Bahrain Chamber for Dispute Resolution

INTERNATIONAL ARBITRATION REVIEW

Published by *Kluwer Law International B.V.*
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South
Wolters Kluwer Legal & Regulatory U.S. 7201
McKinney Circle Frederick MD 21704 United
States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by
Air Business Subscriptions Rockwood House
Haywards HeathWest Sussex RH16 3DH
United Kingdom
Email:
international-customerservice@wolterskluwer.com

ISSN 2352-7374

This Journal should be cited as (2018) 5 BCDR Int.Arb.Rev. 1

The *BCDR International Arbitration Review* is published twice per year.
Subscription prices for 2018 [Volume 5, Numbers 1 through 2] including postage and handling:
Subscription rate (print):EUR 380.00 / USD 511.00 / GBP 304.00

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at lrus.wolterskluwer.com
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BCDR International Arbitration Review is indexed/abstracted in the European Legal Journals Index.

Printed on acid-free paper

Bahrain Chamber for Dispute Resolution
INTERNATIONAL ARBITRATION REVIEW

Volume 5 | July 2018 | Number 1

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BCDR-AAA 2017 ARBITRATION RULES, PART II

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Rules

Joinder and Consolidation

Gary Born & Dharshini Prasad*

Article 28: Joinder

28.1 At any time following the Chamber's notice of the commencement of the arbitration pursuant to Article 3, and before the appointment of the arbitral tribunal, a party wishing to join an additional party to the arbitration shall submit to the Chamber, and at the same time to all other parties to the arbitration and to the additional party, a written request for arbitration against the additional party (the 'Request for Joinder'), including or accompanied by all the items prescribed for a Request in accordance with Article 2.2.

28.2 The additional party shall submit a response to the Request for Joinder (the 'Response to Request for Joinder'), the time limit, form and content of which shall be as prescribed for a Response in accordance with Article 4.

28.3 The Chamber shall join the additional party to the existing arbitration, provided that no additional party shall be joined pursuant to Article 28.1 unless the Chamber is prima facie satisfied that an arbitration agreement conforming to Article 1.1 may exist between all the parties, including the additional party.

28.4 At any time following the appointment of the arbitral tribunal, a party wishing to join an additional party to the arbitration shall proceed in the manner prescribed by Article 28.1, provided always that:

(a) the additional party shall not be joined after the appointment of the arbitral tribunal unless all parties to the arbitration and the additional party so agree in writing, and further agree that the additional party shall waive any right to participate in the selection of the arbitral tribunal that it would or might have had, had it been joined prior to the appointment of the arbitral tribunal;
(b) the arbitral tribunal shall, after consultation with the parties, determine in its sole discretion whether the additional party should be joined, taking into account the stage of the arbitration, whether joinder would serve the interests of justice and efficiency, and such other matters as it considers appropriate in the circumstances of the case; and

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Born, Gary & Prasad, Dharshini. 'Joinder and Consolidation'. *BCDR International Arbitration Review* 5, no. 1 (2018): 53–84.

(c) the arbitral tribunal, if it permits joinder, shall determine the time, form and content of any Response to Request for Joinder.

28.5 If joined, the additional party shall be a party to the arbitration for all purposes.

28.6 A Request for Joinder and a Response to Request for Joinder may, but need not, be submitted to the Chamber using the Chamber's online filing form located at www.bcdr-aaa.org.

Article 29: Consolidation

29.1 If two or more arbitrations subject to these Rules are commenced pursuant to the same arbitration agreement and between the same parties, the Chamber may, in its discretion and after consultation with the parties, consolidate the arbitrations into a single arbitration subject to these Rules, provided that no arbitral tribunal has yet been appointed in any of the arbitrations to be consolidated.

29.2 Following the appointment of the arbitral tribunal, the arbitral tribunal shall, on the application of any party, and having consulted all the parties, have the power to consolidate two or more arbitrations commenced under these Rules into a single arbitration, provided that no arbitral tribunal has been appointed in the other arbitration or arbitrations, or, if appointed, is the same arbitral tribunal as the arbitral tribunal appointed in the arbitration that commenced first; and

(a) all parties to the arbitrations to be consolidated have agreed in writing to consolidation; or
(b) all claims and counterclaims in the arbitrations are made under the same arbitration agreement; or
(c) if the claims and counterclaims in the arbitrations 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 arbitral tribunal determines that the arbitration agreements are compatible.

29.3 In determining whether to consolidate two or more arbitrations, the arbitral tribunal shall take into account the stage of the arbitrations, whether the consolidation of the arbitrations would serve the interests of justice and efficiency, and such other matters as it considers appropriate in the circumstances of the case.

29.4 When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed in writing by all parties or the arbitral tribunal determines otherwise.

1 INTRODUCTION

In 2017, the Bahrain Chamber for Dispute Resolution ('BCDR', referred to hereinafter as 'BCDR-AAA' or the 'Chamber'), which operates in partnership with the American Arbitration Association, released the second version of its arbitral rules (the '2017 BCDR Rules'). The rules contain a number of amendments that bring the institution's arbitral framework in line with international best practices, priming BCDR-AAA to compete with leading arbitral institutions in the Middle East. One of the most notable amendments is the inclusion of new provisions on the joinder of additional parties and the

consolidation of BCDR-AAA arbitrations, contained in Articles 28 and 29 of the 2017 BCDR Rules, respectively.

This article provides a theoretical and practical analysis of the joinder and consolidation provisions in the 2017 BCDR Rules. In Part 2, the article explores the rationales for, and obstacles to, joinder and consolidation mechanisms in international arbitration. Parts 3 and 4 provide a commentary on Articles 28 and 29 of the 2017 BCDR Rules on joinder and consolidation, including, where appropriate, through a comparative assessment of the consolidation and joinder rules of other arbitral institutions. The article then discusses the growth of multiparty arbitrations through institutional cooperation and the consolidation of arbitrations across arbitral institutions in Part 5, before providing some concluding remarks.

2 JOINDER, CONSOLIDATION AND THE RISE OF MULTIPARTY ARBITRATIONS

BCDR-AAA's new joinder and consolidation provisions are a timely addition to its rules. The Middle East has witnessed, and will continue to witness, rapid growth in large multiparty transactions.[1] This is not a localized phenomenon. Indeed, the increasingly specialized and complex nature of international commerce has led to a proliferation of large multiparty transactions on a global scale. It is inevitable therefore that disputes arising out of these transactions will involve multiple parties and multiple contracts.[2] Joinder and consolidation mechanisms play a crucial role in addressing these complexities and enhancing the quality of the arbitral process.

Claims arising between multiple parties and out of multiple related contracts are likely to have common factual and legal issues. Resolving these claims in a single proceeding will lead to substantial savings in time and costs as it will avoid the need for duplicative submissions, evidence and hearings.[3] It also eliminates the risk of the different decision makers in the different proceedings reaching

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1 Large construction, infrastructure and transport projects are expected to grow significantly in the Middle East in 2018. Recent market analysis indicates, for instance, that, as of April 2018, construction and transport projects worth USD 715 billion had been commenced, or were at the design or tender stage, in the Gulf Cooperation Council region. *See* Middle East Economic Digest, *GCC Construction on the Path to Recovery but Challenges Remain* (3 April 2018).

2 According to one study, about 40% of arbitrations worldwide involve more than two parties. *See* Nathalie Voser, *Multi-party Disputes and Joinder of Third Parties*, in Albert Jan van den Berg (ed.), *50 Years of the New York Convention*, ICCA Congress Series, Vol. 14 (Kluwer Law International 2009), p. 343. In 2016, an ICC arbitration was even reported to have had as many as forty-six parties. *See* ICC, *2016 ICC Dispute Resolution Statistics*, ICC Disp. Res. Bull. 2017(2).

3 *See e.g.* Voser, *supra* note 2, p. 350.

inconsistent results or granting inconsistent relief,[4] which leads to unfair and unsatisfactory outcomes for parties.

Mechanisms like joinder and consolidation also enhance the quality of the decision-making process. When related factual and legal issues are heard together, the decision maker is able to acquire a more complete and contextual understanding of the parties' transaction and obligations.[5] This in turn provides a basis for better-reasoned decisions.

In the litigation context, these benefits have resulted in national courts being empowered with tools to reduce the multiplicity of proceedings, including through joinder and the consolidation of proceedings. The international arbitration context, however, raises unique concerns that must be balanced against the notions of efficiency and quality decision making outlined above.

First, unlike national courts, which derive their jurisdiction from statute, tribunals derive their authority from the consent of the parties.[6] The arbitral process is a creature of contract premised on party autonomy. The limits of the arbitral process are thus primarily defined by the parties.[7] Where the parties to arbitration proceedings have not consented to have their disputes resolved together with other parties or with claims arising from other contracts, there will be no basis for a tribunal, or indeed a national court, to order otherwise.[8] Any award rendered in proceedings that are conducted contrary to the parties' agreement will

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4 *See* Nigel Blackaby et al. (eds.), *Redfern and Hunter on International Arbitration* (6th ed., Oxford University Press 2015), p. 141; Michael Pryles and Jeffrey Waincymer, *Multiple Claims in Arbitration Between the Same Parties*, in Albert Jan van den Berg (ed.), *50 Years of the New York Convention*, ICCA Congress Series, Vol. 14 (Kluwer Law International 2009), at p. 438; Philippe Leboulanger, *Multi-Contract Arbitration*, 13(4) J. Int'l Arb. 43, p. 63 (1996).

