

Working Paper on
Multi-Party and Multi-Contract
Disputes in International
Arbitration

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A. Introduction

Major commercial projects often involve multiple parties and interconnected contracts. When settling disputes arising from these projects through international arbitration, parties and counsel face various challenges not typically encountered in state court litigation involving multiple parties and contracts.

In most countries, the codes of civil procedure for state court proceedings contain detailed provisions dealing with and providing solutions for such situations. The State Court's authority to join parties or to consolidate proceedings is based on the respective statutory provisions and derived from State power. In contrast thereto, arbitral tribunals are not vested with such powers. They derive the powers from the parties' agreement to submit a dispute to arbitration. This contractual basis of arbitration poses limits to a tribunal's power to order similar measures and can make it more difficult to deal with such issues.

However, the increasing complexity of commercial transactions creates a need for a clear, predictable framework that enables parties to solve their disputes in an efficient manner. In order to pay tribute to this demand, numerous arbitral institutions have updated their arbitration rules and added provisions on multi-party and multi-contract disputes. This paper will concentrate on the revisions made by the ICC in 2012, the LCIA in 2014, the AAA/ICDR regarding the ICDR International Arbitration Rules in 2014, the HKIAC in 2013 and the SIAC in 2016.

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Behind the rather broad term “multi-party arbitration” there lies a variety of different issues that can arise if more than two parties are involved or want to be involved in arbitral proceedings. One of the most important questions that needs to be answered by the arbitration rules is how the tribunal is to be constituted in case of multiple parties (B.). Additionally, arbitral institutions and tribunals are repeatedly confronted with one of the following scenarios:

- during a dispute between two parties, either the claimant or the respondent wishes to add a third party to the proceedings in order to raise a claim against it (C.);
- the parties have already initiated parallel proceedings which they now wish to merge into one (D.);
- the same parties have entered into numerous contracts and would like to settle disputes that arose out of different contracts in the same arbitral proceedings (E.); and finally,
- a third party wants to intervene in an ongoing arbitration between two (or more) other parties on its own initiative (F.).

The following paper will, on the one hand, examine how the respective institutions have dealt with the aforementioned issues in the past and, on the other hand, analyse how their revised rules now intend to deal with these issues.

B. Constitution of the Arbitral Tribunal in case of Multiple Parties

When it comes to the constitution of the arbitral tribunal in proceedings involving more than two parties, maintaining each party’s right to procedural fairness and equal treatment is a difficult task arbitral institutions, tribunals and state courts have quite frequently been faced with in recent years. Giving every party involved the right to appoint its own arbitrator does not work since it could lead to tribunals of impractical size and might also be unfair if either the claimant or respondent side is made up of a larger number of parties. On the other hand, obliging each side to appoint an one arbitrator irrespective of how many parties there are is also problematic since the parties

may have clashing interests although they stand on the same side in that particular arbitration.²

The fatal consequences of an imbalanced appointing mechanism are well depicted in the famous decision of the French Cour de Cassation in the case of BKMI and Siemens v Dutco.³ In this dispute, the ICC Court confirmed the arbitrator nominated by the claimant (Dutco) and requested the respondents (BKMI and Dutco) to jointly nominate an arbitrator. In case the respondents should not reach an agreement, the ICC Court announced it would appoint an arbitrator on their behalf while the claimant's appointment would remain valid. This last part – that is that the claimant would retain its arbitrator while the respondents were forced to share their influence on the tribunal's composition or lose it altogether – turned out to be the deathly blow for the enforcement of the award rendered by the tribunal. Faced with the options presented by the ICC Court, the respondents eventually submitted a joint nomination, but only under protest. In due course, they challenged the constitution of the tribunal and while both the tribunal and the Cour d'Appel in Paris rejected the challenge at first, the French Cour de Cassation held that the ICC Court's practice in the present case violated the parties' right to equal treatment and therefore French public policy. In its reasoning, the Court argued that the appointment of the arbitral tribunal was unfair because it afforded the claimant a better position to influence the final outcome of the arbitration.

Bearing this decision in mind, all sets of rules include detailed provisions on how the tribunal is to be constituted in case multiple parties are involved.

I. ICC Rules

Regarding the constitution of the tribunal in case multiple parties on either side were involved, it was common practice of the ICC Court up until 1992 to simply request that multiple claimants or respondents appoint one arbitrator jointly and, should either side fail to do so, the ICC Court would appoint the arbitrator on that side's behalf while keeping the other side's appointment intact. When this approach was rejected by the French Cour de Cassation, Art. 10 (1) and (2) were added when drafting the ICC Rules of 1998. In this provision, it was stipulated that the parties on each side were to appoint

² Lew, Mistelis, Kröll, *Comparative International Commercial Arbitration*, 2003, para 16-11 et seq.

³ *BKMI Industrienlagen GmbH and Siemens AG v Dutco Construction*, Cour de Cassation, 7 January 1992, *Revue de l'arbitrage* (1992) pp. 470-472.

an arbitrator jointly, yet should they fail to come to an agreement, the ICC Court had the discretion to appoint the *entire* tribunal.⁴

The same mechanism has been maintained in the revised rules of 2012 and can now be found in Art. 12 (6) to (8). Art. 12 (6) stipulates that “*the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator*”. If an additional party has been joined, and where the dispute is to be referred to three arbitrators, the additional party may nominate an arbitrator jointly with the claimant(s) or with the respondent(s) pursuant to Art. 12 (7). In case the parties on each side fail to come to a consensus regarding “their” arbitrator and they cannot agree on another method for the constitution of the tribunal, Art. 12 (8) provides that the ICC Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president. When making its decision, the ICC Court is free to choose any person it regards as suitable to act as arbitrator.

II. LCIA Rules

Unlike most other institutional rules, Art. 8 of the LCIA Rules 1998 already expressly provided for a mechanism how to constitute the tribunal in case of multiple parties:

“Where the Arbitration Agreement entitles each party howsoever to nominate an arbitrator, the parties to the dispute number more than two and such parties have not all agreed in writing that the disputant parties represent two separate sides for the formation of the Arbitral Tribunal as Claimant and Respondent respectively, the LCIA Court shall appoint the Arbitral Tribunal without regard to any party's nomination.”

In other words, the LCIA Court was to appoint the whole tribunal unless the parties had come to an agreement that fulfilled the requirements stipulated in Art. 8.

While slight changes have been made to its wording, Art. 8 essentially remained the same under the revised LCIA Rules 2012. Therefore, the approach taken by LCIA and the ICC are similar. Although the structure of the sentence places more emphasis on the LCIA Court’s appointment of the whole tribunal, the parties’ agreement on a different procedure shall also prevail under the LCIA Rules. However, Art. 8 (1) sets rather strict

⁴ Fry/Greenberg/Mazza, *The Secretariat’s Guide to ICC Arbitration*, 2012, 3-471; Bamforth/Maidment, “‘All join in’ or not? How well does international arbitration cater for disputes involving multiple parties or related claims?”, *ASA Bulletin* 2009, Vol. 27 Issue 1, 3 (10).

requirements to the parties' agreement since it requires a *written* agreement of all parties and dictates its content. Due to these significantly higher barriers the parties need to overcome to determine the arbitrators themselves, it seems more likely that in case of multiple parties in an LCIA arbitration, the Court will ultimately appoint the arbitral tribunal without participation of the parties.

III. AAA/ICDR Rules

The AAA/ICDR Rules 2009 did not contain a particular mechanism how the tribunal was to be constituted in case of multiple parties. Instead, the general rule of Art. 6 (3) applied, which left it to the parties to agree on a procedure within 45 days from the commencement of the arbitration, failing which the Administrator would appoint all arbitrators for both the claimant and the respondent side.⁵

Art. 12 (5) of the revised AAA/ICDR Rules 2014 still contains the same procedure as before. Thus, the AAA/ICDR also primarily leaves it up to the parties to choose their arbitrators and only in case no consensus can be reached shall the Administrator step in.

