the opportunity to be heard’. The author suggests the difference in language reflects the arbitral tribunal’s due process obligation.

#### 6.2[g] *What Factors Does the Decision-Maker Take into Account in Deciding Whether to Join an Additional Party to the Existing Proceedings?*

The decision on joinder, whether made by the arbitral institution or the arbitral tribunal, as the case may be, is discretionary under all Rules. The Rules vary from

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<sup>35</sup> In the case of the Swiss Rules, Peter Wolfgang, ‘Some Observations on the New Swiss Rules of International Arbitration’ (Jusletter 12 July 2004), n. 18, refers to the drafters as not considering it practicable to set out a ‘comprehensive designation of all conceivable scenarios’, and preferred to indicate that consolidation of arbitral proceedings and the participation of third parties may be ordered, thus affording the appropriate bodies (the Chamber, or the Arbitral Tribunal, as applicable) the necessary flexibility in deciding on each individual case.

being silent on the factors the arbitral institution or arbitral tribunal, as the case may be, take into account in deciding an application, to describing in wide terms such circumstances.

The ICC, LCIA, HKIAC, and ACICA Rules do not specify the circumstances taken into account in considering an application for joinder. However, pursuant to Article 7(2) of the ICC Rules, the party filing the request for joinder may submit 'such other documents or information as it considers appropriate or as may contribute to the efficient resolution of the dispute', which suggests the ICC Court would take into account the efficiency of dealing with the disputes among the parties in a single consolidated arbitration.

The Swiss Rules refer to the arbitral tribunal 'taking into account all relevant circumstances',<sup>36</sup> and the SIAC Rules refer to the SIAC Court's and arbitral tribunal's obligation in terms of 'having regard to the circumstances of the case'.<sup>37</sup> The SCC Rules are the most detailed, and refer to the SCC Board's obligation, where claims are made under more than one arbitration agreement, to 'have regard' to the matters set out in Article 14(3),<sup>38</sup> being whether the arbitration agreements 'are compatible', whether the relief sought 'arises out of the same transaction or series of transactions', the 'efficiency and expeditiousness of the proceedings', and 'any other relevant circumstances'.

The author submits that in all cases, whether the decision on joinder is made by the arbitral tribunal or the arbitral institution, the decision-maker will assess whether it is more efficient and cost-effective to grant the application for joinder, and this will include consideration of the legal, factual, and technical connections between the pending arbitration and an arbitration involving the additional party, and the stage of the pending arbitration. The more advanced the pending arbitration, the less likely that joinder will be approved, since substantial delay and/or disruption to arbitration proceedings already substantially progressed is unlikely to be viewed as more efficient or cost-effective. In making its assessment, the decision-maker is likely to consider a global view as to efficiency and cost-effectiveness, since it is likely to be the case that one party will have a lesser involvement in an overall dispute than the other parties.

There is no requirement in any of the Rules for the decision-maker, whether the arbitral institution, or the arbitral tribunal, to give reasons for its decision on an application for joinder. On the contrary, with respect to decisions by the arbitral

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<sup>36</sup> Swiss Rules, Art. 4.2.

<sup>37</sup> SIAC Rules, Rules 7.4 and 7.10, respectively.

<sup>38</sup> SCC Rules, Art. 13(6).

institution, the SIAC,<sup>39</sup> HKIAC,<sup>40</sup> and ACICA,<sup>41</sup> expressly state that the relevant institution has no obligation to provide reasons for any decision. Where the arbitral tribunal is obliged to decide on joinder under the relevant rules, it is likely that the arbitral tribunal will issue reasons at least in summary form.

#### 6.2[h] *When Does the Arbitration with an Additional Party Commence?*

The ICC, SCC, SIAC, HKIAC, and ACICA Rules, all stipulate that the date of receipt of the application for joinder by the relevant arbitral institution is deemed to be the date of commencement of the arbitration in respect of the additional party.<sup>42</sup> The LCIA and the Swiss Rules are silent as to commencement of the arbitration in respect of the additional party. In the case of the LCIA Rules, this is likely to reflect the limited means by which an additional party can be joined.

