PEPPERDINE UNIVERSITY

Pepperdine Dispute Resolution Law Journal

Volume 17 | Issue 1 Article 2

5-1-2017

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ABSTRACT

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This article deals with the question whether arbitration institutions should introduce a consolidation provision in their respective rules, and if so, under what conditions consolidation should be ordered. It stresses the general advantages and potential disadvantages which consolidation may have. It further investigates whether the parties' interests regarding consolidation are sufficiently respected in the absence of an express consolidation rule. In this regard, it argues that interpretation of arbitration agreements can have a detrimental outcome, and therefore, the introduction of a consolidation provision in institutional rules is recommended. The article goes on to compare various consolidation provisions of different arbitration institutions and examines whether these rules could serve as a model for those arbitration institutions, which have not yet adopted a consolidation provision in their arbitration rules.

§ 1: INTRODUCTION

International commercial arbitration as well as domestic arbitration are developing dynamically and are more and more frequently used as an

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The author would like to thank Professor Peter Gottwald for his valuable guidance in the completion of this article. He is also grateful to Professor Athanassios Kaissis for organizing a highly interesting LL.M. programme at the International Hellenic University of Thessaloniki.

He is sincerely grateful to Professor Herbert Kronke for his generous help and support. Finally, the author expresses many thanks to Professor Heinz-Peter Mansel for his guidance throughout the author's academic life.

alternative dispute resolution mechanism in the financial and economic world.[1] There are many reasons for this, such as: the contractual nature of arbitration which grants the parties the freedom to adjust the procedure to their particular demands; the efficiency of arbitral proceedings in comparison to litigation; the fact that parties that arbitrate to avoid litigating their disputes under a foreign jurisdiction, thus eliminating the risks of facing a hostile court and the problem of obtaining competent legal counsel in a different country; and lastly, judicial review of arbitral decisions is limited and arbitral awards are as a rule final.[2]

Traditionally, international commercial arbitration has been perceived as an arrangement between two parties: a claimant and a respondent.[3] This approach started to change in recent years with international business transactions becoming more complex and more global in its reach.[4] In today's globalized economy, a large number of interrelated agreements can be found in the performance of major projects.[5] Consequently, this picture is increasingly reflected in arbitral procedures with the effect that the number of complex arbitrations, consisting of at least two parties and/or more than one contract, has increased in recent years.[6] While twenty-five years ago it

1. For example, 147 disputes were referred to the London Court of International Arbitration in 2000. In 2011 the cases increased to 224. *See LCIA Statistics 2000-2011,* ARBITRATIONS RUSSIA, http://www.arbitrations.ru/files/articles/uploaded/LICA_stats_2000-2011.pdf [https://web.archive.org/web/20130814213433/http://arbitrations.ru/files/articles/uploaded/LICA_stats_2000-2011.pdf] (Last visited Sept. 9, 2016).

2. *See* Juliska M. Aponte, *Compulsory Consolidation of International Arbitral Proceedings: Effects on Pacta Sunt Servanda and the General Arbitral Process*, 2 TUL. J. INT'L & COMP. L. 223, 224 (1994); E. Scott Fraser, *International Arbitration of Multi-Party Contract Disputes: The Need for Change*, 6 LOY. L.A. INT'L & COMP. L. REV. 427, 429 (1983); Matthew D. Schwartz, *Multiparty Disputes and Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma?*, 22 CASE W. RES. J. INT'L L. 341, 342 (1990); Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 474 et seq. (1987); Irene M. Ten Cate, *Multi-Party and Multi-Contract Arbitrations: Procedural Mechanisms and Interpretation of Arbitration Under U.S. Law*, 15 AM. REV. INT'L ARB. 133, 133 (2004).

3. Richard Bamforth & Katerina Maidment, *"All Join In" or Not? How Well Does International Arbitration Cater for Disputes Involving Multiple Parties or Related Claims?,* 27 ASA BULL. 3, 3 (2009); JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 376 (Kluwer Law International 2003); Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L. J. 89, 91 (1995); S. I. Strong, *Intervention 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, 995 et seq. (1998).

4. Bamforth & Maidment, *supra* note 3.

5. *Id*. at 3-4.

6. *Id*.

was estimated that about 20% of the commenced arbitrations involved three or more parties,[7] today about 30% of the commenced arbitration procedures have a complex structure.[8]

However, the frequency with which complex transactions are beginning to occur suggests the growing need for workable solutions in the field of arbitration, especially because unforeseen problems might occur in such situations.[9] The multiplicity of issues, agreements, or parties involved in a certain dispute may give rise to parallel proceedings, and this can further lead to conflicting decisions.[10]

The problems connected with complex arbitrations have already been recognized more than twenty years ago with the effect that major arbitral institutions have been called upon to include provisions to their rules providing for consolidation.[11] Although a number of procedural tools exist which could also be considered to avoid these undesired results,[12] consolidation of parallel proceedings has been seen as the most promising way to handle these problems.[13]

Despite the fact that problems related to complex arbitrations have been detected some decades ago, arbitral institutions have only in recent years begun to provide for the consolidation of arbitrations in their respective rules to avoid parallel proceedings with all of its ensuing problems.[14] Indeed, a real wave of reform was initiated by several arbitral institutions within the last three years in order to provide, inter alia, a consolidation provision in

7. Platte suggests that in the period between 1984 and 1988 about 21 percent of the pending ICC cases involved three or more parties. Martin Platte, *When Should an Arbitrator Join Cases?*, 18 ARB. INT'L 67 (2002). E. Schwartz suggests that in 1992 approximately 20% of the arbitrations organised by the ICC Court involved more than two parties. Eric A. Schwartz, *Multi-Party Arbitration and the ICC*, 10 J. INT'L ARB. 5, 5 (1993).

8. Born states that roughly a third of all ICC arbitrations involve now multiple parties. 2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2565 et seq. (2d ed., Kluwer Law International 2014). Wyss suggests that in about 28% of the ICC arbitration cases more than two parties are involved. Lukas Wyss, *Multi-party contract and multi-party arbitration proceedings in Switzerland: What commercial users should know*, BRATSCHI WIEDERKEHR & BUOB ARBITRATION NEWSLETTER (August 1, 2014), https://www.bratschi-law.ch/fileadmin/daten/dokumente/newsletter/2014/2014-08-21_05_Finaler_Beitrag_LWY.pdf.

9. Bernardo M. Cremades & Ignacio Madalena, *Parallel Proceedings in International Arbitration*, 24 ARB. INT'L 507, 538 (2008); Ten Cate, *supra* note 2, at 134.

10. Cremades & Madalena, *supra* note 9.

11. Schwartz, *supra* note 2, at 372.

12. These include, inter alia, joinder, intervention and stay of proceedings.

13. Howard S. Miller, *Consolidation in Hong Kong: The Shui on Case*, 3 ARB. INT'L 87, 90 (1987).

14. Bamforth & Maidment, *supra* note 3, at 15.

their respective rules.[15] However, numerous international commercial arbitration institutions have not followed this wave of reformation.[16] Among these are, for instance: the ADR Institute of Canada (ADRIC), the Arbitration Foundation of Southern Africa (AFSA), the Arbitration Center of Mexico (CAM), the Milan Chamber of Arbitration (CAM), the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the German Institution of Arbitration (DIS), the Dubai International Arbitration Centre (DIAC), the Indian Institute of Arbitration & Mediation (IIAM), and the Israeli Institute of Commercial Arbitration.[17] The purpose of the present article is to examine the question whether there is a need for arbitration institutions to introduce a consolidation provision in their respective rules and, if so, under what conditions consolidation should be ordered. As a preliminary step, the concept of consolidation will be defined, and situations in which complex arbitrations may emerge will be illustrated (**§ 2**). After that, the general advantages and potential disadvantages of consolidation will be discussed, with particular regard to multi-contract and multi-party situations (**§ 3**). Afterwards, the question will be raised whether the parties' interests regarding consolidation are sufficiently respected in the absence of an express consolidation rule (**§ 4**). Finally, attention will be given to the content of various consolidation provisions which have been introduced by a number of arbitral institutions in their arbitration rules (**§ 5**). Regarding the last point, the question will be posed whether these rules could serve as a model for those arbitration institutions, which have not yet adopted a consolidation provision in their arbitration rules.

§ 2: CONSOLIDATION AND COMPLEX ARBITRATIONS

Before beginning any analysis, the term consolidation must be defined, and the different types of complex structured arbitration procedures must be distinguished. This is important because the further analysis is basically centered on these terms. In addition, it is also critical for understanding the problems raised by complex arbitrations with respect to the interpretation of arbitration agreements.[18]

15. Strong, *supra* note 3.
16. *Id*.
17. *Id*.
18. This will be analysed *infra* in § 3.

I. Definition of the Term Consolidation

The concept of consolidation can be understood in different ways.[19] For the purpose of this article, consolidation is defined as the unification of two or more independent but related cases, which are pending or initiated, into one single proceeding, where a single tribunal will render a binding award with regard to all of the claims that would have been otherwise included in separate arbitrations.[20] Consolidation does not necessitate more than two parties, but can also take place in two-party situations when more than one set of proceedings are pending alternatively initiated between those two parties.[21]

II. Complex Arbitrations

As mentioned above, complex arbitrations are increasing. The term "complex arbitration" is to be understood as an umbrella term in this article covering all arbitration proceedings involving at least two parties and/or more than one contract.[22] In this context, there are various combinations possible.

1. Several Parties to One Contract

It is increasingly common, particularly in international trade and commerce, for individuals, corporations, or State agencies to participate in a joint venture or consortium or in some other legal relationship of this kind, in order to enter into a contract with another party or parties.[23]

The *Dutco* case is a famous example of several parties to one contract.[24] The *Dutco* case was an arbitration process regarding the construction of a

19. Strong, *supra* note 3, at 921.

20. 2 BORN, *supra* note 8, at 2564, n. 2; LARA PAIR, CONSOLIDATION IN INTERNATIONAL COMMERCIAL ARBITRATION – THE ICC AND SWISS RULES 9 (Eleven Publishing 2011); Platte, *supra* note 7, at 68.

21. Platte, *supra* note 7, at 68. Some authors define consolidation more narrowly, requiring that the pending cases to be consolidated are between *different* parties. *See, e.g.*, Dominique T. Hascher, *Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration?*, 1 J. INT'L ARB. 127, 127 (1984); Stipanowich, *supra* note 2, at 492, n.93.

22. Ten Cate, *supra* note 2, at 134.

23. Platte, *supra* note 7, at 70; Edwin Tong Chun Fai & Nakul Dewan, *Drafting Arbitration Agreements with 'Consolidation' in Mind?*, 5 ASIAN INT'L ARB. J. 70, 72 (2009).