IV. HKIAC Rules

Like the LCIA Rules, the previous version of the HKIAC Rules from 2008 already included a mechanism for the constitution of the arbitral tribunal in Art. 8 (2) when more than one claimant and/or respondent was involved in the dispute. Primarily, each group of claimants or respondents was supposed to jointly nominate one arbitrator. If one side failed to reach an agreement on this matter, the HKIAC Council was to appoint "*the arbitrator in question and the presiding arbitrator*". This means that under the previous rules, the appointment of the other side remained intact while for the side that failed to reach an agreement the arbitrator was appointed by the Council. This mechanism seems slightly surprising in light of the *Dutco* decision,⁶ which was rendered more than 15 years before the HKIAC Rules 2008 came into force and in which the identical procedure had proven fatal for the award.

⁵ *Gusy/Hosking/Schwarz* in Weigand, Practitioner's Handbook on International Commercial Arbitration (2nd ed.), 2009, para 17.131.

⁶ see above, B. before I.

In its revised version of 2013, the HKIAC has now opted to alter this provision and chosen the same path as the other institutions. Art. 8 of the new rules stipulates that primarily, the group of claimants or respondents shall jointly designate an arbitrator (Art. 8.2 (a)). Only in case such a consensus cannot be reached shall the HKIAC step in and appoint all members of the arbitral tribunal “*without regard to the any party’s designation*”.

V. SIAC Rules

The previous revision of the SIAC happened not that long ago in 2013. The SIAC Rules 2013 already contained a specific mechanism in Rule 9 for the constitution of the tribunal in case multiple parties were involved. Rule 9.1 applied where three arbitrators were to be appointed. In that case, it provided that

“...the Claimant(s) shall jointly nominate one arbitrator and the Respondent(s) shall jointly nominate one arbitrator. In the absence of both such joint nominations having been made within 28 days of receipt by the Registrar of the Notice of Arbitration or within the period agreed by the parties or set by the Registrar, the President shall appoint all three arbitrators and shall designate one of them to act as the presiding arbitrator.”

If the dispute was meant to be decided by a sole arbitrator, all parties were to agree on an arbitrator pursuant to Rule 9.2; otherwise, the arbitrator was also appointed by the President. Thus, the SIAC Rules 2013 already contained the same mechanism that can be found in the newest versions of the other rules today. Primarily, the group of parties should try to jointly nominate an arbitrator for their “side”. Only in case no agreement could be reached would the President of SIAC step in and appoint *all three* arbitrators.

Despite some slight changes to the wording, the provision of the SIAC Rules 2013 remained mostly unchanged and can now be found in Rule 12 of the SIAC Rules 2016.

C. Joinder of a Third Party

The term “joinder of a third party” describes the situation in which arbitral proceedings between two parties have already been initiated and one of these parties – typically the respondent – wishes to involve another party. Whereas the joinder of a third party in litigation before a state court is well-known and meticulously regulated by national procedural law, compelling a third party to participate in an ongoing arbitration is

barred by the principle of party autonomy.⁷ Therefore, arbitral institutions have been faced with the challenge of construing rules which strike a balance between the need for procedural efficiency whilst maintaining one of arbitration's most fundamental principles.

I. ICC Rules

The ICC Court has allowed a respondent party to request the joinder of an additional party ever since the early years of 1998. However, according to the former practice, a decision of the ICC Court on the admissibility of the joinder was required before the Request for Joinder was forwarded to the other party.⁸ The conditions required for the ICC Court to grant a request for joinder were the following: (1) claims had to be raised against the additional party and (2), no steps had been taken towards the constitution of the tribunal and (3) the additional party needed to have signed the relevant arbitration agreement.⁹

Art. 7 of the revised ICC Rules 2012 essentially preserves the ICC Court's previous joinder practice, yet it has broadened the scope of its application. Pursuant to the new rule, a third party may be joined into an arbitration if either one of the already existing parties submits a "Request for Joinder" to the Secretariat. This means that both claimant and respondent can now initiate joinder proceedings, not only the respondent. Also, the ICC Rules have eliminated the requirement that the ICC Court needs to have declared the Request admissible before it is submitted to the additional party.¹⁰ Instead, the additional party becomes a party to the arbitration automatically as soon as the Request for Joinder is received by the Secretariat. However, this does not mean that it will necessarily remain a party to the arbitration. It will only do so if the arbitral tribunal ultimately decides that it has jurisdiction over the parties and the claims against it.¹¹

The new rule is consistent with the previous practice insofar as it is necessary for the requesting party to bring a claim against the third party it wishes to be joined. This

⁷ Lew, Mistelis, Kröll, *Comparative International Commercial Arbitration*, 2003, para 16-39 et seq.

⁸ Fry/Greenberg/Mazza, *The Secretariat's Guide to ICC Arbitration*, 2012, para 3-291 et seq.

⁹ Fry/Greenberg/Mazza, *The Secretariat's Guide to ICC Arbitration*, 2012, para 3-292; Bamforth/Maidment, "All join in' or not? How well does international arbitration cater for disputes involving multiple parties or related claims?", *ASA Bulletin* 2009, Vol. 27 Issue 1, 3 (14).

¹⁰ Fry/Greenberg/Mazza, *The Secretariat's Guide to ICC Arbitration*, 2012, para 3-292.

¹¹ *Bond/Paralika/Secomb* in Mistelis, *Concise International Arbitration* (2nd ed.), 2012, p. 370.

excludes the possibility to join a party merely in order to gain assistance in the arbitration procedure.¹² The time stipulation also remains identical, as Art. 7 (1) fourth sentence says that

“No additional party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree.”

This requirement is sensible to ensure that every party’s right to equal treatment concerning the constitution of the tribunal is preserved. If the joinder occurred after the constitution of the tribunal, the joining party would have no influence on its composition, which – bearing in mind the *Dutco* decision – could prove to be problematic for the award’s enforceability.

The third requirement under the previous practice, namely that the additional party needed to have signed an arbitration agreement, has been somewhat “softened” slightly. Under the ICC Rules 2012, it is generally for the tribunal to decide on the admissibility of a request for joinder. However, Art. 7 refers to Art. 6 (3) and (4), according to which the Secretary General may request the ICC Court to make a preliminary decision whether and to what extent the arbitration should proceed based on a prima facie assessment of the relevant facts. The purpose of this provision is to sort out those requests for joinder which obviously have no chance of success. Art. 6 (4) contains two options in which the ICC Court may grant the request. In order for a joinder to be permissible pursuant to Art. 6 (4) (i), it is necessary that the ICC Court is prima facie satisfied that an arbitration agreement may exist which binds all of the parties. Consequently, it is no longer necessary for the third party to have actually signed an agreement but it rather suffices that the ICC Court is prima facie satisfied such an agreement exists.

Alternatively, if the parties are not bound by the same arbitration agreement, the ICC Court needs to be prima facie satisfied of two things pursuant to Art. 6 (4) (ii): first, that the arbitration agreements under which the claims are made are compatible and second, that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration. Regarding the first point, the previous practice of the ICC Court shows that the same number of the arbitrators, the same procedural language

¹² Voser, “Overview of the Most Important Changes in the Revised ICC Arbitration Rules”, ASA Bulletin 2011, Vol. 29 Issue 4, 783 (795 et seq.)

and the same seat of the arbitration suggest compatibility. The parties' agreement to the joint determination of their claims can either be express or implied. In its assessment, the ICC Court considers factors such as whether the same economic transaction is at stake, the date of the contracts containing the arbitration agreement and the nature of the relationship between the contracts, i.e. horizontal or vertical.¹³

If the application for joinder is successful, the constitution of the arbitral tribunal is governed by Art. 12 (7) and Art. 12 (8). In line with the *Dutco* decision, they stipulate that the additional party shall nominate an arbitrator jointly with the other claimants or respondents – depending on which side it will take in the proceedings – and should this fail, the ICC Court will appoint each member of the tribunal.

