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JOINDER AND CONSOLIDATION IN INSTITUTIONAL ARBITRATION OVER THE LAST 10 YEARS: EVOLUTION OR REVOLUTION?

*Kirtan Prasad**

Joinder and consolidation have acquired greater practical significance in recent times given the increased complexity of commercial transactions, which now involve multiple suites of documents and multiple parties. Arbitral rules relating to joinder and consolidation have consequentially evolved to keep pace with user feedback in this regard. There has been a palpable shift in the last ten years from a conservative approach to a more permissive and innovative one. This article attempts to trace that evolution with reference to certain Indian and international arbitral rules. It concludes with a few comments on how parties may wish to deal with this evolving trend in their contracts, and cautions that any forthcoming changes and innovations will be need to be rigorously assessed against the touchstone of party consent.

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I. PREFACE

This article endeavours to describe the evolution of arbitral rules relating to joinder and consolidation over the past ten years. In doing so, it analyses three international institutional rules frequently used by Indian parties, namely: the London Court of International Arbitration ('LCIA'), the International Court of Arbitration ('ICC') and the Singapore International Arbitration Centre ('SIAC'),¹ and two Indian institutional rules:² the Indian Council of Arbitration ('ICA') and the Mumbai Centre for International Arbitration ('MCIA'). It also provides a brief comment on the general trend in this area.

II. INTRODUCTION

Although they are often referred to in the same breath, joinder and consolidation are conceptually different.

Joinder refers to the inclusion of third parties (often *prima facie* non-parties to the arbitration agreement) in proceedings. Unlike applications for joinder in court proceedings, however, arbitral tribunals do not have coercive powers over third parties since the Tribunal derives its power from consent. It is therefore important to analyse if the third party has consented to the tribunal's jurisdiction and, equally, whether the original parties to the contract have consented to such a joinder. Joinder may be affected through reliance on traditional contractual doctrines such as agency or equitable assignment, but also corporation-related concepts such as piercing the corporate veil, alter ego, or the "group of companies" doctrine.³

Consolidation, on the other hand, is where two or more separate arbitral proceedings are merged into a single arbitration. The consolidated arbitration can be presided over by one of the existing arbitral tribunals, or a new arbitral tribunal can be appointed for the merged arbitration. The two

¹ This is based on experience and anecdotal evidence.

² Although over thirty arbitral institutions are said to exist in India. It has been observed that ad-hoc arbitration remains the overwhelming arbitral case load in India. See, 'Working Paper on Institutional Arbitration Reforms in India' <<https://www.icaindia.co.in/HLC-Working-Paper-on-Institutional-Arbitration-Reforms.pdf>> accessed 20 October 2020.

³ See, for instance, the joinder discussed in the decision of the Indian Supreme Court in *Chloro Control India (P) Ltd v Severn Trent Water Purification Inc* (2013) 1 SCC 641 (Supreme Court of India), which considered whether a third-party could be bound by an arbitration clause under Section 45 of the Arbitration and Conciliation Act, 1996 ('the 1996 Act'), and more particularly, pursuant to the group of companies doctrine.

separate arbitral proceedings can be in relation to disputes under the same contract, or under different contracts, but arising from similar facts.

Both joinder and consolidation do, however, rest on a common juridical foundation, that is, the scope of party consent. This may be provided for in the underlying contracts between the parties or reflected in the legislation of the applicable laws chosen by the parties.

Issues relating to joinder and consolidation have acquired greater practical significance in recent times given the increased complexity of commercial transactions, which now involve multiple suites of documents and multiple parties. This is so across several sectors, most notably, oil and gas, energy, resources, projects, and construction.

There is some benefit to having disputes relating to the same transaction or related contracts, between related parties being determined by the same tribunal. Doing so is more efficient and mitigates the risk of inconsistent decisions by tribunals who may need to consider overlapping issues. It also diminishes the risk of tribunals deciding cases in a silo (i.e., with reference to one contract or one contractual relationship alone), without the benefit of all the facts relating to the overall transaction.

