**Multiplicity**

Multiparty, multi-contract and/or multi-dispute arbitrations

**Joinder and consolidation**

Arbitration is quick to react to user demand and to adapt standard practice accordingly. Multiple arbitral institutions vying for business creates a heavily competitive environment where the need to continually adapt to commercial circumstances ensures that arbitration remains fit for purpose.

The key arbitral centres are New York, Washington DC, London, Paris, Geneva, Stockholm, Hong Kong and Singapore. This is linked to the fact that these are viewed as “safe seats” of arbitration. Many law firms offer multi-jurisdictional teams who work on international arbitrations anywhere around the world, drawing on local law advice where needed (for example, where they are not qualified in the governing law of the contract).

One of the historic disadvantages of arbitration used to be the difficulty of joining third parties. However, arbitrations today are much more likely to involve multiple parties on one or both sides of the dispute. The 2023 International Chamber of Commerce (“ICC”) Dispute Resolution Statistics reveal that in cases filed in 2023, approximately 31% of the cases involved multiple parties.

Joinder and consolidation are two key procedural mechanisms that have been incorporated into leading institutional arbitration rules in order to save time and costs and avoid parallel proceedings and inconsistent decisions.

**Joinder**

Even where arbitrations are initiated with only two parties, third parties may be joined as a party to an existing arbitration or may even seek to intervene in a pending arbitration. Institutional rules have taken slightly different approaches with respect to joining to the proceedings a party who is not subject to the arbitration agreement.

For instance, the LCIA Rules provide that joinder of a third party who is not a party to the arbitration agreement may be granted by the tribunal upon consent by the applicant party and the third party even over an objection by one of the existing parties to the arbitration.

The ICC 2021 Arbitration Rules, which entered into force on 1 January 2021, include enhancements to the joinder and consolidation provisions, even allowing, in certain circumstances, joinder of a party after the confirmation or appointment of an arbitrator. In addition, even if a party at the commencement of the arbitration objects to the joinder of an additional party, the arbitral tribunal now has the power and discretion to permit the joinder where the conditions are met.

Clearly a third party cannot be joined to an arbitration unless they have, in some sense, agreed to arbitration – that is a key difference between arbitration and court proceedings. A third party will also not be permitted to join the arbitration unless they are in some way involved or have an interest in the dispute being resolved.

The 2021 UNCITRAL rules do not go as far. Article 17(5) of the rules only allow for joinder of parties to the original arbitration agreement. Article 17 (5) states:

*“The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.”*

**Appointment of tribunal by multiple parties**

Where there are multiple parties involved in an arbitration the key issue which arises is the need to ensure that each of the parties, regardless of how many there are, receive equal treatment in the formation of the tribunal and throughout the arbitration. This issue of equal treatment can be critical during the enforcement of an award where the unsuccessful party may look to raise an argument that the award is incapable of enforcement due to the unfairness of the tribunal appointment process.

The leading arbitral institutions have attempted to address this issue by setting in place a ‘fair’ appointment process in instances where the parties cannot reach consensus on the appointment process. Their rules allow the parties to agree between them who is to fall within the “Claimant camp” and who is in the “Respondent camp” with each group appointing an arbitrator. If agreement on who falls within each camp cannot be reached, the rules will usually provide for the institution to appoint the whole tribunal.

**Multi-contract arbitration: commencing a single arbitration and Consolidation**

“Multi-contract” arbitration relates to instances where there are several contracts, potentially between different parties, which all have an interest or connection with the issues in dispute, for instance, where there is a chain of contracts ie contracts entered one after the other such as in insurance or the sale of goods or in the banking and finance realm. A common example of a multi-contract scenario is a facility agreement where loans may have been advanced under several essentially identical contracts. In engineering, procurement, and construction (EPC) contracts it is customary for an employer to enter into a construction contract with the main contractor, who then contracts out different parts of the work to a number of subcontractors. The result is one project consisting of multiple, interconnected contracts which are in place between various parties.

Assuming binding arbitration clauses exist in all the relevant contracts, it is evident that there is a significant risk of inconsistent findings and duplicative / parallel proceedings if the actions are adjudicated separately. This gives rise to a need to ensure disputes are resolved together, either by commencing a single arbitration in respect of all disputes arising under those contracts or by commencing multiple arbitrations and consolidating them into a single arbitration.

Most institutional rules contain provisions regarding the commencement of a single arbitration under multiple contracts. It is striking that the LCIA Rules 2020, ICC Rules 2021 and ICDR Rules 2021 have further broadened their existing consolidation mechanisms, while SIAC has sought to innovate with an ambitious proposal for cross-institutional consolidation.

**LCIA Consolidation Rules**

Under Article 22A of the LCIA Rules 2020, the tribunal and LCIA Court have been given wider powers to consolidate arbitrations. In particular, the rules now provide that a tribunal that has already been constituted by parties to an arbitration agreement may consolidate the arbitration on which it sits with other arbitrations arising out of the same or related transactions, even where the parties in those arbitrations were not parties to the original arbitration and did not enjoy the opportunity to appoint any of the arbitrators who will determine the consolidated arbitration.

This provision is set out on the next page.

*“22.7 The Arbitral Tribunal shall have the power to order with the approval of the LCIA Court, upon the application of any party, after giving all affected parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:*

*(i) the consolidation of the arbitration with one or more other arbitrations into a single arbitration subject to the LCIA Rules where all the parties to the arbitrations to be consolidated so agree in writing;*

*(ii) the consolidation of the arbitration with one or more other arbitrations subject to the LCIA Rules and commenced under the same arbitration agreement or any compatible arbitration agreement(s) and either between the same disputing parties or arising out of the same transaction or series of related transactions, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such arbitral tribunal(s) is(are) composed of the same arbitrators; and*

*(iii) that two or more arbitrations, subject to the LCIA Rules and commenced under the same arbitration agreement or any compatible arbitration agreement(s) and either between the same disputing parties or arising out of the same transaction or series of related transactions, shall be conducted concurrently where the same arbitral tribunal is constituted in respect of each arbitration.*

*22.8 Without prejudice to the generality of Article 22.7, the LCIA Court may:*

*(i) consolidate an arbitration with one or more other arbitrations into a single arbitration subject to the LCIA Rules where all the parties to the arbitrations to be consolidated so agree in writing; and*

*(ii) 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 or any compatible arbitration agreement(s) and either between the same disputing parties or arising out of the same transaction or series of related transactions, 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.”*

**UNCITRAL Consolidation Rules**

The 2021 UNCITRAL Rules do not contain an express provision for consolidation. For consolidation to happen, it might still be possible by agreement between the parties on an ad hoc basis, taking into account requirements concerning fairness arising from the law of the seat and/or jurisdiction in which enforcement is contemplated.

**Summary**

- Joinder - Even where arbitrations are initiated with only two parties, third parties may be joined as a party to an existing arbitration or may even seek to intervene in a pending arbitration.

- “Multi-contract” arbitration relates to instances where there are several contracts, potentially between different parties, which all have an interest or connection with the issues in dispute

- Assuming binding arbitration clauses exist in all the relevant contracts, it is evident that there is a significant risk for inconsistent findings and duplicative / parallel proceedings, if the actions are adjudicated separately. This calls for a need to ensure that these disputes can be resolved together in a single arbitration. This can be achieved by consolidating arbitral proceedings.