### 6.3 CONSOLIDATION PROVISIONS

#### 6.3[a] *Which Party or Parties Can Apply for Consolidation?*

The ICC, SCC, SIAC, HKIAC, and ACICA Rules all permit any party to any pending arbitration to apply to consolidate two or more arbitrations, subject to satisfaction of the criteria in the various rules.<sup>43</sup> Unlike the SCC, SIAC and HKIAC Rules, both the ICC and ACICA Rules require that where claims are made under more than one arbitration agreement, the arbitrations must be between the same parties, thereby precluding consolidation of proceedings among multiple parties to multiple contracts. The LCIA provisions on consolidation are the most restrictive. Consolidation of proceedings under the LCIA Rules involving different parties is only by agreement, whilst consolidation of two or more proceedings involving the same parties can be ordered by an arbitral tribunal, provided no arbitral tribunal has yet been formed for the other arbitration(s), or if formed, the same arbitrators have been appointed.

<sup>39</sup> SIAC Rules, Rule 40.1.

<sup>40</sup> HKIAC Rules, Art. 3.2.

<sup>41</sup> ACICA Rules, Art. 48.2. Pursuant to s. 3.3(b) of the ACICA Protocol, the ACICA Council is responsible for deciding applications for joinder received by ACICA before the date on which the arbitral tribunal is confirmed, under Art. 15.8 of the Rules. Pursuant to s. 6.4 of the ACICA Protocol, the ACICA Council is obliged to make a recommendation to ACICA on the application for joinder with a 'brief summary of the reasons'.

<sup>42</sup> ICC Rules, Art. 7(1); SCC Rules, Art. 13(3); HKIAC Rules, Art. 27.10.

<sup>43</sup> ICC Rules, Art. 10; SCC Rules, Art. 15.1; SIAC Rules, Rules 8.1 and 8.7 for applications to the SIAC Court prior to constitution of any of the tribunals in the arbitrations sought to be consolidated, and to the arbitral tribunal, once constituted; HKIAC Rules, Art. 28.1; and ACICA Rules, Art. 14.1.

The Swiss Rules differ from the other Rules, in that Article 4.1 appears to give the SAC wide discretion to decide upon consolidation on the basis of a notice of arbitration, and does not refer expressly to the requirement for a party to request consolidation. Notwithstanding the wide scope of Article 4.1, there are indications from both the SAC and commentators that the SAC will continue to take a restrictive approach to consolidation, and will only do so where a party has made an application for consolidation.<sup>44</sup>

6.3[b] *What Consents Are Required for Consolidation of Two or More Arbitrations?*

The ICC, SCC, SIAC, HKIAC, and ACICA Rules do not require the consent of the opposing party to the applicant party, or the parties to any of the other pending arbitrations, for consolidation of two or more arbitrations. The LCIA Rules require all parties to agree to consolidate two or more arbitrations involving multiple parties, but no consent is required of the opposing party where a party seeks consolidation of two or more arbitrations under the same arbitration agreement, or compatible arbitration agreements, between the same parties.

As noted above, the SAC technically does not require consent from any party for consolidation under the Swiss Rules, but in practice, the SAC will only consider consolidation of two or more arbitrations upon application by a party.

6.3[c] *At What Stage Can a Party Apply for Consolidation?*

There is no temporal limit under the Swiss, SCC, SIAC, HKIAC, or ACICA Rules for a party to apply for consolidation of two or more arbitrations. In the case of the SIAC Rules, there is an implied temporal limit on applying to the SIAC Court for consolidation of two or more proceedings since after any tribunal in any of the arbitral proceedings has been constituted, a party must apply to the arbitral tribunal.

Whilst there are no temporal limits upon an application, in making its assessment of the factors referred to below, the later the application, the less likely that a decision-maker will conclude that it is more efficient and expeditious for the proceedings to be heard as a consolidated arbitration.

The ICC Court, in contrast, in considering an application for consolidation, takes into account whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations, and if so, whether the same or different persons have been confirmed or appointed. The Secretariat's Guide to the

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<sup>44</sup> See Ruth Stackpool-Moore, *Joinder and Consolidation – Examining Best Practice in the Swiss, HKIAC and ICC Rules*, in *10 Years of Swiss Rules of International Arbitration – ASA Special Series No 44*, 28 (Nathalie Voser ed. 2016).



ICC Rules stipulates that the ICC Court will be unable to consolidate cases where an arbitrator has been appointed because it does not have the power to constitute a single tribunal absent the resignation of arbitrators or their removal by the ICC Court by agreement of the parties. The net result is that there is a temporal limit on consolidation under the ICC Rules up to the stage when an arbitrator is confirmed in more than one of the proceedings.

The LCIA Rules also contains a temporal limit on consolidation involving multiple parties, since consolidation is only possible provided that the arbitral tribunal has not been formed for the other arbitrations, but if formed, comprises the same arbitrators.