5 *See* Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), p. 378; Fritz Nicklisch, *Multiparty Arbitration and Dispute Resolution in Major Industrial Projects*, 11 J. Int'l Arb. 57, pp. 63–64 (1994).

6 Lew, Mistelis and Kröll, *supra* note 5, pp. 99–100 ('The arbitration agreement is the foundation of almost every arbitration. There can be no arbitration between parties which have not agreed to arbitrate their disputes. The contractual nature of arbitration requires the consent of each party for an arbitration to happen. State courts derive their jurisdiction either from statutory provisions or a jurisdiction agreement. In contrast, the arbitration tribunal's jurisdiction is based solely on an agreement between two or more parties to submit their existing or future disputes to arbitration.').

7 Gary B. Born, *International Commercial Arbitration* (2d ed., Kluwer Law International 2014), pp. 2130–31 ('One of the most fundamental characteristics of international commercial arbitration is the parties' freedom to agree upon the arbitral procedure. This principle is acknowledged in and guaranteed by the New York Convention and other major international arbitration conventions; it is guaranteed by arbitration statutes in virtually all jurisdictions; and it is contained in and facilitated by the rules of most arbitral institutions. The principle of the parties' procedural autonomy is qualified only by mandatory requirements of fundamental procedural fairness, which are narrowly limited in scope under most international and national arbitration regimes.').

8 Blackaby et al., *supra* note 4, p. 91 ('Unlike litigation in state courts, in which third parties can often be joined to proceedings, the jurisdiction of an arbitral tribunal to allow for the joinder or intervention of third parties to an arbitration is limited. The tribunal's jurisdiction derives from the will of the parties to the arbitration agreement and therefore joinder or intervention is generally only possible with the consent of all parties concerned.').

risk being set aside under the law of the seat[9] or refused recognition under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').[10]

Second, multiparty proceedings may also sit in tension with the confidential nature of arbitration. Parties have an expectation that their arbitral proceedings will be confidential.[11] In some cases, that expectation is enshrined as a right under national law or the applicable arbitral rules.[12] The introduction of non-parties to the arbitration agreement into the proceedings would lead to a loss, albeit limited, of that confidentiality.[13] However, as one commentator notes, confidentiality obligations can be extended to non-parties that join an arbitration. Thus, the joinder of non-parties does not undermine the 'main purpose of the confidential nature of arbitration, which is not to make confidential information known to the public at large'.[14]

Third, multiparty arbitrations may also raise practical concerns in relation to the composition of the tribunal. For instance, tribunal appointment procedures generally presume that parties fall into one of two clear 'sides' in a dispute[15] (i.e. claimants and respondents). Thus, appointment procedures typically call for each side to jointly nominate or appoint its own arbitrator in a three-member tribunal, with the arbitral institution making the appointment for the side that fails to participate in the process. However, this presumption of joint action falls where parties, although ostensibly on the same 'side', have divergent interests in the outcome of the proceeding.[16]

Lastly – and this applies to both litigation and arbitration – multiparty proceedings, while generating overall efficiencies, may make proceedings more complex, and thus longer and more expensive, for certain parties.[17] For instance, if the owner in a construction project has claims against the main contractor that could be resolved with relative ease in a two-party proceeding, those same claims would take longer and more money to resolve in a multiparty proceeding that requires the resolution of related claims between the main contractor and the

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9 *See e.g.* UNCITRAL Model Law on International Commercial Arbitration, art. 34(2)(a)(iv).
10 New York Convention, art.V(1)(d).
11 Voser, *supra* note 2, p. 351.
12 *See e.g.* 2014 LCIA Arbitration Rules, art. 30. Similarly, in the national law context, various jurisdictions have affirmed the confidentiality of proceedings. *See e.g. AAY v. AAZ* [2011] 1 SLR 1093 (Singapore High Court).
13 Voser, *supra* note 2, p. 352. *See also* Born, *supra* note 7, p. 2569.
14 Voser, *supra* note 2, p. 352.
15 *See e.g.* 2014 LCIA Arbitration Rules, art. 8; 2017 ICC Arbitration Rules, arts. 12(4) and 12(8).
16 *See* Richard Bamforth and Katerina Maidment, '*All join in' or not? How well does international arbitration cater for disputes involving multiple parties or related claims?* 27(1) ASA Bull. 3, p. 8 (2009); Born, *supra* note 7, p. 2568.
17 Born, *supra* note 7, p. 2569.

subcontractor.[18] Parties will need to draft more complex submissions, prepare for a more complex hearing and inevitably bear higher arbitrators' fees. This increase in time and costs creates an incentive for litigation strategies that pressure or intimidate parties with the threat of longer and more expensive proceedings.[19]

Notwithstanding the challenges outlined above, joinder and consolidation mechanisms have become increasingly prevalent in international arbitration because of the benefits that they offer in the resolution of multiparty disputes. The practical and theoretical concerns, including party autonomy, confidentiality and enforceability of awards, have been addressed through appropriately framed multiparty provisions that respect the necessity for party consent to arbitrate, while catering to the desire for efficient dispute resolution. Critically, however, consent remains the touchstone for consolidation and joinder in any dispute.[20]

As with other aspects of arbitration, party consent is construed through applicable national laws, arbitral rules or the language of the arbitration agreement. In the context of consolidation and joinder, national laws rarely provide detailed guidance. For instance, Bahrain, like many other Middle Eastern countries, has adopted the UNCITRAL Model Law on International Commercial Arbitration (the 'UNCITRAL Model Law') with minor modifications.[21] Although the drafters of the UNCITRAL Model Law considered proposals on consolidation and joinder at the time of the original draft in 1985, and during the revision process in 2006, these provisions were ultimately rejected.[22] Where national laws do refer to multiparty mechanisms, the discussion is typically limited to emphasizing the primacy of party consent.[23]

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18 Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 Iowa L. Rev., p. 505 (1987); Irene M. Ten Cate, *Multi-Party and Multi-Contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Agreements under U.S. Law*, 15 Am. Rev. Int'l Arb. 133, p. 138 (2004).

19 Eric A. Schwartz, *Multi-party Arbitration and the ICC: In the Wake of Dutco,* 10(3) J. Int'l Arb. 5, p. 343 (1993).

20 Born, *supra* note 7, p. 2585 ('It bears emphasis that the agreement for consolidation and joinder/intervention must be unanimous. It is not sufficient for the parties to one of several arbitrations to agree or to have agreed to consolidation, if those in the other arbitration(s) have not so agreed. Equally, it is not sufficient for the existing parties, but not the party to be joined, or the potential intervener, to agree to joinder/intervention. Rather, it is essential that all parties have agreed (or agree contemporaneously) to consolidation or joinder/intervention.')

21 Nayla Comair-Obeid, *Consolidation and Joinder in Arbitration: The Arab Middle Eastern Approach*, in Albert Jan van den Berg (ed.), *50 Years of the New York Convention*, ICCA Congress Series, Vol. 14, p. 502 (2009).

22 Howard M. Holtzmann et al., *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 2015), pp. 307, 670–72.

23 For instance, section 35 of the 1996 English Arbitration Act provides that '[u]nless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings'. A small number of national laws go further to specify additional requirements for consolidation, such as identical parties (e.g. 1986 Bermuda Arbitration Act, sec. 9) or the arbitral tribunals (e.g. 2018 New Zealand Arbitration Act, sched. 2, art. 2(1)).

Likewise, arbitration agreements are also typically silent on multiparty procedures. Arbitration agreements are usually drafted at the end of the negotiation process when little attention is paid to the nuances of dispute resolution.[24] Even where negotiated, parties may lack the expertise required to draft detailed procedural mechanisms on matters such as consolidation and joinder in their arbitration agreements. Furthermore, it would also unduly complicate an arbitration agreement to introduce these mechanisms.

The use of consolidation and joinder in arbitration has thus primarily been driven by arbitral institutions through their respective arbitral rules.[25] In particular, arbitral institutions have included increasingly effective provisions on consolidation, joinder and intervention in successive versions of their rules. The central role played by arbitral institutions in the field of multiparty arbitrations is unsurprising given their administrative and case-management functions.

The inclusion of provisions on multiparty arbitration in institutional arbitration rules addresses issues of consent. By incorporating arbitral rules that include multiparty mechanisms into their arbitration agreements, and by not choosing to contract out of such mechanisms, parties are deemed to have consented to these provisions.[26] The scope of the arbitral rules defines the scope of the parties' consent to consolidation and joinder.

Today, all leading arbitral institutions, including the London Court of International Arbitration ('LCIA'), the Hong Kong International Arbitration Centre ('HKIAC'), the International Chamber of Commerce ('ICC'), the Singapore International Arbitration Centre ('SIAC') and the Stockholm Chamber of Commerce ('SCC'), have provisions on consolidation and joinder in their rules. By amending its rules to provide for consolidation and joinder, BCDR-AAA has modernized its arbitral framework to reflect international best practices on complex dispute resolution.

3 ARTICLE 28: JOINDER OF ADDITIONAL PARTIES

Under Article 28, which contains the institution's new provisions on the joinder of an additional party to ongoing proceedings, parties to the arbitration agreement can, in theory, be joined to the proceeding at any stage of the dispute, subject to the requirements of Articles 28.3 and 28.4(a). Article 28 is in line with the practice

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[24] This is the fate of most dispute resolution clauses, regardless of whether they refer to arbitration, which has led to such provisions being aptly termed 'midnight clauses'.

[25] Indeed, 'the desire to streamline procedure in multiparty/multi-contract situations was recognized as a priority during the revisions to the 2008 HKIAC Rules'. *See* Michael Moser and Chiann Bao, *A Guide to the HKIAC Arbitration Rules* (Oxford University Press 2017), para. 10.06.

