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Abstract

Arbitration has become one of the most preferred dispute resolution mechanisms as an alternative to domestic litigation proceedings. Being an alternative, it is at the parties' discretion, in other words, their creation of a contract, to choose arbitration over the national courts. Parties may prefer arbitration for its fast proceedings, confidentiality or due to its other qualifications.

Despite usually being a contractual relationship between two parties, the growth of commercial, technological, and financial activities has brought the involvement of multiple parties to the forefront. Accordingly, the participation of a third party, either by joinder or consolidation, has raised questions, particularly when one of the parties has not foreseen an additional party to be joined in their dispute and does not consent to such procedures.

These procedural mechanisms, also present in national litigation proceedings, serve the same purposes when applied in arbitration. In domestic litigation procedures, since the principle of party autonomy does not apply to the same extent, judges do not face issues such as obtaining the parties' consent, breaches of confidentiality, or ensuring equal participation in the constitution of the decision making body. Additionally, in domestic litigation, enforcement is generally not a concern that could make the entire litigation process futile. However, considering the advantages of preventing inconsistent awards and ensuring the proceedings' effectiveness and fairness, the joinder and consolidation mechanisms seem indispensable.

Consequently, by taking into account the parties' real intent during the drafting stage of their contracts and their expectations from arbitration, several criteria and indicators have been developed over time regarding the detection of the consent of the parties, whether explicit or implicit. These include the claims being dependent on the same arbitration agreement, arising from a single transaction or series of transactions, and the compatibility of the arbitration agreements.

In this context, this thesis is structured to determine the circumstances under which joinder and consolidation procedures can be practised and the legal reasons for overcoming arbitration specific challenges. While presenting these, the methodology is based on the developments of the arbitration rules of various arbitral institutions, including the 2020 Rules of the London Court of International Arbitration, the 2024 Rules of the Hong Kong International Arbitration Centre, the 2016 Rules of the Singapore International Arbitration Centre, the 2021 Rules of the International Chamber of Commerce, the 2023 Rules of Stockholm Chamber of Commerce and

2015 Rules of Istanbul Arbitration Centre, relevant decisions and scientific works of pioneers in arbitration studies.

Considering the advantages of these procedural mechanisms, their practice in real life, and the tendency to regulate them as specific provisions, it is evident that practising such procedural mechanisms is essential and a part of the principles of judicial economy. It should not be forgotten that arbitral tribunals also conduct extra-judicial proceedings, where party autonomy is not limitless, and to keep arbitration as an efficient dispute resolution mechanism that meets the expectations of parties in complex situations, these procedures must be performed, at least in cases where implied consent is determined by the relevant authority, either by an arbitral tribunal or an institutional body. As a principle of judicial economy, which is one of the common principles of law, it can be accepted that these procedures can be practised even in cases where the chosen arbitral rules do not contain such provisions; however, the application of such common principles of law could be a topic for further study, exploring the inherent powers of arbitral tribunals in international arbitration. Thus, this thesis aims to provide a comprehensive analysis of these mechanisms and their practical applications, offering insights into how they can enhance the effectiveness of arbitration in complex, multi-party disputes.

Keywords: joinder, consolidation, multi-party arbitration, multi-contract arbitration, international arbitration, consent.

Zusammenfassung

Die Schiedsgerichtsbarkeit hat sich als eines der bevorzugten Streitbeilegungsverfahren als Alternative zu nationalen Gerichtsverfahren etabliert. Als Alternative liegt es im Ermessen der Parteien, also in ihrer Vertragsgestaltung, die Schiedsgerichtsbarkeit den nationalen Gerichten vorzuziehen. Parteien können sich für die Schiedsgerichtsbarkeit aufgrund ihrer schnellen Verfahren, Vertraulichkeit oder anderer Qualifikationen entscheiden.

Obwohl es sich in der Regel um eine vertragliche Beziehung zwischen zwei Parteien handelt, hat das Wachstum kommerzieller, technologischer und finanzieller Aktivitäten die Beteiligung mehrerer Parteien in den Vordergrund gerückt. Dementsprechend hat die Teilnahme einer dritten Partei, entweder durch Beitritt oder Konsolidierung, Fragen aufgeworfen, insbesondere wenn eine der Parteien nicht damit gerechnet hat, dass eine zusätzliche Partei in ihren Streitfall einbezogen wird und solchen Verfahren nicht zustimmt.

Diese Verfahrensmechanismen, die auch in nationalen Gerichtsverfahren vorhanden sind, dienen denselben Zwecken, wenn sie in der Schiedsgerichtsbarkeit angewendet werden. In nationalen Gerichtsverfahren, da das Prinzip der Parteiautonomie nicht in gleichem Maße gilt, sehen sich Richter nicht mit Problemen wie die Einholung der Zustimmung der Parteien, Verletzungen der Vertraulichkeit oder die Gewährleistung gleicher Beteiligung bei der Bildung des Entscheidungsgremiums konfrontiert. Darüber hinaus ist in nationalen Gerichtsverfahren die Durchsetzung in der Regel kein Problem, das den gesamten Gerichtsprozess sinnlos machen könnte. Angesichts der Vorteile der Vermeidung widersprüchlicher Entscheidungen und der Gewährleistung der Wirksamkeit und Fairness der Verfahren scheinen die Mechanismen des Beitritts und der Konsolidierung jedoch unverzichtbar zu sein.

Folglich wurden im Laufe der Zeit mehrere Kriterien und Indikatoren entwickelt, um die Zustimmung der Parteien, sei sie ausdrücklich oder stillschweigend, zu erkennen, wobei die tatsächliche Absicht der Parteien bei der Ausarbeitung ihrer Verträge und ihrer Erwartungen an die Schiedsgerichtsbarkeit berücksichtigt wurden. Dazu gehören Ansprüche aus einer einzelnen Transaktion oder einer Reihe von Transaktionen, die auf derselben Schiedsvereinbarung und der Vereinbarkeit von Schiedsvereinbarungen beruhen.

In diesem Zusammenhang ist diese Arbeit darauf ausgerichtet, die Umstände zu bestimmen, unter denen Beitritts- und Konsolidierungsverfahren praktiziert werden können, sowie die rechtlichen Gründe zur Überwindung schiedsgerichtsspezifischer Herausforderungen darzulegen. Dabei basiert die Methodologie auf den Entwicklungen der Schiedsregeln

verschiedener Schiedsinstitutionen, einschließlich der 2020-Regeln des London Court of International Arbitration, der 2024-Regeln des Hong Kong International Arbitration Centre, der 2016-Regeln des Singapore International Arbitration Centre, der 2021-Regeln der International Chamber of Commerce, der 2023-Regeln der Stockholm Chamber of Commerce und der 2015-Regeln des Istanbul Arbitration Centre, relevanten Entscheidungen und wissenschaftlichen Arbeiten von Pionieren der Schiedsgerichtsbarkeit.

Angesichts der Vorteile dieser Verfahrensmechanismen, ihrer Praxis im wirklichen Leben und der Tendenz, sie als spezifische Bestimmungen zu regeln, ist es offensichtlich, dass die Anwendung solcher Verfahrensmechanismen wesentlich und Teil der Prinzipien der gerichtlichen Ökonomie ist. Es darf nicht vergessen werden, dass auch Schiedsgerichte gerichtliche Tätigkeiten ausüben, wobei die Parteiautonomie nicht grenzenlos ist. Um die Schiedsgerichtsbarkeit als effizientes Streitbeilegungsverfahren zu erhalten, das den Erwartungen der Parteien in komplexen Situationen entspricht, müssen diese Verfahren durchgeführt werden, zumindest in Fällen, in denen eine stillschweigende Zustimmung von der zuständigen Behörde, sei es durch ein Schiedsgericht oder eine institutionelle Stelle, festgestellt wird. Als Prinzip der gerichtlichen Ökonomie, das eines der allgemeinen Rechtsprinzipien ist, kann akzeptiert werden, dass diese Verfahren auch in Fällen praktiziert werden können, in denen die gewählten Schiedsregeln solche Bestimmungen nicht enthalten; jedoch könnte die Anwendung solcher allgemeinen Rechtsprinzipien ein Thema für weitere Studien sein, die die inhärenten Befugnisse der Schiedsgerichte in der internationalen Schiedsgerichtsbarkeit untersuchen. Diese Arbeit zielt daher darauf ab, eine umfassende Analyse dieser Mechanismen und ihrer praktischen Anwendungen zu bieten und Einblicke zu geben, wie sie die Wirksamkeit der Schiedsgerichtsbarkeit in komplexen, mehrparteiigen Streitigkeiten verbessern kann.

Schlagwörter: Beitritt, Konsolidierung, Mehrparteien-Schiedsverfahren, Mehrvertrags-Schiedsverfahren, internationale Schiedsgerichtsbarkeit, Zustimmung.

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Abbreviations

Art.	Article
ch.	Chapter
ECHR	European Court of Human Rights
ed.	Editor
eds.	Editors
edn.	Edition
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ISTAC	Istanbul Arbitration Centre
LCIA	London Court of International Arbitration
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
para.	Paragraph
pt.	Part
s.	Section
SCC	Stockholm Chamber of Commerce Arbitration Institute
SIAC	Singapore International Arbitration Centre
v.	Versus
Vol.	Volume

Introduction

Arbitration is a consensual process, based on the parties' agreement, where a dispute is resolved by one or more arbitrators, who constitute the arbitral tribunal. By selecting arbitration, as a dispute resolution mechanism, parties choose a private dispute resolution procedure instead of pursuing litigation in state courts.

The most common scenario in international arbitration involves only two parties, who have consented to resolve their disputes through arbitration. Arbitration is mostly preferred for its speed, practicality, confidentiality, flexibility and impartiality. Nevertheless, as time passed, complex relations arising from the continuous growth in the volume of domestic and international commercial relations caused an increase in demand for arbitration as well.¹ This issue itself also made it necessary for the institutional arbitration institutions to improve the traditional bilateral arbitration scheme into a mechanism that can solve the problems of today.

Considering the complex relations in commercial life, multilateral arbitrations have become an important means of resolution mechanism in arising disputes, especially where there are more than two parties present. Such disputes may arise from contracts between employer-contractor-subcontractor, consortium contracts, maritime charter parties, warranty contracts, and joint venture contracts.² In this manner, institutional arbitration centres have also modified their rules to address these types of *multi-party* disputes.

“Multi-party arbitration” is used for arbitral proceedings involving more than two parties, either at the respondent's and/or claimant's side.³ These disputes can arise from a contract having more than two parties, or from multiple contracts involving different parties being related to the same dispute.⁴ The procedures of joinder and consolidation can also cause such multi-party arbitrations. While joinder refers to the addition of a *third/additional party* to an existing arbitration, consolidation means merging two separate arbitrations. It is noteworthy that consolidation does not necessarily lead to a multi-party dispute if the parties involved in both arbitrations are identical.

¹ Joachim G. Frick, *International Arbitration Law Library: Arbitration and Complex International Contracts* (Kluwer Law International 2001), 229.

² Pelin Akin, ‘Uluslararası Tahkimde Çok Taraflılık’ (2014) *Gazi University Law Review*, Vol. 18, 300; Frick (n 1) 229; Nigel Blackaby, Constantine Partasides, Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn., Kluwer Law International; Oxford University Press 2023) ch. 2, s. I, para. 2.235.

³ Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International 2018) ch. 18, pt. I, 2505.

⁴ Blackaby, Partasides, Redfern, (n 2) ch. 2, s. I, para. 2.235.

This *third/additional* party refers to a party who is not named as a participant at the outset of the arbitration proceedings, but who may be joined after the commencement of the proceedings. In this sense, it should be taken into consideration that third/additional parties may be persons who are already parties to the multilateral arbitration agreement, to whom the arbitration agreement may be extended or persons who are not parties to the arbitration agreement.⁵

As Akin observes, there has been a noticeable increase in third parties seeking to benefit from arbitral proceedings, especially in cases where legal issues arise from the same or related transactions.⁶ This trend underscores the growing complexity and interconnection of modern commercial disputes, which further amplifies the need for arbitration practices to evolve. Such developments challenge traditional notions of bilateral dispute resolution and necessitate a broader understanding of how arbitration can be adapted to accommodate multiple parties with diverse interests.

In light of these developing situations and demands, it is clear that arbitration, as an alternative dispute resolution method, encounters unique procedural challenges and must remain open to new ideas, rules, practices, and regulations. As Leboulanger has quoted from Sir John Donaldson, “...the rules and procedure governing the arbitration are a living thing which inevitably require statutory amendment from time to time in the light of experience and changing conditions.”⁷

For instance, the principle of consent in arbitration appears contradictory when a third party is included in an ongoing arbitral proceeding without an agreement, or when a claimant is forced to arbitrate with a third party due to a respondent’s claims.⁸ However, as complex relationships have become more common in the commercial world, there has been an increasing recognition that the procedural rules of arbitration must adapt, and align with the evolving expectations of the parties.

Statistics on arbitration proceedings conducted under the International Chamber of Commerce Arbitration Rules also reveal that nearly one-third of arbitration proceedings are conducted as

⁵ Stavros L. Brekoulakis, *Third Parties in International Commercial Arbitration* (Oxford University Press 2010) para.1105; Banu Şit Köşgeroğlu, ‘Başlıca Tahkim Merkezlerinin Kuralları Uyarınca Milletlerarası Ticari Tahkimde Üçüncü Kişilerin Davaya Dahil Edilmesi (Joinder) ve Davaya Katılması (Intervention)’ (March-April 2023) *Union of Turkish Bar Associations Review*, Vol. 35, Issue 165, 175.

⁶ Akin (n 2) 300.

⁷ Philippe Leboulanger, ‘Multi-Contract Arbitration’ (Kluwer Law International 1996), *Journal of International Arbitration*, Vol. 13, Issue 4, 45.

⁸ Richard Bamforth, Katerina Maidment, ‘All join in or not? How well does international arbitration cater for disputes involving multiple parties or related claims?’ (2009) *ASA Bulletin*, Vol. 27 Issue 1, 5.

multi-party arbitration. According to the 2023 statistics on ICC arbitration proceedings, 2389 cases were filed in 2023 and 31% of these lawsuits were categorised as multi-party cases.⁹ Within these disputes, the rate of cases with more than one respondent is 58%; the rate of cases with more than one claimant is 25% and the rate of cases with more than one party on both the claimant and respondent side is 17% of the proportion.

Despite the advantages of arbitration, the integration of multiple parties into a single arbitration proceeding poses significant challenges and controversies in both literature and practice. Scholars and courts have grappled with issues such as the legitimacy of including non-signatory parties without explicit consent, the potential breaches of confidentiality, and the difficulties in ensuring equal participation in the tribunal's constitution. Furthermore, the risk of inconsistent awards and the complexities of merging separate arbitral proceedings highlight the need for an effective procedural framework. These concerns necessitate a deeper examination of the joinder and consolidation mechanisms within institutional arbitration rules.

To this end, this thesis will begin by defining and exploring the concepts of joinder and consolidation within the framework of arbitration. It then proceeds to analyse the advantages and disadvantages inherent in these procedural mechanisms. This will be followed by a comparative examination of the relevant provisions found in various institutional arbitration rules. Finally, the discussion will lead to an exploration of the formation of the arbitral tribunal in multi-party scenarios and delve into the intricacies of cross-institutional consolidations. The overarching goal is to provide a comprehensive theoretical exploration of these mechanisms in the context of international arbitration.

1. Joinder and Consolidation in General

1.1. Joinder in General

In its most fundamental terms, the involvement of a third party in an ongoing arbitration proceeding is referred to as a joinder.¹⁰

⁹ <https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf> accessed 27 June 2024.

¹⁰ Rouven F. Bodenheimer, Axel Benjamin Herzberg, 'Arbitration: Joinder, Consolidation' <<https://www.changing-perspectives.legal/arbitration/frequently-arising-issues-in-international-arbitration/joinder-consolidation/#:~:text=Joinder%20in%20arbitration%20is%20the,%20For%20multi%2Dcontract%20arbitration.>>> accessed 16 September 2023.

To clarify the terminology regarding the joinder, it is beneficial to note its difference from the intervention procedure. As stated, a joinder occurs when an existing party in a dispute seeks to include a third party, whereas intervention is initiated by the third party itself, desiring to join the dispute. Although confidentiality poses a challenge in both scenarios, intervention uniquely complicates matters due to the additional requirement that the third party must somehow learn about the existing dispute. This could be why most institutional arbitration rules do not define the intervention procedure. Also, in the review of the aforementioned institutional rules, only the SIAC and HKIAC rules were found to include such intervention procedures.¹¹

However, considering the similar challenges and outcomes between them, most institutional rules do not regulate the intervention procedure separately and foresee those procedures within the joinder provisions. Therefore, this thesis, in light of the examined institutional rules, will not provide an additional heading regarding the intervention and use the word “joinder” to represent both of these procedures.

When the necessity of these procedures is scrutinised, the primary reason is the growing number of long-term commercial relationships conducted through multiple contract arrangements which involve multiple parties. Similar to the consolidation, joinder also contributes to the reduction of time and expenses. In this regard, a joinder can also be named as a mechanism of judicial economy principle, especially by preventing the initiation of a separate case that might arise from the respondent’s recourse to a third party.

As stated above, third parties in arbitration include individuals who are already bound by the arbitration agreement, those to whom the agreement may be extended, and those who are neither parties to the agreement nor intend to become one.

In an ongoing arbitration, both the claimant and respondent can request the inclusion of a third party either to their or to the opposing side of the dispute. If the applicable rules to the dispute allow the third party, they may also apply to participate in the arbitral proceedings by intervention.¹² On this matter, some arbitral rules stipulate a preliminary decision on applications for joinder, particularly in cases where non-signatories are deemed *prima facie*¹³

¹¹ See below, ch. 4, 52-72.

¹² Richard J. Tyler, ‘Kicking and Screaming: Joinder of Non-Signatories in Arbitration Proceedings’ (2020) *Dispute Resolution Journal*, Vol. 75, 111-112.

¹³ The *prima facie* phrase does not necessitate strict privity of a third party to the arbitration agreement. *Prima facie* means ‘at first sight, on the first appearance’. The arbitration will proceed if the relevant authority concludes that an arbitration agreement might exist in the given circumstance. Determining when *prima facie* satisfaction is met, especially with non-signatories, is challenging. However, there should at least be a reasonable argument that

bound by the arbitration agreement, with the decision being made either at the institutional level or by the tribunal.¹⁴

As a consequence of the joinder transaction, the respondent side of the dispute may submit more relative pieces of evidence and can enlighten the missing parts of the allegations made by the claimant. In this regard, by helping the respondent, the joined third party may also get released from a litigation process against itself.¹⁵ Similarly, the claimant may also get an award that reveals both parties, including the joined one, as responsible for the breach of contract, in this sense, it can be seen that the transaction of joinder enhances the effectiveness of arbitration.¹⁶

In parallel with consolidation, an important factor to consider regarding joinder is the absence of consent. While some arbitration institutions require consent, as discussed below, in some rules, joinder requests can be examined without the consent of the other parties. In cases where the third party's consent is lacking, the arbitral award may likely be annulled if the third party initiates a challenge against the arbitral award.¹⁷ Likewise, there may also be situations where the existing parties do not provide their consent, and still, the award may stand against the challenges.¹⁸

Moreover, appointing arbitrators and approaching all parties equally, including the additional one, presents another dilemma to be considered. In light of the institutional rules, different procedures apply to the consent and equal arbitrator nomination issues, whether the request for joinder is submitted before or after the appointment of any arbitrator. These issues and the current practices related to them will be addressed in the later headings.¹⁹

the case's facts support a legal theory extending the contract to a non-signatory. Legal theories like agency, estoppel, alter ego, or the 'group of companies' doctrine can imply consent to the agreement from the actions of non-signatories. Therefore, even if the *prima facie* test allows the matter to proceed to arbitration, a thorough choice of law analysis is needed to determine which legal theory applies to extend the arbitration agreement to non-signatories. In this analysis, first, the proper law for the arbitration agreement must be determined, with party choice prevailing. If there is no express choice, the choice of law is more complex, often between the governing law of the contract or the law of the seat of arbitration. Once the relevant law is determined, the next step is to examine how that jurisdiction addresses the binding effect of arbitration agreements on non-signatories. See Dongdoo Choi, 'Joinder in International Commercial Arbitration' (2019) *Arbitration International*, Vol. 35-36.

¹⁴ Choi (n 13) 30.

¹⁵ Choi (n 13) 33.

¹⁶ Gary Born, *International Commercial Arbitration* (3rd edn., The Hague: Kluwer Law International 2021), 2777-2778.

¹⁷ Born (n 16) 2793.

¹⁸ Tyler (n 12) 111-112.

¹⁹ See below, ch. 7, 93-99.

1.2. Consolidation in General

Consolidation refers to the process of combining multiple cases into a single proceeding under a unified set of procedural rules. This approach, similar to the joinder, allows for a comprehensive examination of evidence, facilitates a deeper understanding of the material facts, and helps prevent conflicting decisions by treating related disputes integrally.²⁰ Consequently, consolidation streamlines the arbitration process, making it more efficient and coherent.

Consolidation can also be named as a mechanism to complete the missing parts of ongoing proceedings.²¹ By merging cases, consolidation prevents delays caused by awaiting the resolution of related issues and eliminates the redundancy of addressing preliminary matters across separate cases.²² As follows, consolidation eliminates the insufficient inspection and incompleteness of the evidence in each one of the consolidated cases and ensures the right to be heard for all parties.²³ If the consolidation of the cases causes a deficiency in the examination of the substantive elements or results in a lack of collecting evidence for one of the parties of the merged cases, it may constitute a violation of the right to be heard.²⁴

Consolidation embodies the judicial economy principle by aiming to achieve resolutions that are time-efficient, cost-effective, and straightforward.²⁵ These aspects are essential for access to justice, allowing parties to present their claims efficiently and reduce uncertainty, thereby contributing to the fairness of the trial. The significance of consolidation, therefore, aligns with the essence of Article 6 of the European Convention on Human Rights, which emphasises the right to a fair trial.²⁶ This connection underscores the importance of maintaining a balance between procedural efficiency and the parties' ability to fully engage in the arbitration process.

²⁰ İbrahim Ermenek, *Medeni Usul Hukukunda Davaların Birleştirilmesi ve Ayrılması* (Ankara 2014), 23, 27.

²¹ Ermenek (n 20) 26.

²² Ibid.

²³ Aziz Serkan Arslan, *Medeni Usul Hukukunda Delillerin Toplanması ve Doğrudanlık İlkesi* (Ankara 2012), 18.

²⁴ Hans-Joachim Musielak (ed.), *Kommentar zur ZPO* (München 2013), §147; Ermenek (n 20) 42.

²⁵ Judicial economy is binding due to its qualification as a common principle. Even though there are different views, this common principle can be applied to international adjudications even when such provisions are not present; see Fulvio Maria Palombino, 'Judicial Economy and Limitation of the Scope of the Decision in International Adjudication' (2010) Cambridge University Press Leiden Journal of International Law, Vol. 23 Issue 4, 909-932.

²⁶ Ermenek (n 20) 31.

Since without the aspects of the judicial economy principle, parties will not be able to reach judicial authorities, assert their claims and arguments with easy methods and eliminate uncertainty, it would also not be possible to qualify the trial as fair.²⁷

In sum, while consolidation offers numerous benefits in terms of efficiency and clarity, its application must be carefully balanced with the need to ensure comprehensive evidence examination and respect for the parties' rights. This delicate balance is crucial for upholding the principles of a fair and equitable arbitration process.

2. Consolidation and Joinder in International Arbitration

Arbitration awards are usually final and not subject to review on the merits, meaning prolonged court appeal procedures can generally be avoided. Therefore, in arbitral proceedings, there is also an obligation to comply with certain procedural rules from the beginning to the end of the trial. Due to this, the activities of arbitrators within the scope of the dispute resolution are considered extra-judicial activities.²⁸

Before analysing the issues related to the will of the parties and the legal basis of consolidation and joinder, it has to be mentioned that consolidation and joinder in international arbitration also have similar aims to the domestic procedural rules. Born has also stated that the purposes of such procedural mechanisms (consolidation, joinder and intervention) in domestic regulations are partially applicable to international arbitration as well.²⁹

Consolidation of arbitral proceedings or the joinder of a third party can proceed through, either by the agreement of parties on the specified provisions in their arbitration agreement which is within their commercial contracts or according to *lex arbitri* at the seat of arbitration, or indirectly by the parties choosing institutional arbitration rules that include provisions for these proceedings.³⁰ Given that institutional arbitration rules offer a comprehensive and reliable framework for addressing the complexities of joinder and consolidation, this thesis will focus on such rules.

Nonetheless, while carrying out these procedures, it is also important to consider the reasons behind the arbitration being chosen by the parties, such as ensuring flexibility in the

²⁷ Zeynep Duygu Kıyak, *Uluslararası Tahkimde Davaların Birleştirilmesi* (Istanbul Bilgi University PhD Thesis Istanbul 2021), 10.

²⁸ For detailed information see Frances T. Freeman Jalet, 'Judicial Review of Arbitration the Judicial Attitude' (1960) Cornell Law Review, Vol. 45, Issue, 3, 521.

²⁹ Born (n 16) 2779.

³⁰ Gordon Smith, 'Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules' (2018) Journal of International Arbitration Vol. 35 No. 2, 174-175.

determination of procedural rules, the possibility of selecting an expert on the subject matter of the disputes, confidentiality in proceedings, and ease of enforcement of arbitral awards in many countries.³¹

At this point, it is worth briefly mentioning that although there are concerns about party autonomy, particularly regarding the consent³² for joinder or consolidation and involvement of a third party while forming the arbitral tribunal, by agreeing to institutional arbitration rules within the arbitration agreement, it is accepted that parties have implicitly accepted the joinder and consolidation terms under the institutional rules and its ensuing implications.³³ Considering the parties' reluctance to agree on joinder or consolidation after the dispute occurs, to keep arbitration as an effective and preferred dispute resolution mechanism,³⁴ institutional arbitration bodies have adopted new rules regarding consolidation and joinder transactions and tried to keep awards enforceable by maintaining the equal treatment of parties. Nevertheless, not choosing institutional arbitration rules, does not directly result in denying the consolidation or joinder requests.³⁵

2.1. Advantages of Consolidation in International Arbitration

2.1.1. Effectiveness and fairness of arbitral proceedings along with the judicial economy principle

Since arbitration is a judicial activity, in the context of the judicial economy, both the consolidation's effectiveness and fairness for the proceedings have to be considered.³⁶ In fact, in the *Canfor Case*³⁷ (**'Canfor Case'**), where the NAFTA investment arbitration rules are applied, to determine whether the consolidation decision would be fair and efficient, the consolidation tribunal has compared the situations, where the consolidation decision would be given and where the separate arbitral proceedings would be conducted. According to the consolidation tribunal, the factors to be taken into account, while making these comparisons are

³¹ Kiyak (n 27) 15; Born (n 16) 77-89.

³² See below, ch. 3, 28-35.

³³ Smith (n 30) 176.

³⁴ Ibid.

³⁵ See below, ch. 3, 28-35.

³⁶ Peter Muchlinski, Federico Ortino, Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008) 234.

³⁷ Kiyak (n 27) 20; *Canfor Corporation v. United States of America*; *Tembec et al. v. United States of America and Terminal Forest Products Ltd. v. United States of America*, Order of the Consolidation Tribunal (07.09.2015) <www.italaw.com/sites/default/files/case-documents/ita0115.pdf> accessed 8 July 2024.

time, money and avoidance of contradictory awards.³⁸ Likewise, in doctrine, increasing the effectiveness of the trial is also considered in terms of time, legal effort and costs.³⁹ These factors clearly align with the aspects of the judicial economy principle, demonstrating a unified approach to enhancing the efficiency and coherence of legal proceedings

Again, according to the Consolidation Tribunal in the Canfor Case, the tribunal being convinced by the effectiveness of the consolidation for the resolution of claims will be enough to give a decision in favour of the consolidation, therefore, it is not an accounting activity to create a matrix of comparative advantages and disadvantages and apply relative weighing criteria to determine what is efficient.⁴⁰

Indeed, as arbitration is a fast-moving dispute resolution mechanism, in practice, evaluating all aspects of the situation, like parties' claims and their effects in arbitral proceedings can be a real dilemma. While a tribunal or an institutional authority is deciding to consolidate separate proceedings, they cannot analyse all forthcoming arbitral proceedings, especially if more than two arbitrations are going on.⁴¹ Even though it can depend on the facts of the case, disputes involving multiple parties and interconnected contracts often share common factual and legal issues and addressing these claims in a single proceeding can significantly reduce time and costs by eliminating the need for repetitive submissions, evidence, and hearings.⁴²

For instance, preparations for a witness or expert statements will be conducted more than once and eventually will lead to a futile loss in both money and time for the parties.⁴³ In this regard, objection to consolidating the proceedings can also be used by the defendants as a tool to prolong the process, complicate the presentation of evidence and complicate to give an accurate award.⁴⁴ Especially, when one of the parties is economically stronger, increasing the number of disputes and procedural transactions can be a tool to create pressure on the opposing party.