Ideally, parties ought to provide for a complete code to deal with multi-contract or multi-party disputes by consent, at the outset, in their relevant contracts. However, this is often not the case. Dispute resolution provisions are notoriously named “midnight clauses” reflecting the fact that they tend to be negotiated at the very end of a transaction and therefore receive little, if any, attention. This has changed in recent times, with commercial parties (if not their transactional lawyers) being very alive to the benefits of drafting effective and enforceable dispute resolution provisions. Parties are also increasingly aware of the issues arising out of multi-contract and multi-party disputes. Indeed, large suites of documents in the project finance sector, for instance, now regularly explicitly address joinder and consolidation. Parties sometimes use umbrella dispute resolution agreements⁴ as well, in a bid to

⁴ Complex transactions typically involve multiple documents between different sets of parties. For instance, there may be finance agreements between banks and the borrowers (who may be one or more of the underlying obligors), security documents between a guarantor and the finance parties, and contracts relating to the performance of the obligation in question (whether the project or a share purchase agreement) between the underlying obligors. Rather than providing for dispute resolution clauses in relation to each of these agreements, parties sometimes use an umbrella dispute resolution agreement or master dispute resolution agreement to govern all of the agreements in this transactional suite. This agreement is typically signed by each of the parties, or alternatively, incorporated by reference into the individual documents. This is not to be confused with the term “umbrella arbitration agreements” or “umbrella clauses” as used in the context of investment treaty disputes.

ensure that the entire suite of documents is subject to a single dispute resolution clause. Such umbrella agreements also contain provisions for joinder of parties and consolidation of disputes across the entire suite of documents. Although, this level of awareness and engagement of dispute resolution clauses is not uniform. The need to engage with such complex drafting is often dispensed with in lower value transactions which tend to adopt historic dispute resolution clauses, without reflection.

Even if the parties did direct their minds to the question of joinder and consolidation, it is not always possible to fully and accurately predict the nature of disputes which may arise at the point of negotiation.

Parties, tribunals, and institutions have sometimes resorted to pragmatic techniques to overcome the absence of adequate joinder and consolidation provisions. For example, in lieu of formal consolidation, parties have been known to agree to appoint the same tribunal across all of the related disputes in question and thereafter agree to conduct all of the related arbitrations concurrently, resulting in *de-facto* consolidation.⁵ However, such measures often require party agreement after the dispute has arisen, when there is less scope for consensus. An obstructive respondent, for instance, could inflict considerable cost inefficiency by insisting on separate proceedings, raising objections to joinder, and appointing a different tribunal to hear each dispute. As such, despite best intentions, the end result is often unsatisfactory and inefficient.

In a bid to address this, most leading international institutional arbitral rules now provide for rules relating to joinder and consolidation. As these rules are deemed incorporated by reference into the parties' contract, there is no need for the contract itself to provide for a full chapter and verse code on joinder and consolidation. However, it may nevertheless be prudent for parties to further define the scope of such joinder and consolidation provisions in their contracts (for instance, by expressly stipulating which third parties may be joined to an arbitration and/or defining the scope of "related contracts" in respect of which disputes may be consolidated). In such a case, the parties will have, by agreement, modified the institutional joinder and consolidation rules which are to apply as between themselves.

⁵ Concurrent conducted arbitrations, however, remain formally separate. For instance, the Tribunal typically issues a separate award in relation to each of the arbitrations.

III. EVOLUTION OF JOINDER AND CONSOLIDATION RULES

Over the past ten years, most arbitral institutions have either introduced rules relating to joinder and consolidation or refined pre-existing ones. Such amendments have typically been in response to user feedback and complications that have arisen in the practical implementation of the rules. This section of the article seeks to describe this evolution.

A. The LCIA Rules

1. 1998-2014

The LCIA Rules provided for the joinder of third parties as early as in the 1998 edition of the rules. Article 22.1(h) of those rules provided for the tribunal:

“To allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.” (emphasis added).

This was considered a “potentially far reaching power” at the time.⁶ Indeed it was acknowledged that the idea that a third party could be joined without the consent of all parties “could be seen as a departure from normal practice”.⁷ However, this approach was justified on the basis that the non-consenting party could be deemed to have consented to the joinder on account of agreeing to arbitrate under the LCIA Rules.⁸ This provision was amended in 2014 to delete the words “only upon the application of a party,” such that the third party could apply for joinder as well.

However, there was no provision on consolidation until the 2014 LCIA Rules. The 2014 edition of the LCIA Rules provided for the tribunal’s power to order consolidation in Articles 22.1 (ix) and (x) as follows:

“(ix) to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations into a

⁶ Peter J. Turner and Reza Mohtashami, *A Guide to the LCIA Arbitration Rules* (OUP 2009) 137-78.

⁷ *ibid.*

⁸ Turner and Mohtashamin (n 6).

single arbitration subject to the LCIA Rules where all the parties to the arbitrations to be consolidated so agree in writing; and

(x) to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations subject to the LCIA Rules commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such tribunal(s) is (are) composed of the same arbitrators.”