[26] *The Bay Hotel & Resort Ltd v. Cavalier Constr. Co. Ltd* [2001] UKPC 34 (Turks & Caicos Islands Privy Council), para. 38; Born, *supra* note 7, p. 2580.

of some of the leading arbitral institutions. It sets out a detailed framework that addresses a range of issues, including the identity of the parties that may file joinder applications, the timing and decision maker of the applications, and the criteria that must be satisfied before an additional party may be joined. The key aspects of Article 28 are explored in the following sections.

3.1 *Locus Standi*

The request for joinder of an additional party is akin to filing a request for arbitration in relation to that party. A request for joinder must therefore comply with the same requirements as a request for arbitration set out in Article 2.2 of the 2017 BCDR Rules. Consequently, it must, among other things, specify the name and contact details of the additional party to be joined and include a statement setting out the facts of the dispute.[27] However, unlike a request for arbitration, which may be filed by any entity or person that is a party to the arbitration agreement, only an existing party to the arbitration (i.e. a named claimant or respondent) has the *locus standi* to file an application for joinder. Article 28.1 states that '*a party wishing to join* an additional party to the arbitration' shall file an application with BCDR-AAA. Article 28.4 similarly limits joinder applications to existing parties to the arbitration. The 2017 BCDR Rules thus do not permit non-parties to the arbitration to voluntarily join proceedings – otherwise known as 'intervention' – even in cases where the non-party is a signatory to the arbitration agreement.

While the 2017 BCDR Rules do not expressly contemplate the intervention of additional parties, in practice this could be achieved if all the existing parties to the arbitration consent to the additional party's application. Absent such unanimous consent, however, there is no mechanism for an additional party to intervene in proceedings over the objection of any of the existing parties to the arbitration.[28]

Article 22.1(viii) of the LCIA Arbitration Rules and Article 7(1) of the ICC Arbitration Rules[29] adopt an approach similar to that of the BCDR Rules, conferring standing to file joinder applications only on existing parties to the arbitration. Non-party intervention applications are not permitted. By contrast, the

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27 2017 BCDR Rules, art. 2.2 (a) and (d).

28 The additional party can commence new proceedings and apply to have that proceeding consolidated with the existing arbitration under Article 29. However, as explained below, this will not be feasible if there are different arbitrators in the two proceedings.

29 Thomas H. Webster and Michael W. Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (3d ed., Sweet & Maxwell 2014), para. 7-19.

SIAC[30] and HKIAC[31] rules confer standing on both parties and non-parties to the arbitration, thus permitting both the joinder and intervention of additional parties.

The difference in approach between these institutional rules reflects competing policy concerns. An additional party will apply to intervene in an ongoing arbitration only where it has claims against the claimant or respondent that arise out of the same arbitration agreement. If the additional party can bring its claims in the same proceedings, it avoids the need for that party to commence new proceedings to litigate those claims, thus enhancing the overall efficiency of the dispute resolution process.[32] It also reduces the risk of inconsistent decisions.

On the other hand, as explained above, the intervention of a non-party to an arbitration would lead to a loss, albeit limited, of the confidentiality of proceedings.[33] The ICC Secretariat's Guide thus notes that '[w]hen contacted by a person requesting to be joined to an existing arbitration, the Secretariat has usually pointed out that, due to the ICC's obligation of confidentiality, the Secretariat is not even in a position to acknowledge the existence of the arbitration, much less entertain a request for intervention'.[34]

As a matter of principle, it is difficult to see why confidentiality concerns justify preventing the intervention of an additional party but do not require preventing the joinder of that same party. The right to confidentiality extends to all parties to the dispute. Save in cases where there is unanimous consent, a joinder application is no less likely than an intervention application to violate at least one party's expectation of confidentiality.[35]

Furthermore, as one commentator notes, confidentiality concerns should not limit the use of multiparty procedural mechanisms, as confidentiality obligations can be extended to non-parties that join an arbitration.[36] The joinder of non-parties thus does not undermine the 'main purpose of the confidential nature

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30 2016 SIAC Rules, rr. 7.1 and 7.8.

31 2013 HKIAC Rules, art. 27.6.

32 *See e.g.* Moser and Bao, *supra* note 25, para. 10.54 ('Article 27.6 allows a party who was not originally party to the arbitration to request that it be joined to the proceedings. This is sometimes known as "intervention". Its express inclusion in Article 27 reflects the overall objective of creating maximum clarity, flexibility, and procedural efficiency, by specifically providing in the HKIAC Rules for as many of the possible situations which could arise in practice in complex arbitrations').

33 Voser, *supra* note 2, p. 352. *See also* Born, *supra* note 7, p. 2569.

34 Jason Fry et al., *The Secretariat's Guide to ICC Arbitration* (ICC 2012), para. 3-294.

35 *See* S. I. Strong, *Third Party Invention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?* 31 Vand. J. Transnat'l L. 915, pp. 933–34 (1998) ('The reality is that many potential third party participants will already have full or partial knowledge of the affairs at issue . . . [as they may be] linked to the parties through contract or other business contacts').

36 *See ibid.*, p. 934 ('[confidentiality] concerns can also be addressed by bifurcating proceedings or discovery or by requiring intervenors and joined third parties to sign confidentiality agreements that carry strict penalties for noncompliance').

of arbitration, which is not to make confidential information known to the public at large'.[37]

By permitting both the joinder and intervention of additional parties, a larger number of multiparty disputes can be heard in a single proceeding. This will in turn provide a more efficient and fair framework for the resolution of multiparty disputes. In the next revision of its rules, the BCDR may therefore wish to consider expanding the scope of its joinder provisions to permit intervention applications by non-parties.

3.2 Timing of Application

Under Articles 28.1 and 28.4, a party may file an application for joinder either before or after the 'appointment of the arbitral tribunal' (i.e. the constitution of the tribunal). Thus, subject to the criteria for joinder, an additional party could, in theory, be joined at any stage of the proceedings. A number of other arbitral institutions, such as the LCIA, HKIAC and SIAC, adopt a similarly expansive approach.[38] The ICC is a notable exception as it does not contemplate the possibility of joinder once the tribunal has been constituted, even if all parties, including the additional party, consent to the joinder.[39] Critics question whether the ICC's approach of forbidding joinder even with unanimous consent is compatible with principles of party consent.

Although there is no temporal limit under the 2017 BCDR Rules on when a joinder application can be filed, the timing of the application has two consequences. First, it determines the body that rules on the application. Before the constitution of the tribunal, joinder applications are determined by the Chamber under Article 28.1, whereas post-constitution, that role is performed by the tribunal under Article 28.4. Under the *Kompetenz-Kompetenz* principle, incorporated in Article 27 of the 2017 BCDR Rules, any decision by the Chamber to permit the joinder of an additional party can be challenged before the tribunal on jurisdictional grounds.

Second, as explained below, the criteria for joinder under Article 28.4 become significantly more restrictive once the tribunal has been constituted. In particular, an additional party can only be joined with the unanimous consent of all parties, including the additional party itself. As a strategic matter, therefore, parties should consider making any joinder applications at the earliest possible stage of the proceedings.

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37 Voser, *supra* note 2, p. 352.

38 *See* 2014 LCIA Arbitration Rules, art. 22.1(viii); 2016 SIAC Rules, rr. 7.1 and 7.8; 2013 HKIAC Administered Arbitration Rules, arts. 27.1 and 27.8.

39 *See* 2017 ICC Arbitration Rules, art. 7(1); Webster and Bühler, *supra* note 29, para. 7-26.

3.3 Joinder by the Chamber

As noted above, the 2017 BCDR Rules set out different criteria for joinder depending on whether the application is filed before or after the constitution of the tribunal. Prior to the tribunal's constitution, Article 28.3 provides that an additional party shall be joined only if the Chamber is '*prima facie* satisfied that an arbitration agreement . . . may exist between all the parties, including the additional party'. Article 28.3 thus sets out both the standard of review and the applicable test for joinder before the Chamber.

By permitting the institution to rule on joinder applications prior to the constitution of the tribunal, the 2017 BCDR Rules reflect the practice of some leading arbitral institutions, like the ICC, HKIAC and SIAC.[40] An early determination by the institution means that parties will not be obliged to wait until the tribunal is fully constituted before hearing and then ruling on the joinder application.[41] This avoids substantial delays. Furthermore, where the additional party is joined before the tribunal is constituted, it will also have the opportunity to participate in the appointment of the tribunal.

3.3[a] Prima Facie Standard

The prima facie standard establishes a relatively low threshold for the Chamber to determine the existence of an arbitration agreement between all the parties. The prima facie standard will be satisfied as long as there is some evidence or a reasonable possibility of the existence of an arbitration agreement between the parties.[42] This must typically be documentary proof, as a mere allegation that the additional party is bound by the arbitration agreement will not suffice.[43]

The low prima facie threshold has multiple benefits. First, it ensures the expeditious resolution of joinder applications without the need for lengthy evidentiary inquiries into the nature of the relationship between the additional party and the arbitration agreement in question. Should the additional party or any other party object to the joinder, the tribunal, under the principle of *Kompetenz-Kompetenz,*[44] will be able to engage in a full review of the evidence and legal arguments to determine whether it has jurisdiction over the additional party.