Although the ICC Court may grant the request for joinder based on a *prima facie* assessment, Art. 7 in connection with Art. 6 (5) ICC Rules 2012 clarifies that the power to make a final decision on the request for joinder lies with the tribunal:

“... any decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the arbitral tribunal itself.”

Therefore, even if the ICC Court declares the joinder admissible, the tribunal will ultimately have to undertake a thorough examination and be convinced that the requirements for the joinder are fulfilled.

II. LCIA Rules

The LCIA Rules 1998 already explicitly addressed the possibility of a joinder in Art. 22.1 (h):

“Unless the parties agreed otherwise in writing, the arbitral tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views:

(h) to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in

¹³ Fry/Greenberg/Mazza, *The Secretariat's Guide to ICC Arbitration*, 2012, para 3-249; Voser, “Overview of the Most Important Changes in the Revised ICC Arbitration Rules”, *ASA Bulletin* 2011, Vol. 29 Issue 4, 783 (789 et seq.).

writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.”

Thus, three requirements had to be met: (1) One of the parties needed to have made an application for joinder; (2) both the third party and the applicant party needed to have consented to the joinder in writing and (3) the parties must not have excluded tribunal’s power to join a third party. Regarding the last prerequisite, such an exclusion required a clear written agreement of the parties to the effect that Art. 22.1 (h) was not to apply or that there would be no power of joinder as contemplated there.¹⁴

Art. 22.1 viii) of the LCIA Rules 2012 largely contains the same wording as the 1998 rules on the issue of third party joinder. Like under the former Art. 22.1 (h), the other party’s consent is not necessary in order for the tribunal to grant the request for joinder. Instead, it must only be given reasonable opportunity to state its views before the tribunal may reach a decision.¹⁵ In order to reconcile this mechanism with the principle of party autonomy, a non-consenting party will be deemed to have consented to this possibility of joinder by agreeing to the use of the LCIA Rules. Therefore, the request for joinder itself can be granted against the wishes of one of the parties at the time of the arbitration itself, although in practice it appears never to have been done.¹⁶

The clause “*unless the parties agreed otherwise in writing*” is no longer included in the new version. However, due to the principle of party autonomy this alteration cannot mean that the parties can no longer exclude the tribunal’s power to join a third party.

Unlike the ICC Rules, Art. 22.1 viii) does not set a time limit for joining a third party. Therefore, a joinder is also possible after the tribunal has been constituted. In that case – provided the third party consents to its joinder – the LCIA Rules do not foresee the appointment of an additional arbitrator or any other mechanism which would grant the third party an opportunity to influence the composition of the arbitral tribunal. This has

¹⁴ C v. D1, D2, D3, High Court of England and Wales, Queen’s Bench Division, Commercial Court, 22 July 2015, [2015] EWHC 2126 (Comm).

¹⁵ *Nesbit/Darowski* in Mistelis, *Concise International Arbitration* (2nd ed.), 2015, p. 537.

¹⁶ Yuen, “The new HKIAC Arbitration Rules and how they compare to other institutional rules”, available at [https://uk.practicallaw.thomsonreuters.com/3-542-4605?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/3-542-4605?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1), dealing also with Art. 22.1 of the LCIA Rules

given rise to criticism since the third party could deny its consent merely because of this gap in the rules.¹⁷

III. AAA/ICDR Rules

In its Art. 3 (1), the AAA/ICDR Rules 2014 already foresaw the possibility to join a third party since the respondent was supposed to submit “*a statement of defense, responding to the issues raised in the notice of arbitration, to the claimant and **any other parties***” (emphasis added). However, the AAA/ICDR Rules did not contain any wording as to the requirements that had to be satisfied so that the tribunal could permit the joinder. Therefore, to use the words of the Privy Council in a decision concerning a joinder under the former AAA/ICDR Rules, the same rule as always applied:

*“The basic criterion remains consent.”*¹⁸

The AAA/ICDR Rules 2014 now also contain an express provision in Art. 7 on the issue of joinder of parties, which resembles Art. 7 of the ICC Rules. Pursuant to Art. 7 (1), a party wishing to join an additional party to the arbitration shall submit a Notice of Arbitration against the additional party to the Administrator. This indicates that, like the ICC Rules, a joinder under the AAA/ICDR Rules is only possible if the applying party wants to bring a claim against the third party. The stipulations in Art. 7 (2), second sentence concerning the time of the joinder are also identical to the ICC Rules, namely that the joinder may not occur after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. Other than that, the AAA/ICDR Rules do not set forth any requirements for the joinder of a third party. However, as the Privy Council has rightly pointed out, the principle of party autonomy dictates that the joinder may not occur against the will of either party or without a binding arbitration agreement, even if this requirement is not expressly stipulated in the rules.¹⁹

¹⁷ Konrad/Hunter in Schütze, *Institutionelle Schiedsgerichtsbarkeit* (3rd ed.), 2018, p. 529, Art. 22 LCIA Rules para 14; see also *Nesbit/Darowski* in Mistelis, *Concise International Arbitration* (2nd ed.), 2015, p. 537.

¹⁸ *Bay Hotel & Resort Ltd v Cavalier Construction Co. Ltd.*, UK Privy Council, 16 July 2001, [2001] APP.L.R. 07/16, para 46.

¹⁹ similarly *The ICDR International Arbitration Reporter*, Fall 2016 Vol. 5, p. 3 et seq, available at https://www.icdr.org/sites/default/files/document_repository/ICDR_International_Arbitration_Reporter-Vol.5.pdf.

IV. HKIAC Rules

Art. 14 (6) of the HKIAC Rules 2008 also already permitted the tribunal to join a third party, provided that one of the original parties had requested such joinder and the third person and the applicant party had consented to the joinder in writing. Also, only the tribunal was entitled to permit the joinder and, therefore, the request could only be made *after* its constitution.²⁰

In the revised version of 2013, the possibilities for the HKIAC to grant a request for joinder have been broadened. Similar to the LCIA Rules, Art. 27 of the HKIAC Rules 2013 permits the joinder of a party upon request of either party both before and after the arbitral tribunal is constituted. If a party submits its request after the tribunal has been confirmed, it is for the tribunal to decide on the request pursuant to Art. 27 (1). If the request is made before the tribunal is confirmed, the HKIAC may decide whether to join the additional party according to Art. 27 (8) on a preliminary basis, although the final decision on jurisdiction is reserved to the tribunal once it is confirmed (cf. Art. 27 (8), third sentence).

In both cases, the decision-making body needs to apply a *prima facie* test similar to the one stipulated in Art. 6 (4) of the ICC Rules.²¹ In particular, the tribunal/the HKIAC needs to assess *prima facie* whether the additional party is bound by an arbitration agreement under the HKIAC Rules giving rise to the arbitration (Art. 27 (1)/Art. 27 (8)). This provision has replaced the requirement that both the third party and the applicant party need to have consented to the joinder in writing.

If the additional party is joined before the confirmation of the arbitral tribunal, Art. 28 (11) contains a detailed mechanism how the arbitrators are to be appointed. In that case, all parties are deemed to have waived their right to designate an arbitrator, and the HKIAC may revoke the appointment of any arbitrator already designated or confirmed and appoint all members of the tribunal. If the joinder occurs after the confirmation of the tribunal, the HKIAC Rules – like the LCIA Rules – do not allow the third party to exercise any influence on its composition, e.g. by appointing its own arbitrator. Instead,

²⁰ Connor/Talib, “Joinder, Intervention and Consolidation under the HKIAC Administered Arbitration Rules 2013”, *Asian Dispute Review*, Vol. 2014 Issue 4, 190 (191).