³⁸ Canfor Case (n 37) §126.

³⁹ Catherine Yannaca-Small, 'Chapter 8: Consolidation of Claims: A Promising Avenue for Investment Arbitration?' in *International Investment Perspectives* (OECD Paris 2006) 234.

⁴⁰ Canfor Case (n 37) §124.

⁴¹ The issues about what factors must be considered for a consolidation decision are analysed in detail. See below, ch. 6, 91-93.

⁴² Gary Born, Dharshini Prasad, 'Joinder and Consolidation' (2018) *BCDR International Arbitration Review*, Vol. 5 Issue 1, 55.

⁴³ Michael Pryles, Jeffrey Waincymer, 'Multiple Claims in Arbitration Between the Same Parties' in Albert Jan van den Berg (ed.), (Kluwer Law International 2009) 50 Years of the New York Convention: ICCA International Arbitration Conference, 438.

⁴⁴ Kiyak (n 27) 15-16; B. Ted Howes, Allison M. Stowell, 'The Consolidation Dilemma: Is There Finally a Pragmatic Solution?' (April 2016) *Dispute Resolution International* Vol. 10 Issue 1, 4.

2.1.2. Preventing Inconsistent Results

Unlike the domestic judiciary, international arbitration lacks a hierarchical legal remedy system. In the same manner, in international arbitration, there is no supreme court order that binds all lower courts/tribunals to ensure consistency across decisions with each other, and this absence could potentially undermine individuals' confidence in the justice delivered through international arbitration.⁴⁵ Indeed, the consistency of the awards rendered in arbitral proceedings, as in state court proceedings, is a requirement of a fair and effective proceeding.⁴⁶ In this context, arbitration is often criticised for potentially leading to conflicting awards.⁴⁷

Cases of *CME Czech Republic B.V. v. The Czech Republic*⁴⁸ and *Ronald S. Lauder v. The Czech Republic*⁴⁹ are good examples to demonstrate the importance of preventing inconsistent decisions. In the investment arbitration proceedings initiated against the Czech Republic, the claimants were in a close relationship to be considered the same, and the subject matter of the disputes was identical. One case was brought by the investor company and the other by a minority shareholder of the investor company. The most important difference was that the arbitral proceedings were based on different Bilateral Investment Treaties. In the end, while the Czech Republic was found liable in *CME Czech Republic B.V. v. The Czech Republic*, in *Ronald S. Lauder v. The Czech Republic* the tribunal denied the claims of the respondent against the Czech Republic.

The enforcement of one of the contradictory awards may prevent the enforcement of the other award.⁵⁰ Therefore, consolidation is also important for the enforcement of arbitral awards to ensure legal predictability and confidence in the proceedings.⁵¹ The enforcement of conflicting awards with the same parties and subject matter may be hampered by the public order

⁴⁵ Kiyak (n 27) 21; Anne Véronique Schlaepfer, Emmanuel Gaillard, Philippe Pinsolle and Louis Degos (eds.), *Towards a Uniform International Arbitration Law?* (Juris Publishing Inc. 2005) 294.

⁴⁶ Kiyak (n 27) 21; Louis Alberto Gonzalez Garcia, 'Is Consolidation a Step to Improvement? The HFCS case, Making the Most of International Investment Agreements: A Common Agenda' (December 2005) Symposium Co-organized by ICSID, OECD, and UNCTAD <<https://www.matrixlaw.co.uk/wp-content/uploads/2016/05/Is-consolidation-of-claims-a-step-to-improvement.pdf>> accessed 31 August 2023.

⁴⁷ Michael Waibel, Asha Kaushal, Kyo-Hwa Chung, Claire Balchin (eds.), *The Backlash against Investment Arbitration, Perceptions and Reality* (Kluwer Law International 2010), 80.

⁴⁸ *CME Czech Republic B.V. v. The Czech Republic* (14.03.2003) <<https://www.italaw.com/sites/default/files/case-documents/ita0180.pdf>> accessed 31 August 2023.

⁴⁹ *Ronald S. Lauder v. The Czech Republic* (03.09.2001) <<https://www.italaw.com/sites/default/files/case-documents/ita0451.pdf>> accessed 31 August 2023.

⁵⁰ Julie C. Chiu, 'Consolidation of Arbitral Proceedings and International Commercial Arbitration' (1990) *Journal of International Arbitration*, Vol. 7 Issue 2, 56.

⁵¹ Kiyak (n 27) 23.

obstacle.⁵² By eliminating the risk of inconsistent or conflicting decisions, joinder and consolidation mechanisms also prevent unfair and unsatisfactory outcomes.⁵³

Besides the risk of inconsistent awards, in cases where the same or similar disputes are heard separately, upon the objection of one of the parties, all arbitral proceedings for the same legal conflict should be conducted twice.

2.2. Disadvantages of Consolidation in International Arbitration

2.2.1. Confidentiality in International Arbitration

The principle of confidentiality, allows the parties to avoid a public hearing, prevent third parties from discovering their information, and even conceal the fact that they are in dispute.⁵⁴

According to *Bamforth* and *Maidment*, one of the primary draws of arbitration appears to have been its private and confidential nature for a long time, which means that parties can generally keep the facts and details of their dispute to the tribunal, the existing parties to the arbitration, and the relevant arbitral institution.⁵⁵

In international arbitration, confidentiality and privacy are treated as separate concepts.⁵⁶ While privacy prevents third parties' participation -who are not signatories to the arbitration agreement- in arbitral proceedings, confidentiality prevents both the participation and the transfer of any document and information shared within the scope of the arbitral proceedings.⁵⁷ Meanwhile, many domestic laws have evaded from providing general provisions on confidentiality of arbitration; some national courts, in the absence of a statutory provision, have recognized that confidentiality is inherent in arbitration and there is an implied duty of confidentiality on the parties.⁵⁸

To determine the law applicable to the parties' confidentiality obligations, the law governing the arbitration agreement, the law governing the arbitral proceedings or the law governing the

⁵² Lara M. Pair, *Consolidation in International Commercial Arbitration - the ICC and Swiss Rules* (PhD Thesis Lahey 2011), 233.

⁵³ Born, Prasad (n 42) 55-56; Blackaby, Partasides, Redfern (n 2) ch. 2, s. I, para. 2.244; Pryles, Waincymer (n 43) 438; Leboulanger (n 7) 63-64.

⁵⁴ Kıyak (n 27) 28; Born (n 16) 3003; Joyiyoti Misra, Roman Jordans, 'Confidentiality in International Arbitration' (Kluwer Law International 2006) *Journal of International Arbitration*, Vol. 23, Issue 1, 39-48.

⁵⁵ Bamforth, Maidment (n 8) 5.

⁵⁶ Born (n 16) 3004.

⁵⁷ Born (n 16) 3004-3005.

⁵⁸ Born (n 16) 3007, 3009.

commercial contract between the parties can be used.⁵⁹ According to *Born*, the most appropriate law to apply in this regard is the law governing the arbitration agreement, especially where the arbitration agreement contains a confidentiality provision, moreover, the validity and scope of this provision will also be determined by the law applicable to the arbitration agreement.⁶⁰

In terms of arbitration, if the parties of each consolidated proceeding are the same, there would be no effect on confidentiality.⁶¹ On the contrary, the consolidation of separate arbitral proceedings involving different parties may result in a breach of confidentiality.⁶² The fact that a party, who is not involved in one of the proceedings, may have access to the information and documents submitted in other proceeding may cause a problem, especially for commercial actors competing in the same sector.⁶³ Still, in consolidated arbitrations, it is possible for the arbitral tribunal to separate unrelated issues and to restrict or completely prevent the parties from accessing certain information and documents.⁶⁴ So, the breach of confidentiality itself cannot be the sole reason to reject the request for consolidation.

Due to the close relationship between multiparty disputes and confidentiality, institutions also take further steps to ensure this comfort to the parties. For instance, in the revised text of the 2020 LCIA Rules, the LCIA Court and arbitrators are empowered to issue an order related to data protection and information security. The arbitral tribunal's orders/directions are binding on the parties, and if the orders/directions are decided by the LCIA, the arbitrators are also obliged to proceed harmoniously with these. Especially, at the beginning of the proceedings, the arbitrators have to consult with the LCIA Court and the parties to determine if any certain measures are needed to secure information in the arbitration and/or the personal data.⁶⁵ Following this, in terms of confidentiality, the revised rules now compel the parties and arbitrators to obtain confidentiality undertakings from any additional parties involved in the arbitral proceedings.⁶⁶

⁵⁹ Kiyak (n 27) 29.

⁶⁰ Born (n 16) 3041-3042.

⁶¹ Kiyak (n 27) 29; Pair (n 52) 54; Leboulanger (n 7) 64.

⁶² Born (n 16) 2764.

⁶³ Kiyak (n 27) 29; Stacie I. Strong, 'The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?' (2009) *Michigan Journal of International Law*, Vol. 30, Issue 4, 1087.

⁶⁴ Leboulanger (n 7) 65; Strong (63) 934, 994.

⁶⁵ Raphaëlle Legru, 'Overview of the Differences in the Recent Updates to the LCIA Rules and the ICC Rules' (2021) *Belgian Review of Arbitration*, Vol. 2021 Issue 1, 257.

⁶⁶ Institutional rules are analysed in the later headings. See below, ch. 4, 35-80.

2.2.2. Increase in Cost and Duration

Even though one of the main aims of consolidation is to decrease the time and costs of the disputes, by avoiding the repetition of procedural issues, every dispute has its own dynamics and can have different requirements to be solved. In this sense, if one of the consolidated proceedings is more complex and involves more issues than the other, this will result in an extension of the duration of the other consolidated case or cases.⁶⁷

When the consolidation decision increases the number of parties, it may create difficulties in allocating the costs of the proceedings as well. In situations where the consolidated cases' parties are the same, the costs will be divided into two, just like a classic two-sided arbitration dispute, however, if the number of parties increases, the consolidation may result in one of the parties paying more than it would.⁶⁸

2.2.3. Appointment of Arbitrators

In classic two-sided arbitrations, generally, each party appoint an arbitrator and later the head of the arbitral tribunal is chosen by the appointed arbitrators. Similar to the division of costs and expenses, when the same-sided proceedings are consolidated, the appointment of arbitrators will not be a problem. Even in cases, when a tribunal is constituted for one of the disputes, a second conflict can be brought in front of the same tribunal. Similarly, if the parties have decided to appoint a sole arbitrator for the dispute, again appointment of an arbitrator will not be a dilemma.

Albeit, in consolidated cases, there can be more than one party, either on the claimant's or respondent's side and these same-sided parties have to appoint an arbitrator together, even though their interests may differ. To overcome this issue, it is possible to increase the number of arbitrators in the arbitral tribunal to prevent the parties with conflict of interest from choosing an arbitrator as a single party. However, an increase in the number of arbitrators may lead to an increase in costs, problems in bringing the arbitrators together, and can cause a deadlock in the resolution of the dispute.⁶⁹ Furthermore, a greater number of arbitrators for either side of the dispute may result in a breach of the equal treatment principle and can cause turmoil in the recognition and enforcement of the award.

⁶⁷ Kiyak (n 27) 32-33; Pair (n 52) 239.

⁶⁸ Kiyak (n 27) 33; Leboulanger (n 7) 68.

⁶⁹ Kiyak (n 27) 26; Born (n 16) 2764; Leboulanger (n 7) 67.

The most important example related appointment of arbitrators and the breach of the equal treatment principle is the *French Cour de Cassation in Siemens AG and BKMI Industrieanlagen GmbH v. Dutco Construction Co.* case (**‘Dutco Case’**).⁷⁰ The case involves an arbitration proceeding initiated by a Dubai based company Dutco against two German companies Siemens and BKMI before the ICC arbitration. Although the issue of consolidation was not addressed in this arbitration since it was initiated as a single proceeding, the decision of the French Supreme Court is significant in the context of consolidation due to its implications for the selection of arbitrators.⁷¹

In this case, Dutco signed a consortium agreement with Siemens and BKMI and initiated a single arbitration proceeding before the ICC against both companies based on the arbitration clause in the contract.⁷² According to the arbitration clause in the consortium agreement, disputes would be resolved before an arbitral tribunal composed of three arbitrators.⁷³

The ICC rules in effect at that time did not include a special provision for multiple respondents and required the respondents to jointly appoint a single arbitrator, and in cases where the parties failed to select an arbitrator, the ICC would appoint the arbitrator itself.⁷⁴ Therefore, Siemens and BKMI, being on the respondent side, were required to jointly appoint a single arbitrator despite having different interests. When their requests for separate proceedings were unsuccessful, Siemens and BKMI participated in the arbitration by appointing an arbitrator with the reservation of all their rights to challenge any future arbitral award before national courts.⁷⁵

The arbitral tribunal, composed of three arbitrators, issued an interim decision stating that the tribunal was properly constituted and that the arbitration would proceed as a multiparty arbitration.⁷⁶ The tribunal interpreted the parties’ participation in the consortium agreement as indicating their intention to have their disputes resolved in a single arbitration proceeding.⁷⁷ Furthermore, the tribunal decided that the term ‘party’ in Article 2.4 of the 1988 ICC Rules

⁷⁰ *Siemens AG and BKMI Industrieanlagen GmbH v Dutco Construction Co.*, (07.01.1992) <https://jsumundi.com/en/document/decision/fr-dutco-construction-v-bkmi-industrieanlagen-gmbh-et-siemens-ag-arret-de-la-cour-de-cassation-tuesday-7th-january-1992#decision_12569> accessed 06 September 2023.

⁷¹ Lara M. Pair, Paul Frankenstein, ‘The New ICC Rule on Consolidation: Progress or Change?’ (2011) *Emory International Law Review*, Vol. 25, Issue 3, 1077.

⁷² Kıyak (n 27) 169.

⁷³ Eric A. Schwartz, ‘Multi-Party Arbitration and the ICC in the Wake of Dutco’ (Kluwer Law International 1993) *Journal of International Arbitration*, Vol. 10, Issue 3, 11 [hereafter ‘Schwartz Dutco’].

⁷⁴ 1988 Rules of the International Chamber of Commerce <<https://www.acerislaw.com/wp-content/uploads/2018/08/1988-ICC-Arbitration-Rules.pdf>> accessed 09 June 2024. Under the 1988 ICC rules, the ICC Court only appoints an arbitrator for a single side(s) of the dispute, who fails to choose an arbitrator jointly.

⁷⁵ Kıyak (n 27) 170.

⁷⁶ Schwartz Dutco (n 73) 11.

⁷⁷ *Ibid.*

should be interpreted as referring to only two parties, claimant and respondent, therefore found it appropriate for the companies on the respondent side to jointly appoint an arbitrator, concluding that the tribunal was properly constituted.⁷⁸

Subsequently, due to the procedure followed for the constitution of the arbitral tribunal, the respondent parties have challenged the arbitral award and requested its annulment. Even though the Paris Court of Appeal did not accept the arguments related to the constitution of the arbitral tribunal, the French Court of Cassation set aside the arbitral award due to a violation of the principle of equality in the arbitrator appointment process, as it adversely affected the respondents. Addressing the argument that the respondents' consent to arbitrate under the current ICC Rules implied a waiver of their right to appoint an arbitrator, the Court ruled that such a waiver, being a matter of public policy, can only be valid after a dispute has emerged.⁷⁹ In this decision, the French Supreme Court has stated that *"the principle of equality of the parties in the designation of arbitrators is a matter of public policy; it can be waived only after the dispute has arisen."*⁸⁰

While the Dutco case demonstrates an important issue, it must be noted that this case should not be interpreted as parties cannot waive their right to appoint their arbitrators.⁸¹ In other words, the Dutco decision does not grant each party an inalienable right to select an arbitrator before a dispute arises.⁸² It is accepted that it would violate the principle of equality if one party could select its arbitrator while the other parties are deemed to have waived this right in advance.⁸³ However, based on the principle of freedom of contract, all parties can agree to waive their right and allow arbitration institutions or national courts to appoint the arbitrator or arbitrators.⁸⁴

Another example regarding the appointment of arbitrators is the Westland Case, where the appointment of a single arbitrator for respondents with different interests in an ICC arbitration seated in Geneva was not found to be contrary to the principle of equality of the parties by the

⁷⁸ Schwartz Dutco (n 73) 12; Kiyak (n 27) 170.

⁷⁹ Chiu (n 50) 38.

⁸⁰ Mangesh Krishna, 'Whose Side Are You On? Modification of the Dutco Principle by the French Supreme Court' (February 2023) Kluwer Arbitration Blog <<https://arbitrationblog.kluwerarbitration.com/2023/02/09/whose-side-are-you-on-modification-of-the-dutco-principle-by-the-french-supreme-court/>> accessed 09 June 2024.

⁸¹ Born (n 16) 2811; Jean-Francois Poudret, Sebastien Besson, *Comparative Law of International Arbitration* (2nd edn., 2007) para. 242; Kiyak (n 27) 172.

⁸² Schwartz Dutco (n 73) 14.

⁸³ Born (n 16) 2812-2813.

⁸⁴ Born (n 16) 2813-2814; Kiyak (n 27) 172.

Swiss Federal Supreme Court.⁸⁵ In the Westland Case, the claimant, Westland Helicopters Limited initiated an ICC arbitration in Geneva against six respondents, including four Arab states. During the constitution of the arbitral tribunal, following its institutional arbitration rules, the ICC Court has appointed one of the three arbitrators, on behalf of all respondents. One of the respondents, the State of Egypt, objected to the jurisdiction of the arbitral tribunal before the Geneva Cantonal Court due to the seat of arbitration being in Geneva. The State of Egypt argued that the claimant had a predominant influence in the formation of the arbitral tribunal, that the arbitrators were not independent, and therefore, the arbitral tribunal should withdraw from the case.⁸⁶ In its decision, which was upheld by the Swiss Federal Tribunal, the Geneva Cantonal Court rejected Egypt's objection, stating that an arbitrator, even if appointed by one of the parties, is not an advocate or representative of the appointing party.⁸⁷ The Geneva Cantonal Court also noted in its decision that the ICC's practice of appointing arbitrators was not contrary to Swiss public policy.

Lastly on this subject, while some authors argue that since the concept of a party arbitrator does not exist, the right to select an arbitrator cannot be exercised without limitations,⁸⁸ Chiu contends that depriving a party of this right even has a significant psychological effect on the parties.⁸⁹ It must be noted that the impression formed on a party by the external appearance of the tribunal and the factors influencing a party's justified expectation of a fair trial plays an important role in the determination of fairness.⁹⁰ Increasing the number of arbitrators on either side of the tribunal or restricting the right to select an arbitrator, thereby breaching the principle of equal treatment, can cause serious problems during the enforcement of such an award. Consequently, as explained in detail below, to ensure equal treatment, most institutional tribunals seem to restrict the right of appointing arbitrators for both sides and give themselves the authority to appoint the whole arbitral tribunal.⁹¹

⁸⁵ *Westland Helicopters v. Arab Organization for Industrialization, United Arab Emirates, Saudi Arabia, Qatar, Egypt and Arab British Helicopter* (19.04.1994) <<https://jsumundi.com/fr/document/decision/en-westland-helicopters-limited-v-1-arab-organization-for-industrialization-2-united-arab-emirates-3-kingdom-of-saudi-arabia-4-state-of-qatar-5-arab-republic-of-egypt-and-6-arab-british-helicopter-company-decision-of-the-swiss-federal-tribunal-120-ii-155-tuesday-19th-april-1994>> accessed 11 June 2024.

⁸⁶ Kiyak (n 27) 173.

⁸⁷ Schwartz Dutco (n 73) 10.

⁸⁸ Kiyak (n 27) 26; Pair (n 52) 171-173; Martin Platte, 'When Should an Arbitrator Join Cases?' (LCIA 2002) Arbitration International, Vol. 18, No.1, 59.

⁸⁹ Chiu (n 50) 59.

⁹⁰ Jean-Hubert Moitry, 'Right to a Fair Trial and the European Convention on Human Rights' (June 1989) Journal of International Arbitration, Vol. 6, 118.

⁹¹ See below, ch. 7, 93-99.

2.2.4. Enforcement Difficulties

In cases where the parties do not expressly consent to consolidation and it has been imposed on parties by law or court practices, the rendered arbitral award can be subjected to the domestic enforcement rules and by the denial of the award, arbitration proceedings can turn into a great waste of time and money.⁹² Some authors argue that efforts to enforce an arbitral award, rendered as a result of consolidated arbitration proceedings without the express consent of the parties will lead to lengthy and cumbersome litigation processes before the national courts and this contradicts the expectations from international arbitration, which to solve the disputes in a fast and efficient way.⁹³

Thereupon a review of the New York Convention is required. The Convention has three related provisions, which are Article V(1)(a), Article V(1)(d) and Article V(2)(b). The possible obstacles to the recognition and enforcement of arbitral awards may be raised from these provisions.

2.2.4.1. Article V(1)(a) of New York Convention

According to Article V(1)(a); recognition and enforcement of the award may be refused if

“the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.”

The obligation of signatory states to recognise and enforce arbitral awards made pursuant to such agreements is limited to written agreements under Article II of the New York Convention.

This criterion is unlikely to be met in cases when a non-signatory has been added to the arbitration. Nevertheless, this does not automatically prevent the recognition and enforcement of awards issued in arbitrations involving multiple parties.⁹⁴

In Article V(1)(a), which lists the situations under which an award can be refused recognition and enforcement, awards made under an arbitration agreement that was invalid under the law determined by the parties to be the applicable law of the agreement or, if none, the law of the jurisdiction in which the award was rendered are mentioned. As a result, recognition should not

⁹² Dominique Hascher, ‘Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration?’ (Kluwer Law International 1984) *Journal of International Arbitration*, Vol. 1, Issue 2, 138.

⁹³ Hascher (n 92) 137-138.

⁹⁴ Bamforth, Maidment (n 8) 6.

be denied where the arbitral tribunal's jurisdiction is valid under the law chosen by the parties or, as applicable, the law of the jurisdiction in which the award was made.⁹⁵

2.2.4.2. Article V(1)(d) of New York Convention

According to Article V(1)(d);

“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”.

This article expresses that the will of the parties prevails over the law of the place of enforcement.⁹⁶

The law of the seat of arbitration may only come into effect in the absence of an agreement between the parties on the relevant issue. If the parties have expressly stated in the arbitration agreement that a consolidation decision cannot be given and still the tribunal has consolidated the proceedings according to the provisions of the law of the seat of arbitration, the courts of the place of enforcement may refuse to enforce the award.⁹⁷

It is mentioned that, if the law of the seat of arbitration permits consolidation, the rules of the seat of arbitration become a part of the arbitration agreement.⁹⁸ On the contrary, opponents of this view argue that where the arbitration agreement contains an express provision on the selection of arbitrators, allowing a consolidation would mean an interference with the parties' agreement.⁹⁹ Because the consolidation decision can result in a change in the procedure of appointing the arbitrators, the number of parties may increase, and with the decision of consolidation, the arbitration agreement's several provisions have to be considered as rewritten.

The appointment of an arbitrator in consolidated proceedings is a real obstacle. Nonetheless, although this view is criticized, the acceptance of the parties' consent to consolidate the cases, where the law applicable to the arbitration permits this situation, can be considered that the

⁹⁵ Ibid.

⁹⁶ Born (n 16) 2767.

⁹⁷ Born (n 16) 2768.

⁹⁸ Kıyak (n 27) 189.

⁹⁹ Kıyak (n 27) 189; Matthew Schwartz, 'Multiparty Disputes and Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma' (1990) Case Western Reserve Journal of International Law, Vol. 22, Issue 2, 370.

parties may also have consent to amend their agreement on the selection of the arbitrator as well, yet again this consent can be described as artificial.¹⁰⁰

Leboulanger states that in cases where the seat of arbitration has not been chosen by the parties, a consolidation award based on the law of the seat of arbitration may be found contrary to the will of the parties by the courts of the place of enforcement.¹⁰¹

Another view on this issue specifically refers to the emergence of multiparty arbitration as a result of consolidation.¹⁰² Considering that the appointment of arbitrator clauses, mostly drafted in bilateral arbitrations, it will not be possible to apply these clauses in multiparty arbitration. Consequently, the gap in the contract can be filled in accordance with the law applicable to the arbitration procedure.¹⁰³

If the applicable law to the arbitration, allows the arbitrator, arbitral tribunal or a court to consolidate arbitral proceedings even in the absence of a party's consent, the arbitration clause or agreement drafted in anticipation of the dispute between the two parties should not be given any meaning with respect to consolidation.¹⁰⁴ *Ten Cate* notes that this argument is particularly strong where the parties have chosen a law or arbitration rules that contain mandatory consolidation rules, or where the designated seat of arbitration accepts consolidation.¹⁰⁵

Moreover, since Article V(1)(d) of the New York Convention only provides an option for the courts to deny the enforcement of the arbitral award, it would be wrong to assume that the courts of the place of enforcement will reject the consolidated arbitration award outright, still, the courts may enforce the award even if the agreement on the selection of the arbitrator has not been complied with.¹⁰⁶

¹⁰⁰ Born (n 16) 2813; Stefan M. Kröll, Julian D. M. Lew, Loukas A. Mistelis, *Comparative International Commercial Arbitration* (Wolters Kluwer 2003) 382.

¹⁰¹ Kiyak (n 27) 189; Leboulanger (n 7) 65.

¹⁰² Irene M. Ten Cate, 'Multi-Party and Multi-Contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreements under U.S. Law' (2004) *American Review of International Arbitration*, Vol. 15, Issue 1, 145.

¹⁰³ Kiyak (n 27) 190.

¹⁰⁴ *Ibid.*

¹⁰⁵ Ten Cate (n 102) 145.

¹⁰⁶ Kiyak (n 27) 190.

2.2.4.3. Article V(2)(b) of New York Convention

According to Article V(2)(b);

“Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: The recognition or enforcement of the award would be contrary to the public policy of that country”.

The concept of public policy can be defined as the set of institutions and rules that determine the basic structure of a society in terms of political, social, economic, moral and legal aspects within a certain period of time and protect its basic interests.¹⁰⁷

Due to the reasons that the effect of public order varies according to the characteristics of each case, that the understanding of public order varies among states and even within the courts of the same states, the concept of public order is being criticised.¹⁰⁸ Even though the term public order is regulated in one of the most signed international conventions, still a uniformed framework of this concept cannot be drawn precisely.

Yet, some authors state that the public order in international arbitration has to be accepted much narrower than public order in domestic law¹⁰⁹, there is also a view that the decisions to consolidate arbitral proceedings with a court’s decision can be considered a breach of the contract between the parties and, on the grounds of freedom of contract principle, consolidation can be named as a reason to cause a breach of public order in the country of enforcement.¹¹⁰

Furthermore, Article V(2)(b) can be applicable in cases, when one of the parties cannot be able to participate in the appointment of arbitrators equally. In the *French Cour de Cassation in Siemens AG and BKMI Industrieanlagen GmbH v. Dutco Construction Co.* case¹¹¹, the French Court of Cassation considered the equal participation principle in the selection of arbitrators to be a fundamental principle of French private international law, and since one of the parties could not participate in the appointment of arbitrator phase, the award is found contrary to the public policy of the country.

¹⁰⁷ Ercüment Erdem, *Milletlerarası Ticaret Hukuku* (Istanbul 2024), 718.