Second, from an institutional perspective, the lower standard of proof also eases the administrative burden on BCDR-AAA, and thus the cost to the parties,

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[40] *See* 2017 ICC Arbitration Rules, arts. 6(4) and 7(1); 2016 SIAC Rules, r. 7.1; 2013 HKIAC Administered Arbitration Rules, art. 27.8.

[41] *See also* Moser and Bao, *supra* note 25, para. 10.60.

[42] Fry et al., *supra* note 34, para. 3-219. *See also* Moser and Bao, *supra* note 25, para. 10.24.

[43] Fry et al., *supra* note 34, para. 3-219. *See also* Moser and Bao, *supra* note 25, para. 10.25.

[44] 2017 BCDR Rules, art. 27.1.

as the Chamber will not be required to conduct a comprehensive factual investigation.

Third, the prima facie standard filters out frivolous applications for joinder at a preliminary stage, thereby saving the parties the time and cost of litigating jurisdictional objections over the joinder of the additional party before the tribunal.

3.3[b] Additional Party as Party to the Arbitration Agreement

Where the additional party to be joined is a signatory to the arbitration agreement, establishing the prima facie existence of an arbitration agreement that binds all the parties will generally be a straightforward exercise. Given the low prima facie threshold, it is likely that the Chamber will dismiss only obviously frivolous applications. This includes cases where the signatory can demonstrate that it has signed the agreement as an agent on behalf of a principal or that it has signed the agreement as an acknowledgement but did not accept any obligations under the contract.[45]

However, the situation is likely to be more complex where the additional party is not a signatory to the arbitration agreement. As one of the authors has noted elsewhere, there are numerous legal theories that could be used to bind a non-signatory to an arbitration agreement, including the 'group of companies' doctrine, the alter ego theory and agency principles.[46] It is beyond the scope of this article to provide a detailed analysis of these legal theories. However, in essence, each of these theories ultimately seeks to establish that the additional party has either impliedly consented to be bound by the arbitration agreement, or that it has conducted itself in a manner that would justify disregarding the separation of its corporate personality from the actual signatories to the agreement (e.g. a subsidiary).[47]

It is also important to bear in mind that these theories of joinder of a non-signatory may give rise to unique choice-of-law issues.[48] For instance, in determining whether a party is bound, as principal, to an arbitration agreement entered into by a third-party agent, it is first necessary to establish whether the

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45 These are the circumstances in which the ICC International Court of Arbitration has refused to join a signatory to the arbitration. *See* Fry et al., *supra* note 34, paras. 3-230, 3-231.

46 *See generally* Born, *supra* note 7, pp. 1418–89.

47 William W. Park, *An Arbitrator's Dilemma: Consent, Corporate Veil and Non-Signatories* in *Multiple Party Actions in International Arbitration* 3 (Oxford 2009), pp. 3–6.

48 *See generally* Born, *supra* note 7, pp. 1418–89.

law applicable to the inquiry is the law of the agency relationship, the arbitration agreement or the place of incorporation of the agent.[49]

In order to satisfy the prima facie threshold before the Chamber, it may not be necessary to submit full legal arguments on the legal issues outlined above. However, parties should give close consideration to these issues as they will have to be argued before the tribunal in the event the parties or the additional party object to the Chamber's joinder decision and the jurisdiction of the tribunal over the additional party. Even if a party succeeds in establishing a prima facie joinder before the Chamber, it may fail to demonstrate the tribunal's jurisdiction over the additional party on a balance of probabilities.

3.3[c] Tribunal Constitution and Appointment of Arbitrators

Where an additional party is joined under Article 28.3, it will be entitled to participate in the constitution of the tribunal. The mechanism for the appointment of tribunal members under the 2017 BCDR Rules is contained in Article 9, which includes provisions on multiparty appointments.

Articles 9.1 to 9.3 govern the appointment process where the tribunal is to comprise a sole arbitrator. The parties are, in the first instance, given an opportunity to jointly nominate the sole arbitrator. In the event they are unable to reach agreement, BCDR-AAA will either use a list procedure to appoint the arbitrator or make the appointment itself.

Where the arbitration agreement provides for a three-member tribunal and there are more than two parties to the dispute, as will be the case when an additional party is joined, the procedure for the tribunal's constitution is subject to Article 9.8. Article 9.8 provides the claimant(s) and respondent(s) with an opportunity to jointly nominate their respective co-arbitrators. In the event one side fails to make its joint nomination, BCDR-AAA will appoint the entire tribunal, notwithstanding a nomination by the other side.

Article 9.8 reflects the now well-established principle of party equality in the designation of arbitrators that was set out in the 1992 French Court of Cassation case known as *Dutco*.[50] Here, the court set aside an arbitral award rendered in a three-party dispute where each of the two respondents asserted the right to appoint its own arbitrator, rather than make a joint appointment. The arbitration agreement provided for a three-member tribunal with each side appointing one arbitrator and the two appointed arbitrators appointing the presiding arbitrator.

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[49] *Ibid*., pp. 1423–24.

[50] Cour de cassation, 1e civ., 7 Jan. 1992, *Sociétés BKMI et Siemens v. Société Dutco*, 10(2) ASA Bull. 295 (1992).

While the respondents eventually made a joint nomination, this was done only under protest. The court annulled the award on the basis that the appointment procedure violated the respondents' right to equal treatment because it granted the claimant greater influence in the constitution of the tribunal than each of the respondents. The court held 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'.[51]

Dutco led to the revision of the rules of a number of prominent arbitral institutions, including the ICC and LCIA.[52] Indeed, most modern institutional rules on multiparty appointments now reflect the *Dutco* principle,[53] including Article 9.8 of the 2017 BCDR Rules.

While Article 9.8 provides a straightforward mechanism for the tribunal's constitution, one temporal issue that arises is how BCDR-AAA would proceed with appointment in cases where the joinder application is filed before the tribunal's constitution but after one or more of the arbitrators have been appointed, and the additional party objects to the appointed arbitrator(s). In contrast to the SCC, SIAC and HKIAC Rules,[54] the 2017 BCDR Rules do not expressly grant the institution the right to revoke any existing arbitrator appointments. Arguably, without express powers an institution cannot remove appointed arbitrators unless they resign or the parties agree,[55] even if the additional party objects to their appointment.

To address this situation, some institutional rules, like those of the ICC and the International Centre for Dispute Resolution ('ICDR'), state that no additional

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51 *Ibid.*, p. 297; *see also* Ricardo Ugarte and Thomas Bevilacqua, *Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions*, 27(1) J. Int'l Arb. 9, pp. 10–12 (2010).

52 *See* Blackaby et al., *supra* note 4, p. 142.

53 *See e.g.* 2013 HKIAC Rules, art. 8.2; 2016 SIAC Rules, r. 12; 2017 SCC Arbitration Rules, art. 17(5).

54 *See e.g.* 2016 SIAC Rules, r. 7.6; 2013 HKIAC Rules, art. 27.11; 2017 SCC Arbitration Rules, art. 13(8).

55 For instance, the ICC does not consolidate arbitrations where different arbitrators have been appointed in the proceedings because it does not have the power to remove appointed arbitrators unless they resign or the parties agree to the removal. *See* Fry et al., *supra* note 34, para. 3-358 ('In exercising its discretion, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different arbitrators have been confirmed or appointed. Once consolidated, the previously separate arbitrations will become a single arbitration to be decided by a single arbitral tribunal, so if arbitrators have been confirmed in more than one of the arbitrations, and if those arbitrators are different individuals, *the Court will be unable to consolidate the arbitrations as it will be impossible to constitute a single arbitral tribunal unless the different arbitrator(s) resign or are removed by the Court at the parties' request*' (emphasis added)). *See also* Born, *supra* note 7, p. 2583 ('consolidating the separate arbitrations would ordinarily require removal and reappointment of arbitrators in one or more of the individual arbitrations, a result that is difficult to implement consensually. Absent all parties' cooperation, coercive action would be required to remove and replace one or more of the arbitral tribunals – a result which most national arbitration legislation would not readily permit').

party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, agree.[56] This strict time limit ensures that an additional party is not compelled to arbitrate before a tribunal that it did not have an opportunity to select.

This temporal complexity is not, however, liable to arise under the BCDR-AAA Rules. In practice, BCDR-AAA exercises its appointment powers under Articles 9.7 and 9.10 to appoint all arbitrators at the same time. There is therefore no risk of an arbitrator being appointed before a joinder application is filed.

3.4 Joinder by the Tribunal

Joinder applications before the tribunal are subject to substantially more stringent criteria than those applicable to applications before the Chamber. Article 28.4(a) provides that the tribunal may join an additional party only where (i) all the parties and the additional party have consented in writing to the joinder; and (ii) the additional party waives any right to participate in the constitution of the tribunal. These are conjunctive requirements that secure a party's right to participate in the constitution of the tribunal.

The ability of a party to choose its arbitrator and participate in the constitution of the tribunal is one of the hallmarks of the arbitral process.[57] However, where a joinder application is filed after the tribunal's constitution, the additional party, if joined, will necessarily be unable to nominate its own arbitrator or otherwise comment on the appointment of the tribunal, which has already been constituted.

Article 28.4(a) therefore provides an important safeguard to ensure that the additional party is not compelled to arbitrate before a tribunal in whose constitution it did not have the opportunity to participate. The additional party's written consent and waiver is tantamount to the additional party's *ex post* consent to the appointment of the tribunal. It also ensures that any award that is rendered is not exposed to annulment or non-recognition on the basis that the additional party was not provided with an equal opportunity like the other parties to participate in the constitution of the tribunal.

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[56] 2017 ICC Arbitration Rules, art. 7(1); 2014 ICDR-AAA International Arbitration Rules, art. 7(1).