It also provided for the LCIA Court’s power to order consolidation in Article 22.6, which stated that:

“Without prejudice to the generality of Articles 22.1(ix) and (x), the LCIA Court may determine, after giving the parties a reasonable opportunity to state their views, that two or more arbitrations, subject to the LCIA Rules and commenced under the same arbitration agreement between the same disputing parties, shall be consolidated to form one single arbitration subject to the LCIA Rules, provided that no arbitral tribunal has yet been formed by the LCIA Court for any of the arbitrations to be consolidated.”

As such, the LCIA Court could consolidate proceedings before the formation of the tribunal. Thereafter, the tribunal could order consolidation (with the approval of the LCIA Court) if either: (a) all the parties to the consolidated arbitration agreed in writing; or (b), absent consent, if the arbitrations to be consolidated arose out of (i) the same or “compatible arbitration agreements” (ii) between the same disputing parties, and (iii) provided that no arbitral tribunal had been formed for the other arbitrations or, if they were, they were composed of the same arbitrators.

Also, unlike joinder, which was to be determined by the tribunal, “*ultimate consolidation authority rested with the institution (the LCIA Court) rather than solely the tribunal, although consolidation ordered by the tribunal was permissible after appointment and with approval of the Court.*”⁹

2. 2020

The most recent edition of the LCIA Rules was released in October 2020. The provision on joinder remains substantially the same, save that it clarifies

⁹ Maxi Scherer and Lisa Richman, *Arbitrating under the 2014 LCIA Rules: A User’s Guide* (first published 2015, Kluwer Law International 2015) 239-256 paras 32-33.

when and how consent to joinder may be provided. The new Article 22.1 (x) states that the tribunal may:

“Allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented expressly to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement; and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.” (emphasis added).

Provisions relating to consolidation and concurrent proceedings have been moved into a new Article 22A (also numbered Article 22.7). This article is largely a re-arrangement of the previous Articles 22.1 (ix), (x), and 22.6 on consolidation, but it also broadens the power of the LCIA Court and the tribunal in two important respects:

1. First, tribunals (or the LCIA Court, if the tribunal has not yet been appointed) now have the power to order the consolidation of arbitrations commenced under the same arbitration agreement or any compatible arbitration agreement(s) and arising out of the same transaction or series of related transactions – even if the disputing parties are not the same (Article 22.7(ii)). This is a notable expansion, effected by deleting the phrase “[between]the same disputing parties” found in Articles 22.1(x) and 22.6 of the 2014 Rules.
2. Second, Article 22.7(iii) now explicitly provides for the power of the tribunal to order concurrent conduct of proceedings (with the approval of the LCIA Court) *“either between the same disputing parties or arising out of the same transaction or series of related transactions [i.e., even if the disputing parties are not the same]”, “where the same arbitral tribunal is constituted in respect of each arbitration.”* As discussed briefly above, parties have been known to agree to conduct proceedings concurrently as a form of de-facto consolidation (in the absence of explicit consolidation provisions). However, this new rule helpfully clarifies that the tribunal (and LCIA Court) may order concurrent proceedings, even if one of the parties objects and even if the disputing parties are not the same. Critically, concurrent proceedings may only be ordered if the same tribunal has been appointed across all the proceedings. The situations in which parties or a tribunal may opt to order concurrent proceedings (under Article 22.7(iii),) as opposed to consolidation (under Article 22.7(ii)), are likely to be limited. However, concurrent proceedings under Article 22.7(iii) may prove to be an effective alternative, in case there are any concerns

under the relevant applicable laws arising out of the enforcement of an award rendered in consolidated proceedings.

B. The ICC Rules

1. 1998-2012

Unlike the LCIA Rules, the 1998 edition of the ICC Rules did not contain a provision on joinder but did allow for a limited form of consolidation in relation to disputes between the same parties. Article 4(6) of the 1998 ICC Rules stated that:

*“4(6) When a party submits a Request in connection with a legal relationship in respect of which arbitration proceedings **between the same parties** are already pending under these Rules, the Court may, at the request of a party, decide to include the claims contained in the Request in the pending proceedings provided that the Terms of Reference have not been signed or approved by the Court. Once the Terms of Reference have been signed or approved by the Court, claims may only be included in the pending proceedings subject to the provisions of Article 19.”*

The 2012 version of the ICC Rules contained extensive provisions on both joinder and consolidation (primarily in Articles 7-10).

Article 7 of the 2012 ICC Rules allowed for any party (the Claimant, Respondent, or indeed the third-party seeking to be joined) to apply to the Secretariat for joinder. Article 7(1) stipulates that a request for joinder can only be filed before any arbitrator has been confirmed or appointed, unless all parties, including the additional party, agree otherwise. Articles 7(2) – (3) set out the information that must be contained in a Request for Joinder, whilst Article 7(4) explicitly provided for the other party/parties to file an Answer to such a Request.