24. BKMI Industrienlagen GmbH & Siemens AG v. Dutco Construction, Cour de Cassation (1er Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 7, 1992, [Pourvoi N° 89-18708 89-18726], REVUE DE L'ARBITRAGE 1982 470-472 (Fr.) [Hereinafter *Dutco*].

cement factory.[25] Dutco had entered into a contract with a consortium of two German companies, BKMI and Siemens.[26] Dutco commenced an ICC arbitration proceeding against BKMI and Siemens in which it alleged separate and distinct breaches of the consortium agreement by each of them.[27]

2. Several Contracts with Different Parties

A different conceivable situation arises in case of several contracts with different parties, each of which has a bearing on the issues in dispute.[28] Again, this is a situation that is not uncommon in modern international trade and commerce.[29] A major international construction project is likely to involve not only the employer and the main contractor, but also a host of specialized suppliers and sub-contractors.[30] Each party operates under different contracts, often with different dispute resolution clauses.[31] Failure to establish a coordinated dispute resolution regime may result in parallel proceedings in case a dispute arises between the various participants of the project.[32] Such a situation can be illustrated by the example of the *Adgas* case.[33] In this case, the company Abu Dhabi Gas Liquefaction Co. Ltd (Adgas) was the owner of a liquefied gas production plant in the Persian Gulf.[34] Adgas contracted with a contractor to build storing tanks for liquefied gas.[35] The main contractor entered into a contract with a Japanese subcontractor.[36]

25. *Id*.
26. *Id*.
27. *Id*.
28. NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & J. MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 152 (Oxford: Oxford University Press, 5th ed. 2009).
29. *Id*. at 152; Cremades & Madalena, *supra* note 9, at 518.
30. BLACKABY, PARTASIDES, REDFERN & HUNTER, *supra* note 28, at 152.
31. Cremades & Madalena, *supra* note 9, at 518.
32. *Id*.
33. *Abu Dhabi Gas Liquefaction Company v. Eastern Bechtel Corporation*, I.L.M., 1054, 1054-1065 (1982) [Hereinafter *Adgas*].
34. *Id*.
35. *Id*.
36. *Id*.

3. Two Parties to Several Contracts

Parallel proceedings may also occur when it is impossible to bring within one single proceeding all the claims from the same legal relationship between the same parties or when one party considers that the award rendered does not fully settle a dispute with the other party.[37] The parties may also enter into a general agreement and several ancillary agreements out of which different claims arise.[38] Examples of ancillary agreements are sales agreements, financing agreements, and service agreements.[39] The main difference to the situations mentioned above is that here only two parties are involved.

4. Distinction between Multi-Party and Multi-Contract Arbitration

The situations in which several parties are involved is commonly referred to as *multi-party* arbitration.[40] In these and in similar cases, the arbitration is deemed multi-party because more than two parties are involved in the proceedings even though it is possible that only two interests are at stake.[41] In contrast, the situation in which only two parties are involved is known as *multi-contract* arbitration.[42] The term multi-contract arbitration should not be confused with multi-party arbitration. The distinction between the concept of multi-party and multi-contract arbitration is critical for understanding the problems that could arise by complex arbitrations.

§ 3: ADVANTAGES AND DISADVANTAGES OF CONSOLIDATION

I. Introduction

As the numbers of complex arbitration procedures have increased in recent years and together with them the related problems, the question has to be raised if consolidation is the right mechanism to handle these situations.[43] The implementation of a consolidation provision into institutional rules is

37. Cremades & Madalena, *supra* note 9, at 522.
38. Ten Cate, *supra* note 2, at 134.
39. *Id*. at 134, n.6.
40. BLACKABY, PARTASIDES, REDFERN & HUNTER, *supra* note 28, at 149-50; Platte, *supra* note 7, at 70.
41. Ferdinando Emanuele & Milo Molfa, *Multiparty Arbitrations: The Italian Perspective*, 5 EUR. & MID. EAST. ARB. REV. 64 (2012).
42. Platte, *supra* note 7, at 70.
43. Bamforth & Maidment, *supra* note 3, at 8-9; Schwartz, *supra* note 2, at 372-73.

suitable only if this mechanism does not reveal a disadvantageous impact on the parties involved in the consolidated proceedings.[44]

Therefore, as a first step, the general advantages and potential disadvantages of the procedural tool consolidation will be illustrated in this chapter.[45] After that, a closer look will be taken at the specific effects of consolidation on multi-party and multi-contract arbitration. If the analysis leads to the result that the disadvantages outweigh the advantages, it would not make sense for arbitration institutions to implement a consolidation provision in their respective rules.

II. General Advantages of Consolidation

Consolidating parallel proceedings has at least two strong advantages, such as promoting efficiency and the prevention of inconsistent awards.[46]

1. Efficiency

Whenever disputes arise from the same facts or from related facts, consolidation greatly contributes to make the arbitration proceedings more efficient.[47] In the context of consolidating arbitral proceedings the concept of efficiency means that significant savings of both time and money can be realized if the presentation of evidence and witness/expert testimony can be made once, rather than duplicated before two or more different tribunals.[48] Furthermore, the constitution of a single arbitral tribunal with jurisdiction over the issues of the two or more parallel disputes will also have a direct impact on decreasing the arbitral costs, as consolidation will avoid the constitution of unnecessary tribunals and will thus reduce arbitral fees, an expenditure which often constitutes a significant portion of costs of arbitration.[49]

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44. Schwartz, *supra* note 2, at 372-73.

45. Unlike many scientific papers on this topic, this article will not deal with the subject of disadvantages related to compelled consolidation. For an analysis of the disadvantages connected to forced consolidation *see, e.g.*, Julie C. Chiu, *Consolidation of Arbitral Proceeding and International Arbitration*, 7 J. INT'L ARB. 56-62 (1990); Philippe Leboulanger, *Multi-Contract Arbitration*, 13 J. INT'L ARB. 43, 64-70 (1996).

46. Chiu, *supra* note 45, at 55; Leboulanger, *supra* note 45, at 62; Fritz Nicklisch, *Multi-Party Arbitration and Dispute Resolution in Major Industrial Projects*, 11 J. INT'L ARB. 57, 69 (1994).

47. Leboulanger, *supra* note 45, at 62.

48. 2 BORN, *supra* note 8, at 2567; Chiu, *supra* note 45, at 55; Fraser, *supra* note 2, at 454; Platte, *supra* note 7, at 78; Ten Cate, *supra* note 2, at 138.

49. 2 BORN, *supra* note 8, at 2567; Leboulanger, *supra* note 45, at 62 et seq.; Lara Pair, *Efficiency at All Cost – Arbitration and Consolidation?*, KLUWER ARBITRATION BLOG (March 3,

2. Prevention of Inconsistent Awards

Another advantage of consolidating arbitral proceedings is that, with this mechanism, it is possible to minimize and, perhaps, to avoid altogether the problems associated with inconsistent or even contradictory awards.[50] The splitting of complex disputes would otherwise leave the door open to inconsistent decisions and injustice.[51] This issue is of particular importance, especially with regard to countries which have ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or countries which have national legislation containing similar enforcement provisions.[52] This is because unlike judicial decisions in civil actions, inconsistent arbitral awards cannot be reconciled by courts examining the merits or the reasoning of the awards as the control of the enforcing court is limited to verifying whether a ground under Article V of the New York Convention exists.[53]

3. Confidence in the Process of Arbitration

Finally, it is stated that consolidation helps to promote confidence in the process of arbitration.[54] This can be best illustrated by the example of a tribunal which issues injunctive relief inconsistent with that of another tribunal—for instance, requiring a party to do something that another tribunal forbids to do.[55] The existence of conflicting decisions may threaten the legal predictability required by international business transactions.[56] It might be obvious that such decisions are not desirable and are seen as unjust results, which would be able to diminish the confidence in the process of arbitration, in particular, where issues of public interest are at stake.[57] Apart from that, by having all the necessary parties before the same tribunal in a

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2014), http://kluwerarbitrationblog.com/blog/2014/03/14/efficiency-at-all-cost-arbitration-and-consolidation/.

50. Bamforth & Maidment, *supra* note 3, at 4; 2 BORN, *supra* note 8, at 2567; Chiu, *supra* note 45, at 55 et seq.; Ten Cate, *supra* note 2, at 137.

51. Leboulanger, *supra* note 45, at 63.

52. Bamforth & Maidment, *supra* note 3, at 6-7.

53. Chiu, *supra* note 45, at 56; Patricia Nacimiento, *Article V(1)(a)*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 205, 210 (ed. Herbert Kronke et al., Kluwer Law International, 2010).

54. Chiu, *supra* note 45, at 56; Leboulanger, *supra* note 45, at 63.

55. *See* 2 BORN, *supra* note 8, at 2567 et seq.

56. Frank Spoorenberg & Jorge E. Viñuales, *Conflicting Decisions in International Arbitration*, 8 L. & PRACT. INT'L CTS. & TRIBS. 91, 92 (2009).

57. Chiu, *supra* note 45, at 56; Leboulanger, *supra* note 45, at 63.

consolidated proceeding, it is likely that the arbitrators will reach a more complete picture of the facts in dispute so as to issue an award whereby the risk of factual errors should decrease.[58]

III. Potential Disadvantages of Consolidation

At first glance, the benefits of consolidated parallel proceedings seem favorable. But one should not be deceived about this. Consolidation also has its drawbacks.

1. Inefficient to Some Parties

In some cases it might be possible that single arbitrations are more efficient for an individual disputant.[59] The above-mentioned benefits must be weighed against the additional costs to those who otherwise would have avoided complex arbitration proceedings.[60] This may be the case because the involvement of additional parties and matters in dispute will likely make arbitration more time-consuming and more costly than a two-party proceeding.[61] One reason for this is surely the increased organizational effort.[62] Scheduling hearings will be more difficult as a result of the need to accommodate the conflicting commitments of additional parties and also the hearing procedure will have to be structured so that all parties have the opportunity to participate in presenting their case.[63] "Furthermore, when cases are consolidated after arbitrators have been chosen for both proceedings, one (set of) arbitrator(s) is superfluous. The dismissed (set of) arbitrator(s) is entitled to certain compensation, decreasing thus cost efficiency. Similarly, costs may be increased because collection of evidence or other procedural steps must be repeated."[64]

58. Chiu, *supra* note 45, at 60.
59. Pair, *supra* note 49; Ten Cate, *supra* note 2, at 138.
60. Leboulanger, *supra* note 45, at 68; Stipanowich, *supra* note 2, at 505.
61. Stipanowich, *supra* note 2, at 505; Ten Cate, *supra* note 2, at 138.
62. Stipanowich, *supra* note 2, at 503.
63. *Id*. at 505.
64. Pair, *supra* note 49.

2. Confidentiality

Another issue concerns the maintenance of confidentiality. Most national court proceedings are not confidential.[65] Hearings and court dockets are open to the public, competitors, press, and regulators in many countries and parties are often free to disclose submissions and evidence to the public.[66] Public disclosure may impede compromises by hardening positions, aggravating tensions, or provoking collateral disputes.[67]

Unlike court proceedings, arbitration proceedings normally remain confidential.[68] Confidentiality is often considered to be one of the main advantages of international commercial arbitration.[69] In the context of arbitration, the concept of "[c]onfidentiality, in its purest form, means that the existence of the arbitration, the subject matter, the evidence, the documents that are prepared for and exchanged in the arbitration, and the arbitrators' awards and other decisions cannot be divulged to any third parties."[70] "It also means that only parties to the arbitration, their legal representatives and those who are specifically authorized by each party can attend the arbitration hearing."[71]

In complex arbitration proceedings the parties might worry about disclosing confidential information and it appears to be at odds with the notion of confidentiality if third parties, who are not signatories to the arbitration agreement, would participate in the arbitration proceeding.[72] This view was already held thirty years ago by Justice Leggatt who decided in the *Oxford Shipping* case that "[t]he concept of private arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only them. It is implicit in this

65. GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 15 (Kluwer Law International 2012).

66. *Id*.