²¹ Connor/Talib, “Joinder, Intervention and Consolidation under the HKIAC Administered Arbitration Rules 2013”, *Asian Dispute Review*, Vol. 2014 Issue 4, 190 (191).

the joining party must submit itself to the tribunal appointed by the original parties to the dispute.

V. SIAC Rules

The SIAC Rules 2013 already contained an express rule on the issue of joining a party to an ongoing arbitration. In Rule 24, “*Additonal Powers*” of the tribunal were listed and in that regard, Rule 24.1 (b) empowered it to join a party

“upon the application of a party, allow one or more third parties to be joined in the arbitration, provided that such person is a party to the arbitration agreement, with the written consent of such third party, and thereafter make a single final award or separate awards in respect of all parties”

Since the tribunal was competent to decide on the issue, the parties could only submit a request for joinder after the tribunal had been constituted. Also, the joinder provision was quite narrow in its scope of application since only third parties could be joined who were not only party to the arbitration agreement but had also agreed to the joinder in writing.

This mechanism has undergone significant changes in the revision of 2016 and the possibilities to join a third party have been broadened. The previous rule, consisting of one single sentence, has been replaced by Rule 7 of the SIAC Rules 2016, which deals with the issue in 13 paragraphs.

In general, one can say that the new provision bears certain resemblance to the respective rule of the HKIAC Rules 2013.²² Rule 7 of the SIAC Rules 2016 now also permits the joinder to occur both before and after the constitution of the tribunal, provided that one of the original parties has requested such joinder.²³ Before the tribunal is constituted, the request must be made to the Registrar and the SIAC Court will be the competent authority to decide on the issue (Rule 7.1 and 7.4). If the request is filed after the tribunal has been constituted, it is generally for the tribunal to decide on the application pursuant to Rules 7.8 and 7.10. However, “*where appropriate*”, the

²² Dulac/Lo, “The SIAC Rules 2016: New Features”, Indian Journal of Arbitration Law 2016, Vol. 5 Issue 2, 129 (136).

²³ Dulac/Lo, “The SIAC Rules 2016: New Features”, Indian Journal of Arbitration Law 2016, Vol. 5 Issue 2, 129 (130).

provision also permits the parties to file the request with the Registrar even after confirmation of the tribunal. Also, Rule 7.4, third sentence clarifies that

“The Court’s decision to reject an application for joinder under this Rule 7.4, in whole or in part, is without prejudice to any party’s or non-party’s right to apply to the Tribunal for joinder pursuant to Rules 7.8.”

Thus, each party is able to get a “second chance” with the tribunal even if its first attempt to achieve the joinder of a third party has failed with the SIAC Court.²⁴

The prerequisites the SIAC Court and the tribunal need to examine before granting the request are the same.²⁵ In particular, they need to be satisfied that

- the additional party to be joined is prima facie bound by the arbitration agreement, or
- all parties, including the additional party to be joined, have consented to the joinder of the additional party

Since only one of these requirements needs to be fulfilled, the SIAC Court may join the third party even without an agreement of all parties, provided that the third party is prima facie bound by the arbitration agreement. This departure from Rule 24.1(b) of the SIAC Rules 2013 and its required “*written consent of such third party*” demonstrate how the scope of the joinder provision under the SIAC Rules 2016 has been broadened.²⁶

The prima facie test, which is comparable to the requirement set forth in Art. 27.1 and 27.8 of the HKIAC Rules 2013, is also applied by the tribunal when deciding on the request for joinder. However, if the tribunal decides to grant the request for joinder, it does not compromise its power to subsequently decide any question as to its jurisdiction arising from such a decision pursuant to Rule 7.10.

Additionally, the SIAC Rules 2016 stipulate that the SIAC Court/tribunal shall consider the views of the parties and take into account the relevant circumstance of the case when making their decision. In case the tribunal decides, the parties must be given the

²⁴ Boog/Raneda, “The SIAC 2016 Rules: A State-of-the-Art Rules Revision Ensuring an even more Efficient Process”, ASA Bulletin 2016, Vol. 34 Issue 3, 584 (588).

²⁵ cf. Rule 7.1 und 7.8.

²⁶ Dulac/Lo, “The SIAC Rules 2016: New Features”, Indian Journal of Arbitration Law 2016, Vol. 5 Issue 2, 129 (131).

opportunity to be heard (Rule 7.10). This demonstrates that even if the requirements set forth in Rule 7.1 and 7.8 are fulfilled, the SIAC Court/tribunal is not obliged to join the additional party but retains a rather broad discretion in deciding whether or not to grant the application for joinder.²⁷

In case the joinder occurs before the constitution of the tribunal, Rule 7.6 of the SIAC Rules 2016 authorises the Court revoke the appointment of any arbitrator prior to the decision on joinder. If it does, the composition of the tribunal shall follow the usual procedure set out in Rules 9 to 12, unless the parties agree otherwise. Thus, the parties primarily remain in charge to choose their own arbitrators even if their previous appointments have been revoked in order to ensure that the joined party can participate in the composition of the tribunal. In this regard, the SIAC Rules 2016 deviate from the HKIAC Rules 2013 because the latter transfer the power to appoint the entire tribunal to the HKIAC if it decides to revoke an arbitrator's appointment.²⁸

Finally, Rule 7.12 clarifies that in case the request for joinder is granted and a party has not nominated an arbitrator or participated in the constitution of the tribunal, it is deemed to have waived its right to do so.

D. Consolidation of Proceedings

The issue of consolidating different arbitral proceedings has been one of the main focal points of arbitral institutions when revising their rules in recent years.

I. ICC Rules

The issue of consolidation is one of the few things that was already explicitly regulated in the ICC Rules 1998. Under Art. 4 (6), the ICC Court could only order consolidation (1) upon request of one of the parties, (2) if the request was in connection with the same legal relationship, (3) if the parties in the proceedings to be consolidated were identical, and (4), unless the parties had agreed to consolidate, only until the Terms of Reference had been signed. Regarding the second requirement, the Secretary General and a former Deputy Secretary General of the ICC Court took the view that, for the purposes of

²⁷ Dulac/Lo, "The SIAC Rules 2016: New Features", *Indian Journal of Arbitration Law* 2016, Vol. 5 Issue 2, 129 (131).

²⁸ Boog/Raneda, "The SIAC 2016 Rules: A State-of-the-Art Rules Revision Ensuring an even more Efficient Process", *ASA Bulletin* 2016, Vol. 34 Issue 3, 584 (591).

Article 4(6), “*same legal relationship would appear to mean the same economic transaction*”.²⁹

Although the consent of all parties was not required, the ICC Court was increasingly reluctant to order consolidation over the objection of one of the parties.³⁰ Also, the ICC Court was prevented from joining two arbitrations involving a new third party unless all parties agreed thereto.³¹ Overall, this provision on consolidation was rather narrow and consequently hardly ever applied.³²

Under the ICC Rules 2012, the powers of the ICC Court regarding consolidation have been significantly broadened in Art. 10, which replaces the former Art. 4 (6).³³ If one party requests consolidation of two or more proceedings, the ICC Court may decide in favour of consolidation if one of the following three prerequisites is fulfilled:

- The parties have agreed to consolidate different arbitration proceedings (Art. 10 subpara (a)).
- All the claims in the different arbitrations are raised under the same arbitration agreement (Art. 10 subpara (b)). In that case, it is irrelevant whether or not the parties to the different proceedings are identical.³⁴
- In case the claims in the different arbitration proceedings are raised under different arbitration agreements, consolidation is possible if
 - the proceedings are between identical parties,
 - the disputes arise in connection with the same legal relationship and
 - the arbitration agreements are found to be compatible (Art. 10 subpara (c)). The question of the arbitral agreements’ compatibility is determined in the same way as under Art. 6 (4) (ii) of the ICC Rules 2012.³⁵

²⁹ Schwartz/Derains, *Guide to the ICC Rules of Arbitration* (2nd ed.), 2005, p. 61; Fry/Greenberg/Mazza, *The Secretariat’s Guide to ICC Arbitration*, 2012, para 3-357.