In light of the ruling in the *Dutco* case,¹⁰ Article 12(7) of the 2012 ICC Rules also explicitly dealt with the constitution of the tribunal in the case of

¹⁰ *Sociétés BKMI et Siemens v Société Dutco Construction* (7 January 1992) Court of Cassation, First Civil Chamber. That case related to the ICC’s practice of asking co-respondents to jointly nominate a co-arbitrator, as the arbitration agreement in that case provided for the appointment of a three-member panel. The French Court of Cassation ruled that the Tribunal had not been properly constituted in that case, and in doing so held (i) that each party had a right to equal treatment when it came to constituting the arbitral tribunal and (ii) that it was not possible to waive this right in an arbitration agreement made before the dispute arose.

joinder. Article 12(7) provides that the additional party has the choice, when a three-member arbitral tribunal must be constituted, to jointly select and nominate a co-arbitrator with the claimant(s) or to jointly select and nominate a co-arbitrator with the respondents. If the parties are unable to agree, then Article 12(8) provides that ICC Court may appoint each member of the tribunal and designate one of them to act as president.¹¹

Consolidation was dealt with in Article 10. Article 10 provided that the ICC Court may order consolidation in three circumstances, where:

- “a) the parties have agreed to consolidation; or*
- b) all of 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 in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.”*

Article 10 also sets out the basis on which consolidation is to be ordered. It states that the *“Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.”* In addition, it states that *“when arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.”* In this regard, the ICC Court has exclusive jurisdiction to order consolidation under the ICC Rules.¹² The tribunal has no authority to do so.

Notably, rather than confine itself simply to provisions on joinder and consolidation, Articles 8 and 9 of the ICC 2012 Rules clarified certain additional points relating to the conduct of proceedings between multiple parties and under multiple contracts:

1. Article 8 clarified that in a claim involving multiple parties, a claim may be made by any party against any other party. Although it was

¹¹ This overcomes the issue in the *Dutco* case by effectively providing that, in the absence of agreement, none of the parties shall have the right to appoint an arbitrator. As all appointments are made by the Court, all parties will have deemed to be treated equally.

¹² T Webster and M Buhler, *Handbook of ICC Arbitration: Commentary, Precedents and Materials* (3rd edn, Sweet & Maxwell 2014).

largely reflected in practice, this provision clarified, for instance, that co-Respondents could make cross-claims against each other.¹³

2. Article 9 allowed for “*claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.*”

However, Articles 7-10 are subject to the limits in Article 6(3)-(7) of the 2012 ICC Rules. These Rules provided for the mechanism to deal with situations in which a party raised an objection concerning “*the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration.*” Broadly, in such cases, the arbitral tribunal would determine the objection or plea, unless the Secretary-General referred the matter to the ICC Court, for its decision.¹⁴

As such, the 2012 ICC Rules took a fairly expansive approach to joinder and consolidation, as well as the conduct of proceedings under multiple contracts and between multiple parties more generally, whilst bearing in mind the rulings of national courts on previous editions of its Rules (e.g., the French Court de Cassation’s decision in the *Dutco* case).

This approach to joinder and consolidation was maintained in the 2017 edition of the ICC Rules.¹⁵ However, the ICC has recently issued a 2021 version of its Rules, which came into effect on 1 January 2021.

2. 2021

The 2021 Rules do contain notable refinements to the joinder and consolidation provisions. In particular:

¹³ Herman Verbist and Erik Schaefer, *ICC Arbitration in Practice* (2nd edn, Kluwer Law International 2015) 23-230, 57- 58.

¹⁴ If the matter was referred to the Court, then the arbitration could only proceed “*if and to the extent that the Court [was] prima facie satisfied that an arbitration agreement under the Rules existed*” (Article 6(4)). As such, the Court could either order that the arbitration proceed (in which case the arbitral tribunal would be at liberty to consider the question of its jurisdiction afresh – (Article 6(5)), or the Court could order that all or part of the arbitration(s) not proceed. However, a negative decision by the Court did not prevent a party from asking any competent national court to determine if there was a binding arbitration agreement (Article 6(6)) or a party from making the same claim at a later date in other proceedings (Article 6(7)), i.e., the decision of the Court, was without prejudice to the merits of the parties’ plea.

¹⁵ There were no revisions to arts 7, 8, 9 and 10 of the Rules.