67. *Id*.

68. BLACKABY, PARTASIDES, REDFERN & HUNTER, *supra* note 28, at 136.

69. *Id*.; Nicklisch, *supra* note 30, at 69; Lara Pair & Paul Frankenstein, *The New ICC Rule on Consolidation: Progress or Change?*, 25 EMORY INT'L L. REV. 1061, 1069 (2011); Platte, *supra* note 7, at 79.

70. Bamforth & Maidment, *supra* note 3, at 5; Loukas A. Mistelis, *Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corporation v. United States*, 21 ARB. INT'L 211, 213 (2005).

71. Mistelis, *supra* note 70.

72. Bamforth & Maidment, *supra* note 3, at 6; Ten Cate, *supra* note 2, at 138-39.

that strangers shall be excluded from the hearing and conduct of the arbitration[.]"[73]

3. Difficulties Regarding the Constitution of the Arbitral Tribunal

The parties' right to choose their own arbitrators who will hear and determine their dispute is held to be another major advantage of arbitration procedure and an important advantage over the court system.[74] It is a fundamental principle that the parties must have equal influence on the choice of the arbitrators.[75] Arbitration clauses,[76] institutional rules,[77] and national legislations often provide for a three-arbitrator tribunal—one appointed by each party and the third appointed either by the first two arbitrators jointly, by a designated institution or by the competent court.[78]

However, the selection of the arbitral tribunal is one of the most complex and difficult aspects of consolidation.[79] Accordingly, a number of problems are closely linked to the constitution of the arbitral tribunal.[80] Typical problems and issues arise if the proceedings to be consolidated have already been commenced and the tribunals are constituted with different arbitrators.[81] In this case, for conducting the consolidated proceeding, a decision has to be taken which arbitrator shall be competent and which one's contract shall be cancelled.[82] A further problem is posed if more than one party, which follow different interests and therefore cannot agree upon an arbitrator jointly, shall select a co-arbitrator.[83] It is often rightly argued that the foregoing customary appointment procedure does not work if such a

73. Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha, [1984] 2 Lloyd's Rep. 373 (QB) at 379 (Eng.).

74. Bamforth & Maidment, *supra* note 3, at 6; 2 BORN, *supra* note 8, at 2607; Nicklisch, *supra* note 30, at 69.

75. *Ductco, supra* note 24; Platte, *supra* note 7, at 74.

76. 2 BORN, *supra* note 8, at 2607.

77. *See* DEUTSCHE INSTITUTION FÜR SCHIEDSGERICHTBARKEIT E.V. [GERMAN INSTITUTION OF ARBITRATION], DIS ARBITRATION RULES 98 §§ 3, 12 (1998); Arbitration Institute of the Stockholm Chamber of Commerce, *SCC Arbitration Rules*, SCC INSTITUTE 1, 9 (2010), http://www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf, (Art. 12).

78. *See, e.g.*, ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], AS amended by Article 1 of the Act dated 10 October 2013, §§ 1034 (1), 1035 (3), *translation* at http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (Ger.).

79. 2 BORN, *supra* note 8, at 2607.

80. Bamforth & Maidment, *supra* note 3, at 11.

81. *Id*.

82. *Id*. at 18-19.

83. *Id*.

situation occurs.[84] The issue in such circumstances is how to constitute the tribunal in a manner that respects the principle that each party should be treated fairly and equally.[85] Ensuring the proper designation of the arbitral panel is of critical importance because "a failure to respect the parties' rights in the designation process can have severe consequences on the validity and enforceability of the award."[86] This has been emphasized by the French Cour de cassation's 1992 *Dutco* decision in which an ICC award rendered a three-party arbitration where each of the two respondents wanted to choose its own arbitrator has been annulled on the ground of inequality in the appointment of the tribunal.[87]

IV. Analysis

Looking at the general advantages and potential disadvantages of consolidating arbitral proceedings, one might question the usefulness of including consolidation provisions to institutional rules. However, a closer look at the alleged drawbacks of consolidation reveals that they are negligible. This can best be illustrated by comparing the negative impact consolidation might have in multi-contract arbitration with those it might have in multi-party arbitration.

1. Disadvantages of Multi-Contract Arbitration

In multi-contract arbitration the above-mentioned problems cannot, or only to a reduced extent, arise. Firstly, a third party, who is not a signatory to an arbitration agreement, is not involved in the merged proceedings.[88] Thus, confidentiality problems do not occur, since only signatories to the arbitration agreement will have access to sensitive information.

Secondly, consolidating parallel proceedings in respect of multi-contract arbitration causes no additional costs to the parties.[89] Again, the reason for this is again that no third party is involved in the consolidated proceedings.[90]

84. Izquierdo Piña, *supra* note 11, at 8 et seq.; Leboulanger, *supra* note 45, at 67.

85. Bamforth & Maidment, *supra* note 3, at 18-19.

86. Ricardo Ugarte & Thomas Bevilacqua, *Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions*, 27 J. INT'L ARB. 9, 8-9 et seq. (2010).

87. *Dutco, supra* note 24, at 472.

88. Leboulanger, *supra* note 45, at 64-65.

89. *Id*. at 68.

90. *Id*.

Consequently, no additional organizational effort is expected, *e.g.*, for scheduling the hearings.

Nevertheless, the composition of the arbitral tribunal may cause practical problems. On the one hand, in multi-contract arbitration the principle of equality is fully complied with as the parties do not lose their right to each appoint a different arbitrator.[91] But on the other hand, it is conceivable that complications occur, especially when the parallel proceedings to be consolidated have already been commenced with differently composed tribunals.[92] In such a situation, the question arises which the appointed arbitrators shall decide upon the consolidated proceeding.[93] Furthermore, the dismissed arbitrators will also be entitled to certain compensation.[94]

However, this problem can be prevented by permitting consolidation only on the condition that no more than one arbitration proceeding be commenced.[95] This solution prevents both complications with the composition of the consolidated tribunal and the subsequent payment of compensations to dismissed arbitrators.[96]

2. Disadvantages of Multi-Party Arbitration

In comparison to multi-contract arbitration, where the advantages clearly outweigh the risks in respect of consolidation, the situation in multi-party arbitration seems to be different since all of the mentioned disadvantages related to consolidation apply to multi-party arbitration. In summary, this means there is a substantial likelihood that consolidation of multi-party arbitration is associated not only with delays, increased costs and confidentiality infringements, but also with problems regarding the constitution of the arbitral tribunal.

However, it would be a fallacy to draw the conclusion, based on the above, that consolidation is incompatible with multi-party arbitration. The disadvantages resulting from consolidation in multi-party arbitration are less serious than it appears at first glance.

It may be correct that conducting consolidated proceedings involving different parties may take longer and result in additional costs to some

91. *Id*. at 66.
92. *Id*.
93. *Id*.
94. *Id*.
95. *Id*. at 68.
96. *Id*.

parties, but nevertheless, it must be kept in mind that consolidation is considered appropriate only in cases involving common issues and facts arising out of related transactions. Therefore, the same testimony and documentary evidence presumably will be presented whether a given proceeding involves two or more parties.[97] Also, bearing in mind that consolidation aims to avoid inconsistent awards, it consequently supports to some extent saving money, which would otherwise have to be spent because of inconsistent awards or for a recovery process.[98]

Furthermore, even if more than two different parties are involved in consolidated proceedings, the issues resulting from consolidation in respect of confidential information should not be exaggerated since they do not necessarily bar consolidation.[99] In fact, such problems often turn out to be limited because additional parties involved in the dispute usually "already have full or partial knowledge" of the confidential information.[100] If, however, confidentiality concerns should occur in a consolidated proceeding, one possible solution would be to require all parties "to sign confidentiality agreements that carry strict penalties for noncompliance."[101] Another solution is to structure the consolidated proceeding in a way, which restricts a party's access to information, that is not relevant to its case, and to limit subsequent use of such information.[102]

Finally, it is clear that if more than two parties are involved in the arbitration procedure, in which all have distinct interests, the arbitrator nomination might prove to be difficult in the case that every party insists on the nomination of its preferred co-arbitrator. Nevertheless, the problems and challenges concerning the constitution of the arbitral tribunal in a multi-party situation are not insurmountable. In most cases of multi-party arbitration, the parties, whether on the claimant or the respondent side, are closely connected and their positions and interests are almost identical. This generally permits multiple parties on a single side to reach agreement on the identity of a co-arbitrator with relatively little difficulty.[103] But even if

97. Stipanowich, *supra* note 2, at 505.
98. *Id*. at 506.
99. Ten Cate, *supra* note 2, at 139.
100. Strong takes generally this view in respect of third party participation in arbitration. Strong, *supra* note 3, at 933 et seq.
101. Strong, *supra* note 3, at 934; Ten Cate, *supra* note 2, at 139.
102. Chiu, *supra* note 45, at 60.
103. Ugarte & Bevilacqua, *supra* note 88, at 14.

parties cannot agree on a co-arbitrator jointly, a viable solution can be found in national legislations and the rules of the various arbitration institutions.[104]

As a reaction to the *Dutco* decision, virtually all arbitration institutions have incorporated explicit provisions in their arbitration rules dealing with the appointment of arbitrators in multi-party proceedings.[105] In the event that multiple claimants and/or respondents are not successful in agreeing upon a co-arbitrator, the arbitration institutions appoint all arbitrators or just the co-arbitrators in multi-party arbitrations under certain circumstances.[106]

One could assume that this changes the customary procedure of appointing the arbitrators significantly in a way which not all parties may desire as the parties' right to participate directly in selecting the tribunal will be denied.[107] However, this effect should not be overestimated. It should be stressed that the purpose of involving the parties in the process of selecting the arbitrators is not so much to inject a partisan element into the proceedings, but rather constitutes an expression of confidence by the nominating party in the arbitrator's fairness and neutrality.[108] Bearing the aforementioned in mind, it appears that the loss of the parties' right to appoint their own arbitrators might be acceptable.[109] In particular, this conclusion is confirmed by the fact that on the one hand the arbitrators are naturally under a duty to be fair and neutral.[110] On the other hand, in most cases the arbitration institutions' selection will depend—in addition to the arbitrators' neutrality and fairness—on the knowledge or expertise of the arbitrators on a particular legal or technical point. Thus, the choice of arbitrators by the various arbitration institutions will mostly comply with the parties' expectations regarding the desired arbitrators' profile.

In regards to the problem that arises if the proceedings to be consolidated have already been commenced and the tribunals are constituted with different arbitrators, reference can be made to the comments regarding the same issue in respect of multi-contract arbitration.

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104. *See, e.g.*, International Chamber of Commerce, *ICC Arbitration Rules*, ICC WORLD BUSINESS ORGANIZATION (January 1, 2012), http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/, (Article 12) [Hereinafter ICC Arbitration Rules]; *see also* GERMAN INSTITUTION OF ARBITRATION, *supra* note 79.