¹⁰⁸ Nuray Ekşi, ‘Yargıtay Kararları Işığında Yabancı Hakem Kararlarının Tenfizinde Kamu Düzeni’ (2020) *Public and Private International Law Bulletin*, Vol. 40, Issue 1, 152-153.

¹⁰⁹ Ziya Akıncı, *Milletlerarası Tahkim Hukuku* (Istanbul 2021), 375.

¹¹⁰ Kıyak (n 27) 192; Shwartz (n 99) 371.

¹¹¹ Dutco Case (n 70).

2.3. Advantages and Disadvantages of Joinder in International Arbitration

As a procedural transaction, a joinder is grounded by the essential principle of effectively administering justice.¹¹² Its primary objectives are to guarantee fair outcomes for the parties involved by avoiding inconsistent awards in related cases, which often occur in separate legal proceedings, while also aiming to improve the efficiency of legal processes and minimize both time and costs, particularly by coordinating the gathering of evidence in a unified manner.¹¹³

Therefore, as mentioned earlier under the preceding title,¹¹⁴ the resolution of a dispute in a single case signifies not only a saving of time and expense but also prevents contradictory decisions that may arise in different cases. Still, the practice of multi-party arbitration presents also various challenges due to its consensual structure based on the will of the parties, being a bilateral, confidential, and private judicial mechanism, the necessity of treating parties equally, and potential problems that may occur in enforcement.¹¹⁵ Just as in the consolidation of cases, all these benefits and challenges came into question when a third party joined the arbitral proceedings. Thus, detailed information regarding these concepts will not be described to avoid the repetition of the previous heading. In short, it can be noted that procedures such as joinder and consolidation enhance the effectiveness of the decision making processes by addressing interconnected factual and legal issues collectively, and the decision maker authority gains a better comprehensive and contextual understanding of the parties' transactions and obligations, this also ensures the formulation of more well-founded reasoned decisions.¹¹⁶

3. Consent of Parties for Joinder and Consolidation

The claims and demands of two or more parties in different arbitration proceedings, without legal basis, cannot be heard together.¹¹⁷ And this legal basis is the existence of the will of the parties.¹¹⁸ It has been argued that forcing arbitration proceedings to consolidate or deciding on the joinder of a third party without the parties' consent, violates the freedom of contract principle, which constitutes the basis of the arbitration agreement.¹¹⁹ In this sense, it can be

¹¹² Leboulanger (n 7) 44.

¹¹³ Smith (n 30) 174; Leboulanger (n 7) 44.

¹¹⁴ See above, ch.2, 14-18.

¹¹⁵ Berk Demirkol, 'Çok Taraflı Tahkim Yargılaması' (2018) in Genç Milletlerarsı Özel Hukukçular Konferansı, 44.

¹¹⁶ Born, Prasad (n 42) 56; Kröll, Lew, Mistelis (n 100) 378.

¹¹⁷ Kıyak (n 27) 52; Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 497.

¹¹⁸ Waincymer (n 117) 497.

¹¹⁹ Kıyak (n 27) 53; Chiu (n 50) 57; Andrea Marco Steingruber, *Notion, Nature, and Extent of Consent in International Arbitration* (PhD Thesis London 2009), 176.

mentioned that the will to arbitrate, is crucial for arbitration and has to be ascertained, whether its presence is explicit or implicit.

As stated in the report published by the ICC in 1995, the source of the difficulties encountered in multi-party arbitration disputes is also the will to arbitrate:¹²⁰

“The difficulties of multi-party arbitrations all result from a single cause. Arbitration has a contractual basic; only the common will of the contracting parties can entitle a person to bring a proceeding before an arbitral tribunal against another person, and oblige that other person to appear before it. The greater the number of such persons, the greater the degree of care which should be taken to ensure that none of them is joined in the proceeding against its will.”

According to *Born*, in this context, the parties’ will to arbitrate is an artificial concept. Especially while concluding an arbitration agreement, parties typically do not consider the potential need for consolidating disputes or the joining of a third party in any future disputes. Since detailed procedural issues such as consolidation and joinder are not considered at the drafting stage, any determination about the will to arbitrate is based on assumptions which are evaluated through parties’ expectations.¹²¹ In the decision of *Noble Energy Inc. and Machalapower Cia. Ltda. v The Republic of Ecuador and Consejo Nacional de Electricidad* (**‘Noble Energy Case’**),¹²² the arbitral tribunal also mentioned that, while interpreting the real intention of the parties, one of the factors to be considered is the parties’ expectations as inferred from the agreement or the entire transaction.¹²³

Some authors find that excluding the advantages of such procedural mechanisms, by the will of the parties is unrealistic.¹²⁴ The separation of related proceedings, which may lead to conflicting awards and, therefore, impede the enforcement of arbitral awards, is contrary to the effectiveness that the parties expect from arbitration. *Born* has also stated that, as an extension of the rule of good faith, the expectation of the parties to prevent the rendering of contradictory judgements by ensuring an efficient proceeding may indicate the existence of an implicit will to arbitrate.¹²⁵

¹²⁰ Commission on International Arbitration, ‘Final Report on Multiparty Arbitrations’ (May 1995) ICC International Court of Arbitration Bulletin, Vol. 6 Issue. 1, para. 5.

¹²¹ *Born* (n 16) 2765-2766; *Leboulanger* (n 7) 66; *Chiu* (n 50) 57.

¹²² *Noble Energy Inc. and Machalapower Cia. Ltda. v The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/5/12, Decision on Jurisdiction (5 March 2008) <<https://arbitrationlaw.com/library/noble-energy-inc-and-machalapower-cia-ltda-v-ecuador-and-consejo-nacional-de-electricidad>> accessed 18 June 2024.

¹²³ *Noble Energy Case* (n 122) §195.

¹²⁴ *Kiyak* (n 27) 62; *Leboulanger* (n 7) 66.

¹²⁵ *Born* (n 16) 2780.

The will of the parties can be revealed in various ways. In the event that the arbitration agreement between the parties contains an explicit provision, there is no doubt that the parties have the will to consolidate the cases or allow the joining of a third party.¹²⁶ The parties may include a detailed provision in the arbitration agreement regulating who will be authorized to order consolidation or joinder, when and under what conditions the consolidation or joinder will take place, and how the arbitral tribunal will be appointed.¹²⁷

According to *Rau* and *Sherman*, in cases where the arbitration agreement is silent on this matter, the primary issue is what to presume from this silence, in other words, in arbitration agreements that do not contain any provision on consolidation or joinder, which rule has to be adopted in the absence of this contractual gap.¹²⁸ Even if there is no explicit provision in the arbitration agreement, the will to arbitrate may be implicitly present.¹²⁹ In such cases, when investigating the existence and scope of the parties' common will to arbitrate, it is necessary to interpret both the arbitration agreement and the surrounding facts.¹³⁰

In this context, if an institutional arbitration rule is selected, like LCIA Arbitration Rules, which contain provisions related to both consolidation of the arbitral proceedings and joinder of a third party, this choice can be evaluated as the consent of the parties to arbitrate.¹³¹ Although some authors argue that deciding on consolidation or joinder by reference to the arbitration institutes' rules would be contrary to the parties' freedom of will, however, parties' selection of these rules by reference should be understood as an indication of their will to arbitrate together, otherwise finding a legal base for these procedural transactions can be nearly impossible.¹³² Furthermore, there are also authors who mention that the principle of freedom of will in procedural law can be softened by the application of mandatory principles of public international law, such as the administration of justice, adversarial proceedings, equal treatment of the parties, and the right of audience.¹³³

¹²⁶ Kiyak (n 27) 53; Kröll, Lew, Mistelis (n 100) 392.

¹²⁷ Ten Cate (n 102) 153; Born (n 16) 2777.

¹²⁸ Alan S. Rau, Edward F. Sherman, 'Tradition and Innovation in International Arbitration Procedure' (1995) *Texas International Law Journal*, Vol. 30, No. 1, 115.

¹²⁹ Kiyak (n 27) 55; Born (n 16) 2777; Platte (n 88) 69.

¹³⁰ Platte (n 88) 69; Ten Cate (n 102) 154.

¹³¹ Born (n 16) 2776; Platte (n 88) 69; Choi (n 13), 33-34.

¹³² Kiyak (n 27) 54; Pryles, Waincymer (n 43) 463.

¹³³ Leboulanger (n 7) 98; Steingruber (n 119) 189.

Regarding the consent of the parties, the arbitral tribunal in the case of *Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge*¹³⁴ (**‘Cambodai Case’**) noted that “*whilst such consent usually takes the form of an express provision, whether in a contract or treaty, by way of incorporated arbitration rules, or in a submission agreement, it can also be implied from the circumstances,*”¹³⁵ and accepted that the incorporation of arbitration rules is a clear indicator of the parties’ consent.

Conversely, even if the institutional arbitration rules incorporated into the arbitration agreement by reference allow to consolidate proceedings or decide on a joinder, it is necessary to check whether there is a dissent of a party that prevents these transactions in the arbitration agreements, and if there is such a contrary will, the rules of the arbitral institution in question should not be applied.¹³⁶ Born has stated that the existence of special provisions on confidentiality or on the selection of arbitrators in the parties’ arbitration agreement, since they specially decided on these issues rather than applying the institutional rules, can be considered as the parties have denied the consolidation or joinder provisions in the institutional rules.¹³⁷

In case there is an absence of a chosen institutional arbitration rule that contains the following provisions, or if the law of the seat of arbitration does not permit joinder or consolidation without an express intention of the parties, it is possible to say that the silence of the arbitration agreement on the issue of consolidation and joinder is presumed to be against the will of arbitrate.¹³⁸

Moreover, the determination of the will of the parties may vary in multi-party¹³⁹ and multi-contract¹⁴⁰ arbitrations. In cases, where there are more than two parties, there will eventually be a multi-party arbitration. Contrarily, multi-contract arbitration does not always result in multi-party arbitration.¹⁴¹ There can be more than one contract between two same parties, and

¹³⁴ *Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge* (22.03.2011) <<https://www.iareporter.com/wp-content/uploads/2024/02/Cambodia-Power-decision-on-jurisdiction.pdf>> accessed 16 June 2024.

¹³⁵ Cambodai Case (n 134) §122.

¹³⁶ Kıyak (n 27) 54; Born (n 16) 2776.

¹³⁷ Born (n 16) 2776.

¹³⁸ Born (n 16) 2779.

¹³⁹ “Multi-party arbitration may arise when there are more than two parties to a contract, or when multiple contracts with different parties are related to the same subject of dispute” See Kıyak (n 27) 64; Blackaby, Partasides, Hunter (n 2) 142.

¹⁴⁰ “Multi-contract arbitration refers to situations where there are a number of contracts between potentially different parties, all of which have an interest in or connection to the matters in dispute” See Mustafa Kaan Ceyhan, *Milletlerarası Ticaret Odası (ICC) Tahkim Yargılaması* (Ankara 2022), 88.

¹⁴¹ *Leboulanger* gives such examples for a multi-contract arbitration; parties may sign a framework agreement and then enter into implementing agreements; they may sign more than one agreement concerning the same economic relationship; or they may sign several completely independent agreements. See *Leboulanger* (n 7) 45.

in this type of consolidation or joinder, it is clear that both parties have a will to resolve their disputes with each other through arbitration and the involvement of a third party is not a question.

According to the *Leboulanger*, contracts which are part of a single economic transaction should be considered as one and this can also be an indicator of the presence of will to arbitrate.¹⁴² *Leboulanger's* view about the contracts being a part of a single economic relationship is essentially about the determination of the *ratione materia*. When considering the possibility of consolidation of the proceedings and joinder for a third party, if the scope of one of the arbitration agreements includes the base contract of the other dispute, it can be assumed that parties have the will to arbitrate.¹⁴³ In the Noble Energy Case, the arbitral tribunal has also determined there was, at the very least, an implied agreement to resolve the pending disputes stemming from the same overall economic transaction within a single arbitration.¹⁴⁴

Another indicator for the will to arbitrate can be the similarity and the differences of the agreements. While the existence of identical or similarly worded arbitration agreements governing the disputes can be interpreted as an implicit consent of the parties to arbitrate¹⁴⁵, the incompatibly drafted arbitration agreements can indicate that parties did not have consent for consolidation and joinder.¹⁴⁶ For instance, in ICC Case No. 5989, the slightly different wording of the arbitration clauses in the prime contract and the sale contract did not constitute an obstacle to consolidation.¹⁴⁷ Still, there are also views in opposition which say that the identical or similarly worded arbitration clauses or agreements are not solely enough to decide if there is a will for the consolidation.¹⁴⁸ In the example provided by *Poudret and Besson*, disputes arising from different contracts were consolidated into a single ICC arbitration proceeding, even though one arbitration agreement specified Geneva as the place of arbitration, while the other specified Paris. Subsequently, the French court annulled the arbitral award due to a breach of the parties' will.¹⁴⁹

As the reasons for evaluating whether the parties have the intention to arbitrate are being explained, it must be stated that it is not necessary to find all of these factors present in a single

¹⁴² *Leboulanger* (n 7) 98.

¹⁴³ Kiyak (n 27) 61-62.

¹⁴⁴ Noble Energy Case (n 122) §194.

¹⁴⁵ Kiyak (n 27) 56; Kröll, Lew, Mistelis (n 100) 394; Born (n 16) 2778; *Leboulanger* (n 7) 78-79; Platte (n 88) 70-71; Steingruber (n 119) 178.

¹⁴⁶ Ten Cate (n 102) 155; Platte (n 88) 72; Poudret, Besson (n 81) para. 240.

¹⁴⁷ Kröll, Lew, Mistelis (n 100) 394.

¹⁴⁸ Poudret, Besson (n 81) para. 240.

¹⁴⁹ *Ibid.*

dispute. Each individual case should be assessed based on its unique characteristics, and a final decision should be made in accordance with the circumstances of that particular case. For instance, at times, even if arbitration agreements are drafted differently, it may still be possible to interpret that the parties intend for their disputes to be resolved in a single proceeding.

In the case of *Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative*¹⁵⁰ (“Anderson Case”), despite the arbitration clauses in the contracts subject to multi-party arbitration being drafted differently, the arbitrator decided that they had the authority to initiate the arbitration proceedings based on the arbitration clause referencing ICC rules.

In 1997, 44 companies under the Andersen Consulting Business Unit Member Firms initiated ICC arbitration against 97 companies under the Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative based on 141 separate arbitration agreements. During this period, due to only a small number of companies having signed the revised 1994 contract, the defendants raised objections to the jurisdiction of the ICC.¹⁵¹ The sole arbitrator appointed by the ICC issued an interim award, determining that all parties were historically bound by the most recently amended arbitration clause referencing the ICC rules, and therefore, they expressed their intent for their disputes to be consolidated into a single arbitration proceeding. The arbitrator reached this conclusion because the contracts between the parties were based on a standard agreement, and AWSC¹⁵² had executed the latest revised contract on behalf of all its members. Accordingly, the revision in 1994 was binding for each member, whether or not they had updated their own contracts. The defendants filed a request for the annulment of the interim arbitral award to the Swiss Federal Supreme Court. The Swiss Federal Supreme Court, agreeing with the arbitrator’s assessment, rejected the application to annul the arbitral award.¹⁵³ Cognizant that resolving the dispute necessitated an examination and interpretation of the contracts between the parties, the Swiss Federal Supreme Court determined

¹⁵⁰ *Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative*, (28 July 2000) ICC Case No. 9797 <<https://jsumundi.com/en/document/decision/en-andersen-consulting-business-unit-member-firms-v-arthur-andersen-business-unit-member-firms-and-andersen-worldwide-societe-cooperative-final-award-friday-28th-july-2000>> accessed 21 October 2023.

¹⁵¹ Kiyak (n 27) 72.

¹⁵² In 1989, due to commercial reasons, AWSC split into two separate business units: Andersen Consulting Business Unit and Arthur Andersen Business Unit.

¹⁵³ Kiyak (n 27) 73; Kröll, Lew, Mistelis (n 100) 394-395.

that the parties were bound by the final version of the arbitration clause as a result of this analysis and interpretation.¹⁵⁴

Moreover, the “group of companies doctrine” is another aspect to be discussed in this section. In situations where a signatory of an arbitration agreement is a member of a corporate group, the group of companies doctrine permits extending the arbitration agreement to encompass other entities within the same group.¹⁵⁵ In the *Dow Chemical Group v Isover-Saint-Gobain Case*,¹⁵⁶ two entities within the Dow Chemical group independently established distribution agreements, each containing an arbitration clause, with several companies. The rights of these companies were subsequently assumed by Isover-Saint-Gobain.

At the time of the dispute, not only the two Dow Chemical firms that had signed the agreements but also their parent company and another subsidiary, who are non-signatory to the agreements, initiated arbitration procedures against Isover-Saint-Gobain.

Isover-Saint-Gobain contested the claims made by the companies that had not signed the agreements, arguing that these entities were not bound by the arbitration clauses within the agreements. Nonetheless, the tribunal has dismissed this objection by stating the following considerations:

“Considering that irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality of which the arbitral tribunal should take account when it rules on its own jurisdiction subject to Article 13 (1955 version) or Article 8 (1975 version) of the ICC Rules. Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.”

It is detectable that the basis for the tribunal’s decision was the significant contributions of the non-signatory companies to the initiation, execution, or conclusion of the contracts containing the arbitration agreements. Additionally, the tribunal noted a common intent among all parties involved that these non-signatories were effectively parties to the contracts and, thus, should be bound by the arbitration clauses they contained.

¹⁵⁴ Kröll, Lew, Mistelis (n 100) 395.

¹⁵⁵ Bamforth, Maidment (n 8) 21.

¹⁵⁶ *Dow Chemical Group v Isover-Saint-Gobain* (23.09.1982) ICC Case No. 4131 <https://www.trans-lex.org/204131/_/icc-award-no-4131-yca-1984-at-131-et-seq-/#head_4> accessed 30 December 2023.

In this regard, this extension is conditional on two key factors; firstly, the non-signatory's involvement in the contract's initiation, execution, or conclusion that contains the arbitration agreement, and secondly, a mutual intention among the signatory parties that the non-signatory should be subject to the contract and its arbitration clause.¹⁵⁷

As can be understood from the aforementioned decisions and doctrinal views, in practice, the focus has been primarily on the intended result of executing the arbitration agreement, acknowledging that the arbitration agreement would remain valid even when these procedural processes are employed, and emphasizing that trials should be conducted. Indeed, although the will of the parties predominates in arbitration proceedings, at the end of the day, it is a trial where arbitrators become independent upon their appointment, and there are obligations to render a fair decision. Thus, when an implicit will for the consolidation of arbitration proceedings or the inclusion of a third party is detected, these procedural mechanisms should be applied. Otherwise, following a dispute, if one party wishes to prolong the process, they will not accept any later claims for consolidation or intervention, will object on the grounds of lacking consent, and if these objections are accepted, the arbitration agreement initially made would become meaningless.

4. Joinder and Consolidation in Institutional Arbitration Rules

As time passes, with the increase in the selection of arbitration, the number of institutional arbitration bodies also expands. At the moment, there are nearly 270 Arbitration Institute Directories¹⁵⁸ around the world. Therefore, several selected arbitral rules will be outlined in this work, which will include the ICC, LCIA, SIAC, HKIAC, SCC and ISTAC Rules.

4.1. 2021 ICC Arbitration Rules

The ICC has released a revised edition of its Arbitration Rules on 1 December 2020. These rules have replaced the 2017 ICC Rules and become effective on 1 January 2021.

According to Article 8 of the ICC Rules, in arbitral proceedings with more than two parties, each party may bring claims and make demands against the other. However, even in this case, no new claims can be made after the signing of the Terms of Reference or its approval by the Court, except when the arbitral tribunal approves it pursuant to Article 23(4). In the context of

¹⁵⁷ Bamforth, Maidment (n 8) 22.

¹⁵⁸ International Council of Commercial Arbitration <https://www.arbitration-icca.org/institutes?combine=&field_country_target_id=All&page=7> accessed 10 June 2023.

this provision, the requesting party must also provide the information referred to in subparagraphs c), d), e) and f) of Article 4(3).

Previously, the ICC Rules were structured around a dual scenario where a claimant submits a claim against a respondent, who may then file a counterclaim claim in return. However, since 2012, the ICC Rules have acknowledged that any party involved in an ICC arbitration, including a third party joined through a Request for Joinder under Article 7, can make a claim against any other party in the arbitration, this principle is embodied and reflected in Article 8.¹⁵⁹

While Article 8 addresses claims between multiple parties, Article 9 specifies that parties can bring claims arising from multiple contracts, regardless of the number of parties, within a single arbitration. Article 9, similar to the provisions for joinder and consolidation discussed below, requires addressing the jurisdiction and compatibility of the arbitration agreements.

When the provisions set out in the “Multiple Parties, Multiple Contracts, and Consolidation” section are examined cumulatively, it is evident that they complement each other, particularly by expressly declaring that there can be multi-party and multi-contract disputes. Articles 8 and 9 clearly provide directions for the joinder and consolidation procedures.

4.1.1. Joinder in ICC Rules

As explained in detail above, multi-party disputes may arise in claims against parties who are not signatories to a contract on the same or similar subject matter, and the participation of such third parties in an arbitration proceeding is referred to as a *joinder*, and it is generally permitted by the consent of all subjects of the arbitration.¹⁶⁰

Joinder is regulated in Article 7 of ICC Rules and titled, “Joinder of Additional Parties”. In ICC Arbitration, rather than a third party joining the proceedings by its own will, one of the parties to an existing dispute has to request for the joining of the third party in the arbitration proceedings and therefore, this party, who seeks the joinder, has to submit a Request for Joinder to the Secretariat.¹⁶¹

If a third party becomes aware of the dispute, such as in the case where claims in arbitration arising from a joint venture contract to which the party is a signatory but has not been requested

¹⁵⁹ Thomas H. Webster, Michael W. Bühler, *Handbook of ICC Arbitration* (Sweet & Maxwell 2021) 183.

¹⁶⁰ Ioannis Alexopoulos, Ryan Cable, ‘Arbitrating multi-party and multi-contract disputes’ <<https://www.signaturelitigation.com/arbitrating-multi-party-and-multi-contract-disputes-ioannis-alexopoulos-and-ryan-cable/>> accessed 09 September 2023; Ceyhan (n 140) 86.

¹⁶¹ ICC Rules Art.7(1).

to join in either the request for arbitration or the answer, not only do the disputing parties need to consent, but the arbitral tribunal, if constituted, must also approve the intervention.¹⁶² As demonstrated, even though the procedure for joinder is not explicitly outlined under ICC Rules, the rules do not entirely preclude the possibility of joining a third party.

This Request for Joinder has to include the case number of the current arbitration; the full name, title, address and other contact details of the parties, including the additional party; and other relevant information mentioned in Article 4(3), subparagraphs c), d), e) and f). Moreover, the party filing the Request for Joinder may also include any other papers or information it deems suitable or that may aid in the expeditious resolution of the dispute.¹⁶³

The date on which the Secretariat receives the Request for Joinder will be recognized as the start date of the arbitration proceedings against the additional party.¹⁶⁴ According to Article 4(3)(c) and (d) and Article 7(2)(c) of the Rules, the Request for Joinder must contain a claim against the third party.¹⁶⁵

If a claim is raised against a third party under a different contract from the one cited in the Request for Arbitration, the ICC Court's jurisdictional control will apply according to Article 9, which addresses claims made in the same arbitration under multiple contracts, and Article 6(4)(ii) of the Rules. This reference to Article 9 substantially limits the ability to bring claims against a third party based on any contract other than those forming the basis of the Request for Arbitration.

Upon receiving the joinder request, the third party will file its reply in accordance with Articles 5(1)-5(4), depending on the circumstances of the case. In the context of Article 8, in its reply, the third party can also bring its claims against all other parties, including the jurisdictional objections.¹⁶⁶ The third party, who has received a Request for Joinder, has the same rights and obligations as any respondent that is served with a Request for Arbitration.¹⁶⁷

¹⁶² Webster, Bühler, (n 159) 172.

¹⁶³ ICC Rules Art.7(2).

¹⁶⁴ ICC Rules Art.7(1).

¹⁶⁵ Webster, Bühler (n 159) 174.

¹⁶⁶ ICC Rules Art.7(4).

¹⁶⁷ Webster, Bühler (n 159) 173.

When a third party raises a jurisdictional objection, it will be addressed directly by the arbitral tribunal unless the Secretary General refers the issue to the ICC Court for a ruling under Article 6(4).¹⁶⁸

As a rule, no additional party can be joined after the approval or appointment of any arbitrator.¹⁶⁹ This approach safeguards the third party's right to participate in the constitution of the arbitral tribunal while also setting a time limit in Article 7(1).¹⁷⁰ By determining such a time limit, the Secretariat can also avoid the risk of multiple joinder requests, which would cause delays in the formation of the arbitral tribunal.¹⁷¹ However, with the mutual agreement of all parties, including the third party, or by following the procedure outlined in Article 7(5), the joinder of the third party can be enabled.¹⁷² Additionally, the Secretariat itself may also impose a time limit for submitting a Request for Joinder.

According to Article 7(5) of the Rules, which was not included in the 2017 ICC Rules, any Request for Joinder made after the confirmation or appointment of any arbitrator shall be decided by the arbitral tribunal once it has been constituted and, where appropriate, shall be conditional upon the joining party's acceptance of the constitution of the arbitral tribunal and its Terms of Reference.¹⁷³ As a result, unlike the 2017 ICC Rules, the new requirements do not demand the consent of all parties, regarding requests made after the confirmation or appointment of an arbitrator has been relaxed, and even if one of the parties objects, the arbitral tribunal is granted the discretion to accept the joinder requests if the conditions are met.¹⁷⁴ If the third party agrees to the tribunal's constitution and the terms of reference, the arbitral tribunal is enabled to add this third party to the arbitration without unanimous consent.¹⁷⁵

The arbitral tribunal has to consider all relevant circumstances in deciding on such a Request for Joinder according to Article 7(5), which may include whether the arbitral tribunal has *prima facie* jurisdiction over the third party, the timing of the Request for Joinder, potential conflicts of interest, and the impact of the joinder on the arbitral procedure. The requirement of

¹⁶⁸ Webster, Bühler (n 159) 174.

¹⁶⁹ ICC Rules Art.7(4).

¹⁷⁰ Bamforth, Maidment (n 8) 6; Webster, Bühler (n 159) 175.

¹⁷¹ Webster, Bühler (n 159) 175

¹⁷² ICC Rules Art.7(4).

¹⁷³ Ceyhan (n 140) 87; Köşgeroğlu (n 5) 184; Legru (n 65) 254; Webster, Bühler (n 159) 175.

¹⁷⁴ Webster, Bühler (n 159) 180.

¹⁷⁵ Daniel H. Sharma, 'The Revised New 2021 ICC Arbitration Rules' <<https://www.dlapiper.com/en/insights/publications/2021/04/the-revised-new-2021-icc-arbitration-rules>> accessed 02 June 2024.

considering all relevant circumstances assumes that the tribunal will give all parties a chance to provide their remark on the suggested joinder.¹⁷⁶

It should be noted that considerations of the joinder's impact on the arbitral procedure extend beyond the timing of the request to include its overall effect on the proceedings.¹⁷⁷ The arbitral tribunal will evaluate the conflicting interests of efficiency and fairness against maintaining the procedural timetable and take into account significant disruptions, such as the excessiveness of the third party's claims, which may lead the arbitral tribunal to not favour the joinder decision.¹⁷⁸

Lastly, adding a new party to the proceedings doesn't impact the arbitral tribunal's authority to determine its jurisdiction concerning that party.

4.1.2. Consolidation in ICC Rules

As mentioned earlier, consolidation can occur between the same two parties with different disputes when there are multiple contracts, or it can be initiated between different parties when there are more than two contracts and more than two signatories.

In ICC Rules, as it has been regulated similarly to most institutional rules, "multiple contracts" and "consolidation of arbitrations" are two different articles.

Article 9 of the ICC Rules, titled "Multiple Contracts," is introduced with the aim of regulating situations involving more than one contract. According to the provisions of this article, claims arising from multiple contracts, regardless of whether they fall under one or more arbitration agreements and their connection, can be resolved through a single arbitration process, subject to the provisions of Articles 6(3) – 6(7) and 23(4).