#### 6.3[d] *Which Tribunal or Body Decides the Application for Consolidation?*

Pursuant to the ICC, Swiss, SCC, HKIAC, and ACICA Rules, the arbitral institution in each case determines applications for consolidation, whether pre- or post-appointment of arbitrators or constitution of the tribunal.

Pursuant to the LCIA and SIAC Rules, the LCIA Court and the SIAC Court, respectively, determines applications for consolidation pre-constitution of any tribunal in the proceedings, and an arbitral tribunal determines applications for consolidation after constitution of any tribunal in the proceedings.

#### 6.3[e] *What Are the Requirements for the Content of the Application?*

The ICC, Swiss, SCC, LCIA, HKIAC, and ACICA Rules do not specify the requirements for the content of an application for consolidation. However, the HKIAC Practice Note sets out the requirements for content of the request for consolidation, and any comments on the request.

The SIAC Rules stipulate in some detail the requirements for the content of an application for consolidation, in similar terms to the HKIAC Practice Note. Rules 8.2 and 8.8 of the SIAC Rules set out the requirements for the content of an application under Rules 8.1 (to the SIAC Court) and 8.7 (to the arbitral tribunal), respectively, which includes the relevant case reference numbers, the contact details, if known, of all parties and their representatives, and any arbitrators who have been nominated or appointed.

The author submits that an applicant party should clearly address in its application the factors which the decision-maker is obliged to take into account in assessing the application, including the status of constitution of the tribunals, common issues of fact, law, or expert opinion between the arbitration proceedings, the current progress of the pending arbitrations, and any other matters relevant to whether consolidation proceedings would be more efficient and expeditious.

6.3[f] *What Factors Does the Decision-maker Take into Account in Deciding Whether to Consolidate Two or More Arbitration Proceedings?*

All of the Rules stipulate the circumstances in which consolidation is possible, but vary in the degree of detail specified.

Pursuant to the Swiss, SCC, HKIAC, and SIAC Rules, consolidation of two or more arbitrations is possible where the parties to those proceedings are not the same, whether or not the claims in the proceedings arise out of the same or different arbitration agreements.

However, the ICC, ACICA, and LCIA Rules are more restrictive. Pursuant to Article 10(c) of the ICC Rules, if the claims are made under more than one arbitration agreement, consolidation is only possible if the arbitrations are between the same parties, the disputes in the arbitration arise in connection with the 'same legal relationship', and the ICC Court finds the arbitration agreements to be 'compatible'. Article 14.1(c) of the ACICA Rules is in identical terms, except that rather than a reference to the 'same legal relationship', Article 10(c) stipulates that the relief claimed must 'arise out of the transaction or series of transactions', and the additional requirement for 'a common question of law or fact arises in both or all of the arbitrations'.

The expression 'compatible' arbitration agreement is used in the consolidation provisions in the ICC, SCC, LCIA, SIAC, HKIAC and ACICA Rules. Arbitration agreements specifying matters such as different seats, language of the arbitration, mechanisms for appointing arbitrators, different qualifications of arbitrators, and the number of arbitrators, are unlikely to be compatible.<sup>45</sup> However, more difficult questions arise in circumstances where one of the arbitration agreements is silent on some matters, for example, the seat or the language of the arbitration, and the tribunal is required to decide whether the agreements are sufficiently compatible to adopt the equivalent express requirements in an arbitration agreement in a related contract.<sup>46</sup> This highlights the importance of parties drafting arbitration agreements in multi-contract situations in identical terms as far as possible.

<sup>45</sup> Lara M Pair & Paul Frankenstein, *The New ICC Rule on Consolidation: Progress or Change?*, 25 *Emory Int'l L. Rev.* 1061, 1077 (2011) after reviewing relevant case law and commentator views, are of the view that two arbitration agreements will be incompatible in any of the following circumstances (1) incompatible seats; (2) incompatible languages; (3) incompatible choice of institutions; (4) incompatible applicable law either on the merits or procedurally; and (5) different number, qualification, or selection procedures for arbitrators.

<sup>46</sup> See Thomas H Webster & Dr Michael Buhler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, at paras 6-49 and 6-50 (Sweet & Maxwell 2014).

Since the consolidation provisions under each of the Rules only apply to arbitrations pending under each of the Rules, this is likely to eliminate elements of potential incompatibility in some arbitration agreements.

The LCIA Rules permit consolidation of multiple arbitrations only if commenced under the same arbitration agreement, or under compatible arbitration agreements, provided they are the same parties, and only if the arbitral tribunal has not been formed for the other arbitrations.