1. The new Article 7(5) provides for requests for joinder after the constitution of the tribunal. In such circumstances, the rules state that, “*the arbitral tribunal shall take into account all relevant circumstances, which may include whether the arbitral tribunal has prima facie jurisdiction over the additional party, the timing of the Request for Joinder, possible conflicts of interests and the impact of the joinder on the arbitral procedure.*” Notably, this new Article 7(5) along with an amendment to Article 7(1), removes the requirement that joinder, after the appointment of any arbitrator, may only take place with the consent of all parties. It is understood that this change was in response to inefficiencies arising out of the requirement for all parties to consent in the previous versions of Article 7.¹⁶ This has been described as the most important change in the 2021 Rules.¹⁷
2. The previous version of Article 10(b) provided that the Court may allow consolidation of pending arbitrations (between non-identical parties) where “all the claims are made under the same arbitration agreement.” This raised questions as to whether “same arbitration agreement” encompassed identical arbitration agreements contained in different contracts. The 2021 Rules now clarify that the Court may order the consolidation where “all of the claims in the arbitrations are made under the same arbitration agreement or agreements.”
3. In a similar vein, Article 10(c) has been amended to clarify that consolidation may be ordered “where the arbitrations are not made under the same arbitration agreement or agreements” (i.e., where the arbitrations have been commenced under different arbitration agreements), but where the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship and the Court finds the arbitration agreements to be compatible.

As such, the 2021 ICC Rules now permit the tribunal to order joinder, even without the consent of all parties. Further, disputes between non-identical parties may be consolidated if they arise from the “same arbitration agreement or agreements”. If the arbitration agreements are different, however, consolidation may only be ordered if the arbitrations are between the

¹⁶ Martha E Vega-Gonzalez and Katie Gonzalez, ‘New York Arbitration Week Revisited: The Challenges of Multi-Party and Multi-Contract Issues in International Arbitration and the Anticipated ICC Rules Changes’ (*Kluwer Arbitration Blog*, 5 December 2020) <<http://arbitrationblog.kluwerarbitration.com/2020/12/05/new-york-arbitration-week-revisited-the-challenges-of-multi-party-and-multi-contract-issues-in-international-arbitration-and-the-anticipated-icc-rules-changes/>> accessed 15 January 2021.

¹⁷ *ibid.*

same parties, arise in connection with the same legal relationship and the arbitration agreements are compatible.

C. The SIAC Rules

The SIAC has published three editions of its Rules between 2010 and 2020: 2010, 2013, and 2016. Further, at the time of writing of this article, the SIAC has announced the formal commencement of the process of reviewing the 2016 SIAC Arbitration Rules.

1. 2010-2013

As of 2010, the SIAC Rules contained a limited provision on joinder, with no provision for consolidation of proceedings. Article 24 of the SIAC Rules provided that a tribunal may “*upon the application of a party, allow one or more third parties to be joined in the arbitration, provided that such person is a party to the arbitration agreement, with the written consent of such third party, and thereafter make a single final award or separate awards in respect of all parties.*”¹⁸ In limiting joinder to “parties to the arbitration agreement” and requiring an application from one of the existing parties to the arbitration, the SIAC Rules were much more conservative than the 1998 LCIA Rules (for instance).

This remained unchanged in the 2013 version of the SIAC Rules as well.

2. 2016-2017

However, there were significant changes to joinder and consolidation in the 2016 edition.¹⁹ In this regard:

1. Rule 6 of the SIAC Rules deals with the commencement of arbitration disputes arising out of multiple contracts;
2. Rule 7 contains a considerably expanded regime for joinder; and
3. Rule 8 deals with consolidation.

On joinder, an application for joinder may be made either to the SIAC Court, before the constitution of the tribunal (Rules 7.1 to 7.7), or to the

¹⁸ This was the case even in previous 2007 version of the Rules.

¹⁹ Some of these changes responded to the guidance provided by the Singapore Court of Appeal in *PT First Media TBK v Astro Nusantara International BV* [2013] SCGA 57 (Singapore Court of Appeal), which related to the Tribunal’s power to order joinder under Rule 24(b) of the previous version of the Rules.

tribunal, after it has been formed, and even if the SIAC Court has rejected joinder in the first instance (Rules 7.8 to 7.11). To this end, the fact that the SIAC Court has ordered a joinder does not preclude the tribunal from subsequently ruling on its own jurisdiction and finding that it has no jurisdiction over the third party. Instead, as recognised by Rules 7.4 and 7.10, the tribunal retains its power under Rule 28.2 to rule on its own jurisdiction.²⁰

The application can be made either by the existing parties to the arbitration or by the non-parties seeking to be joined (Rules 7.1 and 7.10). Rules 7.1 and 7.10 also set out two grounds on which joinder may be ordered by the SIAC Court and the tribunal, respectively: (i) if the non-party is *prima facie* bound by the arbitration agreement; or (ii) all parties, including the non-party, have consented to joinder.