Accordingly, in the event of a dispute, there is no necessity to conduct an arbitration proceeding for each arbitration agreement. However, the decision to consolidate all claims into a single arbitration is entirely at the discretion of the arbitral tribunal.¹⁷⁹ In the absence of any objection from the opposing party regarding a single proceeding, the Secretariat responsible for case management will refer the case directly to the arbitral tribunal during the preliminary stages.¹⁸⁰

¹⁷⁶ Webster, Bühler (n 159) 180.

¹⁷⁷ Webster, Bühler (n 159) 180.

¹⁷⁸ Ibid.

¹⁷⁹ Jan Hlubuček, *Multiple Claims From Multiple Contracts in International Arbitration* (Masaryk University, Diploma Thesis, 2015), 27.

¹⁸⁰ Ceyhan (n 140) 89.

Nonetheless, there may be situations where the Secretariat finds it suitable to refer the case to the ICC Court, even if there has not been any objection to the single arbitration.¹⁸¹ Meanwhile, the scenario changes somewhat when there are claims stemming from multiple contracts with multiple arbitration agreements. In these situations, the likelihood of requiring a preliminary decision from the ICC Court, as outlined in Articles 6(3) - 6(7) of the ICC Rules, becomes more probable, however, still the final decision will be given by the arbitral tribunal.

According to Article 10 of ICC Rules, titled “Consolidation of Arbitrations,” at the request of a party, if the conditions mentioned in the article are set, the Court may consolidate two or more ongoing arbitrations when all of them are being conducted under the ICC Rules.

The ICC Court exclusively makes the decision to consolidate arbitrations, and this administrative decision is binding on both the parties and the tribunal.¹⁸² Arbitrators lack the authority to consolidate ICC arbitration proceedings or reverse the ICC Court’s consolidation decision.¹⁸³

As can be seen, while the provisions of the 2017 ICC Rules stipulated the consolidation procedure as applicable only if all claims by multiple parties were in the scope of a single arbitration agreement, the 2021 revision permits the consolidation procedures even when the multiple parties bring claims under different arbitration agreements.¹⁸⁴

In this regard, consolidation of arbitrations is permissible under the ICC Rules in specific situations. These include cases where the parties willingly agree to consolidation,¹⁸⁵ or where all claims in the arbitrations stem from the same arbitration agreement or agreements,¹⁸⁶ or when the claims in the arbitrations involve different arbitration agreements but share a common set of parties, relate to the same legal relationship, and the ICC Court deems the arbitration agreements to be compatible.¹⁸⁷

Even if one of these situations is present, the Court may choose not to grant a consolidation decision.¹⁸⁸ While reaching a decision, the Court is free to consider any factors it deems relevant, like whether one or more arbitrators have been confirmed or appointed in multiple

¹⁸¹ Hlubuček (n 179) 28.

¹⁸² Webster, Bühler (n 159) 191.

¹⁸³ Ibid.

¹⁸⁴ Legru (n 65) 253; Sharma (n 175); Webster, Bühler (n 159) 192.

¹⁸⁵ ICC Rules Art. 10(1)(a).

¹⁸⁶ ICC Rules Art. 10(1)(b).

¹⁸⁷ ICC Rules Art. 10(1)(c).

¹⁸⁸ Webster, Bühler (n 159) 192.

arbitrations, and if so, whether the same individuals or different people have been confirmed or appointed.¹⁸⁹ The relevant factors are not specifically mentioned in the article, so the Court is not bound by any legal framework.

In this context, analysing the first situation where the parties agree to consolidate, it is evident that this provision is specifically intended for cases where the parties have decided to consolidate after the dispute has arisen. In the presence of a mutual agreement for the consolidation of cases, the ICC Court will generally acknowledge the agreement and act in accordance with the principle of party autonomy, unless there are conditions that make consolidation impractical, reflecting its discretionary authority to approve such requests.¹⁹⁰ For instance, if the arbitration agreements are incompatible, the parties' agreement to consolidate would not resolve this issue, and the ICC Court would therefore refrain from merging the cases into a single proceeding.¹⁹¹

Considering Article 10(b), the 2021 amendment permits consolidations when claims stem either from the same or multiple arbitration agreements, whereas the 2012 Rules restricted consolidation to scenarios where all claims were made under the same arbitration agreement.¹⁹² In this regard, it was no longer necessary for there to be a strict identity between the disputing parties involved in the cases.¹⁹³

Under Article 10(c), to ensure that only the relevant contract parties were involved in a given arbitration and to prevent the inclusion of unrelated parties in a chain of contracts, the 2012 Rules required that the parties to the arbitration be identical if claims were made under multiple arbitration agreements.¹⁹⁴ The amendments, nevertheless, have broadened the scope of the ICC Court's consolidation authority, permitting it to consolidate multiple arbitrations if the four conditions specified in Article 10(c) are satisfied.¹⁹⁵

The ICC Note for the revised 2021 ICC Rules provides two helpful examples, each for Article 10(b) and Article 10(c).

¹⁸⁹ ICC Rules Art. 10(2).

¹⁹⁰ Webster, Bühler (n 159) 192.

¹⁹¹ Ibid.

¹⁹² The Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (The "ICC Note") para.19 <<https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/note-parties-arbitral-tribunals-conduct-arbitration/>> (cited as "ICC Note") accessed 04 December 2023.

¹⁹³ Webster, Bühler (n 159) 193.

¹⁹⁴ Ibid.

¹⁹⁵ Webster, Bühler (n 159) 193; Pair (n 52) 57.

While the ICC Note presented the example for Article 10(b) as,

“...parties A, B, C and D are parties to a Share Purchase Agreement (SPA) and a Shareholders Agreement (SHA). Parties A and D are parties to arbitration 1, while parties B and C are parties to arbitration 2. In such a scenario, consolidation of arbitrations 1 and 2 may be possible;”

another illustration for Article 10(c) is described as,

“...arbitration 1 is between parties A and B with claims under an SPA arbitration agreement, and arbitration 2 is between the same parties with claims under a SHA arbitration agreement. In that scenario, consolidation may be possible if the disputes in the arbitrations arise from the same legal relationship and the Court finds these arbitration agreements to be compatible.”¹⁹⁶

The final paragraph of Article 10 governs which of the consolidated cases will take precedence. Under this regulation, in the event of the consolidation of arbitration cases, unless otherwise agreed by all parties, the cases will be consolidated into the initially filed case.¹⁹⁷

4.2. 2020 LCIA Arbitration Rules

The LCIA issued the revised version of its arbitration rules on August 11, 2020, and determined its date to be effective as October 1, 2020, which has replaced the institution’s 2014 LCIA Rules.

The revised 2020 LCIA Rules brought some significant changes to simplify the complex arbitrations. For instance, under Article 1(2) of the 2020 LCIA Rules, claimants may submit their claims originating from multiple arbitration agreements and/or involve more than one respondent in a single arbitration request.¹⁹⁸

Correspondingly, the LCIA Rules also grant the respondents the right to serve a composite response for all or any of the arbitral proceedings.¹⁹⁹ Conversely, if there are no composite requests for arbitration and the claimant has initiated separate proceedings, the respondents cannot file composite responses to separate arbitrations.

Composite Requests and Responses reduce the administrative burden for parties in closely related multiparty or multi-contract arbitrations by allowing the Claimant to file a single

¹⁹⁶ ICC Note (n 192) 5.

¹⁹⁷ ICC Art. 10(3).

¹⁹⁸ Legru (n 65) 253; LCIA Rules Art. 1(2).

¹⁹⁹ LCIA Rules Art. 2(2).

composite Request for Arbitration instead of multiple similar ones that differ only in party names and specific details.²⁰⁰

Although the composite Request for Arbitration does not consolidate the proceedings it initiates, it can be still favoured by claimants who aim to have the arbitral proceedings consolidated or conducted concurrently.²⁰¹

The explicit inclusion of the composite request was also influenced by a decision of the English Commercial Court, dated 2017 and referred to as *Case of A v. B*.²⁰² In this case, the claimant sought payment for crude oil delivered under two contracts and filed a single request, paying a single registration fee to initiate proceedings against the respondent. The respondent later contested the resulting award on jurisdictional grounds, alleging that the request addressed two separate disputes rather than a single dispute and matter as required by the 2014 LCIA Rules. Although the claimant argued that by submitting a single request for arbitration, it had effectively filed two distinct arbitration proceedings, the Commercial Court rejected this claim and stated that the LCIA Rules treated the request as a single arbitration, with fees for a single arbitration and the constitution of a single arbitral tribunal. Consequently, the Commercial Court found the request ineffective and invalidated the arbitral award due to the tribunal's lack of jurisdiction, as the 2014 LCIA Rules did not permit composite requests for claims arising under multiple contracts.

The revised 2020 LCIA Rules now explicitly allow for the initiation of arbitrations through composite Requests and their continuation through composite Responses, addressing the issue raised by the English Commercial Court's ruling.

4.2.1. Joinder in LCIA Rules

In LCIA Rules, joinder is regulated as one of the powers of the arbitral tribunal and has taken its place under the “Additional Powers”.²⁰³ In this regard, the LCIA Rules differ from the ICC Arbitration Rules and a majority of other examples. As can be understood from other examples, joinder provisions are typically regulated in the initial sections of rules related to arbitration procedures and as a separate article.

²⁰⁰ Maxi Scherer, Lisa Richman, Remy Gerbay, *Arbitrating under the 2020 LCIA Rules: A User's Guide* (Kluwer Law International 2021) 297.

²⁰¹ Philip Clifford KC, Shai Wade, *A Commentary On The LCIA Arbitration Rules* (Sweet & Maxwell 2022) 32.

²⁰² *A v B* [2017] EWHC 3417 (2017) England and Wales High Court <<https://www.acerislaw.com/wp-content/uploads/2020/09/A-v-B-2017-EWHC-3417-Comm-21-December-2017.pdf>> accessed on 25.07.2024.

²⁰³ LCIA Rules Art. 22.

In 1998, LCIA introduced a limited joinder provision. In the 2014 revision, the wording of this provision was changed. In the 2020 revision, while the provision remained the same, the word “expressly” was added, requiring that the party seeking joinder and the third party must expressly agree in writing.²⁰⁴

Article 22(1)(x) aims to prevent the potential waste of time and expenses, as well as the risk of conflicting awards, which inevitably occur when distinct arbitrations are required to resolve disputes involving related parties, commercial relationships, and issues of fact and law.²⁰⁵

It is understood from Article 22.1(x) that a joinder can only be possible if there is a written and explicit declaration of intent between the requesting party and the third party. In addition, the arbitral tribunal, to ensure consistency with Article 14(1)(i), which mandates that the tribunal must act fairly and impartially between all parties and provide the means to present claims and address opposing parties, is obliged to give a reasonable opportunity for the parties to state their comments before rendering such a joinder decision.²⁰⁶

The inclusion of the word “expressly” in the 2020 revision signifies the necessity for both parties’ intent for joinder to be unambiguously stated.²⁰⁷ This express consent of the third party will even be demanded when it is a party to the same arbitration agreement as the disputing parties.²⁰⁸

This addition to the rules also aligns with the Singapore High Court’s 2021 decision in *CJD v. CJE*,²⁰⁹ (**‘CJD v. CJE Case’**) which indicates that, unless explicitly stated, consent for joinder is generally not implied in a multi-party arbitration agreement.²¹⁰

In the *CJD v. CJE Case*, the dispute arose from a joint venture agreement involving two parties, which was subject to arbitration under the 2014 LCIA Rules. During the arbitral proceedings, a request for joinder is submitted to include a second defendant, who is also a signatory of the joint venture agreement, as a party.²¹¹ The request was denied by the arbitral tribunal because

²⁰⁴ Köşgeroğlu (n 5) 186.

²⁰⁵ Clifford, Wade (n 201) 337.

²⁰⁶ Clifford, Wade (n 201) 323.

²⁰⁷ Köşgeroğlu (n 5) 187.

²⁰⁸ Scherer, Richman, Gerbay (n 200) 312.

²⁰⁹ *CJD v. CJE* (2021) The High Court of The Republic of Singapore SGHC 61 <https://www.elitigation.sg/gd/s/2021_SGHC_61> accessed 24 July 2024.

²¹⁰ Scherer, Richman, Gerbay (n 200) 312.

²¹¹ *CJD v. CJE Case* (n 209) para. 15.

the parent company refused to be joined.²¹² The arbitral tribunal reasoned its rejection decision as follows;

“...[T]he Tribunal does not accept the Respondent’s argument that the Joinder Respondent has consented to be joined. Merely because the Joinder Respondent signed the JVA does not mean that it has consented to be joined into the present arbitration.

*The Tribunal would expect express wording to have been used if the Joinder Respondent was agreeing to be joined. For example, a subcontract may provide that if any issue in dispute between the main contractor and the employer touches upon an issue involving the subcontractor, then the subcontractor agrees to be joined into the main contract arbitration. There is no such express wording in the present case.*²¹³”

The Singapore High Court upheld this decision, stating that the 2014 LCIA Rules seek explicit written consent from the joinder of a third party, and this consent cannot be assumed merely because the third party is a signatory to the contract containing the arbitration agreement.²¹⁴

Under these circumstances, since the joinder provision only requires the consent of the applicant and the related third party, the LCIA Rules do not require obtaining the consent of the opposing party.²¹⁵ This means that other parties in the arbitration may be compelled to arbitrate with the joined third party without their consent, which some view as a deviation from the principle of party autonomy.²¹⁶ However, the joining third party accepts this standing offer by agreeing to join the arbitration with the applicant, leading to the creation of a new multilateral arbitration agreement among the existing parties and the third party.²¹⁷ Therefore, any later single-sided objection to the joinder by other parties does not impact the original arbitration agreement under the LCIA Rules or the standing offer to include non-parties.²¹⁸ Agreeing to the LCIA Rules means that no party can oppose if a third party seeks to join with the consent of another party.²¹⁹

Considering these conditions for the joinder provisions, whereas many other institutional rules²²⁰ allow joinder if the third party is *prima facie* bound by the arbitration agreement, the LCIA Rules do not necessitate a preexisting contractual relationship between the existing

²¹² CJD v. CJE Case (n 209) para. 16.

²¹³ CJD v. CJE Case (n 209) para. 18.

²¹⁴ CJD v. CJE Case (n 209) para. 51.

²¹⁵ Smith (n 30) 181; Manuel Gómez Carrión, ‘Joinder of third parties: new institutional developments’ (2015) *Arbitration International*, Vol. 31, 486-488.

²¹⁶ Smith (n 30) 181.

²¹⁷ Scherer, Richman, Gerbay (n 200) 311.

²¹⁸ Born (n 16) 2805; Scherer, Richman, Gerbay (n 200) 312.

²¹⁹ Kröll, Lew, Mistelis (n 100) 382; Clifford, Wade (n 201) 338.

²²⁰ ICC Rules Art. 7(1); HKIAC Rules Art. 27(1); SIAC Rules Art. 7(1).

parties and the third parties.²²¹ This significantly broadens the scope for joinder, extending beyond the parties to the arbitration agreement and thus creating a more inclusive framework.²²²

Regarding the timing of the joinder request, there is no explicit clarification on whether it should be made before or after the constitution of the arbitral tribunal. With respect to the requirement for a written agreement between the party requesting joinder and the third party, it is mentioned that the parties must reach an express written agreement after the commencement of the arbitration proceedings (i.e., the date of the submission of the arbitration request) or that the arbitration agreement must contain a provision on this matter.²²³ However, since the authority for joinder is vested in the arbitral tribunal, it is understood that even if the joinder request is made before the arbitral tribunal is constituted, the decision making authority on this request rests with the arbitral tribunal.²²⁴ Despite the fact that the arbitral tribunal is already appointed at the time of the joinder procedure, preventing the third party from participating in its constitution, the express agreement of the joining party will be evaluated as an implied waiver of the right to appoint an arbitrator.²²⁵

Since it is mentioned that only one of the parties may request the joinder of a third party, it can be observed that third parties are not allowed to submit requests to participate.²²⁶ In spite of this specific restriction, permitting a third party to intervene when both the third party and at least one party to the arbitration explicitly agree in writing aligns with the intent of the LCIA Rules, making it overly rigid to distinguish based solely on which party requested the joinder; thus, the more reasonable view is that the 2020 LCIA Rules allow third party intervention if the required agreement is established.²²⁷

4.2.2. Consolidation in LCIA Rules

LCIA had introduced provisions for the consolidation of arbitration proceedings in its revised arbitration rules that came into effect on October 1, 2014.²²⁸ Following this, the updated 2020 LICA Rules have broadened the application of the consolidation procedure and lifted the

²²¹ Choi (n 13) 45; Carrión (n 215) 487.

²²² Scherer, Richman, Gerbay (n 200) 311.

²²³ Köşgeroğlu (n 5) 187.

²²⁴ Ibid.

²²⁵ Carrión (n 215) 487; Scherer, Richman, Gerbay (n 200) 313.

²²⁶ Köşgeroğlu (n 5) 187.

²²⁷ Scherer, Richman, Gerbay (n 200) 314.

²²⁸ Smith (n 30) 181; Born (n 16) 2601.

limitation regarding the claims arising out of the same or similar arbitration agreements and between the same parties.²²⁹

Under Article 22.1(ix) of the 2014 LCIA Rules, the arbitral tribunal, subject to the approval of the LCIA Court, was allowed to consolidate proceedings based on multiple arbitration agreements, provided that the parties in these proceedings were the same. Consequently, under the LCIA Rules, consolidation was not possible if the arbitration proceedings to be consolidated involved different parties, even if they were based on the same arbitration agreement.²³⁰ However, with the LCIA Rules that entered into force on October 1, 2020, the scope of consolidation has been expanded. According to Article 22(7)(ii) of the Rules, it is now possible to consolidate arbitration proceedings arising from disputes that -even if the parties are different- are related to the same or connected transactions.

The determination of whether separate arbitrations involve the same or a series of related transactions hinges on the specific facts of the concrete case, the aim of the contracts, and the situation at the date the contract was finalised, especially the parties' awareness that the transaction involves third parties.²³¹ The requirement for identical or related transactions assumes that the parties were aware that fulfilling their contractual duties would bring them into contact with other third parties involved in the same or related transactions, thus substituting the need for all parties to consent to arbitrate together.²³² Common examples of contracts involving the same transaction include those related to a single construction project or the share purchase agreement.

According to Article 22A, titled "Power to Order Consolidation/Concurrent Conduct of Arbitrations," in case the LCIA Court approves, LCIA Rules has given the power to consolidate the cases to the arbitral tribunal, upon the request of any party. Before reaching a decision, the arbitral tribunal has to give a reasonable time to all affected parties and ask for their views, which is a reflection of the right to be heard.²³³

Similar to the joinder provisions, the policy goal of the power to consolidate or conduct concurrent hearings is clearly to save wasted time and costs, as well as avoid the risk of

²²⁹ Legru (n 65) 252.

²³⁰ Kiyak (n 27) 74.

²³¹ Scherer, Richman, Gerbay (n 200) 306.

²³² Ibid.

²³³ LCIA Rules Art. 22(7).

inconsistent arbitral awards by distinct arbitral tribunals concerning closely related factual and legal disputes.²³⁴

Article 22(7) grants the authority to the arbitral tribunal to eliminate the issues regarding the constitution of the arbitral tribunal in such cases.²³⁵ In the same manner, the LCIA Court's authority under Article 22(8) to consolidate arbitrations before the appointment of arbitrators necessitates considering the appointment of arbitrators by the LCIA Court under Article 5(9), which may involve disregarding any specific selection methods or criteria agreed upon by only some of the relevant parties, while also addressing the designation of parties as claimants or respondents.²³⁶

The LCIA Rules have introduced three distinct scenarios for rendering a consolidation decision, as outlined in Article 22(7). In the first scenario, where all arbitrations are subjected to the LCIA Rules, the arbitral tribunal may decide to consolidate one or more arbitrations into a single one, provided that all parties agree to this in writing.²³⁷ Since all parties give written consent to the consolidation, this can be named as the most appropriate situation for the enforcement of the arbitral award.

The second and third scenarios share some similarities. In both situations, all arbitrations must be governed by the LCIA Rules and initiated either under the same arbitration agreement or any compatible arbitration agreement. Furthermore, both scenarios require the involvement of the same parties in all disputes or disputes arising from the same transaction or a series of related transactions. In the second scenario, it's essential that no arbitral tribunal has been constituted by the LCIA Court for the other arbitration(s), or if it has already been formed, the composition of such arbitral tribunal(s) remains the same.²³⁸

Under the LCIA Rules, to be classified as an identical arbitration agreement, the exact wording of these arbitration agreements included in different contracts is not satisfactory, rather this arbitration agreement needs to be involved in the same contract.²³⁹ It is accepted that all parties, in this situation, have given their prior consent to arbitrate disputes collectively, whether in a multiparty arbitration or a two sided arbitration involving distinct disputes arising from the

²³⁴ Clifford, Wade (n 201) 348.

²³⁵ Clifford, Wade (n 201) 349.

²³⁶ Ibid.

²³⁷ LCIA Rules Art. 22(7)(i).

²³⁸ LCIA Rules Art. 22(7)(ii); Smith (n 30) 181.

²³⁹ Scherer, Richman, Gerbay (n 200) 302.

same contract.²⁴⁰ Apart from identical arbitration agreements, compatible arbitration agreements generally imply that a complicated arbitration agreement can be harmonious with a concise one as long as they do not conflict.²⁴¹ For example, while one of the arbitration agreements has specified a certain seat of arbitration, like London, and others are silent on this issue, under Article 16(2) of the LCIA Rules, the default assumption would be that London is the seat of arbitration for both disputes.²⁴²

Even when the initial criteria aforementioned for consolidating separate arbitrations under Article 22(7)(ii) are met, the arbitral tribunal and LCIA Court must still apply their discretion before rendering such a decision.²⁴³

Regarding the arbitral tribunal, LCIA Rules have addressed the practical complications that arise during the consolidation of disputes where some of the arbitrators are already appointed and would need to be removed, leaving only those arbitrators in whose arbitration the disputes are consolidated, which may violate the equal treatment principle and parties' right to appoint their arbitrator.²⁴⁴ Through this procedure, the LCIA Rules prevent persistent parties opposed to consolidation from creating a deadlock by designating different arbitrators in each individual dispute.²⁴⁵

Meanwhile, under the third scenario explained above, the 2020 Rules presented an alternative procedure within the consolidation provision and allowed the arbitral tribunals to proceed "*concurrently*" with other separate arbitrations, where the same arbitral tribunal is composed.²⁴⁶ This third scenario is also evaluated as a pragmatic approach to the consolidation.²⁴⁷

Moreover, the arbitral tribunal is not restricted to choosing between consolidation or concurrency and refraining from any decision, but can instead implement measures to prevent any procedural unfairness that could result from consolidating or conducting concurrent proceedings.²⁴⁸

²⁴⁰ Ibid.

²⁴¹ Scherer, Richman, Gerbay (n 200) 303.

²⁴² Ibid.

²⁴³ Clifford, Wade (n 201) 352.

²⁴⁴ Scherer, Richman, Gerbay (n 200) 307.

²⁴⁵ Born (n 16) 2777.

²⁴⁶ LCIA Rules Art. 22(7)(iii).

²⁴⁷ Legru (n 65) 253.

²⁴⁸ Clifford, Wade (n 201) 350.

The concurrent conduct of non-consolidated arbitrations is not defined under the LCIA Rules, but based on Article 22A, it appears to be an intermediate approach between consolidated and independent arbitral proceedings, allowing the arbitral tribunal to order identical procedural timetables and hearings to ensure efficiency and prevent inconsistent outcomes, thereby enabling the tribunal to conclude informed and aligned decisions in interrelated disputes.²⁴⁹

Arbitral tribunals should be aware of the possible loss of confidentiality and privacy that parties might face when multiple arbitrations are consolidated, and both the disputing parties and the arbitral tribunal need to evaluate if concurrent proceedings under Article 22(7)(iii) are more suitable for the specific case.²⁵⁰

Expanding on the provisions of Article 22(7), Article 22(8) of the LCIA Rules grants authority to the LCIA Court to take specific actions regarding consolidation. Article 22(8)(i) mirrors the conditions set out in Article 22(7)(i), allowing the LCIA Court to consolidate an arbitration with one or more other arbitrations into a single arbitration under the LCIA Rules where all parties have expressly agreed in writing.

The hierarchy established between Articles 22(7) and 22(8) indicates that the LCIA Court's authority to directly consolidate arbitrations pursuant to Article 22(8) should be practised solely when an arbitral tribunal lacks the power to act under Article 22(7).²⁵¹

Even though Articles 22(7)(i) and 22(8)(i) do not specify the timing for the parties' agreement to consolidate, since these provisions only address the consolidation of existing arbitrations, consolidation will be permitted between ongoing LCIA arbitrations.²⁵² In cases where multiple existing arbitrations are pending under different institutional arbitration bodies or one of the arbitrations is an ad hoc arbitration, the parties' consolidation agreement can be assessed as an amendment to the arbitration agreement, effectively converting the ad hoc or other institutional arbitration into an LCIA arbitration.²⁵³

In the scenarios of 22(7)(i) and 22(8)(i), both the arbitral tribunal and the LCIA Court have the discretion to decide on consolidation. However, it is clear that the arbitral tribunal still needs to provide a reasonable time to the parties, besides directly asking them if they have consent to consolidate the cases. The wording of Article 22(8)(ii) also points out this difference, while

²⁴⁹ Scherer, Richman, Gerbay (n 200) 310.

²⁵⁰ Clifford, Wade (n 201) 353.

²⁵¹ Clifford, Wade (n 201) 355.

²⁵² Scherer, Richman, Gerbay (n 200) 301.

²⁵³ Scherer, Richman, Gerbay (n 200) 302.

Article 22(8)(ii) expressly mentioned the necessity of asking for the views of the parties, Article 22(8)(i) does not mention this obligation for the LCIA Court.

Apart from the consolidation by the agreement of the parties, under both Articles 22(7)(ii) and 22(8)(ii), both the arbitral tribunal and the LCIA Court have the authority to render a consolidation decision, provided the similar cumulative conditions are satisfied.

For instance, Article 22(8)(ii) outlines that, if the LCIA Court has not yet constituted an arbitral tribunal for any of the arbitrations, it can, after providing the parties with an opportunity to express their views, consolidate two or more arbitrations governed by the LCIA Rules and initiated under the same arbitration agreement or any compatible arbitration agreements. These arbitrations must involve either the same disputing parties or disputes stemming from the same transaction or a series of related transactions. In such cases, the LCIA Court has the authority to give a consolidation decision. Article 22(8)(ii) may seem similar to Article 22(7)(ii), but one key difference is that the wording of Article 22(8)(ii) does not allow for the consolidation of cases even if the tribunals are composed of the same arbitrators. Once an arbitral tribunal is constituted in one of the multiple arbitrations, the request has to be submitted to that arbitral tribunal.

Another difference between Articles 22(7)(ii) and 22(8)(ii) is the requirement for a party's application. While such a request is mandatory under Article 22(7)(ii), it is not explicitly required for the LCIA Court to render a consolidation decision under Article 22(8)(ii). However, in practice, the LCIA Court is unlikely to consolidate arbitrations on its own without considering the parties' positions; therefore, if the Registrar identifies sufficient similarities between two cases, the parties will be asked to declare their opinion on whether to consolidate their proceedings, which usually leads to either a formal application for consolidation or confirmation that the parties prefer to proceed with separate arbitrations.²⁵⁴

While Article 22A does not explicitly state that either the arbitral tribunal or the LCIA Court must take into account all relevant factors, it is evident that, given the discretionary nature of rendering a consolidation decision when all necessary conditions are met, both authorities have the flexibility to consider additional factors. Specifically, the decision making authority would take into account the essential purposes of the consolidation procedure to ensure fairness, efficiency, and the prevention of inconsistent arbitral awards.²⁵⁵ In addition, by selecting the

²⁵⁴ Ibid.

²⁵⁵ Platte (n 88) 78.