As noted above, the Rules vary on the factors the decision-maker will take into account in deciding an application for joinder or consolidation, but will typically include the status of constitution of the tribunals, common issues of fact, law, or expert opinion between the arbitration proceedings, the current progress of the pending arbitrations, and any other matters relevant to whether consolidation proceedings would be more efficient and expeditious.

6.3[g] *Which Tribunal Hears the Consolidation Proceedings, and How Is the Arbitral Tribunal Constituted?*

Pursuant to the ICC Rules, when arbitrations are consolidated, they are consolidated into the arbitration that commenced first, and pursuant to the LCIA Rules, the arbitration is consolidated into the only constituted arbitral tribunal.

Pursuant to the Swiss, SCC, SIAC, HKIAC, and ACICA Rules, the arbitral institution in each case may revoke the appointment of any arbitrator already appointed, and the institution may appoint the tribunal in respect of the consolidated proceedings. The Swiss, SIAC, HKIAC, and ACICA Rules also include an express waiver by parties to the right to nominate an arbitrator (or otherwise participate in constitution of the tribunal). These two provisions, taken together, are designed to ensure that all parties are treated equally in the consolidated proceedings on the appointment of the tribunal.

As noted earlier, the ICC Court, in contrast, in considering an application for consolidation, takes into account whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations, and if so, whether the same or different persons have been confirmed or appointed, and, applying the terms of the Secretariat's Guide to the ICC Rules, the net result is that there is a temporal limit on consolidation under the ICC Rules up to the stage when an arbitrator is confirmed in more than one of the proceedings.

Similarly, consolidation is only possible by the LCIA Court where no tribunal has been constituted, and by the arbitral tribunal if no arbitral tribunal has been constituted in the other arbitrations.

6.3[h] *When Does the Arbitration with an Additional Party Commence?*

Each arbitration proceedings in the consolidated proceedings retains its identify as a separate arbitration, notwithstanding that the arbitrations are consolidated. As such, each arbitration is commenced as specified in the Rules as at the date of the request for arbitration. The arbitral tribunal has the power to issue a single award covering all arbitrations, or separate awards for each arbitration, depending on the circumstances.

## 7 APPOINTMENT OF ARBITRAL TRIBUNAL

One of the principle concerns in multiparty proceedings is the appointment of arbitrators, and in particular, equality of treatment for all parties in the selection and appointment of the arbitral tribunal. Parties involved in a consolidated arbitration who did not have an opportunity to participate in selection of the tribunal have a potential ground to challenge an award under Article 34(2)(iv) of the Model Law and Article 31(2)(e) of the New York Convention.

In *Siemens AG/BKMI v. Dutco Construction Co.*,<sup>47</sup> Dutco commenced arbitration proceedings against Siemens and BKMI under the ICC Rules. Dutco appointed its party-appointed arbitrator, and each of the respondents wanted to select its own arbitrator. The ICC Court did not grant the respondents' request, and asked the two respondents to jointly appoint an arbitrator. The respondents made the appointment but subsequently challenged the award, submitting that they had not been given an equal opportunity with the claimant in appointment of the arbitral tribunal. The French Cour de Cassation annulled the award on the ground of inequality in the appointment of the tribunal.

The Swiss, SCC, SIAC, HKIAC, and ACICA Rules have addressed the issue arising from the *Dutco* case. As noted in section 6 above, under the Swiss, SCC, SIAC, HKIAC, and ACICA Rules, the arbitral institution in each case revokes the appointment of any arbitrator, and itself appoints the arbitral tribunal. These provisions in themselves should ensure that all parties to the consolidated proceedings are treated equally in the appointment of the arbitral tribunal.

In addition, the Swiss, SIAC, HKIAC, and ACICA Rules include an express waiver by parties to the right to nominate an arbitrator (or otherwise participate in constitution of the tribunal). The position is less clear on the effect of these waivers. Commentators have noted that waiver has been raised successfully in support of the exercise of the court's discretion not to set aside or refuse enforcement in numerous cases.<sup>48</sup> Whilst courts in some jurisdictions have held that

<sup>47</sup> XVII YBCA 140 (1993).

<sup>48</sup> See Bachand & Gelinas, *supra* n. 8, at 136.

parties can exclude the limited grounds for setting aside an award set out in Article 34 of the Model Law,<sup>49</sup> in other jurisdictions, such as New Zealand, courts have held Article 34 to be of fundamental importance, which parties cannot exclude.<sup>50</sup>

As also noted in section 6 above, in contrast, the ICC Court does not consolidate cases where an arbitrator has been appointed because it does not have the power to constitute a single tribunal absent the resignation of arbitrators or their removal by the ICC Court by agreement of the parties.