105. 2 BORN, *supra* note 8, at 2610; Ugarte & Bevilacqua, *supra* note 88, at 15 et seq.

106. *See, e.g.,* ICC Arbitration Rules, *supra* note 104, (Art. 12(8)); GERMAN INSTITUTION OF ARBITRATION, *supra* note 79 at § 13.2.

107. 2 BORN, *supra* note 8, at 2568; Izquierdo Piña, *supra* note 11, at 8 et seq.

108. Chiu, *supra* note 45, at 59; Ugarte & Bevilacqua, *supra* note 88, at 12.

109. *Id*.

110. Ugarte & Bevilacqua, *supra* note 88, at 12.

3. Conclusion

All in all, it can be said that in the event of multi-contract arbitration, neither of the parties has to fear detrimental effects by having all claims decided in a single arbitration. In fact, in such a constellation the advantages of consolidation are overwhelming.[111]

This may only be different where more than two parties are involved in arbitration proceedings. In such a case, confidentiality issues and issues regarding the constitution of the arbitral tribunal might occur. These potential problems can be limited by structuring the consolidated proceeding in a way that restricts a party's access to information that is not relevant to its case and by designating an arbitration institution as the appointing authority.[112] Especially the last point, the modification of the customary procedure of selecting the arbitrators, offers additional benefits of savings in both time and money and appears to do the least violence to principles of equal treatment and the parties' expectations regarding the arbitral process.[113]

Nevertheless, the possibility that consolidation might have a disadvantageous impact on multi-party arbitration still exists. The efficiencies deriving from consolidation must be seen in an overall context. Although multi-party arbitration might be beneficial for a party in the middle, since this party may save time and expenses, the possibilities open to one of the parties for lengthening or delaying the conduct of the proceedings are considerably heightened.[114] However, this is rather an issue that the arbitral institutions and arbitrators have to take into consideration when they decide on the question of whether consolidation is appropriate in the individual case. Therefore, in total, it can be stated that the potential disadvantages connected with consolidation are manageable and controllable.

§ 4: THE NEED FOR IMPLEMENTATION OF A CONSOLIDATION PROVISION

I. Introduction

Since the disadvantages of consolidation do not outweigh the expected advantages, the way is paved, in principle, for an implementation of a

111. Ten Cate, *supra* note 2, at 138 et seq.
112. Schwartz, *supra* note 2, at 343.
113. 2 BORN, *supra* note 8, at 2608; Chiu, *supra* note 45, at 59.
114. Nicklisch, *supra* note 30, at 68.

consolidation provision in the institutional rules of those arbitral institutions that lack such a provision.[115]

However, in this context, the question arises to what extent it is necessary to adopt a corresponding consolidation rule? The introduction of such a provision would not make much sense if the parties' interests in respect of consolidation were, even without express regulation, sufficiently respected.[116] The adoption of a consolidation rule should not be an end in itself. Therefore, in this case, no explicit provision would be required.

In order to examine whether a consolidation provision should be implemented into institutional rules, the question has to be raised about how far an institutional rule that is silent on the issue of consolidation provides a possibility for consolidating parallel proceedings and whether this solution covers sufficiently the parties' interests.

II. Relationship of Consolidation and the Parties' Will

Unlike national courts, which have broad discretion, typically based on perceived considerations of fairness and efficiency, arbitration is based on the principle of private autonomy, and more especially on the principle of freedom of contract.[117] Therefore, the parties' consent is the main pillar in arbitration procedures.[118] As a voluntary dispute resolution mechanism, the arbitrator's authority and jurisdiction derives generally from the specific contractual language in the arbitration agreement.[119] This agreement empowers the tribunal, grants an arbitrator considerable freedom to interpret the facts and the law, and to decide cases in keeping with his personal sense of justice and equity.[120] On the other hand, the same arbitration agreement places significant limits on the arbitrator as he may rule only in the context of interpreting and applying the agreement between the parties.[121]

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115. Stipanowich, *supra* note 2, at 505.

116. Schwartz, *supra* note 2, at 362.

117. 2 BORN, *supra* note 8, at 2566; Werner Müller & Annette Keilmann, *Beteiligung am Schiedsverfahren wider Willen?*, 5 SCHIEDS VZ 113 (2007); Nicklisch, *supra* note 30, at 59.

118. Nicholas Greenwood & Richard Ellison, *Effective multi-party/multi-contract arbitration*, FTSE GLOBAL MARKETS, (July 7, 2014), *available at* http://www.ftseglobalmarkets.com/issues/issue-77-june-august-2014/effective-multi-party-multi-contract-arbitration.html; Müller & Keilmann, *supra* note 117, at 113.

119. Bernard Hanotiau, *Complex Multicontract-Multiparty Arbitrations*, 14 ARB. INT'L 369, 372 (1998); Strong, *supra* note 3, at 924.

120. Greenwood & Ellison, *supra* note 118; Hiroshi Motomura, *Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices*, 63 TUL. L. REV. 29, 43 (1988).

121. Motomura, *supra* note 84, at 43.

Accordingly, in the absence of an agreement between the parties, neither the tribunal nor the institution, which handles the arbitration, is entitled to consolidate separate proceedings, as this would be in direct contradiction to the consensual nature of arbitration and would thus exceed an arbitrator's authority.[122] For example, it would appear at odds with that consensual nature for a claimant to find himself in arbitration proceedings with a third party that the respondent has joined although the claimant has no interest in proceedings with that third party.[123] This applies even if one of the parties concerned has a strong interest in consolidating arbitration procedures in order to avoid conflicting decisions.[124]

Given the immense importance of the parties' consent, arbitrators, who are faced with the question of whether to consolidate parallel proceedings into one proceeding, will have to look first at the arbitration agreement in order to find out what the parties' position on this question is.[125] In this context, an arbitrator may encounter two different contractual situations: a contract that expressly considers the possibility for consolidation (either by allowing or prohibiting it) and a contract that is silent or vague regarding consolidation.[126]

In the case where all parties have expressly stipulated in their arbitration agreements to have related disputes resolved in a single arbitration,[127] there is no obstacle for consolidation and, consequently, either the appointing authority or the arbitral tribunals have to give effect to that language and join cases.[128] Conversely, when parties explicitly declare to conduct their disputes in separate procedures, arbitrators have to respect the principle of party autonomy, and thus are not entitled to order consolidation.[129] Hence, if all arbitration agreements would contain a carefully drafted consolidation clause, be it either by expressly allowing or refusing it, there would be no

122. Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635, 637 (9th Cir. 1984); Fraser, *supra* note 2, at 428; Nicklisch, *supra* note 30, at 59; Stipanowich, *supra* note 2, at 477.

123. Bamforth & Maidment, *supra* note 3, at 5.

124. Müller & Keilmann, *supra* note 117, at 121.

125. Bamforth & Maidment, *supra* note 3, at 5.

126. *Id*.

127. One example of an express agreement to consolidate parallel proceedings is an arbitration agreement incorporating institutional rules that provide for consolidation. *See* 2 BORN, *supra* note 8, at 2580.

128. Platte, *supra* note 7, at 69; Strong, *supra* note 3, at 924; Ten Cate, *supra* note 2, at 152.

129. For a dissenting opinion, refer to Strong who argues that such a language might be also disregarded based on efficiency arguments, public policy, or equitable grounds. Strong, *supra* note 3, at 924.

need to introduce a corresponding consolidation provision in the arbitration rules.

III. Consolidation in the Absence of a Consolidation Provision

However, contractual provisions that explicitly contain a reference to how to deal with complex structured arbitration are rare.[130] This is even the case in situations where arbitration proceedings with closely connected issues are at stake.[131] Accordingly, in the usual case, there will not be any express statement of intentions by the parties concerning consolidation. Instead, arbitrators will be faced with a contract that is silent on the issue of consolidation.[132] Nevertheless, as consent is a "multifaceted concept,"[133] which does not cover only express consent but also consent by conduct, the parties' agreement to consolidate arbitration procedures may also be implied.[134]

Based on this, the question arises in which situations an implied agreement (or rejection) to join separate proceedings into one can be assumed. In accordance with Hanotiau's view "[a]ny answer to the question raised above must . . . start from an interpretation of the intent of the parties in the case in question, such as it is expressed in the arbitration clause(s)," since the arbitrator's decision to consolidate parallel proceedings has to reflect the parties' will rather than that of the tribunal.[135] In that respect, scholars take different approaches in regards to the question on how to interpret a silent arbitration agreement and determining the parties' original intention.[136]

130. Bamforth & Maidment, *supra* note 3, at 7; 2 BORN, *supra* note 8, at 2581; Nicklisch, *supra* note 30, at 59; Strong, *supra* note 3, at 924.

131. This applies, for example, in the field of complex transnational maritime disputes. *See* Coleen C. Higgins, *Interim Measures in Transnational Maritime Arbitration*, 65 TUL. L. REV. 1519, 1533 (1991).

132. 2 BORN, *supra* note 8, at 2581; Leboulanger, *supra* note 45, at 66; Rau & Sherman, *supra* note 3, at 112; Strong, *supra* note 3, at 924; Ten Cate, *supra* note 2, at 154.

133. Bernard Hanotiau, *Consent to Arbitration: Do We Share a Common Vision?*, 27 ARB. INT'L 539, 553 et seq. (2011).

134. Cremades & Madalena, *supra* note 9, at 535 et seq.

135. Hanotiau, *supra* note 133, at 372.

136. Strong, *supra* note 3, at 924.

1. Rejection of Consolidation

Some authors assume that if consolidation has not been foreseen in the provisions of the arbitration clause, it is because the parties to a complex dispute have chosen to submit their disputes to separate arbitral tribunals despite the risk that the awards rendered may be inconsistent.[137] Indeed, it is conceivable that parties to arbitral procedures have omitted the introduction of a consolidation rule on purpose.[138] However, the presumption that the absence of a consolidation provision means that the parties have knowingly decided against it cannot be generalized, and is questionable at best.[139] The reason for this is mainly that contractual arbitration agreements are seldom the product of negotiation, and so the absence of a provision specifically addressing consolidation might signify only that the parties did not recognize at the time of the conclusion of the arbitration agreement that a situation could possibly occur in the future, which would make it necessary to consider the implementation of a consolidation provision in the arbitration agreement.[140] Therefore, it cannot be automatically inferred that the parties considered the issue of consolidation if the arbitration agreement is silent in respect of consolidating parallel arbitration procedures.

2. Interpretation in Favour of Consolidation

For that reason, the vast majority of legal scholars deal with the question in what circumstances the absence of an express agreement to merge parallel proceedings can nevertheless be interpreted in favour of consolidation.[141] The determination of whether the parties intended the use of the procedural tool consolidation is factual and has to be made on a case-by-case assessment.[142] Questions of implied agreement to consolidation depend in substantial part on the (**1**) language of the arbitration agreement, (**2**) the structure of the parties' contractual relations, and (**3**) the purpose of the arbitration agreement.[143]

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137. Aponte, *supra* note 2, at 251; Hascher, *supra* note 21, at 143.
138. *Id*.
139. Chiu, *supra* note 45, at 57.
140. Leboulanger, *supra* note 45, at 66; Stipanowich, *supra* note 2, at 496; Strong, *supra* note 3, at 924 et seq., n. 33.
141. Leboulanger, *supra* note 45, at 66.
142. Ten Cate, *supra* note 2, at 154.
143. Leboulanger, *supra* note 45, at 66.