2020 LCIA Rules, the parties grant consolidation powers to the LCIA Court and the arbitral tribunal, which supports a general presumption for consolidation when all other conditions are satisfied and it does not excessively prejudice any party.²⁵⁶

4.3. 2016 SIAC Arbitration Rules

4.3.1. Joinder in SIAC Rules

With the last revision of the SIAC Rules, the provision regarding joinder and additional parties has become more comprehensive and regulated as a separate article. In the versions of the SIAC Rules before 2016, similar to the LCIA Rules, the provision regarding joinder was included within the additional powers of the arbitral tribunal.²⁵⁷

According to Article 7 of the SIAC Rules, titled “Joinder of Additional Parties,” a party or non-party seeking to include a third person has two options based on whether the arbitral tribunal has been constituted as of the date of the request or not.²⁵⁸ The procedure for applying to the formation of the arbitral tribunal is outlined in Article 7(1), while Article 7(8) addresses the process for applications made after the constitution of the arbitral tribunal.

According to Article 7(1) of the SIAC Rules, a request for joinder may be submitted, by a party or non-party, to the Registrar before the constitution of the arbitral tribunal. Considering both the parties and non-parties can make a submission for the joinder, SIAC Rules are more inclusive compared to the other institutional arbitration rules, which mostly do not allow third parties to apply for a joinder. The rationale behind Article 7(1) is that by agreeing to the SIAC Rules, the parties have consented to multi-party arbitration, and consequently, a third party should not be excluded from joining an ongoing arbitration merely due to not being cited as a party by the claimant, nor because none of the existing parties wish to include the third party in the arbitration.²⁵⁹

²⁵⁶ Scherer, Richman, Gerbay (n 200) 308.

²⁵⁷ Köşgeroğlu (n 5) 190.

²⁵⁸ Christopher Boog, Julie Raneda, ‘The 2016 SIAC Rules: A State-of-the-Art Rules Revision Ensuring an even more Efficient Process’ (2016) ASA Bulletin, Vol. 34, Issue 3, 587.

²⁵⁹ John Choong, Mark Mangan, Nicholas Lingard, *A Guide To The SIAC Arbitration Rules* (Oxford University Press 2018) 115.

At this stage there are two possibilities; either the third party is *prima facie* bound by the arbitration agreement²⁶⁰ or all parties, including the third party, will consent²⁶¹ to the joinder of the additional party.

In the context of the first possibility, the Court's only role is to ascertain whether a valid arbitration clause exists that covers the current dispute and the non-party involved, while the second scenario is only applicable if all parties, including the third party, consent to the procedure of joinder at the time the application, as a prior agreement to be bound by the SIAC Rules does not constitute consent.²⁶²

In the case of *PT First Media TBK v Astro Nusantara International BV and others*, where the 2007 SIAC Rules were applicable, the Court of Appeal emphasized the significance of the requirement for consent, and stated that if consent is provided in any form, whether through the arbitration agreement or by adhering to a set of institutional rules that clearly allow for forced joinder, it would be sufficient to counter any later claims that there was no agreement to arbitrate with the joined party.²⁶³ However, in *PT First Media Case*, the Court of Appeal determined that Rule 24(b) of the 2007 SIAC Rules did not grant the tribunal the authority to include third parties who were not signatories to the arbitration agreement in question.²⁶⁴

The applicant, who files an application for joinder to the Registrar, according to Article 7(1), needs to send a copy of this request to all parties, including the additional party to be joined and must inform the Registrar in this regard as well.²⁶⁵

The matters concerning the contents of the joinder request are set out in Article 7(2). The joinder application is considered complete either when all the conditions specified in Article 7(2) have been met or when the Registrar determines that there has been substantial adherence to these conditions. SIAC will inform all the parties, including the additional party to be joined when the joinder application has been finalized.²⁶⁶ This procedure guarantees that all involved parties are informed of the application and have the chance to respond.

²⁶⁰ SIAC Rules Art. 7(1)(a).

²⁶¹ SIAC Rules Art. 7(1)(b).

²⁶² Choong, Mangan, Lingard, (n 259) 116.

²⁶³ Mark Mangan, Darius Chan, 'The Singapore Court of Appeal's decision in *Astro*: Providing Clarity or Causing Uncertainty?' (2014) *Asian Dispute Review*, Vol. 16, Issue 2, 92.

²⁶⁴ Choong, Mangan, Lingard, (n 259) 116.

²⁶⁵ SIAC Rules Art. 7(3).

²⁶⁶ SIAC Rules Art. 7(2)'s last paragraph.

Under Article 7(4), taking into account the views of all parties, including the third party, and evaluating the conditions related to the case, the Court will decide whether the application for joinder under Article 7(1) shall be partially or entirely accepted. The decision rendered by the Court on this matter does not interfere with the arbitral tribunal's authority to make decisions related to jurisdiction.

Upon the decision of the joinder, either rendered by the Court or arbitral tribunal, the third party will be involved in the proceeding with one of the sides of the dispute. Because any provision under Article 7 does not allow for an additional party to join the arbitration solely as an intervening party without any claims being made by or against them.²⁶⁷

Moreover, the Court's decision under Article 7(4) to partially or completely reject the application does not affect the parties' and the third party's right to make a submission to the arbitral tribunal on the same matter under Article 7(8).²⁶⁸ Regarding the request for joinder, both provisions, Article 7(1) and 7(8) are essentially identical. After the procedure outlined in Article 7(8), where the arbitral tribunal renders a decision regarding the joinder request, there is no further possibility for the parties to make such a request, even if they have not previously applied to the Court.²⁶⁹

Article 7(8) allows an application for joinder, in case an arbitral tribunal has already been constituted, under one of two following conditions, either a third party is *prima facie* bound by the arbitration agreement,²⁷⁰ or all parties, including the third party, consent²⁷¹ to the joinder or participation. Article 7(2) will also be applicable here, with necessary adjustments (*mutatis mutandis*), for the matters concerning the contents of the joinder request.²⁷² Article 7(10) is also regulated similarly to 7(4) and mentions that the tribunal has to take into account the views of all parties, including the third party, and evaluate the conditions related to the case. Furthermore, the tribunal's approval of a joinder application under Rule 7(10) does not affect its authority to later address any jurisdictional issues that may arise from this decision.

²⁶⁷ Choong, Mangan, Lingard (n 259) 115.

²⁶⁸ SIAC Rules Art. 7(4).

²⁶⁹ Choong, Mangan, Lingard (n 259) 120.

²⁷⁰ SIAC Rules Art. 7(8)(a).

²⁷¹ SIAC Rules Art. 7(8)(b).

²⁷² SIAC Rules Art. 7(9).

As it can be seen, SIAC Rules emphasize the importance of obtaining the consent of all parties, including the third party, in cases where it is not *prima facie* evident that the third party is a party to the arbitration agreement in terms of joinder.²⁷³

The SIAC's joinder provisions also include rules regarding the appointment of the arbitrators and regulate the situations separately whether the joinder request is submitted before or after the constitution of the arbitral tribunal.

If the application for joinder is accepted by the Court, prior to the constitution of the arbitral tribunal, under Article 7(6), the Court has the authority to revoke any appointed arbitrators. In this situation, the SIAC Rules stipulate that Articles 9 to 12²⁷⁴ should be applicable as appropriate. This procedure addresses the potential issues of fairness, ensuring all parties have an equal opportunity in the constitution of the arbitral tribunal and preserving the fairness and integrity of the proceedings.²⁷⁵ On the other hand, the Court's authority does not result in a direct revocation in case of every joinder decision, the Court would still evaluate the specifics of each situation and render a decision to ensure the fairness of the proceedings for all parties of the dispute.²⁷⁶ At all events, if the parties unanimously agree, they can decide otherwise.²⁷⁷

In case the Court has decided to revoke the appointed arbitrators, all transactions, including any order or award made by the arbitrator, will retain their validity even if the Court decides to revoke them later.²⁷⁸ An illustration of this is when an emergency arbitrator issues an award and is later appointed with the consent of all parties to serve as an arbitrator in the main arbitration proceedings, and consequently, even if the arbitrator's appointment is revoked under Rule 7(6), the validity of any previous actions, orders, or awards made by that arbitrator remains unaffected.²⁷⁹

Although the aforementioned procedure applies when a third party is joined to the arbitration prior to the constitution of the arbitral tribunal, no equivalent revocation process exists for joinder requests made directly to the arbitral tribunal; nonetheless, the tribunal is likely to consider the potential risk of an award challenge when deciding on joinder.²⁸⁰

²⁷³ Köşgeroğlu (n 5) 193.

²⁷⁴ The relevant SIAC Rules are as follows: Article 9, titled "Number and Appointment of Arbitrators;" Art. 10, titled "Sole Arbitrator;" Art. 11, titled "Three Arbitrators;" Art. 12, "Multi-Party Appointment Arbitrator(s)".

²⁷⁵ Choong, Mangan, Lingard (n 259) 119.

²⁷⁶ Ibid.

²⁷⁷ SIAC Rules Art. 7(6).

²⁷⁸ SIAC Rules Art. 7(7).

²⁷⁹ Choong, Mangan, Lingard (n 259) 120.

²⁸⁰ Choong, Mangan, Lingard (n 259) 120, 122.

Moreover, regardless of the basis of the joinder decision, either according to Article 7(4) or Article 7(10) and one of the parties has not nominated an arbitrator or participated in the constitution of the arbitral tribunal, it is assumed that this party has waived its right to appoint an arbitrator or to participate in the tribunal's establishment.²⁸¹ While this provision aligns with Article 7(6) and emphasizes that the third party does not have an inherent right to participate in the constitution of the arbitral tribunal, Article 14 of the rules also preserves their right to challenge an arbitrator -although the challenge procedure focuses on the arbitrator's impartiality or independence- and maintains the balance between parties while ensuring the effectiveness and speed of the arbitration.²⁸²

In this regard, the waiver provision effectively serves as a contractual waiver of a joined third party's right to later challenge an award on the grounds that they were not given a chance to fully or partially participate in the tribunal's constitution.²⁸³ However, it is argued that such an implied waiver could be deemed invalid as contrary to public policy in others.²⁸⁴

When the joinder decision is granted according to Article 7(10), the date that the arbitral tribunal or the registrar receives the complete application for joinder is officially deemed the commencement date of the arbitration concerning the third party.²⁸⁵

4.3.2. Consolidation in SIAC Rules

In SIAC Rules, Article 6, which addresses "Multiple Contracts," governs disputes arising from or in connection with multiple contracts and includes cross-references to Article 8, titled "Consolidation," in the SIAC Rules. This indicates that the rules for handling disputes related to multiple contracts may involve the consolidation procedures outlined in Article 8.

Similar to Article 7, Article 8 of the SIAC Rules also allows parties to apply for consolidation both before and after the constitution of the arbitral tribunal.

According to Article 8(1) of the SIAC Rules, a request to consolidate two or more arbitrations under SIAC Rules can be submitted by a party to the Registrar before the formation of the arbitral tribunal.

²⁸¹ SIAC Rules Art. 7(12).

²⁸² Choong, Mangan, Lingard (n 259) 119.

²⁸³ Choong, Mangan, Lingard (n 259) 122.

²⁸⁴ Ibid.

²⁸⁵ SIAC Rules Art. 7(11).

At this stage, there exist three possibilities: either all parties will consent to consolidate the cases;²⁸⁶ all claims in the arbitration proceedings will stem from a single arbitration agreement;²⁸⁷ or the disputes will arise out of the same legal relationships or arise out of contracts consisting of a principal contract and its related ancillary contracts or arise out of the same transaction or series of transactions, and the arbitration agreements will also be compatible.²⁸⁸

The three situations outlined in Article 8(1) are alternatives to each other, meaning the presence of any one of them is sufficient for the Court to render a consolidation decision. However, it should be noted that Article 8(1) does not specify the criteria for ordering consolidation but outlines the initial requirements that must be met, so even if one of these situations is present in a specific case, the Court will consider all the qualifications of the case and make a decision under its discretionary authority.²⁸⁹

Within the aforementioned situations, mutual agreement of all parties is the most straightforward condition for accepting the consolidation request. However, simply agreeing on the SIAC Rules does not suffice to recognise an acceptable agreement to practice Article 8(1)(a), typically this specific agreement to consolidate is reached after the arbitrations have begun.²⁹⁰ In this scenario, it is not required for all parties involved to be the same in all ongoing arbitrations, nor is it necessary for them to be bound by the same arbitration agreement.

In case a mutual agreement cannot be gathered from all parties, the scenarios under Article 8(1)(b) and 8(1)(c) will be evaluated.²⁹¹ Even though the parties could not reach an agreement, regardless of the parties being the same in every arbitration, if all claims arise under the same arbitration agreement, the Court may decide to consolidate the cases.²⁹² Given that the arbitration agreements are also distinct in the ongoing arbitrations; however, the arbitration agreements are compatible and one of the three conditions in Article 8(1)(c) requiring a connection between the disputes is met, the Court may still decide to consolidate the arbitrations.²⁹³

²⁸⁶ SIAC Rules Art. 8(1)(a).

²⁸⁷ SIAC Rules Art. 8(1)(b).

²⁸⁸ SIAC Rules Art. 8(1)(c).

²⁸⁹ Choong, Mangan, Lingard (n 259) 123.

²⁹⁰ Choong, Mangan, Lingard (n 259) 124.

²⁹¹ Boog, Raneda (n 258) 592-593.

²⁹² Choong, Mangan, Lingard (n 259) 124.

²⁹³ Ibid.

Regarding the compatibility of the arbitration agreements, they do not need to be identical and the assessment will be made on a case-by-case basis.²⁹⁴ For instance, if the agreements specify different arbitration rules, languages or numbers of arbitrators, these differences may lead to compatibility issues.

The applicant seeking consolidation under Article 8(1) must provide the necessary details specified in Article 8(2), and is required to send a copy of this request to all parties as well as inform the Registrar accordingly.²⁹⁵

Like Article 7(4), Article 8(4) of the SIAC Rules also stipulates that the Court must take into account the views of all parties and evaluate the case-specific conditions when deciding whether to partially or fully accept the consolidation application under Article 8(1).²⁹⁶ The decision rendered by the Court on this matter does not interfere with the arbitral tribunal's authority to make decisions related to jurisdiction. Moreover, the Court's decision under Article 8(4), to partially or completely reject the application, does not affect the parties' right to make a submission to the arbitral tribunal on the same matter under Article 8(7).²⁹⁷

In cases where the Court orders the consolidation of two or more arbitrations under Article 8.4, the arbitrations will be combined into the first initiated arbitration, unless all parties reach a different agreement, or the Court -by considering the specific circumstances- decides otherwise.²⁹⁸ The reason behind this provision is the possibility of including previously appointed arbitrators in the consolidated arbitration unless the Court uses its authority under Article 8(6).²⁹⁹ Arbitrations that are not subjected to consolidation will proceed as individual cases.

If the secretariat phase of the proceedings is concluded, Article 8(7) allows parties to request still the consolidation of two or more arbitrations pending under SCIA Rules directly from the tribunal. This provision closely resembles Article 8(1) and presents three similar situations. The first scenario mirrors the requirement of obtaining consent from all parties to decide on consolidation.³⁰⁰

²⁹⁴ Ibid.

²⁹⁵ SIAC Rules Art. 8(3).

²⁹⁶ Kirtan Prasad, 'Joinder and Consolidation in Institutional Arbitration over the last 10 years: Evolution or Revolution?' (2021) National Law School Business Law Review, Vol. 7, Issue 2, 35.

²⁹⁷ Smith (29) 182; Prasad (n 296) 36.

²⁹⁸ SIAC Rules Art. 8(5).

²⁹⁹ Choong, Mangan, Lingard (n 259) 126.

³⁰⁰ SIAC Rules Art. 8(7)(a).

In the second and third scenarios, the common criterion is the necessity for the same tribunal to be constituted in each of the arbitrations, or for no tribunal to be constituted in other arbitrations; otherwise, the tribunal cannot decide on the consolidation of the cases. Additionally, in the second scenario, consolidation is permissible when all claims are made under the same arbitration agreement.³⁰¹ In contrast, in the third scenario, consolidation is allowed if the arbitration agreements are compatible and the disputes either originate from the same legal relationship, are connected to a principal contract and its ancillary contracts, or stem from the same transaction or a series of related transactions.³⁰²

As evidenced by the language of both Articles 8(1) and 8(7), the provisions are anticipated to be likely applicable. However, apart from the initial scenario foreseen in Article 8(7)(a), to issue a consolidation decision under Articles 8(7)(b) and 8(7)(c), it is required that either a single arbitral tribunal be constituted or that each tribunal be composed of the same arbitrators.³⁰³ If different arbitral tribunals have already been constituted in each arbitration, then neither Rule 8.7(b) nor Rule 8.7(c) can be applied.

Unless the arbitral tribunal issues specific instructions, the regulations outlined in Article 8(2) will apply with necessary modifications to a consolidation request made under Article 8(7).³⁰⁴

The tribunal will render a decision on the consolidation request similar to the Court's procedure, as in Article 8(7). According to Article 8(9), the tribunal must hear the arguments of all parties and the case's circumstances to fully or partially approve the request. The tribunal's approval of a consolidation request will not affect its authority to later address any jurisdictional issues that may arise from that decision.³⁰⁵

Article 8(9) appears similar to Article 8(4), but there are a few distinctions, such as Article 8(9) requiring the tribunal to provide '*the opportunity to be heard*' to all parties, while Article 8(4) mandates that the Court need to '*consider the views of all parties,*' and with this wording difference, this provision underscores the parties' right to be heard by the tribunal on consolidation matters once the tribunal is constituted.³⁰⁶

³⁰¹ SIAC Rules Art. 8(7)(b).

³⁰² SIAC Rules Art. 8(7)(c).

³⁰³ Choong, Mangan, Lingard (n 259) 127.

³⁰⁴ SIAC Rules Art. 8(8).

³⁰⁵ SIAC Rules Art. 8(9).

³⁰⁶ Choong, Mangan, Lingard (n 259) 128.

Furthermore, similar to the joinder provisions, the consolidation rules stipulate that once the arbitral tribunal has made its decision, the parties have no further authority to submit a consolidation request, irrespective of any prior application to the Court.

In both consolidation phases, whether the request for consolidation is made to the Court or the tribunal, as both Article 8(6) and Article 8(10) are mostly similar, the power to revoke an arbitrator is granted to the Court.³⁰⁷ This action does not impact the validity of any transactions, including any orders or awards issued by the arbitrator.³⁰⁸

In the context of revocation, it is probable that some of the parties in the consolidated dispute have not been involved in the appointment procedures of the arbitrators; however, just like in other institutional rules, the Court would not directly revoke the already appointed arbitrators but evaluate if each side had a fair and equal chance to be involved in the formation of the arbitral tribunal.³⁰⁹ For instance, even if the parties in the consolidated arbitrations are not the same, they might represent closely related interests, and the Court may determine that each side has had a fair and equal chance to be involved in forming the arbitral tribunal, depending on the circumstances.³¹⁰

If the Court decides to revoke the appointed arbitrators, unless all parties have unanimously agreed otherwise, Articles 9 to 12 will apply to the appointment processes of the arbitrators.

Lastly, in the same direction as Article 7(12), Article 8(12) foresees that if the consolidation decision is made by the arbitral tribunal, following Article 8(9), or if the Court has issued the consolidation decision but one of the parties has not participated in the constitution of the arbitral tribunal, it is assumed that this party has waived its right to appoint an arbitrator or to participate in the tribunal's establishment. Still, this party retains the right to challenge an arbitrator in accordance with Article 14.³¹¹

The waiver provision, akin to the joinder provisions, effectively acts as a contractual waiver of a party's right to later contest an award based on the argument that they were not afforded the opportunity to fully or partially participate in the tribunal's constitution. Similarly, this

³⁰⁷ SIAC Rules Art. 8(10).

³⁰⁸ SIAC Rules Art. 8(11).

³⁰⁹ Choong, Mangan, Lingard (n 259) 127.

³¹⁰ Ibid.

³¹¹ SIAC Rules Art. 8(12).

provision has been debated due to the implied waiver, which could be considered invalid as contrary to public policy in certain jurisdictions.³¹²

4.4. 2024 HKIAC Arbitration Rules

As the 2024 HKIAC Rules will come into effect on June 1, 2024, this thesis will examine both the 2018 and 2024 HKIAC Rules, highlighting the new provisions related to multi-party disputes.

4.4.1. Joinder in HKIAC

The HKIAC Rules provide the flexibility for parties to apply for joinder both prior to and after the establishment of the arbitral tribunal. Additionally, both the existing parties and any additional party³¹³ involved in the arbitration have the right to make such a request.

If the arbitral tribunal has not yet been constituted, the Request for Joinder has to be submitted to the HKIAC, with copies sent to other parties and any arbitrators, in case they are confirmed or appointed.³¹⁴ Similarly, if the application for a joinder is made after the constitution of the arbitral tribunal, the request has to be submitted to the tribunal by sending a copy to the HKIAC and other parties.³¹⁵

The authority to order the joinder of an additional party lies with the arbitral tribunal provided its appointment has been confirmed, and the arbitral tribunal will determine the form of the order, which could be an order or an interim award that binds both the original parties and the additional party to the arbitration.³¹⁶ Although parties could not submit a request to the HKIAC under the 2008 Rules, the current approach enhances efficiency and enables HKIAC to advance proceedings when appropriate, prevents delays, reduces the risk of the challenges -especially regarding the equal participation of the parties- to the award by the additional party.³¹⁷

According to Article 27(1), if the third party is *prima facie* bound by the arbitration agreement under HKIAC Rules, including consolidated or multi-contract arbitrations;³¹⁸ or all parties,

³¹² Choong, Mangan, Lingard (n 259) 129.

³¹³ HKIAC Rules Art. 27(9).

³¹⁴ HKIAC Rules Art. 27(4).

³¹⁵ HKIAC Rules Art. 27(5).

³¹⁶ Michael J. Moser, Chiann Bao, *A Guide to the HKIAC Arbitration Rules* (Oxford University Press 2022) 272.

³¹⁷ Moser, Bao (n 316) 273.

³¹⁸ HKIAC Rules Art. 27(1)(a).

including the joining party, expressly agree³¹⁹ to this procedural transaction, the joinder request can be accepted.

The additional party must be *prima facie* bound by the arbitration agreement, as this is a crucial prerequisite for a joinder application because the decision making authority only has jurisdiction over parties bound by the agreement.³²⁰ In most cases, an arbitral tribunal or HKIAC will render a joinder decision if it determines there is a reasonable probability that the third party is bound by the arbitration agreement.³²¹

In case the joinder request is being made in a consolidated arbitration or a multi-contract arbitration, then the relevant authority will evaluate if the third party is bound by any of the arbitration agreements from which the consolidated disputes originate.³²²

Furthermore, unlike the ICC and LCIA Rules, it is not mandatory for the requesting party to bring out any claims against the third party, and the parties may conduct such a request only for the addition of a co-claimant or co-respondent to the proceedings.³²³

The conclusions of both decision making authorities on joinder requests will not affect the arbitral tribunal's authority to decide any jurisdictional issues arising from such a decision.³²⁴ Consequently, even if the tribunal has rendered a joinder decision itself, it would not prejudice any allegations made for the lack of jurisdiction of the arbitral tribunal. Moreover, any joinder decision rendered by the HKIAC is considered an administrative decision, aiming to improve the efficiency and procedural fairness of the arbitration, and all parties can present their allegations on the admissibility and merits in the usual manner.³²⁵

The request has to include the contents specified in Article 27(6) and is typically submitted before the Statement of Defence.³²⁶ In exceptional circumstances, as permitted in Article 27(3), the request can also be submitted after the Statement of Defence. Nevertheless, it is stated as an uncommon practice for an arbitral tribunal to permit such a late joinder, making it crucial for claimants to determine all respondents before initiating arbitration and to incorporate them in

³¹⁹ HKIAC Rules Art. 27(1)(b).

³²⁰ Nicolas Wiegand, Markus Altenkirch (eds.), *HKIAC Administered Arbitration Rules: Article-by-Article Commentary* (2021) 108.

³²¹ Moser, Bao (n 316) 273.

³²² Wiegand, Altenkirch (n 320) 109.

³²³ Moser, Bao (n 316) 277.

³²⁴ HKIAC Rules Art. 27(2).

³²⁵ Moser, Bao (n 316) 275.

³²⁶ HKIAC Rules Art. 27(3).

their initial Notice of Arbitration.³²⁷ However, such situations might include cases where the third party was not informed of the arbitral proceedings until a later stage, or where the requesting party has objected to the jurisdiction of the arbitral tribunal in the domestic courts of the seat of arbitration and is waiting for the decision before attempting to join an additional party.³²⁸

Article 27(3) also seeks to safeguard the due process rights of the existing parties to the arbitral proceedings and to reduce any prejudice that may result from the Request for Joinder.³²⁹

Upon receiving the Request of Joinder, within 15 days, the third party³³⁰ or the disputing parties³³¹ must submit their arguments to the HKIAC and confirmed or appointed arbitrators and to all other parties involved. The distinction in the terminology used by the HKIAC Rules lies in referring to these arguments as an “answer” when the request is made by the parties of the dispute and as a “comment” when the request is made by the third party itself. Each type of response has its own set of contents and these are detailed in the relevant articles.³³² When the third party has requested to join the arbitration under Article 27(9), it is not required to submit an answer, meanwhile, all other parties are required to provide comments in accordance with Article 27(10).³³³

According to Article 27(8), the HKIAC or the arbitral tribunal has the discretion to modify the requirements of Article 27(6), which pertains to the content of the request for joinder, and Article 27(7), which addresses the answers from the additional parties. There is a single change between the content of the *request for joinder* and the *answer to the request for joinder* in the 2018 and 2024 arbitration rules of the HKIAC, and now the rules foresee the addition of the “telephone number” as well.

Upon receiving a Request for Joinder, either of the decision making authorities will review the relevant arbitration agreements, the associated contracts, and any other pertinent evidence provided by the parties to determine if the additional party is a signatory or has in some other way consented to be bound, whether through conduct, assignment, succession, or the act of an

³²⁷ Moser, Bao (n 316) 275.

³²⁸ Ibid.

³²⁹ Wiegand, Altenkirch (n 320) 110.

³³⁰ HKIAC Rules Art. 27(7).

³³¹ HKIAC Rules Art. 27(10).

³³² Under the HKIAC Rules, Art. 27(7) dictates the guidelines for drafting an “Answer” whereas Art. 27(6) specifies the requirements for the “Comments.”

³³³ Moser, Bao (n 316) 279.

agent.³³⁴ As simple claims of a spoken agreement to an arbitration arrangement are unlikely to be adequate, documentary evidence will typically be necessary.³³⁵

When a third party is brought into the arbitration, the proceedings against that party are considered to begin from the date on which the Request for Joinder is received by the HKIAC or the constituted arbitral tribunal.³³⁶

Just like the SIAC Rules, the HKIAC Rules also contain special provisions concerning the constitution of the arbitral tribunal. Under the HKIAC Rules, it is accepted that with the joinder of a third party to the arbitral proceedings, all parties, including the joined one, are deemed to have waived their right to appoint an arbitrator.³³⁷

The deemed waiver regarding the rights to appoint arbitrators aims to guarantee party equality when a third party is joined to the arbitral proceedings and to prevent objections related to unequal arbitrator appointments, thereby avoiding any grounds for the annulment of the arbitral award.³³⁸ As this article is subjected to Article 32(2), the waiver means that parties cannot challenge or resist the enforcement of an arbitral award based on a decision about the arbitral tribunal made under Article 27(12), except where any provision of the applicable law considers such a waiver invalid.³³⁹

In cases, where a third party joined the arbitration, the power to revoke any confirmed or appointed arbitrator rests with the HKIAC.³⁴⁰ Subsequently, the HKIAC will appoint the arbitral tribunal, considering or disregarding any party's nomination. Unlike the 2024 HKIAC Rules, the 2018 HKIAC Rules gave this authority to HKIAC only when a third party joined the arbitration before the constitution of the arbitral tribunal. This article's wording has clearly broadened the HKIAC's competence and excluded such specific time limitations. Similar to Article 27(7), the purpose of Article 27(13) is to ensure the equal treatment of all parties in the constitution of the arbitral tribunal and avoid such objections from emerging later.³⁴¹

If a third party is joined either before the constitution of the arbitral tribunal or afterwards, the power to revoke any confirmed or appointed arbitrator rests with the HKIAC. The revocation

³³⁴ Moser, Bao (n 316) 273.