³⁰ Schwartz/Derains, *Guide to the ICC Rules of Arbitration* (2nd ed.), 2005, p. 61; Hanotiau, “Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues - An Analysis”, *Journal of International Arbitration* 2001, Vol. 18 Issue 3, 253 (332).

³¹ *Bühler/Jarvin* in Weigand, *Practitioner’s Handbook on International Commercial Arbitration* (2nd ed.), 2009, para 15.270.

³² Schwartz/Derains, *Guide to the ICC Rules of Arbitration* (2nd ed.), 2005, p. 59.

³³ Fry/Greenberg/Mazza, *The Secretariat’s Guide to ICC Arbitration*, 2012, para 3-349; Voser, “Overview of the Most Important Changes in the Revised ICC Arbitration Rules”, *ASA Bulletin* 2011, Vol. 29 Issue 4, 783 (796).

³⁴ Fry/Greenberg/Mazza, *The Secretariat’s Guide to ICC Arbitration*, 2012, para 3-354; Voser, “Overview of the Most Important Changes in the Revised ICC Arbitration Rules”, *ASA Bulletin* 2011, Vol. 29 Issue 4, 783 (796).

This last provision alone basically encompasses the former Art. 4 (6), but is now only one of three scenarios in which consolidation is possible. This depicts how the scope of application of the ICC's consolidation provision has been extended.

Even if one of the abovementioned requirements is fulfilled, the ICC Court is not obliged to order the consolidation but retains discretion to deny the request. In exercising this discretion, the ICC Court may consider any circumstances it deems to be relevant, including whether one or more arbitrators have been confirmed or appointed and, if so, whether the same or different persons have been confirmed or appointed. There is one exception to the generally wide discretion of the ICC Court if all parties have agreed on consolidation. In that case, it has been the standard practice of the ICC Court that the Secretariat shall take the administrative steps necessary to effect the consolidation without requesting a decision from the ICC Court.³⁶

If arbitrators have been confirmed in more than one of the arbitrations and if they are different individuals, the ICC Court is not able to consolidate the arbitrations since the constitution of the arbitral tribunal would be impossible unless one of the already confirmed arbitrators resigned voluntarily or was removed at the parties' request.³⁷ However, Art. 10 – unlike the former Art. 4 (6) – does not contain a time limit and therefore, consolidation could theoretically still occur even if the proceedings in one of the arbitrations are already at an advanced stage.³⁸

If the ICC Court decides to grant the request, the proceedings will be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties (Art. 10, third sentence).

II. LCIA Rules

The matter of consolidating two or more arbitral proceedings was not addressed in the LCIA Rules 1998. Due to this lack of a provision, consolidation was considered to be impossible where the parties had agreed to arbitration under the LCIA Rules.³⁹

³⁵ Fry/Greenberg/Mazza, *The Secretariat's Guide to ICC Arbitration*, 2012, para 3-356.

³⁶ Fry/Greenberg/Mazza, *The Secretariat's Guide to ICC Arbitration*, 2012, para 3-353.

³⁷ Fry/Greenberg/Mazza, *The Secretariat's Guide to ICC Arbitration*, 2012, para 3-358.

³⁸ Voser, "Overview of the Most Important Changes in the Revised ICC Arbitration Rules", *ASA Bulletin* 2011, Vol. 29 Issue 4, 783 (797).

³⁹ Born, *International Commercial Arbitration*, Vol. II (2nd ed.), 2014, p. 2601.

The LCIA Rules 2014 now contain a provision expressly allowing consolidation. Pursuant to Art. 22.1 of the new rules, there are two situations in which a tribunal may consolidate two or more arbitrations into one arbitration. The general prerequisite in both cases is that the arbitrations which are to be consolidated are subject to the LCIA Rules. Also, Art. 22.1 does not give the tribunal the power to consolidate proceedings on its own initiative but instead, an application of one of the parties is required in both cases.⁴⁰ If these basic conditions are met, Art. 22.1 (ix) allows consolidation if all the parties to the arbitrations have consented thereto in writing. Alternatively, the tribunals may order the consolidation pursuant to Art. 22.1 (x) provided that

- the arbitrations were commenced under the same arbitration agreement or compatible arbitration agreements,
- the disputing parties are the same and
- no arbitral tribunal has been formed yet or, if already formed, such tribunal(s) is(are) composed of the same arbitrators. The last requirement aims to ensure that the right of every party to each arbitration regarding the appointment of an arbitrator is preserved.

Finally, any consolidation pursuant to Art. 22.1 is subject to the LCIA Court's approval. Unlike the tribunal, the LCIA Court also has the opportunity to consolidate two or more proceedings of its own accord without an application of either party pursuant to Art. 22.6.⁴¹ In this case, it only needs to have given the parties a reasonable opportunity to state their views. The further prerequisites for a consolidation under Art. 22.6 are that

- the arbitration agreements are commenced under the same arbitration agreement
- between the same disputing parties and that
- no tribunal has been appointed yet.

⁴⁰ *Nesbit/Darowski* in Mistelis, *Concise International Arbitration* (2nd ed.), 2015, p. 538.

⁴¹ Sabharwal/Zaman, "Vive la difference? Convergence and Conformity in the Rules Reforms of Arbitral Institutions: The Case of the LCIA Rules 2014", *Journal of International Arbitration* 2014, Vol. 31 Issue 6, 701 (705).

III. AAA/ICDR Rules

The AAA/ICDR Rules 2009 neither allowed the tribunal, nor the Administrator nor any other decision-making body to consolidate two or more arbitral proceedings.

Art. 8 of the AAA/ICDR Rules 2014 now contains an approach to the issue of consolidating arbitrations which seems quite unique compared to the mechanisms found in other institutional rules. Whereas other arbitration rules transfer the power to grant or deny a request for consolidation either to the tribunal of the institution itself, the AAA/ICDR Rules opted to create a completely new authority to decide on the issue, the “*consolidation arbitrator*”. To be more precise, Art. 8 (1) of the AAA/ICDR Rules 2014 permits a party to request the Administrator to appoint said consolidation arbitrator, who will then have the power to consolidate two or more arbitrations pending under the AAA/ICDR Rules or administered by the ICDR or AAA.

Apart from the decision-making body, the Art. 8 of the AAA/ICDR Rule is similar to the ICC Rule on consolidation. The Administrator may grant the request under the same conditions that are stipulated in Art. 10 of the ICC Rules, namely if

- the parties have expressly agreed to consolidation or
- all claims are made under the same arbitration agreement or
- all the claims, counterclaims or setoffs are made under more than one arbitration agreement, the arbitrations involve the same parties, the disputes in the arbitrations arise in connection with the same legal relationship and the consolidation arbitrator finds the arbitration agreements to be compatible.