2.1 Language of the Arbitration Agreement

A factor arbitrators should take into account in order to find some sort of implied consent to consolidation is the language of the arbitration agreement.[144] Certain expressions may signal the parties' understanding that a tribunal is allowed to order or, conversely, that a tribunal has to reject consolidation.[145] Furthermore, it may sometimes be possible that the level of detail found in an arbitration agreement allows arbitrators to draw conclusions regarding the parties' intention.[146] In this context, Ten Cate states that a carefully drafted clause which contains detailed provisions about procedural issues may indicate the parties' wish not to consolidate separate proceedings into one, whereas a hastily drafted clause that does not even address basic issues of arbitration may indicate that the parties did not intend to preclude consolidation.[147]

Additionally, the existence of identical or nearly identical arbitration clauses in multiple contracts can also be deemed an indication of the parties' intent to have related disputes resolved in a single proceeding.[148] On the other hand, the presence of consent to consolidate arbitration proceedings may be excluded from the outset when the content of the different arbitration clauses are found to be in conflict, for instance because they refer to different jurisdictions or because they provide for arbitration under different institutional rules (*e.g.*, DIS Rules in one arbitration and ICC Rules in another).[149] Equally, as Born notes, "where the parties have entered into different contracts, some of which contain no dispute resolution provision, it is very difficult to imply any agreement to consolidation in relation to disputes under the various contracts."[150]

Likewise, one might even think that the adoption of the traditional three-arbitrator tribunal, with the corresponding right of each party to select its arbitrator, could itself be some indication of the parties' intent to exclude consolidation.[151] The problem, however, with this assumption is that institutional rules providing for a tri-partite panel may also contain a

144. Rau & Sherman, *supra* note 3, at 112.
145. Ten Cate, *supra* note 2, at 154.
146. *Id*. at 155.
147. *Id*.
148. Platte, *supra* note 7, at 72.
149. Leboulanger, *supra* note 45, at 80 et. seq.; Nicklisch, *supra* note 30, at 59; Pair, *supra* note 20, at 75.
150. 2 BORN, *supra* note 8, at 2585.
151. Rau & Sherman, *supra* note 3, at 112.

consolidation provision.[152] Applying the aforementioned interpretation to a case where such rules have been incorporated by reference into the arbitration agreement would lead to conflicting results. On the one hand, the incorporation by reference could be seen as an express agreement to consolidate parallel proceedings and on the other hand, it could be deemed as an implied rejection of consolidation. As the composition of the arbitral tribunal with three arbitrators does not constitute an exception, especially not in multi-party arbitration, it can rather be assumed that by choosing a tri-partite panel the parties had no intentions with respect to consolidation.[153]

2.2 Structure of the Parties' Contractual Relations

Other factors arbitral tribunals have to consider for determining the parties' intent are the circumstances surrounding the making of a contract and the legal relationships between the parties.[154] In this context, consolidation of complex arbitration is deemed to present no major problems if all parties are signatories to a single contract, for instance in a joint venture or a consortium agreement.[155] Conversely, it may be more difficult to find an agreement to allow for consolidation in a chain relationship where each party entered into an agreement with only one other party.[156] Furthermore, the presence of an arbitration clause in a general agreement accompanied by different ancillary agreements may also be an indication of the parties' intention to have the disputes arising out of the different ancillary agreements settled before one single tribunal.[157] Otherwise, it would not make any sense to stipulate an arbitration agreement in the general agreement.

Apart from that, arbitrators have to examine whether the disputes are connected in an adequate degree to justify the conclusion that the parties implicitly agreed to allow consolidation.[158] In this context, it is sufficient if a close relationship of interdependence exists between the proceedings in question, without being necessary that the proceedings refer to identical claims.[159] However, the assessment whether proceedings are sufficiently

152. *See, e.g.*, Stockholm Chamber of Commerce, *supra* note 79, (Art. 11-12).
153. Rau & Sherman, *supra* note 3, at 112.
154. Stipanowich, *supra* note 2, at 499.
155. 2 BORN, *supra* note 8, at 2582; Platte, *supra* note 7, at 70.
156. Ten Cate, *supra* note 2, at 156.
157. Leboulanger, *supra* note 45, at 78; Platte, *supra* note 7, at 73.
158. Ten Cate, *supra* note 2, at 156.
159. Cremades & Madalena, *supra* note 9, at 534.

connected in order to be consolidated is sometimes much more difficult than it might appear to be at first sight.[160] For example, Nicklisch states that contracts of a large-scale project do not fulfil this requirement although they "are factually linked with one another in that their common objective is the completion of that project and disturbances in one contract will frequently have repercussions on other contracts interlinked with them in this way."[161] This would be due to the strict separation of contractual relationships by the parties themselves.[162]

2.3 Purpose of the Arbitration Agreement and Efficiency

Finally, in addition to the aforementioned, arbitrators should consider the purpose of the arbitration agreement in order to determine the parties' intention in respect of consolidation.[163] The main purpose of consolidation is the effective resolution of disputes and the avoidance of conflicting awards.[164] Therefore, where it appears that parties' chose arbitration for reasons of efficiency, arbitrators may interpret this as an indication of the parties' intent to allow for consolidation.[165] The problem, however, with using the agreement's purpose for guidance is that arbitration agreements often serve numerous goals and it may seem arbitrary to pick efficiency as the overriding objective.[166] For that reason, the interpretation of the arbitration agreement's purpose must be treated with care.

IV. Analysis

In a perfect world, all arbitration agreements would expressly consider the possibility for consolidation (either by allowing or rejecting it) and arbitrators could order consolidation without any problems. However, as we do not live in a perfect world, the matter of consolidation is rarely contained in arbitration agreements. Where an arbitration agreement is silent on this matter, arbitrators have to interpret the arbitration agreement in order to determine if an implied agreement to consolidate parallel proceedings is given.

160. Nicklisch, *supra* note 30, at 59.
161. Nicklisch, *supra* note 30, at 59.
162. *Id*. at 60.
163. Leboulanger, *supra* note 45, at 65.
164. *Id*.
165. Ten Cate, *supra* note 2, at 157.
166. *Id*.

The above presentation shows that it is sometimes not sufficient if only one factor exists which indicates the parties' intention to consolidate parallel proceedings. Thus, arbitrators have to take all relevant circumstances into consideration for determining whether the parties implicitly agreed to allow consolidation.[167] In this respect, one thing is certain: as consent is of overwhelming importance in arbitration procedures, the parties' consent has to prevail over considerations of saving time and money.[168] For that reason, arbitrators have to ask if it is more likely than not that the parties intended to allow for consolidation.[169]

Based on the importance of the parties' consent and the fact that disputes which arise in today's commercial landscape are more likely than ever to involve multiple parties, it falls upon those parties to ensure that they address or at least consider the issue of complex arbitrations.[170] In order to prevent difficulties with interpretation, it is of vital importance that parties make clear, at the time of drafting the related arbitration agreements, whether or not they want disputes arising out of related agreements to be heard together in a single proceeding.[171] Although it is not always possible to predict what disputes may arise between the parties at the moment of the drafting of the arbitration agreements, it is often quite foreseeable that disputes are likely to involve at least two of the agreements concluded by the same or different parties, since a dispute regarding one of the agreements may affect the performance of the second one and therefore give rise to a second dispute.[172]

As a consequence of the parties' choice to refer disputes to arbitral tribunals instead of national courts, parties have to accept the performance of the arbitral procedures with all its advantages and disadvantages. Therefore, if parties to arbitral proceedings do not take the foregoing recommendation into account when drafting their arbitration agreement, they have to accept possible errors of interpretation in regard of consolidation.[173] The interpretation of a contractual provision or a whole agreement becomes

167. Leboulanger, *supra* note 45, at 65.

168. Jens Kleinschmidt, *Die Widerklage Gegen Einen Dritten im Schiedsverfahren*, 6 SCHIEDSVZ 142, 144 (2006); Leboulanger, *supra* note 45, at 65.

169. Ten Cate, *supra* note 2, at 159.

170. Bamforth & Maidment, *supra* note 3, at 17.

171. Jason Fry & Simon Greenberg, *The New ICC Rules on Arbitration: How Have They Fared After the First 18 Months?*, 16 INT'L ARB. L. REV. 171, 176 (2013); Schwartz, *supra* note 7, at 19.

172. Leboulanger, *supra* note 45, at 72.

173. At least as long as there is no infringement of the New York Convention. *See* Bamforth & Maidment, *supra* note 3, at 17.

necessary where room for interpretation exists.[174] This is always the case where terms of a contract are unclear or ambiguous.[175] In cases that an arbitration agreement does not contain a consolidation provision, the possibility of a misinterpretation of the parties' intention must always be expected.[176]

Although as stated above, several factors may be considered to determine the parties' intention, one may nevertheless assume that a broad generalisation about how to interpret an arbitration agreement is not possible. This could be due to the fact that the interpretation of an arbitration agreement depends on the national law governing this question. As the parties are entitled to determine the applicable law governing this issue and the various legal systems take different approaches to contract interpretation,[177] these differences could potentially lead to the result that the outcome of the interpretation of the same arbitration agreement varies from case to case, depending on the applicable law chosen by the parties in the individual case. Thus, it is rarely possible to predict with any reasonable certainty which factor leads to the conclusion that the parties' impliedly agreed to consolidate parallel proceedings.[178]

Apart from that, the different views expressed by legal scholars on how to interpret an arbitration agreement already show how difficult it can be in practice to determine the parties' intention in regard of consolidation. For example, Nicklisch holds the opinion that contracts of a large-scale project do not sufficiently indicate the parties' implied agreement to have separate proceedings joined into one although they are factually linked with one another.[179] Whereas Born states that such a situation can "fairly be interpreted as impliedly accepting consolidation."[180]

V. Conclusion

For the abovementioned reasons, the introduction of a consolidation provision in the arbitration rules of the various arbitration institutions, which

174. Bamforth & Maidment, *supra* note 3, at 17.

175. Patrick S. Ottinger, *Principles of Contractual Interpretation*, 60 LA. L. REV. 765, 766 (2000).

176. Ottinger, *supra* note 177.

177. *See* Jonas Rosengren, *Contract Interpretation in International Arbitration*, 30 J. INT'L ARB. 1, 2 (2013) (The common law systems follow an objective approach, whereas the civil law systems follow a subjective approach.).

178. *See Id*.