³³⁵ Moser, Bao (n 316) 274.

³³⁶ HKIAC Rules Art. 27(11).

³³⁷ HKIAC Rules Art. 27(12).

³³⁸ Moser, Bao (n 316) 283.

³³⁹ Moser, Bao (n 316) 284.

³⁴⁰ HKIAC Rules Art. 27(13).

³⁴¹ Wiegand, Altenkirch (n 320) 113.

of any appointed or confirmed arbitrator and the appointment of a new tribunal are not obligatory but rather fall under the discretion of the HKIAC. In practice, as long as valid challenges are brought up, HKIAC would choose to appoint nominees that are already identified by the parties, and if the joinder request is accepted when one or more arbitrators have been appointed, or under the 2024 Rules the arbitral tribunal is being constituted, HKIAC would call the parties to approve whether they desire to uphold the appointments.³⁴²

During the appointments, even though HKIAC has the authority to consider any party's designation, the institution will aim to adhere to the original procedure for appointing arbitrators and therefore encourage the multiple parties to provide a written agreement to be considered as two separate sides, including the joined party.³⁴³ If such an agreement cannot be concluded by the parties, HKIAC will constitute the arbitral tribunal by appointing all arbitrators itself.³⁴⁴

The HKIAC Rules have gone a step further than the SIAC Rules and not only regulated the validity of transactions³⁴⁵ made by the arbitrators before their revocation but also bound the arbitrator's payment of fees and expenses³⁴⁶ to a provision within the same article. This provision is related to the validity of the transactions made to ensure procedural certainty in cases where a request for a joinder is approved.³⁴⁷

Furthermore, this revocation does not affect the timeline for raising any claims or defences, particularly to any statute of limitations or similar rules or provisions.³⁴⁸ This ensures that the procedural rights of the parties are not adversely affected by the revocation process.

Compared to the prior institutional rules, the HKIAC Rules stand out for their unique provision, which grants HKIAC the authority to modify its Administrative Fees and the fees of the arbitral tribunal after receiving the Request for Joinder.³⁴⁹

4.4.2. Consolidation in HKIAC

When the HKIAC Arbitration Rules are examined, it can be observed that three different provisions have been introduced for the hearing of multiple related cases. These relevant

³⁴² Moser, Bao (n 316) 284.

³⁴³ Moser, Bao (n 316) 285.

³⁴⁴ Wiegand, Altenkirch (n 320) 114.

³⁴⁵ HKIAC Rules Art. 27(14)(a).

³⁴⁶ HKIAC Rules Art. 27(14)(b).

³⁴⁷ Wiegand, Altenkirch (n 320) 114.

³⁴⁸ HKIAC Rules Art. 27(14)(c).

³⁴⁹ HKIAC Rules Art. 27(15).

provisions are found in Article 28, titled “Consolidation of Arbitrations;” Article 29, titled “Single Arbitration Under Multiple Contracts;” and Article 30, titled “Concurrent Proceedings”.

Under Article 28, only the HKIAC has the authority to consolidate two or more arbitrations currently in progress under its rules. HKIAC may consider issuing a consolidation decision only if one of the parties has submitted a Request for Consolidation.³⁵⁰

Granting this authority to the institutional body promotes objectivity and independence in decision making, eliminates the complex issue of determining which tribunal should order consolidation when multiple tribunals have been constituted before the Request for Consolidation is submitted, and prevents potential conflicts of interest that might arise if a tribunal is asked to decide on a Request for Consolidation, particularly if granting the request would lead to the tribunal’s dissolution.³⁵¹

The party seeking a consolidation decision is required to send the Request for Consolidation to the HKIAC, as well as to all other involved parties and to any arbitrators who have been confirmed or appointed.³⁵² Article 28(3) enumerates the contents required for this request, and as stipulated in Article 28(4), the HKIAC retains the discretion to alter any provisions within Article 28(3) as deemed necessary. Regarding the consolidation of arbitrations, the only difference between the 2018 and 2024 Rules in the following article also shows itself in Article 28(3), and this difference is the addition of the telephone number, just like it was in the joinder provisions.

After a Request for Consolidation is submitted, the HKIAC must consult with the parties and confirmed or appointed arbitrators. Consolidation can be permitted by the HKIAC if one of the three conditions specified in Article 28(1) is met, however, even if all the conditions are present in the concrete case, it is still under HKIAC’s discretion to consolidate the cases.³⁵³ In this regard, the HKIAC shall decide to consolidate the proceedings if the parties have agreed on it;³⁵⁴ if the claims made in the arbitrations depend on the same arbitration agreement;³⁵⁵ alternatively, if the claims stem from multiple arbitration agreements, and there is a shared legal or factual question present across all arbitrations, the relief sought is related to or arises from a

³⁵⁰ HKIAC Rules Art. 28(1).

³⁵¹ Moser, Bao (n 316) 289.

³⁵² HKIAC Rules Art. 28(2).

³⁵³ Wiegand, Altenkirch (n 320) 116.

³⁵⁴ HKIAC Rules Art. 28(1)(a).

³⁵⁵ HKIAC Rules Art. 28(1)(b).

single transaction or a sequence of connected transactions, and the arbitration agreements are congruent.³⁵⁶

Aligned with fundamental principles of party autonomy, HKIAC will render a consolidation decision when all parties involved in the arbitrations consent, unless there are significant reasons to refrain from doing so.³⁵⁷ Such consent of these parties has to be in writing.

Under the criteria of Article 28(1)(a), it is not necessary for all parties to be bound by the same arbitration agreement, nor do the parties in each arbitration need to be identical.³⁵⁸ However, simply agreeing to arbitration under the HKIAC Rules is also insufficient, hence HKIAC requires clear evidence of a significant agreement before concluding a consolidation decision under Article 28(1)(a), which is generally reached after the dispute has arisen.³⁵⁹

The second issue to be evaluated is the claims arising from the same or a series of related transactions. The provision expressly mentions that there has to be a relationship between these transactions. The related contracts must be interconnected by more than just superficial factors, requiring a legal or factual relation between them.³⁶⁰

HKIAC will engage with the parties and any appointed arbitrators to determine if they concur that the relief sought in each arbitration stems from the same transaction or a series of related transactions, and in cases where the parties reach an agreement, HKIAC will acknowledge that this criterion is fulfilled.³⁶¹ If no such agreement exists, HKIAC will scrutinize the foundational contractual documents, including any recitals or analogous sections outlining the transaction's background, to ascertain whether the disputes originate from the same or a series of transactions.³⁶²

In a specific arbitration case, HKIAC has, by considering the practical benefits of consolidating numerous related cases to maximize efficiency and minimise costs, rendered a consolidation decision for the arbitrations initiated under eleven separate receivables purchase agreements, as each agreement explicitly referenced other existing and anticipated agreements among the same group of parties with the same or similar terms, and stipulated that the total value of receivables

³⁵⁶ HKIAC Rules Art. 28(1)(c).

³⁵⁷ Moser, Bao (n 316) 290.

³⁵⁸ Wiegand, Altenkirch (n 320) 116.

³⁵⁹ Wiegand, Altenkirch (n 320) 117.

³⁶⁰ Wiegand, Altenkirch (n 320) 118.

³⁶¹ Moser, Bao (n 316) 291

³⁶² Ibid.

the respondent could purchase would be based on commitment advices delivered under all agreements.³⁶³

In addition, the mere fact that the transactions involve the same parties or share a similar nature may not always automatically ensure the sought connection by the HKIAC.³⁶⁴ For instance, the presence of an entire agreement clause in each contract may be taken into account when assessing whether the contracts are sufficiently related to warrant consolidation.³⁶⁵

In a recent case, mentioned by Moser and Bao, HKIAC has ordered consolidation in a dispute involving three separate contracts for the supply of fuel oils to merchant vessels.³⁶⁶ HKIAC determined that the criterion of related transactions was satisfied because all three contracts shared the same standard terms, the arbitrations revolved around the same underlying claim for non-payment, all claims were directed at the same respondent, and the two claimant entities were related and represented by the same counsel. Consolidation was ordered despite differences such as the claimant in one arbitration being different from the claimants in the other two, the contracts providing for the supply of different fuel types to different vessels at different ports, each contract containing an entire agreement clause, and the absence of cross-references between the contracts. HKIAC concluded that the contracts were part of an overarching commercial relationship between the claimant group and the respondent, thereby meeting the Article 28(1)(c) test for sufficiently related transactions.

Regarding Article 28, the final issue is the compatibility of the arbitration agreements. Similar to other institutional rules, the arbitration agreements do not need to be identical for the consolidation procedure under HKIAC Rules. In such cases, the Request for Consolidation will be approved when the proceedings under either of the underlying arbitration agreements would result in no practical difference in the resolution of the consolidated case.³⁶⁷

When assessing the compatibility of arbitration agreements, several factors must be taken into account, including but not limited to any preconditions for initiating arbitration, the qualifications required of arbitrators, the process for constituting the arbitral tribunal, the

³⁶³ Moser, Bao (n 316) 292.

³⁶⁴ Moser, Bao (n 316) 293.

³⁶⁵ Ibid.

³⁶⁶ Ibid.

³⁶⁷ Moser, Bao (n 316) 294.

language in which the arbitrations will be conducted, and the governing law applicable to the arbitration agreements.³⁶⁸

In one instance, the HKIAC declined to proceed with a case where certain arbitration agreements stipulated English as the arbitration language, while others specified Chinese, determining that these differing clauses indicated separate agreements made by the parties concerning the arbitration process.³⁶⁹

After presenting the aforementioned criteria, HKIAC Rules, under Article 28(5), has outlined the expected content for comments from the non-requesting parties or any confirmed or appointed arbitrators, when the HKIAC seeks their input on the Request for Consolidation, without limiting conditions on what may be included. Even though the 2013 HKIAC Rules did not explicitly require other parties to comment on a Request for Consolidation, it has always been HKIAC's practice to solicit opinions from all parties involved in the arbitrations, as well as any confirmed or appointed arbitrators.³⁷⁰ This procedure has now been codified in the 2018 and 2024 HKIAC Rules.

If the HKIAC determines that multiple arbitrations should be combined, they will typically be merged into the one that started earliest, except if all involved parties concur or the HKIAC elects a different course of action based on the specifics of the situation.³⁷¹ The decision of consolidation does not affect the legitimacy of any prior actions taken or orders issued by an authorised entity in relation to the arbitration.³⁷²

Similar to the joinder provisions, when two or more arbitrations have been consolidated by the HKIAC, it is assumed that all parties, including the additional party, have waived their right to appoint an arbitrator, and again the HKIAC may revoke any confirmed or appointed arbitrator without affecting the validity of any transactions made before the revocation.³⁷³

The purpose of the waiver is to create an equal footing for all parties regarding the appointment of the tribunal.³⁷⁴ This is especially crucial in consolidation scenarios, where it may be challenging to clearly separate the parties into claimant and respondent groups for the purpose of selecting arbitrators, and even when it is possible to divide the parties into claimant and

³⁶⁸ Wiegand, Altenkirch (n 320) 120.

³⁶⁹ Moser, Bao (n 316) 294.

³⁷⁰ Moser, Bao (n 316) 299.

³⁷¹ HKIAC Rules Art. 28(6).

³⁷² HKIAC Rules Art. 28(7).

³⁷³ HKIAC Rules Art. 28(8).

³⁷⁴ Moser, Bao (n 316) 302.

respondent sides, the interests of each claimant may not always align perfectly with those of the other claimants.³⁷⁵

Thereafter, the HKIAC will appoint the arbitral tribunal for the consolidated proceedings by considering or disregarding any party's nomination. In practice, HKIAC will maintain an existing appointment only if all parties involved in the consolidated arbitrations agree or do not raise any challenges, and if there is any disagreement regarding the candidates, HKIAC will typically revoke all the existing appointments and form an entirely new arbitral tribunal.³⁷⁶

Similarly to the joinder, it is separately mentioned in the consolidation provisions that the revocation of a confirmed or appointed arbitrator will not prejudice the validity of any prior act or order made by that arbitrator.³⁷⁷

Once more, this revocation does not affect the timeline for raising any claims or defences, particularly to any statute of limitations or similar rules or provisions.³⁷⁸ As regulated in joinder provisions, this article also ensures that the procedural rights of the parties are not adversely affected by the revocation process.

In accordance with the joinder provisions, the consolidation provisions include the fees and expenses of the revoked arbitrators³⁷⁹ and grant the authority to modify both its administrative and arbitral tribunal's fees after receiving the Request for Consolidation to HKIAC.³⁸⁰

Independently from Article 28, according to Article 29, multiple contractual claims can be seen in a single arbitration, if the dispute meets certain criteria and HKIAC is convinced that there is a valid arbitration agreement or the arbitral proceedings are commenced properly. HKIAC's satisfaction with the commencement of the arbitration and the validity of an arbitration agreement is limited by a *prima facie* assessment. In the 2018 version of the HKIAC rules, Article 29 did not include 'Article 19(5)' in its wording, which describes the *prima facie* satisfaction of the HKIAC, regarding the existence of the arbitration agreement or commencement of the arbitration was in accordance under this provision, meaning Article 29.

When claims under multiple contracts are presented in a Notice of Arbitration, HKIAC will first verify whether the applicable arbitration agreements are dated on or after 1 November

³⁷⁵ Ibid.

³⁷⁶ Moser, Bao (n 316) 303.

³⁷⁷ HKIAC Rules Art. 28(9)(a).

³⁷⁸ HKIAC Rules Art. 28(9)(c).

³⁷⁹ HKIAC Rules Art. 28(9)(b).

³⁸⁰ HKIAC Rules Art. 28(10).

2013, and if they are not, and parties did not specifically agree otherwise, Article 1(5) prevents the claimant from initiating a single arbitration.³⁸¹

When the certain criteria mentioned in Article 29(1) are examined, there must be a shared legal or factual issue across the arbitration agreements from each contract;³⁸² the claims must be related to either a single transaction or a closely linked series of transactions;³⁸³ and the arbitration agreements that form the basis of these claims have to be compatible.³⁸⁴ Using “and” instead of “or” in Article 29 implies that all mentioned conditions must be met in concrete cases.

These conditions generally mirror the stipulations of Article 28(1)(c), which outlines the criteria for consolidating arbitral proceedings when claims are made under multiple arbitration agreements. The scope of application of Article 29 is broadened with the 2018 HKIAC Rules for the first time and permits claims to be raised under multiple contracts to be addressed in a single arbitration, even when not all parties are bound by the same arbitration agreement.

This revision acknowledges that parties have faced difficulties in initiating a single arbitration to resolve multi-contract disputes when the transaction encompassed agreements that did not involve the same parties.³⁸⁵

A recent development in Article 29 of the 2024 HKIAC Rules is the second paragraph of the provision, which was not present in the prior version of the rules. Similar to Articles 27(12) and 28(8), when the HKIAC finds that the arbitration is commenced correctly, the parties are considered to have waived their right to choose an arbitrator.³⁸⁶ In its announcement of the 2024 Administered Arbitration Rules, the HKIAC highlighted that the amendment to Article 29(2) was made to ensure alignment with the consolidation provisions found in Article 28(8).³⁸⁷

With such an amendment, the HKIAC Rules have aimed to ensure similar protection, as foreseen under consolidation provisions and avoid the subsequent challenges to be made regarding the validity of an arbitral award.

Furthermore, in case the consolidation decision cannot or has not been given, an arbitral tribunal is also empowered to concurrently oversee multiple arbitrations, sequence them one after the

³⁸¹ Moser, Bao (n 316) 306.

³⁸² HKIAC Rules Art. 29(a).

³⁸³ HKIAC Rules Art. 29(b).

³⁸⁴ HKIAC Rules Art. 29(c).

³⁸⁵ Moser, Bao (n 316) 307.

³⁸⁶ HKIAC Rules Art. 29(2).

³⁸⁷ ‘HKIAC releases 2024 Administered Arbitration Rules (effective 1 June 2024)’ <<https://hkiac.org/news/hkiac-releases-2024-administered-arbitration-rules-effective-1-june-2024>> accessed 18 May 2024.

other, or temporarily halt any of them under the conditions that the same panel of arbitrators presides over each case and that each case shares a common legal or factual issue.³⁸⁸

The arbitral tribunal's authority to proceed with multiple arbitrations concurrently stems from its inherent power to establish appropriate procedures for arbitration, similar to the rationale behind joinder and consolidation procedures, to prevent unnecessary delays or expenses.³⁸⁹

As there is no need for the arbitrations to originate from the same or related transactions, nor is there a necessity for compatible arbitration agreements, this criterion is more expansive than the requirements for consolidating multiple arbitrations or combining multiple contracts into a single arbitration.³⁹⁰ In such scenarios, the HKIAC reserves the right to adjust its administrative and arbitral fees in accordance with the unique procedural arrangement dictated by Article 30(1).³⁹¹

4.5. 2023 SCC Arbitration Rules

The provisions related to joinder, multiple contracts, and consolidation are regulated with the same wording in the 2017 and 2023 SCC Rules.

4.5.1. Joinder in SCC Rules

According to Article 13, titled "Joinder of additional parties," only the parties of the dispute can submit a Request of Joinder to the Board.³⁹² In this submission, the parties can request the inclusion of a third party to the opposing side. This provision is not designed for situations where a claimant or respondent wishes to add a third party to their own side.³⁹³ Therefore, Article 13 is regulated for the situations where multiparty disputes arise, specifically when the respondent intends to bring claims against a third party who was not initially included in the claimant's Request for Arbitration, or when the claimant discovers, after submitting the Request for Arbitration, that another third party should have been involved as a respondent.³⁹⁴

³⁸⁸ HKIAC Rules Art. 30(1)(a)(b).

³⁸⁹ Moser, Bao (n 316) 308.

³⁹⁰ Ibid.

³⁹¹ HKIAC Rules Art. 30(2).

³⁹² SCC Rules Art. 13(1).

³⁹³ Jakob Ragnwaldh, Fredrik Andersson, Celeste E. Salinas Quero, *A guide to the SCC Arbitration Rules* (Kluwer Law International 2020) 36.

³⁹⁴ Ragnwaldh, Andersson, Quero (n 393) 35.

This request has to include the contents described in Articles 6 and 7 of SCC Rules, to the extent that they are applicable.

While the SCC Rules foresees submitting the Request for Joinder as soon as possible, it also establishes a certain time limit for this, which coincides with the submission of the answer.³⁹⁵ There are no exceptions to this timeframe unless the Board uses its discretion to decide otherwise. Article 13(2) does not limit the Board's discretion and, unlike HKIAC rules, also does not reference "exceptional circumstances" as a basis for granting additional time or accepting a late Request for Joinder. After receiving the request, the Secretariat will determine a deadline for the additional party to submit its answer.³⁹⁶

The SCC Rules avoid lengthy provisions by not detailing the content of every correspondence between parties, instead referring to other pertinent articles. For instance, the rules stated that Articles 6 and 7 will be applicable to the request of joinder, and Article 9 will be applicable to the answer to this request, each with the appropriate adjustments.

The Board has the authority to allow the inclusion of one or more new parties into the arbitration process with the evaluation of the dispute between the requesting party and the third party, and it mirrors the jurisdictional assessment outlined in Article 12(i).³⁹⁷ In practice, this means that the Board will conduct its *prima facie* assessment based on the arbitration agreement cited in the Request for Joinder, without considering at this stage whether the arbitral tribunal in the ongoing arbitration will have jurisdiction over the third party.³⁹⁸ While the decision to join an third party to the arbitration lies with the Board, the final determination of the arbitral tribunal's jurisdiction over the third party will be made by the arbitral tribunal itself.³⁹⁹

When claims arise from multiple arbitration agreements, the Board, after consulting with the involved parties, will assess the request for joinder by considering the provisions of Article 14(3)(i)-(iv).⁴⁰⁰ The provisions in Article 14(3)(i)-(iv) outline the conditions under which claims can be processed in a single arbitration. The Board may choose to join a party by applying the same criteria used for consolidation and multi-contract disputes.⁴⁰¹

³⁹⁵ SCC Rules Art. 13(2).

³⁹⁶ SCC Rules Art. 13(4).

³⁹⁷ SCC Rules Art. 13(5).

³⁹⁸ Ragnwaldh, Andersson, Quero (n 393) 37.

³⁹⁹ SCC Rules Art. 13(7).

⁴⁰⁰ SCC Rules Art. 13(6).

⁴⁰¹ Sverker Bonde, 'SCC Arbitration (2023 Rules): a step-by-step guide' (2024 Thomson Reuters Practical Law UK) <<https://uk.practicallaw.thomsonreuters.com/Document/I544f3bfd2c6211ee8921fbef1a541940/View/FullText.html?transitionType=Default&contextData=%28sc.Default%29>> accessed 20.07.2021

Considering multi-contract disputes, when the case against the third party is based on a different arbitration agreement than the one underlying the existing dispute, a positive *prima facie* jurisdictional decision alone will not suffice to join the third party to the arbitration.⁴⁰² In such situations, the Board must also evaluate the criteria specified in Article 14(3), including the compatibility of the arbitration agreements, whether the relief sought stems from the same transaction or series of transactions, the efficiency and promptness of the arbitration, and any other relevant factors the Board considers important.

Regarding the compatibility of the arbitration agreements, it has to be mentioned that each dispute resolution clause or agreement has to cite the SCC arbitration rules. Ragnwaldh, Andersson, Quero have illustrated an example that, in an arbitration under the 2010 SCC Rules, where two claimants initiated a single arbitration against three respondents.⁴⁰³ The claimants brought forward several claims based on a loan agreement with two of the respondents and a guarantee agreement with one respondent acting as the guarantor. While the loan agreement cited the SCC arbitration rules, the guarantee agreement cited the SCC expedited rules. When the Respondents failed to engage in the arbitration process in this case, the SCC independently raised the issue of jurisdiction and determined that it had jurisdiction over the claims but concluded that the claims could not be resolved in a single arbitration due to the conflicting arbitration agreements. Consequently, the arbitration was divided into two separate proceedings.

In line with other institutional rules, the day on which the Request for Joinder is officially received by the SCC is accepted as the commencement day of the arbitration process for the third party.⁴⁰⁴

The SCC rules also include a provision for the removal of the arbitrators.⁴⁰⁵ According to the SCC rules, if the joining third party does not consent to the appointed arbitrators, the Board has the authority to revoke or, as it is stated in the article, “release” the arbitrator and reconstitute the entire arbitral tribunal. This provision seeks to balance the third party’s right to participate in the appointment process with the existing parties’ right to select arbitrators of their choice. If either of the existing parties has previously appointed their arbitrator by the time the Request for Joinder is submitted, the third party may choose to comply with either side and approve the

⁴⁰² Ragnwaldh, Andersson, Quero (n 393) 38.

⁴⁰³ Ragnwaldh, Andersson, Quero (n 393) 40.

⁴⁰⁴ SCC Rules Art. 13(3).

⁴⁰⁵ SCC Rules Art. 13(8).

existing appointment; however, if the third party does not accept any of the existing appointments, the SCC has the discretion to release the appointed arbitrators and appoint the entire Arbitral Tribunal to ensure equal treatment of all parties.⁴⁰⁶

Meanwhile, the parties may also agree on an alternative procedure for the constitution of the arbitral tribunal.

Alternatively, the SCC may decide not to release a previously appointed arbitrator, particularly if it appears that a party is attempting to hinder the tribunal's formation by depriving the other parties of their right to select an arbitrator.⁴⁰⁷

4.5.2. Consolidation in SCC Rules

The consolidation procedure is outlined in Article 15 of SCC Rules, which is entitled as "Consolidation of Arbitrations." The first paragraph specifies the situations where consolidation decisions can be approved, and the second paragraph mentions the factors that must be taken into account while approving such decisions.

Upon the request of a party, Article 15(1) allows the Board to merge two distinct arbitrations under three circumstances. Under the mentioned circumstances, the authority to consolidate cases lies with the Board rather than the arbitral tribunal, ensuring for efficient and proper consideration of consolidation requests, especially when such requests are made early on, before any arbitral tribunal has been formed in the existing arbitrations.⁴⁰⁸ However, since the consolidation procedure can only occur at the request of a party, it is clear that the Board does not have the authority to initiate consolidation on its own.

The following three situations in the related provision is the consent of all parties involved in disputes;⁴⁰⁹ all claims stemming from a single arbitration agreement;⁴¹⁰ or, in instances where the alleged claims are made under multiple arbitration agreements, the requested claims are based on the same transaction or related series of transactions, and the Board deems the arbitration agreements compatible.⁴¹¹ Similar circumstances are also present in Article 14,

⁴⁰⁶ Ragnwaldh, Andersson, Quero (n 393) 38.

⁴⁰⁷ Ibid.

⁴⁰⁸ Ragnwaldh, Andersson, Quero (n 393) 44.

⁴⁰⁹ SCC Rules Art. 15(1)(i).

⁴¹⁰ SCC Rules Art. 15(1)(ii).

⁴¹¹ SCC Rules Art. 15(1)(iii).

“Multiple contracts in a single arbitration,” where the joinder provision has also referred to it in Article 13(6).

Within these situations, the first situation, the consent of all parties is to ensure applicability of the party autonomy principle. When the parties consent to consolidation, the Board does not need to render a decision, instead, the Secretariat will merely acknowledge the parties’ common agreement and proceed with the administrative actions needed to effectuate the agreed-upon consolidation.⁴¹²

In the second situation, where the Board can consolidate the arbitral proceedings if all claims stemming from a single arbitration agreement, even though the parties in these arbitrations may differ. However, the mere fact that all claims are made under the same arbitration agreement is not enough for the Board to consolidate the arbitrations, the Board may still practice its discretion to decide on the consolidation procedure and must consider the non-exhaustive criteria outlined in Article 15(2) as part of its assessment.⁴¹³

Considering the last situation, the third sub-paragraph of Article 15(1), which provides a broad scope to the Board, could potentially lead to the consolidation of arbitrations involving parties who have not explicitly agreed to arbitrate with each other in their underlying agreements. Therefore, the broad application of Article 15(1)(iii) is restricted by additional criteria that must be satisfied for the Board to consolidate the arbitrations, specifically that the relief sought must arise from the same transaction or series of transactions, and the arbitration agreements must be deemed compatible.

The requirements in Article 15(1)(iii) somewhat mirror the criteria in Article 14(3), which the Board must evaluate when deciding whether multiple claims under different arbitration agreements should be consolidated into a single arbitration, and according to Article 13(6), these criteria are also pertinent for joining an additional party when multiple claims are involved under more than one arbitration agreement.⁴¹⁴

According to Article 15(2), when considering consolidation, the Board is required to engage with the parties and the arbitral tribunal and has to consider the progress⁴¹⁵ of the ongoing

⁴¹² Ragnwaldh, Andersson, Quero (n 393) 45.

⁴¹³ Ibid.

⁴¹⁴ Ibid.

⁴¹⁵ SCC Rules Art. 15(2)(i).

arbitration, the proceedings' efficiency and speed,⁴¹⁶ and any other significant factors⁴¹⁷ relevant to the dispute.

As aforementioned, consolidation is one of the results of the procedural economy principle, therefore, the Board will be hesitant to consolidate two arbitrations when the first proceedings are significantly advanced and the advantages of consolidation are minimal.⁴¹⁸ Additionally, the Board must weigh the potential gains in efficiency and speed from consolidating the arbitrations against the parties' right to due process.⁴¹⁹ For instance, if the factual and legal issues in the arbitrations are similar, this would support the decision to consolidate.

Furthermore, in case the Board has decided to consolidate the proceedings, it has the authority to revoke/release any priorly appointed arbitrator.⁴²⁰ Considering the wording of the Article 15(3), the releasement of any arbitrator is also in the discretion of the Board, as the text of the provision clearly indicates that the Board '*may*' conduct such a transaction if it founds appropriate.