[57] David A.R. Williams and Anna Kirk, *Balancing Party Autonomy, Jurisdiction and the Integrity of Arbitration: Where to Draw the Line*? in Neil Kaplan and Michael Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International 2018), p. 88 ('The right to appoint an arbitrator and to determine the scope of that arbitrator's mandate are key aspects of party autonomy and is pivotal in differentiating arbitration from national court systems').

Under Article 28.4(b), it is for the tribunal to decide in 'its *sole discretion* whether the additional party should be joined, taking into account the stage of the arbitration, whether joinder would serve the interests of justice and efficiency, and such other matters as it considers appropriate in the circumstances of the case'. Thus, notwithstanding the parties' and the additional party's agreement to the joinder, the tribunal has the discretion to refuse the application if it considers it inappropriate. This discretion must be exercised in the light of the tribunal's duty under Article 16.2 to conduct the proceeding in an expeditious manner, avoiding unnecessary delay and expense. In practice, it would be rare for the tribunal to refuse a joinder application where all the parties involved have consented to the joinder.

4 ARTICLE 29: CONSOLIDATION OF ARBITRAL PROCEEDINGS

Under Article 29, which contains the consolidation mechanism of the 2017 BCDR Rules, two pending BCDR-AAA arbitrations may be consolidated into a single proceeding and heard by a single arbitral tribunal. If the consolidation application is granted, the proceedings will be consolidated into the proceeding that was commenced first.[58]

As with the joinder provisions in Article 28, by avoiding a multiplicity of proceedings Article 29 strives to secure savings in time and costs for the parties, while reducing the risk of inconsistent decisions. The following sections discuss key aspects of the new BCDR-AAA provision on consolidation, including the commencement of consolidation applications and the criteria for consolidation before the Chamber and the tribunal, respectively.

4.1 Commencement of Application

Consolidation applications under Article 29 of the 2017 BCDR Rules are determined by the Chamber prior to the constitution of the tribunal, and by the tribunal itself thereafter. While the tribunal's authority to consolidate arbitrations arises only if the parties so request, the Chamber is empowered, on consultation with the parties, to consolidate pending BCDR-AAA arbitrations *proprio motu*, without an application by any party, if the required criteria are satisfied. Thus, Article 29.1 of the 2017 BCDR Rules provides that '*the Chamber may, in its discretion* and after consultation with the parties', decide to consolidate two pending BCDR-AAA arbitrations. Article 29.2, by contrast, provides that the

[58] 2017 BCDR Rules, art. 29.4.

tribunal can consolidate arbitrations '*on the application of any party*, and having consulted with the parties'.

Article 29.1 is a progressive provision, unparalleled in many other arbitral rules,[59] as it empowers the arbitral institution to take on an active case-management role and order consolidation even without a request by the parties. This approach advances the important role that arbitral institutions can play in effective dispute resolution.

While Article 29.1 clarifies that the Chamber may act on its own motion to consolidate proceedings, the rules are silent on whether the parties have standing to file an application under the provision. There are strategic reasons why a party may wish to apply for consolidation before the Chamber prior to the constitution of any tribunal. For instance, a non-cooperative party can easily obstruct consolidation of proceedings by the tribunal by appointing different arbitrators in the two proceedings. This is contrary to the requirement of Article 29.2 that, if appointed, the tribunals in the two arbitrations must be identical. This risk is substantially mitigated where consolidation applications are filed early in the proceedings, before BCDR-AAA appoints any arbitrators nominated by the parties. In practice, it is difficult to see why the Chamber would not consider a consolidation application by a party.

4.2 Consolidation by the Chamber

Under Article 29.1, the Chamber has the 'discretion', on consultation with the parties, to consolidate two or more BCDR-AAA arbitrations 'commenced pursuant to the same arbitration agreement and between the same parties', provided that 'no arbitral tribunal has yet been appointed' in any of the proceedings to be consolidated. The following sections discuss the criteria for consolidation, the temporal limit imposed by the constitution of the tribunal on the Chamber's powers of consolidation, and the factors relevant to the Chamber's exercise of discretion.

4.2[a] Same Arbitration Agreement and Same Parties

Article 29.1 sets twin threshold criteria for consolidation by the Chamber: the disputes must be between the same parties and arise out of the same arbitration agreement. In cases where the dispute arises out of a single contract which

[59] For instance, HKIAC does not have the power to consider consolidation on its own initiative. *See* Moser and Bao, *supra* note 25, para. 10.98. *See also* 2017 ICC Arbitration Rules, art. 10; 2016 SIAC Rules, r. 8; 2017 SCC Arbitration Rules, art. 15(1); 2014 LCIA Arbitration Rules, art. 22.1(ix) and (x).

contains the arbitration agreement, establishing the existence of the same arbitration agreement is likely to be straightforward. The assessment may become more complex in cases where the disputes arise out of related contracts that are subject to an arbitration agreement contained in a stand-alone umbrella clause. In such cases, the Chamber will have to ascertain the relationship between the contracts and the arbitration agreement, and whether the disputes indeed relate to the same arbitration agreement.

It will similarly be easy to establish that the parties are the same in most cases, as they will be identical. However, in cases involving non-signatories to an arbitration agreement, questions may arise over whether the parties, although ostensibly separate legal entities, are in fact the same (e.g. where the corporate veil is pierced). It is unclear whether these scenarios meet the threshold for consolidation under Article 29.1 or whether the Chamber will require strict identity of the parties.

The ICC, for instance, takes a narrow view in assessing the 'same parties' requirement under Article 10(c) of the ICC Arbitration Rules and permits consolidation only where the parties are identical.[60] Given its administrative role, BCDR-AAA is unlikely to engage in an extensive and potentially complex evidentiary analysis of the relationship between parties. As such, it may adopt the same approach as the ICC and permit consolidation only where the parties are in fact identical.

4.2[b] Tribunal Constitution

Article 29.1 also stipulates that the Chamber has the power to consolidate arbitrations 'provided that *no arbitral tribunal has yet been appointed* in any of the arbitrations to be consolidated'. Thus, there is a temporal limit to the Chamber's powers of consolidation. This is similar to the SIAC Rules, which vest consolidation powers in the institution only until a tribunal in any of the proceedings has been constituted.[61]

4.2[c] Discretionary Factors

Even if the threshold and temporal requirements of Article 29.1 are met, the Chamber has the discretion not to consolidate proceedings. Article 29.1 does not set out the discretionary factors that the Chamber may consider. It is likely, however, that the Chamber will balance the efficiencies that can be gained by

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[60] *See* Fry et al., *supra* note 34, para. 3-357.
[61] *See* 2016 SIAC Rules, rr. 8.1 and 8.7.

consolidation against any prejudice that may be caused to any of the parties.[62] In *Alpha Building Construction v. Best Partner Ltd*, for instance, a Hong Kong court refused to consolidate proceedings under the Hong Kong Arbitration Ordinance because consolidation would unfairly and unnecessarily prolong a relatively straightforward claim and disproportionately increase costs for one party.[63]

The Chamber may also refuse consolidation if the claims in the two proceedings, although involving the same parties and arbitration agreement, are in fact substantively unrelated with no overlapping factual or legal issues. In such a case, there are no efficiencies gained by hearing the claims together. On the contrary, increasing the number of claims in one arbitration risks making the proceedings more complex, and thus protracted.

In exercising its discretion to consolidate under Article 29.1, the Chamber is also required to consult with the parties. Like other institutions, it is unlikely to hold oral hearings on consolidation applications. Parties will instead be provided with an opportunity to make written submissions on whether consolidation is appropriate.

4.3 Consolidation by the Tribunal

Once a tribunal has been constituted in any of the proceedings, only it can rule on a consolidation application under Article 29.2. As noted above, the tribunal can order consolidation only upon the application of a party to one of the proceedings to be consolidated. However, the tribunal can order consolidation in a wider set of circumstances than the Chamber. Notably, the grounds for consolidation under Article 29.2 are largely similar to those found in Article 10 of the ICC Arbitration Rules. Given the ICC's long-standing practice on the consolidation of proceedings and the similarity of the provisions, jurisprudence under the ICC rules can be useful when interpreting Article 29.2.

4.3[a] Tribunal Constitution

The tribunal's power to order consolidation under Article 29.2 is subject to the proviso that 'no arbitral tribunal has been appointed in the other arbitration or arbitrations, or, if appointed, is the same arbitral tribunal as the arbitral tribunal appointed in the arbitration that commenced first'. The composition of the

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62 The tribunal is required to consider similar factors in exercising its discretion to consolidate under Article 29.3 of the 2017 BCDR Rules.

63 *See Alpha Building Construction v. Best Partner Ltd* [2008] 2 HKLRD D4, cited in Moser and Bao, *supra* note 25, p. 226, fn. 49.

tribunal in the different proceedings sets an important limit on consolidation under Article 29.2.

Where the tribunals in the proceedings are identical, consolidation can easily be achieved as the same tribunal can continue to hear the consolidated arbitration. Where different tribunals have been constituted in the proceedings, however, it will be impossible to determine the composition of the tribunal that will hear the consolidated proceeding. A tribunal for the consolidated proceeding can be constituted only by removing at least some of the arbitrators. However, as explained above, once appointed, arbitrators can be removed only upon resignation or if the parties so agree.[64] Again, this does not appear to be a difficulty under the 2017 BCDR Rules because the institution appoints the entire tribunal at the same time.