Art. 8 (2) stipulates the procedure for the appointment of the consolidation arbitrator. Primarily, the appointment procedure shall be established by agreement of the parties. If such an agreement cannot be reached within the time limit of 15 days, the Administrator will appoint the consolidation arbitrator. Like the ICC Court, the consolidation arbitrator has the power to consolidate proceedings, however he or she is not obligated to do so if one of the requirements of Art. 8 (1) is fulfilled. Because of this, the

consolidation arbitrator may decide against consolidation even if all parties have reached an agreement on the matter.⁴²

Like Art. 10 of the ICC Rules 2012, Art. 8 (3) of the AAA/ICDR Rules 2014 lists the issues to be considered by the consolidation arbitrator when making his or her decision, i.e. whether one or more arbitrators have been appointed and if so, whether the same or different persons have been appointed.

As stipulated under the ICC Rules, if consolidation takes place, the arbitration proceedings shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties. However, the consolidation arbitrator is granted further discretion in that he may also consolidate the proceedings into the later arbitration without the parties' agreement if he finds otherwise (Art. 8 (5)).

In case of consolidation, each party in those arbitrations shall be deemed to have waived its right to appoint an arbitrator pursuant to Art. 8 (6). The consolidation arbitrator may revoke the appointment of any arbitrators and may select one of the previously-appointed tribunals to serve in the consolidated proceedings. The Administrator shall, as necessary, complete the appointment of the tribunal in the consolidated proceedings. Absent the agreement of all parties, the consolidation arbitrator shall not be appointed in the consolidated proceedings.

IV. HKIAC Rules

The HKIAC Rules 2008 did not contain any express provision on the question of consolidating multiple arbitral proceedings.

The approach taken in Art. 28 of the HKIAC Rules 2013 has similarities to the one in the ICC Rules. Like Art. 10 of the ICC Rules 2012, the HKIAC Rules assign the power to decide on a party's request for consolidation to the institution itself, not the tribunal. Art. 28 also lists three scenarios in which consolidation may occur. The first alternative is that the parties agree on consolidation, Art. 28.1, subpara (a). Second, proceedings may be consolidated if all of the claims are made under the same arbitration agreement, Art. 28.1, subpara (b). Third, if the claims are made under more than one arbitration

⁴² This mechanism is criticized e.g. by Kantor, "The Consolidation Arbitrator – An Arbitrator Too Far?", Kluwer Arbitration Blog, 24 October 2014, available at <http://arbitrationblog.kluwerarbitration.com/2014/10/24/the-consolidation-arbitrator-an-arbitrator-too-far/>. Fehler! Hyperlink-Referenz ungültig.

agreement, a common question of law or fact must arise in both or all of the arbitrations, the rights to relief claimed must be in respect of, or arise out of, the same transaction or series of transactions, and the HKIAC must find the arbitration agreements to be compatible (Art. 28.1, subpara (c)).

While the first two provisions are identical to Art. 10, subpara (a) and (b) of the ICC Rules 2012, Art. 28.1, subpara (c) differs from Art. 10, subpara (c) since the HKIAC Rules do not require the different arbitration proceedings to involve the same parties. Thus, Art. 28.1, subpara (c) of the HKIAC Rules 2013 is broader than the respective ICC rule – and most of the other institutions for that matter – and consolidation is possible in a wider range of cases.⁴³

Like the ICC Court, the HKIAC shall consider the circumstances of the case when making its decision. The exemplary list of relevant factors in Art. 28.3 enumerates the same circumstances that are named in Art. 10 ICC Rules 2012 and Art. 8 (3) of the AAA/ICDR Rules 2013, such as whether one or more arbitrators have been designated or confirmed in more than one of the arbitrations, and if so, whether the same or different arbitrators have been confirmed.

One other significant difference to the ICC Court's powers under the ICC Rules is that the HKIAC is not barred from consolidating two proceedings if different tribunals have already been appointed in those proceedings. If both proceedings have progressed to a stage beyond the constitution of the tribunal, Art. 28.6 authorises the HKIAC to revoke the appointment of any arbitrators already designated or confirmed and to appoint the tribunal itself. This is possible because in case of consolidation, the parties are deemed to have waived their right to designate an arbitrator. As a result, the HKIAC offers considerably greater possibilities for consolidation and a significantly broader authority to the institution than most other institutional rules.⁴⁴

Finally, Art. 28.4 – similar to Art. 8 (5) of the AAA/ICDR Rules – stipulates that in case the HKIAC grants the request for consolidation, the proceedings shall be consolidated into the arbitration that commenced first, unless all parties agree or the HKIAC decides otherwise taking into account the circumstances of the case.

⁴³ Connor/Talib, "Joinder, Intervention and Consolidation under the HKIAC Administered Arbitration Rules 2013", *Asian Dispute Review*, Vol. 2014 Issue 4, 190 (194).

⁴⁴ Born, *International Commercial Arbitration*, Vol. II (2nd ed.), 2014, p. 2602.

V. SIAC Rules

The issue of consolidation was not addressed in the SIAC Rules 2013, yet in practice it was permitted in case all parties involved agreed to the consolidation.⁴⁵ In the revision of 2016, Rule 8 has been added to fill this gap.

When analysing the necessary requirements for consolidation under Rule 8, one needs to distinguish between applications made before and after the constitution of the arbitral tribunal since the SIAC Rules permit consolidation in both scenarios. In the first case, that is if *none* of the arbitral tribunals has been constituted yet, the SIAC Court is the competent authority to decide on the request pursuant to Rule 8.1 to 8.6. In the latter case, the power to decide is transferred to the tribunal itself.⁴⁶ This constitutes a substantial difference to the approach taken by the ICC, the LCIA and the AAA/ICDR because under their respective rules, the confirmation of an arbitrator means that consolidation is no longer possible.⁴⁷ Therefore, the scope of Rule 8 of the SIAC Rules 2016 is broader and consolidation is possible in a wider range of cases. While the solution of the SIAC resembles the one of the HKIAC to some extent, the HKIAC Rules do not authorise the tribunal to make any decisions on a request for consolidation, but vest only the institution with this authority.⁴⁸

Rule 8 is similarly structured as the provision on joinder in Rule 7. If the request for consolidation is submitted prior to the tribunal's constitution, Rule 8.1 to 8.6 apply, which transfers the authority to decide on the request to the SIAC Court. If the tribunal is already constituted at the time of the request, it shall make a decision pursuant to Rule 8.7. The requirements the SIAC Court and the tribunal have to examine before granting the request are quite similar to each other and stipulated in Rule 8.1 and 8.7. In particular, two or more proceedings may be consolidated if one of the three requirements is fulfilled:

- all parties agree to consolidation (subpara (a)),

⁴⁵ Boog/Raneda, "The SIAC 2016 Rules: A State-of-the-Art Rules Revision Ensuring an even more Efficient Process", *ASA Bulletin* 2016, Vol. 34 Issue 3, 584 (592).

⁴⁶ Dulac/Lo, "The SIAC Rules 2016: New Features", *Indian Journal of Arbitration Law* 2016, Vol. 5 Issue 2, 129 (141).

⁴⁷ cf. Art. 10 ICC Rules 2012, Art. 22.1 (x) LCIA Rules 2014; Art. 8 subpara (3b) AAA/ICDR Rules 2014.

⁴⁸ see above, D.IV.; Dulac/Lo, "The SIAC Rules 2016: New Features", *Indian Journal of Arbitration Law* 2016, Vol. 5 Issue 2, 129 (137).

- all the claims in the arbitration are made under the same arbitration agreement(subpara (b)) or
- the arbitration agreements are compatible and
 - the disputes arise out of the same legal relationship(s);
 - the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s) or
 - the disputes arise out of the same transaction or series of transactions (subpara (c)).