4.6. 2015 ISTAC Arbitration Rules

The Istanbul Arbitration Centre (ISTAC) and its rules were first time published in 2015. Considering the ISTAC's rules first enforcement date, compared to other institutional frameworks, the ISTAC Rules can be considered new.

4.6.1. Joinder in ISTAC Rules

Despite being a recently structured institutional rule, the ISTAC Rules do not include a specific provision regarding the joinder procedure in arbitration proceedings. Similar to other domestic arbitration legislations in Turkey, like the Civil Procedural Code and the International Arbitration Act, ISTAC Rules also lack any provisions regarding the joinder in arbitration.

Alike to the ICC arbitration processes, which permitted decisions on joinder prior to the 2012 rules amendment, the absence of explicit provisions for third-party joinder in the ISTAC arbitration rules does not preclude the possibility of such requests being granted.⁴²¹

⁴¹⁶ SCC Rules Art. 15(2)(ii).

⁴¹⁷ SCC Rules Art. 15(2)(iii).

⁴¹⁸ Ragnwaldh, Andersson, Quero (n 393) 46.

⁴¹⁹ Ibid.

⁴²⁰ SCC Rules Art. 15(3).

⁴²¹ Demirkol (n 115) 66.

In case such a request is made in ISTAC arbitration, Article 22 of the ISTAC Rules would be applicable. According to the relevant procedure, “*in cases where the Rules are silent, the rules agreed by the parties shall apply. If there is no agreement between the parties on such matter, the rules designated by the Sole Arbitrator or Arbitral Tribunal shall apply.*”⁴²²

In accordance with the nature of arbitration, where party autonomy is paramount, if all parties consent to a third party’s joinder, the arbitral tribunal can easily decide on this matter. As stated in Article 22(1), if no such agreement has been reached among all parties, then the rules determined by the arbitral tribunal regarding this matter will apply.

As indicated by *Demirkol*,⁴²³ the decision on this issue by the arbitral tribunal means that the joining party will not have any role in the appointment of the arbitrator and the joinder issue could be resolved before the constitution of the arbitral tribunal. Moreover, in the absence of any specific rule on this procedural transaction, the arbitral tribunal faced with such a request may apply the provisions foreseen in the consolidation of cases⁴²⁴ between different parties by analogy. When the consolidation provisions are applied analogously, a request for a joinder by a non-party to the ongoing arbitration will be denied unless all parties consent to the third party’s inclusion. The fact that the third party is a part of the same arbitration agreement does not change this outcome.

Unlike other institutional rules, as described in the next heading, the consolidation provisions or any other related provision regarding the appointment of arbitrators do not grant the ISTAC Board the authority to revoke an arbitrator and constitute the tribunal itself.

4.6.2. Consolidation in ISTAC Rules

ISTAC is among the institutions that grant sole authority to the Board to decide on consolidation of arbitrations. As stipulated in Article 11, titled “Consolidation,” the Secretariat collect the parties’ opinions upon receiving a request for consolidation and then sends these to the Board for a decision.⁴²⁵ In this regard, the request for consolidation also needs to be submitted to the Secretariat.

Similar to the decisions of other institutional boards, the ISTAC Board’s decision is administrative and, unlike decisions regarding the authority of the arbitral tribunal, is not based

⁴²² ISTAC Rules Art. 22(1).

⁴²³ Demirkol (n 115) 67.

⁴²⁴ ISTAC Rules Art. 11(1)(a).

⁴²⁵ ISTAC Rules Art. 11(3).

on a prima facie assessment; consequently, the decision of the ISTAC arbitration board is final, and arbitral tribunals cannot issue a new ruling on this matter.⁴²⁶

Article 11 outlines two distinct scenarios for consolidation based on whether the parties to the disputes are the same or not. In cases where the parties involved in the disputes to be consolidated differ, all parties have to agree on the consolidation for the Board to be able to accept the request.⁴²⁷ On the other hand, when the parties are the same in all disputes, consolidation may be decided by the Board if all parties consent; if all claims originate from the same arbitration agreement; or if the claims, though arising from multiple arbitration agreements, relate to the same legal relationship and the arbitration agreements are compatible.

Under Article 11, when the parties are different, the consent of the parties is the only way to consolidate the cases, whereas when the parties are the same, consent is not a prerequisite. This provision aims to ensure that the rights of the parties in consolidated proceedings are not violated.⁴²⁸

In all events, even if all the conditions have been met in the specific case, it is in the Board's discretion to accept the request for consolidation.⁴²⁹

The ISTAC Rules have also not established a time limit under the consolidation provision, ensuring flexibility for the Board, which will ultimately evaluate the stage at which the arbitration has reached.⁴³⁰

When deciding on consolidation, the Board will consider all relevant factors, including the status of arbitrator appointments and whether the appointed arbitrators are identical, and if the respondent's co-arbitrator is not appointed at the time of the request, the appointment will be put on hold until the Board reaches a decision on the consolidation.⁴³¹

Moreover, the ISTAC Rules grant parties the flexibility to deviate from established rules and opt out of procedures at their discretion, therefore, the arbitral tribunal also needs to consider this and proceed in alignment with the principle of party autonomy.⁴³²

⁴²⁶ Fatih Işık, 'Multiparty Arbitration and Consolidation of Arbitrations' (2023) in Tahkim Okulu Panelleri Serisi, Vol. 3, 267

⁴²⁷ ISTAC Rules Art. 11(1)(a).

⁴²⁸ Candan Yasan Tepetaş, 'Key Features of the Istanbul Arbitration Centre Arbitration Rules' (2018) Turkish Commercial Law Review, Vol. 4, Issue 1, 73.

⁴²⁹ Işık (n 426) 267.

⁴³⁰ Işık (n 426) 268.

⁴³¹ ISTAC Rules Art. 11(2).

⁴³² Tepetaş (n 428) 74.

Lastly, unless the parties agree otherwise, upon the decision of the Board, the arbitrations will be consolidated into the first commenced proceedings.⁴³³

5. Comparative Analysis of Institutional Rules

5.1. Comparative Analysis of Joinder Provisions

Except for the ISTAC Rules, all other institutional rules have provided a special provision for joinder transactions. Therefore, while comparing the institutional rules, ISTAC rules will be compared with others with an analogical approach.

In both joinder and consolidation procedures, a primary issue is the necessity of a request, as none of the institutions have regulated a provision allowing the relevant authority to decide at its own discretion.

Although the HKIAC and SIAC Rules allow both the parties to the arbitration and the third party to request a joinder, the ICC, LCIA, and SCC Rules restrict this competency to the parties of the dispute and do not allow an additional party to request a joinder on its own. Regarding the ISTAC Rules, if Article 11 is applied by analogy, the same conclusion will be reached as with the ICC, LCIA, and SCC Rules.

	Who can make a request?
ICC	Only parties of the arbitration can request for joinder.
LCIA	There has to be a written agreement between one of the existing parties and an additional party.
SIAC	A party or non-party can request for joinder.
HKIAC	A party or non-party can request for joinder.
SCC	Only parties of the arbitration can request for joinder.
ISTAC	Only parties of the arbitration can request for joinder.

In various institutional rules, there are often time limits set for parties to submit a request for joinder. Following the analysed institutional rules, the SIAC Rules are the most flexible, setting no specific time limit for submission requests. The HKIAC and SCC Rules impose specific deadlines, the HKIAC requires submission before the Statement of Defence, and the SCC specifies it must be done before the Submission of Answer. Nevertheless, the relevant authorities may still permit the addition of a third party after these deadlines, while HKIAC has

⁴³³ ISTAC Rules Art. 11(3).

mentioned that there have to be *exceptional circumstances*, SCC left this issue only to the discretion of its Board.

The LCIA Rules, not citing any specific time limit, only require that the request be made after the commencement of the arbitral tribunal, as the joinder provision falls under the “Additional Powers” section. The ICC Rules generally prohibit joinder after the appointment or confirmation of an arbitrator. However, the 2021 ICC Rules introduced a provision allowing parties to submit a Request for Joinder to the tribunal as well. Even if the tribunal deems the joinder appropriate, it cannot authorize the joinder without the unanimous agreement of all parties, including the third party. This contrasts with the HKIAC and SCC Rules, where the relevant body retains the authority to approve a joinder independently from the agreement of all parties.

Under the ISTAC Rules, even if Article 11 is deemed applicable, the current version of the provision does not specify any time limit for the consolidation requests as well. Therefore, since there is no limitation, it must be accepted that parties can submit a request at any time, and the rest will be in the discretion of the Board.

	Until when a party can be joined?
ICC	As a rule, no party can be joined after the confirmation or appointment of any arbitrator. However, if the tribunal finds the joinder appropriate and all parties, including the one to be joined, agree to the transaction, the additional party.
LCIA	Since the only authority to apply is the arbitral tribunal, the request has to be after the commencement of this tribunal.
SIAC	More flexible, the joinder request can be submitted both before and after the commencement of the arbitral tribunal.
HKIAC	Request has to be made before the “Statement of Defence”. Under exceptional circumstances, HKIAC can still allow the parties to make a submission.
SCC	Request has to be made until the “Submission of Answer”. However, the Board can decide otherwise.
ISTAC	No specific time limitation.

Another important aspect to consider is the ability to submit a Request of Joinder after its initial rejection by the relevant authorities of the institutions. According to the provisions of the SIAC,

if the board of the concerned institution rejects a Request for Joinder, the parties explicitly retain the right to apply to the arbitral tribunal with the same request.

Under the HKIAC Rules, the provisions allow parties to submit a Request of Joinder both before and after the commencement of the arbitral tribunal. Although there is no explicit statement indicating that parties may reapply to the tribunal after a rejection by the HKIAC, the rules do establish that parties can submit such requests to the tribunal, which possesses the authority to decide on a joinder. Therefore, as it is not been restricted, in HKIAC Rules as well, the parties may still apply for the second time.⁴³⁴

The 2021 amendments to the ICC Rules have updated the criteria for joinder decisions, aligning them more closely with the HKIAC Rules due to the lack of a specific prohibition against resubmitting a joinder request following the Board's initial rejection. However, even with these changes in the ICC Rules, the arbitral tribunal is not authorized to render an independent joinder decision once proceedings have started. The amendments introduced a condition that requires the tribunal's approval of the joinder request, in addition to the unanimous agreement of the parties.

Comparing the LCIA, and the SCC Rules, it is clearly visible that these rules are more restrictive than the other institutional rules. Both sets of rules delegate the decision making power regarding the request for joinder exclusively to a single body within the arbitral proceedings.

Under ISTAC Rules, due to the need of a constituted arbitral tribunal, to apply Article 11 by analogy, the application can solely be made to the tribunal.

	Where the application will be made?
ICC	Parties can apply to the arbitral tribunal after the rejection of their request by the ICC Court; no restriction is mentioned.
LCIA	Parties can apply only to the arbitral tribunal.
SIAC	Parties can apply to the arbitral tribunal after the rejection of their request by the Board; it is expressly stated in the Rules.
HKIAC	Parties can apply to the arbitral tribunal after the rejection of their request by the HKIAC; no restriction is mentioned.
SCC	Parties can apply only to the SCC Board.
ISTAC	Parties can apply only to the arbitral tribunal.

⁴³⁴ Smith (n 30) 191.

The concept of consent, as outlined earlier, is assessed based on the parties' intentions when selecting the arbitration and drafting the relevant clause(s) or agreement(s), and institutional rules they choose. While this may sometimes be seen as a deviation from party autonomy, there are numerous instances where the institutional rules also necessitate obtaining consent.

According to the SIAC and HKIAC Rules, neither the third party nor the opposing party in the arbitration needs to give consent when one of the parties request for a joinder of a third party. In parallel, existing parties' consent is also not required if the third party applies for a joinder.

Under the SCC Rules, when a party files a request, it is not necessary to obtain consent from either the third party or the opposing party in the arbitration. In the ICC Rules, the ICC Court can decide on a joinder without the consent of other parties, whereas the arbitral tribunal requires the consent of the third party to render a joinder decision. In the LCIA Rules, there has to be expressly written consent between the applicant party and the third party, so the consent of the third party is also required here. Lastly in the ISTAC Rules, the consent of all parties is required for the joinder of a third party to the proceedings.

	Whose consent is required?
ICC	No consent is required by the ICC Court; consent of the third party is required by the arbitral tribunal.
LCIA	An explicit written consent of a third party is required.
SIAC	No consent is required.
HKIAC	No consent is required.
SCC	No consent is required.
ISTAC	All parties' consent is required.

From the aforementioned explanations, it's evident that the decision making authority for joinder requests varies across institutions. The ICC, SIAC, and HKIAC Rules grant decision making power to both their institutional boards and the arbitral tribunals. In contrast, the SCC Rules confer this authority solely to its Board, and the LCIA Rules designate only the arbitral tribunal as competent to render the joinder decisions.

When considering the ISTAC Rules in this context, due to the reason that the arbitral tribunal needs to apply Article 11 of the ISTAC Rules analogously, after gathering all parties' consent, the request of the joinder will be concluded by the arbitral tribunal.

	Which authority will decide?
ICC	Both the ICC Court and the arbitral tribunal can decide.
LCIA	Only the arbitral tribunal can decide.
SIAC	Both the Board and the arbitral tribunal can decide.
HKIAC	Both the HKIAC and arbitral tribunal can decide.
SCC	Only the Board can decide.
ISTAC	Only the arbitral tribunal can decide.

The ICC, LCIA, SIAC, HKIAC, and SCC Rules all address the inclusion of one or more additional parties in arbitration proceedings. In these instances, except for the ICC, LCIA, and SCC, the decision making authority must initially be convinced that the arbitration agreement applies to all involved parties. Since the LCIA Rules require explicit written consent from all parties, there is typically no need to question issues regarding jurisdiction according to the foreseen provisions. Similarly, in ISTAC Rules, since all parties' consent is required, the arbitral tribunal needs to accept that it has the jurisdiction to render a decision on the merits of the case as well. Alongside all these matters, in every instance, the question of jurisdiction regarding the inclusion of a third party will always be determined by the arbitral tribunal.

5.2. Comparative Analysis of Consolidation Provisions

Unlike joinder, consolidation provisions are available in all institutional rules, including the ISTAC Rules. The consolidation provisions will also be examined in a similar sequence to the joinder section.

To start with, all institutional rules allow any party in an ongoing arbitration to request the consolidation of two or more arbitral proceedings, in case they meet the certain criteria outlined in the following rules.

	Who can make a request?
ICC	Any party.
LCIA	Any party.
SIAC	Any party.
HKIAC	Any party.
SCC	Any party.
ISTAC	Any party.

In the SCC, SIAC, and HKIAC Rules, there is no certain time limit for a party to request the consolidation of arbitrations. However, in SIAC Rules, once a tribunal in any of the arbitration proceedings has been constituted, a party is required to submit the consolidation request to the arbitral tribunal instead of the SIAC Court, and so, the existence of an implied time limit becomes visible.⁴³⁵

When considering requests for consolidation, according to the ICC Rules, the ICC Court evaluates if one or more arbitrators have been confirmed or appointed in any arbitral proceedings and whether these arbitrators are the same individuals or different. According to the Secretariat's Guide to the ICC Rules, the ICC Court cannot consolidate cases if an arbitrator has already been appointed, as it lacks the authority to form a single tribunal unless the arbitrators resign or are removed by the ICC Court with the parties' agreement.⁴³⁶ Consequently, in ICC Rules, there's a temporal limitation for consolidation, which is until an arbitrator is confirmed in one of the proceedings.

Although there is a perspective that the ICC Court can consolidate multiple arbitral proceedings, even when distinct arbitral tribunals have been formed,⁴³⁷ the fact that the ICC Court is not granted the authority to revoke an arbitrator makes the aforementioned procedure more coherent with the principle of equal treatment. While Articles 12(6) to 12(9) do not legally support the consolidation of arbitral tribunals -as no arbitrator has yet been appointed and confirmed in these articles- the consolidation of distinct arbitral tribunals could only be justified under the applicability of Article 40⁴³⁸. According to this provision, in case one of the parties continues with the arbitration processes without objecting to "*any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal,*" that party will be considered to have waived the right to raise any objections at a later stage.

The ISTAC Rules are also designed as the ICC Rules, and state that the Board will consider any situation if any of the arbitrators have been confirmed or appointed in any arbitral proceedings and whether these arbitrators are the same individuals or different. Unlike the ICC

⁴³⁵ Smith (n 30) 196.

⁴³⁶ Smith (n 30) 197.

⁴³⁷ Legru (n 65) 254; "...the ICC Rules (both the previous version and the new version) provide the ICC Court (as opposed to arbitral tribunals) with the power to consolidate separate proceedings even in cases where distinct arbitral tribunals have already been constituted."

⁴³⁸ Art. 40 of the 2021 ICC Rules states that; "*A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.*"

Rules, there is no guide regarding the consolidation of arbitrations in ISTAC, however, since the ISTAC Board also cannot release any arbitrator, in light of the equal treatment principle, an acceptance of temporal limitation for consolidation is necessary, which is similarly until the confirmation of any arbitrator in one of the proceedings.

The LCIA Rules also determined a certain time for the consolidation of arbitrations. This is because consolidation can occur only if the arbitral tribunal for the other cases has not yet been established or, if it has been, it consists of the same arbitrators.

	Until when a party can request the consolidation of arbitrations?
ICC	Until the appointment of an arbitrator.
LCIA	Until the establishment of the arbitral tribunal. If the arbitrators are the same, there is no time limit.
SIAC	No time limit.
HKIAC	No time limit.
SCC	No time limit.
ISTAC	Until the appointment of an arbitrator.

According to the ICC, SCC, SIAC, HKIAC, and LCIA Rules, two or more arbitrations can be consolidated without the approval of the conflicting party, or the parties involved in any of the other ongoing arbitrations.

Similar to the prior version of the LCIA Rules (2014 LCIA Rules), in ISTAC Rules, if the parties in all proceedings to be consolidated are the same, the ISTAC Board may decide on consolidation without the consent of the opposing party. However, according to Article 11(1)(a) of the ISTAC Rules, if the parties are different in multiple arbitrations, all parties have to agree to consolidate the cases.

	Whose consent is required?
ICC	No consent is required.
LCIA	No consent is required.
SIAC	No consent is required.
HKIAC	No consent is required.
SCC	No consent is required.

ISTAC	If the parties of the arbitrations to be consolidated are different, all parties' consent is required. If the parties are the same, no consent is required.
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Under the rules of the ICC, HKIAC, SCC, and ISTAC, the respective arbitral institutions are authorised to decide on consolidation requests, regardless of whether arbitrators have been appointed or the tribunal has been constituted.

In LCIA and SIAC Rules, both the institutional bodies, the LCIA Court and the SIAC Court, are responsible for concluding the consolidation requests before any tribunal is established in the proceedings. Once a tribunal is constituted, it is the arbitral tribunal that decides on requests for consolidations.

Article 8(4) of the SIAC Rules, explicitly states that a party can still apply to the arbitral tribunal, after the rejection of the SIAC Registrar. In the LCIA Rules, although there is no explicit restriction, it is inferred that parties have the same right to reapply to the arbitral tribunal for consolidation, due to the absence of a restrictive provision.

	Which authority will decide?
ICC	The ICC Court
LCIA	If there is an agreement in writing of all parties, both the arbitral tribunal and the LCIA Court. Otherwise, parties can request consolidation of proceedings from the arbitral tribunal after its establishment, and from the LCIA Court before the arbitral tribunal is established.
SIAC	Both the SIAC Registrar and the arbitral tribunal
HKIAC	The HKIAC
SCC	The SCC Board
ISTAC	The ISTAC Board

After the decision on consolidation of the cases, one of the issues is to determine the arbitral tribunal which will hear the consolidated proceedings.

In accordance with the rules of the SCC, SIAC, and HKIAC, each respective arbitral institution has the authority to revoke/release any previously appointed arbitrator. Furthermore, these institutions also have the power to appoint arbitrators to the tribunal for consolidated cases. Additionally, the SIAC and HKIAC rules specifically state that parties involved in the

proceeding expressly waive their right to nominate an arbitrator or take part in forming the tribunal.

In the LCIA Rules, the consolidation occurs into the single existing arbitral tribunal. Either the tribunal itself decides to consolidate cases in its current proceedings or the LCIA Court decides on consolidation at the phase that no arbitral tribunal has been constituted yet.

Under the ICC Rules, when arbitrations are consolidated, the proceedings will be combined into the arbitration that was initiated earliest. As previously mentioned, when the ICC Court evaluates a request for consolidation, it considers if one or more arbitrators have been confirmed or appointed in the cases. The Court also assesses whether these arbitrators are the same individuals or not. In conclusion, as stated by the Secretariat's Guide to the ICC Rules, there is a time restriction on consolidation that lasts until an arbitrator is confirmed in more than one of the proceedings.

In the ISTAC Rules, it is also expressly stated that *“the arbitrations shall be consolidated into the arbitration that commenced first”* and again as aforementioned, the ISTAC Board will consider *“any relevant circumstances, such as whether or not the arbitrators have been designated and, if so, whether the designated persons are the same or not”*. Since the ISTAC Board, like in ICC arbitration, does not have the authority to revoke any appointed arbitrator, there is an implied time limit within the ISTAC rules as well.

	Who will hear the consolidated cases?
ICC	Consolidated cases are heard by the arbitration that commenced first.
LCIA	Consolidated cases are heard by the only existing tribunal.
SIAC	The discretion of which arbitral tribunal will hear consolidated arbitration proceedings lies with the Institutional Body (contains an express waiver from the parties regarding their right to appoint an arbitrator).
HKIAC	The discretion of which arbitral tribunal will hear consolidated arbitration proceedings lies with the Institutional Body (contains an express waiver from the parties regarding their right to appoint an arbitrator).

SCC	The discretion of which arbitral tribunal will hear consolidated arbitration proceedings lies with the Institutional Body.
ISTAC	Consolidated cases are heard by the arbitration that commenced first.

The comparative analysis of institutional arbitration rules reveals significant variations in how joinder and consolidation provisions are approached. Each institution's rules demonstrate unique methodologies and conditions that reflect their underlying principles and procedural frameworks.

Regarding consolidation provisions, all reviewed institutions provide mechanisms for consolidation, yet the specifics of these mechanisms vary. Each institution has distinct rules on the timing of such requests and the authority responsible for making consolidation decisions. For joinder provisions, the flexibility and requirements for initiating a joinder request differ notably among institutions. While SIAC and HKIAC permit both parties and non-parties to request joinder, the ICC, LCIA, and SCC restrict this right solely to the parties involved in the arbitration. The ISTAC Rules, when analogously applied, align more closely with the restrictive approach of the ICC, LCIA, and SCC.

In conclusion, while the general objectives of promoting efficiency, reducing costs, and preventing conflicting decisions are shared across institutions, the detailed provisions and their applications reflect diverse procedural philosophies. Parties should therefore carefully consider these differences when drafting arbitration agreements and selecting the governing rules, as the chosen institution's framework will significantly impact the management and outcome of multi-party and multi-contract arbitrations.

6. The Factors to be Considered While Deciding on Joinder or Consolidation

6.1. Considerations for Joinder Decision

As outlined above, there are several criteria that must be met to render a joinder decision, which may vary across different institutional rules. These several criteria can also differ depending on whether the request is made before or after the constitution of the arbitral tribunal. However, some institutional rules stipulate that such requests may solely be made to the arbitral tribunal itself.

In the previous version of the ICC Rules, in Article 7(2), it was only stated that the request of joinder should incorporate and allow parties to submit any “...*other documents or information as it considers appropriate or as may contribute to the efficient resolution of the dispute.*” However, with the revised version of the rules, a new paragraph is added to the provision and states that “*the arbitral tribunal shall take into account all relevant circumstances, which may include whether the arbitral tribunal has prima facie jurisdiction over the additional party, the timing of the Request for Joinder, possible conflicts of interests and the impact of the joinder on the arbitral procedure.*”

With the current version of the ICC Rules, it became similar to the provisions of the SCC Rules. According to Article 14(3) of the SCC Rules, if the arguments are made pursuant to more than one arbitration agreement, the SCC Board has to consider the compatibility of the arbitration agreements, determine if the sought relief is connected to the same transaction or a series of transactions, evaluate the efficiency and speed of the proceedings, and take into account any other relevant situations.

Meanwhile in SIAC Rules, if the conditions stipulated in Article 7(1) or Article 7(8) are met, the decision making authority, either the SIAC Registrar or the arbitral tribunal, will decide all relevant factors themselves. The SIAC Rules only mention that the decision maker will conclude the request for a joinder by “*having regard to the circumstances of the case.*”

In the LCIA and HKIAC Rules, there are no specific factors that have been specifically described for the decision making bodies.

When the ISTAC Rules are examined, due to the absence of a joinder provision, no factors are also mentioned in the rules. Therefore, the factors to be considered will only be identifiable upon determining the applicable rules for such a procedure in accordance with Article 22(1)⁴³⁹ of the ISTAC Rules.

Besides all these considerations and regardless of the stage or the authority to which the application is made, the relevant decision making authority should evaluate whether accepting the request for joinder is more efficient and cost-effective by considering the legal, factual, and technical connections between the ongoing arbitration and arbitration involving the third party.⁴⁴⁰ The further progressed the ongoing arbitration is, the less likely it is that the joinder

⁴³⁹ Art. 22(1) of the ISTAC Rules states that “*In cases where the Rules are silent, the rules agreed by the parties shall apply. If there is no agreement between the parties on such matter, the rules designated by the Sole Arbitrator or Arbitral Tribunal shall apply.*”

⁴⁴⁰ Smith (n 30) 194.

request will be approved, as introducing significant delays and interruptions to an already substantially progressed arbitration process is unlikely to be seen as more efficient or cost-effective.⁴⁴¹

Moreover, even in situations where the foreseen criteria are satisfied, the decision making authority's extent of discretion should also be assessed, which has not been clearly regulated within the institutional rules, and therefore results in the evaluation of a broad latitude while considering the joinder request's suitability, however, there are also particular limitations.⁴⁴² According to *Choi*, when all the procedural conditions for a joinder are satisfied but the opposing party objects to the transaction, and the applicable arbitration rules do not address this situation, the decision maker has to consider whether the national court of the seat of arbitration would accept the joinder request under the existing circumstances.⁴⁴³ Moreover, *Choi* also argues that the parties cannot agree to terms of joinder that exceed the permissible scope of the national rules for joinder.⁴⁴⁴

6.2. Considerations for Consolidation Decision

In all institutional arbitration rules, there is more than one possibility for the relevant authority, to render a consolidation decision. However, in all of the examined rules, the most common and important criterion is the multiple arbitration agreements being compatible.⁴⁴⁵ Even though there would be factual and legal connections between the multiple disputes, when the arbitration agreements are not compatible, it would not be possible to consolidate the arbitration.⁴⁴⁶

Related to the compatible agreements, the challenges can become more complex when one of the arbitration agreements does not include such qualifications as language and number of arbitrators. In these cases, the tribunal must determine if the agreements are compatible enough to apply the explicit terms from a related contract's arbitration agreement.⁴⁴⁷ However, given that the consolidation provisions within each set of rules apply solely to arbitrations conducted under those respective rules, this likely reduces potential incompatibilities in some arbitration agreements.⁴⁴⁸

⁴⁴¹ Ibid.

⁴⁴² Choi (n 13) 31.

⁴⁴³ Choi (n 13) 32.

⁴⁴⁴ Ibid.

⁴⁴⁵ Pair, *Frankenstein* (n 71) 1077.

⁴⁴⁶ Leboulanger (n 7) 82.

⁴⁴⁷ Smith (n 30) 198.

⁴⁴⁸ Smith (n 30) 199.

Furthermore, another common situation for all rules can be mentioned as the disputes that arise out of the same legal relationships or out of contracts consisting of a principal contract or out of the same transaction or series of transactions. The arbitral tribunal can also assess this issue while evaluating its *prima facie* jurisdiction. The tribunal has to find a reasonable argument for both of these issues. The legal theories related to agency, estoppel and alter ego can also be considered while determining the series of transactions.

As previously explained while presenting the criteria of consolidation for each institutional rule, the factors considered by the decision maker in applications for consolidation may differ among the rules. Even though, they typically include the status of the arbitral tribunal's constitution, shared issues of fact, law, or expert opinion between the arbitration proceedings, the current progress of the ongoing arbitrations, and other relevant considerations regarding whether consolidation would be more efficient and expeditious.