4.3[b] Party Consent

Under Article 29.2(a), the first ground for consolidation is where the parties have agreed to do so in writing. This provision reflects the primacy of party autonomy in international arbitration. Virtually all institutional rules that cater for consolidation recognize party consent as a ground (often the first) for consolidation.[65]

Party agreement to consolidation may be provided either before or after a dispute has arisen.[66] In the former scenario, the agreement will usually be contained in the arbitration agreement. As noted above, it is unusual for arbitration agreements to contain details on procedural issues such as consolidation.[67] Invariably, therefore, party consent to consolidation will be provided after the dispute has arisen, or after proceedings have been commenced. Such post-dispute consent is not uncommon in practice as the savings in time and costs mean that it is often in the interests of all parties to streamline their proceedings before a single tribunal.

There is no requirement under Article 29.2(a) that the proceedings in question arise out of the same arbitration agreement or be between the same

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64 *See* Fry et al., *supra* note 34, para. 3-358. For instance, once a tribunal is constituted, even HKIAC lacks the power to revoke the appointment of an arbitrator. HKIAC's powers of revocation can be exercised only after an arbitrator has been appointed but before the tribunal is constituted. *See* Moser and Bao, *supra* note 25, para. 10.76.

65 *See e.g.* 2017 SCC Arbitration Rules, art. 15(1)(i); 2017 ICC Arbitration Rules, art. 10(a); 2016 SIAC Rules, rr. 8.1(a) and 8.7(a); 2013 HKIAC Administered Arbitration Rules, art. 28.1(a).

66 *See* Moser and Bao, *supra* note 25, para. 10.101.

67 *Ibid*., para. 10.04.

parties, as foreseen in Articles 29.2(b) and 29.2(c). If the parties so choose, they can agree to consolidate complex disputes relating to different parties, contracts and arbitration agreements in a single proceeding. Notwithstanding party agreement, the tribunal may exercise its discretion under Article 29.3 (discussed below) to refuse consolidation if it would be inappropriate. For instance, if the arbitration agreements are incompatible, and the parties' consent to consolidate does not reconcile the incompatibility.[68]

Unlike other institutional rules,[69] Article 29.2(a) imposes a strict requirement that the parties' consent to consolidate be in writing. This avoids the risk of parties subsequently challenging their consent to consolidation, and exposing any award to annulment[70] or non-recognition[71] on the basis that the arbitration was not conducted in accordance with the parties' agreement.

4.3[c] Same Arbitration Agreement

The second ground for consolidation under Article 29.2(b) is where the proceedings arise out of the same arbitration agreement. In contrast to consolidation by the Chamber, there is no requirement that the parties to the proceedings be the same. As explained above in the context of Article 29.1, the arbitration agreement in question may be contained in the same document as the substantive contract giving rise to the dispute. Alternatively, the arbitration agreement may be contained in a separate umbrella contract. In the latter case, the tribunal will have to ascertain the relationship between the contracts and the arbitration agreement.

4.3[d] Multiple Arbitration Agreements

The third, and final, ground for consolidation under Article 29.2(c) caters to disputes involving multiple arbitration agreements. Consolidation is permissible in this circumstance only if three conjunctive requirements are satisfied: (i) the arbitrations involve the 'same parties'; (ii) 'arise in connection with the same legal relationship'; and (iii) 'the arbitration agreements are compatible'. Each of these requirements is explained below.

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68 Webster and Bühler, *supra* note 29, para. 10-7.

69 *See e.g.* 2017 SCC Arbitration Rules, art. 15(1)(i); 2017 ICC Arbitration Rules, art. 10(a); 2016 SIAC Rules, rr. 8.1(a) and 8.7(a); 2013 HKIAC Administered Arbitration Rules, art. 28.1(a).

70 *See e.g.* UNCITRAL Model Law on International Commercial Arbitration, art. 34(2)(a)(iv).

71 New York Convention, art.V(1)(d).

4.3[d][i] Same Parties

The interpretation of the 'same parties' requirement under Article 29.2(c) should be consistent with that under Article 29.1, discussed above. Thus, it appears likely that only strict identity of the parties will suffice for consolidation.

4.3[d][ii] Same Legal Relationship

The requirement that the disputes in a multi-contract context relate to the 'same legal relationship' is found in the consolidation provisions of multiple arbitral rules, including those of the ICC, SIAC and the ICDR.[72] This requirement ensures that unrelated claims are not heard together, but rather that the claims share 'a legal or factual connection'.[73] The ICC has thus held that the 'same legal relationship' criterion is satisfied if the disputes arise from contracts 'related to the same economic transaction'.[74]

A leading authority on multiparty disputes suggests that economically or functionally interrelated contracts could be construed as one economic transaction.[75] When arbitrations arise from several interrelated contracts, the tribunal needs to look at the will of the parties to 'determine whether they conceived of the various contracts as one contractual entity, one single multilateral contract or forming together one single economic transaction'.[76]

There are several factors that are relevant to determining whether a dispute arises out of the same economic transaction, including whether (i) the contracts form an 'indivisible whole or are very closely connected', and (ii) 'there is a close linkage of the reciprocal rights and obligations'.[77]

The ICC has thus found that the requirement is not met if two or more claims arose from contracts that, despite having similar terms and objectives (including having identical arbitration clauses), related to two distinct projects at

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72 2017 ICC Arbitration Rules, art. 10(c); 2016 SIAC Rules, r. 8.7(c); 2014 ICDR-AAA International Arbitration Rules, art. 8.1(c).

73 Lara M. Pair and Paul Frankenstein, *The New ICC Rule on Consolidation: Progress or Change*, 25(3) Emory Int'l L. Rev. 1061, p. 1075 (2011).

74 Fry et al., *supra* note 34, para. 3-357. *See also* Stephen R. Bond, Marily Paralika and Matthew Secomb, *ICC Rules of Arbitration, Multiple Parties, Multiple Contracts and Consolidation, Article 10 [Consolidation of Arbitrations]*, in Loukas A. Mistelis (ed.), *Concise International Arbitration* (2d ed., Kluwer Law International 2015), p. 372; Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* (Kluwer Law International 2006), para. 351 ('the awards and court decisions are based on a close analysis of the particular facts of the dispute. Any attempt to induce general principles should never overlook the very important factual dimension of any given case').

75 Hanotiau, *supra* note 74, para. 355.

76 *Ibid*.

77 *Ibid*.

sites in two different cities.[78] By contrast, the ICC has held that the same legal relationship was implicated in two arbitrations based on two separate agreements, signed by the same parties on the same day and relating to products with the same definition. The disputes related to the claimant's right to terminate both agreements. The claimant was seeking the same relief and submitted almost the same evidence in both arbitrations.[79]

In another case, the ICC consolidated arbitrations involving disputes arising from two contracts relating to the same project. The claims in question were based on an original and amended contract, respectively.[80] The 'same legal relationship' requirement will likely also be satisfied in cases involving repeat orders for the sale of goods that are made under a series of identical contracts.[81]

4.3[d][iii] Compatible Arbitration Agreements

The last condition for consolidation under Article 29.2(c) is that the arbitration agreements in question be 'compatible'. Compatibility does not mean that the agreements must be identical. The agreements must, however, be aligned on the key aspects of an arbitration agreement, including on the seat, appointing authorities, procedure for the tribunal's constitution, the language of the arbitration and any preconditions to the commencement of the arbitration.[82] As one commentator notes,

> Clauses will be considered incompatible if the difference relates to a fundamental element of the arbitration agreement: the institutional or ad hoc nature of the arbitration, the seat, the number of arbitrators, the appointment procedure. If, on the other hand, the difference relates to a secondary element (law applicable to the merits, steps to be taken before the initiation of the procedure, etc.), the clauses will be considered compatible.[83]

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78 Fry et al., *supra* note 34, para. 3-357.

79 Pair and Frankenstein, *supra* note 73, p. 1075.

80 *Ibid*.

81 *See* Moser and Bao, *supra* note 25, para. 10.109.

82 *See ibid*., para. 10.113 (identifying preconditions to the commencement of arbitration and the qualifications of arbitrators as relevant factors in assessing compatibility).

83 Hanotiau, *supra* note 74, para. 296. *See also* Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration*, trans. Stephen V. Berti and Annette Ponti (2d ed., Sweet & Maxwell 2007), p. 199 (incompatibility is typically found when 'the seat, the constitution of the arbitral tribunal or the applicable procedure differ'); Fry et al., *supra* note 34, para. 3-245 ('Providing for different languages of arbitration in different arbitration agreements will normally be considered as an incompatibility that prevents the arbitration from proceeding. However, providing for different laws applicable to the merits in different contracts will not normally be considered as an incompatibility because the arbitral tribunal need not apply the same substantive law to all the claims made in an arbitration; it can apply one law to the claims brought under one arbitration agreement and a different law to those brought under another').

The compatibility requirement is an essential precondition to consolidating arbitrations that arise out of different arbitration agreements, as it ensures that fundamental aspects of the parties' arbitration agreement remain unchanged once the proceedings are combined. The compatibility requirement thus appears in the consolidation provisions of all leading arbitral rules.[84]

4.3[e] Discretionary Factors

Even if the grounds in Article 29.2 are satisfied, the tribunal has the discretion to refuse consolidation. Under Article 29.3, in determining whether to grant a consolidation application, the tribunal must consider 'the stage of the arbitrations, whether consolidation of the arbitrations would serve the interests of justice and efficiency, and such other matters as it considers appropriate in the circumstances of the case'. As with the Chamber's discretionary powers under Article 29.1, the catch-all language in the third limb of Article 29.3 gives the tribunal broad latitude to determine whether consolidation is appropriate in any given case.