179. Nicklisch, *supra* note 30, at 59.

180. 2 BORN, *supra*,note 8, at 2584.

do not yet deal with this issue, seems appropriate. This would pave the way to avoid misinterpretation and increase legal certainty. As arbitral institutions are essentially operating in a private market for the provision of dispute resolution services, improving the predictability of arbitration rules leads to a development of user-friendliness, which in turn would result in promoting the arbitral institution that adopts such a provision in its respective rules.[181] Hence, the adoption of a consolidation provision can be an instrument to attract international arbitrations.[182] Finally, introducing a consolidation provision in the rules of an arbitral institution also reflects the preferences of the users.[183] This is confirmed by the results of a survey conducted and published by the School of International Arbitration at Queen Mary University where the respondents criticized the lack of third party mechanisms in international arbitration that also comprises consolidation.[184]

§ 5: REQUIREMENTS FOR CONSOLIDATION

I. Introduction

Historically, most institutional rules did not provide for consolidation. In recent years, however, arbitral institutions have increasingly revised their rules to include such provisions.[185]

The arbitration rules of the following institutions by now include special provisions addressing the issue of consolidation: the International Chamber of Commerce (ICC), the Belgian Centre for Mediation and Arbitration (CEPANI), the China International Economic and Trade Arbitration Commission (CIETAC), the Hong Kong International Arbitration Centre (HKIAC), the Japan Commercial Arbitration Association (JCAA), the London Court of International Arbitration (LCIA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the Singapore International Arbitration Centre (SIAC), and the Vienna International Arbitral Centre

181. Fernando Dias Simões, *Is Legal Reform Enough to Succeed in the 'Battle of the Seats'?*, KLUWER ARB. BLOG (Sep. 30, 2014), http://kluwerarbitrationblog.com/blog/2014/09/30/is-legal-reform-enough-to-succeed-in-the-battle-of-the-seats/; *see* Dipen Sabharwal & Rebecca Zaman, *Vive la Difference? Convergence and Conformity in the Rules Reforms of Arbitral Institutions: The Case of the LCIA Rules 2014*, 31 J. INT'L ARB. 701, 712 (2014).

182. *Id*.

183. *Id*.

184. School of Int'l Arbitration at Queen Mary Univ. of London & PriceWaterhouseCoopers, *International Arbitration: Corporate Attitudes and Practices 2006*, QUEEN MARY UNIVERSITY OF LONDON 1, 7 (2006) http://www.arbitration.qmul.ac.uk/docs/123295.pdf.

185. 2 BORN, *supra* note 8, at 2596.

(VIAC).[186] In addition, the Swiss Rules of International Arbitration (Swiss Rules) adopted by several Swiss chambers of commerce and industry likewise contain a specific provision on consolidation.[187]

However, not every arbitration institution has yet adopted a provision providing for consolidation. Based on the above results, consolidation of parallel arbitral proceedings should be seriously considered by those arbitration institutions and introduced to their rules so that complex arbitrations under their respective rules would be more efficient and meet the parties' legitimate expectations.[188]

In this context, the question arises how such a provision should be structured in order to achieve the aforementioned goals in the best possible way. A solution to this problem could possibly be provided by the existing consolidation provisions. If the recently introduced consolidation provisions of the above mentioned arbitration institutions already provide an efficient solution for complex arbitrations and at the same time meet the parties' legitimate expectations and interests, those rules could serve as a model for arbitration institutions which have not yet adopted a consolidation provision in their arbitration rules.

Therefore, this section examines the question whether the existing consolidation provisions of the above mentioned rules meet those goals. For this purpose, as a preliminary step, the content of the consolidation provisions of the above listed arbitration institutions will be briefly outlined (**II**).[189] Afterwards, the various rules will be compared with each other (**III**),[190] and the results of this comparison shall clarify if the existing rules might serve as a model consolidation clause so that they could be adopted by arbitration institutions (**IV**).[191]

186. This list is not exhaustive—there are many other arbitral institutions that have adopted consolidation provisions in their arbitration rules in recent years.

187. TOBIAS ZUBERBÜHLER ET AL., SWISS RULES OF INTERNATIONAL ARBITRATION 1 (JurisNet LLC, 2nd ed. 2013).

188. Leboulanger, *supra* note 45, at 98.

189. In this illustration, the Swiss Rules of International Arbitration are also considered although they merely represent a uniform set of arbitration rules issued by the Swiss Chambers and not by a specific arbitration institution.

190. *See infra* Part III.

191. *See infra* Part IV.

II. Institutional Rules allowing for consolidation

1. Consolidation under the ICC Rules

On January 1, 2012, the most recent version of the ICC Rules of Arbitration (ICC Rules) came into force, replacing the older set of rules from 1998.[192] Unlike any other set of institutional rules, the ICC Rules are truly international in the sense that ICC arbitrations are seated all over the world and involve diverse parties, applicable laws and legal cultures.[193]

The mechanism of consolidation is regulated in Article 10 of the ICC Rules. Under this provision, the ICC Court may, at the request of a party, consolidate two or more arbitrations into a single arbitration, where

> the parties have agreed to consolidation; or (b) all the claims in the arbitrations are made under the same arbitration agreement; or (c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship and the [ICC] Court finds the various arbitration agreements compatible.[194]

Based on this provision, it is up to the ICC Court to decide whether to consolidate the proceedings. An arbitral tribunal cannot itself order consolidation even where the same arbitrators have been appointed in all the arbitrations.[195] Furthermore, as consolidation requires a request of a party to that effect, the ICC Court cannot order consolidation on its own initiative or at the suggestion of one of the arbitral tribunals.[196] Finally, the Court is not obliged to order consolidation if one of the three alternative conditions laid down in Article 10 is satisfied.[197] This can be inferred from the word "may" in the first paragraph and the wording "[i]n deciding whether to consolidate" in the second paragraph which express that the ICC Court has discretion as to whether consolidate arbitral proceedings.[198] In exercising its discretionary power, the Court has to take all relevant circumstances (*e.g.*, the links between the cases and the progress of the arbitration proceedings) into

192. Strong, *supra* note 3, at 965.

193. Fry & Greenberg, *supra* note 171, at 178.

194. ICC Arbitration Rule, *supra* note 106, (Art. 10).

195. ELLIOTT GEISINGER & PIERRE DUCRET, INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 86 (Elliott Geisinger & Nathalie Voser eds., 2d ed., Kluwer Law Int'l 2013); JACOB GRIERSON & ANNET VAN HOOFT, ARBITRATING UNDER THE 2012 ICC RULES 122 (Kluwer Law Int'l, 2012).

196. GRIERSON & VAN HOOFT, *supra* note 195, at 122.

197. ICC Arbitration Rule, *supra* note 106, (Art. 10).

198. *Id*.; Fry & Greenberg, *supra* note 171, at 176; *see* Anke Sessler & Nathalie Voser, *Die Revidierte ICC-Schiedsgerichtsordnung – Schwerpunkte*, 10 SCHIEDSVZ 120, 125 (2012).

account.[199] As the ICC Rules do not contain any restriction as to the timing of consolidation, it is theoretically possible to consolidate proceedings even after the signing of the Terms of Reference or even if arbitrators have been appointed in all procedures.[200]

2. Consolidation under the CEPANI Rules

On January 1, 2013, the new CEPANI Rules of Arbitration (CEPANI Rules) entered into force that replaced the previous Rules of 2005.[201] The CEPANI Rules have from the outset been inspired by the ICC Rules of Arbitration.[202] This becomes apparent, *inter alia*, from Article 13 of the CEPANI Rules, which governs the consolidation of arbitration procedures.[203] Similar to consolidation under the ICC Rules, Article 13 of the CEPANI Rules makes it possible to consolidate pending arbitration proceedings between identical and also between different parties.[204] Furthermore, consolidation under the CEPANI Rules is even possible if the procedures to be consolidated have commenced.[205]

A special feature of the CEPANI Rules is that two administrative bodies are entitled to order consolidation, the CEPANI Appointment Committee and the President.[206] Apart from this, another difference between the ICC Rules and the CEPANI Rules is that, besides the parties, the arbitral tribunal may also make a request for consolidation of arbitral procedures.[207] Finally, the decision to order consolidation under the CEPANI Rules is basically left to the discretion of the Appointment Committee and the President.[208] However, in exceptional cases, these administrative bodies are obliged to grant the application for consolidation if it is presented by all parties and if

199. GEISINGER & DUCRET, *supra* note 195, at 85-6.

200. Fry & Greenberg, *supra* note 171, at 176; Sessler & Voser, *supra* note 198, at 125.

201. *See* CEPANI, CEPANI Arbitration Rules, CEPANI: THE BELGIAN CENTRE FOR ARBITRATION AND MEDIATION 1 (2013), http://www.cepani.be/sites/default/files/images/hayez_reglement_arbitrage_cepani_en_dec2014_1.1.pdf [Hereinafter CEPANI Rules].

202. Herman Verbist, *New Belgian Arbitration Law of 24 June 2013 and New CEPANI Arbitration Rules of 1 January 2013*, 30 J. INT'L ARB. 597, 608 (2013).

203. CEPANI Rules, *supra* note 201, at 20, (Art. 13(2)).

204. *Id*. at 20, (Art. 13).

205. *Id*.

206. *Id*. at 20, (Art. 13(1)).

207. *Id*. at 20, (Art. 13).

208. *Id*.

they have also agreed on the manner in which the consolidation shall occur.[209]

3. Consolidation under the CIETAC Rules

In an effort to adapt to the newest development in international arbitration practice and to better accommodate the needs of the parties, CIETAC has revised its Arbitration Rules dating back from 2012. The new CIETAC Arbitration Rules (CIETAC Rules) came into force on January 1, 2015.[210] The procedural tool of consolidation is stipulated in Article 19 of the CIETAC Rules.[211]

Consolidation under the CIETAC Rules is essentially the same as under the ICC Rules. This means that the administering institution and not the arbitrators have the discretionary power to consolidate arbitration proceedings upon a party's request to that effect.[212] Furthermore, the CIETAC Rules do not contain any restriction as to the timing of consolidation and proceedings between different parties may also be consolidated.[213] The only difference between both set of rules is that CIETAC has to take the opinions of all parties into account before deciding on the issue of consolidation.[214] In practice, this means that CIETAC will have to consult the parties.

4. Consolidation under the HKIAC Rules

On November 1, 2013, the new HKIAC Administered Arbitration Rules (HKIAC Rules) came into force that replaced the rules dating back from 2008.[215] The revised rules contain provisions governing the consolidation of arbitration proceedings that are quite similar to those found in the ICC Rules.[216] The relevant terms are found in Article 28 of the HKIAC Rules.

As is the case under the ICC Rules, where the Court and not the arbitral tribunal has the authority to decide on the issue of consolidation, it is the

209. *Id.* , at 20, (Art. 13(2)).

210. China International Economic and Trade Commercial Arbitration Commission, *Arbitration Rules,* CIETAC (2014), http://www.cietac.org/Uploads/201607/5795f078aa6d5.pdf [hereinafter CIETAC Rules].

211. *Id*. at Art. 19.

212. *Id*. at Art. 19(2); ICC Arbitration Rule, *supra* note 106, (Art. 10).

213. CIETAC Rules, *supra* note 212, at Art. 19(2).

214. *Id*.

215. *See* Article 28 of the HKIAC Rules [hereinafter HKIAC rules].

216. *Id*. at Art. 28.1.