In case the tribunal decides pursuant to Rule 8.7 and not all parties have agreed to the consolidation, the additional prerequisite applies that the same tribunal has been constituted in each of the arbitrations or no tribunal has been constituted in the other arbitration (cf. Rule 8.7, subpara (b) and (c)). This demonstrates that even though consolidation is possible after the tribunal has been constituted, it is only allowed where the tribunals of all disputes are identical or only one has been constituted. If different tribunals have been constituted in both arbitrations, consolidation would only be possible if the parties agreed to revoke the tribunal in one of the arbitrations and to submit both disputes to the same tribunal, which would fall under Rule 8.7, subpara (a).⁴⁹

The SIAC Rules 2016 share the HKIAC's broad (broad?) approach and allow consolidation even if the arbitrations are not between the same parties and not all parties agree to the consolidation. Instead, it suffices if the disputes arise out of the same or connected contracts. Again, the respective provisions in the revised rules of the ICC, the LCIA and the AAA/ICDR are stricter insofar as they require the parties to be identical.⁵⁰

Like in the case of joinder, the SIAC Court has the power to revoke the appointment of any arbitrators if proceedings are consolidated pursuant to Rule 8.6 and 8.10, in which case the constitution of the tribunal shall follow the "regular" method described in Rules 9 to 12.

⁴⁹ Dulac/Lo, "The SIAC Rules 2016: New Features", Indian Journal of Arbitration Law 2016, Vol. 5 Issue 2, 129 (140).

⁵⁰ cf. Art. 10 subpara (c) ICC Rules 2012, Art. 22.1 (x) LCIA Rules 2014; Art. 8 subpara (1c) AAA/ICDR Rules 2014.

When making the decision, the SIAC Court or the tribunal again shall consider the views of the parties and the relevant circumstances. Insofar, Rule 8.4 and 8.9 mirror the joinder provision in Rule 7.4 and 7.10. Also in this case the SIAC Court/tribunal retains discretion whether to consolidate even if the requirements of Rule 8.1 or 8.7 are fulfilled. Also, Rule 8.4 clarifies that once again, the SIAC Court's decision to reject the request for consolidation is without prejudice to a party's right to apply for consolidation to the arbitral tribunal once it has been constituted pursuant to Rule 8.7

In case the SIAC Court grants the request, the arbitrations shall be consolidated into the arbitration that commenced first (Rule 8.5), unless otherwise agreed by all parties or the SIAC Court decides otherwise regarding the relevant circumstances. Although there is no express provision, the same should apply when the tribunal consolidates the proceedings.⁵¹

E. Multiple Contracts

Unlike the revised rules of the AAA/ICDR and the LCIA, the new version of the ICC Rules, the HKIAC Rules and the SIAC Rules also expressly permit a party to commence a single arbitration under multiple contracts from the outset, instead of initiating separate proceedings first and subsequently asking for a joinder or consolidation. However, both the AAA/ICDR Rules and the LCIA Rules permit the joinder of a third party and neither of them stipulate that the claims brought against the additional third party need to arise out of the same contract that is subject of the dispute between the original parties. Therefore, one can say that all sets of rules generally permit arbitration under multiple contracts, but only the ICC Rules 2012, the HKIAC Rules 2013 and the SIAC Rules 2016 stipulate specific prerequisites. Because of this, only these three sets of rules will be discussed below.

I. ICC Rules

The ICC Rules 1998 did not contain any provision that expressly addressed the question of disputes involving multiple contracts. Nonetheless, the ICC Court has long

⁵¹ Boog/Raneda, "The SIAC 2016 Rules: A State-of-the-Art Rules Revision Ensuring an even more Efficient Process", ASA Bulletin 2016, Vol. 34 Issue 3, 584 (595).

acknowledged the possibility of multi-contract proceedings.⁵² For example, in ICC Case no. 7925 of 1995, the parties to the dispute had entered into two contracts, a Partnership Agreement from 1986 which contained an arbitration clause and a Cooperation Agreement from 1987 which did not. When one party initiated arbitral proceedings based on claims arising out of both contracts, the tribunal decided it had jurisdiction over all claims arising out of the Partnership Agreement. With regard to the Cooperation Agreement, it held that its jurisdiction only covered claims

*“if and to the extent that this is shown to be a part of a unified contractual scheme with the 1986 Agreement but not from the 1987 Agreement on its own.”*⁵³

In ICC Case no. 4392 of 1983, also this arbitral tribunal was faced with claims arising out of two different contracts. The first one contained an arbitration clause whereas the second agreement gave jurisdiction to the national courts of Gaggenau. After pointing out that arbitration clauses had to be construed restrictively and taking into consideration the existence of a jurisdiction clause in the second contract, the arbitral tribunal refused to extend its jurisdiction to disputes arising under the second agreement.⁵⁴

Art. 9 of the ICC Rules 2012 now expressly permits claims arising out of or in connection with several contracts to be raised in a single arbitration. The scope of application is broad: Not only does Art. 9 allow for the claimant to raise claims under two different contracts, but it also permits counter-claims raised by the respondent or a party that has joined the proceedings, or any claim between multiple parties, to arise out of different contracts.⁵⁵

However, this is subject to certain requirements. First, all the claims that are made must be subject to an arbitration agreement under the ICC Rules, which reflects the practice of the tribunal in the above mentioned ICC award no. 4392. Second, if the claims are made under more than one arbitration agreement and the matter is submitted to the ICC Court for a preliminary decision pursuant to Art. 9 and Art. 6 (3) of the ICC Rules 2012, the prima facie test described in Art. 6 (4) (ii) of the ICC Rules 2012 applies. In that

⁵² Fry/Greenberg/Mazza, *The Secretariat's Guide to ICC Arbitration*, 2012, para 3-341.

⁵³ Hanotiau, “Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues - An Analysis”, *Journal of International Arbitration* 2001, Vol. 18 Issue 3, 253 (317).

⁵⁴ Hanotiau, “Problems Raised by Complex Arbitrations Involving Multiple Contracts-Parties-Issues - An Analysis”, *Journal of International Arbitration* 2001, Vol. 18 Issue 3, 253 (319).

⁵⁵ Fry/Greenberg/Mazza, *The Secretariat's Guide to ICC Arbitration*, 2012, para 3-342.

case, the ICC Court needs to assess whether the arbitration agreements are compatible with each other and whether all parties have agreed to the determination of the claims in a single arbitration.⁵⁶ However, even if the ICC Court affirms the agreements' compatibility, the final decision in that regard will be rendered by the tribunal pursuant to Art. 9 and Art. 6 (5) of the ICC Rules 2012.⁵⁷

The signing of the Terms of Reference once again poses the time limit until claims from other contracts can be added, unless the tribunal grants its authorisation.

II. HKIAC Rules

Until the revision of the HKIAC Rules in 2013, they did not contain any wording with regard to the admissibility of multi-contract arbitration.

Today, Art. 29 of the HKIAC Rules 2013 explicitly allows for claims arising out of or in connection with multiple contracts to be made in a single arbitration, provided that

- all parties to the arbitration are bound by each arbitration agreement giving rise to the arbitration;
- the dispute concerns a common question of law or fact arising under each arbitration agreement giving rise to the arbitration;
- the rights to relief claimed relate to the same transaction or series of transactions; and
- the arbitration agreements under which those claims are made are compatible.

Since these prerequisite need to be fulfilled cumulatively, the threshold set by the HKIAC is comparatively higher than the one of the ICC. Whereas under Art. 9 of the ICC Rules 2012 only the arbitration agreements need to be compatible, Art. 29 of the HKIAC Rules 2013 additionally requires the substantive claims to overlap to a certain extent.

⁵⁶ Fry/Greenberg/Mazza, *The Secretariat's Guide to ICC Arbitration*, 2012, para 3-343.

⁵⁷ see above, C.I.

III. SIAC Rules

The SIAC Rules 2013 did not address the issue of multi-contract arbitration explicitly, although it was already considered to be possible to connect disputes arising out of different contracts into one arbitration if all parties consented or if “common sense” suggested such a connection.⁵⁸ Now, Rule 6 of the SIAC Rules 2016 has introduced a completely new scheme for the solution of multi-contract issues.