In exercising its discretion, the tribunal will likely take into account the same factors as those set out above in the context of consolidation by the Chamber – in particular, efficiency, prejudice to a party, the appointment of any arbitrators and the overlap of factual and legal issues. In the multiple arbitration agreements scenario under Article 29.2(c), the tribunal is also likely to consider whether the parties deliberately structured their transaction to segregate their obligations.[85] If so, the tribunal is unlikely to grant consolidation, as it would undermine party autonomy in the arrangement of their deal.

In addition, Article 29.3 expressly calls for the tribunal to consider the stage of the proceedings. Whereas this is less likely to be a concern for the Chamber, since it can act only at a very early stage of the proceedings when no tribunal has yet been constituted, the tribunal, on the other hand, may be asked to consolidate arbitrations that are at markedly different stages. Parties in one proceeding may be filing initial pleadings, while the other proceeding is in the document production phase. In such circumstances, consolidation is likely to have little appeal as it would unduly prolong the resolution of the more advanced proceedings.

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84 *See* 2017 SCC Arbitration Rules, art. 15(1)(iii); 2017 ICC Arbitration Rules, art. 10(c); 2016 SIAC Rules, rr. 8.1(c) and 8.7(a); 2013 HKIAC Administered Arbitration Rules, art. 28.1(c); 2014 LCIA Arbitration Rules, art. 22.1(x).

85 *See* Moser and Bao, *supra* note 25, para. 10.111.

5 FUTURE DIRECTIONS – CROSS-INSTITUTIONAL CONSOLIDATION

By incorporating new consolidation and joinder mechanisms, BCDR-AAA has brought its arbitration rules in line with international best practices relating to multiparty arbitrations. Today, most leading arbitral rules contain provisions that permit the consolidation of disputes arising under multiple contracts and between multiple parties. This has substantially enhanced the efficacy and quality of decision making in international arbitration.

The existing consolidation provisions of most institutional rules do not, however, provide a means to consolidate arbitrations that are subject to different arbitral rules, even if they satisfy the other criteria for consolidation (e.g. the disputes arise out of the same legal relationship or transaction). As explained above, consolidation is permissible only where the arbitration agreements in question are compatible, including by incorporating the same institutional rules.

While the choice of different institutional rules in a complex transaction may be deliberate, this is not always the case. Oftentimes, the difference is merely a reflection of the fact that the separate contracts were negotiated separately. Disputes arising under these related contracts are thus inadvertently forced into different fora, which leads to the inefficiencies and risks outlined above.

It is, of course, open to the parties at this stage to agree to consolidate their proceedings by agreeing to vary the applicable arbitral rules. Parties may also de facto consolidate their arbitrations by appointing the same arbitral tribunal to hear all the disputes.[86] Hearings may also be conducted concurrently or sequentially to mitigate the risk of inconsistent decisions.[87] These solutions are subject to the express consent of the parties provided after the dispute has arisen. However, for obvious reasons, such *ex post* consent is not always forthcoming. Parties may, for instance, wish to leverage the fragmentation of disputes, including the increase in time and costs, to try to secure a non-legal resolution of their claims. Parties are thus left exposed to an unsatisfactory dispute resolution framework that may lead to unfair outcomes, including through the risk of inconsistent decisions.

To address this lacuna in international arbitration, in December 2017, SIAC proposed a protocol, entered into by arbitral institutions, that would permit the consolidation of arbitrations subject to different arbitral rules. The protocol would remove one element of incompatibility between arbitration agreements that would otherwise preclude the consolidation of proceedings. Arbitration agreements would still need to align on other aspects, including on the choice of a seat.[88]

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[86] Leboulanger, *supra* note 4, pp. 61–62 (1996).
[87] *Ibid*.
[88] SIAC Memorandum on Cross-Institutional Consolidation, para. 8.

Although envisaged primarily as a bilateral agreement, it is equally feasible for three or more arbitral institutions to enter into a multilateral protocol on cross-institutional consolidation.

The proposed mechanism for cross-institutional consolidation is described in SIAC's *Memorandum Regarding Proposal on Cross-Institution Consolidation* ('SIAC Memorandum on Cross-Institutional Consolidation').[89] It is beyond the scope of this paper to traverse the details of SIAC's proposal. Rather, in this paper, the authors, who were closely involved with SIAC in developing the proposal, set out a brief summary of the proposal before addressing the theoretical and practical concerns that may arise from it.

5.1 Mechanism for Cross-Institutional Consolidation

In its proposal on cross-institutional consolidation, SIAC sets out a two-pronged framework covering (i) how arbitral institutions can determine whether proceedings under different arbitral rules should be consolidated; and (ii) how the proceedings should be administered, once consolidated.

5.1[a] Decision to Consolidate

As the discussion on Article 29 of the 2017 BCDR Rules evinces, although there are many similarities between arbitral rules on when proceedings under different arbitration agreements can be consolidated (e.g. the compatibility requirement and some formulation of a factual or legal nexus between the proceedings), there are also nuances that differentiate these mechanisms. For instance, BCDR-AAA and the ICC impose a requirement that the parties in the proceedings be the same,[90] while HKIAC, the SCC and SIAC do not.[91] In addition, under the SIAC and BCDR rules, both the institution and the tribunal are empowered to rule on consolidation applications, depending on the timing of the application,[92] whereas the SCC, ICC and HKIAC only authorize the institutions to act,[93] and the LCIA only authorizes the tribunal, with the approval of the LCIA Court.[94] The

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89 The memorandum is accessible on SIAC's website at http://siac.org.sg/images/stories/press_release/2017/Memorandum%20on%20Cross-Institutional%20Consolidation%20(with%20%20annexes).pdf.

90 2017 BCDR Rules, art. 29.2(c); 2017 ICC Arbitration Rules, art. 10(c).

91 2017 SCC Arbitration Rules, art. 15(1)(iii); 2016 SIAC Rules, rr. 8.1(c) and 8.7(c); 2013 HKIAC Administered Arbitration Rules, art. 28.1(c).

92 2017 BCDR Rules, arts. 29.1 and 29.2(c); 2016 SIAC Rules, rr. 8.1(c) and 8.7(c).

93 2017 SCC Arbitration Rules, art. 15(1)(iii); 2013 HKIAC Administered Arbitration Rules, art. 28.1(c); 2017 ICC Arbitration Rules, art. 10(c).

94 2014 LCIA Arbitration Rules, art. 22.1(x).

institutions also vary on issues such as the timing of the application and the power of the institution to revoke arbitrator appointments.

In light of these differences, SIAC proposes that arbitral institutions jointly develop a 'new, standalone mechanism' on the decision-making process for cross-institutional consolidation, which would establish the identity of the decision maker, the timing of the application, and the criteria applicable to determining when proceedings should be consolidated.[95] A joint committee, composed of members of the participating arbitral institutions, would be authorized to rule on the consolidation application, with a specific committee being appointed for each application.[96]

While institutions will need to dedicate time and resources to developing the mechanism, it is unlikely to be arduous given the limited scope of issues to be resolved.[97] The mechanism is ultimately the most favourable as it ensures democratic and equitable decision making since all the institutions whose rules are implicated in the consolidation application can participate in the decision-making process. Thus, it avoids giving any one institution substantial discretion, which could give rise to reservations by the parties and the arbitral institutions involved.[98]

5.1[b] Administering the Consolidated Proceedings

Once consolidated, SIAC proposes that the proceedings be administered by one arbitral institution under its own rules, rather than jointly administered by the institutions under an entirely new set of rules.[99] While the latter approach has benefits, including being more democratic and equitable, it would be practically complex and resource-intensive for arbitral institutions to negotiate and jointly administer an entirely new set of rules.[100] This could, in turn, lead to an undue increase in time and costs for the parties.

SIAC proposes the use of objective criteria to determine the arbitral institution that will administer the consolidated proceeding. Possible standards include the number of cases being consolidated under each institution's rules, the aggregate value of the disputes and the timing of the first-commenced arbitration. Each of these factors have their advantages and disadvantages, which are explored

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95 SIAC Memorandum on Cross-Institutional Consolidation, para. 13.
96 *Ibid*.
97 *Ibid.,* para. 15.
98 *Ibid*., para. 14.
99 *Ibid*., paras. 28–30.
100 *Ibid*.

in greater detail in the SIAC Memorandum on Cross-Institutional Consolidation.[101]

5.2 Theoretical and Practical Concerns

While SIAC's proposal for cross-institutional consolidation offers a means to reduce the fragmentation of disputes, it also raises theoretical and practical concerns, including in relation to party autonomy, the enforceability of any award rendered and increased time and costs. While it is important to give close consideration to these concerns, when unpacked they do not, in the authors' view, pose insurmountable obstacles to the notion of cross-institutional consolidation.

5.2[a] Party Autonomy

Perhaps the most significant concern that has been raised in relation to the proposal for cross-institutional consolidation is that it insufficiently respects party autonomy. While this criticism is superficially attractive, it does not withstand scrutiny.

Party autonomy is indisputably the touchstone of arbitration. It requires that parties, subject to the limits of applicable national law, be allowed to define their own arbitral framework. That autonomy breaks down when parties are mandatorily subject to rules they did not agree to.