In institutional arbitration, there is no general rule established for the existence of a connection, but it is accepted that there is a connection if the proceedings are of a nature that they will affect each other and in disputes arising from the same legal relationship.⁴⁴⁹ According to Platte, the identical arbitration agreement is considered a definitive indicator of a connection, creating a suitable basis for the consolidation of different arbitral proceedings, and the purpose of the consolidation to prevent conflicting arbitral awards and parallel proceedings will only be achievable if a connection exists.⁴⁵⁰

However, even when a clear connection exists, there may be situations where consolidation is not possible.⁴⁵¹ For example, if there are conflicting provisions in the arbitration agreements, different institutions or seats of arbitration are chosen, or the parties' consent to the consolidation of proceedings cannot be clearly ascertained, a decision to consolidate may not be made despite the existence of a connection.⁴⁵²

The explanations provided in the Canfor Case's order of the consolidation tribunal should also be taken into account. The consolidation tribunal stated that the situations where a consolidation decision would be made and where separate arbitral proceedings would be conducted must be

⁴⁴⁹ Platte (n 88) 71.

⁴⁵⁰ Platte (n 88) 70.

⁴⁵¹ Leboulanger (n 7) 82.

⁴⁵² Ibid.

compared to determine if the consolidation decision is fair.⁴⁵³ In making these comparisons, the factors to be considered are time, cost, and the avoidance of contradictory awards.⁴⁵⁴

In this regard, the decision to consolidate arbitration proceedings hinges on the compatibility of multiple arbitration agreements and related legal relationships or transactions. The criteria for consolidation, while varying across institutional rules, generally emphasize efficiency, fairness, and the avoidance of contradictory awards. In any case, whether the foreseen situations are present, the discretion still lies with the decision making authority. Therefore, consolidation decisions should be made with careful consideration of these factors to ensure a just and expedient resolution of disputes.

7. Constitution of the Arbitral Tribunal and The Principle of Equal Treatment

The processes for requesting and granting joinder and consolidation, as well as constituting the tribunal, are distinct issues. The tribunal or any decision making authority may provide lawful reasons for these decisions, but it is also essential to ensure equality among all parties. Some institutional rules incorporate provisions related to joinder and consolidation within the same articles, while others address these issues in separate articles.

In the LCIA rules, since there must be a written agreement between the party seeking the joinder and the third party, and the arbitral tribunal is the authorised decision maker, the tribunal has to be constituted to accept the joinder request. Similarly, in consolidation procedures, the tribunal may decide to consolidate the cases when there are the same arbitrators in all arbitrations or no tribunal is formed in the other cases.

It is worth noting that, under the LCIA Rules, the parties do not inherently have the right to appoint an arbitrator, but it exists only if the parties have settled this issue in the arbitration agreement or otherwise.⁴⁵⁵ Without such an agreement, the LCIA Court constitutes the arbitral tribunal without considering party nominations. Therefore, for Article 8, which regulates the constitution of the arbitral tribunal in multi-party cases, to apply, each party must be entitled to appoint an arbitrator under the arbitration agreement.⁴⁵⁶

The purpose of Article 8 of the LCIA Rules, just like in other institutional arbitration rules, is to ensure the principle of equal treatment in the context of constituting the arbitral tribunal.

⁴⁵³ Kiyak (n 27) 20; Canfor Case (n 37) §124.

⁴⁵⁴ Canfor Case (n 37) §126.

⁴⁵⁵ LCIA Rules Art. 5(6)-5(8); Scherer, Richman, Gerbay (n 200) 116.

⁴⁵⁶ Clifford, Wade (n 201) 127.

Equal treatment becomes a concern when multiple claimants and respondents have different interests and cannot agree on a common arbitrator nominee.⁴⁵⁷

Article 8 is designed to address the potential inequality, where such situations occur and the co-parties lose their chance to nominate an arbitrator, while the opposing side, possibly a single party, can still nominate one.⁴⁵⁸

If the arbitration agreement allows each party to nominate an arbitrator, but there are more than two disputing parties who have not agreed in writing to represent two distinct “sides” (one side nominating a single arbitrator for the claimants and the other for the respondents), the LCIA Court will appoint the arbitrators of the tribunal without considering any party’s individual nominations.⁴⁵⁹ In practice, before the LCIA Court acts in accordance with Article 8(1), the LCIA Secretariat should invite the parties, inform them about the application of Article 8(1), and ask them to confirm whether they agree to be considered as two distinct ‘sides’ for the formation of the arbitral tribunal.⁴⁶⁰

In the joinder procedures of the ICC rules, similar to the LCIA rules, there would be no dilemma for the constitution of the arbitral tribunal. According to the ICC rules, even if the request for joinder is made after the appointment of any arbitral, the constituted tribunal can only render a joinder decision if the third party accepts the already constituted arbitral tribunal and terms of reference.

Moreover, Article 12 of the ICC Rules includes an additional provision stating that if the tribunal has not yet been constituted, the third party can nominate an arbitrator for confirmation with either the claimant or the respondent.⁴⁶¹

Since the assumption under ICC Rules is the third party is joined before the constitution of the arbitral tribunal, the third party would try to agree on a co-arbitrator nominee with either side of the dispute; however, it is not mandatory for the third party to reach an agreement with any party for the nomination of an arbitrator.⁴⁶² In practical terms, the third party usually aligns with

⁴⁵⁷ Scherer, Richman, Gerbay (n 200) 142.

⁴⁵⁸ Ibid.

⁴⁵⁹ LCIA Rules Art. 8(1); Blackaby, Partasides, Redfern, (n 2) ch 2, s I, para. 2.238.

⁴⁶⁰ Clifford, Wade (n 201) 128.

⁴⁶¹ ICC Rules Art. 12(7).

⁴⁶² Webster, Bühler (n 159) 231.

one side of the dispute and is frequently represented by the same counsel as one of the original arbitration parties.⁴⁶³

Besides, Article 12 also includes a provision which states that multiple claimants or respondents have to nominate an arbitrator jointly.⁴⁶⁴ If multiple parties cannot agree on an arbitrator, the ICC Court may appoint all members of the arbitral tribunal and designate one of them as the president of the tribunal.⁴⁶⁵

For the ICC Court to constitute the arbitral tribunal, under Article 12(8), two conditions must be met. First, there must be an inability by either multiple claimants, respondents, or third parties to jointly make a nomination, and second, all disputing parties must be unable to make a settlement on a method for the formation of the arbitral tribunal.⁴⁶⁶

In *ICC Case No. 19/10666*, the ICC Court invoked Article 12(8) when one party contested an arbitration agreement that allowed each of the four parties to nominate an arbitrator, arguing that the other three parties were collaborating, thus always placing the objecting party in the minority on the Tribunal and resulting in permanent minority representation.⁴⁶⁷ The ICC Court agreed with this assessment and proceeded to appoint all five arbitrators. The decision was subsequently upheld by the International Chamber of the Paris Court of Appeal.

In such situations, the SIAC,⁴⁶⁸ HKIAC⁴⁶⁹ and SCC⁴⁷⁰ Rules have also foreseen a similar procedure to be practised by their relevant authority, where the institutional board constitutes the arbitral tribunal, to prevent the violation of the principle of equal treatment.

In this regard, it is worth mentioning that the discretionary qualification of Article 17(5) of the SCC Rules permits the Board to manage the constitution of the arbitral tribunal as an

⁴⁶³ Ibid.

⁴⁶⁴ ICC Rules Art. 12(6).

⁴⁶⁵ ICC Rules Art. 12(8); Webster, Bühler (n 159) 230.

⁴⁶⁶ Choi (n 13) 52.

⁴⁶⁷ Webster, Bühler (n 159) 232.

⁴⁶⁸ SIAC Rules Art. 12(2); In such cases, where multiple respondents have conflicting interests and cannot agree on an arbitrator, to ensure procedural fairness, any nomination made by the claimant will be disregarded, and the SIAC will constitute the arbitral tribunal, also designating one of the arbitrators as the presiding arbitrator. *See* Choong, Mangan, Lingard (n 259) 143.

⁴⁶⁹ HKIAC Rules Art. 8(2); In the event that one side of the dispute fails to nominate an arbitrator or if the parties cannot agree to represent separate sides, the HKIAC has the authority to disregard the other side's nomination and to constitute the entire arbitral tribunal. *See* Wiegand, Altenkirch (n 320) 31.

⁴⁷⁰ SCC Rules Art. 17(5); Under Article 17(5), if either side fails to appoint an arbitrator, the Board has the authority to release any appointed arbitrator and constitute the entire arbitral tribunal itself. *See* Ragnwaldh, Andersson, Quero (n 393) 56.

appointment under Article 17(4),⁴⁷¹ where appropriate, rather than Article 17(5).⁴⁷² For instance, in case multiple respondents fail to engage in the formation of the arbitral tribunal, the Board may find it suitable to appoint the co-arbitrator on behalf of the non-participating respondents under Article 17(4) instead of constituting the entire arbitral tribunal according to Article 17(5).⁴⁷³

In a relevant case, Royal Unibrew A/S's subsidiary signed an asset transfer agreement with Advadis S.A. and Mr. Brodowski, one of Advadis's directors.⁴⁷⁴ Advadis and Brodowski provided guarantees to Royal Unibrew A/S, which later led to a dispute. Royal Unibrew A/S initiated arbitration under the 2010 SCC Rules against Advadis and Brodowski, appointing an arbitrator. The respondents, however, were unable to make a settlement on a joint arbitrator and each desired to appoint different arbitrators. Following Article 10(4) of the 2010 Rules, the Board constituted the entire arbitral tribunal, including the arbitrator previously chosen by the claimant, but did not appoint either of the respondents' proposed arbitrators. The respondents challenged the award, claiming they were denied participation in the tribunal's constitution with the violation of the equal treatment principle. The Svea Court of Appeal upheld the Board's decision, ruling it did not violate the 2010 Rules or the principle of equal treatment, as the Rules did not specify who the SCC should appoint in such situations and the Respondents failed to show their inability to jointly appoint was due to a dispute between them. It has been stated that the relevant court could reach the same conclusion under the up to date SCC Rules.⁴⁷⁵

Due to the importance of the principle of equality, the ICC rules grant the authority to the ICC Court to appoint all three members of the arbitral tribunals in exceptional circumstances.⁴⁷⁶ From the wording of the provision, these exceptional circumstances can be understood as significant risks to equal treatment and fairness that may affect the validity of the arbitral award.⁴⁷⁷

⁴⁷¹ Art. 17(4) of SCC Rules; *"Where the Arbitral Tribunal is to consist of more than one arbitrator, each party shall appoint an equal number of arbitrators and the Board shall appoint the chairperson. Where a party fails to appoint any arbitrator within the stipulated time period, the Board shall make the appointment."*

⁴⁷² Ragnwaldh, Andersson, Quero (n 393) 57.

⁴⁷³ Ibid.

⁴⁷⁴ *Advadis S.A. in bankruptcy v. Royal Unibrew A/S* (20 March 2015) Svea Court of Appeal, Case T 8043-13. <<https://jursmunda.com/en/document/decision/en-royal-unibrew-a-s-v-advadis-s-a-judgment-of-svea-court-of-appeal-friday-20th-march-2015>> accessed 29.07.2024.

⁴⁷⁵ Ragnwaldh, Andersson, Quero (n 393) 57.

⁴⁷⁶ ICC Rules Art. 12(9).

⁴⁷⁷ Webster, Bühler (n 159) 233.

The ICC Note also provides an illustration of applying this provision, explaining that the ICC Court may practice the procedure in Article 12(9) when an arbitration agreement grants one party the unilateral right to form the arbitral tribunal, and this unilateral right is not recognized by the law of the seat of arbitration.⁴⁷⁸

Unlike the LCIA and ICC rules, the SIAC and HKIAC rules included provisions related to the revocation of arbitrators and waiver of the parties in the joinder and consolidation articles. The SIAC rules grant the SIAC Court the authority to revoke any arbitrators appointed before the decision on joinder⁴⁷⁹ or consolidation⁴⁸⁰ procedures. Similarly, in both relevant articles, it is stated that if the request for joinder⁴⁸¹ or consolidation⁴⁸² is accepted, any party who did not choose an arbitrator or participate in the constitution of the arbitral tribunal will be deemed to have waived these rights.

These provisions related to the revocation and appointment of the arbitrators deal with situations where one of the parties of the dispute has entered into arbitration, either by joinder or consolidation, and has not found an opportunity to participate in the constitution of the arbitral tribunal.⁴⁸³

Under the HKIAC rules, parties are similarly deemed to have waived their rights to choose an arbitrator in both joinder⁴⁸⁴ and consolidation⁴⁸⁵ procedures. The HKIAC is also authorized to revoke any appointed and confirmed arbitrator and to appoint a new arbitral tribunal without being bound by any party's designation.⁴⁸⁶ Similarly, these provisions are also foreseen to ensure the equal participation of all parties and to avoid any *Dutco-style* objections against the arbitral awards to challenge its enforcement.⁴⁸⁷

HKIAC rules include a separate provision in Article 32, titled "Waiver," which specifically includes complex arbitrations involving joinder and consolidation. According to Article 32, the parties waive any objections concerning the procedures under Articles 27, 28, 29, 30, or 43 and

⁴⁷⁸ ICC Note (n 192) 8.

⁴⁷⁹ SIAC Rules Art. 7(6).

⁴⁸⁰ SIAC Rules Art. 8(6).

⁴⁸¹ SIAC Rules Art. 7(12).

⁴⁸² SIAC Rules Art. 8(12).

⁴⁸³ Choong, Mangan, Lingard (n 259) 119, 126.

⁴⁸⁴ HKIAC Rules Art. 27(12); Moser, Bao (n 316) 283.

⁴⁸⁵ HKIAC Rules Art. 28(8); Moser, Bao (n 316) 302.

⁴⁸⁶ HKIAC Rules Art. 27(13); HKIAC Rules Art. 28(8).

⁴⁸⁷ Moser, Bao (n 316) 283-284.

any related decisions, regarding the validity or enforcement of an award by the arbitral tribunal, as long as such a waiver is legally permissible.⁴⁸⁸

While the SCC rules include provisions for the revocation of arbitrators within the joinder⁴⁸⁹ and consolidation⁴⁹⁰ articles, they do not mention any waiver by the parties. However, similar to Article 32 of the HKIAC rules, the SCC rules foresaw a separate waiver provision. According to this, a party that does not object to any non-compliance with the arbitration agreement, the arbitration rules, or other applicable rules during the arbitration is considered to have waived their right to object to such non-compliance.⁴⁹¹ Unlike the HKIAC provision, the SCC rules do not specify particular provisions related to joinder and consolidation procedures but present a broader view by encompassing arbitration rules and other applicable rules.

Meanwhile, under the ISTAC rules, neither the consolidation provision nor any other provision foresees a procedure related to the revocation of arbitrators or the constitution of the arbitral tribunal by the Board itself. The consolidation provisions only state that if one of the co-arbitrators has not been chosen by the time of the consolidation request, the appointment will be postponed until the ISTAC Board has decided on the consolidation.⁴⁹² Moreover, in ISTAC arbitration, if there are multiple claimants or respondents and one of the sides, either claimants or respondents, cannot agree on the selection of an arbitrator, the arbitrator will be appointed by the Board on behalf of the parties that cannot make a selection.⁴⁹³ Consequently, while one of the parties will appoint an arbitrator of their free will, the other side(s) of the dispute would not be able to do the same. These provisions are notably different from other institutional rules, as the ISTAC rules did not grant the Board the authority to appoint all members of the arbitral tribunal. In such cases, to secure the enforceability of the arbitral award, it would be best to design the rules and grant authority to the Board to revoke the already appointed arbitrator and constitute all the arbitrators themselves. Similar provisions of ISTAC rules, for the appointment of arbitrators, were foreseen in the fifth version of the ICC rules⁴⁹⁴, which were changed after

⁴⁸⁸ HKIAC Rules Art. 32(2).

⁴⁸⁹ SCC Rules Art. 13(8).

⁴⁹⁰ SCC Rules Art. 15(3).

⁴⁹¹ SCC Rules Art. 36.

⁴⁹² ISTAC Rules Art. 11(2).

⁴⁹³ ISTAC Rules Art. 14(4).

⁴⁹⁴ 1988 Rules of the International Chamber of Commerce <<https://www.acerislaw.com/wp-content/uploads/2018/08/1988-ICC-Arbitration-Rules.pdf>> accessed 09 June 2024. Under the 1988 ICC rules, the ICC Court only appoints an arbitrator for a single side(s) of the dispute, who fails to choose an arbitrator jointly.

the annulment decision of the French Supreme Court regarding the enforcement of an ICC arbitration award.⁴⁹⁵

Although it can be argued that by choosing ISTAC rules, the parties have accepted these procedures, such procedures can easily violate the principle of equal treatment. The only possible way out seems to be Article 40 of the ISTAC rules which regulates the waiver of the parties. According to this article, if a party does not object to the constitution of the arbitral tribunal under the arbitration agreement, that party is deemed to waive its rights.⁴⁹⁶ While these provisions may grant protection for the arbitral award, regarding the parties who are not the signatories of the arbitration agreements, the scope of such waiver would not be enough in all cases.

It is evident from the aforementioned procedures that if a third party joins an arbitration after the tribunal has been constituted, it must arbitrate before a tribunal in whose formation it did not participate. Thus, agreeing to joinder at this point also implies waiving the right to equally participate in the tribunal's appointment process.⁴⁹⁷ Most of the examined institutional rules, except for ISTAC, emphasize the importance of this procedure, either by seeking a written agreement, obtaining the consent of the third party, or including a special waiver provision.

The reason behind regulating such similar procedures regarding the constitution of arbitral tribunals in joinder and consolidation mechanisms is the aforementioned *Dutco Case* decision of the French Supreme Court.⁴⁹⁸ Institutional rules, which previously did not have specific provisions for multiparty arbitration proceedings, have introduced special regulations explained above. The institutional rules grant their relevant authority either the discretion or an obligation to appoint all arbitrators in cases where the interests of the parties on the same side do not align, and therefore a joint appointment of an arbitrator is not made in multiparty arbitration.⁴⁹⁹

8. Cross-Institutional Consolidation

As mentioned in detail, the consolidation of distinct arbitrations is only permitted when the arbitration agreements are compatible, unless the parties have independently agreed to consolidate the arbitrations apart from their arbitration agreement.⁵⁰⁰ In the assessment of the

⁴⁹⁵ Kiyak (n 27) 176; Demirkol (n 115) 47.

⁴⁹⁶ ISTAC Rules Art. 40(1)(d).

⁴⁹⁷ Choi (n 13), 34.

⁴⁹⁸ Blackaby, Partasides, Redfern (n 2) ch. 2, s. I, para. 2.245.

⁴⁹⁹ Kiyak (n 27) 175.

⁵⁰⁰ See above, ch. 6, 89-93.

compatibility of arbitration agreements, the chosen institutional rules will also be taken into consideration and, in case different institutional rules are determined by parties, the agreements can be accepted as incompatible.

Under this topic, it must be noted again that the parties have the option to agree on consolidating their disputes by modifying their arbitration agreements. Moreover, by constituting identical arbitral tribunals parties can also *de facto* consolidate their arbitral proceedings to handle all disputes.⁵⁰¹ In addition, concurrent or sequential hearings can be conducted to reduce the risk of conflicting arbitral awards as well.⁵⁰² These approaches, however, may require the parties' explicit consent given after the dispute has arisen, which, for various reasons, is not always provided. Parties might prefer to take advantage of the division of disputes, resulting in additional time and costs, to pursue a non-legal resolution of their claims, leading to an ineffective dispute resolution process and potentially unfair outcomes, such as the risk of conflicting arbitral awards.⁵⁰³

Regarding cross-institutional consolidation, *Born* and *Prasad* stated that it is also possible for multiple arbitral institutions to establish a multilateral protocol for cross-institutional consolidation.⁵⁰⁴ In this regard, a proposed protocol is also available. In December 2017, SIAC proposed a protocol aimed at filling this gap in international arbitration. The protocol, to be adopted by institutions, would allow the consolidation of arbitrations governed by different institutional rules, thereby eliminating one barrier to consolidating proceedings.⁵⁰⁵ However, compatibility in other areas, such as the choice of the arbitration seat, would still be necessary for the arbitration agreements.

SIAC presents a dual-approach framework in its proposal for cross-institutional consolidation, explaining how institutions should determine whether proceedings governed by different arbitration rules ought to be consolidated and outlining the management of proceedings once they are consolidated. While doing these, SIAC also addressed to the nuances between the institutional rules and suggested to collaboratively creating a new, standalone mechanism for making decisions in cross-institutional consolidation. This mechanism would specify who the decision-maker is, the appropriate timing for the application, and the standards for deciding

⁵⁰¹ Leboulanger (n 7) 61-62.

⁵⁰² Ibid.

⁵⁰³ Born, Prasad (n 42) 77.

⁵⁰⁴ Born, Prasad (n 42) 78.

⁵⁰⁵ Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol ('SIAC Cross-Institutional Consolidation') <<https://siac.org.sg/wp-content/uploads/2023/04/Memorandum-on-Cross-Institutional-Consolidation-with-annexes.pdf>> accessed 13 June 2024.

when proceedings should be consolidated.⁵⁰⁶ A joint committee, comprising members from the involved institutions, would have the power to decide on the consolidation request, with a distinct committee appointed for each case.⁵⁰⁷

This foreseen mechanism by the SIAC seems to be highly advantageous, ensuring a democratic and fair decision making procedure by involving all institutions with relevant rules in the consolidation request process.⁵⁰⁸ This approach prevents any single institution from having significant discretion, thereby alleviating potential concerns from both the parties and the involved arbitral institutions.⁵⁰⁹

SIAC suggests that, once consolidated, a single arbitral institution should manage the proceedings using its own rules, instead of having multiple institutions jointly administer them under a completely new set of rules.⁵¹⁰ Although this option offers benefits such as increased democracy and fairness, it also presents challenges in implementation and is resource-intensive for institutions to coordinate an entirely new framework.⁵¹¹

Apart from these procedures, theoretical and practical issues may emerge, such as those related to party consent, the enforceability of arbitral awards, and increased time and costs, but these should not be viewed as overwhelming challenges.⁵¹² For instance, similar to the aforementioned explanations, choosing rules that incorporate a cross-institutional consolidation protocol implies that the parties have inherently consented to that protocol. In fact, current joinder and consolidation mechanisms in institutional rules are also based on the same principle. Additionally, as parties in practice may exclude certain rules, such as the conflict of law rules, they are free to exclude the cross-institutional consolidation protocol as well, making acceptance of this protocol entirely optional.⁵¹³

For the same reason, enforceability issues are unlikely to arise in most developed jurisdictions. By adopting institutional rules that allow for cross-institutional consolidation, parties implicitly agree to the potential of their proceedings being governed by the rules of another arbitral institution involved in the protocol at the time the arbitration agreement is made. Accordingly,

⁵⁰⁶ SIAC Cross-Institutional Consolidation (n 505) para.13.

⁵⁰⁷ Ibid.

⁵⁰⁸ Born, Prasad (n 42) 79.

⁵⁰⁹ SIAC Cross-Institutional Consolidation (n 505) para.14.

⁵¹⁰ SIAC Cross-Institutional Consolidation (n 505) para.30.

⁵¹¹ SIAC Cross-Institutional Consolidation (n 505) para.29.

⁵¹² Born, Prasad (n 42) 80.

⁵¹³ Born, Prasad (n 42) 81.

this sole procedure of cross-institutional consolidation would not cause an annulment of an arbitral award.

Considering the benefits of consolidated arbitration, such as reducing parallel proceedings, lowering the costs of addressing overlapping factual or legal issues in multiple venues, and preventing conflicting decisions, the evaluation for applying cross-consolidation would likely yield similar advantages. This assessment would support cross-consolidation, especially when conflicting arbitral awards could render all procedures wasteful and ineffective.

Under these circumstances, cross-institutional consolidation offers similar benefits and faces similar challenges as the consolidation procedures outlined in the institutional rules. With a comparable legal basis, it can be readily adopted by institutional arbitration bodies.

9. Conclusion

International arbitration fundamentally relies on the mutual agreement of the parties involved, and it is this consent that establishes the jurisdiction and authority of the arbitral tribunal. However, in complex situations, such as the maritime charter parties, employer-contractor-subcontractor relationships, or joint liability contracts, the addition of a non-signatory party to the dispute could be requested by the claimant, respondent, or, in some exceptional cases, by the third parties themselves.

If multiple disputes are connected, conducting them separately can be inefficient in terms of both time and cost. Through joinder and consolidation, it is possible to provide an effective and efficient resolution among the parties by handling multiple cases in a single proceeding. It is evident that, similar to national litigations, these procedural mechanisms aim to uncover material facts, fill gaps in concrete cases, and help the decision making authority to render better reasoned decisions.

The main dilemma to handle is determining the legal basis for practising joinder and consolidation mechanisms, especially when one of the parties does not have express consent for these procedural transactions. Over time, with the guidance of the judicial decisions and works of the arbitration study pioneers, certain criteria have been established where the presence of all criteria is not compulsory to render a joinder or consolidation decision.

For handling the issue of practising the procedures of consolidation and joinder in arbitration, the applicable rules for these procedural issues must be determined. Consolidation of arbitral proceedings or the joinder of a third party can proceed through, either by the agreement of

parties on the specified provisions in their arbitration agreement which is within their commercial contracts or according to *lex arbitri* at the seat of arbitration, or indirectly by the parties choosing institutional arbitration rules that include provisions for these proceedings.

In this regard, this thesis has especially analysed the 2021 ICC Arbitration Rules, 2020 LCIA Arbitration Rules, 2016 SIAC Arbitration Rules, 2024 HKIAC Arbitration Rules, 2023 SCC Arbitration Rules and 2015 ISTAC Arbitration Rules and offered a comprehensive and reliable framework for addressing the complexities of joinder and consolidation.

Despite certain disadvantages of consolidation and joinder, such as the constitution of the arbitral tribunal, breaches of confidentiality, and increased cost and duration, these are not insurmountable obstacles. The arbitral tribunal can take necessary measures to ensure document accessibility for each party and balance effectiveness and fairness with the increase in cost and duration, which is under its or the institutional decision making body's discretion. Regarding the appointment of the arbitrators, the tribunal, despite any prior decision given by the institutional body, has the authority to decide on its jurisdiction. Moreover, while the appointment of arbitrators in multi-party scenarios can be complex, many arbitral institutions have already established detailed provisions for constituting the arbitral tribunal in both joinder and consolidation cases, along with specific waiver provisions.

The enforcement of awards from consolidated or joined arbitrations can face challenges. The New York Convention's provisions, specifically Articles V(1)(a), V(1)(d), and V(2)(b), outline grounds on which enforcement can be refused, including issues related to party consent and public policy. Nevertheless, by ensuring that consolidation and joinder procedures align with the chosen arbitral rules and applicable laws, the likelihood of successful enforcement of awards can be increased.

The development of institutional arbitration rules ensures compatibility with the chosen rules, guides arbitrators by specifying criteria for rendering joinder or consolidation decisions, and ensures the proper constitution of the arbitral tribunals. Given these developments' importance, this thesis has demonstrated each procedural transaction under the examined institutional rules, highlighted the differences between the institutions, and thus serves as a guide for practitioners considering complex arbitrations.

From this perspective, since parties often do not consider the possibility of a multi-party dispute resolution mechanism at the drafting stage of their contracts, the acceptance of certain criteria to detect the implied consent of the opposing parties meets the practical needs and expectations

of arbitration. Without these procedures, arbitration could become an unpreferred dispute resolution mechanism.

In conclusion, the effective implementation of joinder and consolidation procedures is crucial for maintaining the efficiency and fairness of international arbitration. As the landscape of commercial disputes continues to evolve, it is imperative for arbitral institutions and practitioners to adapt and refine these mechanisms to meet the changing needs of the parties involved. This thesis underscores the importance of these procedural tools and provides a comprehensive analysis to guide future developments in this field, ensuring that arbitration remains a viable and preferred method of dispute resolution in increasingly complex scenarios.

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