The approach taken by the SIAC in its Rule 6 is rather different than the one of the ICC and the HKIAC.⁵⁹ Instead of treating multi-contract arbitration as a separate and distinct issue, the SIAC Rules link it to the procedure regarding the consolidation of two proceedings. In particular, Rule 6.1 provides the party wishing to initiate arbitration under multiple contracts with two possibilities:

- it can either file a Notice of Arbitration in respect of each arbitration agreement invoked and concurrently submit an application to consolidate the arbitration pursuant to Rule 8.1 (Rule 6.1, subpara (a)); or
- it can file a single Notice of Arbitration in respect of all arbitration agreements including a statement identifying each contract and arbitration agreement invoked (Rule 6.1, subpara (b)). In that case, the claimant is deemed to have commenced multiple arbitrations, one in respect of each arbitration agreement invoked, and the Notice of Arbitration under Rule 6.1, subpara (b) shall be deemed to be an application to consolidate all such arbitrations pursuant to Rule 8.1.

In short, multi-contract arbitration is subject to the same requirements as consolidation pursuant to Rule 8.1, regardless of whether the claimant files one or more Notices of Arbitration.⁶⁰

The requirements set forth in Rule 8.1 resemble those stipulated by Art. 29.1 of the HKIAC 2013 as the latter also requires compatibility of the arbitration agreements and that the dispute arises out of the same transaction or series of transactions. However, Art. 29.1, subpara (b) further demands that all parties are bound by each arbitration agreement giving rise to the arbitration and that a common question of law of fact arises

⁵⁸ *Hirth* in Schütze, *Institutionelle Schiedsgerichtsbarkeit* (3rd ed.), 2018, p. 732, Rule 6 para 55.

⁵⁹ Boog/Raneda, “The SIAC 2016 Rules: A State-of-the-Art Rules Revision Ensuring an even more Efficient Process”, *ASA Bulletin* 2016, Vol. 34 Issue 3, 584 (596).

⁶⁰ For a detailed analysis of Rule 8.1, see above, D.V.

under each arbitration agreement. Therefore, the SIAC Rules appear to be more liberal than the other institutional rules discussed in this paper in relation to multi-contract arbitration.⁶¹ On the other hand, a party cannot simply file claims arising from different contracts under the SIAC Rules without having obtained the SIAC's approval after going through the consolidation process. This way, the SIAC can keep more control over which arbitrations may be run as one.⁶²

F. Third-Party Intervention

None of the arbitral rules discussed in this paper contained any provision on third-party intervention prior to their latest revision and most of them still do not today.

Of the four sets of rules, only the HKIAC Rules 2013 and the SIAC Rules 2016 offer the possibility for a third party to intervene in an ongoing arbitration between others on its own initiative, meaning without a request from one of the parties to the proceedings.

I. HKIAC Rules

Amidst the provisions on joinder of third parties – that is adding a third party upon the request of one of the original parties –, Art. 27 (6) of the HKIAC Rules 2013 provides:

“A third party wishing to be joined as an additional party to the arbitration shall submit a Request for Joinder”.

Due to the location of this provision and the lack of any other rule explicitly referring to intervention, the HKIAC or the tribunal as the decision-making body must apply the same prima facie test as if the request for joinder had been made by one of the original parties (see above, C.IV) when deciding whether to grant the third party's request.

On the surface, permitting third-party intervention in arbitration might seem problematic in view of the principle of party autonomy, particularly where all of the original parties to the proceedings do not want the third party to intervene. However, this apparent discrepancy disappears if one considers the substantive requirements that have to be fulfilled for the intervention to be admissible. According to Art. 27 (1) and (8), which apply both to joinder and intervention, the HKIAC or the tribunal

⁶¹ Boog/Raneda, “The SIAC 2016 Rules: A State-of-the-Art Rules Revision Ensuring an even more Efficient Process”, ASA Bulletin 2016, Vol. 34 Issue 3, 584 (592).

⁶² Dulac/Lo, “The SIAC Rules 2016: New Features”, Indian Journal of Arbitration Law 2016, Vol. 5 Issue 2, 129 (142).

respectively must be prima facie satisfied that an arbitration agreement exists that is binding for all parties concerned. Therefore, all of the parties must have originally consented to arbitrate with one another in case of a dispute, which is why the intervention of a third party – even against the explicit wish of the parties at a later stage – does not necessarily violate the principle of party autonomy.⁶³

II. SIAC Rules 2016

Like in the HKIAC Rules, the provision on third-party intervention is closely related to and dealt with in connection with the rules on joinder in Rule 7 of the SIAC Rules 2016. To be more precise, Rule 7.1 and 7.8 do not differentiate between the status of the applicant. Instead, these provisions subject a non-party's application to intervene in proceedings to the same conditions as a party's request for joinder.⁶⁴

*“Prior the constitution of the Tribunal, a party **or non-party** to the arbitration may file an application with the Registrar for one or more additional parties to be joined in an arbitration pending under these Rules as a Claimant or Respondent, provided that...”*

*“After the constitution of the Tribunal, a party **or non-party** to the arbitration may apply to the Tribunal for one or more additional parties to be joined in an arbitration pending under these Rules as a Claimant or a Respondent, provided that...”*

Because of this, reference can be made at this point to the analysis of the joinder provisions.⁶⁵ Once again, the SIAC Rules 2016 have followed the same path as the HKIAC Rules 2013 which also apply the same requirements to a request to intervene as they do to a request for joinder.

The mechanism contained in the SIAC Rules also prevents that any third-party intervention would clash with the principle of party autonomy. Since Rule 7.1 and 7.8 require either the prima facie existence of a binding arbitration agreement between all parties or the actual consent of every party in order for the intervention to be successful, it is not possible for a third party to join the proceedings unless the other parties have – at least at some point – agreed to arbitrate with said party.

⁶³ Connor/Talib, “Joinder, Intervention and Consolidation under the HKIAC Administered Arbitration Rules 2013”, Asian Dispute Review, Vol. 2014 Issue 4, 190 (193).

⁶⁴ see above, C.V., for a detailed analysis of the requirements for joinder.

⁶⁵ see above, C.V.

G. Conclusion

To a large extent, the revised arbitration rules of ICC, the LCIA, the AAA/ICDR, the HKIAC and the SIAC greatly resemble each other and approach the different issues concerning multi-party and multi-contract arbitration in a similar manner. Particularly the provisions of the ICC Rules and the Rules of the AAA/ICDR are similar in some parts. Also, several provisions of the HKIAC Rules and the SIAC Rules bear resemblance in some areas.

Albeit the similarities, the comparison of the different rules also illustrates a number of differences. For example, under the ICC Rules and the AAA/ICDR Rules, comparatively strict time-limits apply to any measure relating to multi-party arbitration. To have any chance of success, a request for joinder or consolidation must be submitted early on before one of the arbitrators is confirmed. Both the LCIA Rules, the HKIAC Rules and the SIAC Rules are less rigorous in this regard and allow for both joinder and consolidation to occur also after the tribunal has been constituted.

Also, the HKIAC Rules and the SIAC Rules stand out compared to the others since they transfer greater powers to the tribunal than the other rules, e.g. by enabling it to add a third party without an application of the original parties or by allowing consolidation of proceedings where the parties are not identical.

On the whole, the revised rules of the four respective arbitral institutions mostly codify what has already been practiced in recent years. Accordingly, the new provisions mainly repeat the requirements that result from the application of arbitration's general principles. Nonetheless, due to the fact that the institutional rules now provide a clear framework for complicated matters such as consolidation and joinder, the new provisions will prove to be a valuable tool for tribunals in the future.