As with joinder, consolidation may also be ordered by the SIAC Court (before the tribunal has been constituted) (Rule 8.1) or by the tribunal (after it has been constituted and even if the SIAC Court refused to order consolidation under Rule 8.1, in the first instance) (Rule 8.4).

The grounds for SIAC Court ordered consolidation are as follows (Rule 8.1):

1. all parties have agreed to the consolidation;
2. all the claims in the arbitrations are made under the same arbitration agreement; or
3. the arbitration agreements are compatible, and: (i) the disputes arise out of the same legal relationship(s); (ii) the disputes arise out of contracts consisting of a principal contract and its ancillary contract(s); or (iii) the disputes arise out of the same transaction or series of transactions.

The grounds for tribunal ordered consolidation (under Rule 8.7) are similar to those in the case of consolidation applications to the SIAC Registrar, save that, “*the consolidation application can be made only if the same tribunal has been constituted in each of the arbitrations sought to be consolidated, or only one tribunal has been constituted in all the pending arbitrations. If different tribunals have been constituted, then neither Rule (b) nor (c) can apply.*”²¹

²⁰ SIAC Rules 2016, rr 6-8; John Choong, *A Guide to the SIAC Arbitration Rules* (2nd edn, OUP 2018) ch 7, 37.

²¹ *ibid.*

Although the LCIA and ICC were quicker off the mark in terms of joinder and consolidation provisions, the SIAC has caught up, if not led the way in some respects. For instance, the 2016 version of the SIAC Rules reflected the ability to order consolidation even if there was no identity of parties across the various proceedings.

It remains to be seen if the upcoming seventh edition of the SIAC Rules will contain any further innovations in this realm.

Quite apart from changes to the Rules themselves, SIAC has proposed a cross-institutional consolidation protocol in December, 2017 because:²²

“The consolidation provisions of existing institutional rules of leading arbitral institutions do not permit the consolidation of arbitrations that are subject to different sets of institutional arbitration rules (for example, SIAC and ICC arbitrations), even if they satisfy the other criteria for consolidation...In turn, this prevents related disputes, which otherwise meet the criteria for consolidation, from being heard together and thus limits the ability of arbitration to reach its full potential as a dispute resolution mechanism to serve the needs of users.”

The proposal puts forward two options:²³

1. First, it proposes that arbitral institutions could adopt a consolidation protocol that sets out a new, standalone mechanism; or
2. Second, and alternatively, it proposes that arbitral institutions could adopt a consolidation protocol providing that one institution would be authorized to determine any cross-institution consolidation application based on its own consolidation rules. The institution whose rules are to apply will be based on objective criteria agreed in the protocol.

Whilst cross-institutional co-operation would facilitate non-fragmented resolution of disputes, it could, however, test the limits of party autonomy. On the one hand, it may be argued that the fact of disparate institutional rules being applied to related contracts is simply a result of parties not having directed their minds to the issue. Had they done so, they would likely choose

²² SIAC, ‘Proposal on Cross-Institution Consolidation Protocol’ (19 December 2017) <<https://siac.org.sg/69-siac-news/551-proposal-on-cross-institution-consolidation-protocol>> accessed 15 January 2021.

²³ The Memorandum may be found at this link <[https://siac.org.sg/images/stories/press_release/2017/Memorandum%20on%20Cross-Institutional%20Consolidation%20\(with%20%20annexes\).pdf](https://siac.org.sg/images/stories/press_release/2017/Memorandum%20on%20Cross-Institutional%20Consolidation%20(with%20%20annexes).pdf)> accessed 15 January 2021.

just one institution in the interests of consistency (to this end, it could be argued that the cross-institutional protocol is simply a mechanism for giving effect to party autonomy). On the other, it is equally arguable that disparate institutional rules selected reflect the parties comfort with a particular institution (e.g., a lender may prefer LCIA arbitration whilst the owner and contractor may choose to have their arbitration administered by the ICC or ad-hoc arbitration), and to that end, the fragmentation, though messy, reflects party autonomy.

However, the efficacy of this protocol depends on consensus amongst the institutions.²⁴ Wherever the chips land on this protocol, it certainly wins high praise for innovation and its attempt to rationalise an unruly terrain.

D. The ICA Rules

The 2012 version of the ICA Rules contained the following provision on consolidation at Rule 39:

“Where there are two or more applications for arbitration by the Council and the issue involved in the dispute arises out of same transactions, the Registrar may, if he thinks proper to do so and with the consent of the Parties, fix the hearings of the disputes to be heard jointly or refer the applications to the same Tribunal. The awards, however, shall be given separately in each case.”