HKIAC which has the power to order consolidation.[217] Further, like under the ICC Rules, the HKIAC is only entitled to order consolidation of arbitral procedures if one of the parties has requested it.[218] In contrast to the ICC Rules, which requires that the parties to the arbitration must be the same or bound by a single arbitration agreement (for example, Article 10 of the ICC Rules),[219] Article 28 of the HKIAC Rules permits consolidation of arbitrations involving different parties, even when the arbitrations are conducted under multiple arbitration agreements.[220] Another difference between both sets of rules is that the HKIAC has to consult the parties and any confirmed arbitrators before it can order consolidation.[221]

5. Consolidation under the JCAA Rules

On February 1, 2014, the revised JCAA Commercial Arbitration Rules (JCAA Rules) came into effect.[222] This set of rules replaced the old provisions from 2008.[223] The old rules granted both the arbitral tribunal and the JCAA power to consolidate arbitration procedures.[224] Now only the arbitral tribunal has the discretionary power to decide whether to consolidate arbitral proceedings, provided that one of the parties requested it.[225] This differs from the ICC Rules where the ICC Court, not the arbitral tribunal, has the decision-making power.[226] Another difference between both sets of rules is that under the ICC Rules there is no restriction as to the timing of consolidation.[227] Whereas the JCAA Rules stipulate that consolidation is only possible as long as no arbitral tribunal has been constituted for the

217. *Id*.
218. *Id*.
219. ICC Arbitration Rule, *supra* note 106, (Art. 10).
220. *See* HKIAC Rules, *supra* note 217, at Art. 28.
221. *Id*. at Art. 28.1.
222. The new set of Rules, which came into effect on 10 December 2015, fully adopted the consolidation provision of the 2014 JCAA Rules. *See* The Japan Commercial Arbitration Association, *Commercial Arbitration Rules*, JCAA 1, 21 (Dec. 10, 2015) http://www.jcaa.or.jp/e/arbitration/Arbitration_Rules_2015e.pdf (Rule 53) [*hereinafter* JCAA 2015 Rules].
223. *See The Key Points of the 2014 Amend. to the Com. Arb. Rules*, 31 JCAA NEWSLETTER 1, 1 (Mar. 2014), http://www.jcaa.or.jp/e/arbitration/docs/news31.pdf.
224. *See* The Japan Commercial Arbitration Association, *Commercial Arbitration Rules*, JCAA 1, 11-12 (Jan. 1, 2008) http://www.jcaa.or.jp/e/arbitration/docs/e_shouji.pdf (Rule 44(1))[*hereinafter* JCAA 2008 Rules].
225. *See* JCAA 2015 Rules, *supra* note 222.
226. ICC Arbitration Rule, *supra* note 106, (Art. 10).
227. *See* JCAA 2015 Rules, *supra* note 222.

claim to be consolidated.[228] Apart from these differences, both the JCAA Rules and the ICC Rules are similar.[229]

6. Consolidation under the LCIA Rules

The LCIA is amongst the busiest and most prominent arbitral institutions worldwide.[230] It adopted its revised Arbitration Rules (LCIA Rules) on October 1, 2014 replacing its Arbitration Rules of 1998.[231] The revised version of its rules marks the first time that the LCIA expressly provides for the consolidation of arbitral proceedings.[232] The requirements that state when consolidation can be ordered are stipulated in Article 22 of the LCIA Rules.[233]

According to Article 22.6 of the LCIA Rules, the LCIA Court has discretionary power to consolidate arbitrations before any tribunal has been appointed if the arbitrations are between the same parties and are all subject to the same arbitration agreement.[234] Based on this provision, the LCIA Court can order consolidation without needing one party's request to that effect.[235] However, the LCIA Court has to give "the parties a reasonable opportunity to state their views" before it can order consolidation.[236] This differs essentially from the ICC Rules, where the ICC Court may only order consolidation if a party has requested it.[237] Another difference between both sets of rules is that under the LCIA Rules the Court may order consolidation only between the same disputing parties, while under the ICC Rules disputes between different parties may be consolidated.[238] Furthermore, the LCIA

228. *See* JCAA 2015 Rules, *supra* note 222.

229. *See* Peter Godwin, Elaine Wong & James Allsop, *JCAA Introduces New Com. Arb. Rules*, KLUWER ARB. BLOG (March 3, 2014), http://kluwerarbitrationblog.com/2014/03/03/jcaa-introduces-new-commercial-arbitration-rules/.

230. *See* Kevin O'Gorman & Mark Stadnyk, *The New LCIA Arb. Rules: At the Vanguard of Promoting the Good and Equal Conduct of Couns. in Int'l Arb.*, 18 INT'L ARB. L. REV. N-5, N-5 (2015).

231. *See* LCIA, *LCIA Arbitration Rules*, LCIA (October 1, 2014) http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx (Art. 22.1(ix) and (x)).

232. *See* Georg Scherpf & Shantanu Majumdar, *The Revised LCIA Arb. Rules 2014*, 5 SCHIEDSVZ 227, 230 (2014).

233. *See* LCIA, *supra* note 231.

234. *Id*.

235. *Id*.

236. *Id*.

237. *Id*.

238. *Id*.

Rules require that "no arbitral tribunal has yet been formed by the LCIA Court for any of the arbitrations to be consolidated," whereas under ICC Rules such a restriction does not exist.[239]

A special feature of the LCIA Rules is that according to Article 22.1(ix) and (x) the arbitral tribunal also has discretionary power to consolidate arbitral proceedings.[240] However, compared to the LCIA Court, the arbitral tribunal has limited power to order consolidation.[241] This is because any order for consolidation has to be approved by the LCIA Court.[242] Furthermore, an arbitral tribunal may order the consolidation of arbitrations only upon the application of a party.[243]

7. Consolidation under the SCC Rules

The SCC Arbitration Rules entered into force on January 1, 2010.[244] The procedural tool of consolidation is explained in Article 11 of the SCC Arbitration Rules.[245] The provision states that, "[i]f arbitration is commenced concerning a legal relationship in respect of which an arbitration between the same parties is already pending under these Rules, the Board may, at the request of a party, decide to consolidate the new claims with the pending proceedings."[246]

It is clear from the text of the provision that the Board of the SCC is not entitled to order consolidation on its own initiative or at the suggestion of one of the arbitrators because Article 11 expressly requires a request to consolidate arbitral proceedings by one of the parties.[247] In addition, the provision limits consolidation to situations where the related arbitral proceedings are pending between the same parties.[248] Thus, the provision

239. *Id*.
240. *Id*.
241. *Id*.
242. *See Id.*
243. *Id*.
244. Stockholm Chamber of Commerce*, supra* note 79.
245. *Id*.
246. *Id*. .
247. *See* Stefan Brocker & Kristoffer Löf, *The Proceedings in* INTERNATIONAL ARBITRATION IN SWEDEN: A PRACTITIONER'S GUIDE 153, 165-66 (Ulf Franke et al. eds., Kluwer Law International 2013).
248. *See* DOROTHÉE SCHRAMM, *Commentary on the Swiss Rules, Article 4 [Consolidation and Joinder] in* ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE 360, 360 (Manuel Arroyo ed., Kluwer Law International 2013).

does not cover the consolidation of arbitral proceedings between different parties.

Furthermore, Article 11 does not provide for the consolidation of two ongoing arbitrations that both already have arbitral tribunals in place, and the SCC Rules do not give the arbitral tribunal the authority to consolidate proceedings.[249] Only the SCC Board has the authority to order consolidation.[250] However, Article 11 further requires that a decision to consolidate only be made after the SCC Board has consulted the arbitral tribunal and the parties.[251] In this context, an express agreement by the parties to consolidate arbitral proceedings is not needed.[252]

8. Consolidation under the SIAC Rules

The SIAC is deemed to be one of the most prolific and important international arbitration centers in the world.[253] To mark twenty-five years since its establishment, SIAC released the sixth edition of its arbitration rules, the SIAC Rules 2016, which are effective as of June 1, 2016.[254] Indeed, the changes made to the SIAC Rules bring the institution up to speed with the other leading arbitral institutions, which have long been offering joinder and consolidation to varying degrees.[255]

The consolidation provision is enshrined in Rule 8 of the 2016 SIAC Rules.[256] The SIAC Court is likely to grant a consolidation request if all parties agree to consolidation, the claims are made under the same arbitration agreement, or the claims are made under compatible arbitration agreements; and if the disputes arise out of the same legal relationship or out of the same transaction or series of transactions.

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249. *See* Brocker & Löf, *supra* note 247, at 165; Kristoffer Löf & Kristoffer Stråth, *Institutional Rule Reforms – SCC*, 16 INT'L ARB. L. REV. 192, 196 (2013).

250. *See* Brocker & Löf, *supra* note 249, at 165; Löf & Stråth, *supra* note 24.

251. Stockholm Chamber of Commerce*, supra* note 79.

252. *See* Kaj Hobér & Alexander Foerster, *Die neue Schiedsordnung 2007 des Schiedsgerichtsinstituts der Stockholmer Handelskammer*, 4 SCHIEDSVZ 207, 207 (2007).

253. *See* Gautam Bhattacharyya & Simon Greer, *New Singapore International Arbitration Centere ("SIAC") Arbitration Rules 2016*, REED SMITH (June 1, 2016), https://www.reedsmith.com/New-Singapore-International-Arbitration-Centre-SIAC-Arbitration-Rules-2016-06-01-2016/.

254. *Id*.

255. *See* Olga Boltenko & Priscilla Lua, *The SIAC Rules 2016: A Watershed in the History of Aritration in Singapore*, KLUWER ARBITRATION BLOG (July 12, 2016), http://kluwerarbitrationblog.com/2016/07/12/the-siac-rules-2016-a-watershed-in-the-history-of-arbitration-in-singapore/.