However, the proposal for cross-institutional consolidation does not envisage detracting from the parties' freedom of choice. Quite to the contrary, by choosing certain rules that incorporate a cross-institutional consolidation protocol, parties also choose that protocol. This is the principle of deemed consent that is well established in international arbitration.[102] Indeed, existing consolidation and joinder mechanisms in arbitral rules are also premised on notions of deemed consent.[103] By agreeing to the SCC Arbitration Rules, for instance, parties accept the possibility that their arbitration may be consolidated with another arbitration arising out of a different arbitration agreement and involving different parties, so long as both proceedings arise out of the same transaction or series of transactions and the arbitration agreements are compatible.[104]

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101 *Ibid*., paras. 31–41.

102 *See e.g.* Voser, *supra* note 2, p. 360 ('In institutional arbitration . . . the parties are deemed to have consented to any solution the institutional rules provide regarding multiparty arbitration, such as rules on consolidation or joining of third parties'). This could include cross-institution consolidation.

103 *See e.g.* Moser and Bao, *supra* note 25, para. 10.08 ('By agreeing to arbitrate under the HKIAC Rules, the parties are deemed to have given consent in principle to joinder and consolidation in advance of any dispute').

104 2017 SCC Arbitration Rules, art. 15(1)(iii).

Furthermore, the cross-institutional consolidation protocol is by no means mandatory. Parties are thus entirely free to contract out of it in their arbitration agreements. Such carve-outs are not uncommon. For instance, substantive choice-of-law clauses often provide for a specific governing law excepting its conflicts-of-law rules. Institutions may also make the protocol subject to the express consent of the parties, on an opt-in basis.

To the extent that the parties may have deliberately chosen to separate certain aspects of their transaction, the joint committee reviewing the consolidation application can exercise its discretion to refuse consolidation. Again, existing consolidation mechanisms already provide for such a safety net to ensure that party autonomy is preserved.[105]

It may be argued that the mere choice of different arbitral rules, absent further factual indicators, demonstrates an intention to keep transactions, and thus disputes, separate. However, this attribution of intention to the parties is detached from the realities of contract negotiation. Contracts in complex transactions, particularly where they involve different parties, are invariably negotiated separately. Even where aspects of the contracts may interrelate, it is unusual for dispute resolution mechanisms to be jointly negotiated. As noted above, dispute resolution clauses are often drafted as an afterthought at the end of the negotiation process.[106]

Relatedly, it may be argued that the protocol exposes parties to a potentially unknown and limitless universe of arbitral rules since institutions can continue to enter into new agreements on cross-institutional consolidation even after the date of the parties' arbitration agreement. Parties cannot have consented to arbitrate under rules that they were unaware of at the time of the arbitration agreement. This argument is also easily disposed of. The protocol can, and should, provide that parties are bound only by the cross-institutional consolidation protocols that exist at the time of the arbitration agreement.

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[105] *See* Moser and Bao, *supra* note 25, para. 10.111 ('In general, where the relevant agreements form part of the same project or contractual matrix, they will be judged to form part of the same transaction, or series of transactions. However, there may be circumstances in which parties have deliberately structured their transactions to separate certain aspects of the deal . . . In such cases, HKIAC may exercise its discretion to decline consolidation, so as not to subvert the parties' intentions').

[106] *See e.g.* Blackaby et al., *supra* note 4, pp. 72–73 ('[arbitration clauses] are often . . . the last clauses to be considered in contract negotiations . . . insufficient thought is given to how disputes are to be resolved . . .'); *see also FirstLink Investments Corp. Ltd v. GT Payment Pte Ltd and others* [2014] SGHCR 12, para. 1 ('"midnight clauses" may be included in the main contract very late in the day along with other standard terms just before the contract is signed, understandably so as most parties would be enthusiastic about concluding the negotiations on the contractual obligations, while failing to direct their minds to a possible breakdown of the commercial relationship and the attendant specifics of the dispute resolution process').

5.2[b] Enforceability of the Award

Related to party autonomy is a concern that any award rendered in the consolidated proceeding may be unenforceable[107] or annulled[108] because the arbitration was not conducted in accordance with the arbitral rules chosen by the parties in their arbitration agreement. It may also be argued that the new rules to which the parties are subject as a result of the cross-institutional consolidation contain fundamental differences from the parties' chosen rules. For instance, some institutions provide for mechanisms like emergency or expedited arbitration,[109] which are unavailable under others.[110]

As explained above, by incorporating arbitral rules that provide for cross-institutional consolidation, the parties are deemed to have consented to the possibility of their disputes being subject to the rules of another arbitral institution that is party to the protocol at the time of the arbitration agreement. It is therefore unlikely that any enforceability issues will materialize in most developed jurisdictions.

5.2[c] Confidentiality

Another theoretical concern relates to the impact cross-institutional consolidation will have on the confidentiality of proceedings. By consolidating proceedings under different institutional rules, pursuant to different arbitration agreements and between potentially different parties, some may argue that it undermines the parties' expectations on the confidentiality of their arbitral proceedings.

However, confidentiality should not present an insurmountable obstacle to the cross-institutional consolidation. First, as one commentator notes, 'a considerable number of arbitration institutions address the matter of confidentiality in great detail'.[111] Examples include the rules of the LCIA, SIAC, HKIAC, SCC, ICDR-AAA, ACICA and BCDR-AAA itself.[112] Even where institutions do not impose a specific confidentiality obligation, as with the ICC, the parties can request the tribunal to 'take measures for protecting trade secrets and confidential information'.[113] In ordinary circumstances, therefore, each arbitration will

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107 *See* New York Convention, art.V(1)(d).
108 *See e.g.* UNCITRAL Model Law on International Commercial Arbitration, art. 34(2)(a)(iv).
109 *See e.g.* 2016 SIAC Rules, r. 30 and sched. 1; 2013 HKIAC Administered Arbitration Rules, art. 41.
110 *See e.g.* 2012 CAM-CCBC Arbitration Rules.
111 Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International, 2011), p. 74.
112 *See e.g.* 2014 LCIA Arbitration Rules, art. 30; 2016 SIAC Rules, r. 39; 2013 HKIAC Administered Arbitration Rules, art. 42; 2017 SCC Arbitration Rules, art. 3; 2014 ICDR-AAA International Arbitration Rules, art. 37; 2016 ACICA Arbitration Rules, art. 22; 2017 BCDR Rules, art. 40.
113 *See* 2017 ICC Arbitration Rules, art. 22(3).

continue to retain its confidential character. Cross-institutional consolidation will not detract from this baseline position.

Second, existing consolidation mechanisms in many arbitral rules already permit disputes under different arbitration agreements and between different parties to be heard in a single forum.[114] Thus, in principle, international arbitration has already crossed the Rubicon. Non-parties to an arbitration and arbitration agreement can be brought into proceedings. The mere fact that the proceedings to be consolidated arise under different rules does not change the analysis.

5.2[d] Deadlocks in Decision Making

One practical concern is how deadlocks in decision making by an even-numbered joint committee of the arbitral institutions will be resolved. This is an issue that will need to be addressed in the protocol by the negotiating arbitral institutions. One, relatively straightforward, solution would be to require that any decisions be made unanimously.

There is a risk that members of the joint committee may withhold consent to ensure that their arbitral institution retains administrative control over those proceedings that are subject to its rules. In practice, however, this risk is unlikely to materialize with great frequency. Members of the joint committee are likely to comprise well-established academics and practitioners who sit on the courts or boards of the arbitral institutions. These individuals are unlikely to unreasonably obstruct the consolidation of proceedings. In any event, the reputational risk of acting in a recalcitrant manner will counterbalance the risk of unreasonable decision making.

5.2[e] Increased Costs and Delays

Another practical concern is whether cross-institutional consolidation – in particular, the process of having a joint committee of the arbitral institutions decide the consolidation applications – would increase costs and cause delays in the proceedings. As with any application in the arbitral (or even litigation) process, it is inevitable that an application for cross-institutional consolidation will result in additional costs for the parties (in the form of legal resources) and prolong the dispute.

However, an increase in time and costs cannot be considered in absolute terms. Rather, it must be weighed against the benefits of a consolidated arbitration,

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[114] *See e.g.* 2017 SCC Arbitration Rules, art. 15(1)(iii); 2016 SIAC Rules, rr. 8.1(c) and 8.7(c); 2013 HKIAC Administered Arbitration Rules, art. 28.1(c).

including the reduction in parallel proceedings and the attendant costs of having to litigate overlapping factual or legal issues in multiple fora. Consolidated proceedings also avoid the risk that parties receive conflicting decisions that may ultimately result in the separate proceedings being wasteful and ineffective in meaningfully resolving the parties' dispute. Therefore, looked at holistically, it is likely that cross-institutional consolidation will result in more streamlined and cost-effective proceedings for the parties.

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Although novel, the proposal for cross-institutional consolidation is by no means radical. It builds on existing principles in international arbitration, such as deemed consent, to develop the existing framework for complex multiparty dispute resolution. As of the writing of this article, a number of leading arbitral institutions have agreed to form a working group to discuss the feasibility of, and potential framework for, a cross-institutional consolidation protocol. If implemented, the protocol will affirm the role of arbitral institutions in shaping the frontiers of international arbitration, while creating a unique platform for cooperation between institutions to harness the uses of multiparty procedures for the benefit of parties.

6 CONCLUSION

The new joinder and consolidation provisions in Articles 28 and 29 of the 2017 BCDR Rules are a valuable addition and reflect the institution's modernized approach to case management and dispute resolution. By expanding the range of procedural mechanisms available to parties in multiparty disputes, BCDR-AAA has enhanced the efficiency and quality of the dispute resolution process that it can offer to parties. With these rules, BCDR-AAA is also poised to consider innovative mechanisms like the protocol on cross-institutional consolidation and further develop the international arbitration landscape.