The power to consolidate was expanded further in Rule 17(6) of the ICA Rules which states:

“The Tribunal may, with the consent of the parties, direct consolidation of two or more arbitral proceedings before it, if the disputes or differences therein are identical and between the same parties or between the parties having commonality of interest or where such disputes arise out of separate contract but relate to the same transactions.”

Further, under the 2014 ICA Rules, it is the tribunal, rather than the Registrar, who has the power to consolidate. This rule was not changed in

²⁴ The protocol has also been criticised from a practical implementation perspective. See, for instance, Matthew Knowles, ‘UK: SIAC’s Proposal for a Protocol on Cross-Institutional Consolidation of Arbitrations: Too Much Complexity to be Beneficial?’ (*Mondaq*, 16 January 2018) <www.mondaq.com/uk/arbitration-dispute-resolution/663930/siac39s-proposal-for-a-protocol-on-cross-institutional-consolidation-of-arbitrations-too-much-complexity-to-be-beneficial> accessed 15 January 2021.

the amended ICA Rules on International Commercial Arbitration published in 2016.²⁵

The ICA Rules, however, do not contain any provisions on joinder.

E. The MCIA Rules

The MCIA is a relatively new institution (having only been launched in 2016). It was borne out of a joint initiative between the domestic and international business and legal communities. However, what it lacks for in age, it has certainly made up for with its state-of-the-art rules (which include emergency arbitrator provisions, expedited proceedings, scrutiny of awards, etc).

It also contains provisions for the consolidation of arbitrations, but not joinder. In this regard, Rule 5.1 provides that: (a) at the request of a party; and (b) after consultation with parties and appointed arbitrators, (c) the MCIA Council has the power (but not obligation) to consolidate two or more arbitration proceedings, provided that:

- i. all the parties agree to the consolidation; and
- ii. all claims in the arbitration are made under the same arbitration agreement.

The fact that the power to consolidate has been conferred on the Council, but not the tribunal, is interesting, but not unusual. It is similar, for instance, to the ICC approach. However, unlike the ICC Rules, consolidation may only be granted if the claims are made under the same arbitration agreement, and if all the parties agree to consolidation.

The approach to consolidation and absence of joinder provisions may reflect jurisdiction-specific considerations,²⁶ or a preference to take a more conservative approach in the first edition of the arbitral rules for a new institution. In any event, it adds to the diversity of institutional approaches to joinder and consolidation, in what is already proving to be a colourful terrain.

IV. KEY TRENDS

There is not, as yet, consensus on international best practice in so far as joinder and consolidation is concerned. Each of the institutions described

²⁵ Rules of International Commercial Arbitration 2016.

²⁶ As discussed further in the Key Trends Part below.

above has taken a slightly bespoke approach. However, there is a palpable trend towards facilitating the resolution of multi-party and multi-contract disputes before a single body, by way of increasing the grounds and avenues for joinder and consolidation. This recognises the practical problems that have arisen by the absence of these rules such as time and cost inefficiencies, the risk of conflicting decisions by arbitral tribunals, and indeed applications to national courts to resolve such issues.

Of the institutions discussed above, the LCIA and ICC were off the mark early, given that they provided for some form of joinder and/or consolidation, as early as in their 1998 Rules, and that they both provided for fairly extensive joinder and consolidation provisions by 2012-2014.

Notwithstanding this, a 2018 article which undertook a comparative analysis of joinder and consolidation rules (albeit, comparing a different set of arbitral rules to the ones discussed in this article), commented as follows:

“As a general observation, the various arbitral rules can be categorized as those which take a more conservative approach on joinder and consolidation, and those which take a more aggressive approach. The ICC, LCIA, and UNCITRAL Rules fall into the former category, whilst the Swiss, SCC, HKIAC, and ACICA Rules fall into the latter category, reflecting a divergence among the arbitral institutions in their willingness to interfere with party autonomy.”²⁷

It would appear that with the recently announced revisions to their rules, the ICC and LCIA are also moving towards a more permissive approach. As described above, the SIAC is in the same vein as these institutions – if not leading the charge in some respects. Indeed, in proposing the cross-institutional protocol, the SIAC has also demonstrated its willingness to push the frontier of the debate further.²⁸

The approach of the Indian institutions is currently more conservative. This may reflect the nascency of institutions such as the MCIA (who may choose to take a more permissive approach in future iterations of their rules) or, alternatively, this approach may reflect jurisdiction-specific concerns. For instance, there may be hesitance to adopt a more permissive approach on account of historic “excessive judicial intervention in arbitration” coupled

²⁷ Gordon Smith, ‘Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules’ (2018) 35(2) *Journal of International Arbitration* 173.