## 8 CONCLUSION

It is clear from the differences in approach among the institutional arbitral rules discussed in this article on the treatment of both joinder and consolidation that there is no consensus internationally on best practice for dealing with arbitrations involving multiple parties and multiple contracts. However, the ICC, Swiss, SCC, LCIA, SIAC, ACICA, and HKIAC Rules all provide a means by which arbitration proceedings involving disputes among multiple parties and/or under multiple contracts can be managed in an effective and cost-efficient manner, of varying scope.

The consolidation provisions in the ICC, SCC, LCIA, SIAC, HKIAC, and ACICA Rules apply in some circumstances only where the arbitration agreements in the underlying commercial agreements are ‘compatible’, as such it is essential for each of the commercial agreements to contain identical arbitration agreements as far as possible in relation to important matters such as the seat of the arbitration, the number of arbitrators, appointment of arbitrators, qualification of arbitrators, and the language of the arbitration.

As a general observation, the various arbitral rules can be categorized as those which take a more conservative approach on joinder and consolidation, and those which take a more aggressive approach. The ICC, LCIA, and UNCITRAL Rules fall into the former category, whilst the Swiss, SCC, HKIAC, and ACICA Rules fall into the latter category, reflecting a divergence among the arbitral institutions in their willingness to interfere with party autonomy.

The Swiss, SCC, SIAC, HKIAC, and ACICA Rules provide the widest scope for both joinder and consolidation, in terms of allowable applicants, required consents, timeframes for applications,<sup>51</sup> and the circumstances in which

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<sup>49</sup> See Ontario Supreme Court’s decision in *Noble China Inc. v. Lei* (1998) 42 O.R. (3d) 69; 42 B.L.R. (2d) 262.

<sup>50</sup> See New Zealand Court of Appeal’s decision in *Methanex Motonui Ltd. v. Joseph Spellman* CA 171/03 (June 2004).

<sup>51</sup> Subject to the comments in ss 5.8 and 6.3.6 above on the more restrictive approach to multiple party, multiple contract arbitrations under the ACICA Rules, Art. 14.1(c).

applications will be granted. SIAC's new joinder and consolidation provisions in Rules 6, 7, and 8 of the SIAC Rules provide a regime of particularly wide scope for the joinder of parties to arbitration proceedings, and for the consolidation of two or more arbitration proceedings.

Whilst joinder and consolidation provisions increase the overall efficiency and cost-effectiveness of multiparty arbitrations, those benefits are likely to vary among the parties. The benefits of joinder and consolidation provisions are often achieved at the expense of a party who is involved in a small part of a complex transaction and dispute. There may also be circumstances where a party could use its power to join third parties or consolidate arbitral proceedings in a complex commercial transaction for the purpose of coercing settlement of a dispute. These issues are particularly relevant with respect to joinder of parties without their express consent, because some parties in a complex commercial transaction may only have intended to arbitrate with their contractual counterpart.

There will be circumstances, therefore, where a party does not wish to be involved in potentially lengthy multiparty arbitration proceedings; for example, a party may have only a limited role in an overall transaction or project, may not wish to disclose a contract relationship, or may not wish to disclose to other parties in the transaction or project information of a confidential nature. Where such circumstances exist, parties may wish to exclude the operation of the relevant Rules.

In the draft version of the Rules issued by SIAC for public consultation in early 2016, the consolidation provisions in Rule 8 of the SIAC Rules applied only to arbitration agreements entered into after the SIAC Rules come into force. This provision was removed in the final version of the SIAC Rules, and by the terms of Rule 1.2, the SIAC Rules are effective from 1 August 2016, and, unless the parties have agreed otherwise, the SIAC Rules apply to any arbitration which is commenced on or after that date.

The ACICA adopted a different approach, since pursuant to Article 2.5 of the ACICA Rules, the joinder and consolidation provisions of Articles 15 and 14 apply only if the arbitration agreement was concluded before the new version of the Rules came into force, being 1 January 2016, unless otherwise agreed by the parties.

Parties should therefore review their existing arbitration agreements to assess the effect of joinder and consolidation provisions in the arbitral rules, particularly where parties have included in their agreements existing joinder, intervention, and consolidation arrangements, and assess whether these provisions are sufficient to exclude the operation of the provisions in the Rules.

Parties should also review any future arbitration agreements in light of Rules 6, 7, and 8 of the SIAC Rules, and similar provisions, to consider whether they may wish to exclude the operation of these provisions.