256. Bhattacharyya & Greer, *supra* note 253.

Based on Rule 8.1 in conjunction with Rule 8.4, it is up to the discretion of the SIAC Court of Arbitration to decide whether to consolidate parallel proceedings.[257] In addition to that and contrary to ICC Rules, under Rule 8.7 of the 2016 SIAC Rules, the arbitral tribunal can also order consolidation.[258] Thus, the SIAC Court's decision to reject a consolidation application does not prejudice that party's right to submit that same application to the tribunal after it has been constituted.[259] Both the Court of Arbitration and the Tribunal are only entitled to order consolidation if one party has filed an application for it.[260]

9. Consolidation under the Vienna Rules

The most recent version of the Rules of Arbitration and Conciliation of VIAC (Vienna Rules) was adopted on May 8, 2013.[261] The new Vienna Rules took effect on July 1, 2013 and apply to all proceedings initiated on or after that date.[262] The Vienna Rules replaced the old set of rules from 2006, and the comprehensive revision process has lasted for more than one year.[263] The mechanism of consolidation is stipulated in Article 15 of the Vienna Rules.[264] Article 15(1) of the Vienna Rules provides that "two or more proceedings may be consolidated" upon a party's request "if all the parties agree to consolidation" or if the same arbitrators have been appointed in all the arbitrations and "the place of arbitration in all of the arbitration agreements" is the same.[265] Article 15(2) further rules that "[t]he Board shall decide on Requests for Consolidation."[266]

Based on this, it is only the VIAC Board that may decide whether to consolidate proceedings.[267] However, a decision to consolidate may only be made after the VIAC Board has consulted both the arbitral tribunal and the

257. *Id*.
258. *Id*.
259. *Id*.
260. *Id*.
261. *See* Alice Fremuth-Wolf & Yoanna Schuch, *The New Arbitration Rules of the Vienna International Arbitral Centere (Vienna Rules 2013)*, 16 INT'L ARB. L. REV. 198, 198 (2013).
262. *See* VIAC, *Vienna Rules*, VIAC (July 1, 2013), http://www.viac.eu/en/arbitration/arbitration-rules-vienna/93-schiedsverfahren/wiener-regeln/144-new-vienna-rules-2013.
263. *Id*.
264. *Id*.
265. *Id*.
266. *Id*.
267. *Id*.

parties.[268] Furthermore, the VIAC Board is not entitled to order consolidation on its own.[269] This is because a request of a party to that effect is required.[270] Contrary to the SCC Board, the VIAC Board is allowed to consolidate on-going arbitral procedures between different parties at any time of the proceedings.[271]

10. Consolidation under the Swiss Rules

On June 1, 2012, the revised Swiss Rules of International Arbitration (Swiss Rules) came into force and replaced the old set of rules from 2004.[272] The Swiss Rules were introduced by the Chambers of Commerce and Industry of Basel, Bern, Geneva, Neuchâtel, Ticino, Vaud and Zurich in order to harmonize their rules of arbitration.[273] The Swiss Rules are by far the most frequently used institutional arbitration rules in Switzerland.[274]

Article 4 (1) of the Swiss Rules provides for the possibility to consolidate related arbitral proceedings that are pending under the Swiss Rules between the same parties or even between different parties.[275] The Court has the discretionary power to decide on consolidation.[276] Pursuant to Article 4 (1) of the Swiss Rules, before deciding on consolidation, the Court shall consult all the parties involved, including any arbitrator already confirmed, and take into account all relevant circumstances.[277] However, unlike the ICC Rules and the SCC Rules, the Swiss Rules do not require a party's request for consolidation for the court to consider it.[278] The parties are deemed to have given their consent to consolidation in advance by submitting the dispute to the Swiss Rules.[279] However, as Article 4 is not mandatory, the parties can agree to opt out of this provision.[280]

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268. *Id*.
269. *Id*.
270. *Id*.
271. *Id*.
272. Matthias Scherer, *Revised Swiss Rules of International Arbitration Enter into Force,* KLUWER ARBITRATION BLOG (May 31, 2012) http://kluwerarbitrationblog.com/2012/05/31/revised-swiss-rules-of-international-arbitration-enter-into-force/.
273. Zuberbühler et al., *supra* note 189, at 52.
274. GEISINGER & DUCRET, *supra* note 196, at 83.
275. Zuberbühler et al., *supra* note 189, at 52.
276. *Id*.
277. *Id*.
278. Swiss Chambers of Commerce, *supra* note 79.
279. SCHRAMM, *supra* note 248, at 360.
280. *Id*. at 359.

The Swiss Rules further provide the Court with the power to revoke arbitrators in all concerned proceedings and to appoint new arbitrators within the framework of the consolidated multi-party arbitration.[281] This approach may make sense where the parties to the pending arbitration are not identical with the ones of the proceeding to be consolidated therewith.[282]

III. Analysis of the different Provisions

The existing consolidation provisions could serve as a model clause if their prerequisites, under which consolidation of arbitral proceedings may be ordered, respect the parties' legitimate expectations and help to enhance the efficiency of the procedures.

A consolidation provision has to deal with the following key issues: (1) who shall have the power to order consolidation; (2) should consolidation only be considered upon a party's request; (3) should the parties and/or the arbitrators be consulted prior to the decision; and (4) should there be any restriction as to the timing of consolidation?

In order to determine if the conditions under which consolidation may be ordered under the existing consolidation provisions comply with the above-mentioned goals, a comparative analysis of the presented institutional provisions with a view to the key issues of consolidation should be conducted. Only elements of various institutional consolidation rules should be adopted, particularly those which come closest to the objective of the model arbitration clause. This would provide an efficient solution for complex arbitration to meet parties' legitimate expectations and interests.

1. Determination of the Decision-Making Authority

As is apparent from the above illustration, the various arbitration institutions follow contrasting approaches (with a few similarities) in regard to the conditions under which consolidation may be ordered. This also applies to the question of who shall have the power to order consolidation. Most of the arbitral institutions have determined that the respective administering institution shall decide on the matter of consolidation. A different approach is followed by the JCAA and the LCIA. Pursuant to Rule 53 of the JCAA Commercial Rules of Arbitration, the arbitral tribunal is authorized to order consolidation,[283] whereas under Article 22.1 (ix)-(x), the

281. Wyss, *supra* note 8, at 4.
282. *Id*.
283. JCAA 2015 Rules, *supra* note 222.

LCIA Arbitration Rules the arbitral tribunal may order consolidation if the LCIA Court has given its approval to that order.[284]

As the arbitrators decide the merits of a dispute, one might think that the arbitral tribunal is in the best position to determine if the procedures in question are sufficiently linked.[285] However, a closer look at this issue reveals that it may be more efficient to let the administrative body determine whether proceedings should be consolidated. This is substantiated by the fact that the arbitral institution receives and administers the procedural requests and thus knows better if potential cases exist which are suitable for consolidation whereas the arbitral tribunal lacks such knowledge.[286] Furthermore, an arbitral tribunal cannot bind another tribunal to a decision, whereas institutions may render a single decision for all cases concerned.[287] Hence, the arbitral institution should have the decision-making authority in respect of consolidation.

2. The Need for a Party's Request

Another point to be clarified is whether consolidation should only be ordered if at least one party has requested it. This approach is stipulated in eight out of the ten presented institutional provisions. An exception to this is formed by the LCIA Rules and the Swiss Rules, which do not require any request.[288] This approach appears to be the preferable one since the parties have already given their consent to consolidation in advance by incorporating institutional rules which contain a consolidation provision.

However, as the parties' consent is the main pillar in arbitration, consolidation must be considered by the administering institution if the parties have expressly agreed to consolidation. This also applies in the reverse case, where parties decide not to consolidate. For that reason, the consolidation provision should not be mandatory so that the parties can agree to opt-out of this provision.

3. Consultation of the Parties and/or Arbitrators

Since a party's request for consolidation is not necessary, the question arises if the parties or the arbitrators should at least be heard prior to the

284. LCIA, *supra* note 231.
285. Stipanowich, *supra* note 2, at 513.
286. Pair & Frankenstein, *supra* note 20, at 117.
287. *Id*.
288. *See* LCIA, *supra* note 231; Swiss Chambers of Commerce, *supra* note 79.

institution's decision to consolidate arbitral proceedings. The majority of arbitration institutions which have introduced a consolidation provision in their respective rules have opted for such a requirement.[289] However, this approach is not followed by the ICC Rules and the JCAA Rules.[290]

For reasons of efficiency, the arbitral institutions should solely be authorized to decide on the issue of consolidation after consulting both the parties and the arbitral tribunal.[291] Only after hearing the parties and the arbitrators, the arbitration institution will have a clear picture of the case in question and thus will be able to better assess whether connected facts or similar legal issues exist.[292] This approach also reflects the interests of the parties. Before any decision is taken by the arbitral institution in regard to consolidation, the parties must be informed of this intention.[293] In this way, the parties will be able to jointly consider the possibility of opting out from consolidating arbitral proceedings.

4. Time Limits for Consolidation

Lastly, there is the question of whether a consolidation clause should contain a restriction as to the timing of consolidation. Of the ten institutional provisions considered, only the SCC Rules and the JCAA Rules do not provide for consolidation of two ongoing arbitrations when both have arbitral tribunals already in place. According to these rules, consolidation is only possible as long as only one arbitral tribunal has been constituted.

Contrary to this approach, all other arbitration institutions have decided not to set limitations as to the timing of consolidation. Indeed, the latter approach seems to make more sense, since the arbitral institutions will take all relevant circumstances into consideration before ordering consolidation. This includes the procedural aspects of the relevant arbitrations, such as the number of arbitrators and whether the parties have nominated the same arbitrators in both cases. The administrative body also has to take into account the potential delay caused by the consolidation, in particular when consolidation requires the arbitral tribunal to be reconstituted. For this reason, there is no need for a time limitation in regards to consolidation.

289. *See* ICC Arbitration Rule, *supra* note 106, (Art. 10). *See also* JCAA 2015 Rules, *supra* note 222.

290. *Id*.

291. Leboulanger, *supra* note 45, at 62.

292. *Id*.

293. *See* ICC Arbitration Rule, *supra* note 106, (Art. 10). *See also* JCAA 2015 Rules, *supra* note 222.

IV. CONCLUSION

In summary, a consolidation provision which respects the parties' interests and at the same time provides for efficient solutions of complex arbitrations has to be structured as follows:

- The administrative body has to determine whether proceedings should be consolidated.
- A separate request by one of the parties is not required.
- The consolidation provision should not be mandatory so that the parties may agree to opt-out of this provision.
- Before ordering consolidation, the arbitral institution must hear both the parties and the arbitral tribunal.
- The consolidation provision should not contain a restriction as to the timing of consolidation.

The only consolidation provisions that fully comply with these requirements are those of the Swiss Rules and the LCIA Rules. Hence, these rules can be viewed as model clauses that should be adopted by arbitral institutions that have not yet introduced a consolidation provision in their respective rules.

§ 6: CONCLUSION

This article set out to examine whether the procedural tool of consolidation should be introduced in institutional arbitration rules and how such a consolidation provision should be structured. The main findings of this research are the following:

a) In the event of multi-contract arbitration, neither of the parties has to fear detrimental effects by having all claims decided in a single arbitration. In the case of multi-contract arbitration, confidentiality issues and issues regarding the constitution of the arbitral tribunal might occur. However, these potential problems can be limited by structuring the consolidated proceeding in a way that restricts a party's access to information that is not relevant to its case and by designating an arbitration institution as the appointing authority. Hence, it can be concluded that the potential disadvantages with consolidation are manageable and controllable.

b) The matter of consolidation is rarely contained in arbitration agreements. If an arbitration agreement is silent on the issue of consolidation, arbitrators will have to interpret the agreement in order to determine whether an implied consent to consolidate parallel proceedings is given. Contract interpretation, however, has a lot of drawbacks. For this reason, it is recommended to introduce a consolidation provision in

institutional arbitration rules. In this way, misinterpretation of arbitration agreements may be avoided. Furthermore, the adoption of a consolidation provision may be instrumental in attracting international arbitrations that reflect the preferences of the users.

c) As the potential disadvantages of consolidation do not outweigh the expected advantages and the interpretation of arbitration agreements is not an adequate solution in determining whether there is implicit consent to consolidate parallel proceedings, the way is paved for an implementation of a consolidation provision in institutional rules. Consolidation of parallel arbitral proceedings should be seriously considered by those arbitration institutions which have not yet stipulated a corresponding provision in their set of rules. The consolidation provisions present in the Swiss Rules and the LCIA Rules respect the parties' interests while providing efficient solutions for complex arbitrations. These rules may be viewed as model clauses that should be adopted by arbitral institutions that have not yet introduced a consolidation provision in their respective rules.