²⁸ At the time of writing this article the SIAC has announced the formal commencement of the process of reviewing the 2016 SIAC Arbitration Rules. It remains to be seen if the seventh edition of these rules will contain any further innovations in this realm.

with delays in the Indian courts,²⁹ both of which may be counterproductive to the cause of efficiency. There is much to be said for a conservative approach that minimises the risk of obstructive parties making ill-founded applications to the courts, either during the arbitration or at the enforcement stage. Similarly, provisions on joinder may have been eschewed on account of Section 45 of the Indian Arbitration and Conciliation Act of 1996, which allows the courts to refer certain non-signatories to arbitration.³⁰

V. CONCLUSION

Whilst the emphasis on innovation and a more permissive approach is encouraging from an efficiency perspective, it is imperative that parties, counsel, arbitrators, and institutions remain vigilant to ensure that the joinder and consolidation provisions (i) respect the bounds of party consent; and (ii) also take into account national laws which may give rise to enforcement concerns.

Enforcement of an award arising out of an allegedly inappropriate joinder or consolidation may be challenged under Article V of the *New York Convention*,³¹ in particular, on the basis of Article VI(c) that:

“The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.”

There may also be additional requirements under the laws of the place where enforcement is anticipated, which ought to be taken into account. It may be argued that it is not legitimate for tribunals (or institutions) to have regard to such enforcement concerns in the underlying arbitration (which ought to be determined in accordance with the laws chosen by the parties).

²⁹ The Working Paper on Institutional Arbitration identified “*problems with delays and excessive judicial involvement in arbitration proceedings*” as one of the reasons why institutional arbitration is not the preferred mode of arbitration in India.

³⁰ See, for instance, the decision of the Supreme Court of India in *Chloro Control India (P) Ltd v Severn Trent Water Purification Inc* (2013) 1 SCC 641 (Supreme Court of India), which considered whether a third-party could be bound by an arbitration clause under Section 45 of the 1996 Act, and more particularly, pursuant to the group of companies doctrine.

³¹ The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

Regardless, as a practical matter, parties will no doubt wish to ensure that any award obtained is ultimately enforceable. Tribunals may also wish to have regard to such enforcement concerns in order to preserve the efficacy of any award that they may render.³²

Enforcement concerns may be more complicated in cases where the underlying suite of documents provides for more than one governing law. For instance, in a project finance deal, the governing law of the project documents may well be the law of the place where the project is to be implemented. However, the security documents may well provide for another governing law, because of the lender's preference or in view of the jurisdiction in which enforcement is envisaged (e.g., the jurisdiction where the guarantor is incorporated or has assets). Similarly, is not unusual to see the documents providing for disparate seats of arbitration as well.

Quite apart from enforcement concerns, there may well be circumstances in which it is neither objectively desirable nor the intention of parties to facilitate joinder or consolidation. This is particularly so in areas such as shipping or commodities, where there is a premium on the swift resolution of a large volume of claims of relatively modest value. An unduly permissive approach to joinder and consolidation in such cases would unnecessarily complicate relatively straightforward disputes.

Joinder and consolidation are not always appropriate for large high-value disputes either. For instance, there may be a desire to prevent sub-contractors further down the chain from interfering in disputes between the owner and original contractor. Also, finance parties frequently wish to keep the underlying obligor out of disputes with the guarantor under the security documents.

If the parties wish to keep such ostensibly related disputes separate and/or prevent related third parties from intervening in proceedings, then they ought to, ideally, make their preference clear in their contracts. Tribunals and institutions also ought to be vigilant to ensure that the bounds of consent are not overstepped. This will, in turn, turn on the individual facts of each case.

Indeed, an interesting area to watch out for in the future will be to ascertain how institutions, tribunals, and parties alike deal with the ever-expansive but differing approaches to joinder and consolidation, particularly in

³² Article 42 of the ICC Rules, for instance, provides that "*in all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.*"

the case of overlapping jurisdiction. Query whether there will be more court applications on this account.

In all, there have been significant changes in the area of joinder and consolidation over the past ten years. Perhaps, not a revolution, but certainly a considerable evolution. Given the ongoing innovation in this realm, it would be premature to pass a final verdict. The author may wish to take stock again, perhaps in ten years' time. Until then, it is hoped that any forthcoming changes and innovations will be rigorously assessed against the touchstone of party consent (and national legislation, where appropriate).